

**ARE AUTHORS OF MUSICAL WORKS ADEQUATELY PROTECTED UNDER
KENYA'S COPYRIGHT LAW?**

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**A Research Project Paper Submitted in Partial Fulfilment of the Requirements for
the Degree of Master of Laws (LLM) of the University of Nairobi**

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CERTIFICATION

The undersigned certifies that he has read and hereby recommends for acceptance by the University of Nairobi a dissertation titled: *Are Authors of Musical Works Adequately Protected Under Kenya’s Copyright Law?* in partial fulfilment of the requirements for the degree of Master of Laws (LLM) of the University of Nairobi.

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DECLARATION

I, **David Gikunda Miriti**, declare that this dissertation is my own original work and that it has not been presented and will not be presented to any other University for a similar or any other degree award. I declare further that all references I have used and quoted or Paraphrased have been indicated or acknowledged by means of footnotes or references.

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DEDICATION

This work is dedicated to my family members namely Maryanne Ruguru, Ian and Tevin who by all means encouraged and supported the idea and decision to take up the task.

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During the course of writing this thesis I have benefited greatly from the intellectual input of many people.

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ABSTRACT

The Kenya Society has placed immense emphasis on tangible property such as land as a means of production and as a development mode. Intellectual property rights have been ignored. Although the Government has enacted laws regarding protection of music copyrights, the study reveals that enforcement and implementation of these laws have not been wholly effective. This is due to deliberate non-adherence to the law, a situation that is encouraged by a weak enforcement mechanism.

The general objective of the study was to critically examine the effectiveness of the Copyright Law in Kenya with particular reference to the Copyright Act 2001. Specifically, the research sought to determine the following: the extent to which music piracy has deprived the Kenyan artists of IPRs in their works; the pitfalls in the legal frame work of copyright laws in Kenya; the existing enforcement mechanism of Copyright protection in Kenya; and the practical solutions to music piracy in Kenya. The data and information pertaining to this study was obtained through documentary research.

The data obtained, presented and analyzed both indicate that enforcement of the copyright law has not been effective. The use of percentages has been employed as much as possible. Key informant interviews and consultations with KECOBO, the Judiciary and the Police were carried out in a bid to gather information from the relevant Government institutions.

The findings of this research are significant to the stakeholders in the music industry and the Government as we seek to effectively protect Intellectual Property Rights. In due time, the music copyright holders will be able to reap the justifiable fruits of their sweat. The research offers solutions necessary to enhance the protection of music copyrights in Kenya so as to motivate the artistes and spur growth within the industry hence increase revenues to the individual musicians and the government thus leading to overall development.

Moreover, the study will also contribute to the field of legal research in general and intellectual property law in particular. Legal scholars may deem the findings useful to develop further research, which could lead to eventual elimination of music copyright infringement.

ABBREVIATIONS

ACA	Anti-Counterfeit Agency
APSD	Anti-Piracy Security Device
CAD	Computer-Aided Design
CAM	Computer-Aided Manufacturing
CD	Compact Discs
CISAC	Confederation of Authors and Composers Societies
CMOs	Collective Management Organizations
DMCA	Digital Millennium Copyright Act
DVD	Digital Versatile Disc
EAC	East Africa Community
EUCD	European Union Copyright Directive
ECMS	Electronic Copyright Management System
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
ICT	Information and Computer Technology
IP	Intellectual Property
IPRs	Intellectual Property Rights
KAM	Kenya Association of Manufactures
KAMP	Kenya Association of Music Producers
KBS	Kenya Bureau of Standards
KECOBO	Kenya Copyright Board
KOPIKEN	Reproduction Rights Society of Kenya
KPA	Kenya publishers Association
MCSK	Music Copyright Society of Kenya
MOOs	MUDs Object-Oriented
MUDs	Multi-User Domain
NORCODE	Norwegian Copyright Development Association
PPP	Public Private Partnerships
RROs	Reproduction Rights Organizations
TPMs	Technological Protection Measures
PRSK	Performing Rights Association of Kenya
TPS	Technical Protection Services
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UCC	Uniform Commercial Code
UDHR	Universal Declaration of Human Rights
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

LIST OF CONSTITUTIONS AND CONSTITUTIONAL INSTRUMENTS

Constitution of Kenya 1963

Constitution of Kenya 1969

Constitution of Kenya 2010

LIST OF TRANSNATIONAL AND FOREIGN LAWS

Copyright Act of Trinidad and Tobago

Vienna Convention on the Law of Treaties, 1969

WIPO Copyright Treaty 1996

WIPO Performances and Phonogrammes Treaty, 1996

LIST OF KENYAN STATUTES

Copyright Act, 2001

Films and Stage Plays Act, Cap 222

Industrial Property Act, 2001

Judicature Act, Cap 8 Laws of Kenya

Kenya Anti-Counterfeit Act No.13 2008

Kenya Broadcasting Corporation Act, Cap 221

Kenya Communications Act, 2008

Kenya National Library Services Board, Cap 225

South Africa Copyright (Amendment) Act 1992

LIST OF CASES

A&M Records Inc. v. Napster Inc 239 F.3d 1004.

Anton Piller K G v. Manufacturing Process Limited [1976] Ch 55.

Communications Commission of Kenya & 5 Ors v. Royal Media Services Ltd & 5 Ors [2014] eKLR

Entertainment and Restaurants Association of Kenya (PERAK) [2014] eKLR [2004] eKLR.

John Boniface Maina v. Safaricom Limited [2013] eKLR.

Katz v. United States, 389 US 347 (1967) [1967] US.

Music Copyright Society of Kenya v. Parklands Shade Hotel t/a Klub House, Civil Suit 1458 of 2000.

Music Copyright Society of Kenya v. Tom Odhiambo Ogowl [2014] eKLR.

Northern Office Microcomputers (Pty) Ltd and Others v Rosentein 1981(4) (SA136(c)).

Republic v. Kenya association of Music Producer (KAMP) & 3 Others Ex-parte Pubs,

Royal Media Services Ltd & 2 Ors v. Attorney General & 8 Ors [2013] eKLR

Sanitam Services (EA) v. Tamia Ltd & Ors Nairobi Petition No. 305 of 2012 [2012] eKLR

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CHAPTER 1

INTRODUCTION AND METHODOLOGY ON THE STUDY

1.1 Background to the Study

Intellectual property, very broadly, means the legal rights, which result from intellectual activity in the industrial, scientific, literary and artistic fields.¹ In Kenya, Intellectual Property is provided under articles 11(2)(c), 40(5) and 69(1)(c) of the Constitution.² The Constitution recognises intellectual property by generally placing the duty of promoting intellectual property rights of the people of Kenya on the state.³

Generally speaking, intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions. Intellectual property is traditionally divided into two branches, “industrial property” and “copyright.” Copyright is a property that arises from the human intellect. It is a product of human creation.⁴

The rationale for protection of copyright is to stimulate and promote further creativity. Copyright also ensures certain minimum safeguards of the rights of Musicians over their musical works and creations thereby rewarding creativity. Most importantly, the protection provided by the copyright to the musicians, creates an atmosphere conducive for creativity that induces the musicians to create more as well as motivating other aspiring musicians to join the industry and create more musical works. Copyright has never been as much in the news as it is today.⁵

Copyright plays an essential role in any developed society. If society is to recognize creativity, innovation and imagination, then copyright is the principal tool by which we accord such recognition. This is economically expressed by the award of a range of exclusive rights that grant the musical authors the power of control and the right of commercial exploitation of their musical works.⁶

In the long run, the rights of copyright are an award for innovation, creativity and risk taking.⁷ It is recognition that both the culture and the economy of the Kenyan

* See Sihanya Mentoring PhD and LLM Thesis Guidelines and Sihanya Mentoring PhD and LLM Thesis Guidelines on Citation, Punctuation, Form(ating), Corrections, Submissions, and Marking Schemes.

¹ Eduardo Borensztein, Jose De Gregorio, and Jong-Wha Lee (1998) “How Does foreign Direct Investment Affect Economic Growth?” *Journal of International Economics* 45, 115-135.

² Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, Sihanya Mentoring and Innovative Lawyering, Nairobi & Siaya, at page 236.

³ *ibid.*

⁴ James Frankel (2009) *The teacher's Guide to Music, Media, and Copyright Law*, Technology Institute for Music Educators, New York.

⁵ David Moser & Cheryl Slay (2012) *Music Copyright Law*, Course Technology, Cengage Learning, Boston, MA.

⁶ James Frankel (2009) *The Teacher's Guide to Music, Media, and Copyright Law*, *op.cit.*

⁷ *ibid.*

community are dependent on encouraging and fostering these characteristics. Copyright underlies most of the ways that people make money out of music. It is fundamental. To make real money in the music industry, talent is optional but copyright is indispensable. Copyrighting musical works by authors is inevitable in this century.⁸

This is because; they all involve payment for the use of copyright material. Most songs that are recorded are copyright, even the sound recording itself has a copyright, much of the sheet music published is of works that are in copyright and are only able to be published because the publisher has bought or licensed the necessary rights of copyright to do so.⁹

There is a copyright in the published edition, distinct from the copyright in the composition itself, most of the popular music played in live performances is in copyright, merchandising involves the use of copyright material, playing music in public places, such as shops and lifts, usually requires payment of license fees to the copyright owners, communicating music on the internet usually requires the consent of copyright owners, virtually no film or television drama is now made without the use of music and thus the use of copyright, most radio and television commercials use copyright music.¹⁰

Every time you listen to music on the radio, you are listening to the result of several contracts involving copyright. The list is endless. Whether you are a musician, a manager, a publisher, a record company executive or an entertainment industry lawyer, your income is based largely on copyright.¹¹

For the above reasons, it is necessary to spend quality time in understanding the basics in order to maximize your rewards resulting from music copyright. It is by exploiting copyright that one makes real money in the Kenyan musical industry.

1.2 What is covered by copyright in musical works?

Majorly, the Copyright in musical works protection is categorized into two classes namely:¹²

⁸ David Moser & Cheryl Slay (2012) *Music Copyright Law*, *op.cit.*

⁹ Jeremy De Beer, Chris Armstrong, Chidi Oguamanam & Tobias Schonwetter (eds) (2014) "Innovation & intellectual property: Collaborative dynamics in Africa" University of Cape Town Press Association, Cape Town, South Africa.

¹⁰ Richard Stim (2000) *Copyright Law*. West Legal Studies, Albany, New York, USA.

¹¹ David Moser & Cheryl Slay (2012) *Music Copyright Law*, *op.cit.*

¹² Ben Sihanya (2010) "Author Empowerment through Copyright in Kenya: Open Scholarship, and Alternative Publishing" in Chris Armstrong, Jeremy De Beer, Khaleed Fourati and Sisule Musungu (eds) *Access to Knowledge in Africa: The Role of Copyright*, UCT Press, Cape Town, South Africa. Also see Ben Sihanya (2012) "Author Empowerment through Copyright in Kenya: Open Scholarship, and Alternative Publishing" in African Innovation Research and Training (Open AIR), University of Cape Town, Cape Town; Innovative Lawyering & Sihanya Mentoring, Nairobi & Siaya.

- a) “Works” which includes: musical, literary, dramatic works and artistic works – which covers photographs); and
- b) “Subject matter other than works” which includes sound recordings, broadcasts, published editions and film – or ‘cinematograph works’.

1.2.1 What are the rights does musical works?

Copyright is a bundle of rights. Copyright in musical work includes the exclusive right to:

- a) Reproduce the work-this includes reproducing it in sheet music or on records or synchronizing it in films, television programs and advertisements;
- b) To issue copies of the works to the public;
- c) Publishing the work- for instance, by lawfully supplying copies of it to the public;
- d) To make any translation of the work;
- e) Communicating the work to the public- this include ‘live’ performances, playing recorded music in public, playing music on the radio, television and, vitally to the modern music economy, via the internet; and
- f) Making an adaptation of the work for instance arrangements, transcriptions, parodies etc.

1.2.2 Reproduction

Though the term “reproduction” may be used a lot when referring to copyright, many people misunderstand the term. Reproduction may take many forms even though it is often used as a synonym for ‘copy’; it actually has a wider meaning in copyright law, for the copy does not have to be exact.¹³

It need not be a copy of the whole work, merely a ‘substantial part’ of it. For example, using four notes from a piece of music would not usually be thought of as a ‘substantial part’, but in the case of, say, the opening four notes of the same composition, would be different. The legal test of ‘substantiality’ is qualitative not quantitative. The copy need not be in the same medium, either. For instance, a song may be based on a book. A license must be negotiated with the author of the book for the use.¹⁴

1.2.3 Publication

Similarly, the term ‘publication’ is given a special meaning by the Copyright Act: supplying copies of the material to the public (whether by sale or otherwise). For a musical composition, this could be by selling sheet music. Surprisingly, supplying

¹³ *ibid.*

¹⁴ Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, Sihanya Mentoring and Innovative Lawyering, Nairobi & Siaya. See also John Wariungi Chege (1976) *Copyright Law and Publishing in Kenya*, Kenya Literature Bureau, Nairobi.

sound recordings of musical works is not a ‘publication’ of the work under the Copyright Act, even though this is the most common way music is exploited. Many are never even ‘published’ in printed form.¹⁵

1.2.3 Communication to the public

In 2001, a new right for copyright owners, the right to ‘communicate’ their work to the public, was introduced into the Copyright Act. This was a major development in Kenyan copyright law. All contracts involving copyright material should cover this right.

The communication right is far-reaching. It expands and clarifies the bundle of copyrights. It is broad enough to cover use via the Internet, free-to-air television as recently introduced in Kenya’s Digital Broadcasting forum, cable, radio and mobile phones. This extends the copyright protection afforded to sound recordings.¹⁶

In relation to the Internet, (and its future incarnations) the communication right includes the right to ‘electronically transmit’ for instance streaming or emailing a music track, and making available online by having your computer on a peer-to-peer file-sharing system so that others can access the material from your hard drive.¹⁷

The right is not limited to communications within Kenya. It extends to communications originating here but received foreign jurisdictions. It follows that, a Kenyan copyright owners have a right to prevent the unauthorized communication of their material to other jurisdictions. For example, the right could be used to stop a Kenyan based website from making a film or song available not just in Kenya but also anywhere in the world. Given the global nature of the internet, these remedies are essential if owners are to protect their works.¹⁸

1.3 Background of the Problem

In the recent past, the evolution of developed country Copyright regimes has been characterized by three phenomena namely:

- a) *The widening of protectable subject matter*: The parameters of protectable subject matter have been widened, and there has been a tendency to reduce or eliminate exceptions. Examples include the extension of copyright protection to live performance programs, the internet broadcasting and the use of musical works in films and advertisements.¹⁹

¹⁵ John Wariungi Chege (1976) *Copyright Law and Publishing in Kenya*, Kenya Literature Bureau, Nairobi.

¹⁶ *ibid.*

¹⁷ Ben Sihanya (2003) *Constructing Copyright and Literary Creativity in Kenya Cultural Politics and the Political Economy of Transnational Intellectual Property*, JSD (PhD) Dissertation, Stanford University USA.

¹⁸ Marisella Ouma (2006) “Optimal enforcement of music copyright in Sub-Saharan Africa, reality or myth” *Journal of World Intellectual Property Law* 9 (5) 592-627.

¹⁹ LaCroix Sumner (1992) *The Political Economy of Intellectual Property Rights in Developing Countries*, Westview Press, Boulder, Colorado, USA.

b) *The creation of new rights*: Examples of new systems of copyright rights keep emerging in this twenty first century. Such rights have been expanded to cover use via the Internet, free-to-air television as recently introduced in the Kenya's Digital Broadcasting forum, cable, radio and mobile phones. This further extends the copyright protection afforded to sound recordings.²⁰

c) *The progressive standardization of the basic features of copyrights in musical works*: For instance, the introduction of copyrights regulations in Kenya has increasingly provided protection terms to the musical works copyrights owners; require prior art searches and examinations for novelty, inventive step or non-obviousness, and industrial application; assign rights to the first applicant rather than the first creator of musical works; and provide protection for inventions in all industries and fields of technology including musical and entertainment industries.²¹

These developments in copyright law, all of which began in Europe or North America, are spreading to the rest of the world, and at an accelerating pace. Consequently, national copyright regimes throughout the world are becoming increasingly hard to harmonize minimum standards of protection, which, however, remain a long way from uniform law.

Prior to the TRIPS Agreement, the main IPR conventions played the biggest role in the worldwide adoption of national Copyright systems sharing common standards, while still allowing these systems to vary widely.²²

It should not be assumed, though, that the developments referred to above were introduced gradually over time even in the developed world.²³ In fact, many of the examples given above were introduced into national copyrights regimes quite recently. For example, until the 1960s several West European countries (e.g. France, Belgium and Italy) still granted copyrights based on registration. Moreover, the bar to copyrighting musical and artistic works in several developed countries was lifted only in the 1960s or 70s.²⁴

James Roumasset argues that these trends are necessary responses for the increasing change in the entertainment industry. While there is probably much truth in this, there is no reason to suppose that the appropriate response should always be to strengthen

²⁰ Richard Stim (2000) *Copyright Law. op. cit.*

²¹ Jose De Gregorio and Jong-Wha Lee, (1998) "How Does foreign Direct Investment Affect Economic Growth?" 45 *Journal of International Economics*, 115-135.

²² Richard Glen Harris (1984) "Applied General Equilibrium Analysis of Small Open Economies with Scale Economies and Imperfect Competition," *American Economic Review* 74, 1016-1032.

²³ Robert Evenson and Larry E. Westphal (1995) "Technological Change and Technology Strategy," *Handbook of Development Economics: Volume 3A*, Amsterdam: North-Holland.

²⁴ Ben Sihanya (2002) "Integrating Innovation and Intellectual Property into Kenya's Constitution," Nairobi: Institute of Economic Affairs.

existing rights, reduce or eliminate exceptions, or to create new ones.²⁵ Such approaches may indeed be necessary in certain cases where the Copyright systems available are inappropriate for new types of creative product or become inadequate for protecting existing types because, for example, new technologies make mass copying and distribution of musical works easier.

In other cases, weakening rights might be a more appropriate response to some instances of technological change.²⁶ For example, in the entertainment industry there may be a fall in the average life cycles of new musical products, and in other industries, average research and development costs for an industry might decline. In addition, that overprotection might stifle innovation and creativity. More fundamentally – and this will be elaborated upon below – it is far from self-evident that the existence of strong copyright protection is a precondition for the transformation of developing country economies into developed ones.

1.3.1 What is Copyright under the IPRs?

These are legal and institutional devices to protect creations of the mind such as inventions, musical works, arts and literature, and designs.²⁷ They also include marks on products to indicate their difference from similar ones sold by competitors. Over the years, the rather elastic copyrights concept has been stretched to include patents, copyright, industrial designs, trademarks, trade secrets, plant breeders' rights, geographical indications, and rights to layout-designs of integrated circuits. Copyright and trademarks are arguably the most significant in terms of their economic importance, their historical role in the musical industry of Europe and North America, and their current standing as major pillars of the international law of intellectual property rights.²⁸

Copyrights provide musical authors with legal rights to prevent others from using, selling or importing their musical works for a fixed period. Applicants for a music copyright must satisfy a national music copyright society that the works described in the application is new, useful and that its creation involved an inventive step or would be non-obvious to a skilled practitioner.²⁹ This is because copyright protects original expressions which are embodied in a tangible, material or fixed form or medium. According to Sihanya, song's such as Gidi Gidi and Maji Maji's *unbwogable* and

²⁵ Walter Jaffe and Jeroen van Wijk' (1995) *The Impact of Plant Breeders' Rights in Developing Countries*, manuscript, IICA-University of Amsterdam.

²⁶ LaCroix Sumner (1992) *The Political Economy of Intellectual Property Rights in Developing Countries*, *op. cit.*

²⁷ Edwin Mansfield (1994) "Intellectual Property Protection, Foreign Direct Investment, and Technology Transfer," International Finance Corporation, Discussion Paper 19.

