

**PROTECTION OF DIGITAL AUDIO-VISUAL WORKS IN KENYA BEYOND
COPYRIGHT: ENHANCING THE LEGAL FRAMEWORK FOR FIGHTING ONLINE
PIRACY IN DIGITAL AUDIO-VISUAL WORK**

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Table of Contents

List of abbreviations	1
List of International Legal Instruments.....	2
List of Kenyan Statutes	2
List of Foreign Statutes	3
List of Kenyan Regulations	3
List of Cases.....	4
CHAPTER ONE	5
1.1. Introduction.....	5
1.2. Background to the problem	8
1.3. Statement of the problem	10
1.4. Theoretical/ conceptual framework	15
1.5. Literature review	17
1.6. Objectives of the study.....	26
1.7. Assumptions or hypotheses	27
1.8. Research questions.....	27
1.9. Methodology	28
1.10. Chapter breakdown	28
CHAPTER TWO	30
2.1. Introduction.....	30
2.2. Conceptualization of the Legal, Regulatory and Institutional Framework for the protection of digital audio-visual work in Kenya	31
2.3. Definition of key terms	35
2.4.1. The International Legal Regulatory and Institutional Regime for the Protection of Digital Audio-Visual Works	38
2.4.1.1. The Agreement on Trade Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPs).....	39
2.4.1.2. The Berne Convention for The Protection of Literary and Artistic Works (Paris Act, 1971)	40
2.4.1.3. The WIPO Copyright Treaty (WCT, 1996).....	43
2.4.1.4. Treaty on the International Registration of Audiovisual Works (Film Register Treaty), 1989	45
2.4.2. Regional Legal Framework in Africa for the Protection of Digital Audiovisual Works....	47
2.4.2.1. The African Regional Intellectual Property Organization (ARIPO).....	47

2.4.2.2. The African Organisation of Intellectual Property (OAPI).....	48
2.4.2.3. The East African Community (EAC).....	48
2.4.3. The Kenyan Legal Regime for the Protection of Digital Audiovisual Works	50
2.4.3.1. The Constitution of Kenya 2010.....	50
2.4.3.2. The Copyright Act, 2001 Cap 130.....	51
2.4.3.3. The Copyright (Amendment) Bill, 2017.....	53
2.4.3.4. The Movable Property Security Rights Act, 2017	55
2.4.3.5. The Films and Stage Plays Act, Cap. 222.....	55
2.4.3.6. The Consumer Protection Act, 2012.....	56
2.4.3.7. The Competition Act, 2010.....	57
2.5. Institutional Framework for the protection of digital audio-visual works.....	57
2.6. Conclusion on the Legal, Regulatory and Institutional Framework for Protecting Digital Audio-Visual Content in Kenya.....	62
CHAPTER THREE.....	64
3.1. Introduction.....	64
3.2. Contemporary Challenges to Protection of Digital Audio-Visual Content in Kenya	66
3.2.1. Background to challenges in protection of digital audio-visual work.....	66
3.2.2. Incidences of challenges to protection of digital audio-visual work in Kenya	68
3.2.3. Specific Challenges to protection of digital audio-visual work in the information age.....	71
3.2.3.1. Control over digital audio-visual works versus access to information.....	71
3.2.3.2. Right to privacy versus monitoring and enforcement	73
3.2.3.3. Extraterritoriality of the internet	75
3.2.3.4. Costs of Enforcement of rights.....	78
3.2.3.5. Penalizing non-commercial use.....	79
3.3. Conclusion on Contemporary Challenges to Protection of Digital Audio-Visual Content in Kenya 81	
CHAPTER 4.....	83
4.1. Introduction.....	83
4.2. The European Union.....	85
4.2.1. Directive 2010/13/Eu of The European Parliament and of the Council of 10 March 2010 (EU Audiovisual Media Services Directive)	85
4.3. The United States of America	88
4.3.1. The Digital Millennium Copyright Act (DMCA) 1998.....	89

4.4. South Africa	92
4.4.1. The Copyright Act 98 of 1978	93
4.4.2. The Copyright Amendment Bill, 2017.....	94
4.5. Canada	96
4.5.1. Copyright Act (R.S.C., 1985, c. C-42) current to 2018-06-20 and last amended on 2017-06-19	96
4.6. Conclusion on International Best Practices for the Protection of Digital Audio-Visual Works	98
CHAPTER FIVE	100
5.1. Introduction	100
5.2. The current landscape of infringement of digital audiovisual works in Kenya	101
5.3. Recommendations on how to enhance protection of digital audiovisual works in Kenya	103
5.3.1. Focused Consumer Education.....	103
5.3.2. Technological self-help measures or technological protection measures (TPMs).....	105
5.3.3. Contractual arrangements in the form of End User Licence Agreements (EULA)	108
5.3.4. Civil and Criminal Remedies entrenched in the Law	109
5.3.5. Increased use of Collective Societies	111
5.3.6. Enhancing the Enforcement capability of KECOBO.....	112
5.3.7. Enforcement against Private Consumers	113
5.3.8. Redefining the meaning of Authorship and the Right to Copy in respect to Digital Audiovisual Works	114
5.3.9. Possible Legislative Proposals	115
5.4. Conclusion on Proposals and Recommendations to enhance protection of digital audio-visual content in Kenya	117
BIBLIOGRAPHY	119

Declaration of Originality

I, **OYIER CHRISTOPHER OGWENO**, do hereby declare that this is my original work and that it has not been submitted for award of a degree or any other academic credit in any other University.

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Signed..... Date

This Thesis has been submitted for examination with my approval as a University Supervisor.

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List of abbreviations

WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WCT	WIPO Copyright Treaty
CDPA	Copyright, Designs and Patents Act 1988
DMCA	Digital Millennium Copyright Act 1998
DRM	Digital Rights Management
TRIPS	(Agreement on) Trade-Related Aspects of Intellectual Property Rights
URL	Uniform Resource Locator
ICANN	Internet Corporation for Assigned Numbers and Names
UDRP	Uniform Domain Name Dispute Resolution Policy
IP	Intellectual Property

List of International Legal Instruments

ARIPO (1976) *Agreement on the Creation of the African Regional Intellectual Property Organisation*, adopted by the Diplomatic Conference, at Lusaka, Zambia.

UNESCO (1952) *Universal Copyright Convention*, 25 UST 1341 ; TIAS 7868, 943 UNTS 178.

United Nations (1945) *Charter of the United Nations*, October 24, 1945, 1 UNTS XV.

WIPO (1886) *Berne Convention for the Protection of Literary and Artistic Works*, September 9, 1886, last revised July 24, 1971, 828 UNTS 221.

WIPO (1996) *Copyright Treaty*, S. Treaty Doc No 105-17 (1997); 36 ILM 65 (1997).

WIPO (1996) *Performance and Phonograms Treaty*, CRNR/DC/95.

WIPO (2012) *Beijing Treaty on the Protection of Audio-visual Performances*, adopted by the Diplomatic Conference on the Protection of Audio-visual Performances in Beijing, on June 24, 2012.

WTO (1994) *Agreement on Trade Related Aspects of Intellectual Property Rights*, 1869 UNTS 299; 33 ILM 1197.

List of Kenyan Statutes

Copyright Act, Cap 130 (Kenya)

Consumer Protection Act, 2012

Kenya Information and Communications Act, Cap 411A

Moveable Property Security Rights Act No. 13 of 2017

The Film and Stage Plays Act, Cap 222

The Competition Act, 2010

List of Foreign Statutes

Copyright Act, 1978 (South Africa)

Copyright Designs and Patent Act (1988) (UK)

Digital Millennium Copyright Act (DMCA) (USA), 1998.

List of Kenyan Regulations

Copyright (Amendment) Regulations, 2011

Copyright Regulations, 2004

List of Cases

Harper & Row, Publishers, Inc. v. Nation Enters. (1985) 471 U.S. 539, 558.

Feist Publications Inc. v. Rural Telephone Service Co. Inc. 499 U.S. 340 (1991).

Alcoholic Beverages Association of Kenya v Kenya Film and Classification Board & 2 others
[2017] eKLR.

Francis Gicohi & 20 others v Kenya Copy Right Board & another [2014] eKLR.

Mount Kenya Sundries Ltd v Macmillan Kenya (Publishers) Ltd [2016] eKLR.

VMG Salsoul, LLC v. Ciccone (9th Cir. 2016).

Nintendo v. King 2017 FC 246.

Laban Toto Juma & 4 others v Kenya Copyright Board & 9 others [2018] eKLR.

Michael Branham Katana t/a Harsutak Bar & 4 others v Kenya Association of Music Producers (Kamp) & 3 others [2016] eKLR.

Parity Information Systems Limited v Vista Solutions Limited & 2 Others [2012] eKLR.

Wanuri Kahu & another v CEO, Kenya Film Classification Board - Ezekiel Mutua & 4 others
[2018] eKLR.

Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58 (6 October 2005).

CHAPTER ONE

Protection of Digital Audio-Visual Works in Kenya beyond Copyright: Enhancing the Legal Framework for Fighting Online Piracy in Digital Audio-Visual Work

1.1. Introduction

Protection of intellectual property (IP) is critical for any nation's economic growth. Various forms of IP are protected in law, for example, patents, copyright and trademarks. By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish.¹ Countries generally have laws to protect IP for two main reasons. These are, to give statutory expression to the rights of creators and innovators in their creations and innovations, balanced against the public interest in accessing creations and innovations; and to promote creativity and innovation, so contributing to economic and social development.²

Copyright protects the economic and moral rights of the owners. The economic rights of the creators facilitate financial reward from the use of their works by others through reproduction, distribution, rental and importation.³ Moral rights allow authors and creators to take certain actions to preserve and protect their link with their work. This set of rights are enjoyed independent of the economic rights and include, the right of paternity or the right of attribution, and the right to integrity of their work.⁴

Audio-visual works or films form one category of works protected through copyright. Audio-visual content fuses the creativity and effort of a multitude of collaborators: scriptwriters, actors,

¹ World Intellectual property Organization (WIPO) "What is Intellectual Property?" at < <http://www.wipo.int/about-ip/en/>> accessed on 21/10/2016.

² World Intellectual Property Organization (WIPO), *Understanding Copyright and Related Rights* (2nd edn, WIPO, Switzerland, 2016)3.

³ Ibid,10.

⁴ Article 6*bis* of the Berne Convention on Literary and Artistic Works, 1886.

directors, costume and set designers, music composers, among others. Copyright law seeks to protect the diverse rights accruing through the development, financing, marketing and distribution of audio-visual work. With the surge in online piracy, numerous challenges emerge in applying the traditional concepts of copyright in the protection of audio-visual work. Digital technologies have introduced interactive communications that enable users to select works to be delivered to their computers or other devices.⁵ The digital age brought with it promising capabilities for creators, but also opportunities for undermining copyright in audio-visual work.

With respect to protection of digital audio-visual works in Kenya, recent developments in the local broadcasting industry are vital. Following the successes of the Nigeria's Nollywood and India's Bollywood, Kenya remains hopeful that its film industry can grow in similar leaps and bounds. As a first step to grow Kenya's film industry, the Communications Authority of Kenya developed the Kenya Programming Code for Free-to-air Radio and Television in March 2016. Under this Code, all broadcasting stations shall adhere to Intellectual Property Rights and shall refrain from any misappropriation of programmes.⁶

Importantly, the Code requires radio and television broadcasters to observe the local content quota as prescribed by the Authority. Additionally, broadcasting stations must ensure that advertisements aired on its station contain at least 40% local content footage.⁷ Central to the Programming Code are the local content requirements under section 18 of the Code. Under the section, broadcasting stations are expected to ensure that within one year of award of licence, not less than 40% of their

⁵ WIPO, *Understanding Copyright and Related Rights*, 12.

⁶ Communications Authority of Kenya, *The Programming Code for Free-To-Air Radio and Television Services in Kenya* (2nd edn, March 2016) 8.

⁷ *Ibid*, 25.

station's programming is local content.⁸ Further, the local content programming should increase to 60% within four years after receipt of licence.⁹

Expectedly, the Programming directive by the Communications Authority attracted keen interest in the local film industry. More entrepreneurs and investors have escalated efforts to develop local films to sell to the broadcasting stations who must in turn meet the local content requirements. In the corollary, this is likely to spur development of the local economy by creating more employment opportunities to Kenyan youth. Predictably, one of the most significant current discussions in the Kenyan film industry is how to obtain financing for film makers and actors. This is where legal protection of audio-visual works becomes critical.

This paper argues that due to the rapid online piracy, IP rights in audio-visual work in digital format are no longer sufficiently protected by the prevailing legal regime in Kenya entrenched in the Copyright Act 2001. Although section 30A of the Copyright Act grants creators the right to equitable remuneration for use of sound recordings and audio-visual works, digital technologies enable users to easily manipulate audio-visual content in digital format without obtaining permission from the creators. This means that authors may not easily realize their economic and moral rights granted under the Copyright Act 2001.

In view of such and other challenges subsequently highlighted in Chapter 3, this paper argues that there is need to enhance protection of intellectual property in digital audio-visual works in Kenya beyond the measures existing under the Copyright Act 2001. This paper will thus discuss the existing forms of protection of digital audio-visual works under the Copyright Act 2001 and explain how the free market system in the form of the law of contract works to circumvent the novel challenges presented by digital technologies in protecting digital audio-visual content. This

⁸ The Programming Code for Free-To-Air Radio and Television Services in Kenya, section 18.2.1.

⁹ Ibid.

paper will additionally explore the use of technology to control the problem of online piracy, an example of using technology to purge itself.

With reference to the Copyright Act of Kenya 2001, the parameters, strategies and mechanisms for protecting digital audio-visual work are not sufficiently clear. First, this paper will critically discuss the extent of protection accorded to digital audio-visual work under the international, regional and domestic legal regimes and interrogate their effectiveness. Secondly, this work will highlight the challenges to protection of digital audio-visual content in the new digital era characterized by rampant online piracy. In doing so, this paper will identify the existing disconnect between the legal regime for the protection of digital audio-visual works and the digital environment in which online piracy of digital audio-visual works thrives. In line with the identified weaknesses, this paper will make a case for the enhancement of protection of digital audio-visual works in Kenya beyond copyright including the use of market options such as freedom of contract, use of modern technology as well as cross-border cooperation to eliminate online piracy and boost the realization of commercial gains from audio-visual content in Kenya.

1.2. Background to the problem

Intellectual property law has been among the many legal constructs that have been severely affected by advances in computing. Patent, copyright, and trade secret law have, for the past several decades, been stretched beyond traditional bounds to accommodate the unusual nature of computer programs and digitization.¹⁰ Protection of copyright in digital audio-visual works remains a growing challenge for most countries in the internet era. Digital media has been defined to mean intellectual products made available in digital electronic form, whether operational in

¹⁰Pamela Samuelson, 'Digital Media and the Changing Face of Intellectual Property Law' (1990) 16 Rutgers Computer & Tech. L.J. 323, 324.

computers or other machines capable of "reading" works in digital form.¹¹ Digitization on the other hand refers to the ability of a person or system to convert a piece of information, a representation of reality or a recording of some matter into digital form.¹²

Control of digital audio-visual works and subsequent intellectual property rights in digital form is a major challenge due to the peculiar characteristics of digital content. First, digital audio-visual works can easily be replicated without incurring significant costs or possessing any expertise. Second, such content can be transmitted in huge volumes to millions of users in a simple step. Third, most digital audio-visual works have the unique capacity to be modified to create new forms of content. Fourth, the ease of multiple uses enables millions of internet users to access digital audio-visual works simultaneously. While this can be a good avenue for mass dissemination of digital audio-visual works, it is difficult to restrict simultaneous access hence the need for protection. Finally, digital audio-visual works can be easily linked over the internet and new search methods used to access them easily.

The peculiar features of digital technology have encouraged virtual theft and resulted to endemic levels of piracy over the internet. Coupled with breakdown of territoriality, IP rights in digital audio-visual works continue to experience illegal access and use through downloads, streaming and sharing. The scale of infringement varies from a single unauthorized use to alarming levels of unauthorized access over the internet. For instance, the movie "Avatar" suffered 16.5 million illegal downloads in 2011 while in 2009 the latest "Star Trek film" was illegally downloaded more

¹¹Ibid.

¹² Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa* (Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya, 2016) 243.

than 10 million times.¹³ The popular fantasy drama “*Game of Thrones*” experienced 32 million illegal downloads in just one week.¹⁴

Cognizant of the new developments in digital technologies, economies with advanced copyright protection systems such as the United States, the United Kingdom and the European Union have resorted to copyright laws that encourage copyright protection through private contracts and enforcement as opposed to pure reliance on statute.¹⁵ In Kenya, digital audio-visual works are primarily protected under the Copyright Act 2001 which grants creators moral and economic rights over their works.¹⁶ The copyright-holders in digital audio-visual work face a number of challenges since they cannot effectively restrict access to their content over the internet. It is the aim of this study to analyse these challenges and make relevant recommendations on how local film producers benefit from their digital audio-visual works.

1.3.Statement of the problem

Kenya’s film industry is currently undergoing a renaissance that promises to improve the fortunes of content producers. Global standard movies like *Rafiki*,¹⁷ *Nairobi Half Life*, *The Captain of Nakara*, *The First Grader*, *Kibera Kid* amongst others have been produced in Kenya in the last

¹³ *Derby Telegraph* (UK) (April 6, 2010) “Avatar would have grossed even more but for the illegal internet downloads” at <http://www.derbytelegraph.co.uk/avatar-grossed-illegal-internet-downloads/story-11621899-detail/story.html#9exfjQ8PUB8fIwHU.99> accessed on 24/10/2016.

¹⁴ Jess Denham, “Game of Thrones season 5 breaks piracy record with 32m illegal downloads” *The Independent*, UK at <<http://www.independent.co.uk/arts-entertainment/tv/news/game-of-thrones-season-5-breaks-piracy-record-with-32m-illegal-downloads-10197482.html>> accessed on 24/10/2016.

¹⁵ Strategic Advisory Board for Intellectual Property Policy, *The Relationship Between Copyright and Contract Law* (2010)

¹⁶ Cap 130 Laws of Kenya.

¹⁷ See *Wanuri Kahiu & another v CEO, Kenya Film Classification Board - Ezekiel Mutua & 4 others* [2018] eKLR where the Kenya Film Classification Board banned the film *Rafiki* for purportedly being morally offensive and consequently preventing the petitioners from submitting the film to the Oscars Selection Committee Kenya for entry to the 2019 Oscars Awards festival under the Best Foreign Language Film category. The Court temporarily lifted the ban to enable the petitioners submit the movie for Oscars. The main petition is still ongoing.

five years.¹⁸With the new digital migration laws, local broadcasters are expected to have forty (40) per cent of their shows produced locally.¹⁹ Further, pursuant to section 18 of the Programming Code, broadcasting stations are expected to ensure that within one year of award of licence, not less than 40% of their station's programming is local content, which should increase to 60% within four years after receipt of a licence.²⁰While this requirement is likely to promote innovation in production of local audio-visual films, digital piracy remains a major threat with increased internet access. Popular file sharing networks such as BitTorrent, PiratesBay are accessed in Kenya as anywhere else in the globe. The challenges in protecting digital audio-visual content accessed and created in Kenya remain similar, hence the need to enhance their protection through copyright or contract.

The regulatory local content requirements for Kenyan broadcasters in the form of the Programming Code is expected to create an upsurge in the production of local films. As noted, the Code guarantees locally produced films up to 60% of broadcasting airtime. Local film producers are likely to reap big from this directive considering the exponential growth of local TV broadcasting stations in Kenya. However, due to the threats of online piracy facilitated, copyright holders may not enjoy the full benefits of this regulatory intervention. The threat of online piracy also discourages potential financiers to local film production since the total revenues may not be sufficient to cost of creating the works. The problem is magnified by the fact that the producer's

¹⁸ Internet Movie Database (IMDb), "Kenya's Movies," at < <http://www.imdb.com/list/ls075755874/>> accessed on 7/12/2017.

¹⁹ Frankline Sunday, "Kenya's film industry is in revival mode" *The Standard*, Nairobi at < <https://www.standardmedia.co.ke/business/article/2000178722/kenya-s-film-industry-is-in-revival-mode>> accessed on 25/10/2016.

²⁰ The Programming Code for Free-To-Air Radio and Television Services in Kenya, section 18.2.1.

cost of creating and disseminating the audio-visual work are incurred before it is known what the demand for the work will be.²¹

The impact of online piracy on the Kenyan film industry is twofold. In the first instance, digital technologies facilitate the proliferation of pirated foreign movies in the local market. This means that consumers can access these foreign films cheaply compared to locally produced ones. Secondly, the locally produced films can similarly be pirated using digital technology hence denying the copyright owners the right to earn money from their work. Once a consumer is able to stream or download a local movie in the illegal online platforms, they will have no incentive to purchase a genuine copy of the work hence denying the local audio-visual stakeholders access to revenue from their work.

There are numerous examples in Kenya of infringement of audiovisual works. It is common to walk in the streets and find various traders, in shops and on the streets, selling films for which they do not have authority from the rights holders. A good example is the case of the film “*Nairobi Half Life*”; thousands of infringing copies were available for purchase before the producers released it for sale or other forms of distribution.²² With online piracy, the distribution of the infringing copies is even much faster and on a wider scale. There is therefore urgent need to protect filmmakers and actors in Kenya to enable them to realize their economic rights.

Even with the recent enactment of the Movable Property Security Rights Act 2017 that enables the use of various forms of IP as security²³, there is growing concern that the potential for

²¹ Peter J Groves, *Sourcebook on Intellectual Property Law* (Cavendish Publishing Limited, London, 1997) 264.

²² Kenya Copyright Board, “Copyright And The Audiovisual Industry In Kenya: A Practical Guide on Copyright for Film makers” in World Intellectual Property Organization (WIPO) “Strengthening the Audio-visual Industry in Africa” at <http://www.kenyafilmcommission.com/images/pdf/COPYRIGHT--THE-AUDIOVISUAL-INDUSTRY-IN-KENYA.pdf> accessed on 20/2/2018.