²⁸ Jean O. Lanjouw (1997) "The Introduction of Pharmaceutical Product Patents in India: 'Heartless Exploitation of the Poor and Suffering?'" Economic Growth Centre, Yale University, Discussion paper no. 775.

²⁹ Edwin Mansfield (1985) "How Rapidly Does Industrial Technology Leak Out?" Vol. 34 *Journal of Industrial Economics*, vol. 34, 217-223.

Nameless' *It's a Friday night* are protected by copyright in Kenya as they are original and have been expressed in a fixed form, like tapes and CDs.³⁰

Copyright gives authors legal protection for various kinds of literary and musical works. Copyright law protects authors of musical works by granting them exclusive rights to sell copies of their work in whatever tangible form (printed publication, sound recording, film, broadcast, etc.) is being used to convey their creative expressions to the public. Legal protection covers the expression of the ideas contained in their musical works, not the ideas themselves.³¹

That means, for instance, that your idea of a TV show, should be expressed in writing in the form of a synopsis or script. What is expressed in writing is what you can protect with copyright.³² Disclaimer: do not share your idea with an individual, institution or a funder before you protect its expressed form. The same goes for your software code, manuscript, or screenplay. The smartest thing to do to protect your copyright of a creative concept is to ensure your idea is drafted and dated, and that you get a certificate from the Kenya Copyright Board (KECOBO).³³

Copyrights origin is Renaissance Italy, although the most famous early copyright law is probably the English Statute of Anne of 1710.³⁴ Early copyright law was associated with the interests of domestic printers rather than musical authors, and to some extent with censorship. While its intent was both to prevent unauthorized printing, reproduction, publication and publishing of musical works and to encourage "learned men to compose and write useful lyrics and songs," the Statute of Anne was primarily the outcome of a campaign by an association of printers (the Company of Stationers) to reassert its control over the English book trade, rather than a law to uphold the rights of authors.

Nonetheless, for the first time in a statute, it did recognize that authors could be proprietors of their works. This law provided a time-limited right to print and reprint books whose titles were entered in the register book of the Company of Stationers. According to the economic historian, Paul David, 'copyright law, from the beginning, and has been shaped more by the economics of publication rather than by the economics of authorship'. Nevertheless, copyright law in continental Europe displayed much more concern for the artistic integrity of authors than did the Anglo-American copyright regulations.³⁵

³⁰ Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*, at page 28.

³¹ Keith Maskus (1997) "Intellectual Property Rights in Lebanon," International Trade Division, World Bank, manuscript.

³² Rose Odengo (2016) "Intellectual property 101: How to protect your ideas," *Daily Nation* Newspaper, at <http://www.nation.co.ke/lifestyle/mynetwork/Intellectual-property-101-protect-your-ideas/3141096-3264094-p3ccow/index.html> (accessed 13/11/2017).

³³ *ibid.*

³⁴ Keith Maskus (1997) "Intellectual Property Rights in Lebanon," *op. cit.*

³⁵ *ibid.*

As with patent law, it is not until the nineteenth century that copyright law took its modern form. During this century, the protection term increased, the law began to accumulate a wider range of subject matters, and international agreements began to proliferate with the result that national standards became more harmonized, and opportunities to secure stronger protection of creative works in more countries were greatly enhanced. These trends have continued.³⁶

With respect to subject matters, for example, U.K. copyright law had by 1988,³⁷ been stretched to include literary and dramatic works (including computer programs), musical works, artistic works, sound recordings, films, broadcasts, cable programmes, typographical arrangements, and computer-generated works. The protection was not only economic in nature, but – following continental tradition and the requirements of the Berne Convention for the Protection of Literary and Artistic Works – included authors' moral rights. Moral rights include the right of authors to be identified as such (the 'right of paternity'), and to object to having their works altered in ways that would prejudice their reputation ('the right of integrity').³⁸

Historically, national copyright laws have generally been less friendly towards the interests of foreigners. This is because while granting rights to foreigners was sometimes considered to benefit the country by encouraging the introduction of protected technologies, allowing foreigners to protect their literary and artistic works does not provide such obvious economic advantages.³⁹

In spite of such a long history, the extent of recent public interest in copyright throughout the world is probably unprecedented. Perspectives on copyrights can differ sharply. International debates have become highly polarized and adversarial. Some believe that strong copyright protection and enforcement is indispensable in the modern industrial and post-industrial economy.⁴⁰ Others, if their rhetoric is anything to go by, consider that copyrights are just another device by which the rich make themselves richer and the poor poorer, and are probably unnecessary to foster creativity anyway.

Many governments accept the need to ratchet up their copyright systems to transform their traditional 'old' industry-based economies into 'new' knowledge-based industrial, and even *post*-industrial, economies. Nevertheless, others see stronger copyright systems as an especially pernicious manifestation of globalization. "Globalization" according to many such critics means – among other unpleasant

³⁶ Jayashree Watal (1996) "Introducing Product Patents in the Indian Pharmaceutical Sector: Implications for Prices and Welfare," *World Competition*, vol. 20, 5-21.

³⁷ *ibid.*

³⁸ World Bank (1999) "World Development Report 1998/99: Knowledge for Development," New York: Oxford University Press.

³⁹ Keith Maskus (1997) "Intellectual Property Rights in Lebanon," *op. cit.*

⁴⁰ *ibid.*

things – developed countries and their corporations forcing their expensive (and in some accounts inappropriate) products on developing countries and controlling markets, while failing to keep their promises to throw open their borders to developing country exporters.⁴¹

According to Sihanya;

“Kenya and most other African countries have been engaged in the transnational copyright system through colonialism. For instance, the Berne Convention and the Universal Copyright Convention (UCC) were negotiated, signed and ratified on behalf of Kenya and other African countries by colonial authorities. After independence the treaties were applied through the doctrine of state succession. A number of Agreements on Friendship, Commerce and Navigation (FCN) also covered or laid a framework for copyright transactions and regulation.”⁴²

1.4 Problem Statement

Kenya has an elaborate legal regime that safeguards intellectual property rights. Moreover, Kenya has ratified various international conventions and agreements that advocate for the protection of intellectual property rights for instance the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs).⁴³ There is also a well-established institutional framework for safeguarding intellectual property rights in Kenya.

However, protection of the copyrights for musical works in Kenya requires urgent consideration in relation to the harmonization of the existing laws to be accordant. The continued infringement of the rights of authors of various works in Kenya has exposed various weaknesses in the domestic law in relation to the implementation of the already existing laws by the enforcement agencies. These legal frameworks specify the rights and duties of authors, the enforcement agencies and their roles including the role of the Competent Authority in dealing with the infringement of the intellectual property rights of various copyright owners.

In the recent past, Kenya has faced an alarming increase in breach of copyright laws. For instance, during the 2007 first East African intellectual property rights conference; Member States deliberated on the impacts of copyrights infringement as well as the counterfeit trade in their economies. It was noted that the region losses US\$ 18 million in taxes due to copyright infringement and piracy of musical and artistic works with Kenya being in the forefront.⁴⁴ Kenya is the leading destination of pirated musical products in East Africa; and as a result, the authors of various musical

⁴¹ Keith Maskus (1997) “Intellectual Property Rights in Lebanon,” *op. cit.*

⁴² Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*, at page 236.

⁴³ World Intellectual Property Organization, website at www.wipo.int/trademark/html (accessed on 21/05/2015).

⁴⁴ International Chamber of Commerce (2007) “Counterfeiting cost East Africa \$20 million in lost taxes,” at <http://www.icc-ccs.co.uk/bascap/article.php?articleid=731> (accessed on 21/05/2015).

products as well as the government have continued to count huge losses in the entire EAC.⁴⁵

Therefore, It has been realized time and again that the intellectual property of musical works authors have suffered greatly due to inefficiency of the implementation mechanisms. This has been the main aim of this study, to look into the source of the problem and to recommend ways in which the available legal instruments can be made effective. In doing so, the chapter delves into the institutional and legal frameworks governing copyrights in Kenya. It also provides appropriate measures to better protect musical authors.

1.5 Research objectives

This research project paper addresses three (3) research objectives. These are:

- a) First, to evaluate the extent to which the Copyright Act, 2001 protects the intellectual property rights of musical works of musical authors.
- b) Second, to determine the level and protection of musical works within the domestic environment.
- c) Third, to make a determination of what practical solutions are needed to enhance the protection of musical works.

1.6 Hypotheses

This research study focuses on two (2) main hypotheses. These are:

- a) Copyright Act, 2001 does not adequately protect the intellectual property rights of musical works of the musical authors.
- b) The copyrights enforcement agencies are not well equipped to combat piracy of musical works.

1.7 Research Questions

This research project paper addresses three (3) research questions. These are:

1. Are the works of the Kenyan Musical artists adequately protected under the Copyright Act, 2001?
2. Are the existing enforcement mechanisms of copyright protection in Kenya adequate?
3. What are the practical solutions to music copyright infringements in Kenya?

1.8 Literature review and law

Secondary literature gathered during this study provides an overview of copyright law and practice in Kenya and globally that includes books, published scholarly articles,

⁴⁵ *ibid.*

theses and newspaper articles. This literature covers various copyright issues, such as copyright protection, licensing and enforcement. It is notable that there are book publishers who look at copyright from the publisher's point of view and thus a protectionist perspective is painted in their works.

Prof Ben Sihanya discusses the evolution of copyright law in Kenya in the context of developments in printing technology and Anglo-American economic, political and cultural imperialism.⁴⁶ The author argues that the country's copyright regime has prevented the rise of indigenous publishing due to foreign competition. He states that Kenya suffers from the 'illusory reciprocity' represented in the Berne and Geneva Conventions.⁴⁷ He is of the opinion that an abrogation of international copyright treaties, such as the Berne Convention and the Geneva Convention, and a subsequent nationalization of foreign publishing interests might encourage growth of the local publishing industry.

He states that in Kenya, Uganda, Tanzania, Ghana, Nigeria, South Africa and in Anglophone Africa generally, copyright law began with the application of the UK Copyrights Act of 1842, 1911 and 1956.⁴⁸ These statutes were applied together with the (English) common law of copyright courtesy of the reception clauses of the respective countries.⁴⁹

Several articles and chapters have been published on copyright law in Kenya in different journals and books. Sihanya, in his article "Copyright law, teaching and research in Kenya,"⁵⁰ provides an overview of the role of copyright in technological, economic and cultural innovation and in creativity and development in Kenya. The author focuses on the development of copyright law, the implementation of the Copyright Act of 2001 and teaching and research on copyright in Kenya. However, he does not delve deeply on the musical works.

In his article, he contends that Kenya's copyright law is essentially Western-oriented because of neo-colonialism, colonialism and the fact that many of Kenya's legal actors, who have fashioned Kenya's copyright law, have internalized interests and values embodied in western and international copyright. According to the article, Sihanya posits that, copyright owners lose millions of shillings due to infringement, piracy and counterfeiting. This affects the authors and copyright owners of musical

⁴⁶ Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*, at page 183.

⁴⁷ See the Geneva Convention, 1971.

⁴⁸ *ibid* at 190.

⁴⁹ See especially Robert Seidman (1969) "The reception of English law in colonial Anglophone Africa revisited," 2 *East African Law Review* 47 at 56. Reprinted in William B. Harvey (1975) *An Introduction to the Legal System of East Africa*, East African Literature Bureau, Nairobi. Cf. Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

⁵⁰ Ben Sihanya (2005) "Copyright law, teaching and research in Kenya" *East African Law Journal* 2.

works as well. The author attributes this to the fact that Kenya does not have the means of monitoring copyright transactions as the role of protecting infringers is left to the copyright owners. Sihanya further maintains that the penalties provided for copyright infringement are not sufficient to control infringement.

In their book *Publishing and Book Trade in Kenya*,⁵¹ Makotsi and Nyariki expounds on the difficulties experienced by Kenyan publishers in marketing, promoting and distributing books. According to the authors, copyright law does not protect unpublished works from infringement. Compared to publishers, most authors are not in a financial position to institute lawsuits against those involved in plagiarism of unpublished manuscripts. The book also states that some university lecturers exploit students by asking them to carry out research and later convert their manuscripts into their own publications. The authors contend that copyright law in Kenya does not safeguard the interests of such authors.

Ouma gives an overview of copyright law in Kenya in light of the enactment of the Copyright Act of 2001. She also briefly analyses the impact of the, then, new law on rights-holders as well as on users.⁵² In her article “Optimal enforcement of music copyright in Sub-Saharan Africa, reality or myth,” the author gives a profound analysis of copyright protection and enforcement in the music industry in Africa.⁵³ The article emulates another article that she published earlier on copyright protection and the music industry.⁵⁴ Even though, these articles speak to the musical industry, they look at the musical industry in Africa. This study however focuses on Kenya’s musical industry.

Sihanya, in *Constructing Copyright and Creativity in Kenya: Cultural Politics and the Political Economy of Transnational Intellectual Property*, evaluates copyright and the infrastructure for literary creativity in Kenya.⁵⁵ In his research, he notes that the public, private and non-profit sectors do not proficiently support training of authors, writing, publishing, distribution and access to literature and other works. He also notes that the construction of literary copyright denies up-and-coming authors, composers and performers efficient and equitable recognition, compensation or protection. Free riders exploit creativity and investment of skill, judgment, time, money and labour.

Access by readers, authors and researchers is also constrained through technologies

⁵¹ Ruth Makotsi and Lily Nyariki (1997) *Publishing and Book Trade in Kenya*, East African Educational Publishers, Nairobi.

⁵² Marisella Ouma (2004) “The Copyright Act 2001: A new era for copyright protection in Kenya” *UNESCO Copyright Bulletin*, July-September 2004.

⁵³ Marisella Ouma (2006) “Optimal enforcement of music copyright in Sub-Saharan Africa, reality or myth” *Journal of World Intellectual Property Law* 9 (5) 592-627.

⁵⁴ Marisella Ouma (2004) “Copyright protection and the music industry in Africa” *Journal of World Intellectual Property Law* 7 919-932.

⁵⁵ Ben Sihanya (2003) *Constructing Copyright and Creativity in Kenya: Cultural Politics and the Political Economy of Transnational Intellectual Property*, *op. cit.*

and laws such as the digital anti-circumvention laws enacted under the WIPO Copyright Treaty of 1996 and the Kenya Copyright Act of 2001. Some of the recommendations made by Sihanya are that the bumpy nature of copyright, creativity and socio-cultural development require inter-disciplinary approaches among creative writers, cultural historians, political economists, IP lawyers and constitutionalists. This is however a broader look to other intellectual property rights. The study however focuses on the musical works.

Other proposals for reconstructing copyright and the infrastructure according to Sihanya include: conducting an all-inclusive analysis of the industry for efficient investment; strengthening community and mobile libraries; encouraging authors through training, prizes and commissions; facilitating international co-publishing arrangements; registering and documenting Kenyan creativity and copyright; as well as guaranteeing the Kenya Copyright Board operates efficiently and with integrity. The author further analyses literary creativity in pre-colonial, colonial and post-colonial Kenya.

Another dissertation focusing on copyright is Julia Wanja Muriithi's *The Impact of Piracy on the Gospel Music Industry in Kenya*.⁵⁶ According to the author, in 2002, one in three CDs sold in Kenya were pirated. Piracy in Kenya is therefore rampant and has had a significant effect on the sale of gospel musical works. The victims are the people currently employed, directly or indirectly by the music industry, that is, performers, producers, distributors and legitimate traders.⁵⁷ Piracy undermines investment in the development of local talent and culture. The author argues that in Kenya there is limited awareness among members of the public of the negative effects of piracy. Piracy of music is a low risk activity because the penalties are minimal. Further, technological innovations have made it easier for pirates to copy music.

The MCSK, which protects the copyright of member artists, has not developed a strategy for dealing with online downloading of music.⁵⁸ Enforcement failures, from raids to protection in the courts as well as about border procedures, make it impossible for rights-holders to protect their rights in Kenya.⁵⁹ Police, customs and other enforcement agencies are reluctant to pursue raids against copyright violators. Police officers have also not received any training on copyright.⁶⁰ According to the author, a special crime prevention unit was established and was mandated to deal with copyright cases.⁶¹

⁵⁶ Julia Wanja Muriithi (2007) *The Impact of Piracy on the Gospel Music Industry in Kenya*, MA Thesis submitted to the University of Nairobi, School of Journalism and Mass Communication.

⁵⁷ *ibid.*

⁵⁸ Music Copyright Society of Kenya website, at <http://www.mcsk.or.ke/> (accessed 10/11/2017).

⁵⁹ Victor Nzomo (2012) "Words for the unwary: Intellectual Property and Political Parties in Kenya," IP Kenya at <https://ipkenya.wordpress.com/2012/05/30/lessons-from-ghana-and-south-africa-intellectual-property-and-political-parties-in-kenya/> (accessed 11/11/2017).

⁶⁰ *ibid.*

⁶¹ Julia Wanja Muriithi (2007) *The Impact of Piracy on the Gospel Music Industry in Kenya*, *op. cit.*

However, the officers in the unit are yet to receive training. Other issues facing enforcement of copyright in Kenya are slow, expensive and long legal proceedings caused by a lack of familiarity by the judiciary regarding copyright and a general backlog of commercial cases. There is also a lack of authority on the part of the Kenya Copyright Board in prosecuting copyright cases under the Copyright Act and laidback custom laws and regulations that allow for the importation of pirated music.⁶² The author further noted that the Copyright Act of 2001 is a step in the right direction in curbing music copyright infringement. However, what is lacking is the infrastructure for its implementation and enforcement - as has been observed by key stakeholders in the authorship industry.⁶³

Nancy Karimi, a former chair of the Kenya Publishers Association (KPA), presented a paper at the 2008 International Publishers Association Congress.⁶⁴ In her paper she highlighted that the majority of people in Kenya are ignorant about the existence of copyright relating to books, music and films. Despite the existence of copyright legislation, enforcement mechanisms are still weak and administrative structures do not support effective copyright protection.

The high level of piracy in Kenya has become a barrier to the publishing and musical industry in Kenya. Karimi emphasized the prominence of copyright protection in the development of the publishing industry. A strong protection of copyright would be an important way of promoting the growth of knowledge, while contributing to the expansion of creative industries and protecting cultural diversity in developing countries. She argued that copyright exceptions should serve the needs of both users and creators in a fairly balanced manner. According to the author, the Kenya Copyright Act was long overdue for review in line with changes at the international level.⁶⁵

Ouma captured the idea that copyright law affects access to knowledge in a paper presented at the 3rd Annual Access to Knowledge Conference in 2008.⁶⁶ In this paper, Ouma argues that copyright laws and policies that only protect and promote the proprietary right of the copyright owner, without recognizing the need for facilitating access to knowledge, hamper access to knowledge.

According to the WIPO report, “On the beat – tapping the potential of Kenyan

⁶² Tom Mshindi (2013) “What Kenya Copyright Board is doing to help secure property ownership rights,” *Daily Nation* Newspaper at <http://www.nation.co.ke/oped/opinion/-Kenya-Copyright-Board-doing-a-lot-in-the-country/440808-2053644-osgyeoz/index.html> (accessed 11/11/2017).

⁶³ *ibid.*

⁶⁴ Nancy Karimi (2008) “Copying exceptions and their impact on publishers in less developed countries” Paper presented at the *International Publishers Association 2008 Congress* in Seoul, Korea.

⁶⁵ *ibid.*

⁶⁶ Marisella Ouma (2008) “Law, technology and access to educational material” Paper presented at the 3rd Annual Access to *Knowledge Conference*, September 10-12, 2008, Geneva, Switzerland. Available at <http://a2k3.org/2008/09/access-toknowledge-and-human-rights-panel/> (accessed on 30/6/2015).

music,” the modern musical landscape in Kenya is one of the most diverse and vibrant of all African countries.⁶⁷ However, the industry is confronted with many obstacles. These include a lack of proper networking in terms of distribution, linguistic diversity and a lack of investment in production. The most serious problem facing the industry, however, is piracy and ineffective management of intellectual property rights (IPRs). According to the Author, piracy results in loss of profits for many musicians and makes it difficult for them to achieve social recognition of their status as artists.

As a result of the rampant piracy in the country, as well the unwillingness of the government to deal with the problem, Kenya was specially mentioned in the International Intellectual Property Alliance Report in 2006.⁶⁸ The Alliance identified the following six (6) priority actions for Kenya to take in the fight against copyright infringement: First, activating the Kenyan Copyright Board and providing dedicated staff for the Board; Second, shutting down street vendors and exhibition halls selling pirated goods; Third, banning importation of copyright goods except from rights-holders; Fourth, seizing and destroying all pirated products within the country; Fifth, copyright enforcement against duplicating facilities and Internet cafes using unlicensed products or providing piracy services; Sixth, introducing, passing and aggressively implementing a new Counterfeit Goods Act; and, finally, combining offences in criminal charges.

Bently & Sherman’s *Intellectual Property Law* is the definitive book on Intellectual Property Law. The authors’ all-embracing approach not only clearly sets out the law in relation to copyright, patents, trademarks, passing off, and confidentiality, but also takes account of a wide range of academic opinion enabling readers to explore and make informed judgments about key principles regarding copyright in musical works. The authors introduce important developments at an international level such as the Beijing treaty for Audio-visual Performers, and the Marrakech Treaty on copyright exceptions for the visually impaired.

This in itself affects copyright of musical works in details. Chapter two of the book discusses copyright, which covers the revolutionary case law of the CJEU, in particular on originality, infringement, and the scope of rights, and analyses the extension of term for sound recordings/performances, the new ‘Hargreaves exceptions’, and the Digital Economy Act 2010.⁶⁹

Sihanya also looks at the role of private publishing ventures. According to him, Africa’s losses arise from the skewed international copyright regime, obstacles to the

⁶⁷ World Intellectual Property Organisation (2007) “On the beat – tapping the potential of Kenya’s music industry,” WIPO Magazine at http://www.wipo.int/wipo_magazine/en/2007/04/article_0001.html (accessed 30/6/2015).

⁶⁸ International Intellectual Property Alliance (2006) :Special 301: Kenya,” issued 13 February 2006, at 467-468 at <http://www.iipawebsite.com/special301.html> (accessed 30/6/2017).

⁶⁹ Lionel Bently and Brad Sherman (2010) *Intellectual Property Law*, Sweet & Maxwell.

reading culture in Africa and book marketing, distribution and pricing. With regard to copyright, he analyses African and international copyright. He states that copyright laws in Kenya and Africa are generally not administered equitably. He also points out that Africa has ‘very little or nothing to sell to the outside world.’⁷⁰

He argues that rights-holders in the global North cling to their rights. Those who grant rights to their African counterparts limit these rights to a particular territory, so that works cannot be circulated or reprinted in other areas. African authors do not have the capacity or experience to defend their copyright, however, NGOs such as the African Publishers Network, have become more involved in the publishing industry and enforcement of copyright laws.⁷¹

He further states that compulsory licensing is regarded by some as a tool that can be used to protect Kenya’s economic, educational, entertainment industry and cultural interests in the context of inequitable and unbalanced international copyright doctrine and practice.⁷²

Lastly, newspaper articles mainly concentrate on the music industry or pieces that are more appealing to the media houses than learning materials. Mwenda Micheni, a journalist, wrote an article on licensing of CMOs – including KOPIKEN – that collect and distribute royalties from users such as libraries and, generally, educational institutions.⁷³

In his article, Okuttah highlights the anti-piracy actions against cyber cafés in Kenya.⁷⁴ Okuttah notes that most cyber cafés in Kenya use Microsoft software without a valid license. The raids on the cyber cafés came after the expiry of a deadline set by the Kenya Copyright Board. During the raid, computers containing unlicensed Microsoft software were confiscated. Cyber café operators, Okuttah reports, are torn between legalizing their Microsoft operating system, shifting to open source, or closing shop altogether following the crackdown on illegal software. The Microsoft initiative on fighting software piracy and counterfeiting of its products in Kenya has been widespread but discreet. A Nairobi business lady mentioned in the

⁷⁰ Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Knowledge for Sustainable Development*, *op. cit.*

⁷¹ *ibid*

⁷² Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Knowledge for Sustainable Development*, *op.cit.* Cf. Henry Chakava 1996) *International Copyright and Africa: The Unequal Exchange’ in Publishing in Africa*, East African Educational Publishers, Nairobi at 75-94.

⁷³ Mwenda Micheni (2008) “Copyright board appoints team to collect royalties” *Business Daily*, Nairobi, 8 October. Available at http://www.bdafrica.com/index.php?option=com_content&task=view&id=10709&Itemid=5822 (accessed 30/6/2015).

⁷⁴ Mark Okuttah (2007) “Copyright Board takes piracy war to cyber cafes” *Business Daily*, Nairobi, 26 November 2007. at http://www.bdafrica.com/index.php?option=com_content&task=view&id=4522 (Accessed 30/6/ Jun3/2015).

article attributed the use of pirated software to ignorance.⁷⁵

1.9 Significance of the study

Intellectual property has long been recognized and used by industrialized countries, and some developing countries, as an important tool of technological and economic development. Many developing countries are becoming increasingly aware that it is in their best interests to establish national industrial property systems, where they do not exist, and to strengthen and upgrade existing systems, which, it inherited from their historical past, are no longer adequately responding to new needs and priorities in the musical industry.

Countries have laws to protect copyrights property for two main reasons. One is to give statutory expression to the moral and economic rights of creator for their creations and the other is to promote, as a deliberate act of government policy, creativity and to encourage fair-trading. This contributes to economic and social development.

1.10 Conceptual Framework on the Protection of Rights of Authors of various Musical works by IP Laws in Kenya

This research draws from the concept of intellectual property, copyright, copying, Piracy and enforcement. This is as discussed below:

1.10.1 Intellectual Property in relation to Copyrighting

Intellectual property refers to the property that results from original creative thought. It relates to the recognition, promotion and the protection of works of mind, the human intellect. Subsequently, intellectual property rights are the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period.⁷⁶ Intellectual property rights (IPRs) is defined under Section 2 of the Anti-counterfeit Act as the rights which includes any right protected under the Copyright Act (emphasis), any plant breeders' right granted under the Seeds and Plant Varieties Act, any right protected under the Trade Marks Act and any right protected under the Industrial Property Act.

The concept of intellectual property rights relates to the fact that certain products of human intellect should be afforded the same protective rights that apply to physical property. Accordingly, Intellectual Property Rights (IPRs) are premised on a Western philosophy of property ownership that seeks to recompense an individual, who is considered to have worked hard to contribute to the good in society.⁷⁷

⁷⁵ *Ibid.*

⁷⁶ World Trade Organization (2015) website at http://www.wto.org/english/tratop_e/trips_e/intel1_e.htm (accessed on 21/05/2015).

⁷⁷ Moni Wekesa (2009) "An Overview of The Intellectual property Rights (IPRS) Regime In Kenya," in Moni Wekesa and Ben Sihanya (eds) *Intellectual Property Rights in Kenya*, Konrad Adenauer Stiftung, Sports Link Limited and authors publishers, Nairobi at http://www.kas.de/wf/doc/kas_18323-1522-2-30.pdf?110214131726 (accessed on 21/05/2015).

1.10.2 Concept of Copyright infringement

Copyright infringement is the act of violating any of a copyright owner's exclusive rights granted under the Copyright Act. There are three elements that must be in place in order for the infringement to occur namely, the copyright holder must have a valid copyright, the person who is allegedly infringing must have access to the copyrighted work and the duplication of the copyrighted work must be outside the exceptions. There are three major exceptions to the copyright law that are commonly used by educators namely, fair use, face-to-face instruction, and virtual instruction. Exceptions allow for the use of a work without requesting permission from the copyright holder and potentially paying fees.⁷⁸

1.11 Theoretical Framework on the Efficacy of Copyright Laws in Kenya

There are various schools of thought that relates to this study. The deontological school teaches that a person has a natural right to a person's creation irrespective of the consequences. John Locke justified private property ownership based on the premise that every individual should own what he/she produces from the commons.⁷⁹ Because of the copyrights, the production of ideas comes from a person's labour and as such, an innovator is entitled to own his innovation. This is the basis of condemning copyright infringement.

Nobody is entitled to engage in copyright infringement. Moreover, John Locke's theory can as well be looked into as value-addition; for instance, that sufficient labour and skill adds to the social value and the value of the product. It is this 'value-addition' that warrants a reward. The 'non-obviousness' prerequisite for copyrights is meant to underscore the value addition. Because of this, copyrights rights must accorded protection due to the benefits that are likely to accrue to people.

Lastly, John Locke argues that because a person has natural property right to the fruits of his/her labour; the State has an obligation to respect and enforce that natural right. It is therefore proper to say that the State is responsible in ensuring that there is a proper institutional and legal framework in place to safeguard against the copyright infringement. This study is based on the argument that proper legal and institutional framework is key to combat copyright infringement.⁸⁰ It is therefore evident that the copyrights rights should be acknowledged and protected by the State. There should be effective laws and implementation strategies in place to curtail copyright infringements.

1.12 Scope of the Study

The study takes a critical look at the Copyright Act together with other applicable laws in Kenya with regard to the protection of copyrights of musical authors and their

⁷⁸ Purdue University website, at <https://www.lib.purdue.edu/uco/CopyrightBasics/exceptions.html> (Accessed on 21/05/2015).

⁷⁹ Michael Freeman (2001) *Freeman Lloyd's Introduction to Jurisprudence*, Sweet & Maxwell 7th edition, pp.148-150.

⁸⁰ See Chapter 2 of the study.

works in Kenya. It is argued that authors' rights are constitutional rights and the passing of the Copyright Act and the Kenya Constitution, 2010 has enhanced that position⁸¹. The research delves into whether controlling copyright is good or bad to both the country and individual musicians as will be highlighted in Chapter 4 of this study.

1.13 Methodology

The methodologies to be used in this research include a series of secondary data such as books, journals, newspaper articles, legislation, cases, international material, unpublished articles and Internet sources.

The limited time allocated for this research work will not allow for the effective use of primary sources and visitation, as we are not able to visit and interview the musicians.

1.14 Chapter Outline

This research paper consists of four chapters. The first is the introduction, which gives the background as well as the objectives of the study. Chapter 2 discusses the legal framework for domestic policy on intellectual property, which analyzes the legal protection of musical authors from copyright infringement in Kenya as well as a critique of the said laws. Chapter 3 presents a critique of the Copyright Act, 2001. Chapter 4 on the other hand, looks at the various forms of copyright infringement in musical works. Finally the curtain draws with the conclusion, summary and Recommendations at Chapter 5.

⁸¹ Purdue University website, at <https://www.lib.purdue.edu/uco/CopyrightBasics/exceptions.html> (accessed on 21/05/2015).

CHAPTER 2

LITERATURE REVIEW AND LAW ON MUSIC COPYRIGHTS IN KENYA

2.1 Introduction

Having looked at the concepts to copyright in Musical works in the previous chapter, this chapter addresses the first research question on how musical works are protected under the various legal regimes in Kenya. In particular, this chapter delves into the operative copyright laws and cases churned out by the Kenyan courts regulating the musical works and copyrights in Kenya. Innovation and creativity are sure drivers for financial growth.

Research shows that growth is closely interrelated with the capacity to generate innovation and commercialize innovative products. Intellectual property rights play an important part in the realization, development and progress of innovative capacity. This is particularly vital to the emerging economies, like Kenya's. Intellectual properties are becoming strategic elements for value creation by undertakings. They are increasingly becoming significant in attracting investment and encouraging the growth of innovative sectors in the economy hence the need for legal frameworks to govern it.⁸²

2.2 Legal frameworks for protection of Music Copyright property in Kenya

Kenya has various legislation and statutes governing copyright law. These include:

2.2.1 The Constitution of Kenya, 2010

This is the supreme law in Kenya. Any other law, which is inconsistent with the Constitution, has no legal effect.⁸³ The Constitution does not govern copyrights matters directly, but does provide a background against which copyrights rights and laws operate.⁸⁴ This is seen through two (2) provisions:

- a) First, recognition of the role of science and indigenous technologies in the development of the nation;⁸⁵
- b) Second, promotion of the intellectual property rights of the people of Kenya.

The constitution empowers the parliament to enact legislations to ensure that communities and individuals receive compensation or royalties for the use of their property rights including copyright rights derived from their musical creations.⁸⁶

⁸² Ben Sihanya (2002) "Integrating innovation and intellectual property into Kenya's Constitution," *op. cit.*

⁸³ Article 2 provides for the supremacy of the Constitution. Cf. Section 3 of the Judicature Act Cap 8.

⁸⁴ Ben Sihanya (2009) "Copyright in E-Commerce and Music Industry in Kenya" in Prof Moni Wekesa and Ben Sihanya (eds) *Intellectual Property Rights in Kenya*, Konrad-Adeneur-Stiftung, Nairobi, pp. 133-176. Printed on October 23, 2009 and launched on November 10, 2009, at Panafric Hotel, Nairobi.

⁸⁵ Article 11(2) (b) of the Constitution of Kenya, 2010.

Kenya being a member of the International organizations dealing with Intellectual property rights, it is bound by international law. Kenya therefore must carry out its international obligations irrespective of the contents of its constitutional legislation. A state's own constitution may indicate what measures have to be taken with regard to the implementation of its international obligations. Monism and dualism are the terms used to describe the legal framework within which governments carry out their international obligations. Kenya is essentially a monist country, which means that treaties become operative upon ratification and automatically form part of Kenyan law.⁸⁷

The constitution has also largely provided a broader framework within which copyright is to be constructed. These include the protection of right to property including a musician having rights over his/her own copyrighted work,⁸⁸ freedom of expression⁸⁹ and access to information,⁹⁰ Freedom of expression includes freedom of artistic creativity, academic freedom and freedom of scientific research. These rights as conferred upon an individual or a group of persons by the Constitution. It is therefore a clear indicator that the constitution, 2010 is the basic legal framework upon which copyrights rights are anchored.

2.2.2 The Copyright Act, Act No.12 of 2001

As mentioned in the previous chapter, in 2001, following copious discussions by the government with stakeholders and industry players, a new Copyright Act was passed by Parliament. It came into force in February 2003. In addition to the minimum standards of protection required by international conventions, the law sets stronger administrative structures and enforcement mechanisms. The implementing Regulations were passed in 2005. Section 51 of the Act provides that copyright shall only subsist by virtue of the Copyright Act.⁹¹

2.2.2.1 Works Protected by the Copyright

Section 22(1) of the Copyright Act provides for works that are eligible for copyright protection. These include:

- a) literary works;
- b) musical works(emphasis);
- c) artistic works;
- d) audio-visual works;
- e) sound recordings;
- f) performances; and

⁸⁶ Article 11 (3) of the Constitution of Kenya, 2010.

⁸⁷ Article 2(5) and 2(6) of the Constitution of Kenya, 2010.

⁸⁸ Article 40 (1), which confer the right to acquire and own property of any description either individually or in association.

⁸⁹ Article 33(1) of the Constitution of Kenya.

⁹⁰ Article 35(1) of the Constitution.

⁹¹ Act of 2001.

g) Broadcasts.

2.2.2.2 The nature of copyright

The nature of copyright is clearly laid out under Sections 26 to 29 of the Copyright Act. Section 30 addresses performances, while Section 49(d) deals with folktale. The Act grants both economic rights and, in Section 32, moral rights. Before looking at the precise scope of protection for the different kinds of works with regard to this project, it is noteworthy that the Act contains the following definition of ‘copy’:

‘[C]opy’ means a reproduction of a work in any manner or form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium, by computer technology or any other electronic means.⁹²

This definition covers any transient storage of a work in any medium. This is intended to cover new reproduction and transmission technologies relating to the production and distribution of musical and other copyrightable works. The Act recognizes non-material and non-tangible forms of reproduction as well. It is obvious that the protection of non-tangible forms of reproduction impacts access to digital teaching and learning materials and thus may include musical works.

The owner of artistic, musical or audio-visual works has the exclusive right to control the reproduction, in any material form, of his work, or its translation, its adaptation, its distribution to the public by way of sale, rental, lease, hire or loan, as well to control the importation or communication to the public and broadcasting of his works.⁹³ These exclusive rights are, however, subject to limitations and exceptions, which are discussed herein.

The rights-holder in a sound recording has the exclusive right to: reproduce the sound recording in any manner or form; distribute it to the public by way of sale, hire, rental, lease or any similar arrangements; import it into Kenya; and broadcast and communicate the material to the public.⁹⁴ Broadcasting organizations have the right to control the fixation, broadcast and communication to the public of the whole or part of their broadcast.⁹⁵

The Act also grants performers exclusive rights to fix and reproduce the fixation of their performances and to broadcast or communicate their fixed performances to the

⁹² Section 2 of the Copyright Act of 2001. According to Prof Ben Sihanya there was clearly a need to capture technological change.

⁹³ Section 26(1) of the Copyright Act. Cf. Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

⁹⁴ Section 28 of the Copyright Act. Cf. Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

⁹⁵ Section 29 of the Copyright Act. Cf. Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

public.⁹⁶ Moral rights are not only applicable to authors of literary, artistic and performer's works but also to the musical works. Section 32 of the Copyright Act, provides that moral rights are limited to the right to be named or claim authorship and the right to object to any mutilation or derogatory treatment that affects the honour or reputation of the author or performer.⁹⁷

According to Section 33 of the Copyright Act, economic rights are transmissible as movable property by assignment, by license, by testamentary disposition or by operation of law.

Moreover, the Act specifies that the term 'work' include translations, adaptations, arrangements or other transformations of a work and public performance of the work.⁹⁸

2.2.2.3 Term of Copyright protection

The term of protection for musical works in Kenya is 50 years after the end of the year in which the author dies.⁹⁹ In the case of audio-visual works, the term of protection is 50 years from the end of the year in which the work was either first made available to the public or first published, whichever date is the latest.¹⁰⁰ Sound recordings are protected for 50 years after the end of the year in which the recording was made.¹⁰¹

Broadcasts are protected for 50 years after the end of the year in which the broadcast took place.¹⁰² Section 23(3) and 23(4) cover special provisions for mysterious or pseudonymous work, as well as works of joint authorship. Thus, Kenyan copyright law essentially affords the minimum term of protection required by the most relevant international copyright treaties and agreements such as the Berne Convention and TRIPs.

2.2.2.4 Exceptions and Limitations to Copyright

The Copyright Act contains several general exceptions and limitations to the

⁹⁶ Section 30 of the Copyright Act. Cf. Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

⁹⁷ Compared to Article 66 of the Berne Convention on Literary and Artistic Works of 1886, Rome and Geneva, moral rights under the Copyright Act of Kenya are limited, as the Act only protects the right of paternity and integration.

⁹⁸ Section 2 of the Copyright Act. Cf. Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

⁹⁹ Section 23(2) of the Copyright Act. Cf. Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

¹⁰⁰ Section 23(2) of the Copyright Act. Cf. Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

¹⁰¹ Section 23(2) of the Copyright Act. Cf. Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

¹⁰² Section 23(2) of the Copyright Act. Cf. Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

exclusive rights granted.¹⁰³ To be precise, in an attempt to balance rights-holders' rights and the interests of users, Section 26(1) of the Copyright Act provides, *inter alia*, that copyright in literary, musical, artistic works or audio-visual works does not include the right to control:

- a) “*fair dealing*” for the purposes of criticism, review, scientific research, private use and reporting of current events for as long as the author is acknowledged as such;¹⁰⁴
- b) the inclusion of not more than two short passages of a copyright-protected work in a collection of musical works that is for use by an educational institution;¹⁰⁵
- c) the broadcasting of a work, or reproduction of a broadcast, for educational purposes in an educational institution;¹⁰⁶ or
- d) Reproduction under the direction or control of the government or by public libraries, non-commercial documentation centres and research institutions, ‘in the public interest’ and where no income is derived from the reproduction.¹⁰⁷

2.2.2.5 Parallel importation

Parallel importation occurs where a third party imports and sells intellectual property protected products from one country where they have been lawfully distributed to another country usually against the right holder’s wishes.¹⁰⁸ The importation of any copyright work in Kenya remains under the control of the rights-holder. The law does not allow parallel importation without the authority of the rights-holder. As a result, save in the case of sound recordings, without the express authority of the rights-holder, a third party may not import copyright-protected works into Kenya, which have been released in other countries legitimately. This, for instance, affects learning materials that are produced outside Kenya.¹⁰⁹

2.2.2.6 Compulsory Licensing

A licence is a permission to do what would, in the absence of consent or permission, be illegal.¹¹⁰ There is no specific provision on compulsory licensing. However, Section 26(h) of the Act allows for: the reproduction of a work by or under the direction or control of the Government, or by such public libraries, non-commercial

¹⁰³ Cf. Beijing Treaty 2012.