²³ Movable Property Security Rights Act, 2017, section 2.

infringement of digital audio-visual works through online piracy is likely to fundamentally reduce revenue for holders of copyright in these works. This paper also appreciates the efforts to combat online piracy by tightening controls over Internet Service Providers (ISPs) as contemplated in the Copyright (Amendment) Bill 2017. While this is a great step in the right direction, the provisions are mere proposals and yet to have the force of law in Kenya.

A cursory review of measures adopted to protect digital audio-visual work reveals a combination of copyright and contractual models. For instance, for purposes of enforcement of copyright in audio-visual works, the KECOBO has implemented the anti-piracy security device, which is a tamper proof sticker that is placed on legitimate film carriers. However, this security feature does not apply to digital copies, thus making online piracy a major challenge to the film industry in Kenya. The digital equivalent of such measure is the digital fingerprinting technology, which enables digital copies to be compared by a set of parameters and any pirated content to be detected, even if significantly modified.²⁴ Further, although the existing mechanism of protection allows for criminal prosecution of copyright infringement, online piracy is a transboundary problem that cannot be effectively tackled using territorial law. Hence the more urgent need to explore options within and beyond the law to cater for the emerging challenges presented by online piracy.

Broadly stated, copyright law protects digital content by shielding the copyright owner's given rights against three different groups; competing producers, distributors and users.²⁵ Due to the special characteristics of digital audio-visual works, owners of intellectual property rights in such works have employed numerous mechanisms to restrict access and use, and to derive more revenue

²⁴ The Economic Times, "Definition of 'Digital Fingerprinting'" at <<https://economictimes.indiatimes.com/definition/digital-fingerprinting>> accessed on 9/11/2018.

²⁵ Michael J. Meurer, 'Copyright Law and Price Discrimination,' (2001-2002) 23 Cardozo L. Rev. 55, 60.

from uses of the digital content.²⁶ The interventions include the use of computer operating systems or software to restrict access over the computer system and in the internet. Such software may regulate the audience that may be able to access the digital audio-visual content, control reproduction and dissemination of the content or allow access only after payment of specified subscription fees. In technology advanced economies like the US, digital content is protected using measures passwords, encryption, cryptology, and scrambling as well as related digital rights management systems (DRMs).²⁷ File encryption simply converts a file from a manipulable file format such as a word processor document or a picture file that can be opened or viewed with appropriate software to a scrambled format.²⁸ Authorization in the form of possession of an appropriate “key” is required to “decrypt” the file and restore it to its manipulable format.²⁹ Such measures are then reinforced through law: the Digital Millennium Copyright Act (DMCA), 1998 which criminalizes the breaking of such protective mechanisms.³⁰

This paper will therefore argue that with reference to digital audio-visual works, Kenya must expand the scope of existing statutory protection in order to promote investment in the film industry to such magnitudes as Nollywood of Nigeria or Bollywood of India. This can be achieved not only through benchmarking of international best practice in fighting online piracy but

²⁶ Samuelson, ‘Digital Media and the Changing Face of Intellectual Property Law’, 328.

²⁷ Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa* (Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya, 2016) 15.

²⁸ Michael Keplinger, “Technological Measures for Protection of Copyright and Related Rights on the Internet—Present and Future Technologies” (Regional Workshop for Countries of Asia and the Pacific on the WIPO Internet Treaties and Electronic Commerce, Manila, October 22 to 24, 2001) at <http://www.wipo.int/edocs/mdocs/copyright/en/wipo_cr_ec_mnl_01/wipo_cr_ec_mnl_01_3.pdf> accessed 9/11/2018.

²⁹The public key is the most widely used technique in data encryption. This technique can be used to encrypt data using an algorithm requiring two particular keys – a “public” key and a “private” key. The two keys are affiliated with the recipient to which the information is to be sent. The “public” key is distributed publicly, while the private key is kept secret by recipient. Data encrypted using a person’s public key can only be decrypted using that person’s secret, private key.

³⁰ Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa*, 15.

developing an effective legal and enforcement regime that can adequately protect Kenya's budding film industry.

1.4.Theoretical/ conceptual framework

The essence of copyright protection is for the benefit of all, the creators and the public. Major theories on copyright protection have their backgrounds in philosophy, jurisprudence and economics. The theories attempt to defend the grant of copyright protection to creators and authors. The major theories include the, utilitarianism, labour or reward, personality and social planning theories. This paper will explain these theories in brief although the social planning theory will form the focus.

According to the reward theory, copyright ought to be granted on the basis that the law should give authors what they deserve.³¹ In this sense copyright is a reward for an author's labour.³² This theory borrows from John Locke's labour theory which argues that a person who labors upon resources that are either unowned or "held in common" has a natural property right to the fruits of his or her efforts and that the state has a duty to respect and enforce that natural right.³³ According to this theory, without the counterbalancing grants of monopoly power bestowed through copyright and patent, the inability of authors and inventors to appropriate economic returns from their labors would result in the underproduction of new works and inventions.³⁴ By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and

³¹ William Cornish, David Llewelyn & Tanya Aplin *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, (Sweet & Maxwell, London, 2013).

³² See also Mark A. Lemley (2004) "Ex Ante versus Ex Post Justifications for Intellectual Property," *The University of Chicago Law Review*, 71:1, 129-149.

³³ John Locke (1690) *The Second Treatise on Government 1690* (Hackett Publishing, Indianapolis, 1980).

³⁴ William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, (1989) 18 J. LEGAL STUDIES 325, 326.

disseminate ideas.³⁵ Through the reward theory, Kenyan filmmakers will be able to reap rewards from their works through the enhancement of protection of such works in the digital era.

The personality or labour theory focuses on protecting the emotive connection between the artist and his creation.³⁶ This theory forms the basis for moral rights which include an author's rights to be credited for her work, to protect the integrity of her work, to determine when to publish a work, and to demand that a work be returned.³⁷ The moral rights also include the right to attribution. Thus, the moral rights ensure that the integrity of the creators of digital audio-visual work as well as that of their works are maintained even as the economic rights ensure rewards for creative effort.

The social planning theory advanced by William Fischer³⁸ focuses on the socio-cultural value of the copyrighted works. Under this theory, law only comes in to provide protection to intellectual property efforts that will benefit the society at large. The resultant gains of the protection are examined and weighed against the costs of ensuring such protection. Consequently, policymakers should strive to create and allocate entitlements to resources in the fashion that best enables people to fulfill those needs.³⁹ Such private property rights include intellectual property which encompasses digital copyright.

In the case of Kenyan filmmakers, the government can enhance its facilitative role by ensuring strong IP protection of audio-visual works in the digital era. This will not only move towards

³⁵ *Harper & Row, Publishers, Inc. v. Nation Enters.* (1985) 471 U.S. 539, 558.

³⁶ Jessica Meindertsma, (2010) "Deontologists v Consequentialists" at <https://library.osu.edu/blogs/copyright/author/meindertsma-1osu-edu/> accessed on 20/10/2016.

³⁷ Paul Goldstein Copyright, Patent, Trademark, and Related Doctrines at <http://www.djstein.com/IP/Files/Copyright,%20Patent,%20Trademark,%20and%20Related%20Doctrines.pdf> accessed on 23/10/2016.

³⁸ William W. Fisher, "Theories of Intellectual Property" (2001) in *New Essays in the Legal and Political Theory of Property*, 45-89.

³⁹ Daniel Stengel, "Intellectual Property in Philosophy" in *Archives for Philosophy of Law and Social Philosophy*, 90:1, 20-50.

eliminating illegal competition for local films but also incentivize investment in local filmmaking. Heightened with the challenge of online piracy, this theory calls upon copyright administration system that does not occasion wastage of social resources. Apart from the entertainment value of digital audio-visual work, the social value of their protection includes inter alia, employment creation to many Kenyan youth, cultural preservation and mass education.

William Fischer bases his theory of social planning on the Jeremy Bentham's utilitarian theory.⁴⁰ He argues that one of the central issues to be considered in the shaping of property rights should be the maximization of the net social welfare.⁴¹ Therefore in the context of copyright, there is need to strike an optimal balance between the power of exclusive rights to stimulate the creation of audio-visual work on one hand, and the need to ensure that such exclusive rights do not curtail public access on the other.⁴² This paper extensively interrogates the theme of access versus control with respect to digital audio-visual works in Kenya and protection of consumer welfare.

1.5.Literature review

For the purpose of this research, literature means and includes constitutions, statutes, regulations, books; journal articles book chapters, newspaper and magazine articles, and online sources. I discuss, analyse and review some of the literature that have informed this study below.

The Kenya Copyright Act 2001 provides for protection of copyright in literary, musical and artistic works, audio-visual works, sound recordings, broadcasts and for connected purposes. The Act came into force on 1st February 2003.

⁴⁰ Neil Weinstock Netanel "Debunking Blackstonian Copyright", (2009)118 *Yale Law Journal*, 274 - 299

⁴¹ Fisher, "Theories of Intellectual Property".

⁴² Ibid

Audio-visual work is defined under section 2 of the Act as ‘fixation in any physical medium of images, either synchronized with or without sound, from which a moving picture may by any means be reproduced and includes videotapes and videograms but does not include a broadcast’.

The definition of audio-visual work in the Kenya Copyright Act capture an important aspect of scope of protection actually provided or contemplated by the legislation. This becomes problematic in the digital context when the definitions may not apply wholly to the new forms of digital audio-visual content. In terms of enforcement, the Kenya Copyright Board (KECOBO) is established to direct, co-ordinate and oversee the implementation of laws and international treaties and conventions to which Kenya is a party and which relate to copyright and other rights recognised by the Act and ensure their observance.⁴³

In terms of protection of digital audio-visual content, the Act prohibits circumvention of technological devices used to protect copyright rights, as well as the removal or alteration of electronic rights management systems. The remedies contemplated for infringement under the Act include damages, injunction, and delivery up.⁴⁴ The Act also provides for Anton Pillar orders to secure evidence before it is hidden or destroyed by the accused party.

Under the Act, copyright contract in digital audio-visual works is regulated through licensing. Under Section 2 of the Act, a “licence” means a lawfully granted licence permitting the doing of an act controlled by copyright. Other than through licence, copyright is transmissible by assignment, testamentary disposition, or by operation of law as movable property.⁴⁵ However, such licences are required to be in writing and accompanied by a letter of verification from KECOBO

⁴³ Kenya Copyright Act, section 3.

⁴⁴ Kenya Copyright Act, section 35 (4).

⁴⁵ Kenya Copyright Act, section 33(1).

if the copyright works are from outside Kenya. The recognition of the need for licensing under the Copyright Act is however not accompanied with clear legislative guidelines on the content and reasonableness of the licence contracts.

This paper will argue that the above and other provisions of the Kenya Copyright Act do not adequately protect the rights of authors to control how their digital audio-visual work is used. For instance, section 33 (3) of the Act makes it mandatory for any assignment or exclusive licence of copyright to be in writing signed by or on behalf of the assignor, or by or on behalf of the licensor. Such provisions may not be actualized in the digital world where the user of the copyrighted audio-visual content may be in a different country. The costs of making such arrangements will also be prohibitive to the parties, hence restricting the free flow of digital audio-visual content to the public.

Ben Sihanya, in his *Digital Copyright in Kenya and Africa*⁴⁶ identifies the need for the Kenyan Copyright Act 2001 and related laws to keep pace with developments in the field of information and communication technology (ICT). For any digital material to be protected under the Copyright Act, it should fall within the definition of what is copyrightable subject matter as provided under section 2 of the Act. According to Sihanya, the traditional tests for copyrightability apply in the protection of digital audio-visual content, that is, the work must be original, and expressed in a tangible, material or fixed form.⁴⁷

Sihanya also acknowledges that as technology develops, many authors are under risk from digital infringements of their copyrighted and other intellectual property (IP) related works since

⁴⁶ Ben Sihanya, "Digital Copyright in Kenya and Africa," in Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa* (Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya, 2016) 243-280.

⁴⁷ *Ibid*, 246.

technological developments have made copyright materials easier to access and reproduce, and therefore more difficult to protect. He also recognises that the introduction of the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) of 1996 ushered in many changes in the copyright field.⁴⁸

Sihanya also identifies lack of territoriality as a critical challenge in protection of digital works. He describes the borderless and international character of the internet as posing serious challenges to copyright protection and enforcement.⁴⁹ Since no single entity controls the internet, this has important legal implications as copyright enforcement is essentially territorial.

In his analysis of the Kenyan Copyright Act, Sihanya recognises that the Act has been influenced by transnational legal and institutional regimes such as the Universal Copyright Convention (UCC), Berne; related instruments under the UN Educational, Scientific and Cultural Organisation (UNESCO) and the World Intellectual Property Organisation (WIPO): and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs).⁵⁰

In reforming Copyright Act to secure digital content in Kenya, Sihanya recommends that a secure balance must be achieved at two levels.⁵¹ First, between protection and access. And secondly, between technological protection measures (TPM), digital rights management (DRM) and rights management information (RMI) on the one hand and market principles, social norms on the other.

In the current study, Sihanya's analysis will provide critical background information to the protection of digital audio-visual content in Kenya. The principles, mechanisms and procedures

⁴⁸ Ibid, 248.

⁴⁹ Ibid, 249.

⁵⁰ Ibid, 255.

⁵¹ Ibid, 279.

adopted in the protection of digital copyright will be applied in explaining how far contractual licensing is capable of protecting digital audio-visual content in Kenya. Sihanya's book will also provide a truly local - contextual approach to the protection of digital audio-visual work in Kenya. However, Sihanya's work fails to specifically focus on the peculiar challenges online piracy presents to the Kenyan audio-visual industry, a gap that the present paper seeks to fill.

William Cornish *et al*,⁵² in their "Digital Technology: Computers and the Internet," discuss many challenges posed by digitization for intellectual property regimes. The challenges are discussed under three sections; computer programs, computer storage and output and the internet.⁵³ "Literary work" that is protected under Copyright now includes computer programs, and the preparatory design of a computer program. First, the authors discuss how the UK Copyright, Designs and Patents Act of 1988 protect computer programs by prohibiting copying the work in any medium by electronic means including making of copies which are transient or are incidental to some other use of the program.⁵⁴ In protection of stored content and output, the authors describe how computer databases are protected under the UK CDPA 1988.⁵⁵ The Act allows copyright in databases on the basis of authorship involving personal intellectual creativity plus the additional *sui generis* rights given to the maker of the database.⁵⁶ The Act protects 'extraction' and 're-utilization' of the whole or a substantial part, qualitatively and quantitatively, of computer databases.

⁵² William Cornish, David Llewelyn & Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, (8th edn, Sweet & Maxwell, 2013), Chapter 20.

⁵³ Cornish, *et al*, "Digital Technology: Computers and the Internet", 818.

⁵⁴ U.K. Copyright, Designs and Patents Act, section 17.

⁵⁵ Cornish, *supra*, 846.

⁵⁶ The *sui generis* right prohibits the extraction or re-utilisation of any database in which there has been a substantial investment in obtaining, verifying or presenting the data contents. Thus there is no requirement for creativity or originality (See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, at < <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31996L0009&from=EN>> accessed on 9/11/2018).

Regarding protection of digital content over the internet, the book considers two types of infringement. First, where copyright material has been uploaded to the internet without copyright authorization. Drawing examples from the UK Copyright law, the authors discuss how liability arises for internet sites which avail copyrighted information on interactive services which are open to the public, whether for free or for payment. Under section 97A of the CDPA 1988, an injunction may issue against an internet service provider who has knowledge that one or more persons is using its service to infringe copyright. Secondly, where the material is owned or licensed but not made available for free access and use by others.⁵⁷ In this case, questions may arise over access of the copyrighted material at a right-owner's or licensee's website and the restrictions for use of such content once it has been downloaded. The providers of Digital Rights Management Systems (DRMs) may set out contractual conditions to which a user trying to access the material must agree before gaining access. Alternatively, the DRM provider may build into its site an access control, such as an encryption, scrambling or other means designed to limit how the content can be used once downloaded.⁵⁸

Generally, "Digital Technology: Computers and the Internet," lays a benchmark for the direction Kenyan Copyright law ought to take. The authors have used examples from UK, a jurisdiction with advanced copyright protection legislation. Since digital technology has revolutionized access to information globally, Kenya needs to draw distinctions with the examples given in this work and make context-specific adjustments to its copyright law and adopt additional measures beyond the law such as markets and technology. This work will therefore assist this research in drawing arguments for enhancement of market options such as contractual licensing as a means of enforcing

⁵⁷ Ibid, 859.

⁵⁸ Ibid, 875.

the copyright granted to creators of digital audio-visual content. However, “Digital Technology: Computers and the Internet” fails to highlight the shortcomings of the conventional measures adopted by copyright holders in digital technologies such as TPMs and user licence agreements that the present paper will address.

In “Current Issues in Copyright”⁵⁹, Hector MacQueen, Charlotte Waelde and Graeme Laurie, consider a number of issues of current concern in copyright. They argue that the development of digital, mobile and interactive technology as the means of delivering ideas, information and entertainment have necessitated copyright reform.⁶⁰ The authors highlight how the use of unlicensed peer-to-peer networks to share files especially sound recordings, present challenges of whom to ascribe liability for copyright infringement. Digital technology has also facilitated easier conversion of copyrighted work into other forms or products. In such cases, the medium of transmission of such works as well as the substantive content may be subject to a multitude of subsisting rights thus posing challenges to digital copyright protection.

The authors have also delved briefly into the issue of digital copyright infringement. Since the digital environment easily facilitates copying of copyrighted work, the right to make copies is no longer as significant as it was in the analogue era. The rights of access, modification and subsequent distribution have acquired more relevance in the digital world.⁶¹ The exception of ‘fair use’ in copyright infringement has also been problematized by the authors. Contemporary debates have emerged as to whether the ‘fair use’ provisions in copyright statutes are still necessary in the

⁵⁹ Hector MacQueen, Charlotte Waelde & Graeme Laurie, *Contemporary Intellectual Property Law and Policy* (Oxford University Press, New York, 2007) Chapter 7, 221-249.

⁶⁰ *Ibid*, 222.

⁶¹ *Ibid*, 242.

digital environment. Questions have also arisen whether the provider-user contracts, supported by DRMs, should override certain copyright law exceptions of ‘fair use’.

The authors provide an elaborate discussion of challenges posed by provider-user contracts in digital content protection. The challenges are not restricted to particular jurisdictions. The current research will adopt some of the approaches in discussing how to enhance protection of digital audio-visual work in the Kenyan film industry and expand on these approaches to propose other enforcement measures beyond contractual licensing.

In her *Intellectual Property Law*,⁶² author Jennifer Davis admits that new reproductive technologies pose novel obstacles to expansion of copyright. Davis believes that since much of digital technology is interactive, consumers enjoy leeway in accessing copyrighted digital content. She further highlights how new digital technology has been used to circumvent technological measures to protect digital content. The technological measures refer to any technology, device or component which is designed to protect a copyright work other than a computer program.⁶³ Davis highlights how the UK CDPA 1988 has tried to address the challenges posed by novel technology by reviewing fair use and anti-circumvention measures.

Davis’ *Intellectual Property Law* further discusses the evolving themes of protection of copyright in digital content in the UK context. This research will however benefit from this book in explaining how contractual licensing works in the digital world and exploring its limitations and opportunities in protecting digital audio-visual content in Kenya. Like most existing literature

⁶² Jennifer Davis, *Intellectual Property Law* (3rd edn, Oxford University Press, New York, 2008) 68-88.

⁶³ Davis, *ibid*, 77.

however, Davis' book approaches digital infringement of copyright in a broad manner unlike the current work that narrows down the discussion to the Kenyan audio-visual industry.

Frank H. Easterbrook in his "Contract and Copyright"⁶⁴ argues that what copyright and other IP law does is create property rights in information, after which normal rules of contract and property law determine who uses that information. He believes that copyright protection in digital content entails a combination of digital rights management and contracts between the rights holders and the consumers.⁶⁵ The rights granted under copyright law therefore set the stage for contracts.

Easterbrook proposes the creation of bargaining institutions to set copyright standards and rules on permissions and payment terms for digital content.⁶⁶ He believes that each Internet server and client would understand these terms and carry out the negotiation automatically, remitting any payment to an agreed depository by technologically secure methods.

Easterbrook's work makes numerous assumptions on the contractual capacities and technological competence of licensees and other public users of digital content. Easterbrook's work forms the basis for the arguments presented in the current study in favour of enhanced contractual protection of the IP rights of creators of digital audio-visual work. The current study will however go beyond Easterbrook's work to make context-specific recommendations on how to enhance the scope of protection of digital audio-visual works in Kenya.

In his article "Contracts Enlarging a Copyright Owner's Rights: A Framework for Determining Unenforceability", Ramona L. Paetzold⁶⁷ opines that a system of copyright law exists because of

⁶⁴ Frank H. Easterbrook "Contract and Copyright (2005)42 Houston Law Review 953.

⁶⁵ Ibid, 954.

⁶⁶ Ibid, 972.

⁶⁷ Ramona L. Paetzold "Contracts Enlarging a Copyright Owner's Rights: A Framework for Determining Unenforceability", (1989)68 Neb. L. Rev. 3, 816.

a belief that for intellectual property, the free market system cannot be relied upon to secure the interests of both author and society. He relates that contracts, through the licensing of copyrighted works, allow authors to receive economic gain at privately negotiated prices and therefore promote public access to intellectual property through arrangements for its manufacture, distribution, performance, or display.⁶⁸

For Paetzold, contractual freedom allows copyright owners to enlarge their rights by limiting the use or dissemination of the copyrighted work beyond the limits of the copyright law.⁶⁹ However, he cautions on the misuse of contractual freedom in a manner that undermines dissemination of the protected work to the public. Thus, he argues that courts have been ready to find a contractual agreement unenforceable per se, because the contractual provisions violate such a clear policy in the statute that they cannot be enforceable regardless of the interest in the enforcement.⁷⁰

Although “Contracts Enlarging a Copyright Owner's Rights: A Framework for Determining Unenforceability” recognizes a number of limitations to copyright licensing, it helps to contextualize the views to suit digital audio-visual content. From the work, it emerges that authors have commonly adopted self-help remedies in protecting their works in situations where the law is not clear or enforcement lax such as Kenya. This research paper will therefore endeavor to discuss the limitations in the context of protection of digital audio-visual content within the Kenyan film industry.