¹⁰⁴ Section 26(1)(a) of the Copyright Act.

¹⁰⁵ Section 26(1)(d) of the Copyright Act.

¹⁰⁶ Section 26(1)(e) and (f) of the Copyright Act.

¹⁰⁷ Section 26(1) (h) of the Copyright Act.

¹⁰⁸ See Lionel Bently & Brad Sherman (2009) *Intellectual Property Law*, OUP, London (3rd ed), *op. cit.*; at 14-15 (general), 144-6 (Copyright), 15, 553-8 (international), 544 (Patent), 591 (PBR), 673 (registered design), 942-58, 959-74 (trade mark); David Bainbridge (2009) *Intellectual Property*, Pearson Longman, Harlow, England, at 20, 828, 831-2, 835 (7th ed.).

¹⁰⁹ Section 26(1) of the Copyright Act. Cf. Chapter 20 of Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

¹¹⁰ See Section 33 of the Copyright Act, 2001. Cf. Sol Picciotto (2002) “Compulsory Licencing: The case of Higher Education Photocopying in the UK,” Vol. 24(2) *European Intellectual Property Review* 438-447.

documentation centres and scientific institutions as may be prescribed, where the reproduction is in the public interest and no revenue is derived there from.

From the above provision, it is clear that the government or public library may order the reproduction of a work in the case of the public interest being served. The Act does not define what constitutes public interest.

2.2.2.7 Digital Rights Management and Technological Protection Measures

Although the law nowadays recognizes copyright in computer software, the law does not otherwise make specific provisions in relation to exploitation of copyright works in the digital environment. The provisions contained in the law are presumably seen to apply to the digital environment as well.¹¹¹ The relevant provisions include those covering communication to the public, rental and distribution of the copyright-protected works.

Over and above, Section 35(3) of the Copyright Act provides that copyright is infringed by anyone who prefers any of the following four acts:¹¹²

- a) circumvents any effective technical measure designed to protect works; or
- b) manufactures or distributes devices which are primarily designed or produced for the purpose of circumventing technical measures designed to protect works protected under this Act; or
- c) removes or alters any electronic rights management information; or
- d) distributes, imports, broadcasts or makes available to the public, protected works, records or copies from which electronic rights management information has been removed or has been altered without the authority of the right holder.

This legal protection of technological protection measures (TPMs) is problematic. TPMs have serious consequences for access. TPMs are already limiting access to musical works, e-books, articles, databases and other educational materials that would otherwise have been accessible.¹¹³

2.2.2.8 Traditional Cultural Expressions and Others¹¹⁴

These may include traditional dances and songs that have a bearing on cultural expressions of various communities within Kenya. The provisions governing the Traditional Cultural Expressions under the Act are limited. Section 2 and Section

¹¹¹ Lawrence Lessig (1999) *Code and Other Laws of Cyberspace*, Basic Books, New York.

¹¹² See Chapter 10 of Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

¹¹³ George Sikoyo, Elvin Nyukuri & Judi Wakhungu (2006) "Intellectual property protection in Africa: Status of laws, research, and policy analysis in Ghana, Kenya, Nigeria, South Africa, and Uganda," African Centre for Technology Studies (ACTS): ACTS Press Eco Policy Series No. 16: 1-61.

¹¹⁴ Ben Sihanya (2016) "Traditional Knowledge and Traditional Cultural Expressions in Kenya," Volume 12, 2016 No. 2 LSK Journal 1-38.

49(d) of the Act govern them. Section 49(d) stipulates that if one wishes to make use of Traditional Cultural Expressions for commercial purposes, then one must seek permission from the Attorney General to do so at a fee. By virtue of this section, it is clear that the use of such expressions for educational purposes is not subject to any restrictions for as long as usage is not commercial.

Foreign works on the other hand are granted the same protection as local works by extension of the provisions of the Copyright Act under Section 49 of the Act. These provisions are implemented through the Copyright Regulations of 2004/5. However, this extension of protection is restricted to copyright protected works from countries that are party to international conventions to which Kenya is a party.

Works created by government employees are deemed the copyright of the government.¹¹⁵ They do not automatically fall into the public domain, except for statutes and judicial decisions.¹¹⁶ Other works that belong to the public domain are the following three (3) categories:

- a) works in respect of which the terms of protection have expired;
- b) works in respect of which the authors have renounced their rights; and
- c) Foreign works that do not enjoy copyright protection in Kenya.¹¹⁷

Most government works are protected by copyright; yet most of them are accessible for the public over the Internet. Examples include policy documents. Some hard-copy government works protected by copyright, however, have to be purchased from the Government Printer, which publishes most official government documents.

2.3 International Legal Framework

By virtue of Article 2 (5) and 2(6) of the Kenyan Constitution, 2010, treaties that Kenya has ratified become part of her laws. Kenya is party to several international treaties and conventions dealing with copyright and related rights. Most importantly, Kenya is party to the following two (2) copyright regimes:¹¹⁸

1. the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Paris Act 1971); and
2. The WTO TRIPs Agreement of 1994.

Kenya has not yet acceded to the WIPO Internet Treaties of 1996 (the WPPT and WCT), but has, as mentioned above, already incorporated some relevant provisions in the Copyright Act 12 of 2001.

¹¹⁵ Section 31 of the Copyright Act of 2001.

¹¹⁶ Section 25 of the Copyright Act. Section 2, on definition of literary works.

¹¹⁷ Section 45 of the Copyright Act 2001.

¹¹⁸ See Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development, op. cit.*

2.3.1 WIPO Copyright Treaty (WCT) (1996)

This is a special agreement under the Berne Convention that deals with the protection of works and the rights of their authors in the digital environment.¹¹⁹ Any Contracting Party (even if it is not bound by the Berne Convention) must comply with the substantive provisions of the 1971 (Paris) Act of the Berne Convention for the Protection of Literary and Artistic Works (1886).¹²⁰ Moreover, the WCT mentions two subject matter to be protected by copyright:

- (i) computer programs, whatever the mode or form of their expression; and
- (ii) Compilations of data or other material (“databases”), in any form, which, because of the selection or arrangement of their contents, constitute intellectual creations. (Where a database does not constitute such a creation, it is outside the scope of this Treaty.

As to the rights granted to authors, apart from the rights recognized by the Berne Convention, the Treaty also grants:¹²¹

- (i) the right of distribution;
- (ii) the right of rental; and
- (iii) A broader right of communication to the public.

The right of distribution is the right to authorize the making available to the public of the original and copies of a work through sale or other transfer of ownership.¹²²

The right of rental is the right to authorize commercial rental to the public of the original and copies of three kinds of works including: computer programs (except where the computer program itself is not the essential object of the rental); cinematographic works (only in occasions where commercial rental has led to extensive copying of such works, materially impairing the exclusive right of reproduction); and works embodied in phonograms as determined in the national law of Contracting Parties (except for countries which, since April 15, 1994, have had a system in force for equitable remuneration of such rental).

The right of communication to the public is the right to authorize any communication to the public, by wire or wireless means, including “the making available to the public of works in a way that the members of the public may access the work from a place and at a time individually chosen by them”. The quoted

¹¹⁹ Ben Sihanya (2003) *Constructing Copyright and Creativity in Kenya: Cultural Politics and the Political Economy of Transnational Intellectual Property*, op. cit.

¹²⁰ World Intellectual Property Organisation (WIPO) website, at http://www.wipo.int/treaties/en/ip/wct/summary_wct.html (accessed on 3/7/2015).

¹²¹ Paul Goldstein (2001) *International Copyright: Principles, Law and Practice*, OUP, New York.

¹²² Article 8 of the WCT; Articles 10 & 14 of the WPPT.

expression covers, in particular, on-demand, interactive communication through the Internet.

As to limitations and exceptions, Article 10 of the WCT incorporates the infamous ‘three step’ test to determine limitations and exceptions, as provided for in Article 9(2) of the Berne Convention, extending its application to all rights. The Agreed Statement accompanying the WCT provides that such limitations and exceptions, as established in national law in compliance with the Berne Convention, may be extended to the digital environment. Contracting parties may conceive new exceptions and limitations appropriate to the digital environment. The extension of existing or the creation of new limitations and exceptions is permissible if the conditions of the “three-step” test are met.¹²³

As to the duration, the term of protection must be at least 50 years for any kind of work. The enjoyment and exercise of the rights provided for in the Treaty cannot be subject to any formality. The Treaty obligates Contracting Parties to provide legal remedies against the circumvention of technological measures (e.g., encryption) used by authors in connection with the exercise of their rights, and against the removal or altering of information, such as certain data that identify works or their authors, necessary for the management such as licensing, collecting and distribution of royalties of their rights.

The Treaty obliges each Contracting Party to adopt, in accordance with its legal system, the measures necessary to ensure the application of the Treaty. In particular, each Contracting Party must ensure that enforcement procedures are available under its law to permit effective action against any act of infringement of rights covered by the Treaty. Such action must include expeditious remedies to prevent infringement as well as remedies that constitute a deterrent to further infringement.

The Treaty also establishes an Assembly of the Contracting Parties whose main task is to address matters concerning the maintenance and development of the Treaty. It entrusts the Secretariat of WIPO with the administrative tasks regarding the Treaty.

2.4 Deficiencies in Copyright Act, 2001

Kenya experiences a widespread piracy estimated by the Kenya Copyright Board (KCB) to be 90% in virtually all kinds of copyright works.¹²⁴ The Copyright Act was passed in 2001, and came into force in 2003. It provides specific administrative, enforcement structures and mechanisms for copyright and related rights. The Act also

¹²³ Ryan Bates (2004) “Communication breakdown: The recording industry's pursuit of the individual music user, a comparison of US and EU copyright protections for Internet music file sharing,” *Northwestern Journal of International Law & Business*, 25,1, 229-256.

¹²⁴ Iseme Kamau & Maema Advocates and Mohammed Muigai Advocates “Consortium, Formulation of an EAC Policy on Anti-Counterfeiting, Anti-Piracy and other Intellectual Property Rights,” at <http://on%20the%20Formulation%20of%20an%20EAC%20Policy%20on%20Anti-Counterfeiting.pdf>, p.5. (accessed on 12/5/2015).

makes provision for both criminal sanctions and civil remedies for copyright infringement. The Act provides that any person found guilty of any offence specified in the Act will be liable upon conviction to a fine not exceeding Kenya Shillings Four Hundred Thousand or imprisonment for a term not exceeding six (6) years for a first offender and in any other case to a fine not exceeding Kenya Shillings Eight Hundred Thousand or imprisonment for not exceeding ten (10) years or both. The fines levied are to be shared equally by the Kenya Copyright Board and the Kenya Revenue Authority.¹²⁵

It can be adduced that this provision is meant to provide an incentives to both institutions to prosecute copyright infringers. However, the reality shows that this incentive arrangement has not worked, as the levels of fines levied on offenders and the numbers of prosecutions are far too low despite blatant copyright infringements. The Kenya Copyright Board, established under the Copyright Act, was a remarkable step towards countering piracy but studies show that it is completely overwhelmed by the degree of the problems and that there is no form of an achievement that it has experienced. Whereas the Board is mandated by the Act to prosecute copyright infringers, to-date the Board has only prosecuted a handful cases over the 10 years since its establishment.¹²⁶

The major challenge facing owners of copyright rights looking to enforce and protect their rights in Kenya is the lack of deterrent minimum fines and civil remedies. Customarily, damages are based on the extent seized by the Kenya Copyright Board or the plaintiff during a swoop, which ordinarily do not have any nexus with the quantity already sold by the infringer.¹²⁷

The Duplicity and the lack of clarity in description of roles of both the Anti-Counterfeit Agency and the Kenya Copyright Board must not go unnoticed. Both institutions have powers to raid, cease and prosecute for copyright transgression. In practice, solely the Kenya Copyright Board handles the issues exclusively relating to copyright counterfeit issues. On the other hand, cases of infringement of both copyright and trademarks are handled by the Anti-Counterfeit Agency in practice. From the legal perspective, these distinctions as to roles are not clearly distinct. Critics are of the view that in cases of pure copyright infringement, prosecuting the matter before the Anti- Counterfeit Agency is faster and penalties more deterrent compared to penalties under the Copyright Act.

Such discrepancies require a proposed amendment to the Copyright Act No.12 of 2001 to provide for maximum penalties, which is deterrent for copyright infringers and potential copyright infringers. Such amendments should introduce deterrent

¹²⁵ Kenya Copyright Board (2013) "Board Seeks harsh penalties for Copyright offenders," Facebook at <https://www.facebook.com/KenyaCopyrightBoard/posts/587086817986710> (accessed 4/12/2017).

¹²⁶ *ibid.*

¹²⁷ Marisella Ouma (2004) "Copyright protection and the music industry in Africa," *op. cit.*

minimum fines. Moreover, the Act needs to be amended to define the mandate and respective roles of the Anti-Counterfeit Agency and the Kenya Copyright Board to raid, cease and prosecutorial powers for copyright infringements.

2.5 Policy Approaches to improvement of protection of musical works

From the forgoing, there is need for policy approaches, measures, actions and initiatives to support a more specific implementation and enforcement of Intellectual Protection legislation as proposed in the above discussions. To begin with, Kenya needs a national Intellectual Property action plan covering the full range of legal and policy reforms, technical assistance and capacity building measures, channels for international cooperation and tools for strengthening enforcement practices.¹²⁸

2.6 Conclusion

The administration and enforcement of Intellectual Property Rights in Kenya is a shared responsibility of the office of the Registrar General in the Attorney General's Chambers – under which the Kenya Copyright Board coming under the Kenya Industrial Property Institute (KIPI), Music Copyright of Kenya, Customs Department of the Kenya Revenue Authority and the Kenya Bureau of Standards (KEBS).¹²⁹ As evidenced, Kenya has no shortage of institutions. What is conspicuously missing is the coordination and information sharing among the various institutions.¹³⁰ Combating infringement of intellectual property rights is therefore an inter-agency duty at both policy and operational levels.¹³¹ Kenya therefore requires comprehensive Intellectual Property regimes to achieve combat infringement on IP rights.¹³² Copyright Act, No.12 of 2001 is therefore not adequate in protection against the copyright infringement.

¹²⁸ Julia Wanja Muriithi (2007) *The impact of piracy on the gospel music industry in Kenya*, *op.cit.*

¹²⁹ Patricia Kameri Mbote (2005) ““Intellectual Property Protection in Africa: An Assessment of the Status of Laws, Research and Policy Analysis on Intellectual Property Rights in Kenya,” International Environmental Law Research Centre at <https://pdfs.semanticscholar.org/18a5/740006d62c1624cf2a6d2fd5f05c66f1fc5e.pdf> (accessed 11/11/2017).

¹³⁰ *ibid.*

¹³¹ Nicholas Ombija “Case study of intellectual property rights court regime,” Kenya Law at <http://kenyalaw.org/kl/index.php?id=1899> (accessed 11/11/2017).

¹³² *ibid.*

CHAPTER 3

A CRITIQUE OF THE MUSIC COPYRIGHT REGIMES IN KENYA

3.1 Introduction

This Chapter addresses the third objective of determining whether Copyright Act, 2001 has discharged its burden in line with the International Treaties and Convention ratified by Kenya. As earlier indicated in Chapter 2, Copyright Act of 2001 is the primary legislation governing the Music Copyright rights in Kenya. The Act has incorporated various provisions of the current international treaties and conventions including the TRIPS Agreement, the WPPT and the WCT.

The supreme distinctive new features covered by the Copyright Act, 2001 include: the setting up of an administrative body-the Kenya Copyright Board, that in essence took over the responsibilities of the Copyright Office in the Department of the Registrar General at the State Law Office, the introduction of the anti-piracy security device, the introduction of registration and supervision of collective management societies in Kenya, the appointment of public prosecutors and inspectors who deal with copyright cases thereby enhancing the enforcement of the rights protected under the Act.¹³³

Ratification of various international treaties¹³⁴ and the successive amendments of the 2001 Copyright Act has been a step in the right direction. Nonetheless, the success of the Copyright Act can only be perceived if it is effectively enforced. A good law without the proper enforcement mechanisms is of no use to those it seeks to protect (Copyright owners). Along with the legal instruments, Kenya must have strong enforcement mechanisms to fight against piracy of musical works, a well-educated population on matters of copyright and rights related thereto, strong and efficient collective management societies as well as working administrative structures. This chapter therefore provides a detailed critique of the Copyright Act, 2001 with regard to copyrights in musical works.¹³⁵

3.2. Administration of Music copyright and related rights

Since Section 3 of Act establishes the Kenya Copyright Board as body corporate,¹³⁶ the Board is in charge of the administration of all matters regarding copyright and related rights in Kenya. The Board has assumed the role of the previous Copyright

¹³³ Ben Sihanya (2003) *Constructing copyright and literary creativity in Kenya: Cultural politics and the political economy of transnational intellectual property*, *op. cit.*

¹³⁴ By virtue of Article 2(5) and 2(6) of the constitution of Kenya, 2010 makes such Conventions and treaties so ratified part of her laws.

¹³⁵ Ben Sihanya (2003) *Constructing copyright and literary creativity in Kenya: Cultural politics and the political economy of transnational intellectual property*, *op. cit.*

¹³⁶ The Board is capable of suing and being sued. It has the power to purchase and acquire property, borrow and lend money and perform all other obligations as provided for under the Act. It should be noted that similar models are applicable in Nigeria where her Act on copyright establishes the Nigerian Copyright Commission.

Office.¹³⁷ This has ensured the centralization of this public body thereby helping in the coordination of the whole management and enforcement of copyright and related rights in Kenya. This change was long overdue, as the Copyright Office was not functioning effectively as constituted because of various reasons including lack of personnel¹³⁸ as well as the lack of specific provisions under the previous Act regarding the administration of copyright and related rights there under.

The Board as constituted consists of almost twenty persons nominated by the various copyright organizations in Kenya. It draws its membership from the government officials and various copyright experts.¹³⁹ The knowledge on copyright matters is key as it helps the board members to understand its mandate and the subject matter it deals in. Unlike the membership of the previous Copyright Office, the Kenya Copyright Board is composed of the nominees from the private sector, nominated by their various sponsoring organizations. This has seen great improvement in the copyright administration thereby allowing the stakeholders in the industry to actively participate in the administration and enforcement of music copyright owners rights.

3. 3. Protection of Music works Copyright and related rights

Musical works as well as sound recordings and broadcasts are all eligible for copyright protection should they be original and expressed in material form.¹⁴⁰ Originality is apparent where there is a sufficient effort made to give the work an original character.¹⁴¹ Characteristically, section 22(4) of the Act remains very interesting as it stipulates that works cannot be considered ineligible for copyright protection if the lone reason for objection is that the making of the work, or any act related to the work, includes, an infringement of copyright in another work.¹⁴² Accordingly, this Section ought to be read in relation to the other provisions of the Act.

There is no formality whatsoever in the Act required for the enjoyment purposes of copyright;¹⁴³ consequently, registration is not a precondition for ownership of copyright.¹⁴⁴ Being that Kenya is a member of the Universal Copyright Convention,

¹³⁷ Section 5 provides for the functions of the Kenya Copyright Board.

¹³⁸ Yet another country that has a separate copyright office is Ghana. It has an office headed by a Copyright Administrator; however, the office still belongs to the Ministry of Culture. Malawi on the other hand, has the Copyright Society of Malawi (COSOMA) that not only deals with general administration of copyright and related rights, but also responsible for the collective management of copyright and related rights.

¹³⁹ Section 6 of the Copyright Act.

¹⁴⁰ Section 22 of the Act.

¹⁴¹ This criterion applies to literary, artistic and musical works, Section 22 (3).

¹⁴² A similar provision can be found in Section 1 (4) of the Copyright Act of Nigeria. In Kenya, this provision was already contained in the previous Copyright Act.

¹⁴³ This is in line with Article 5 (2) of the Berne Convention.

¹⁴⁴ This is a topic of debate that keeps surfacing, as there is a general feeling that the registration of copyright would help provide *prima facie* evidence of copyright ownership. This evidenced especially in cases where the ownership disputed. With the advent of the anti-piracy security device, the registration, albeit voluntary, will be crucial for the success of the system.

the authors of various musical works should insert the-© accompanied by their names and the year of publication of those musical works, this is however not mandatory.¹⁴⁵

3.4. The scope of protection of Musical works

Musical works copyright rights exist in any eligible work of which the author, or at least one of the joint authors, is a citizen of Kenya, is domiciled, or is a resident in Kenya at the time when the musical work is created.¹⁴⁶ Whereas section 24 deals with the protection by reference to the country of origin of the works, it excludes the cases of broadcasts.

The scope of protection of protected works also refers to the duration of copyright under Section 23 (2). It is the same as that provided under the previous Act. The rights in musical and artistic works are protected for the life of the author plus fifty years. In the case of audio-visual works, sound recordings and broadcasts, the term of protection is fifty years from the date of publication, recording or broadcast of the work. It is noteworthy that although the Act was enacted at a time when the European Union and the United States had increased the term of protection to seventy years, the fifty-year term was retained for Kenya's case.

3.4.1. The Protected rights of Authors of Musical Works

As earlier indicated in the previous chapter, the Act provides for moral rights and economic rights of the author of musical works. However, it must be noted that the moral rights are independent of the author's economic rights.¹⁴⁷

3.4.1.1 Musical Author's Economic rights

This is drawn from the economic theory as earlier discussed in Chapter one under the theoretical framework. Economic rights are because of the economic theory. Musical copyright protection's objective is to enhance creativity by rewarding the creative author by ensuring that the end users have access to the created musical works at a consideration. The property rights in creative musical works are tools, which help in achieving an economically efficient distribution of musical works. The economic theory from which economic rights draw its foundation advances the idea that musical authors require incentives to continue creating new musical works and the unauthorized use of such works will deter continued growth of the musical industry as witnessed in Kenya in the recent past.

Drafters of the Act being well aware of the economic benefits, introduced Section 26 which provides the authors of musical and artistic works with the exclusive right to

¹⁴⁵ Article 3 of the Universal Copyright Convention does not outlaw formalities such as registration of copyright, deposit of works, issuance of the certificate. Certain countries like the Ghana, United States and others that require the registration of copyrights for ease of administration even though they are members of the Berne Convention.

¹⁴⁶ Under Section 23 of the Act, the notion of "author" includes any legal entity that is incorporated under the laws of Kenya.

¹⁴⁷ Section 2 of the Act defines the term 'author' in relation to the work in question. For instance, in the case of musical works, the author is the person who creates the work in the first instance while in the case of a sound recording; the author is deemed to be the person who made the first recording.

control the reproduction of their works, including the translations and adaptations of the original work in any material form,¹⁴⁸ the distribution to the public by way of sale, rental, lease, hire, importation or any other commercial arrangement, as well as the communication of the work to the public and the broadcasting of the work. This inclusion is the main rationale of the copyright protection as looked at in the previous chapters.

In other instances, a musical work can be expressed in a form of sound recordings. Section 28 of the Act allows the author of such recordings the exclusive right to also control the indirect or direct reproduction of the sound recording in any material form, the distribution to the public, by way of sale, loan, hire, or any other similar commercial transaction, the importation of the sound recording into Kenya and the communication of the sound recording to the public.

The owner of the broadcast shall have the exclusive right to control the fixation and rebroadcast or communication to the public of the whole or a substantial part of the broadcast in either its original or a similar form.¹⁴⁹ With regard to the music artists' performers, the Act allows for the exclusive right to broadcast and communicate their performances to the public, to make fixations of previously unfixed performances and to authorize the reproduction of fixations, as well as the right of commercial rental.¹⁵⁰

The Act further creates room exceptions and limitations to the exercise of the exclusive rights granted to the authors of musical works and the owners of related rights by the Act. These are well described under the concept of fair use.¹⁵¹ Section 26 of the Act allows the use of the works for educational purposes, the inclusion of works in a broadcast or film for non-for-profit use of works in public, the broadcast of works intended to be used for systematic instructional activities, the use of works by the government, public libraries and non-commercial documentation centres as well as the use of works for judicial purposes, provided the author and the source are of such musical works are shown.

Lawrence Lessig in his book *The Future Ideas* argues that always and everywhere, free resources have been crucial to innovation and creativity; that without them, creativity is crippled. Thus, and especially in the digital age, the central question should not be whether the government or the market should control a resource, but whether a resource should be controlled at all. Just because control is possible, it does not follow that it is justified. Instead, in a free society, the burden of justification

¹⁴⁸ The Act defines reproduction to include digital, electronic and transient forms; see also Section 2 of the Act.

¹⁴⁹ Section 2 seems to be in conflict with Section 29 of the Act as it excludes a broadcast from the definition of the communication to the public. The former law defined communication to the public to include the live performance or delivery of any visual or acoustic presentation.

¹⁵⁰ Section 30 of Copyright Act, 2001.

¹⁵¹ Provided under Section 26 (a-k) and Section 28 (2), whereby exceptions a, f, l and g of Section 26 and a, f, h and k of Section 26 apply.

should fall on him who would defend systems of control. No simple answer may satisfy this demand.

The choice is not between all or none. Obviously many resources must be controlled if they are to be produced or sustained. This therefore means that, controlling the musical industry in Kenya would minimize innovation and creativity. Other scholars like Mark Lemley on the other hand do not agree with Lessig's assertion as they argue that where one cannot control access to these resources, or resources called 'mine' one would have little or no incentive to work to produce these resources, including their own musical products.¹⁵²

It must be noted that when access is allowed, a lot of people will access the musical works thereby increasing the government's revenue as well as increasing the popularity of the musicians and their musical works. Equally, and obviously, many resources should be free. The right to criticize a government official is a resource that is not, and should not be, controlled. I should not need the permission of the Einstein estate before I test his theory against newly discovered data. These musical products and others gain value by being kept free rather than controlled. A mature society realizes that value by protecting such resources from both private and public control.¹⁵³

3.4.1.2 Moral Rights

Further to the moral rights of the author envisaged under Section 32 of the Act, Section 30 (5) initiates moral rights for performers, in compliance with the provisions of the WPPT. This also relates to the music artists performing in live shows or in public. These include the right to be recognized as the performer, the right to object to any distortion, mutilation or modification of his or her performances that may be prejudicial to his or her reputation.¹⁵⁴ The moral rights exist separately from the economic rights, are indisputable during the author's lifetime, and are only transferable by testamentary disposition upon the demise of the author of musical works.

With regard to ownership of the musical works, by virtue Section 33, the owner can assign, license or bequeath all or part of his economic rights. The assignments and exclusive licenses must be made in writing and have to be authenticated by the Kenya Copyright Board.¹⁵⁵ The licenses and assignments are binding to the successor in title.¹⁵⁶ Another uncharacteristic addition to the Act was Section 33 (7), which sought

¹⁵² Mark Lemley (2002) "Intellectual Property Rights and Standard-Setting Organizations," 90 Cal. L. Rev. 1889, at: <http://scholarship.law.berkeley.edu/californialawreview/vol90/iss6/3> (accessed 2/10/2015).

¹⁵³ Lawrence Lessig (2001) *The Future Ideas*, Random House Inc, New York, USA.

¹⁵⁴ Article 6 of the Berne Convention.

¹⁵⁵ The provision for the verification by the Board is a feature that was introduced to ensure that the assignments are genuine. This amendment was due to the absence of verification of licenses and assignments.

¹⁵⁶ Section 33 (9).

to limit the term of assignment to three years, if no duration has been agreed specifically in the agreement.¹⁵⁷ The rights and remedies of the exclusive licensee or sub-licensee are set out in Section 34.

3.5. Enforcement of the Provisions of the Act

Section 3 of the Act provides for the duties of the Kenya Copyright Board (KECOBO). These duties include enforcement of copyright and related rights in Kenya. The Act allows the Kenya Copyright Board to appoint inspectors to help in the proper administration and enforcement of copyright and related rights in Kenya. Even though the KECOBO has appointed inspectors, their numbers are still inadequate compared to magnitude of infringements of music copyright that goes on in Kenya.

It's only in big cities such as Nairobi, Kisumu and Mombasa where the inspectors appointed by KCB are mostly operational. The inspectors are also not adequately equipped with knowledge and advance equipment to help them detect copyright infringement. Many Hotels, Clubs, Restaurants and Film theatres use various musical works without the authority of the copyrights owners and are yet to be apprehended. There is need for advocacy on the economic rights to the copyrights owners as well as the copyrights infringers.

Even though the inspectors appointed by the Kenya Copyright Board have the power to enter into premises and search materials infringing the copyrights, in instances where there is reasonable grounds to believe that the premises are being used for purposes in contravention to the Copyright Act, the inspectors can only act upon obtaining a search warrant or a court order allowing them to gain entry into such premises. Moreover, they cannot seize such materials without a seizure warrant.¹⁵⁸ The Act also recognizes the importance of the police hence section 42 allows the police and the inspectors the power to arrest any individual who is reasonably suspected of violating the provisions of the Act.¹⁵⁹

With regard to prosecution of the copyrights infringement offenders, section 43 enables the Attorney General, pursuant to the provisions of the Criminal Procedure Code to appoint public prosecutors to deal with copyright cases. This has now been overtaken by events as the office of the public prosecutor has now been established. In this regard, the Board is deemed a public authority. In order to ensure success rates in the prosecution of such cases, the prosecutors must be adequately equipped with general knowledge of copyright infringements. Shoddy prosecution has always led to the release of the copyrights infringers but with the establishment of the Office of the Public Prosecutor. The Kenya Copyright Board must therefore organize educational seminars to its inspectors and prosecutors on particulars of infringement of copyrights

¹⁵⁷ Section 33 (7) to (10) are new and are specific to the Kenyan Copyright Act.

¹⁵⁸ Wanyama Mellitus Nyongesa (2007) "Policy and implementation: A case of music copyright laws in Kenya," *Muziki Magazine* 4, 1, 27-41.

¹⁵⁹ *ibid.*

in order to effectively enforce the provisions of the Act.

The Duplicity and the lack of clarity in description of roles of both the Anti-Counterfeit Agency and the Kenya Copyright Board must not go unnoticed. Both institutions have powers to raid, cease and prosecute for copyright transgression. In practice, solely the Kenya Copyright Board handles the issues exclusively relating to copyright counterfeit issues. On the other hand, cases of infringement of both copyright and trademarks are handled by the Anti-Counterfeit Agency in practice.

From the legal perspective, these distinctions as to roles are not clearly distinct. Critics are of the view that in cases of pure copyright infringement, prosecuting the matter before the Anti-Counterfeit Agency is faster and penalties more deterrent compared to penalties under the Copyright Act.¹⁶⁰

3.6 Copyright Infringement, Offences and Penalties imposed

The infringement of copyright occurs when a person, other than the copyright owner, assignee or licensee carries out, or causes to be carried out, any act that is covered by copyright, without the authorization of the right holder.¹⁶¹ This applies to the exclusive rights in artistic and musical works, provided for under Section 26, to the exclusive rights in sound recordings under Section 28, as well as to the rights of broadcasters and performers, set out in Section 29.¹⁶²

There are various forms of infringement of musical copyrights that keeps cropping with the advent of new technologies.¹⁶³ This crisis has seriously hit the music industry in Kenya, as it was not properly envisaged by the Act. For instance, advertising relies heavily on creativity with the use of existing copyright protected works including music. Whereas the advertising industry has improved its revenue to 56% worth about 12 billion Kenya shillings, as per Business Daily reported in 2014, citing Synovate, a market –research company, it noted that there are many cases of infringement of music copyrights in various adverts presented in Kenya during that period. This points out to the fact that the Kenya Copyright Board still lacks adequate work force and machinery to fight such infringement.¹⁶⁴ Various authors of musical works are also not aware of the channels and procedure to follow in case of copyright infringement or a looming copyright infringement on their part.¹⁶⁵

¹⁶⁰ *ibid.*

¹⁶¹ WIPO (2016) “Understanding copyright and related rights,” at http://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf (accessed 11/11/2016).

¹⁶² Kenyan Copyright Act, 2001.

¹⁶³ WIPO (2016) “Understanding copyright and related rights,” *op.cit.*

¹⁶⁴ Tom Mshindi (2013) “What Kenya Copyright Board is doing to help secure property ownership rights,” *op. cit.*

¹⁶⁵ Lewis Thomas (1994) “Music copyright law in education,” Bloomington, Ind: Phi Delta Kappa at <https://www.pinelakemusic.com/pdfs/boom4.pdf> (accessed 2/10/2015).

There is a need for harsh penalties for copyright offenders. The law ought to be reviewed to make harsher sentences for persons found guilty of infringing copyright law and the rights of musical authors. Stiffer penalties will act as deterrents especially for corporate offenders who derive a lot of revenue because of copyright infringement. In ensuring stiffer penalties, we should do away with maximum fines as spelt in the law and instead peg the fines to the worth of the musical materials that are being pirated.

Other forms of copyright infringement includes non-payment of dues to owners of copyrighted material, which has been blamed on the failure to pick by the music industry in Kenya, with many works being pirated and artistes getting marginal returns. These include the making of copies music albums, which are among the most common forms of copyright theft in Kenya.

The Act as it is not for posterity as new forms of copyright infringement keeps cropping up day by day. While many people look out for the copyright infringements, many music artists have lost revenue derived from their works to unscrupulous collecting agencies. This is because of the corruption that has hit the rooftop in the country. Many Artists have lodged complain disputing the royalties they receive from their musical works from various agencies, this was pointed out in the case of *Music Copyright Society of Kenya v. Parklands Shade Hotel t/a Klub House*.¹⁶⁶

The brief facts of the case are that the plaintiff filed a suit against the defendant seeking an injunction restraining it from playing or broadcasting any music, either recorded or performed by a live band, which is the subject of an agreement between the plaintiff and its members. The application was based because the defendant had continued to publicly perform music without obtaining the required license from the Music Copyright Society of Kenya (MCSK).

It further sought damages for infringement of copyright and conversion, together with costs and interest. The plaintiff simultaneously filed an application seeking a temporary restraining order pending the hearing and determination of the suit. This case has been discussed in detail in the previous chapter.

Even though new forms of copyright infringement of various musical works persist as a result of the advent of the new technologies, the Act has taken certain positive measures by introducing anti-circumvention measures in its provisions¹⁶⁷ and rights management systems.¹⁶⁸ Section 35 (3) of the Act makes the circumvention of any technical measure that has been put in place to protect the musical works, as well as unauthorized copying or reproduction and distribution of anti-circumvention devices

¹⁶⁶ *Music Copyright Society of Kenya v. Parklands Shade Hotel t/a Klub House*, Civil Suit 1458 of 2000.

¹⁶⁷ Under Article 18 of the WPPT and Article 11 of the WCT.

¹⁶⁸ Article 19 of the WPPT and Article 12 of the WCT.

unlawful. This extends to the removal or alteration of any rights management system, as well as the making available to the public of musical works that have been obtained by way of removing the electronic rights management system.

This is an important improvement compared to the penalties provided for by the repealed law, but with the current high levels of copyright infringement and the effects of piracy on the copyright owners, the penalties should be even more punitive and deterrent. The fine payable should be commensurate to the level of damages caused by the act of infringement, and this should apply to the civil remedies as well.

The provision of enhanced criminal sanctions as well as the specific introduction of the Anton Piller order pursuant to the provisions of Part III of the TRIPS Agreement is timely. Anton Piller orders derive their title from the ground breaking decision in *Anton Piller K G v. Manufacturing Process Limited*.¹⁶⁹ The plaintiff in this case owned copyright in the design of a high frequency converter used to supply computers. The plaintiff had learnt that their English agents, the defendant, wanted to supply information to a rival of the plaintiff.

They made an *ex parte* application to enter the defendant's premises to inspect, remove or make copies of documents belonging to the plaintiff. The Courts view was that the order was extreme and should rarely be made. Ormrod L.J. rendered himself as follows; "*There are three essential pre-conditions for the making of such an order, in my judgment. First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the plaintiff. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made*".

Consequently, in the case *John Boniface Maina v Safaricom Limited*¹⁷⁰ the court issued Anton Piller orders against the defendant and third parties, their servants and agents or howsoever to the effect that they be restrained by injunction from infringing upon the plaintiff's copyright by offering for sale, selling or storing of any data relating to the plaintiff's musical works including but not limited to Muiritu Wa kabete, Tigakumute, Njeri, Ndwaracece, Arata, Tuhuuatwa rose, Unyinyiwakwa, KirindiMundia and TumuraKanua or cover versions by Salim Junior pending the hearing and determination of this suit.

Secondly that the plaintiff was authorized, in the company of an Inspector of the Copyright Board, to enter into the defendant's and third parties' premises during business hours to inspect machines where the plaintiff's music data has been stored, take records of such data, make copies of all purchases and sale records and any item

¹⁶⁹ *Anton Piller K G v. Manufacturing Process Limited* [1976] Ch 55.

¹⁷⁰ *John Boniface Maina v. Safaricom Limited* [2013] eKLR.

which constitutes or could constitute evidence necessary to prove his claim and for purposes of preserving such evidence.

Thirdly, the plaintiff was further authorized, in the company of an Inspector of the Copyright Board to enter the defendant's and third parties' premises within the Republic of Kenya where the defendant or third parties have stored data in machines, documents and electronic gadgets or copies of the plaintiff's music offered for sale through the internet, media works or networks or mobile phones in the Surf to Win promotion and Skiza ringtones and to seize and keep such records, data, documents and materials relating to his musical works including Muirituwakabete, Tigakumute, Njeri, Ndwaracece, Arata, Tuhuatwa rose, Unyinyiwakwa, KirindiMundia and TumuraKanua or cover versions by Salim Junior for safe custody and to preserve them to safeguard vital evidence for trial.

From the above cases, the penalties for copyright infringement should however be more deterrent. Remedies should notably include the seizure and destruction of infringing goods and devices.

In the case of *Music Copyright Society of Kenya v. Parklands Shade Hotel t/a Klub House*,¹⁷¹ the plaintiff in this case filed a suit against the defendant seeking an injunction restraining it from playing or broadcasting any music, either recorded or performed by a live band, which is the subject of an agreement between the plaintiff and its members. The application was based on the grounds that the defendant had continued to publicly perform music without obtaining the required licence from the Music Copyright Society of Kenya (MCSK). It further sought damages for infringement of copyright and conversion, together with costs and interest. The plaintiff simultaneously filed an application seeking a temporary restraining order pending the hearing and determination of the suit.¹⁷²

The defendant opposed the applications on the basis that the Society was not the sole licensing body of copyright in all musical works in Kenya and, further, that MCSK could only enforce the rights of members who had assigned their rights to MCSK. The defendant also argued that they had continually paid Multi Choice Africa the requisite copyright fees and that a collection of royalties would amount to double taxation.¹⁷³

The court held that the plaintiff was not the sole licensing authority that enforces copyright in all musical works. According to the court, only the owner of copyright has the right to enforce compliance. The court did not grant the plaintiff the injunction sought on the basis that the plaintiff had not established a prima facie case with a

¹⁷¹ *Music Copyright Society of Kenya v. Parklands Shade Hotel t/a Klub House*, Civil Suit 1458 of 2000.

¹⁷² Chris Armstrong, Jeremy De Beer, Khaleed Fourati and Sisule Musungu (eds) (2010) *Access to Knowledge in Africa: The Role of Copyright*, UCT Press, Cape Town, South Africa at page 172.