1.6. Objectives of the study

This research is focused on determining the following three (3) objectives:

⁶⁸ Ibid, 817.

⁶⁹ Ibid, 818.

⁷⁰ Ibid, 823.

1. To critically analyse the status of protection of digital audio-visual works under transnational and regional instruments as well as the Kenyan Copyright Act 2001.
2. To highlight and discuss the challenges posed by online piracy in protecting digital audio-visual content generally and relate the challenges to Kenya's political economy.
3. To make relevant recommendations on how to enhance the enjoyment of rights of copyright holders in digital audio-visual works in Kenya.

1.7. Assumptions or hypotheses

This study proceeds on the following three interrelated assumptions or hypotheses.

- a) That the Kenyan audio-visual industry is currently experiencing massive growth.
- b) That the existing laws on protection of audio-visual works do not adequately cater for challenges posed by online piracy.
- c) That enhancing protection of the rights of copyright holders in digital audio-visual work is likely to promote further investment and growth in the Kenyan audio-visual industry.

1.8. Research questions

This research is focused on determining the following three (3) questions:

- a) How does online piracy affect the protection of IP rights of copyright holders in digital audio-visual content in Kenya?
- b) What is the current legal framework providing for the protection of digital audio-visual content in Kenya?
- c) Is the existing legal framework effective in protecting interests of the copyright holders in digital audio-visual content?

- d) What is the international best practice in protecting digital audio-visual content from online piracy?

1.9. Methodology

This study shall wholly rely on desk review and use of secondary research methods. This shall therefore involve gathering and analysing information already published in print media and the Internet. These shall include books, journals, monographs, book chapters, newspaper articles and other online sources. This paper will also rely on scrutiny of the legal provisions on protection of digital audio-visual content under transnational, regional and domestic instruments and especially under the Kenyan Copyright Act 2001 and related laws. The research will also consider the current international best practices to analyse and make recommendations on what lessons Kenya can borrow to enhance its regime for protecting digital audio-visual content from online piracy. Although the research has benefitted from comments by the Kenyan copyright enforcement agency, KECOBO, the writer has not been able to fruitfully engage the affected copyright holders of digital audio-visual works.

1.10. Chapter breakdown

This study will be structured into the following five chapters:

Chapter 1: Methodology on the study of Protection of Digital Audio-Visual Works in Kenya

This Chapter addresses key issues on research methodology including conceptualizing and problematizing the issue, identifying the research objectives, research questions and research hypothesis. The chapter also addresses the literature review as well as the conceptual and theoretical framework on the topic.

Chapter 2: Legal, regulatory and institutional framework for the protection of digital audio-visual content

This Chapter will define technical terms used in this research and discuss the legal, regulatory and institutional framework for the protection of digital audio-visual works in three dimensions; international, regional and local. The chapter will also highlight the challenges within the discussed frameworks.

Chapter 3: Contemporary challenges to copyright protection in digital audio-visual content in Kenya

This Chapter will analyze the contemporary challenges posed by online piracy in protecting rights of copyright holders in digital audio-visual content and the extent of their prevalence in Kenya. Finally, this chapter will discuss emerging judicial jurisprudence in protecting audio-visual work in the context of the challenges identified through an analysis of court cases.

Chapter 4: International Best Practice in protection of digital audio-visual content

In this Chapter, the research will address the current international models of protection of digital audio-visual work. The aim of this chapter will be to highlight the prevailing trends in fighting online piracy of audio-visual work and compare these to Kenya's regime.

Chapter 5: Proposals and Recommendations to enhance protection of digital audio-visual content in Kenya

This final Chapter will make proposals on how best to enhance protection of digital audio-visual works in Kenya having considered the challenges posed by online piracy and how international best practice models have tackled the same.

CHAPTER TWO

The Legal, Regulatory and Institutional Framework for Protecting Digital Audio-Visual Content in Kenya

2.1. Introduction

Chapter One outlined a background to the protection of copyright in digital audio-visual works and introduced online piracy as an entrenched challenge to the protection of digital audio-visual works globally. Chapter 1 also highlighted why online piracy should worry stakeholders in the Kenyan film industry. For one, the availability of illegal online platforms of accessing digital audio-visual work is a reality in Kenya. With the proliferation of ISPs in Kenya and the availability of mobile internet, online piracy is more prevalent than ever. The lingering question that remains is whether creators of digital audio-visual work will be able to reap any economic benefits from their works in Kenya. The ability to control the dissemination of the resultant audio-visual work is an important component of ensuring revenue flows to the investors and stakeholders in Kenya's film industry. Online piracy further undermines the ability to maintain a fair balance between the rights holders in digital audio-visual work and the consumers.

For Kenya, it is becoming increasingly difficult to ignore the apparent gaps in the existing legal and institutional framework for the protection of digital audio-visual works in the era of online piracy. From this background, this Chapter will build on Chapter 1 and discuss how the prevailing international, regional and domestic legal regime protect digital audiovisual work. The key objectives of this Chapter are to first state the relevant legal regime as it exists and proceed to identify the underlying gaps in the framework. Before delving into the legal and institutional regime, this Chapter will first conceptualize the challenges of protecting digital audio-visual works

in Kenya with the surge of online piracy. The first part of the Chapter will be a definition of the key terms of usage in this Chapter and in the ensuing parts of this paper.

2.2. Conceptualization of the Legal, Regulatory and Institutional Framework for the protection of digital audio-visual work in Kenya

Central to the entire regime of intellectual protection is the conferment of legal exclusivity in the marketplace, the right to prevent others from using ideas or information to their own commercial advantage.¹ Nations and the international community responded to this need by enacting various instruments to reconcile the competing rights of consumers and the creators of intellectual works. It increasingly became crucial to protect the intellectual property rights as nations competed to develop and enhance the commercial value of the various forms of IP.² In fact, the level of protection of IP became a distinguishing factor of the level of development between nations especially for higher forms of IP such as patents.

Copyright offers protection to the authors against the unauthorised use or dissemination of the works and protected the moral rights of the authors. The two twin concepts of economic and moral rights have been consistently applied in the protection of all forms of IP whether analogue or digital. However, the pace of legal change has not kept abreast with the fast-changing technology. Recent developments in digital technology have enabled mass dissemination of information in various forms in the global economy. At the heart of the technological transformations of the information age is the availability of the internet. At the global scene, the internet has effectively revolutionized the protection of IP in various ways.

¹ William Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, (4th edn, Sweet & Maxwell, 1999), v.

² Ibid.

On the one hand, it has brought about cheaper and more effective methods of diffusion of various forms of IP to millions of users across the globe. Similarly, the internet has significantly reduced the investment and production costs of various forms of IP including digital audio-visual works. This means that users can obtain copies of digital audio-visual works at very low or even no costs. It has accordingly been difficult to limit access to digital audio-visual works over illegal online platforms. This has necessitated reshaping of IP laws to accommodate the emerging trends brought about by the internet revolution. For instance, what amounts to publication of analogue works is now significantly different in the digital world with a simple link of access to digital audio-visual works qualifying.

The need for enhanced protection of digital audio-visual works consequently follows from the acceptance that new technologies have outpaced existing laws for the protection of such works. Therefore, the more need to explore mechanisms of harmonization or options beyond the law to secure the rights of creators that were previously protected under the traditional legal provisions. Enhanced protection of copyright in digital audio-visual work in Kenya will contribute to socio-economic development in at least two ways. First, copyright and IP are a source of royalty and related payments to creators, publishers and distributors. Second copyright and IP are a source of regular national income or revenue stream, especially in the form of taxes.³

Relatedly, in Kenya the regime for monitoring copyright transactions is not fully developed.⁴ The institutional capacity of KECOBO and collaborative agencies to monitor online piracy is limited. As a result, the role of identifying infringing use is largely left to the copyright owners who have

³Ben Sihanya, “Copyright Law in Kenya” (2010) at <https://innovativelawyering.com/attachments/article/26/Copyright%20Law%20in%20Kenya%20-%20Prof%20Ben%20Sihanya.pdf> accessed on 10/5/2018.

⁴ Ibid,11.

neither the capacity nor the mechanism to monitor the dissemination of their work and look out for copyright infringers.⁵

Further, and as Sihanya emphasizes, many Kenyan creators or artists are not aware that they possess valuable IP rights and consequently go about their lives believing that copyright infringement is either permissible or has no remedy.⁶ The problem is exacerbated for digital audio-visual works whereby majority of Kenyan consumers engage in illegal streaming, downloading and sharing as a norm. According to a 2016 survey by KECOBO, out of 253 respondents, 166 would not download or share copyright-protected material on the internet if they were aware that the material was so protected; while 192 of the respondents would stop the illegal downloading or sharing if they were informed of the copyright in such material.⁷ Additionally, 220 of the respondents would not download content from pirate sites if there were well-known authorised sites.⁸ This paper will emphasize on extensive public education on IP rights as an extra-legal means of ensuring creators of digital audio-visual work benefit from their content.

Finally, online piracy deprives the Kenyan government of substantial amounts of revenue from the unauthorised access and use of digital audio-visual work. Illegal online file-sharing platforms are easily accessible by any Kenyan with internet access. While most users access the illegal sites to download or watch the movies for personal consumption, a significant number also use the movies commercially. The operators of the illegal businesses download the movies from the online sites

⁵ Sihanya, “Copyright Law in Kenya”, 11.

⁶ Ibid.

⁷ KECOBO COPYRIGHT SURVEY REPORT (March 2016) at < <http://www.copyright.go.ke/downloads/send/5-copyright-news-magazine-survey/60-kecobo-copyright-survey-report.html> > accessed on 10/5/2018.

⁸ Ibid.

and burn them into DVDs which they sell for as low as KShs. 40/-. This denies the Kenyan government of revenue from the genuine purchases and sharing of such digital audio-visual works.

On 19th January 2012 the United States Department of Justice seized and shut down the file-hosting site *Megaupload.com* and commenced criminal cases against its owners and others.⁹ The action was described as, “the largest criminal copyright cases ever brought by the United States and directly targets the misuse of a public content storage and distribution site to commit and facilitate intellectual property crime.”¹⁰ This example points out the need for Kenya and other African countries to enhance enforcement measures against infringers of copyright in digital audio-visual work. KECOBO, Kenya’s copyright enforcement agency, must therefore escalate cooperation with ISPs in order to identify infringers and hold them accountable. ISPs will be forced to comply or have their operating licence revoked.

⁹BBC News Services, “Megaupload file-sharing site shut down” (8 March 2012) at <http://www.bbc.com/news/technology-16642369> accessed on 10/5/2018.

¹⁰ Ibid.

2.3. Definition of key terms

For the purposes of this paper. The following words have been used in the context of the meanings ascribed to them:

Audience- this is the preferred term for the people who read, listen or watch works protected by copyright. It is preferred to consumer because the work itself is not destroyed (consumed) by being watched. In fact, a work with no audience is arguably equivalent to no work at all.¹¹

Audio-visual work- means a fixation in any physical medium of images, either synchronised with or without sound, from which a moving picture may by any means be reproduced and includes videotapes and videogames but does not include a broadcast.¹²

Circumvention Device- a device (possibly hardware, software or a combination) that can be used to defeat Technological Protection Measures. Legislation like the Kenyan Copyright Act and USA's DMCA make using, building, trafficking in and even discussing such devices illegal, with very narrow exceptions for encryption research and the like. This despite the fact that using a circumvention device to make an illegal copy of a copyrighted work is already illegal.

Copyright - refers to a bundle of exclusive and intangible rights granted to the author(s) of a literary, musical, artistic or other creative work, protecting and enabling their control over their creation.

Digital Rights Management (DRM) – a term used to describe the technologies used to control access to or copying of a work. For example, encrypting a work so that only people who have a

¹¹Digital Copyright Canada, “Digital Copyright Terminology” at http://www.digital-copyright.ca/copyright_jargon.shtml accessed on 18/3/2018.

¹² Copyright Act No. 12 of 2001, section 2.

valid key can access it. DRM usually includes a set of legal permissions, frequently expressed as a licensing agreement, which establish what one can and cannot do with the work.

Technological Protection Measures (TPM)- this term refers to technologies that control and/or restrict the use of and access to digital media content on electronic devices with such technologies installed.¹³ TPMs require appropriate legislative and legal support to ensure that these measures are respected, and to deter the defeat of such measures by parties that might otherwise violate the rights of content owners.

Digital/ online Piracy- this refers to unauthorised, access, sharing or reproduction of digital copyrighted material especially on online platforms.

Fixation- a work is ‘fixed’ in a tangible medium of expression when its embodiment, “...is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. The requirement of fixation for digital audio-visual work merges “original work and the tangible object in order to produce subject matter copyrightable under law and includes fixation in media memory and virtual memory.”¹⁴

Infringing copies of a work- in relation to digital audio-visual work, means copies of the work produced by any process and in any form the making of which involves infringement of the copyright in the work.¹⁵

¹³ Dean S. Marks and Bruce H. Turnbull, “Technical Protection Measures: The Intersection of Technology, Law and Commercial Licenses” (WIPO Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), Geneva, December 6 and 7, 1999) at <http://www.wipo.int/edocs/mdocs/copyright/en/wct_wppt_imp/wct_wppt_imp_3.pdf> accessed on 9/11/2018.

¹⁴Evan Brown, “Fixed Perspectives: The Evolving Contours of The Fixation Requirement in Copyright Law” (2014)10 Wash. J.L. Tech. & Arts 17.

¹⁵ WIPO, “WIPO Glossary of Terms of The Law of Copyright and Neighboring Rights” WIPO PUBLICATION No.828 (EFP).

Internet Protocol (IP) address- means the number automatically assigned to a user's computer whenever they access the internet and that can sometimes be used to derive their general geographic area.

Public Domain- The realm of works that are no longer protected by copyright and are available for anyone to use, print, perform and copy.

Publication - means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived.¹⁶For digital audio-visual work, publication includes sharing file links in websites, blogs, and social networking platforms, and downloadable materials.

Reproduction- means the making of one or more copies of a work in any material form and includes any permanent or temporary storage of such work in electronic or any other form.¹⁷

¹⁶ Universal Copyright Convention, with Appendix Declaration relating to Articles XVII and Resolution concerning Article XI 1952, Article VII.

¹⁷ Copyright Act No. 12 of 2001, section 2.

2.4. Legal, Regulatory and Institutional Framework for Protecting Digital Audio-Visual Content in Kenya

Ben Sihanya characterizes the legal regime for IP protection into three; the UN regime, which is largely administered by the World Intellectual Property Organisation (WIPO) and United Nations Conference on Trade and Development's (UNCTAD's) Draft International Code of Conduct on Technology Transfer (ToT Code); the World Trade Organization (WTO) regime exemplified by the TRIPs Agreement; and the regional regime revolving around African Regional Intellectual Property Organisation (ARIPO), the African Intellectual Property Organization (OAPI), the African Union (AU), and various categories of regional trade agreements (RTAs) or free trade agreements (FTAs) such as East African Community (EAC), Common Market of Eastern and Southern Africa (COMESA), Southern African Development Community (SADC), Southern African Customs Union (SACU) and Economic Community of West Africa States (ECOWAS), among others.¹⁸ Following this grouping model, this chapter will discuss the provisions of the instruments in the three major categories, that is, international, regional and domestic that specifically apply to the protection of digital audio-visual works.

2.4.1. The International Legal Regulatory and Institutional Regime for the Protection of Digital Audio-Visual Works

For the purposes of protection of digital audiovisual works, this chapter will discuss the following international legal instruments; the Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPs), the Berne Convention for The Protection

¹⁸Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa* (Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya, 2016) 58.

of Literary and Artistic Works, The WIPO Copyright Treaty (WCT, 1996), and the Treaty on the International Registration of Audiovisual Works (Film Register Treaty).

2.4.1.1. The Agreement on Trade Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPs)

The TRIPS Agreement commences with the general application of the primarily trade principles of ‘national treatment’ and ‘most-favoured nation’ to IP protection. Under Article 3 of the Agreement, member states must accord the nationals of other parties treatment no less favourable than that accorded to its own nationals with regard to the protection of intellectual property. Further under Article 4, the ‘most-favoured-nation clause’, any advantage a party gives to the nationals of another country must be extended immediately and unconditionally to the nationals of all other parties, even if such treatment is more favourable than that which it gives to its own nationals.

Part II of TRIPs addresses various intellectual property rights in succession. With respect to copyright, parties are required to comply with the substantive provisions of the Berne Convention for the Protection of Literary and Artistic Works, in its latest version (Paris 1971), though they will not be obliged to protect moral rights as stipulated in Article *6bis* of that Convention.¹⁹

Under its Article 9(2), TRIPS entrenches the primary rule that copyright protection only extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts. The Agreement further requires that authors of audiovisual works be granted exclusive rights to authorize or prohibit the commercial rental of their works to the public.²⁰

¹⁹ TRIPS, Article 9 (1); see also, World Trade Organization (WTO), “ A Summary of the Final Act of the Uruguay Round” at < https://www.wto.org/english/docs_e/legal_e/ursum_e.htm> accessed on 12/4/2018.

²⁰ Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPs), Article 11.

Article 47 of TRIPS offers a reference point to creators of audio-visual work in the fight against online piracy. Pursuant to this Article, member states of the Agreement may grant judicial authorities power to order the infringer to inform the rightsholder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

2.4.1.2. The Berne Convention for The Protection of Literary and Artistic Works (Paris Act, 1971)

The Berne Convention provides a number of standards for copyright protection including copyrightability; subject matter of copyright; and copyright duration.²¹ Kenya acceded to the Convention on 11th March 1993 and it entered into force on 11th June 1993. Under Article 2(1) of the Convention, the expression “literary and artistic works” includes every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression. Digital audio-visual work therefore qualifies for protection as cinematographic works under Berne the fifth categorization of works which further include assimilated works expressed by a process analogous to cinematography.²² Two important tests for copyright are laid down in this article; fixation and originality.

A mere idea is not protected unless expressed in concrete format. Fixation in material form is therefore the first test that any intellectual work must meet to warrant protection. Article 2 of Berne, like most copyright statutes, allow for flexibility on the mode of fixation required. Thus, since digital audio-visual work is expressed in virtual format, this suffices. Fixation not only aids

²¹ Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa* (Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya, 2016) 60.

²² World Intellectual Property Organization (WIPO), “Guide to The Copyright and Related Rights Treaties Administered by WIPO And Glossary of Copyright and Related Rights Terms” (November 2003) 26.

in identifying the work but also serves as an important indicator or proof of the existence of the digital audio-visual works.

Additionally, the digital audio-visual work must meet the underlying originality test, that is, it must be the original expression of the work as a result of “skill and labor” or the “sweat of the brow”.²³ To satisfy the test of originality, the author must not only apply “sweat of the brow” but also imbue the work with “some minimum level of creativity,” a “creative spark”...The “spark need not provide a shock, but it must at least be perceptible to the touch.”²⁴ Digital audio-visual work must also meet the originality test before qualifying for protection.

Article 2(3) allows for protection of derivative works from digital audio-visual work in the form of translations, adaptations and other alterations as original works without prejudice to the copyright in the original work.

The Berne Convention further provides for national treatment in the protection of intellectual property rights.²⁵ “National treatment” means that, in countries other than the country of origin of a work, the authors of works eligible for protection are supposed to enjoy the same rights and exceptions as the nationals of those countries. For digital audio-visual works, the national treatment principle is fundamental in that once the original work is uploaded on the internet, it becomes accessible to the whole world.

Article *6bis* of the Convention forms the basis of the author’s moral rights of attribution and the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work, which would be prejudicial to his honor or reputation. This essentially

²³ Ibid 23.

²⁴ *Feist Publications Inc. v. Rural Telephone Service Co. Inc.* 499 U.S. 340 (1991).

²⁵ The Berne Convention for The Protection of Literary and Artistic Works, Article 5.

buttresses the rights of authors of digital audio-visual work to object derogatory uses of their work which has been made easier by online piracy.

Article 9 lays down the economic rights of authors to retain exclusive rights of authorizing the reproduction of their works while Articles 12 and 14 allow for the exclusive right of authorizing adaptations, arrangements and other alterations of their works. Reproduction entails availing the work to members of the public in any manner and form. Considering the virtual nature of digital audio-visual works, reproduction may occur through several methods such as illegal downloading and direct streaming from unauthorized sites. As this chapter illustrates, the potency of the right to reproduce original works has been diluted by the rampant online piracy of digital audio-visual works hence the need to enhance their protection. Reproduction is totally prohibited if it conflicts with the normal exploitation of the work. However, if the reproduction does not conflict with the normal exploitation of the work, it must be considered whether it does not unreasonably prejudice the legitimate interests of the author, in which case compulsory licences may apply subject to national legislation.²⁶

On enforcement, Article 16 of the Convention provides for seizure in any country of infringing copies of a work. Digital audio-visual works are infringed by unauthorized access facilitated by online platforms that do not necessarily require retention of physical copies. To this end, the Convention does not offer sufficient protection against online piracy of digital audio-visual works. The kind of censorship contemplated by the Convention is only possible if competent national authorities have the capacity and resources to carry monitor internet use and file-sharing by internet users in their respective domestic jurisdictions.

²⁶ Ibid, Guide to The Copyright and Related Rights Treaties Administered by WIPO And Glossary of Copyright and Related Rights Terms, 56.

2.4.1.3. The WIPO Copyright Treaty (WCT, 1996)

This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention. Despite signing this Treaty on 20th December 1996, Kenya is yet to ratify it. From the outset, the WCT recognizes the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works hence aspires to uphold the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.²⁷ The Fourth Paragraph of the preamble to the treaty particularly recognizes that such protection has an outstanding significance as an incentive for the creation of literary and artistic works.

The linking point of the WCT to Berne Convention in respect to digital audio-visual works is under Article 1 that states as follows:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, **fully apply** in the digital environment, in particular to the use of works in **digital form**. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

This provision attempts to clarify the position of digital works as not being inferior to other forms of copyrighted content in analogue or hardcopy form.

Article 2 reiterates that copyright protection extends to expressions of the work and not to ideas, procedures, methods of operation or mathematical concept as such. Digital audio-visual works meet the requirement of fixation or expression once they are created in digital format.

²⁷ The WIPO Copyright Treaty, 1996, Preamble.

The WCT under its Article 6 reserves the author's right of first distribution that becomes exhausted with the first sale of copies of the work. In respect of digital audio-visual works, once the consumer lawfully obtains the file from the author, it becomes difficult to control how the former deals with the obtained copy. The consumer himself may share the work by uploading onto the internet or file-sharing to a number of people.

Additionally, authors digital audio-visual works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.²⁸ As highlighted in Chapter 2 of this paper, this provision further enables the authors of the digital audio-visual works to allow access and use only if certain conditions are met by the members of the public. Similarly, distribution through transmission of electronic signals, in the receiving computers and/or in their terminals constitutes reproduction for the case of digital audio-visual works.²⁹

Like Article 13 of the TRIPS Agreement, Article 10 of the WCT allows for member countries to enact national laws to limit the rights of authors to limit reproduction of their work in specified instances. Relatedly, Article 11 of WCT mandates the enactment of national legislation to provide for adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights.³⁰

Pursuant to this provision, many states including Kenya have included in their copyright legislation the use of technological protection measures (TPMs) such as encryption, and prohibited

²⁸ The WIPO Copyright Treaty, 1996, Article 8.

²⁹ Ibid, Guide to The Copyright and Related Rights Treaties Administered by WIPO And Glossary of Copyright and Related Rights Terms, 208.

³⁰ Ibid, 215.

circumvention of such measures taken by authors of digital audio-visual content. Acts of decrypting (“hacking”) an encrypted work, descrambling a scrambled work, “cracking” software envelopes, tampering with digital watermarks and so on generally amount to “circumvention”.

Article 14 of the WCT requires Contracting Parties to ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by the Treaty. Accordingly, the procedures to be adopted may include rules to promote cooperation between copyright owners and service providers and encourage marketplace solutions in order to facilitate the detection of copyright piracy, the application of technological means, the removal of infringing materials from networks expeditiously, and identifying and pursuing infringers.³¹

By becoming a contracting party to the WCT, Kenya will broaden the protection of digital audiovisual works and secure the rights of its creators beyond its own borders. This will not only promote investment into the audiovisual industry but will additionally enhance employment creation for the youth.

2.4.1.4. Treaty on the International Registration of Audiovisual Works (Film Register Treaty), 1989

The preamble of the Treaty captures the desire by the international community to, ‘...increase the legal security in transactions relating to audiovisual works and thereby to enhance the creation of audiovisual works and the international flow of such works and to contribute to the fight against piracy of audiovisual works...’.³²

³¹ Ibid, 224.

³² Treaty on the International Registration of Audiovisual Works (Film Register Treaty), 1989, Preamble.

The Treaty offers a definition of “audiovisual work” as:

any work that consists of a series of fixed related images, with or without accompanying sound, susceptible of being made visible and, where accompanied by sound, susceptible of being made audible.

Thus, as noted in Chapter 2, the visual expression of the audiovisual work is necessary but not the audio. The Treaty establishes the International Register of Audiovisual Works together with its international registry located in Austria for purposes of recording rights in audiovisual works.³³ Despite its important objectives, the registration system’s inherent restrictions undermine its effectiveness. First, only natural persons and legal entities in the Contracting States are allowed to file their work for registration under the system. This first limitation secludes a significant segment of internet users including Kenyans, who may want their works protected but their countries are not signatories to the Treaty. Secondly, the fees payable by the users of the International Register shall be fixed and collected in the currency of the Republic of Austria.³⁴ Again, such provision will unduly complicate the application process since it prioritizes revenue gains of the hosting country over the objectives of the Treaty.

Additionally, the accompanying regulations to the Treaty require translations of the audio-visual work into English or French.³⁵ Apart from the initial high research and development costs in creating the audio-visual work, this further requirement will not only inflate costs but also lengthen the registration process for aspiring local languages audio-visual creations.

³³ Treaty on the International Registration of Audiovisual Works (Film Register Treaty), 1989, Article 3.

³⁴ See, Treaty between the World Intellectual Property Organization and the Republic of Austria on locating in Klosterneuburg (Republic of Austria) the International Registry of Audiovisual Works, Article 3.

³⁵ See Rule 2 of the Regulations Under the Treaty on the International Registration of Audio-visual works.

2.4.2. Regional Legal Framework in Africa for the Protection of Digital Audiovisual Works

2.4.2.1. The African Regional Intellectual Property Organization (ARIPO)

The Lusaka Agreement created ARIPO in 1976 as a regional Organization with the mandate to develop, harmonize and promote intellectual property in the Member States of the Organization and in Africa.

Currently there are nineteen Member States, namely; Botswana, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, São Tomé and Príncipe, Sierra Leone, Somalia, Sudan, Swaziland, United Republic of Tanzania, Uganda, Zambia and Zimbabwe.³⁶

Substantive activities of ARIPO are implemented through three treaties each focusing on a specific field of intellectual property. These treaties are: (a) the Harare Protocol on Patents and Industrial Designs; (b) the Banjul Protocol on Marks, and (c) the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.³⁷ A fourth treaty, the Arusha Protocol for the Protection of New Varieties of Plants is yet to enter into force.

Presently, ARIPO has not advanced any Treaty for the protection of copyright. However, since the inclusion of copyright and related rights in the mandate of the Organization in 2002³⁸, ARIPO has been working with its Member States with the aim of creating national environments that promote

³⁶ African Regional Intellectual Property Organization (ARIPO) *Magazine*, Vol. 8, No.1, January - March 2018, 2.

³⁷ *Ibid.*

³⁸ The Council of Ministers extended the mandate of ARIPO to include copyright at its 8th session held in Malawi in 2002.

and provide effective protection, management and enforcement of copyright and related rights in the respective Member States.³⁹

2.4.2.2. The African Organisation of Intellectual Property (OAPI)

OAPI was established under the Libreville Agreement of September 13, 1962 that was revised by the Bangui Accord of March 2, 1977 and the Regulations made in terms of the revisions which were effective on February 8, 1982.⁴⁰ The Organization administers the intellectual property regime for the predominantly French West African countries including Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Republic of Congo, Djibouti, Gabon, Guinea, Ivory Coast, Mali, Mauritania, Niger, Senegal, Togo, Guinea-Bissau and Comoros.⁴¹

There have been arguments, especially at OAU (AU) that OAPI and ARIPO be merged to harmonise IP standards across Africa and to reduce administrative and related costs.⁴² Since digital audiovisual works are disseminated over the internet with the attendant extraterritoriality, such harmonization will enable cross-border monitoring of online piracy of such works and ensure uniform enforcement of standards of protection.

2.4.2.3. The East African Community (EAC)

The East African Community (EAC) is a regional organisation of six (6) Partner States, comprising Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda, with its headquarters in Arusha, Tanzania.⁴³

³⁹ African Regional Intellectual Property Organization (ARIPO), “Copyright Awareness Raising Guide for ARIPO Member States” (February 2016).

⁴⁰ Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa*, 75.

⁴¹ OAPI, “List of Member States”, at < <http://www.oapi.int/index.php/en/aipo/etats-membres> > accessed on 18/4/2018.

⁴² Ibid.

⁴³ EAC, “EAC at A Glance” at < <https://www.eac.int/> > accessed on 18/4/2018.

Under Article 43 of the Protocol for Establishment of the East African Community Common Market (the Common Market Protocol) that entered into force on 1st July 2010, EAC partner states are required to undertake to co-operate in the field of intellectual property rights in order to promote and protect creativity and innovation for economic, technological, social and cultural development in the Community; and to enhance the protection of intellectual property rights.

To realize the twin objectives of IP protection, the Protocol requires member states to among other measures:⁴⁴

- (a) put in place measures to prevent infringement, misuse and abuse of intellectual property rights;
- (b) cooperate in fighting piracy and counterfeit activities;
- (c) exchange information on matters relating to intellectual property rights;
- (d) promote public awareness on intellectual property rights issues;
- (e) enhance capacity in intellectual property.

Importantly, the Protocol expects the Partner States to honour their commitments in respect of international agreements which relate to intellectual property rights.⁴⁵ The EAC regime essentially calls for pooling of efforts to curb intellectual property challenges including online piracy of digital audio-visual works. Competent national authorities of the respective member states ought to escalate their efforts on cooperation to tackle online piracy of digital audio-visual works as contemplated under the Common Market Protocol.

⁴⁴ Protocol for Establishment of the East African Community Common Market, Article 43 (3).

⁴⁵ Protocol for Establishment of the East African Community Common Market, Article 43 (6).

2.4.3. The Kenyan Legal Regime for the Protection of Digital Audiovisual Works

The Kenyan legal and regulatory regime for protection of digital audiovisual works include the Constitution, various statutes on protection of intellectual property as well as the accompanying regulations. These will be discussed in turn.

2.4.3.1. The Constitution of Kenya 2010

The starting point for protection of intellectual property in Kenya is Article 11 of the Constitution of Kenya 2010. Under this Article, the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Consequently, the state is required to promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya.

The constitutional entrenchment recognises that culture forms the repository of intellectual property rights in any society. People innovate and develop ideas based on their cultural upbringing and conditioning. Intellectual property concerns itself with the expression of these ideas. The protection of digital audio-visual works in Kenya will ensure that the cultural heritage of the local communities is preserved in this form of intellectual property through the development of content that reflect truly African origins and practices. Enhanced protection of the digital audio-visual work means more returns that in turn inspire more investment into the industry.

Article 40(5) of the Constitution further obliges the state to support, promote and protect Intellectual property rights of the people of Kenya. Digital audiovisual work is a vital component of Kenya's film industry. State protection of the IP rights ensures that the investors in the

audiovisual industry recover their investment costs and make enough profit to incentivize them to reinvest in the industry. Further, the entertainment value of digital audiovisual works for millions of consumers in Kenya and globally cannot be precisely quantified in economic terms. Strengthening the local audiovisual industry will further ensure the flow of investment into the local economy and creation of jobs for the youth.

Under Article 69(1) (c), the state has a further role to protect and enhance intellectual property, traditional or indigenous knowledge of biodiversity and the genetic resources of the communities. While this Article adopts a community approach to protection of intellectual property, the same applies to audiovisual content since Kenyan communities can easily collaborate with competent national authorities to report online piracy and other forms of infringement of digital audiovisual work. To achieve its constitutional mandate, the state must embark on a thorough public awareness campaign to curb online piracy of digital audiovisual works.

2.4.3.2. The Copyright Act, 2001 Cap 130

This is the primary Act that governs the copyright system in Kenya. Audiovisual works are eligible for copyright protection under section 22 of the Act subject to meeting the two-tier test of originality and fixation in material form. Section 2 of the Act defines “**audio-visual work**” as a fixation in any physical medium of images, either synchronised with or without sound, from which a moving picture may by any means be reproduced and includes videotapes and videogames but does not include a broadcast.

Under the Act, the first ownership of copyright vests in author except in cases of: commissioned work, works produced in the course of one’s employment, or created under commission by the

Government or an international body.⁴⁶ Under section 23 of the Act, copyright in audiovisual work is protected for fifty years from the end of the year in which the work was either made, first made to the public or published, whichever date is the latest while the moral rights continue to vest in author and successors even after transfer of economic rights.⁴⁷ For bodies corporate, the duration is fifty (50) years from the end of the year in which it was published.⁴⁸

The Act protects economic rights of creators of digital audiovisual works by prohibiting the reproduction in any material form of the original work or its translation or adaptation; the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation, or similar arrangement; and the communication to the public and the broadcasting of the whole or a substantial part thereof, either in its original form or in any form recognisably derived from the original.⁴⁹

To enhance returns from exploitation of their work, the Act allows for transmission of the copyrighted work by assignment, by licence, testamentary disposition, or by operation of law as movable property.⁵⁰ However, the Act qualifies the assignment or licence by requiring that it should be in writing and signed by or on behalf of the assignor, or by or on behalf of the licensor.⁵¹ Additionally, if the assignment or licence is of copyright works from outside Kenya, it must be accompanied by a letter of verification from KECOBO. The immediate implication of the assignment and licensing requirements on digital audiovisual works is that the creators of the work

⁴⁶ Copyright Act 2001, section 31.

⁴⁷ Copyright Act 2001, section 32.

⁴⁸ Copyright Act 2001, section 23.

⁴⁹ Copyright Act 2001, section 26 (1).

⁵⁰ Copyright Act 2001, section 33 (1).

⁵¹ Copyright Act 2001, section 33 (3).

may not comply. With the current technological tools, the requirement of writing and signature are easily replaced by other control tools such as a password or digit key.

Section 35 of the Act prohibits copyright infringement in general terms. Of particular interest is section 35 (3) that prohibits circumvention of any effective technical measure designed to protect works; the manufacture or distribution of devices which are primarily designed or produced for the purpose of circumventing technical measures designed to protect works; removal or alteration of any electronic rights management information; and the distribution, importation, broadcast or other publication of 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.

In summary, section 35 (3) proscribes a number of activities that have been made easier with the current technological changes. On the face of it, this section adequately prohibits any form of online piracy of audiovisual works. However, as this chapter argues, there is inadequate online monitoring of websites to identify infringing use and follow up prosecutions. Online piracy has become so widespread that it is almost the norm. In Kenya, poor intellectual property rights culture encourages internet users to continue to stream or download digital audiovisual work from online websites without considerations of the economic stagnancy visited on the creators of such works.⁵²

2.4.3.3. The Copyright (Amendment) Bill, 2017

The proposed amendments to the Copyright Act introduce provisions on computer programs, technological protection measures, digital rights management and limitation of publication of live performances as well as Internet Service Providers (ISPs).

⁵² Kennedy Kitui Nalika, “The Future of Intellectual Property Right and Cyber Crime Forensics” in KECOBO “New Legal Regime to Fight Digital Piracy” 2018-Issue 27, 12.

ISPs will not be liable for infringement for providing access to or transmitting content in the ordinary course of business as long as they do not: Initiate the transmission; select the address; perform the functions in an automatic, technical manner without selecting the material; modify the material in the transmission or; in any way promote the material or content being transmitted.

Interestingly, the Bill allows circumvention of technological protection measures in limited circumstances such as fair dealing exceptions of scientific research, private use, or reporting of current events; use of work for judicial proceedings, use of reasonable extract amongst other allowed uses.⁵³

Clause 19 of the Bill proposes amendments to the Act by introducing new sections 35A, 35B and 35C to provide for the protection of ISPs through provisions dealing with ISP liability, safe harbor, takedown and the resultant offences. In summary, the new sections exclude the ISP's liability for the automatic intermediate and temporary storage of the content where the purpose of the storage is to make onward transmission of the data more efficient to others upon their request. However, this is only guaranteed as long as the ISP; does not modify the material; complies with conditions on access to the material; complies with rules regarding the cache conforming to generally accepted standards in the service sector and does not interfere with lawful use of technology to obtain information on the use of material. The ISP is also not liable if it removes or disables access once it receives a takedown notice.⁵⁴

The proposals of the Bill project an enhanced response to online piracy of copyrighted work. This is a major step in ensuring the protection of digital audio-visual works by collaborating with ISPs to monitor infringement and ensure compliance. By broadening the scope of digital rights

⁵³ The Copyright (Amendment) Bill, 2017, section 26 (b).

⁵⁴ See sections 35A, 35B and 35C of the Copyright (Amendment) Bill, 2017.

management and technological protection measures, the Bill effectively legislates for the numerous challenges caused by online piracy. The Bill borrows from the protection model adopted by the United States' Digital Millennium Copyright Act of 1998 in an attempt to curb online piracy in Kenya.⁵⁵

2.4.3.4.The Movable Property Security Rights Act, 2017

This Act is meant to facilitate the use of movable property as collateral for credit facilities and to provide for the registration of security rights in such property including intangible assets such as intellectual property. This Act therefore will enable rights holders in digital audiovisual works to use their creations as security for credit facilities hence the urgent need to enhance protection of this category of IP.

Under section security right is created by a security agreement between the grantor with authority and the secured creditor.⁵⁶ Again, this provision anticipates that banks and other lending institutions will embrace intellectual property as a new form of security and aid in financial mobilization for further investment into creation of audio-visual works.

2.4.3.5.The Films and Stage Plays Act, Cap. 222

The operative definition of films under section 2 of this Act reflects that of audio-visual works adopted under the Copyright Act 2001. Importantly, the Act establishes the Kenya Film and Classification Board (KFCB) that is mandated to among other things restrict unapproved exhibitions of films to the public where the person is not a licensed or has not obtained a certificate of approval from the Board. While such protection essentially protects digital audiovisual works

⁵⁵ Paul Kaindo, "Targeting Internet Service Providers (ISPs) to curtail online copyright piracy" in KECOBO "New Legal Regime to Fight Digital Piracy" 2018-Issue 27, 5.

⁵⁶ The Movable Property Security Rights Act, 2017, section 6.

from unauthorized distribution, online piracy has eased illegal access and copying of digital audiovisual content without serious monitoring from the KFCB.

2.4.3.6. The Consumer Protection Act, 2012.

The primary aim of this legislation is to provide for the protection of the consumers to prevent unfair trade practices in consumer transactions and ancillary purposes. The Act raises critical consumer protection issues that may bring conflicts in digital works. For instance, the Act under section 77 stipulates that, ‘a consumer agreement is *not binding* on the consumer unless the agreement is made in accordance with this Act and the Regulations’. In digital transactions where most consumers are only able to access services upon accepting standard-imposed conditions for service providers, the provisions of the Act may be consistently breached by the latter. Where the service providers originate from other jurisdictions, enforcement of the consumer protection measures under the Act will face great difficulty due to conflict of laws and the costs of enforcement beyond domestic borders.

Section 89 of the Act establishes the Kenya Consumers Protection Advisory Committee (KCPAC) whose roles include policy formulation, co-ordination and networking of consumer activities and the development of linkages with consumer organizations and the competent authorities and agencies locally and outside Kenya for the protection of consumer interests; consumer education and advisory, conflict resolution and importantly, monitoring the working and enforcement of laws that directly or indirectly affect the consumer.⁵⁷ The role of KCPAC is critical in the enforcement of copyright in digital audio-visual works that may ultimately entail monitoring of private internet use and related personal data. As such, the agency ought to engage KECOBO to craft strategies of

⁵⁷ Consumer Protection Act, 2012, section 90.

ensuring enforcement of copyright in digital audio-visual works without infringing on consumer rights.

2.4.3.7. The Competition Act, 2010

Apart from promoting and safeguarding competition in the national economy, one of the key objectives of this Act is to protect consumers from unfair and misleading market conduct. Part VI of the Act creates various offences that derail consumer welfare. For instance, one is guilty of an offence if they falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use.⁵⁸ The Act further empowers the Competition Authority to amongst other roles, consider if suppliers of goods and services have engaged in unconscionable conduct that affects consumer welfare and to promote product safety and information standards.

The Competition Act, 2010 is pro-consumer and fails to take into account circumstances when the consumer may cause reverse harm to the supplier or service providers as is the case of online piracy in digital audio-visual works.

2.5. Institutional Framework for the protection of digital audio-visual works

This chapter limits the discussion of the international, regional and national institutions responsible for the enforcement of copyright in digital audio-visual work to the World Intellectual Property Organization (WIPO), the African Organisation of Intellectual Property (OAPI), the African Regional Intellectual Property Organization (ARIPO), and the Kenya Copyright Board (KECOBO). The protection framework under the OAPI and ARIPO have already been highlighted

⁵⁸ The Competition Act, 2010, section 55.

in the preceding section. This part will therefore briefly discuss the administration framework under WIPO and KECOBO.

2.5.1. The World Intellectual Property Organization (WIPO)

WIPO is the global forum for intellectual property services, policy, information and cooperation and is a self-funding specialized agency of the United Nations, with 191-member states.⁵⁹ All member states of the UN are entitled, though not obliged, to become members of the specialized agencies. WIPO came into existence pursuant to the Convention Establishing the World Intellectual Property Organization signed at Stockholm on July 14, 1967, entered into force in 1970 and was amended in 1979.

Under Article 3, the main objective of WIPO is to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization.⁶⁰

The focus of this chapter with regards to WIPO is its functions as prescribed under Article 4 of the Convention. First, WIPO is required to promote the development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislation in the field of IP.⁶¹ Although WIPO emerged as a forum for IP norm-setting, sceptics have questioned the organization's neutrality with some accusing WIPO of prioritizing developed countries' concerns over those of developing countries.⁶² The claim that WIPO is working for its

⁵⁹ WIPO, "What is WIPO?" at <http://www.wipo.int/about-wipo/en/> accessed on 12/5/2018.

⁶⁰ Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967 and as amended on September 28, 1979, Article 3.

⁶¹ Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967 and as amended on September 28, 1979, Article 4 (1).

⁶² Roy Schestowitz, "WIPO and WTO Are Not International!" at < <http://techrights.org/2010/09/12/pseudo-international-and-unconstitutional/>> accessed on 13/5/2018.

founding/funding sources⁶³ which are concentrated in the Western world is debatable yet points to the disparities in the level of protection of audio-visual works in the West in comparison to the developing world.

WIPO is further mandated to provide ancillary services for the enhancement of protection IP including offering its cooperation to States requesting legal–technical assistance in the field of intellectual property.⁶⁴ In relation to developing countries such as Kenya, this option of assistance has not been fully exploited. As a matter of necessity, WIPO ought to further collaborate with developing countries to build capacities of domestic enforcement institutions to fight online piracy of digital work. Internet access has grown significantly even in the developing countries thus making online piracy of digital audio-visual work a global threat.