¹⁷³ *ibid.*

probability of success and the defendant would suffer irreparable damage should the order sought be granted.¹⁷⁴

Collective management is recognized by copyright law, especially in areas where the individual rights-owner cannot collect royalties from users individually. The court, in this case, failed to address the copyright issues enshrined in the law and the judgment in this case is bound to have far-reaching effects on collective management in all areas of copyright, including reprographic rights. As discussed above, the exceptions and limitations in the Copyright Act are narrowly crafted.

Users usually have to obtain a license to access the copyright-protected work to ensure they do not violate copyright law. It is not clear from the record, however, whether the defendant claimed to have obtained such a license from another CMO. Essentially, this case points to the problem of proliferation of CMOs or reprographic rights organizations (RROs).

The existence of too many CMOs is detrimental to institutional practices and the ability to exploit licenses. In certain circumstances, it defeats the purpose of having a one-stop centre for rights clearance if it is not clear who manages what rights.

Also in the case *Music Copyright Society Of Kenya v Tom Odhiambo Ogowl*¹⁷⁵ being an appeal from the original judgment and decree in Civil Case No. 117 of 2011 at the Chief Magistrates Court at Homa Bay. The appellant (“MCSK”) appealed on the grounds set out in the memorandum of appeal to wit; that the learned magistrate erred in law and in fact by making a finding on liability for malicious prosecution when none was proved. Secondly, that the learned magistrate misdirected himself in awarding the respondent Kshs. 200,000.00 as general damages when it was not proved.¹⁷⁶

The respondent’s case against the appellant was that the MCSK moved to the respondent’s premises at Sofia Estate, Homa Bay Town and impounded his electronic equipment on the ground that he was operating a business without a license. On the next day, he was arraigned and charged at the Homa Bay Senior Residents Magistrates Court in Homa Bay SRM Criminal Case No. 40 of 2011. He was charged with the infringement of copyrighted musical works contrary to section 38(2) as read with section 38(7) and 38(8) of the Copyright Act, Act No. 12 of 2001.¹⁷⁷

¹⁷⁴ Centre for Intellectual Property and Information Technology Law website, at <https://www.cipit.org/index.php/blog/resources/case-laws/1400-case-music-copyright-society-of-kenya-v-parklands-shade-hotel-23-11-2000> (accessed 22/11/2017).

¹⁷⁵ *Music Copyright Society Of Kenya v. Tom Odhiambo Ogowl* [2014] eKLR.

¹⁷⁶ Victor Nzomo (2016) “High Court declares Section 30A of the Copyright Act Unconstitutional and CMO licence agreement unlawful,” at IP Kenya website, at <https://ipkenya.wordpress.com/tag/music-copyright-society-of-kenya/> (accessed 22/11/2017).

¹⁷⁷ *ibid.*

After the hearing of the prosecution's case, the learned magistrate found that the prosecution had not established a prima facie case and that the respondent had no case to answer consequently the respondent was acquitted under section 210 of the Criminal Procedure Code Cap 75.

The respondent therefore filed the claim for malicious prosecution. In his plaint, he stated that the charges were brought maliciously. MCSK admitted that its officers accompanied by police officers, went to the respondent's premises in order to enforce compliance with the Copyright Act. That the respondent was found operating a hall where local and international videos were being shown and played to the paying public.

The appellant alleged that the respondent did not display or produce a Copyright Music Licence issued by MCSK permitting him to relay copyrighted works in his premises. Further, the Appellant claimed that the respondent vanished from the premises whereupon the officers impounded his electronic gadgets and subsequently caused him to be charged. MCSK denied that it had caused the criminal proceedings to be instituted maliciously.¹⁷⁸

The Appeal judge noted that the learned magistrate addressed himself to the ingredients to be proved in a case for malicious prosecution in his judgment. He found as a fact the respondent was acquitted. As to whether the criminal case was instituted without a reasonable and probable cause, the learned magistrate held that the appellant did not demonstrate that the music that was being played in the shop was for the author whose artistic works had been registered and protected by the appellant. He thus concluded that;

“I find that [the] defendant and the agents [of] the 2nd defendant by insisting to charge the accused yet no artistic author was identified fell short of the statutory obligation. By doing this they had no probable and reasonable cause for arresting and charging the accused. I further find that malice was proved.”¹⁷⁹

Whether there was reasonable and probable cause is to be determined from the nature of the charge preferred by the police. The respondent was charged with the infringement of copyrighted musical works contrary to section 38(2) of the Copyright Act, which provides;

“Any person who causes a literary or musical work, an audio-visual work or a sound recording to be performed in public at a time when copyright subsists in such work or sound recording and where such

¹⁷⁸ Victor Nzzomo (2015) “Copyright society successfully appeals malicious prosecution suit,” IP Kenya website, at <https://ipkenya.wordpress.com/tag/seizure/> (accessed 4/12/2017)..

¹⁷⁹ *Music Copyright Society Of Kenya v Tom Odhiambo Ogowl* [2014] eKLR.

performance is an infringement of that copyright shall be guilty of an offence unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright would or might be infringed”.¹⁸⁰

In essence, the provision makes it an offence to cause the performance of a literary, musical or audio-visual work protected by copyright in public where such a performance constitutes an infringement. While displaying a license is one way of showing that owner of the premises has permission to cause the copyrighted work to be performed publicly, it is by no means necessary as the accused is entitled to show he acted in good faith and had no reasonable ground for supposing that copyright would or might be infringed.

With profound respect to the learned magistrates who dealt with the criminal and civil case, the appeal judge found that the offence had nothing to do with membership of a copyright society. He observed that the police prosecuted the offence and it applies in respect of all and any works where copyright subsists. A Collection Society, such as MCSK, is charged with collection of royalties on behalf of its members and safeguarding its members' interests by ensuring that persons who play music publicly are duly licensed and if they are not, they are prosecuted and that is why it plays a complaint with the police. It is entitled to lodge complaints with the police where reasonable grounds exist.

On the issue as to whether there was reasonable ground for belief that the respondent had violated section 38(2) of the Copyright Act, it was noted that the respondent admitted that he was operating a business showing football matches to the public. He admitted that he was aware that he had to have a license and to display it. The showing of football matches to the public is an “audio visual work” under the provisions of section 38(2) of the Act.

A perusal of the proceedings in the criminal case, the Appellate judge noted that the respondent's shop was showing movies and playing music in the background. In view of the clear admissions by the respondent and the evidence, the appellate judge found that there was reasonable and probable cause that that an offence had been committed under section 38(2) of the Act and the MCSK officers were entitled to lay a complaint against the respondent.

This decision has widened the scope of who a complainant is. It may not only be the individual music copyright holder but also the Music Copyright Society of Kenya (MCSK), who is charged with the collection of royalties and protecting its members from copyright infringements.

¹⁸⁰ Section 38(2) of the Copyright Act, 2001.

3.6.1 What are the upheavals in the Copyright laws in Kenya?

Kenyan scholars have pointed out the key challenges in the battle towards eradication of music copyright infringements. Interestingly, the chief accusing finger points at the Kenya Copyright Act 2001, which is the main statute providing the legal framework on copyright in the country. According Prof. Ben Sihanya,¹⁸¹ the Copyright Act 2001 lacks adequate provisions for the protection and promotion of copyrighted works in Kenya. It lacks an adequate enforcement and infrastructural mechanism for effective implementation of the law.¹⁸²

Although the Copyright Act 2001 appears to have domesticated various provisions of the TRIPS Agreement and the Berne Convention, among other international instruments regarding copyright law, the dynamism of the Internet requires constant review of the Act and other attendant laws to give adequate protection to music.¹⁸³ The main reason why piracy of information products such as music, movies, books, and software is difficult to eradicate, especially in this digital era is because of their non-excludability nature. Their creators face a hard time excluding other persons, especially non-payers, from consuming these products. This feature greatly undermines the incentives to create, because of the exertion in appropriating the revenues of the creation.¹⁸⁴

Consequently, digital piracy poses serious limitations to copyright owners in their ability to control how information products get to consumers; and the availability of digital copies reduces the copyright owner's products. The end result is that digital piracy of musical works places at the disposal of the infringers' high profit margins that the large-scale reproduction and distribution of copy- righted products generates. This acts as an attraction to the criminal organizations in the music industry.¹⁸⁵

3.6.2 Digitization of Musial Works versus the Kenya Copyright Act, 2001

Kenya Copyright Act, 2001 protects digital information. The Act encompasses provisions of the World Trade Organization's Agreement on Trade Related Aspects on Intellectual Property (TRIPS); including the 1996 World Intellectual Property Organization (WIPO) Internet Treaties.¹⁸⁶

The Act provides that for any digital material to be protected it should fall within the definition of what is copyrightable subject matter.¹⁸⁷ The subject matter of copyright

¹⁸¹ Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

¹⁸² Moni Wekesa and Ben Sihanya (eds) (2009) *Intellectual Property Rights in Kenya*, Konrad Adenauer Stiftung, Nairobi.

¹⁸³ *ibid.*

¹⁸⁴ Paul Belleflamme, and Martin Peitz (2012) "Digital piracy: Theory," in Martin Peitz, and Joel Waldfogel (eds) *The Oxford Handbook of the Digital Economy*, Oxford University Press, New York.

¹⁸⁵ *ibid.*

¹⁸⁶ These include the 1996 WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. Both were adopted in Geneva on 20 December 1996.

¹⁸⁷ Section 22 of the Copyright Act 2001.

consists of primary and secondary works. Primary works are also referred to as “original” works. These comprise literary, artistic and musical works. Secondary works, on their part, are referred to as “derivative” works. These are developed or derived from another work, especially a primary or another derivative work. They include audio-visual work, sound recording broadcast as well as cable or web casts. These works are granted related, neighbouring, or allied rights.

“Musical works” is defined by the Act as “any musical work, irrespective of musical quality, and includes works composed for musical accompaniment.”¹⁸⁸ It is the view made in this research paper that the definition of “musical works” provided by the Act is inappropriate and therefore poses a significant challenge in the protection of such works. The inappropriateness of the definition is as far as it falls short of underscoring the complexity of musical copyright. This is so because in music, copyright relates to the lyrics, rhythm, music composition, and harmony and sound recordings.

Apparently, therefore, the Act does not encompass musical works in the widest sense as to incorporate compositions with or without words. Accordingly, the Act stands on an inferior pedestal in comparison with the Berne Convention for the Protection of Literary and Artistic Works, 1886. The Berne Convention provides for copyright protection of musical composition with or without words.¹⁸⁹ According to commentators, Berne’s definition of “musical works” encompasses music in the widest sense.¹⁹⁰

Musical Work is protected under Kenya Copyright Act 2001, if the work is original, expressed in a tangible, material or fixed form. The Act implicitly defines originality in terms of “sufficient effort has been expended on making the work to give it an original character.” In addition, tangibility refers to “work, which has been written down recorded or otherwise reduced to material form.”¹⁹¹

The development in the music industry has presented incremental progress in terms of means of enjoying music. Originally, live performances were the order of the day. This progressed to radio broadcasts and later, television footages. Then came the physical music carriers in the form of music cassettes, compact disks (CDs), and vinyl discs. Finally, with digitalization, one is able to stream or download their favourite tracks online through you tube as internet has become part of our daily life.¹⁹²

The major copyright issues currently are the right of making available, reproduction, adaptation and distribution of musical works given the ease with which they are

¹⁸⁸ Section 2 of the Copyright Act 2001.

¹⁸⁹ Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works 1886.

¹⁹⁰ Paul Goldstein (2001) *International Copyright: Principles; Law & Practice*, (3rd ed) Oxford University Press, New York.

¹⁹¹ William Krasilovsky & Sidney Shemel (2007) *This Business of Music*, Watson-Guptill Publications, New York, USA.

¹⁹² Radcliffe Brinson (2000) *Internet Law and Business Handbook*, Landera Press, Victoria, Australia.

available online. Many people download or listen to the music without the authority of the rights holders. The use of the various information communication technology (ICT) gadgets such as moving picture (MP3, MP4) players, tablets, computers, and telephones has further complicated the copyright protection issues. Consequently, there is need for policies that balance the interest of suppliers and users, in the protection and promotion of intellectual property rights and digital rights management (DRM) and technological protection measures (TPM) without disadvantaging innovative e-business models and new technologies.¹⁹³

Additionally, the borderless and transnational nature of the internet presents serious problems to copyright protection and enforcement. Nobody controls the internet and this has great legal consequences, as copyright enforcement is essentially territorial. Using computers and the internet, there can be electronic copying and transmission of digital content including music.

Case law has provided some guidance in asserting digital copyright protection in the Internet. In *A & M Records, Inc. v Napster, Inc.*,¹⁹⁴ the Defendant provided a platform for users to upload and download music files in a compressed digital format. The Plaintiffs were major recording companies who saw the potential for this technology to affect their sales and promptly filed a suit. This case is important to the music industry as it addressed the application of copyright law to peer-to-peer file sharing. For the Defendant to be liable for contributory infringement the users of the service have to be infringing directly; and any form of such infringement cannot be considered to arise out of “fair use.”¹⁹⁵

As long as the ‘fair use’ amounts to infringement of any right of the copyright holder’s exclusive rights, the Defendant is liable. In the matter at hand, the Defendants had infringed the Plaintiffs’ exclusive rights when their clients sampled, space shifted and permissively distributed recordings by both new and established artists. These acts of the Defendants’ clients amounted to infringement of the Plaintiffs’ copyright exclusive rights of reproduction and distribution. It was therefore incumbent on the Defendants to control the infringing behaviour of users. This Napster ruling is often cited as precedent posing a threat to website authors regarding hyper linking to copyrighted content. The court granted an order against Napster to forfeit 20 million dollars on settlement with the record companies involved.¹⁹⁶

¹⁹³ Organization for Economic Co-operation and Development (OECD) (2005) “Online Music Distribution Providing both Challenges and Opportunities,” at http://www.oecd.org/document/24/0,2340,en_2649_201185_34995480-1_1_1_1,00.html (accessed on 10/8/2015).

¹⁹⁴ *A&M Records, Inc. v Napster, Inc* 239 F.3d 1004 (9th Cir. 2001) available at http://www.law.cornell.edu/copyright/cases/239_F3d_1004.htm accessed on 10th August, 2015.

¹⁹⁵ While American Fair use is largely judge-dependent, Kenyan fair dealing is largely statutory.

¹⁹⁶ Ben Sihanya (2009) “Copyright in E-commerce and the Music Industry,” in Moni Wekesa and Ben Sihanya (eds) *Intellectual Property Rights in Kenya*, Konrad-Adeneur-Stiftung, Nairobi, pp. 133-176.

The digital environment nevertheless provides space for creators to create and disseminate their works and therefore should be embraced. There is no doubt that there are a number of challenges due to copyright trying to catch up with technology. However, at the end of it all, the owner of the work has the responsibility of deciding how they want to protect their works after they are uploaded online. They can use technological protection measures to protect their works online; these include encryption of signals and works, digital watermarks, and even use of access codes and passwords.¹⁹⁷

To this end, a fair balance of rights and interests between the rights holders and users must be safeguarded. In the digital environment, it is important to understand what impact the access controls have on the ability to engage in fair use and to what extent circumvention of access controls affects the market for and value of works protected by copyright. When these issues are properly addressed, then it will be possible for copyright to remain relevant in the digital environment and beyond.

3.6.3 How the Music Industry in Kenya Can Use Piracy to its Strategic Advantage

Even though the copyrights Act, 2001 criminalizes the various forms of copyright infringements, a new model recommends that music companies are better off going after third-party commercial pirates than individuals and file-sharing networks. In Kenya, the digital piracy costs music, movie, and software industries millions of shillings in profits.

With decentralized peer-to-peer online networks offering clandestine means for people to swap files, digital goods producers are waging a global war against such networks and individual users. Nevertheless, says TunayTunca, assistant professor of operations, information, and technology, efforts to battle internet piracy can occasionally strategically hurt digital goods industries.¹⁹⁸

Tunca argues that, suing file-sharing internet networks and the consumers who use them to trade copyrighted material can backfire, resulting in significant loss of profits for legal producers of information goods. According to him, globally, the greater enemy is third-party commercial pirates who vend illegal copies of CDs and DVDs filled with music, movies, and software. Tunca further argues that legal digital goods producers can benefit from strategically using the presence of individual file sharers to reduce the damage from commercial pirates.

“In developed markets like the United States and nations in Western Europe, there's a substantial amount of internet piracy and the music industry in particular is very worried about it,” says Tunca, the Moghadam Family Faculty Fellow at Stanford GSB. As a result, the industry is spending

¹⁹⁷ Lawrence Lessig (1999) *Code and Other Laws of Cyberspace*, Penguin Press, New York.

¹⁹⁸ Daniel Gervais (2011) “Collective management of copyright: Solution or sacrifice?” 36, 4, *Columbia Journal of Law and the Arts*, at 589-858.

considerable money and resources suing peer-to-peer networks and individual users across the globe. "One of the problems is that most of the individuals sued turn out to be regular citizens like college kids, single moms, and low-income people. It creates bad press and alienates the fan base," Tunca observes. "However," he adds, "that is only part of the problem."¹⁹⁹

Not only is the process of legally snitching internet infringers damaging from a public relations perspective, it is costly and ends up driving amateurs right into the arms of commercial pirates. Tunca also argues that commercial piracy exists in every country in varying degrees and is particularly virulent in emerging markets, such as those of Africa, Eastern Europe, South America, and parts of Asia. According to him, third-party industry is where the real threat is since it keeps a product that is a closer substitute to the legal one, since any²⁰⁰ consumer with any level of technological practical understanding can purchase it.

In distinction, a limited segment of the population, namely those who can use the technology and are willing to invest their time into the file-sharing activity, can only perform individual piracy. Tunca's observation is a true reflection of the Kenya's music industry plight as copyright infringers' arte advancing in technological expertise.

Even though suing file-sharing technology providers and illegal downloader's aims to reduce the consumer population that is able to pirate individually, Tunca and Ph.D. candidate Qiong Wu demonstrated that an increase in the number of consumers who can or prefer to pirate over the internet does not necessarily result in fewer profits for a legal publisher.²⁰¹

It must be noted that having a larger population of individual copiers means less demand for commercial pirates. Tunca notes that with increased internet piracy activity, just to be able to stay in business, the commercial pirates may be forced not to price very competitively. The legal publishers may then take advantage of this situation by strategically manipulating their prices to suppress the commercial piracy activity or drive them out of certain consumer market segments. This implies that a larger market share for the legal vendors, as many more consumers without the technological savvy to pirate by them will be channelled to obtaining the product legally. As a result, the industry's profits can go up hence boosting Kenya's economy and that of the Artists themselves.

¹⁹⁹Marguerite Rigoglioso (2006) "How the music industry can use piracy to strategic advantage," Stanford Graduate School of Business website, at <https://www.gsb.stanford.edu/insights/how-music-industry-can-use-piracy-strategic-advantage> (accessed 14/9/2015).

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

This does not necessarily mean that it will work exactly the same way in every country or market. Every country has its own characteristics and those should be considered when determining copyright protection policy. The most critical thing is that tolerating internet piracy to a certain degree may hurt the party who hurts the legal publishers even more.²⁰²

In another recent book, *Online File Sharing: Innovations in Media Consumption*, Jonas Andersson Shwarz acknowledges that it is now uncontroversial to suggest that individuals engaging in music piracy are greater consumers of culture overall, noting that music piracy motivates live music attendance. A substantial volume of research some of which is cited in Shwarz's book, demonstrates that those who download music illegally also spend more money on music purchased legally, including concert tickets.²⁰³

3.7 Are Civil Remedies Enough to protect owners of musical works from infringement?

The owner of musical works whose rights have been infringed is entitled to the following three (3) reliefs:²⁰⁴

1. First, relief by way of damages and injunctions;
2. Second, delivery of any infringing copies produced by the defendant;
3. Third, payment of an award calculated based on a reasonable royalty that the plaintiff would have received were it not for the defendant's act of copyright infringement.