2.5.2. Kenya Copyright Board (KECOBO)

The Kenya Copyright Board (KECOBO) is established by section 3 of the Copyright Act 2001 and mandated with the administration and enforcement of copyright and related rights and specifically to direct, co-ordinate and oversee the implementation of laws and international treaties and conventions to which Kenya is a party.⁶⁵ The Board is responsible for organizing legislation on copyright and related rights; conducting training programmes on copyright and related rights; enlightening and informing the public on matters related to copyright; licensing and supervising the activities of collective management societies; and maintaining an effective databank on authors and their works.⁶⁶

⁶³ Jeremy de Beer and Sara Bannerman, “Foresight into the Future of WIPO’s Development Agenda” (2010) 1 W.I.P.O.J., Issue 2 Thomson Reuters (Legal)Limited.

⁶⁴ Convention Establishing the World Intellectual Property Organization, Article 4 (v).

⁶⁵ Copyright Act 2001, section 3.

⁶⁶ Copyright Act No. 12 of 2001, sections 5 and 7.

KECOBO has a further mandate of approving organisations seeking to operate as Collecting Societies upon application and meeting conditions.⁶⁷ There are four main collecting societies in Kenya, namely: Kenya Association of Music Producers (KAMP), Reproduction Rights Society of Kenya (KOPIKEN), Music Copyright Society of Kenya (MCSK) and Performers Rights Society of Kenya (PRISK).⁶⁸ PRISK is the collective management organisation licensed by the Kenya Copyright Board to represent performers in sound recording and audio-visual works. It negotiates, sets tariffs with users of sound recordings and audio-visual works in respect to any exploitation of works relating to broadcasting, communication to the public, making available by wire or wireless including transmission to subscribers to a diffusion or any digital service, copying or similar reproduction such as digital copying and collects license fees and distributes royalties to its right holders. A detailed analysis of the functioning of CMOs in the Kenyan audio-visual sector will be under Chapter 5 of this paper.

Although copyright, unlike industrial property rights, does not require registration, the Board has nonetheless introduced a voluntary system of registration of copyright and related rights.⁶⁹ Registration is intended to help in the administration of copyright particularly the anti-piracy security device⁷⁰; and it is also to help create a database for the creative works within Kenya.⁷¹

Technically, the statutory mandate of KECOBO is sufficiently broad to cover monitoring of online piracy. However, the enforcement capacity of the Board is still minimal due to limited staff

⁶⁷ Copyright Act 2001, section 46.

⁶⁸ African Regional Intellectual Property Organization (ARIPO) *Magazine*, Vol. 8, No.1, January - March 2018.

⁶⁹ Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa*, 578.

⁷⁰ The Anti-Piracy Security Device (APSD) is a tamper proof sticker that is applied on legitimate audio and audio-visual works (films, CDS, DVDS and VCDs). It includes a bar code that is unique to each product and a Hologram that has overt and correct features known to the KECOBO.

⁷¹ Ibid.

numbers, inadequate public awareness on copyright, poor IP culture, lack of a clear government policy on copyright, and lack of the relevant expertise, among others.⁷²

2.5.3. The Anti-Counterfeit Agency

The Anti-Counterfeit Agency was established under the Anti-Counterfeit Act 2008 as a State Corporation with the mandates to enlighten and inform the public on matters relating to counterfeiting, combat counterfeiting, trade and other dealings in counterfeit goods, devise and promote training programs to combat counterfeiting and co-ordinate with national, regional or international organizations involved in combating counterfeiting.⁷³ By delivering on its mandate to combat counterfeiting, the Anti-Counterfeit Agency technically plays the role of ensuring that only legitimate copies of digital audio-visual works are accessed and distributed in Kenya. The Agency has powers to inspect places, premises or vehicles suspected of containing counterfeit goods and thereafter seize and detain such goods.⁷⁴

KECOBO can enhance its enforcement role by strategically collaborating with the Agency to limit the importation of anti-circumvention devices used to make pirated copies of digital audio visual works.

⁷² Helen Koki (Deputy Chief Legal Counsel, Kenya Copyright Board), “The role of Kenya Copyright Board (KECOBO)” (2nd September 2013) Presentation at the University of Nairobi School of Law, Parklands.

⁷³ The Anti-Counterfeit Act, 2008, section 3.

⁷⁴ The Anti-Counterfeit Act, 2008, section 23.

2.6. Conclusion on the Legal, Regulatory and Institutional Framework for Protecting Digital Audio-Visual Content in Kenya

This Chapter has highlighted the international, regional and national legal regime for protection of digital audio-visual work. An analysis of the international instruments reveals the setting of broad standards of protection by the international community and the encouragement of member states to the instruments to adopt national measures of monitoring and enforcement of the ensuing rights. Under TRIPs and the Berne Convention, the creation and protection of digital audiovisual works are subject to the general tests of originality, fixation, fair use and so on. The WIPO Copyright Treaty goes further to make the provisions on protection of copyright fully applicable to the digital environment and sets prohibitions on circumvention of technological protection measures. The regional system represented by ARIPO, OAPI and the EAC correspondingly bears on the member states to adopt uniform standards of protection of IP rights generally, with evidence of efforts to enhance protection of the separate components of IP.

The Kenyan legal regime for protection of digital audiovisual work primarily exists under the Copyright Act 2001 and the resultant regulations. However, due to the challenges brought about by technological advancements and online piracy of copyrighted work, the Copyright (Amendment) Bill 2017 has been proposed to augment the existing laws. The 2017 Bill draws a substantial portion of its amendments from the WIPO Copyright Treaty and copyright legislation of technologically advanced countries such as the USA. While the Bill seeks to intensify online monitoring of infringement in collaboration with ISPs, there is need by Kenya's enforcement agencies to increase public IP awareness activities and training programs for right holders, consumers as well as the law enforcement agents. Relatedly, there is urgent need to harmonize consure protection responses between KECOBO, the Competition Authority and the Kenya

Consumers Protection Advisory Committee. Once national efforts to fight online piracy have been harmonized, creativity and innovation in the digital audio-visual sector will be boosted with the effect of improved competitiveness of Kenyan audiovisual content in local and international markets, employment creation and national economic growth.

CHAPTER THREE

CONTEMPORARY CHALLENGES TO COPYRIGHT PROTECTION IN DIGITAL AUDIO-VISUAL CONTENT IN KENYA

3.1.Introduction

Chapter 2 of this research paper highlighted and discussed the prevailing legal, regulatory and institutional framework for the protection of digital audio-visual works. It provided an analysis of the frameworks from an international, regional and domestic lens and identified the key shortcomings of these. It further conceptualized and contextualized the problem of online piracy in Kenya and rolled out arguments for the enhanced protection of digital audio-visual work from economic and social perspectives. This Chapter will build on the background set out in Chapter 2 and proceed to narrow down the main peculiar features of the information age that impede the protection of digital audio-visual work. In particular, the current chapter will discuss the key challenges to protection of digital audio-visual work as; the difficulty in striking the right balance between access by audiences and protection of the digital audio-visual work; the complexity of balancing privacy rights as weighed against monitoring enforcement; extraterritoriality of online piracy and the resultant accelerated costs of enforcement.

As noted in Chapter One of this paper, audio-visual content fuses the creativity and effort of a multitude of collaborators such as scriptwriters, actors, directors, costume and set designers, music composers, among others.¹ Copyright law seeks to protect the diverse rights accruing through the development, financing, marketing and distribution of audio-visual work. With the surge in online piracy, numerous challenges emerge in applying the traditional concepts of copyright in the

¹ Chapter 1, 6.

protection of audio-visual work. The discussion of these challenges and their meaning to the Kenyan political-economy forms the focus of this chapter.

The traditional realms of copyright protection have been outgrown by new developments in technology in this information age. Every single click of a mouse or a swipe on a gadget connected to the internet most probably accesses some digital content, be it text or audio or audio-visual files. With the popularity of the internet and technology evolving rapidly, more and more people are choosing to consume their content online.² Whether from a mobile phone, tablet or smart TV, online digital consumption is increasing and becoming the people's choice for accessing film, TV, music, books, software and games amongst other content.³ Online piracy cashes in on this growing demand to unlawfully profit from intellectual property of various creators.

With respect to audio-visual work, unlawful access to copyrighted content takes various forms. The most common method of unauthorised access to digital audio-visual work is through illegal streaming that involves viewing of the audio-visual work without downloading. This has been made even easier with the proliferation of internet service providers. Further, as network technologies and media tools such as internet broadband, pod casting or high-resolution scanners flourish, information and creative materials are increasingly created in digital form and analogue materials are being transferred to digital formats.⁴

Digitization therefore means that content can be easily and efficiently preserved, transmitted and accessed. As a result, each internet user is now, thanks to readily available digital technologies and

² FACT (UK), "The Online Piracy Landscape" (2018) at <https://www.fact-uk.org.uk/the-problem/digital-online-crime/online-piracy/> accessed on 18/3/2018.

³ Ibid.

⁴ WIPO Workshop to Probe Copyright Issues Arising from the Preservation of Digital Content (Geneva, July 8, 2008) at http://www.wipo.int/pressroom/en/articles/2008/article_0036.html accessed on 18/3/2018.

media hardware and software, a potential audience, producer, creator, distributor or even infringer of creative work.⁵ The threats and challenges of online piracy brought about by digitization undermine creativity and discourage investment in digital audio-visual works.

For Kenya, the need to address online piracy in the film industry is urgent for the budding industry. Kenya will benefit twofold. First, there will be further investment in better technology to produce more local audio-visual work due to the lure of better returns from authorized access. Secondly, once assured that their films will be safe from online piracy, local creators will unleash their huge creative potential from the rich multi-cultural and ethnically diverse background that Kenya enjoys. Fighting online piracy will be the best way of encouraging local content creators in the film industry and revive interest in African culture through films.

3.2. Contemporary Challenges to Protection of Digital Audio-Visual Content in Kenya

3.2.1. Background to challenges in protection of digital audio-visual work

The World Intellectual Property Organization (WIPO) adopted both the Performances and Phonograms Treaty and the Copyright Treaty, collectively known as the WIPO Internet Treaties, which provide protection for works in the digital environment and regulate technological protective measures. From the definition under section 2 of the Kenyan Copyright Act 2001, to qualify as audiovisual work, the work must have a visual component, but need not have an audio component. This means that a silent movie qualifies as an audio-visual work, but a movie soundtrack does not. Under the Berne Convention for the Protection of Literary and Artistic Works (1886), audio-visual work is protected as cinematographic Works.⁶ The works are protected for a

⁵WIPO, “Copyright Licensing in the Digital Environment” at http://www.wipo.int/copyright/en/activities/copyright_licensing.html accessed on 18/3/ 2018.

⁶ Article 2(1) of the Berne Convention.

minimum term of 50 years after the making available of the work to the public ("release") or – failing such an event – from the creation of the work.⁷ Similarly, under the Kenyan Copyright Act, the period for protection is 50 years from the end of the year in which the work was first published or made available to the public.⁸

Having clarified what constitutes audio-visual work, the context of its protection in the wake of online piracy is key. On the one hand, the primary concern for producers and investors in the audio-visual industry is that of retaining control over their digital work and preventing online piracy. In the current digital environment, transmissions no longer advertise or enhance sales, they threaten to replace them.⁹ A copyright system that neglects access controls is illusory and will disservice audiences in the long run. Access controls make it possible for creators of audio-visual work to offer end-users a variety of distinctly priced options for enjoyment of copyrighted works.¹⁰

On the other hand, the audience wants a continuing flow of improved products at the lowest possible prices and may not mind if the audio-visual work is derived from copying others' work through online piracy.¹¹ Digital technologies enable the owners of digital audio-visual work to establish their respective rights through access controls and prior authorization before viewing or obtaining a copy. This enhanced form of protection has been referred to as 'paracopyright'. Paracopyright is an emerging term used to refer to new legal protections existing outside copyright law that were created for copyright owners to enforce against content users who violate the anti-

⁷ Ibid.

⁸ Copyright Act No. 12 of 2001, section 23.

⁹ Jane C. Ginsburg, "From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law" in Hugh Hansen (ed), *U.S. Intellectual Property Law and Policy* (Edward Elgar Publishing Limited, 2006), 51.

¹⁰ Ibid.

¹¹ Peter J Groves, *Sourcebook on Intellectual Property Law* (Cavendish Publishing Limited, London, United Kingdom, 1997),3.

circumvention devices used by copyright owners to secure their material in the online environment.¹²

Without security of the delivery of digital audio-visual works, novel forms of distribution would be discouraged and content audiences would continue to be charged for all uses, whatever the level of their consumption. Thus, a user who streams an audio-visual file online will have to pay as that who obtains lawful permission to download the file. Although, unauthorized forms of distribution such as piracy and peer-to-peer file ‘sharing’ may fill the gap for some time, these are likely to depress the market for creating works of authorship in the long run.¹³ The next part of this chapter will highlight the prevalent challenges to protection of digital audio-visual content and relate them to the Kenyan scenario.

3.2.2. Incidences of challenges to protection of digital audio-visual work in Kenya

According to the findings of the WIPO/KECOBO study on “The Contribution of Copyright to the Economy”, Copyright contributes 5.3% to the Gross Domestic Product (GDP) of Kenya with core Copyright industries contributing 4.4 %.¹⁴ The same industry employs over 300,000 people directly. While this points to the vital economic role the audiovisual industry as a component of the copyright industry in Kenya play, online piracy significantly undermines such potential. KECOBO is the duly mandated enforcement agency for all manner of copyright infringement. As at the date of this paper, the Board had a legal and enforcement department that has 5 prosecutors

¹² Jeremy De Beer, “Constitutional jurisdiction over paracopyright laws” (2005) in Sara Bannerman, “In the Public Interest: The Future of Canadian Copyright Law” (2006) 2 Canadian Journal of Communication 31, 89.

¹³ Ibid.

¹⁴ Kenya Copyright Board, “Enforcement Bulletin” at <http://www.copyright.go.ke/component/phocadownload/category/6-iec-materials.html?download=35:enforcement-bulletin> accessed on 13/6/2018; Dickson Nyariki, Oliver Wasonga, Calleb Otieno, Eric Ogadho, Charles Ikutwa & Julius Kithinji, “ The Economic Contribution of Copyright-Based Industries in Kenya” (WIPO, March 2009) at < http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_ke.pdf> accessed 13/6/2018.

and 10 copyright inspectors. This lean department is expected to monitor and enforce all copyright-related rights that accrue under the Copyright Act, 2001. It is therefore not a surprise that the enforcement of digital copyright has taken a backstage at KECOBO.

With respect to audiovisual works, KECOBO's primary response to infringement has been to conduct raids to seize the offending hard copies of the works. For instance, in March 2017, the Kenya Publishers Association (KPA) and Kenya Copyright Board (KECOBO) raided Nyamakima in Nairobi and Ngong in Kajiado to reveal how pirates, brokers, headteachers and hawkers work together to stage school break-ins, steal books to sell on the streets to unsuspecting buyers.¹⁵

KECOBO has also conducted investigations and raids against broadcast pirates that offer anti-circumvention devices with capabilities of free streaming for movies and related online content on complaints by sellers of authorised devices.¹⁶ According to Mr. Paul Kaindo, an advocate and enforcement officer in the legal enforcement department at KECOBO, technological evolution has outpaced copyright laws in Kenya.¹⁷ He believes that a direct consequence of the lag in statutory reform has been to severely limit the enforcement capability of KECOBO when it comes to digital audio-visual works in Kenya. Mr. Kaindo believes that the enactment of the Copyright (Amendment) Bill, 2017 will enable meaningful response by KECOBO to infringement of copyright in the digital world. According to Mr. Kaindo, as at 19th September 2018, the Copyright (Amendment) Bill is at the public participation stage at the Senate pending further debate and reintroduction to the National Assembly.

¹⁵ Protus Onyango, "Raid reveals how publishers are losing millions to book pirates" (*The Standard*, Nairobi March 27th 2017) at < <https://www.standardmedia.co.ke/business/article/2001234126/raid-reveals-how-publishers-are-losing-millions-to-book-pirates>> accessed 13/08/2018.

¹⁶ KECOBO, "Enforcement Activities Undertaken Between July-September 2017" in "The Role of Contracts in Copyright Management" *Copyright News*, Issue 26, 15.

¹⁷ Interview with Paul Kaindo, Advocate and IP Enforcement Officer at KECOBO, (Nairobi, 19th September 2018).

It is anticipated that with the ISP liability, takedown and safe harbour provisions under the Bill, rightsholders will take advantage to assert their rights in the digital world. KECOBO's role under the Bill will also be expanded to take into account the novel developments in copyright in the Kenyan digital environment.

Excepting the statutory rigidity of the Copyright Act, 2001 in the digital world, KECOBO faces numerous other challenges in fighting online piracy in digital audiovisual works. First, the agency does not act *suo moto* and must be moved by a complainant who in most cases is a rightsholder in the infringed work.¹⁸ Many cases of online infringement go unreported due to low awareness levels among the authors of films in Kenya. Secondly, KECOBO is currently not resourced with cyber experts whose skills are necessary in monitoring and enforcing digital rights. As a consequence, KECOBO relies on the Cybercrimes Division at the Criminal Investigation Department for cases that involve online violation of copyrighted works.

Mr. Kaindo further cites inadequate budgetary allocation as a special challenge to the enforcement role of KECOBO. The Board is a department under the Attorney General's office and receives budgetary allocations from the AG's office rather than from the National Treasury. Weighed against the expansive rights it is set to administer throughout Kenya, the financial allocation KECOBO receives does not allow it to effectively carry out its enforcement, public education and related mandate. Relatedly, KECOBO has not been able to devolve its services to the counties due to budgetary and human resource constraints.

¹⁸ Ibid.

3.2.3. Specific Challenges to protection of digital audio-visual work in the information age

The main disincentives to protection of audio-visual work over the internet include the inability to retain control over copying and dissemination of the works, extraterritoriality, balancing the right to access information vis a vis the rights of content creators to restrict access to their work and other enforcement related challenges. These are discussed in the ensuing parts of this chapter even though this paper does not claim that these challenges are in the least exhaustive on the matter.

3.2.3.1. Control over digital audio-visual works versus access to information

Alongside recognition of the dangers that the new technologies may pose for the protection of copyrights, there is also a general awareness that these technologies offer the possibility of broad and simple access to information and that they could play a leading role in the fields of education, research and culture in general. As highlighted in the previous parts of this Chapter, new information technologies have fundamentally affected copyright law by making it difficult to control the way works are used.¹⁹ Technological progress has facilitated the reproduction and mass distribution of creative works, thus permitting the establishment in some cases of genuine parallel economies based on counterfeiting or piracy.²⁰

The challenge of control as against access to information applies to digital audio-visual works in similar ways to other forms of digital copyright such as musical works, eBooks, and software. Music videos is the most common type of video content downloaded or watched with most internet users having used their computer to watch other online digital video content such as movie trailers

¹⁹ Christophe Geiger, “The Future of Copyright in Europe: Striking A Fair Balance Between Protection and Access to Information” (July 2009) Report for the Committee on Culture, Science and Education - Parliamentary Assembly, Council of Europe, 4.

²⁰ Ibid.

or full-length videos. Streaming digital video content is more widespread than downloading videos.²¹

Further, although the initial access to the original digital audio-visual may be implemented by technological protection measures (TPM), control over access to a retention copy of the work presents several difficulties. For one, the initial user can access the digital audio-visual content from the owner at a fee and will in most cases be granted an access option such as a password. From the moment the user or audience lawfully obtains a copy of the original audio-visual work, restrictions on access become less effective. The user may for instance choose to share his password with friends or family without consent of the content creator. Alternatively, the user may disseminate the downloaded digital audio-visual file through peer to peer sharing or other file sharing applications.

For digital audio-visual works, it is not cost-effective for copyright owners to sue individual infringers, because there are tens of millions of them, because lawsuits are expensive, and because many infringers would only be liable for (or able to pay) minimal damages.²² As rational persons, the content owners prefer the employment of the means of restricting access to the online audio-visual content or in the least providing such access on their own terms. The other option is to sue facilitators of pirated access for contributory infringement and vicarious liability.

In consequence, recent trends reveal that ISPs have, acting under the pressure from copyright holders and with the implicit agreement of governments, modified their contracts with subscribers

²¹ Nicole Dufft, Philipp Bohn, Andreas Stiehler and Thorsten Wichmann [Berlecon Research], “Digital Video Usage and DRM - Results from a European Audience Survey” at <http://www.indicare.org/tiki-download_file.php?fileId=170> accessed on 10/3/2018.

²² Mark A. Lemley & R. Anthony Reese, “Reducing Digital Copyright Infringement without Restricting Innovation,” (2004) 56 Stan. L. Rev. 1350.

to include clauses that legitimize the disconnection of users for supposed copyright infringements.²³ Although this means of self-regulation or Paracopyright measures seems appealing to right holders in digital audio-visual content, audiences of such content will be exposed to unconscionable terms of access or use if the same is unmonitored.

3.2.3.2. Right to privacy versus monitoring and enforcement

The constitutional guarantee to the right to privacy further complicates protection of audio-visual work online. Monitoring and enforcement of protection essentially entails reviewing internet use by providers of pirated sites as well as the users who access such sites to download or view audio-visual content without authorization. Internet users disclose a lot of personal information to internet service providers as part of the terms and conditions of access. This essentially means that the internet service provider may easily identify the location, occupation, preferences, and social circles of a user pursuant to the information disclosed.

While most internet users do not review the terms of access due to the voluminous details of the terms and conditions or out of ignorance, many users actually give permissions to the ISPs to keep their contact information, such as name, email address, postal address, phone number, facsimile number, and mobile number amongst other data. For instance, according to the popular movie streaming site Showtime's Privacy Policy effective from 4th May 2017, Showtime Networks Service may collect certain user information such as:²⁴

- a) The browser type and operating system;

²³Alberto J. Cerda Silva, "Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy" (2011) 26 American University International Law Review 3, 634.

²⁴Showtime Networks Inc. Privacy Policy dated 4th May 2017 at < <http://www.sho.com/about/privacy>> accessed 23/3/2018.

- b) The IP address;
- c) The Internet Service Provider (ISP);
- d) Websites visited by the user immediately before and after visiting Showtime Networks Services;
- e) Web pages and advertisements viewed by the user;
- f) Information collected through cookies, web beacons, pixel tags and other similar technologies; and
- g) Information about your interactions with audio and video content, such as the type of content listened to and viewed, and information about your interactions with email messages, such as the links clicked on and whether the messages were opened or forwarded.

The foregoing example highlights the extent to which internet audiences of digital audio-visual content are exposed to infringement of their privacy. On the other hand, the ability to access such information by the ISPs and the digital audio-visual content platform owners enable authorities to identify infringers and their accomplices. This encourages parties to order online service providers to transfer expeditiously information on the identity of subscribers to right holders in claims of infringement.²⁵

Individuals may further feel that the level of intrusion into their online privacy is disproportionate to the objective sought to be realized. As such, a delicate balance must be struck between the interests of the producers of digital audio-visual works as weighed against the right to privacy. Ideally, there must be proportionality and safeguards employed in the manner of enforcement of

²⁵Silva, “Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy”, 610.

these competing obligations. A good step towards reconciling the competing interests is the European Union Data Retention Directive that requires ISPs to process subscribers' personal data for the purpose of investigation, detection, and prosecution of serious crime.²⁶

In *Alcoholic Beverages Association of Kenya v Kenya Film and Classification Board & 2 others*²⁷, the High Court affirmed that in order to protect public interest, the Kenya Film and Classification Board had the mandate to protect women and children against sexual exploitation or degradation in films or on the internet as per section 15 of the Films and Stage Plays Act. The judgement inadvertently legitimized the monitoring of online content by the Board, raising serious questions of privacy infringement.

3.2.3.3. Extraterritoriality of the internet

Internet users have become so accustomed to certain online services that any enforcement action against the ISPs would be comparable to social disruption. As such, courts are placed in a difficult position to balance the rights of millions of users spread across the globe who access digital audio-visual content through file-sharing and access sites. When courts shut down such platforms for facilitating online piracy, content audiences will most likely immediately resort to other infringing alternatives and pay for access only as a last option.

Despite their effectiveness at national level, the means of protection employed to limit or control online piracy need enforcement beyond the domestic state to ensure the protection accorded is entrenched as against the whole world. Enforcing the law in the digital environment to address

²⁶ Council Directive 2006/24.

²⁷ [2017] eKLR.

individual infringement requires the identification of infringers and, consequently, collaboration between ISPs and rights holders.²⁸

This not only calls for cooperation among nations to harmonize international enforcement and adopt uniform laws against online piracy of digital audio-visual work, but also to ensure that their domestic systems of protection are effective. Domestic enforcement authorities must establish extensive parameters for collaboration in the exchange of data, investigation of cross-border infringement and prosecution of alleged infringers of digital audio-visual work.

Similarly, relevant government authorities and other stakeholders in the audio-visual industry have an obligation to promote cooperative efforts within the business community to effectively address infringement.²⁹

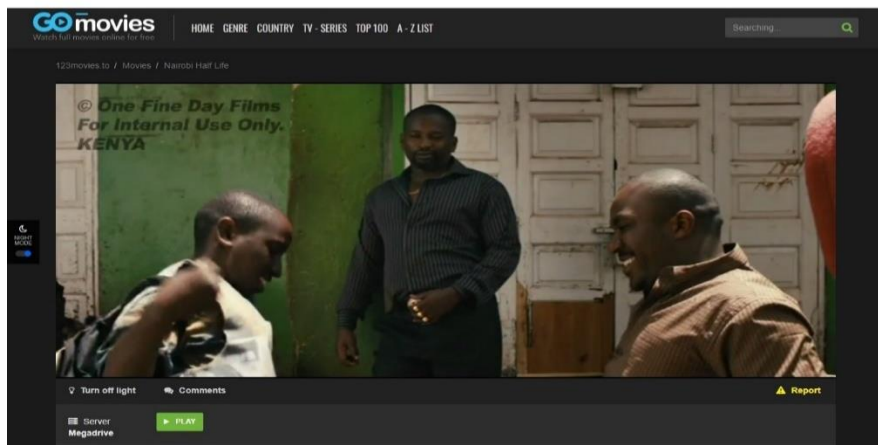
The High Court of Kenya in *Francis Gicohi & 20 others v Kenya Copy Right Board & another*³⁰ discussed the challenge of extra-territoriality in the implementation of the anti-piracy security device for, among others, audio visual works. The petitioners in this case sought a declaration that section 36 of the Copyright Act, No. 12 of 2001 that imposes the obligation to apply for authentication of copyright works on a manufacturer or producer of sound and audial visual works or records, be declared unconstitutional. The petitioners were traders apparently dealing in foreign audio-visual works illegally. The Court, quoting Article 3(1) of the Berne Convention and Article 3 of the TRIPS Agreement, both to which Kenya, held that foreign works enjoyed similar protection in Kenya as works of nationals. The court reiterated the obligation on the state to extend copyright protection both to locally produced works and imported works. Although this case deals

²⁸ Cerda Silva, Ibid.

²⁹ Cerda Silva, 634.

³⁰ [2014] eKLR.

with imported physical copies of audio-visual work, it remains applicable to digital audio-visual works that require a similar approach to enhance protection due to the extraterritorial effects of online piracy. The following two illustrations demonstrate how Kenyan digital audio-visual works are made accessible on unauthorised online sites where consumers from all over the world can access, stream, download or share the works at minimal costs (internet data charges) with no regard to the rights holders.



The figure above is a screenshot of the Kenyan movie, *Nairobi Half Life* uploaded on an unauthorised online platform (<https://www1.123movies.solar/23236-nairobi-half-life.html#> that was accessed on 12/9/2018). It has been reported that thousands of infringing copies of the movie were available for purchase before the producers released it for sale or other forms of distribution.³¹

³¹ Kenya Copyright Board, “Copyright and the Audiovisual Industry in Kenya: A Practical Guide on Copyright for Film makers” in World Intellectual Property Organization (WIPO) “Strengthening the Audio-visual Industry in Africa” at <http://www.kenyafilmcommission.com/images/pdf/COPYRIGHT--THE-AUDIOVISUAL-INDUSTRY-IN-KENYA.pdf> accessed on 20/2/2018.



A screenshot of the Kenyan movie, *The First Grader* uploaded on an unauthorised online platform (<https://www.123movies.solar/7406-the-first-grader.html> accessed on 12/9/2018). There have been concerns that where Kenyan DVD sellers cannot sell the pirated copies of the movie cheaply, the same is accessed on global internet platforms like the one highlighted hence denying the legitimate Kenyan film makers financial gains.³²

3.2.3.4. Costs of Enforcement of rights

Considerable financial and human resources have to be mobilized to realize effective monitoring of digital audio-visual file access over the internet in order to curb online piracy. This must be done at the taxpayer's expense. The research and development (R&D) costs are relatively high in the audio-visual content production. As such, the investor and producer would not make the original investment if an imitator could immediately scoop the market with cheap copies pirated

³² Gerald Langiri, "Secrets about Piracy Revealed by Jitu Films Director" (23/01/2012) at <<http://www.actors.co.ke/en/mer/articledetail/127>> accessed on 2/10/2018.

online.³³ The costs administering protection of audio-visual work in the digital era of necessity involves monitoring access of the work through online platforms. The right-holders of the work uploads the original digital audio-visual work online from whence it may be accessed by internet users globally.

Where infringing use of the digital audio-visual work arises outside the territory of the rights holder, it becomes difficult to pursue the complex system of liability in that country to bring the offender to book. To this end, the rights holder must invest in expensive technology to monitor access of the uploaded work as well as the relevant experts. These costs may be prohibitive for players in budding film industries like Kenya's. Additionally, Kenya's film sector has suffered from poor prioritization and inadequate allocation of resources to the needs of the players in the film industry. The capacity of national regulatory institutions such as the Kenya Copyright Board (KECOBO) to monitor illegal downloading or streaming on videos online is far below satisfactory.

3.2.3.5. Penalizing non-commercial use

The bigger headache for regulators in protecting digital audiovisual work is the prevalence of non-commercial use of the content. Traditional models of copyright protection lay much emphasis on infringement for commercial gain but not on non-commercial use. Many internet users access video files for personal consumption and not to make copies for sale. This borders invoking the *de minimis* doctrine for copyright infringement. *De minimis* is a Latin term for minimal things and *de minimis non curat lex* means "the law does not concern itself with trifles."³⁴

³³ Groves, *Sourcebook on Intellectual Property*, 4.

³⁴ Andrew Inest, "A Theory of De Minimis and a Proposal for its Application in Copyright" (2006) 21 Berkeley Tech L.J. 945.

According to Andrew Inest, trivial copyright violations are not worth litigating for three reasons. First, the social cost of adjudicating trivial copyright disputes often outweighs the maximum possible benefit. Court costs for example would outweigh the potential reward of the litigation.³⁵ For domestic audiences who are mostly unemployed youth, the ability to pay out court awards for infringing use of digital audio-visual work further makes the pursuit of trivial litigation undesirable. Thus, although the domestic audience are guilty of copyright violation by making copies³⁶ of the digital audio-visual content available to third parties, the creator may choose to explore other means of protection other than pursuing this audience.

Second, strict enforcement of copyright for trivial violations rarely furthers, and often contravenes, the purpose of copyright, that is, promotion of creativity.³⁷ For digital audio-visual work, potential actors and producers need to access the existing pool of digital audio-visual work to avoid duplication of effort and to generate better versions of digital audio-visual work. This will not be possible with strict enforcement of copyright.

Finally, there is apparent consistency in approach on penalizing non-commercial use if the level of copying is trivial. In the US case of *VMG Salsoul, LLC v. Ciccone*³⁸, VMG filed a copyright infringement suit against Madonna and others, alleging that the producer of the song “Vogue,” copied a 0.23-second segment of horns from an earlier song, known as “Love Break,” and used a modified version of that snippet when recording “Vogue.” The court held that Madonna was not liable for copyright infringement for incorporating the 0.23 second horn blast from the disco song

³⁵ Ibid, 946.

³⁶ In *Mount Kenya Sundries Ltd v Macmillan Kenya (Publishers) Ltd* [2016] eKLR, the Kenyan Court of Appeal affirmed that “to constitute piracy of a copyright it must be shown that the original has been either substantially copied or to be so imitated as to be a mere evasion of the copyright.” The test of ‘copying’ is more easily satisfied in digital works, where even sharing a link that leads a viewer to the unauthorized work suffices.

³⁷ Ibid.

³⁸ (9th Cir. 2016).

and that the “de minimis” exception applied since it was unreasonable to conclude that an average audience would recognize the appropriation of the horn blast.

Section 26 (a) of the Kenyan Copyright Act illustrates the point of *de minimis* in the ‘fair use’ doctrine and allows use for purposes of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of the source. Since the nature of digital technologies may enable the owner of the digital audio-visual work to trace the source of infringement, and in view of the undesirability of pursuing a legal claim for minor infringement, the owners of the work may only effectively protect their work through the use of DRM platforms.

3.3. Conclusion on Contemporary Challenges to Protection of Digital Audio-Visual Content in Kenya

It is critical to note from the outset that the challenges discussed in this Chapter apply to Kenya’s film industry as anywhere else. The key concern is that of striking the right balance between the rights of creators of digital audio-visual content to get returns for their investment on the one hand and ensuring that audiences enjoy variety at reasonable costs on the other. Critics have expressed fear that access controls will foster a digital ‘lock up’ enabling copyright owners who will have ceased to make the work available in analog or nonprotected digital formats to restrict all access to works to their (overreaching) terms.³⁹ If, indeed, unprotected hard copies or unprotected digital copies disappear, then fair use problems may arise.⁴⁰ It may be as well argued that strict access controls may limit fair use or transformative use of the digital audio-visual work such as

³⁹ June M. Besek, “Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law,” *Media and the Arts*, (2004) 27 *Colum. J.L. of the Arts*, 389.

⁴⁰ *Ibid*, Ginsburg, 51.

independent commentary. Nonetheless, structured access of digital audio-visual work is necessary to help curb online piracy and ensure return on investment by the producers.

It is common sense that audio-visual content creators should maintain sufficient control over new digital markets to keep the copyright incentive meaningful, but not so much as to stifle the spread of the new technologies of dissemination. Kenyan courts should be reluctant to stifle the spread of new technologies even though they are primarily designed to facilitate access to copyrighted works. Bearing this in mind, Kenyan digital audio-visual content creators should at least be allowed to participate in facilitation of access through the new digital means of dissemination that makes their works particularly vulnerable to online piracy.

The reality that cannot be wished away is that online piracy presents a serious threat to commercialization of digital audio-visual work. Kenya must reassess its options for strengthening protection of digital audio-visual works in light of the problems discussed in this Chapter. Following trends set by other jurisdictions, strong emphasis on the rights of the creators alone does not suffice. Kenyan audiences of online content like their global counterparts, have grown accustomed to virtual theft and will be reluctant to adjust their consuming behavior without proper audience education and the necessary scheme of incentives and penalties to curb online piracy of digital audio-visual work. Finally, as noted in this Chapter, capacity building of the responsible national institutions and collective management organizations should be prioritized to improve monitoring and compliance in the digital world.

CHAPTER 4

INTERNATIONAL BEST PRACTICES IN THE PROTECTION OF DIGITAL AUDIO-VISUAL WORKS

4.1.Introduction

Copyright law generally operates as a system of incentives, attempting to strike a balance between protecting authors and allowing public access to the copyrighted work. Without protection of one's intellectual labor, there would be no incentive to create a work and ultimately, the public would be impoverished.¹ The digital revolution has challenged than never before the copyright owner's ability to control the unauthorized uses of the copyrighted work. The works have become increasingly vulnerable to piracy and expropriation. Further and as noted in previous chapters of this paper, digital technologies allow the manipulation of data in ways not possible before since once the work has been digitized, it can be modified without degradation. The advanced communication facilities also allow transmission of digital works from anyone to everywhere. No ceiling exists as to the number of copies that can be transmitted or to the audience.

Without the ability to exclude others as is apparent in the digital world, creators of digital audiovisual content will have little incentive to create works that take heavy investments of time and effort. The problem is exacerbated by the culture of the internet-an anything goes attitude among some Internet users.² In sum, on the internet, copying can take place without limits, without visibility, and without cost to the copier; a formula that spells disaster for authors to control use of their works.³In recognition of the technologically advanced environments within which copyright

¹ Marshall Leaffer, "Protecting Author's Rights in a Digital Age," (1995) 27 U. Tol. L. Rev. 1, 12.

² Laurence J. Kirmayer, Eugene Raikhel & Sadeq Rahimi, 'Cultures of the Internet: Identity, community and mental health' (2013) 50 Transcultural Psychiatry 2, 165-191.

³ Leaffer, (n1).

works are created and exploited, this chapter will give an overview of the prevailing trends adopted by other nations in the protection of their digital audio-visual work. The ultimate aim of this analysis is to borrow vital lessons for Kenya in the protection of digital audio-visual work.

As Chapter 3 of this paper records, the internet and digital technologies are transforming the world of intellectual property. However, online piracy means that Kenyan content creators will continue to forego the revenue from the sale of genuine digital audiovisual works and as well miss out on thousands of jobs. Securing protection of digital audiovisual works could spur Kenya's economy, boosting jobs, growth, competition, investment and innovation. Additionally, the Kenyan audience stands to benefit from better and more cost-effective audio-visual works, opportunities for new start-ups and allow companies to grow and innovate in Kenya's film industry. Generally, the legal instruments discussed in this chapter have aligned the basic building blocks of copyright law, namely the concepts of authorship, ownership, and access to conform to the technological innovations in the current information age. While some of the instruments are voluntary domestic initiatives, others are as a result of pressure either from international bodies such as the European Union or from strategic trade partners such as the US to introduce legislation to comply with various treaty obligations.

The new information-processing technologies have made certain kinds of knowledge and information increasingly critical to the accumulation and distribution of global wealth.⁴ In the film industry, the foregoing has been manifested in the successes of Hollywood, Bollywood and Nollywood among others. Kenya must take urgent measures to enhance protection of digital audiovisual works to tap into this valuable resource. Despite the uneven distribution of technological knowledge between the developed and the developing states, the realization of the

⁴ Amy Kapczynski, 'Access to Knowledge: A Conceptual Genealogy' in Gaëlle Krikorian and Amy Kapczynski (eds), *Access to Knowledge in the Age of Intellectual Property* (Zone Books, New York, 2010), 17.

central role the film industry will play in the Kenyan economy should at least stir better efforts from the government. The international best practices discussed in this Chapter are not exhaustive and merely reflect the global trends in the protection of digital audio-visual work in the information age. On the whole, this paper hopes that some of the highlighted practices can be replicated in Kenya to enhance the protection of its digital audio-visual work and the accruing benefits.

4.2.The European Union

The driving force behind initiatives taken by the European Commission relating to intellectual property was the achievement of the objective of harmonising laws in the Community with a view to completing the internal market.⁵ The following directive issued by the EU is relevant to the discussion at hand.

4.2.1. Directive 2010/13/Eu of The European Parliament and of the Council of 10 March 2010 (EU Audiovisual Media Services Directive)

The general approach of this Directive is to establish a minimum set of regulatory requirements are to be implemented in each EU Member State in relation to audiovisual media services that fall within that Member State's jurisdiction.⁶ The primary aim of this Directive is to provide a common programme for the EU production and distribution market, and to guarantee conditions of fair competition without prejudice to the public interest role to be discharged by the audiovisual media services.⁷ Among the benefits of audiovisual services listed by the Directive are employment

⁵ Dr Anne-Marie Mooney Cotter, *Intellectual Property Law* (Cavendish Publishing Limited, London, United Kingdom, 2003) 54.

⁶Tim Johnson, "Country of Origin Principle" (Fieldfisher, August 2015), at <<https://www.fieldfisher.com/media/3364499/country-of-origin.pdf>> accessed 13/6/2018.

⁷ Directive 2010/13/Eu of The European Parliament and of the Council of 10 March 2010 (Official Journal of the European Union, 15/4/2010).

creation particularly for small medium enterprises (SMEs), cultural significance in ensuring democracy, freedom of information as well as their educational value.⁸

Section 22 of the Directive narrows the scope of its application by including audiovisual commercial communication but excluding private correspondence, such as e-mails sent to a limited number of recipients, and incidental services such as websites that contain audiovisual elements only in an ancillary manner.

The Directive further roots for the country of origin principle as its core and makes it applicable to all audiovisual media services.⁹ Further, only one Member State should have jurisdiction over an audiovisual service provider.¹⁰ The country of origin principle means that provided a service is licensed in a Member State and having met the minimum criteria collectively set by the EU on behalf of all the Member States, then that service is licensed to be made available throughout the European Union.¹¹ Each Member State is free to impose more strict regulatory requirements, but a Member State should not interfere with a service property licensed in another Member State even though it may not meet the more stringent requirements. The objective of the country of origin principle is to ensure regulatory control over the service provider remains with the country of origin or where it is primarily licensed as opposed to the country of destination, or where the service is targeted.

Importantly, section 44 of the Directive recognises self-regulation as a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves. This sets ground for collective management organisations to set guiding standards for their members and to monitor

⁸ EU Audiovisual Media Services Directive, ss 6-8.

⁹ EU Audiovisual Media Services Directive, s. 33.

¹⁰ EU Audiovisual Media Services Directive, s. 34.

¹¹ Ibid, Johnson, 2.

compliance to complement state regulation efforts. Kenya's position in respect to CMOs is average by ordinary standards. There in fact exist various CMOs for the respective categories of copyrightable works such as the Music Copyright Society of Kenya (MCSK) for musical works, the Performers Rights Society of Kenya (PRISK) for musical and dramatic works, Kenya Association of Music Producers (KAMP), and Reproduction Rights Society of Kenya (KOPIKEN) for literary works. Although Kenya allows the co-existence of homogeneous CMOs and encourage competition among them, there has been uninspiring returns on investment to content rightsholders whose works are still exposed to online piracy.

With respect to audiovisual works, PRISK has developed tariffs for use of such works in public and broadcasts. For example, for the use of audiovisual work in a public service vehicle, one pays Kshs. 30/- per day or Kshs. 600/- per month while broadcasting of audiovisual works attracts up to 3.5% of the monthly income of the broadcaster.¹² The focus of the highlighted examples is on public distribution and commercial use of the audiovisual works but not on domestic consumption whereas the latter category of use perhaps contributes to greater online piracy. This has been reflected in the low revenues collected on behalf of authors in successive years.¹³ CMOs continue to perform the critical roles of licensing the use of the rights they manage, monitoring the usage of works and collecting and distributing the royalties payable as a result of the licensed use.¹⁴ Kenyan CMOs like elsewhere, continue to face numerous challenges with the decline of copyright value in the digital environment. Despite the territorial fragmentation in the enforcement of rights

¹² Kenya Gazette, Legal Notice No. 192 of 2015.

¹³ According to a 2014 WIPO Report, CMOs in Africa collected only 1% Share of the Global Collections compared to 61% for Europe and 17% for Canada-USA- See <http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_cr_sin_16/wipo_cr_sin_16_t9.pdf>.

¹⁴ WIPO, 'Copyright and The Creative Industries –Role of Collective Societies' at http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_cr_sin_16/wipo_cr_sin_16_t9.pdf accessed on 6/7/2018.

in digital audiovisual works, few scholars would downplay the critical role of CMOs in protection of digital content.¹⁵

The recognition of media literacy and its ability to influence consumer behavior in accessing digital content is highlighted under the Directive and its promotion emphasized.¹⁶ ‘Media literacy’ is defined as the skills, knowledge and understanding that allow consumers to use media effectively and safely.¹⁷ The Directive further notes that media-literate people are able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies. The proposed measures for increasing media literacy include continuing education for teachers and trainers, national campaigns for citizens for responsible internet use. KECOBO has in the recent past embarked on creating awareness through several fronts such as publication of newsletters, trainings and workshops for their officers and members of the public.