Since the above remedies may not adequately address the act of copyright infringement, Section 35 of the Act brings the act of judicial discretion where the court is mandated to award any further damages in case it is of the opinion that effective relief would not be available to the plaintiff. Nonetheless, if the court is of the opinion that the defendant has infringed copyright in a musical work, but at the time of committing the infringing act has not been aware, and has had no reasonable grounds to believe, that copyright subsisted in the musical work in question, the court shall in that case not award damages to the plaintiff.²⁰⁵

Interestingly, Section 35(8) of the Act provides for the presumption of copyright. Accordingly, copyright is presumed to exist in the musical work where the defendant does not dispute the existence of copyright, as well as where it is presumed or

²⁰² Franziska Ellen Schulze (2014) "Resale of Digital Content such as Music, Films or eBooks under European Law," 36, 1, *European Intellectual Property Review*, at 9-13.

²⁰³ Steven Caldwell Brown (2014) "How piracy is changing the music industry landscape," at <http://theconversation.com/how-piracy-is-changing-the-music-industry-landscape-31919> (accessed on 15/10/2015).

²⁰⁴ See section 35 of the Kenyan Copyright Act which provides for civil remedies for copyright infringement.

²⁰⁵ This would only be applicable under Section 35.

admitted. In such circumstances, the plaintiff is presumed to be the copyright owner where he lays a claim and the defendant does not dispute such ownership.²⁰⁶

The Copyright law also envisages the working together of various government departments. This is an acknowledgment that copyright infringement is very serious in Kenya. This has seen the introduction of authentication of copyright by Section 36 of the Act. Under this Section, all sound and audiovisual works are expected to have an anti-piracy security device that enables the identification of genuine copies. The Act makes it an offence to distribute, sell, and offer for sale an audio and audio-visual musical works without the anti-piracy security device.²⁰⁷

The manufacturers and producers of sound recordings and audiovisual works must to apply to the KRA for the anti-piracy security device. Various critics have questioned this provision.²⁰⁸ However, this Section provides for a means of safeguarding the rights of the authors of musical works and effectively enforcing them. It must be plainly understood that this section is solely enhancing the enforcement of the ownership right and not the enjoyment of the copyright.

3.8 Jurisdictional limitations by the courts to try copyright infringement cases

Copyright cases can only be introduced in court within three years from the alleged infringement act and only before the Resident Magistrate's Court or the High Court. Being that many people are yet to understand copyright law and copyright infringement, this limitation of action is unwarranted even though ignorance to law is no defence.

This stance has limited the space for those seeking justice outside the timeline created by the statute. While this Section already existed in the repealed Copyright Act, the copyright cases were often filed in courts that had no jurisdiction to hear such cases and especially after the lapse of the 3 years. Therefore, even if the judge was to find in favour of the plaintiff, the cases would be dismissed based on a matter of technicality. Even though the constitution has remedied the procedural technicalities that impede justice by virtue of Article 159 (2) (d) of the Constitution of Kenya, 2010, this is not a leeway for a litigator to invoke the courts' jurisdiction with stale copyright infringement suits.²⁰⁹

²⁰⁶ Ben Sihanya (2016) *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development*, *op. cit.*

²⁰⁷ *ibid.*

²⁰⁸ It was one of the issues that were raised by the United States of America when Kenya was under the TRIPS review by WTO in 2001. The USA's main concern was that the provision did not conform to Article 5 (2) of the Berne Convention and consequently Article 9 of the TRIPS Agreement.

²⁰⁹ Unreported cases *R v. Christine Mwangi* (CF 2436/2000), *R v. David Gachecho* (CF 2429/2000), *R v. Lucy Wanjiru Murithi* (CF 2435/2000). These cases were instituted in the subordinate courts even though the Act specified that the cases could only be instituted in the Resident Magistrate's court or the High Court. The defendants were charged with copyright infringement of musical works, under Section 35 of the 1966 Copyright Act. In all three cases, although the prosecution had a *prima facie* case, the Magistrate ruled that the court had no jurisdiction to hear the cases.

3.9. Conclusion

Kenya experiences a widespread piracy as estimated by the Kenya Copyright Board (KECOBO) to be 90% in virtually all kinds of copyright works.²¹⁰ The Copyright Act being passed in 2001, and coming into force in 2003 ought to be amended further to capture the newly identified techniques of the copyright infringements. Even though the Act provides specific administrative, enforcement structures and mechanisms for copyright and related rights, as well as making provision for both criminal sanctions and civil remedies for copyright infringement, such sanctions and remedies are not deterrent as evidenced by the skyrocketing number of continued copyright infringement.

From the forgoing, there is need for policy approaches, measures, actions and initiatives to support a more specific implementation and enforcement of Copyright Protection legislation as proposed in the above discussions. Kenya needs a national copyright action plan covering the full range of legal and policy reforms, technical assistance and capacity building measures, channels for international cooperation and tools for strengthening enforcement practices.

More importantly, it must be noted that the administration and enforcement of copyright rights in Kenya is a shared responsibility of the office of the Registrar General in the Attorney General's Chambers, the Kenya Copyright Board, the Kenya Industrial Property Institute (KIPI), Music Copyright of Kenya, Customs Department of the Kenya Revenue Authority and the Kenya Bureau of Standards (KEBS), musical works copyright owners and the public at large. As evidenced, Kenya has no shortage of institutions. What is conspicuously missing is the coordination and information sharing among the various institutions. Combating copyrights infringement of musical works is therefore an inter-agency duty at both policy and operational levels. Kenya therefore requires comprehensive Copyright's regime to achieve success in combating copyright infringement on rights of the authors of musical works.

²¹⁰ Iseme Kamau & Maema Advocates and Mohammed Muigai Advocates "Consortium Formulation of an EAC Policy on Anti-Counterfeiting, Anti-Piracy and other Intellectual Property Rights," *op. cit.*

CHAPTER 4

FORMS AND IMPACT OF MUSIC COPYRIGHT INFRINGEMENTS ON THE KENYAN MUSICIANS AND ECONOMY

4.1 Introduction

In the recent, advocates representing copyright industries have been making a case that copyright is a major contributor to Kenya's economy and an important job creator for Kenyan workers. This study indeed confirms this assertion. In case there were any doubts, a new study released by the International Intellectual Property Alliance (IIPA) showed that, for the first time, the core copyright industries - the creators and producers of copyrighted materials like music, computer software, videogames, books, newspapers and films and television programming - added over \$1 trillion in value to the global economy in 2012.²¹¹

Of course, that is only part of the story - the other is that these important industries - and the millions of creative workers whose jobs are based on copyright - continue to face a major threat from piracy and other forms of infringements.²¹² If we want copyright to continue to be a vibrant job producer and economic generator, we need to do more in strengthening and protecting its businesses and workers, even as important new digital business ventures emerge to provide an ever-increasing array of online movies, television shows, music and other creative products for consumers.²¹³ Such reasons form the justification of this study.

In Kenya, copyrights infringement of musical works remains a huge problem, even after the enactment of the Copyright Act of 2001. As previously discussed in earlier Chapters of this study, the Act provides for, *inter alia*, copyright in literary, musical and artistic works, audio-visual works, sound recordings, and broadcasts.²¹⁴ The advent of digital technology and internet has presented fresh challenges to copyright protection. The menace brought by the use of the Internet for the unauthorized reproduction of copyrighted works continues to be worldwide problem.²¹⁵

Various forms of copyright infringement on musical works include: unauthorized reproduction and distribution of copies of musical works; essentially without the

²¹¹ Chris Dodd (2014) "Copyright: A leading force for jobs, innovation and growth," at http://www.huffingtonpost.com/chris-dodd/copyright--a-leading-forc_b_4302882.html (accessed on 21/10/2015).

²¹² Julia Wanja Muriithi (2007) *The impact of piracy on the gospel music industry in Kenya*, *op. cit.*

²¹³ Franziska Ellen Schulze (2014) "Resale of Digital Content such as Music, Films or eBooks under European Law," *op. cit.*

²¹⁴ Preamble to the Copyright Act, 2001.

²¹⁵ Whitney D. Gunter (2008) "Piracy on the High Speeds: A Test of Social Learning Theory on Digital Piracy among College Students," *Journal of Criminal Justice Sciences* 54-68.

consent of the copyright owner or a license from the relevant agency, making derivative works²¹⁶ from other musical works without the authority of the copyright owner and unauthorized display of works. Although this right is rarely applicable to music, one example would be displaying the lyrics and musical notation to a song on a karaoke machine.²¹⁷

Many scholars describe digital piracy as the act of copying digital goods, software, digital connections, digital audio (music and voice), and digital video for any reason other than backup without clear permission from and compensation to the copyright holder.²¹⁸ Therefore, music piracy encompasses illegal uploading and downloading of digital sound without the explicit permission of the legal owner.²¹⁹ Such act of uploading is a form of copyrights infringement as highlighted in chapter three of the study.

Presently, Private persons have the capacity to produce copies of copyrighted works and distribute them at a minimal cost. Internet users also share video and Music files, illegally, on an unprecedented scale thereby affecting the profits of the right musical works copyright holders. Additionally, as technology continues to advance, making of pirated copies of musical works is becoming much easier. Worst of all, such pirated musical works retail cheaply off the shelf as compared to the original musical products.

4.2 Impact of Music Piracy on Kenyan Musicians and Kenya's Economy

As earlier indicated in the study, research shows that Kenya is the biggest market for counterfeit and smuggled goods in East Africa. The statistics places the counterfeiting and piracy business in Kenya as worth Kshs. 70 billion. Moreover, Kenya loses about Kshs. 0.8 billion in tax revenues to counterfeiting and piracy, funds that could be invested in key social sectors.²²⁰

These statistics paint a vivid picture of a country that ought to take advantage of Intellectual Property Rights as key contributor to the economy. Undoubtedly, Intellectual Property Rights generate economic activity, employment and growth to Kenya. The benefits of IPRs cannot be underestimated. Intellectual Property Rights generally attract Foreign Direct Investment (FDI) and promote Research, Creativity,

²¹⁶ A derivative work is a work that is based on another work such as a remix of a previous song or a parody lyric set to a well-known song.

²¹⁷ Peter J. Strand, Robert Kouchoukas and William Rattner (2005) "Legal issues involved in the music industry," at http://law-arts.org/pdf/Legal_Issues_in_the_Music_Industry.pdf (accessed on 2nd October 2015).

²¹⁸ Ram Gopal (2004) "A behavioral model of digital piracy," *Journal of Organizational Computing and Electronic Commerce* (14) 89-105.

²¹⁹ George Higgins (2006) "Digital piracy: Assessing the Contributions of an Integrated Self-control Theory and Social Learning theory using the structural equation modelling," *Criminal Justice Studies* (19) 3-22.

²²⁰ Peter Gastrow (2011) "Termites at Work: A Report on Transnational Organized Crime and State Erosion in Kenya - Comprehensive Research Findings," International Peace Institute, at http://www.rich.co.ke/rcfrbs/docs/ipi_epub-kenya-toc.pdf (accessed 21/10/2015).

Innovation and Development (R&D), as well as technology transfer in developing countries thereby spurring significant economic growth. A sound Copyrights regime is therefore an important component of Kenya's economy.²²¹ According to WIPO, copyright related industries generate substantial GDP and employment creation in emerging and developing countries. Relevant studies indicate that Kenya's creative industries contribute more than 5% to GDP and over 3% to employment.²²² Certainly, a larger chunk of the creative industry goes to the musical industry.

It is thus important to strengthen Kenya copyright regime and IPR regime generally. This will encourage technology transfer from foreign huge income economies and coupled with the effects of FDI the country stands to gain immensely from the resultant capital and skills.²²³ It must be noted that renowned economists have established the correlation between sound IPR protections regime with increased FDI. The correlation between copyright and FDI far outweighs that between trademark and FDI.

Accordingly, a research done by economists, observed that 1% improvement in Trademark and Copyright protection increases FDI by 3.8% and 6.8% respectively.²²⁴ Moreover, a strong copyright regime stimulates cultural expression and diversity, dissemination of new technologies and development. It has been reported that an increase of trademark and copyright protection correlates to a 1.4% and a 3.3% increase in Domestic Research and Development (DR & D) singly.²²⁵ Thus Musicians can earn substantially more from their creations that are protected under Copyright regimes and Intellectual property Laws in Kenya. East Africa Community (EAC) has recognized closer home, the significance of IPR protection laws in attracting FDI.²²⁶

²²¹ Elijah Onyancha (2006) "Determinants of Foreign Direct Investment," in Kenya Institute African de Development Economiqueet de planification) available at <<http://upan1.un.org/intra.doc.groups/public/documents/idep/unpan023352.pdf>. (accessed on 14/8/2015)

²²² WIPO (2012) "Studies on the Economic Contribution of the Copyright Industries," p. 28 Tables 6.1 & 6.2 accessed at <http://www.wipo.int/export/sites/www/ipdevelopment/en/creative_industry/pdf/economic_contribution_analysis_2012.pdf Accessed on 14th August 2015 ; WIPO (2011). 'Economic Contribution & Mapping' accessed at http://www.wipo.int/ipdevelopment/en/creative_industry/economic_contribution.html accessed on August 14, 2015.

²²³ WIPO (2011) "The Changing Face of Innovation," at http://www.wipo.int/export/sites/b.www.freepublications/en/intproperty/944/wipo_pub_944_2011.pdf. (accessed 14/8/2015)

²²⁴ Walter Park and Douglas Lippoldt (2008) "Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries," *OECD Trade Policy Working Paper No. 62*, at <<http://www.oecd.org/official-documents/display-documents.pdf/> (accessed on 14/10/2015).

²²⁵ Ricardo Cepeda, Douglas Lippoldt and Jonathan Senft (2010) "Policy Complements to the Strengthening of IPRs in Developing Countries," *OECD Trade Policy Working Paper No. 104*, p. 21 at http://www.oecdlibrary.org/trade/policy-complements-to-the-strengthening-of-iprs-in-developing-countries_5km7fmwz85d4-en (accessed on 14/10/2015).

²²⁶ The East African Community (2009) "Policy On Anti-Counterfeiting, Anti-Piracy And Other Intellectual Property Rights Violations," at <<http://documents.jdsupra.com.ed4ac7-0ba4-40fc-9b50-15ff7765019a.pdf>>: "Granted that IPRs constitute by far the most valuable assets of most modern

According to estimates provided by Frontier Economics, 2012, at Page 13, improving Kenya's IPR regime could be associated with between US \$ 460 and US\$ 630 of additional FDI. The effect of such an increase could be associated with increased employment of between 135,000 and 185,000 persons hence reducing the current Kenya's unemployment rate by 30%.²²⁷

The Kenyan artists also feel the effect of poor Copyright regimes. WIPO notes that despite the vibrant music industry in Kenya which enjoys a booming productions, musicians still struggle to make a living from their music works. This is attributed to the piracy of musical works where copyright infringers copy music CDs or albums the moment they are released and sell them on the streets. This makes it nearly impossible for the Kenyan artists to profit from direct sale of their legitimate recordings.²²⁸ In fact, most artists make losses when comparing the proceeds realized from the sale of their musical works to the expenses expended while recording and fine-tuning their musical works before realizing them into the market.

In addition to the loss suffered by the local musician, counterfeit and piracy also impedes the growth and development of local creative industries in Kenya.²²⁹ The Kenya publishers Association (KPA) in its announcement in 2011 stated that 90% of the Kenyan music is pirated.²³⁰ At national level, Kenya has experienced huge economic loss because of piracy. Between 2002 and 2003, Kenya Customs and Excise Department seized over 100,000 music CD is entering into Nairobi. A further 15,000 music CDs were seized in Mombasa. Interestingly during the same period the industry reported low sales of original CDs estimated at only 15000 music CDs.²³¹ This were only during the raids carried in major cities. Piracy has reached a higher level in Kenya and it is still soaring higher.

In monetary terms, the Kenya Association of Manufactures (KAM) estimates that the

businesses, the creation of an enabling and secure investment climate necessary demands an effective legal regime for the protection of IPRs. The absence of such a regime inexorably drive away new investments from the East African Region."

²²⁷ Franziska Ellen Schulze (2014) "Resale of Digital Content such as Music, Films or eBooks under European Law," *op. cit.*

²²⁸ WIPO (2007) "On the Beat - Tapping the Potential of Kenya's Music Industry," *op.cit.*

²²⁹ The East African Community (2009) "Policy On Anti-Counterfeiting, Anti-Piracy And Other Intellectual Property Rights Violations," *op. cit.* accessed at <http://documents.jdsupra.com/ed4ac7-0ba4-40fc-9b50-15ff7765019a.pdf> : "Granted that IPRs constitute by far the most valuable assets of most modern businesses, the creation of an enabling and secure investment climate necessary demands an effective legal regime for the protection of IPRs. The absence of such a regime inexorably drive away new investments from the East African Region;" Croella C (2007), "On the beat: tapping the potential of Kenya's music industry," *op. cit.*

²³⁰ Iseme Kamau & Maema Advocates and Mohammed Muigai Advocates Consortium (2008) "Formulation of an EAC Policy on Anti-Counterfeiting, Anti-Piracy and other Intellectual Property Rights Violations," at <http://eabc.info/files/inception%20Report-on-%20the-%20Formulation-%20of-%20an-%20EAC-%20Policy-%20on-%20Anti-Counterfeiting.pdf>. p. 5 (accessed on 14/10/2015).

²³¹ Information accessed at <http://www.iipa.com/rbc/2003/2003SPEC301KENYA.pdf> (accessed on 14/10/2015).

manufacturers incur an annual net loss of KSh. 30 billion while the government loses about Kshs. 6 billion in profits and tax revenue due to piracy and counterfeit trade.²³² Other reports estimate the annual loss because of piracy to be between Kshs. 5 billion²³³ and Kshs. 45 billion.²³⁴ When examined well, such loss in revenue deprives Kenyan citizens of jobs of job opportunities, infrastructure, and social amenities as well as increases social costs.²³⁵

4.3 The Magnitude of the Drawbacks in the Kenyan Law

This study establishes that the average fines meted on infringers of copyrighted musical works are KSh. 5000. Whereas the Copyright Act 2001 provides for a fine of up to Kshs. 400,000, or imprisonment for a term not exceeding six years for any offence proved against a first offender, the lesser punishments meted on infringers could be attributed to the framing of the law which sets the ceiling instead of carpet in form of limits of the fines and jail terms. The judiciary treats copyright infringement casually; this explains why the judiciary treats copyright offences as petty offences and is therefore not given priority. The penalties are also not deterrent as observed in chapter three of this study.

In fact, the Anti-Counterfeit Act 2008 also provides for criminal sanctions of a jail term not exceeding five years or a fine of not less than three times the prevailing retail price of the genuine product or both for first offenders. In the case of a second or subsequent conviction, the Act provides for the penalties of imprisonment for a term not exceeding fifteen years or a fine not less than five times the prevailing retail price of the genuine goods or both. The discrepancies in the penalties spelt out in these two different legislations calls for the harmonization of these laws as they all fall under the IPR regimes.

Thus the courts, in exercising their discretion, have tended to mete out lower fines for the infringers. In doing so, the courts often award damages based on the quantity of infringing materials seized by KECOBO or the aggrieved party during a raid. This, however, generally bears no similarities with; neither does it take into account, the quantity of infringing materials already sold by the copyright infringer.

In light of the above, it is indeed plausible that a habitual offender would be sentenced

²³² Presentation by the chief executive of Kenya Association of Manufacturers, Betty Maina, “Anti-Counterfeit Bill We Count on Legislators to Act Rightfully,” available at <http://www.kam.co.ke/index.php/opinion-pieces/147-anti-counterfeit-bill-we-count-on-legislators-to-act-rightfully> (accessed on 14/10/2015).

²³³ According to the Kenya Revenue Authority, 2007. See Keynote address by the Attorney general of Kenya, Amos Wako (2007) “Promoting Better Legislation and Enforcement of Intellectual Property Rights in Kenya,” at www.ccapcongress.net/archives/Geneva/Files/Wako.pdf.and (accessed on 14/10/2015).