4.3.The United States of America

One key area of economic growth for the United States has been the development of legitimate digital platforms for distribution of copyrighted content, so that consumers around the world can enjoy copyrighted content by U.S. artists. However, technological developments have also made the Internet an extremely efficient vehicle for disseminating infringing content, thus competing unfairly with legitimate e-commerce and distribution services that copyright holders and online platforms use to deliver licensed content.¹⁸ The enactment of the Digital Millennium Copyright

¹⁵ Ibid.

¹⁶ EU Audiovisual Media Services Directive, s. 47.

¹⁷ Ibid.

¹⁸Office of the United States Trade Representative, ‘2017 Special 301 Report’ at < <https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF>. Accessed 13/7/2018.

Act (DMCA) 1998 sought to remedy some of these challenges. The choice of the US as an advanced IP protection economy especially in the film industry remains relevant for this paper.

4.3.1. **The Digital Millennium Copyright Act (DMCA) 1998**

This legislation implements two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.¹⁹

Section 411(a) of the Copyright Act requires claims to copyright to be registered with the Copyright Office before a lawsuit can be initiated by the copyright owner but exempts many foreign works in order to comply with existing treaty obligations under the Berne Convention. The prerequisite for registration is not a precondition to the validity of the copyright but merely confers several advantages to those who opt for it. For copyright in digital audio-visual works, it is both in the interest of the authors and the state that these be registered. There are several reasons for this requirement under the U.S. Act.

First, registration is still required prior to bringing an infringement action over a U.S. work. Second, statutory damages and attorney's fees are "available as remedies only for works that had been registered prior to their infringement."²⁰ Third, prompt registration-within five years of publication, creates a prima facie evidentiary presumption respecting the validity of the copyrights and the acts stated in the certificate of registration. Fourth, "a certificate of registration can be recorded with U.S. Customs and Border Protection to prevent the importation of infringing copies." Lastly, starting in 2005, certain authors can preregister their claims as a way to curb prerelease infringement.²¹

¹⁹ U.S. Copyright Office, "THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, U.S. Copyright Office Summary" 1Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

²⁰ Oliar D and Pattison N and Powell K, 'Copyright Registrations: Who, What, When, Where, and Why.' (2014) 92(7) Tex L Rev 2211.

²¹ Ibid.

Implementing the prerequisite for registration before instituting an infringement claim in Kenya would have a twofold effect. On the one hand, rights holders in digital audiovisual work will be encouraged to register or preregister their works before release in order to strengthen their claims to the resultant works. This side of the coin has a potential for revenue boost to the rights holders themselves as well as KECOBO and is as well likely to facilitate better monitoring of the use of such works due to data availability. Conversely, the prerequisite for registration is likely to deter many potential rights holders who may not have sufficient capital and representation resources to comply with registration requirements. While this latter effect has an economic element to it, the competent authority, KECOBO can change this by decentralizing its services to the Kenyan counties and ensuring a robust public education programme.

The most revolutionary provisions of the DMCA fall under Title II, the “Online Copyright Infringement Liability Limitation Act”. This part creates important limitations on the liability of online service providers for copyright infringement when engaging in certain types of activities. Section 1201 of the DMCA implements the obligation to provide adequate and effective protection against circumvention of technological measures used by copyright owners to protect their works as per Article 18 of the WIPO Copyright Treaty.²² The said section divides technological measures into two categories: measures that prevent unauthorized access to a copyrighted work and measures that prevent unauthorized copying of a copyrighted work. The foregoing distinction is vital as it seeks to clarify an area that appears to have been blurred by the digital technologies in copyright protection, that is, distinguishing between access and copying. The specified exceptions to circumvention under the DMCA widen the scope of fair use in the digital space and narrows

²² U.S. Copyright Office, “THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, U.S. Copyright Office Summary”,³.

potential claims by rights holders in digital works to clear cases of infringement and not merely transitory use.

On a related scale, the DMCA proscribes devices or services that fall within any one of the following three categories:²³

- a) they are primarily designed or produced to circumvent;
- b) they have only limited commercially significant purpose or use other than to circumvent;
- or
- c) they are marketed for use in circumventing.

The foregoing list of prohibitions provides useful regulatory options for Kenya as a large-scale consumer for electronic imports. Tightening of custom controls to reduce or eliminate the importation of these devices will significantly reduce the large scale copying and downloading of digital audio-visual work in Kenya for commercial use. As a matter of necessity, KECOBO must enhance its collaboration with the Kenya Revenue Authority to enforce these protection measures. Similarly, borrowing from the expanded circumvention exceptions, Kenya may prefer contextual statutory amendments to the existing copyright regime to allow circumvention for certain ends such as education,²⁴ reverse engineering,²⁵ encryption research,²⁶ protection of minors,²⁷ personal privacy²⁸ and security testing.²⁹ Although section 26B of the Copyright (Amendment) Bill, 2017 contemplates such exceptions, the Bill sticks to the traditional categories of use by educational institutions, libraries and archives and broadcasting institutions. The circumvention exceptions in

²³ The Digital Millennium Copyright Act (DMCA) 1998, Section 1201(c)(3).

²⁴ The Digital Millennium Copyright Act (DMCA) 1998, Section 1201(d).

²⁵ The Digital Millennium Copyright Act (DMCA) 1998, Section 1201(f).

²⁶ The Digital Millennium Copyright Act (DMCA) 1998, Section 1201(g).

²⁷ The Digital Millennium Copyright Act (DMCA) 1998, Section 1201(h).

²⁸ The Digital Millennium Copyright Act (DMCA) 1998, Section 1201(i).

²⁹ The Digital Millennium Copyright Act (DMCA) 1998, Section 1201(j).

the digital arena can still be enhanced to promote science, innovation and technology transfer as is apparent under the DMCA.

The DMCA further offers a digital lifeline to ISPs by limiting their liability for copyright infringement under four heads. These are; transitory communications, system caching, storage of information on systems or networks at direction of users, and information location tools.³⁰ Section 35A of the Kenyan Copyright Amendment Bill discusses these limitations to ISPs briefly in almost similar terms. However, section 35C of the Amendment Bill does not make it mandatory for the ISPs to designate an agent to receive notices of infringement. The DMCA on the other hand makes it compulsory for the ISPs to file a designated agent at the Copyright Office for receiving the infringement claims. Such a mandatory registration with KECOBO ought to have been included in the Kenyan Bill to facilitate monitoring and enforcement by rights holders in digital audio-visual works.

4.4.South Africa

As an important emerging market and a dominant economy in sub-Saharan Africa, South Africa is uniquely positioned to demonstrate how a modern copyright regime can contribute to the growth of creative industries in an era of rapid digital and mobile expansion throughout the country and the region.³¹ Like Kenya, online piracy continues to grow in South Africa with the growth in bandwidth speeds, coupled with lax controls over corporate and university bandwidth abuse.³² An analysis of the prevailing copyright regime in South Africa is

³⁰ The Digital Millennium Copyright Act (DMCA) 1998, Section 512.

³¹ International Intellectual Property Alliance (IIPA), '2018 Special 301 Report on Copyright Protection and Enforcement' at (2018 Special 301: South Africa Issued February 8, 2018) at <<https://iipa.org/files/uploads/2018/02/2018SPEC301SOUTHAFRICA.pdf>> accessed on 15/7/2018.

³² Ibid.

thus essential for this study for the purposes of comparison with Kenya's efforts in combating online piracy of digital audiovisual works.

4.4.1. **The Copyright Act 98 of 1978**

Section 1 (5) considers a copyrighted work to have been published if copies of the work have been issued to the public with the consent of the owner, in sufficient quantities to reasonably meet the needs of the public.³³ The requirement of consent is key for digital works as any unauthorised access of the copyrighted work amounts to infringement. The exemption of transitory copying of copyrighted work of digital platforms is also entrenched under this section of the Act.³⁴ Kenya's move to include a similar exemption to circumvention of TPMs under the Copyright Amendment Bill therefore reflects the global trend in the protection of digital audio-visual works.

In addition to the primary restrictions of use of copyrighted work such as publication, reproduction, performance, adaptation, and broadcast without the right-holder's authority, section 6 of the Act further prohibits 'causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster.'³⁵

The Act defines a 'diffusion service' to mean:

a telecommunication service of transmissions consisting of sounds, images, signs or signals, which takes place over wires or other paths provided by material substance and intended for reception by specific members of the public; and diffusion shall not be deemed to constitute a performance or a broadcast or as causing sounds, images, signs or signals to be seen or heard; and where sounds, images, signs or signals are displayed or emitted by

³³ The Copyright Act 98 of 1978, section 1 (5).

³⁴ The Copyright Act 98 of 1978, section 1 (5) (d) (iii) under this section, transmission in a diffusion service such as the internet or digital platforms does not amount to publication.

³⁵ ³⁵ The Copyright Act 98 of 1978, section 6.

any receiving apparatus to which they are conveyed by diffusion in such manner as to constitute a performance or a causing of sounds, images, signs or signals to be seen or heard in public, this shall be deemed to be effected by the operation of the receiving apparatus;

This section contemplates digital and internet platforms as some of the emerging diffusion services in the technology era. The potential of use of such services for infringement of digital audio-visual works is immense. As highlighted in Chapters 1 and 3, large-scale streaming, downloading and copying of digital audio-visual work occurs across these diffusion services. An express prohibition is statute as demonstrated under section 6 is therefore an important initial step of establishing liability. On Kenya's part, the clear statutory prohibition of dissemination of copyrighted work over digital platforms is lacking.

On the whole, the South African Copyright Act as it is comparable to the Kenyan Copyright Act 2001 in terms of the protection accorded to digital works including digital films. Again, like Kenya, South Africa has embarked on a mission to adjust its copyright laws to accommodate changes in the digital age. The South African Copyright Amendment Bill is discussed briefly in the ensuing part.

4.4.2. The Copyright Amendment Bill, 2017

The preamble of the Bill captures the essence of the proposed amendments including among others, to provide for prohibited conduct in respect of technological protection measures; to provide for prohibited conduct in respect of copyright management information; to provide for management of digital rights; and to provide for certain new offences.

The Bill adopts an open fair use or fair dealing clauses in a trend borrowed from advanced copyright jurisdictions that have embraced these broader exceptions in realization of the colossal inexpressive use of copyrighted work over digital platforms.

The Bill amends section 6 of the Act to provide for potential infringing use over the internet by prohibiting any communication of the work to the public, by wire or wireless means, including by means of internet access and the making of the work available to the public in such a way that any member of the public may access the work from a place and at a time chosen by that person, whether interactively or non-interactively.³⁶ The addition of wireless means accommodates novel access means such as internet file-sharing and offline saving of digital works for future access.

Section 12 of the Amendment Bill further exempts from categorization as infringement, temporary reproduction or adaptation of copyrighted works as an essential part of the technical process to enable lawful transmission of the work or use on different technological devices, such as mobile phones. Unlike the Kenyan Copyright Amendment Bill that exempts any transitory copying of the work, the South African Bill allows only **lawful** temporary reproduction. Another contrast to the Kenyan Bill is the requirement under the South African Bill that the transitory reproduction or adaptation should not be economically significant.

Finally, section 25 of the Bill criminalizes the making, importation, sale, distribution, let for hire, offer or expose for sale or hire or advertisement for sale or hire, a technological protection measure circumvention device. Although the prohibition of circumvention devices is not novel, the provision expands the scope of the prohibition from the point of manufacture, sale and use of these devices to unlawfully access digital works. Like the Kenyan Copyright Amendment Bill, the South

³⁶ The Copyright Amendment Bill, 2017, sections 4, 5 and 6.

African Bill overallly aims to safeguard various uses of copyrighted work over the internet to balance the interests of rights holders and audiences.

4.5.Canada

Prior to making amendments to its copyright law, Canada had been listed as a safe haven for some of the most massive and flagrant internet sites dedicated to the online theft of copyright material.³⁷

4.5.1. Copyright Act (R.S.C., 1985, c. C-42) current to 2018-06-20 and last amended on 2017-06-19

In a bid to bring Canada's copyright laws up to speed with the evolving online world, the Copyright Modernization Act made amendments to the Copyright Act in 2012 and later in 2017 to boost the "protection of copyright works ... including through the recognition of technological protection measures."³⁸ The following key provisions of the latest Canadian Copyright Act are relevant to the current study.

Section 24 of the Act allows an authorised licensee to store a backup copy of any work in instances where the original may be lost on condition that the source copy is not an infringing copy.³⁹ The licensee must further ensure that the backup copy is well secured to avoid unauthorised reproductions of the work. The accommodation for keeping backup copies of copyrighted work apply to the digital environment but may be difficult to enforce due to the requirement of retaining control of the backup copy.

³⁷ International Intellectual Property Alliance (IIPA), '2018 Special 301 Report on Copyright Protection and Enforcement' at (2018 Special 301: Canada Issued February 8, 2018) at < <https://iipa.org/files/uploads/2018/02/2018SPEC301CANADA.pdf>> accessed on 14/7/2018.

³⁸ Brendan Burke, 'Ineffective laws fueling Canada's online piracy problem, U.S. copyright group says' (CBC News, Toronto, Feb 19, 2017) at < <https://www.cbc.ca/news/politics/copyright-online-piracy-canada-laws-infringement-rights-1.3986968>> accessed on 13/7/2018.

³⁹ Canadian Copyright Act, 1985, section 24.24.

As in many other jurisdictions, education institutions are allowed to reproduce copyrighted work, including in digital format, for instruction.⁴⁰ Similar exceptions apply to libraries, archives and museums⁴¹ as well as machines installed in educational institutions, libraries, archives and museums.⁴² Another popular exception to infringement of copyright included in the Canadian Act is where a person reproduces work or other subject-matter for the purposes of encryption research.⁴³ Kenya would benefit from this exception as encryption research would assist enforcement authorities in establishing identity authentication, improving security measures for digital audio-visual work, and protecting information and privacy on large-scale communication networks.⁴⁴

Similarly, the Canadian Copyright Act allows for temporary reproductions of copyrighted work for technological processes.⁴⁵ Additionally, the Act allows the use of technologically circumvention measures to develop a computer program or make any other computer program interoperable.⁴⁶ Unlike the approach adopted by many jurisdictions, the Canadian Copyright Act makes this important exception to promote research and innovation in the technology sector and to improve the use of digital products. Kenya on the other hand seems to have adopted narrow exceptions to infringement that does not allow the use of digital works for the generation of other information products.

⁴⁰ Canadian Copyright Act, 1985, section 29.4.

⁴¹ Canadian Copyright Act, 1985, section 30.1.

⁴² Canadian Copyright Act, 1985, section 30.3.

⁴³ Canadian Copyright Act, 1985, section 30.62.

⁴⁴ See Hongjiang Duan, Weilong Huang & Guangxu Zhu, 'Research on Data Encryption Technology' Information and Computer Security (2018) at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=2ahUKEwj-v63576fcAhWMjqQKH4XBekOFjACegQIAxAC&url=http%3A%2F%2Fsystems.enpress-publisher.com%2Findex.php%2FICS%2Farticle%2Fdownload%2F411%2F236&usg=AOvVaw2RODFEKrf2PL13TxNyOdc0> accessed 13/7/2018.

⁴⁵ Canadian Copyright Act, 1985, section 30.71.

⁴⁶ Canadian Copyright Act, 1985, section 41.12.

In an attempt to limit the importation or export of TPM circumvention devices, the Act places a responsibility on customs officers to provide copyright owners with information on detained prohibited copies of copyrighted work or devices.⁴⁷ Although this chapter notes that it is possible to enhance collaboration between KECOBO and customs officials at the Kenya Revenue Authority to implement similar measures, this has to be done within a clear statutory framework that is lacking in the existing Copyright Act and the Copyright Amendment Bill.

Additionally, the role of the judiciary in the fight against online piracy is increasingly critical. A Canadian court in *Nintendo v. King*⁴⁸ found an Ontario-based provider of game copiers, mod chips and modding services (both online and through a retail location) liable for trafficking in circumvention devices and services (as well as the act of circumvention) in violation of Section 41.1 and made important interpretations of several provisions of the new law.⁴⁹

4.6. Conclusion on International Best Practices for the Protection of Digital Audio-Visual Works

This Chapter has highlighted key intellectual property regimes to gauge the direction copyright law is taking in respect to digital works. What emerges is the reactive nature of law to technological advancements in the information age. Although some intellectual property rights may be enforceable under the traditional models, the digital economy presents a radical shift that threatens to override authors rights in digital intellectual goods. As William Blackstone described the right to material property, “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the

⁴⁷ Canadian Copyright Act, 1985, section 44.01.

⁴⁸ 2017 FC 246.

⁴⁹ Ibid, International Intellectual Property Alliance (IIPA).

universe,” the dominion over intellectual goods no longer holds true in the digital world. for emerging economies like Kenya, the protection of the digital economy and the promotion of informational goods such as digital audiovisual works will not only spur creativity and innovation but will also aid in solving economic challenges such as youth unemployment. As noted in the discussed examples, there is a regulatory shift to expand the reach of law in order to balance the competing rights of control and access to digital works. Even with the ongoing copyright reform in the form of the Kenyan Copyright Amendment Bill 2017, numerous sites dedicated to technologies to circumvent tools used by copyright owners to control access to or copying of their works remain active in Kenya, despite the enactment of anti-circumvention prohibitions in the existing law.

The prevailing suggestion is that the digital economy is critical in the 21st Century and any country that fails to internalize what these developments mean for its economy loses a huge potential for growth and as well fails to fulfill its international obligations under the WIPO Internet Treaties. This Chapter’s analysis therefore informs the policy direction that Kenya ought to take in its quest for enhancing copyright in digital audiovisual works in the global digital market.

CHAPTER FIVE

PROPOSALS AND RECOMMENDATIONS TO ENHANCE PROTECTION OF DIGITAL AUDIO-VISUAL CONTENT IN KENYA

5.1. Introduction

The first four chapters of this paper have discussed at length the contemporary issues relating to protection of digital audio-visual work in Kenya. Chapter 1 presented an overview of copyright protection in Kenya and traced the position of digital audiovisual works in the statutory system. The Chapter also introduced the Programming Code requiring local broadcasting stations to comply with 40% to 60% local content requirement in their programs. While this has and continues to attract investment in the production of local content, the Chapter singles out the threat of online piracy as a major disincentive. In order to avert large scale infringement of digital audio-visual content, the Chapter proposes the need to acknowledge the existing online piracy threat in Kenya and take legislative and other remedial measures to make the film industry more lucrative.

Chapter 2 discussed the legal, institutional and regulatory framework for protecting digital audio-visual content in Kenya by first conceptualizing the unique nature of digital works and the necessity to reshape existing laws to take into account emerging trends. The Chapter then proceeded to contextually and critically discuss the international legal regime for protection of digital audio-visual works such as TRIPs, the Berne Convention, the WIPO Copyright Treaty as well as corresponding regional measure under ARIPO, OAPI and the East African Community. Chapter 2 concludes by tracing the entry point of domestic legislation and institutions such as the Copyright Act, 2001 and the proposed Copyright Amendment Bill, 2017. Chapter 3 of this paper narrows down the peculiar challenges presented by online piracy to the protection of digital audio-visual works. Importantly, Chapter 3 raises key constitutional and consumer protection issues in

relation to access to information and right to privacy in enforcement of rights of creators of digital audio-visual works.

Finally, Chapter 4 provided a comparative review of the global trends in the protection of digital audiovisual works from the European Union, the United States of America, South Africa, and Canada. The Chapter rightly notes the reactive nature of copyright law to developments in the digital world. Importantly, the chapter attempts to highlight the critical areas of action Kenya needs to borrow from the discussed examples. Against the background and context laid down of Chapters 1 to 4, this chapter will draw conclusions and make recommendations on how to enhance protection of digital audiovisual works in Kenya.

5.2.The current landscape of infringement of digital audiovisual works in Kenya

In full realization of the vital role digital audio-visual content plays in the socio-economic and cultural life of the nation, the Kenyan government has a key role in promoting an enabling environment, enhancing the infrastructure, and fostering a business and regulatory climate conducive to the creation, access to and preservation of such content.¹ This paper acknowledges that with the global nature of the internet, developing countries like Kenya cannot continue to ignore the perverse effects of online piracy to its creative industries especially the audio-visual sector. While Kenyans continue to enjoy massive audiovisual content from domestic and international sources through online piracy in the form of illegal file streaming and sharing sites, the greatest concern is the continued ability to enjoy that content if online piracy continues to erode Kenya's creative industries. In the first quarter of 2018, the information and communication sector in Kenya generated Kenya Shillings twenty-eight million seven hundred eighty-five thousand

¹ See OECD, "OECD Policy Guidance for Digital Content" (OECD Ministerial Meeting of the Future of the Internet Economy, Seoul, Korea, 17-18 June 2008) at <https://www.oecd.org/sti/ieconomy/40895797.pdf> accessed on 02/08/2018.

(KShs. 28,785,000) in Gross Domestic Product (GDP).² Copyright-based industries such as film, music and broadcast contribute a significant percentage of this whole.

Further, the Third Quarter Sector Statistics report for the Kenyan communications sector for the period between 1st January and 31st March 2018 estimates the number of mobile subscribers in Kenya at 44.119 million.³ Out of this number, internet data subscriptions grew by 8.2% from 33.365 million to 36.095 million. This not only highlights the increase in internet penetration in the country but also points out to the potential scope of infringing use digital audio-visual works are subjected to.

As the survey notes, for the same period of review, the total number of cyber threats increased from 7,970,286 to 10,705,492. While cyber threats do not directly relate to infringing use of copyrighted content, the escalation of cyber threats highlights the growing misuse of the internet by domestic and international users. Unfortunately, many of these threats go unreported.⁴ KECOBO for instance only received 11 reports of copyright infringement between April and June 2018.⁵ It cannot thus be ruled out that some of the challenges to protection of digital audio-visual works in Kenya is cultural as many consumers are aware of the infringing use but do not report the same.

² Kenya National Bureau of Statistics, “Quarterly Gross Domestic Product Report: First Quarter, 2018”(29th June, 2018) at < <https://www.knbs.or.ke/download/quarterly-gross-domestic-product-report-first-quarter-2018/>> accessed on 4/08/2018.