²³⁴ See Anti-Counterfeiting & Piracy Initiative (ACAPI) (2009) “Kenya’s Counterfeiting Agency Starts Operations,” at www.ammado.com/non-profit/111840/articles/13135 (accessed on 14/8/2015).

²³⁵ See Keynote address by the Attorney general of Kenya, Amos Wako (2007) “Promoting Better Legislation and Enforcement of Intellectual Property Rights in Kenya,” *op. cit.*

to a lesser sentence or jail term than a first offender. This state of affairs does not show the relevant statutes as being meant to provide an incentive to the copyright owners, KECOBO or the police to prosecute copyright infringers for their actions, commission or omission.

4.4 Administration and Enforcement of Copyright Law in Kenya

The Kenya Copyright Act,²³⁶ as discussed under Chapter two of this study provides for the establishment of the Kenya Copyright Board, (KECOBO), and a body corporate.²³⁷ The Board is in charge of the administration of all matters regarding copyright and related rights in Kenya. This board is a centralized public body that coordinates the overall administration and enforcement of copyright and related rights in Kenya.

KECOBO's enforcement unit as discussed earlier consists solely of eight copyright inspectors and five prosecutors covering the entire country. This fact alone highlights the arduous task KECOBO is confronted with in dealing with the menace of piracy. For example, in 2003 when the Attorney General commissioned KECOBO, software piracy hit new levels at 78% in Kenya.²³⁸

BSA approximations indicate that between 2010 and 2011 software piracy levels oscillated between 78% and 79% conforming to a commercial value of US\$ 85 million. It must be noted that apart from pirated software, the overwhelmed KECOBO's enforcement unit has to deal with other forms of piracy relating to music, film, broadcasts and books.²³⁹

Furthermore, KECOBO is the Government regulator of Collective Management Organizations (CMOs). Presently, there exist three CMOs. Its attempts to structure a partnership between these three CMOs has since failed with the most notable attempt in April 2011 even when it had logistical support of the Norwegian Copyright Development Association (NORCODE). This was due to typical among the CMOs as well as the battle for the control of the collected funds. Each of them advocated for a special role in the joint revenue collection venture.²⁴⁰

KECOBO has encountered and continues to encounter challenges with regard to fees collection and royalty payments. Music Copyright Society of Kenya (MCSK) best exemplifies this. KECOBO deregistered MCSK in 2011 as a Collective Management

²³⁶ Section 3 of Copyright Act ,2001, Laws of Kenya.

²³⁷ As a corporate entity, KECOBO can sue and be sued; it has power to purchase, acquire property, borrow money, lend money and perform all other duties as specified by the Act.

²³⁸ Centre for Intellectual Property and Information Technology Law website, at <http://cipitlawstrath.wordpress.com/2013/08/14/kenya-copyright-board-and-collectingsocieties-myths-and-facts/> (accessed on 14/8/2015).

²³⁹ *ibid.*

²⁴⁰ Victor Nzomo (2012) "The Fate of Music Copyright Society of Kenya (MCSK)," at <http://ipkenya.wordpress.com/2012/01/09/the-fate-of-music-copyright-society-of-kenya-mcsk/> (accessed on 14/8/2015).

Organization (CMO) acting on behalf of authors and composers of music for the reason that MCSK's operational costs were too high compared to the royalties it paid musicians.

For example, MCSK's expenses stood at Sh. 137 million in the year to June 2010 against revenues of Sh185 million, leaving it with a surplus of only Sh. 48 million or 25 per cent of the revenue it collected, which are supposed to be disbursed to the musicians. Under the guidelines published by KECOBO, only 30% of monies received can be spent on administrative costs and the remaining 70% to be distributed among musicians as royalties. According to the financial books, MCSK was doing the opposite: distributing 30% and spending 70%, despite the large number of complaints over unpaid royalties from the Kenyan musicians.²⁴¹

Presently, the appropriation ratio of collection paid to musicians is touted to be 30% or thereabout and 70% to administrative costs. This ratio is obviously not in favour of the members of such collecting organizations. MCSK is obviously aware of the world best practices that stipulate that the 70% of the revenue collected is payable to musicians while the 30% cater for administrative costs. This issue ought to be addressed urgently for the benefit of the musicians.²⁴² The Kenyan CMOs must also learn to respect their members and pay them their royalties in time. Furthermore, they must adhere to their organization's articles and memorandums of understanding to enable their members reap maximum benefits from their musical works.

The recently, the Annual Global Economic Survey of Authors' Society Royalty Collections by International Confederation of Authors and Composers Societies (CISAC) published that 7.8 billion Euros was collected worldwide. The Society notes that 75 percent of these collections were realized from public performance royalties, which is mainly made up of collections from broadcasters. Within the CISAC African region, MCSK is ranks among the top three royalty earners despite the Kenya's broadcasters being among the poor royalty payers in relation to their music usage. It is estimated that MCSK accounts for over Kshs. 110,000,000 collected in the form of royalty arrears from television and radio broadcasters spread throughout the country.²⁴³

4.5 Conclusion

From discussions in this Chapter we find that Kenyan musicians are incurring huge losses as a result of piracy. The situation has been worsened by the advent of digital technology that has made copying of musical products very cheap and fast. Furthermore, Kenya continues to lose revenue annually as the proceeds of piracy go

²⁴¹ *ibid.*

²⁴² Kenya Copyright Board "Collective Management Organisations," Copyright News, A Quarterly Publication of the Kenya Copyright Board ISSUE 8 at <https://www.copyright.go.ke/awareness-creation/category/9-newsletters.html> (accessed 14/8/2015).

²⁴³ International Confederation of Societies of Authors and Composers (CISAC) website, at <http://www.cisac.org/CisacPortal/consultArticle.do?=1749> (accessed on 14/10/2015).

untaxed. The Kenya Copyright Act 2001 and The Anti-Counterfeit Act do not provide the much-needed deterrent penalties to curb piracy. Noticeably the study indicates that the government must respond appropriately to strengthen KECOBO, the Police and the Judiciary in their enforcement efforts. These measures are discussed in the final chapter of this project, which deals with recommendations.

CHAPTER 5

SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION ON KENYA'S MUSIC COPYRIGHT

5.1 Conclusion

From the onset, the study set-out to evaluate the extent to which the Copy Right Act, 2001 protects the intellectual property rights of copyrighted works of musical authors. The study also set to determine the domestic legal frameworks governing copyrights in Kenya and whether Copyright Act, 2001 has discharged its burden in line with the International Treaties and Convention ratified by Kenya. Thus, the study has reconnoitred the legal protection of music copyright in Kenya.

The research has been anchored on the two Intellectual Property theories that have been propounded to lay the grounds for justification of Intellectual Property Rights (IPRs) of copyright in musical works. As discussed in Chapter one and partly in chapter two of this study, these theories are the utilitarian theory and natural rights Theory; and both make a proposition that musicians are entitled to derive the greatest benefits from their labour in the musical works.²⁴⁴

The study specifically addressed three main research questions namely: First, whether artists of musical works are adequately protected under the copyright Act, 2001; Second, whether the existing enforcement mechanisms of copyright protection in Kenya are adequate; And third, what the practical solutions to music piracy in Kenya are.

The overarching argument in this research project paper was premised on information gathered from statutes, books, journals and articles that have in one way or another addressed the research questions set out at the beginning of this study. From the various sources of information obtained, it is manifest that authors take a broad perspective with regard to music copyright as Intellectual Property both locally and internationally.

The Constitution of Kenyan, 2010 clearly defines “property” to include Intellectual Property Rights.²⁴⁵ The Constitution also places specific obligations on the State because of Intellectual Property Rights. However, Kenyan IP regime is still lacking in many aspects. Music artists are yet to realize the full economic benefits arising out of Copyrights Law. The study reveals that Kenya loses billions of dollars due to

²⁴⁴ Michael Freeman (2001) *Freeman Lloyd's Introduction to Jurisprudence*, Sweet & Maxwell 7th edition, pp.148-150.

²⁴⁵ See Articles 11 (2)(c), 40(5) and 69(1)(c) of the Constitution 2010.

infringement, piracy, and counterfeiting of various musical works. This extends to the musicians.²⁴⁶

Although Kenya participated in the WIPO Diplomatic Conference that adopted the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), it is yet to ratify these treaties.²⁴⁷ Perhaps that could lend a reason as to why piracy in musical works in Kenya is still rampant despite the coming into force the Copyright Right Act of 2001 more than a decade ago.²⁴⁸

Finally, the study has demonstrated how the Kenyan musicians are incurring huge losses because of piracy and other forms of copyright infringements. The situation has been worsened by the advent of digital technology that has made copying of musical products very cheap and fast. Furthermore, Kenya continues to lose revenue annually as the proceeds of piracy go untaxed. The Kenya Copyright Act 2001 and The Anti-Counterfeit Act do not provide the much-needed deterrent penalties to curb piracy. Noticeably the study indicates that the government must respond appropriately to strengthen KECOBO, the Police and the Judiciary in their enforcement efforts. The study thus makes the finding that the Copyright Act, 2001 does not afford the musicians the adequate protection from infringements.

5.2 Recommendations

It is clear from the discussions in this research study that there is need for improvements on the copyright laws to protect musical works in Kenya. There is therefore need to implement the following legislative and judicial recommendations to achieve this.

5.2.1 Specific Legislative Recommendations

There is need to address and implement the following eleven (11) legislative recommendations to improve the protection of musical copyright in Kenya.

First, the mandate accorded to KECOBO in the administration of copyright matters should be limited. Currently KECOBO has not fully succeeded in netting down large-scale manufactures and suppliers of pirated musical works.²⁴⁹ Perhaps it is time to delegate the function of enforcement and compliance on the Anti-Counterfeit Agency. Under such arrangement, KECOBO would then focus its efforts towards managing CMO's and performing other duties provided for in the Act.²⁵⁰

²⁴⁶ Ann Macharia (2012) *Enforcement of Copyright in Information Communication Technology (ICT) Era: How Effective?* LLM thesis submitted to the University of Nairobi.

²⁴⁷ James Mwangi (2014) *Analyzing the Legal Protection of Music Copyright in Kenya*, A LLM thesis submitted to the University of Nairobi.

²⁴⁸ *ibid.*

²⁴⁹ Annie Njanja (2017) "Copyright agency to crack down on pirated music and films," *Business Daily Newspaper*, Nairobi, at <http://www.businessdailyafrica.com/economy/Copyright-agency-to-crack-down-on-pirated-music--films/3946234-4068558-tumivyz/index.html> (accessed 11/11/2017).

²⁵⁰ *ibid.*

Second, in order to effectively regulate Collective Management Organizations (CMOs) through licensing and supervision, the copyright Regulations 2004 should be amended to provide for more stringent requirements that would make CMOs more accountable to KECOBO.²⁵¹

Third, the current KECOBO Board consists of 16-20 persons.²⁵² Such a larger number could hinder effective decision-making due to disagreements and lack of quorum necessary to conduct meetings. The Board needs to be down sized.

Fourth, whereas KECOBO enjoys wide statutory mandate in administration of copyright matters in Kenya, it is hardly known to Kenyans. As part of public awareness, it is necessary that it devolve the services of the Board to the counties. Consequently, KECOBO should establish offices in every county and such branch offices should be given statutory mandate to enforce the provisions of the Act without bureaucratic hindrances.²⁵³

Fifth, appropriate regulations should be put in place to regulate the proliferation of Reproduction Rights Organizations (PROs) and Collective Management Organizations (CMOs).²⁵⁴ This would ensure quality of services offered by these organization as well as assist KECOBO in monitoring their activities to eradicate unethical practices. Further, such regulations should provide for the monetary threshold conditions precedent to issuance of licenses. In effect, this would enhance financial capacity of the PROs and CMOs.²⁵⁵

Sixth, KECOBO should strive to have its own autonomous and fully-fledged inspectorate arm. Sufficient inspectors should be appointed under section 39 Copyright Act 2001. This would ensure that the Board does not put over reliance on regular police in enforcement matters. Furthermore, with adequate inspectors, timely action can be taken with regard to crackdown on pirates. The inspectorate department of KECOBO should be specialized and trained to deal with copyright matters.

It is a fact that the administration and enforcement Copyrights right in Kenya is a shared responsibility. The agents involved are the office of the Registrar General in the Attorney General's Chambers, the Customs Department of the Kenya Revenue Authority as well as the Kenya Bureau of Standards. In order to avoid the danger of

²⁵¹ Tom Mitsindo (2015) *Collective Management of Copyright and Related Rights under Rwandan Law*, An LLM thesis submitted to University of Rwanda School of Law at <http://dr.ur.ac.rw/bitstream/handle/123456789/158/Tom.pdf?sequence=1&isAllowed=y> (accessed 11/11/2017).

²⁵² Kenya Copyright Board website, at <https://www.copyright.go.ke/about-us/board-of-directors.html> (accessed 11/11/2017).

²⁵³ Victor Nzomo (2011) "The National Copyright Office: Kenya Copyright Board," IP Kenya at <https://ipkenya.wordpress.com/2011/01/04/the-national-copyright-office-kenya-copyright-board-kecobo/> (accessed 11/11/2017).

²⁵⁴ James Mwangi (2014) *Analyzing the Legal Protection of Music Copyright in Kenya*, *op. cit.*

²⁵⁵ *ibid.*

conflict in decision-making and enhance coordination among these organs, it is recommended that an inter-agency office be established to offer liaison services among these departments. Alternatively, the role played by all these organs should be merged and handed over to one body. This could be either KECOBO or Anti-Counterfeiting Agency.

Seventh, though section 48 of the Copyright Act 2001 provides for establishment of Competent Authority that is supposed to serve as Tribunal for dispute resolution, the Authority is presently not constituted.²⁵⁶ In view of the need to establish jurisprudence in this area and for expediency of dispute resolution, there is need for urgent constitution of that Competent Authority as stated under the Act.

Eighth, KECOBO should increase the number of investigators and prosecutors to strengthen its enforcement arm. As the study has shown, there are currently nine (9) trained police officer and four (4) prosecutors. This number is overwhelmed and has no capacity to deal with the increasing cases of music piracy.

Ninth, the Government should also allocate more resources to KECOBO in order to enhance its administrative, enforcement, and capacity. Such funds should be channelled towards the training of the requisite personnel such as investigators and Prosecutors.²⁵⁷ Devolution of KECOBO to the existing counties also requires finances for putting up the necessary infrastructure and human resource.

Tenth, sanctions as well as the penalties imposed under the copyright Act 2001 need to be deterrent.²⁵⁸ Currently the Act provides for custodial sentences but with alternative of fines. Since piracy has created a lucrative market, (90% of Kenyan music is pirated) the penalties imposed on offenders should be deterrent.²⁵⁹ This study therefore recommends that any fines imposed on first offenders should be commensurate to the value of the goods pirated. Apart from first offenders, all other convicted pirates should be given a mandatory custodial sentence, which is long enough to be deterrent. In order to afford uniformity in sentencing, the Act should provide for minimum sentences rather than maximum sentences.

Eleventh, the Anti-Counterfeit Act, 2008 should be amended to introduce comprehensive border enforcement Rules. Such Rules would allow the Kenyan authorities to inspect goods in transit. This may minimize trans-border piracy.

²⁵⁶ Victor Nzomo (2012) "The Competent Authority: Kenya's New Copyright Tribunal," IP Kenya at <https://ipkenya.wordpress.com/2012/04/09/the-competent-authority-behold-kenyas-new-copyright-tribunal/> (accessed 11/11/2017).

²⁵⁷ Kenya Copyright Board website, at <https://www.copyright.go.ke/copyright-enforcement.html> (accessed 11/11/2017).

²⁵⁸ KECOBO (2013) "Board seeks harsh penalties for copyright offenders," Facebook post at <https://www.facebook.com/KenyaCopyrightBoard/posts/587086817986710> (accessed 11/11/2017).

²⁵⁹ *ibid.*

5.2.2 Specific Judicial Recommendations

There is need to address and implement the following four (4) judicial recommendations in order to improve the protection of musical copyright in Kenya.

First, given that Copyrights Law is a great contributor to the economy, having an effective legal regime should therefore protect musical works. In view of the increased practice in the field of intellectual property, the Chief Justice needs to consider establishing a division within the High court to deal with the Commercial aspects of intellectual property.²⁶⁰

Second, priority hearings and determinations should be accorded to the cases involving international trade. This will encourage Foreign Direct Investment in matters relating to Intellectual Property in general and copyrights specifically. The Division of Intellectual Property, if created can formulate rules of practice that will ensure expeditious resolution of disputes within the Division.²⁶¹

Third, through the Judiciary Transformation Framework, the court should educate the public and Civil Society on its judicial procedures regarding Intellectual Property Law disputes generally.²⁶²

Fourth, the courts should also maintain a database for judgments and vital information relating to intellectual property cases and international jurisprudence.²⁶³ This would ensure that the doctrines of precedence and *stare decisis* decision are adhered to and no conflicting decisions are issued on similar facts and principles of law.²⁶⁴ The courts handling intellectual property matters ought to be specialized. The presiding officers in such courts should be properly trained in such matters.

The Judiciary Training institute should undertake this role of training magistrates and judges to preside over the Intellectual property Division. Kenya should adopt the United Kingdom's court's structure by creating this special court with limited jurisdiction as to copyright matters.²⁶⁵ A judiciary well prepared and well informed of the rapidly expanding copyright laws must play a critical role in the implementation and enforcement of copyright law in the following ways:

Through the successful conclusion of copyright cases particularly cases of

²⁶⁰ Nicholas Ombija "Case study of intellectual property rights court regime," Kenya Law at <http://kenyalaw.org/kl/index.php?id=1899> (accessed 11/11/2017).

²⁶¹ *ibid.*

²⁶² The Judiciary (2012) "Judiciary Transformation Framework 2012-2016," at <http://www.judiciary.go.ke/portal/portal/assets/downloads/reports/Judiciary%27s%20Tranformation%20Framework-fv.pdf> (accessed 11/11/2017).

²⁶³ Nicholas Ombija "Case study of intellectual property rights court regime," *op.cit.*

²⁶⁴ *ibid.*

²⁶⁵ GOV.UK website at <https://www.gov.uk/guidance/take-a-case-to-the-intellectual-property-enterprise-court> (accessed on 21/10/2015).

transnational crimes providing a strong disincentive to non-compliance of environmental laws. The judiciary must also provide access to the public and civil society to judicial procedures in copyrights related cases. Through coherent networking among judiciaries and exchange of judgments and sharing information on intellectual property cases and international jurisprudence. Meting out sentences, fines and orders for destruction of exhibits. This ensures punitive measures thus discouraging other would be offenders.

5.2.3 Recommendations with regard to Digital Technology

There is also need to implement the following three (3) recommendations with regard to digital technology.

First, Section 36 of the copyright Act provides that no audio or visual works be to be sold or offered for sale if the works do not carry an anti-piracy security Device that ordinarily consists of a bar-code sticker and hologram. This study recommends that KECOBO through its inspectorate department should take advantage of this provision to seize and destroy all musical works in the shops, which do not meet this requirement.

Second, the Copyright Act should be amended to make provisions for internet service provider liability as a secondary copyright infringement. This is in recognition of the fact that most instances of music piracy occur in digital environment. Compelling by way of legislation the authors of musical works to protect their works using TPM such as encryption, digital watermarks, access codes and passwords.

Amend copyright Act to make provisions for regulation of music copyright infringements arising from technological advancements. Alternatively, Kenya should enact a legislation dealing with digital copyright infringements. Kenya should as a matter of urgency ratify the WIPO internet treaties (WCT and WPPT) to make them applicable under Article 2 of the Constitution. The government should use code to regulate and govern sound and ethical internet use by its citizenry to curb piracy.

Third, there is need for the implementation of the Anti-Piracy Security Device (APSD). This will help in the identification of copyright works and the distinction between the genuine copyright works and the infringing works especially in the film and music industry that has been a major problem. This is exacerbated by the digital technologies, which allow for perfect or near perfect copies of the works. In 2010 as per Section 36 of the Copyright Act, the Kenya Copyright Board introduced the Anti-Piracy Security Device (APSD) in the form of a hologram and bar code sticker.

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