³ Communications Authority of Kenya, “THIRD QUARTER SECTOR STATISTICS REPORT FOR THE FINANCIAL YEAR 2017/2018 (1ST JANUARY – 31ST MARCH 2018), at < <http://www.ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q3%202017-18.pdf>> accessed on 4/08/2018.

⁴ The CAK Report for instance indicates that out of the over 10 million cyber threats, only 677 cyber reports were made during the same period.

⁵ KECOBO, “Commercialisation and Monetisation of Intellectual Property,” *Copyright News*, Issue 29 at <http://www.copyright.go.ke/awareness-creation/send/9-newsletters/104-issue-29-commercialisation-and-monetisation-of-intellectual-property-rights.html> accessed on 4/08/2018.

With the robust growth of mobile data and internet following the deployment 4G Long Term Evolution (LTE) network by the three mobile network operators (MNOs) and one ISP,⁶ millions of Kenyan consumers are able to access digital audiovisual works through their smartphone mobile devices. The increasing availability of websites that act as safe havens for illegal file downloading and file sharing and the potential scale of infringement by mobile subscribers in Kenya therefore call for additional and /or extralegal measures to curb online piracy. The next part of this chapter discusses some of these measures.

5.3.Recommendations on how to enhance protection of digital audiovisual works in

Kenya

The proposals contained in this section range from legal, technological and social. While some recommendations may not be entirely novel, the introduction of the ‘digital’ aspect to some of the approaches is what it would take to truly balance the interests of the rightsholders and the consumers of digital audio-visual works in Kenya.

5.3.1. Focused Consumer Education

Consumer rights under Article 46 of the Constitution and the Consumer Protection Act apply even with respect to digital products. Article 46 (1) of the Constitution provides that consumers have the right to goods and services of reasonable quality, to the information necessary for them to gain full benefit from goods and services, to the protection of their right, safety, and economic interests and to compensation for loss or injury arising from defects in goods and services.

Section 4 of the Consumer Protection Act highlights one of the purposes of the legislation is to promote and advance the social and economic welfare of consumers in Kenya by among other

⁶ The MNOs include Safaricom, Airtel and Telkom and the ISP is Jamii Telcom.

things, improving *consumer awareness and information* and encouraging responsible and informed consumer choice and behavior.⁷ The right to information in the digital context is critical as it determines the choice of consumers to buy or access a legitimate or pirated digital audio-visual work.

Knowledge and awareness levels of online piracy are relatively low in Kenya. Even if instances where consumers involved in digital piracy are generally aware that it is illegal, it is not always perceived as unethical, hence the continued need to promote consumer awareness to overcome this perception.⁸ In contemporary markets, primary focus of consumer education has been to teach individuals to become more skilled and rational buyers especially due to their limited influence in existing marketplace conditions.⁹ The focus for consumer education in digital technologies however moves from rational buying to raising awareness levels on digital piracy and recommending legitimate options for consumers to access the works instead of resorting to online piracy. The personal economic situation of most Kenyan consumers further limits their ability to purchase legitimate video content due to little disposable incomes. This presents another dimension to the fight against online piracy as even where consumers may be aware of the legitimate channels to access the digital audio-visual works, they may not prioritize spending on entertainment hence the rush to online piracy sites that offer similar content for free.

If properly conducted, Kenyan consumers will be educated on the dangers of using online piracy sites, most of which form part of international criminal enterprises. Additionally, collaborating

⁷ Consumer Protection Act, No. 46 OF 2012, section 4 (e).

⁸ OECD, "Counterfeiting And Piracy: Phase II: Piracy Of Digital Content" (DSTI/IND(2008)24/REV1 , 17-Feb-2009) at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/IND\(2008\)24/REV1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/IND(2008)24/REV1&docLanguage=En) accessed on 14/08/2018.

⁹ Judith Staley Brenneke, *Consumer Education and Economic Education in Public Schools*, (Joint Council on Economic Education, New York, 1981), 13.

with consumers and ISPs to report infringements to KECOBO or other law enforcement agencies will be a big boost to tracking down illegal movie streaming sites.

5.3.2. Technological self-help measures or technological protection measures (TPMs)

Content owners continually find themselves stuck behind ancient legal walls when trying to stop people from downloading objects online as copyright laws do not apply to standard physical objects deemed “noncreative.”¹⁰ The counter practice has been for authors to increasingly ignore the traditional copyright law as the basis for enforcing their rights in the digital age and favour a combination of technological restrictions and contractual arrangements. The principal method is by encryption techniques. Encryption encodes a work so that it cannot be read without the proper key. To have access to a work, the user must pay a fee to obtain a decryption key.¹¹ More effective encryption techniques effectively exclude unauthorized use, despite a prospering underground market in cracking encryption systems. Legislation that criminalizes any attempt to circumvent technological means for protecting digitized intellectual products has been a popular response by regulators.

TPMs have achieved a level of sophistication that permits not only technologically preventing a certain act but enabling it to a certain extent or in a specific manner.¹² For example, a single personal copy can be technologically enabled, but making further copies from that copy (serial

¹⁰ Nick Bilton, “Internet Pirates Will always Win” (The New York Times, August 4, 2012) at < <https://www.nytimes.com/2012/08/05/sunday-review/internet-pirates-will-always-win.html>> accessed on 6/08/2018.

¹¹ Tim Johnson, “Country of Origin Principle” (Fieldfisher, August 2015), at < <https://www.fieldfisher.com/media/3364499/country-of-origin.pdf>> accessed 13/6/2018.

¹² Richard Owens, “Topic 10: IP and the Development of DRM Standards: Co-Existence of DRM and Copyright Limitations” (WIPO/IP/CM/07/WWW[82580], May 29, 2007) at < http://www.wipo.int/edocs/mdocs/copyright/en/wipo_ip_cm_07/wipo_ip_cm_07_www_82580.doc> accessed on 8/08/2018.

copies) can be prevented; the use of a digital file can be technologically enabled for a limited period of time, after which the use of the file becomes impossible; moreover, transmission of a certain file to specific terminals and devices can be enabled while preventing distribution to others.¹³ YouTube, which is owned by Google, for instance offers a free tool to the movie studios and television networks called Content ID. When a studio legitimately uploads a clip from a copyrighted film to YouTube, the Google tool automatically finds and blocks copies of the product.¹⁴ Kenyan film creators can innovatively use TPMs in conjunction with established domestic money transfer platforms such as MPESA, Airtel Money and T-Kash to facilitate online sales of their digital works locally and similarly employ other digital sales mechanisms that transcend national boundaries for global sales.

The Kenyan Copyright Act prohibits actual circumvention as well the manufacture or distribution of devices primarily designed to circumvent TPMs or to alter electronic rights management information.¹⁵ This is in line with Article 11 of the WIPO Copyright Treaty that bids contracting parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures. Certain categories of TPMs enable the tracing of any subsequent unauthorized uses of work and automatically debits the user account for the unauthorized use.

Although TPMs seek solutions to online piracy from the source of the problem, that is, technology, the greatest danger of TPMs is that they operate as a digital lock of the work potentially restricts variety of fair uses of the copyrighted material such as for education and scientific research. A

¹³ Owens, *ibid.*

¹⁴ Bilton, *Ibid.*

¹⁵ Copyright Act 2001, Section 35 (3).

further challenge for Kenya is the ability of digital audiovisual content creators to effectively employ TPMs in protecting their digital content. Digital audiovisual content creators also face difficulties in accessing the relevant technology or software to limit illegal distribution of their work over online platforms.

It is however noteworthy to discuss the inherent limitations of the use of TPMs for the protection of digital audiovisual works in Kenya as currently structured in the Copyright Act, 2001 as well as the Copyright Amendment Bill 2017. First, the TPMs clause under section 35 of the Copyright Act, 2001 should be reworded to take into account the various degrees of fair use that may suffer blanket exclusion by the unilateral measures of the copyright holders. The nature and purpose of the digital audiovisual, the character of the use- whether commercial or private enjoyment, and the proportion of the work that is copied ought to be taken into account.¹⁶ This calls for policy guidelines or regulations to restrict the TPMs that override national copyright law exceptions, promote anti-competitive misuse, and stifle technological innovation and creation of interoperable devices.¹⁷ A relevant example of anti-competitive use of TPMS was the Australian case of *Stevens v Kabushiki Kaisha Sony Computer Entertainment*¹⁸ where the Australian High Court held that access codes and boot ROMs installed by Sony that prevented or inhibited the infringement of copyright by preventing access to unauthorised copies of games did not amount to TPMs.

¹⁶ Satish Kumar & Anil Kumar Mishra, “IPR in India: Status, Strategies and Challenges for Digital Content” in Priya Rai, R.K. Sharma, P.K. Jain & Akash Singh, *Transforming Dimension of IPR Challenges for New Age Libraries* (NLUD Press, New Delhi, 2015) 13-14.

¹⁷ Carolina Rossini, “TPMs and Access Rights” (Trans-Pacific Partnership Stakeholder Forum, San Diego, USA - July 02, 2012) at https://www.eff.org/files/filenode/eff_presentation_on_tpms_and_civil_rights_sd.pdf accessed on 11/11/2018.

¹⁸ [2005] HCA 58 (6 October 2005): The High Court of Australia found that “Sony’s device of the Boot ROM chip and the access code... does not constitute a “technological protection measure” by virtue of the device's deterrent effect on the copying of computer games.” Such broad interpretation is likely to allow service providers wider discretion in determining the kind of access to grant to consumers.

5.3.3. Contractual arrangements in the form of End User Licence Agreements (EULA)

Unlike conventional IP licensing where the IP owner makes available the IP asset for commercial use by the licensee in return for either a lump-sum payment or predetermined periodic royalty payments, the EULAs operate mostly in a mass market environment such as the internet and impose blanket restrictions on consumers' ability to access and alienate the licensed product. EULAs delineate the kind of access license the user desires, such as read-only access, access for viewing, or copying access with payment for access guaranteed by automatic on-line debiting of a credit card, and unauthorized use will be excluded by technological means.¹⁹

EULAs raise enforcement concerns first due to their unconscionability and the absence of consumer input in creating the terms. Additionally, where the infringing use is detected, the rights holder may only have access to the infringing consumer's billing account.

EULAs, like TPMs are a double-edged sword. On the one hand, the measures ensure that rightsholders' commercial interests are adequately protected despite of the existing law. If, however, the terms of the protection are so stringent that consumers find difficulty in accessing the digital audiovisual works for ordinary enjoyment, they will resort to obtaining illegitimate copies from piracy sites. Kenyan consumers are increasingly obtaining information about the available digital audiovisual work from online sources like social media, digital advertisements, and various websites. Clear and effective disclosure of the will ensure that consumers of digital audio-visual content make the right decision to obtain content from legitimate sites and shun piracy networks.²⁰

¹⁹Johnson Ibid,10.

²⁰Improving Online Disclosures with Behavioral Insights (OECD Digital Economy Papers, April 2018) at <https://read.oecd-ilibrary.org/science-and-technology/improving-online-disclosures-with-behavioural-insights_39026ff4-en#page1> accessed on 08/08/2018.

5.3.4. Civil and Criminal Remedies entrenched in the Law

In general, national laws and regulations do not distinguish between digital and non-digital uses of copyrighted materials.²¹ As such, available legal remedies, be they civil proceedings or action under public law are those that exist for infringements of copyright more generally.²² The contractual structures adopted by authors need to be reinforced by civil and criminal remedies against users of the networks who do not observe restrictions of their access license or who try to evade the security of the network. Existing statutory remedies like injunctions may be granted against local intermediaries whose services are used by third parties to facilitate illegal access and downloading of digital audio-visual works.

In *Parity Information Systems Limited v Vista Solutions Limited & 2 Others*²³, the Plaintiff sought injunctive orders against all three Defendants, for breach of copyright works in relation to software computer systems. The court, in dismissing the plaintiff's application, held that on a balance of convenience, the Plaintiff had not succeeded in satisfying the principles necessary for the granting of an interlocutory injunction which was consequently declined. The court however ordered the 1st Defendant to keep an account of all transactions involving the sale, installation, commissioning and training in relation to its Vista Management Information System as well as any dealings that it may have with customers as regards SAGE ACCPAC applications (the software in dispute) pending the determination of the substantive case. Although this case involved the use of software, it remains relevant for cases of breaches of digital audiovisual works where instant remedies are warranted and failure of which the rightsholders certainly suffer irrecoverable losses.

²¹OECD, "Counterfeiting And Piracy: Phase Ii: Piracy Of Digital Content" (DSTI/IND(2008)24/REV1 , 17-Feb-2009) at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/IND\(2008\)24/REV1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/IND(2008)24/REV1&docLanguage=En) accessed on 14/08/2018.

²² Ibid.

²³ [2012] eKLR.

Common reliefs for copyright infringement are listed under section 35 of the Copyright Act to include, damages, injunction, and accounts delivery up.²⁴ Section 37 of the Act further provides for Anton Piller orders to secure the preservation of the documents, copies or things as evidence. These civil remedies alongside criminal sanctions outlined under the Act such as imprisonment and fines, are what remain available to infringement of copyright even in digital spheres. Following Article 11 of the WIPO Copyright Treaty, Kenya has relied on the foregoing civil and criminal remedies against the circumvention of effective technological measures. This is the closest response strategy when it comes to online piracy in digital audiovisual works in current Kenya. In certain cases, such as the digital arena, the only practical means of preventing copying is through so-called “copy protection” or “copy-management systems”, that is, systems containing technical devices that either entirely prevent the making of copies or render the quality of the copies made so poor that they are unusable.²⁵

The proposals under the Copyright (Amendment) Bill, 2017 such as take down notices to ISPs, safe harbors and orders by court to disable access to infringing sites as additional remedies to digital infringement, will therefore be more suitable than the existing remedies.²⁶ This projected move from enforcement measures that necessitate recourse to court to those that allow speedy elimination of the infringing piracy sites is a great step in the fight against infringement of digital copyrights.

²⁴ Kenya Copyright Act, 2001, section 35 (4).

²⁵ WIPO Intellectual Property Handbook: Policy, Law and Use at < <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch4.pdf>> accessed on 26/8/2018.

²⁶ The Copyright (Amendment) Bill, 2017, sections 35A, 35B, & 35C.

5.3.5. Increased use of Collective Societies

Under section 48(4) of the Copyright Act, a collecting society means an ‘organization which has as its main objects, or one of its main objects, the negotiating for the collection and distribution of royalties and the granting of licences in respect of copyright works or performer’s rights.’ Increased use of collective societies, much like those that provide a clearinghouse mechanism to collectively enforce the rights digital audio-visual copyright owners. These societies administer voluntary licenses to use copyright works on behalf of the owners and can take up enforcement action against facilitators of online piracy. Legal action against web sites that sustain or promote the illegal transfer of digital content and action against individuals infringing copyright remain a viable approach that collective societies can adopt on behalf of the rightsholders they represent. CMOs offer the safest, simplest, fastest, most innovative, most convenient and most cost-efficient way to seamlessly access content from multiple rightsholders.²⁷

In order to fulfil properly their purposes, CMOs must be well governed, and transparent and accountable in their activities. In *Laban Toto Juma & 4 others v Kenya Copyright Board & 9 others*²⁸, a recent development involving the Music Copyright Society of Kenya (MCSK), the CMO’s licence was recalled by KECOBO over allegations of misappropriation of funds meant to benefit local musicians. A different CMO, the Music Publishers Association of Kenya (MPAKE) was licensed in place of MCSK. Although the court held that the issuance of the licence to the new CMO was administratively invalid, the MCSK was ordered to account for all the licence fees and royalties collected from 1st January 2017 to 13th July 2018 within thirty (30) days.

²⁷ Olav Stokkmo, “Transparency, Accountability, Good Governance of CMOs” (WIPO Ministerial Conference, 4 November 2015, Dakar) at <http://www.wipo.int/edocs/mdocs/africa/en/ompi_pi_dak_15/ompi_pi_dak_15_cluster_ii_11.pdf> accessed on 23/08/2018.

²⁸ [2018] eKLR.

Due to the critical role CMOs play in the management of rights of copyright holders²⁹, the organizational transparency and operational efficiency of the Performers Rights Society of Kenya (PRISK), the collective management organisation licensed by the Kenya Copyright Board to represent performers in sound recording and audio-visual works should therefore be buffered by measures such as institutional rules or codes of conduct and member complaint redress mechanisms to obviate the scenario disclosed in the MCSK case.

5.3.6. Enhancing the Enforcement capability of KECOBO

While KECOBO has intensified raids on tangible infringing copies of music and video content, there is need to prioritize enforcement against online piracy and the trafficking in illicit streaming devices/apps and other circumvention tools. There is need to provide KECOBO with additional financial, human and technological resources to effectively monitor ISPs that host online piracy sites. Additionally, there is need for specialized training to enforcement officials on the diverse aspects of online piracy in digital audiovisual work, including on cybercrime investigators and cybercrime security.

Given the complexity and speed of online piracy, there should be considerations to dedicate a special unit under KECOBO to deal with monitoring and removing of infringing content. This approach has been adopted in Italy that has created a special authority called the *Autorità per le Garanzie nelle Comunicazioni* (AGCOM) to request, following a short administrative procedure that Internet service providers selectively remove or block access to websites hosting allegedly copyright infringing materials, and that on-demand providers remove illegal content from their

²⁹ In *Michael Branham Katana t/a Harsutak Bar & 4 others v Kenya Association of Music Producers (Kamp) & 3 others* [2016] eKLR, the High Court of Kenya at Mombasa affirmed the right of CMOs to set tariffs and licence users of copyrighted works on behalf of authors.

catalogues and refrain from retransmitting illegal works in their future schedules.³⁰ Overall, improving the speed at which the legal system responds to the infringements is key to fighting online piracy in digital audiovisual works.

5.3.7. Enforcement against Private Consumers

The biggest challenge to tackling online piracy of digital audio-visual work is the high rate of recidivism. Once the sites that offer illegal downloading and video streaming of copyright content are tracked and duly shut down, similar sites spring up almost immediately either in the same jurisdiction or elsewhere. On the other hand, certain consumers are perennial infringers by repeatedly downloading or streaming the illegally uploaded audio-visual works. This is very common in higher learning institutions in Kenya where there is free access to the internet. This category of consumers accesses the digital audio-visual work at almost zero cost. While monitoring the download and streaming history of a private consumer will most likely raise privacy questions, the enforcement agency may seek exemptions to issue notices to consumers whose IP addresses are consistently used to access and stream digital audio-visual content from illegal sites. On the other hand, the employment of DRMs by the rightsholders will be more suitable as it will stop the infringement when the consumer attempts to have unauthorised use of the work.

Other private consumer arrangements that have taken root in Kenya include the use of local online distributors such as Mdundo, Waabeh, SuperNgoma, ZikiLab, for music; and Netflix, Showmax, iFlix, ViuSasa, RongaTV & MyChoiceTV for film, television and animations.³¹ KECOBO should

³⁰ Guilda Rostama, “Scoping Study on The Impact of The Digital Environment on Copyright Legislation Adopted Between 2006 and 2016” (Standing Committee on Copyright and Related Rights: Thirty-Fifth Session-Geneva, November 13 to 17, 2017)43.

³¹ MIKE STRANO, “Massive success and breakouts: Kenya's 2018 entertainment scene” (The Star, Nairobi, Jan. 02, 2018) at < https://www.the-star.co.ke/news/2018/01/02/massive-success-and-breakouts-kenyas-2018-entertainment-scene_c1691856> accessed on 25/08/2018.

encourage and monitor the use of such platforms to ensure a balance of the interests of consumers and the rights holders in digital audiovisual works.

5.3.8. Redefining the meaning of Authorship and the Right to Copy in respect to Digital Audiovisual Works

The legislative and enforcement authorities should rethink the meaning of ‘authorship’ in the digital era. As the user of the work easily becomes the author, this blurs the traditional allocation of rights. In this decentralized environment, every consumer is a potential author, a potential publisher, and a potential infringer of copyright, all in one.³² The web of rights that could be breached is more complex stemming from derivative uses of the copyrighted digital work to create new works that could be the subject of new claims.

Similarly, continued reliance on the traditional notion of ‘copying’ or ‘reproduction’ could be misleading in the digital context. As regards the application of the right of reproduction in the digital environment, two general trends have emerged.³³ The first general trend consists in including electronic and/or digital archiving and storage (whether temporary or permanent) under the coverage of the right of reproduction while the second consists in the exclusion of some kinds of digital reproduction from the general scope of the exception regarding private copying.³⁴ Following the two trends, there should be a shift towards defining ‘access’ rights to the copyrighted work as more appropriate to the digital environment. The right of communication to the public should be tightly controlled in favour of the authors to reduce illegal streaming, downloading and sharing of their digital works. These two foregoing options need to be carefully evaluated by the legislative authorities in Kenya such that the ensuing proposals neither unduly curtail access to the

³²Johnson Ibid,9.

³³ Ibid, Rostama, 11.

³⁴ Ibid.

digital works by the consumers nor grant the copyright holders such limited protection as to prejudice creativity and investment in digital audio-visual works.

5.3.9. Possible Legislative Proposals

As this paper notes, the greatest challenge of ensuing protection of digital audio-visual works in the online environment is that of balancing the competing rights of consumers as against those of the copyright holders. The choice of legislative amendment must therefore be informed by socio-economic and political considerations that underlie the nation keen on effecting the changes. For Kenya, there is urgent need to enhance the existing legal structure to protect its infant film industry and its economic potential in the information age. The US Congress³⁵ proposes three main legislative options for a government faced by the digital copyright challenges as those discussed in this paper. These key proposal are: forbearance – where the government will do nothing and allow market forces to work; the second option is the use of compulsory licensing to set a price for certain types of creative works while the third proposal would be to revise copyright law in favor of one of the groups whose interests are at stake in the copyright debate: the copyright owners or the users of copyrighted material.³⁶

Under the first proposal, the government may make an assumption that the recent advances in digital rights management (DRM) technology and the development of business models that take advantage of those advances will most likely lead to market-based solutions to the problem of online piracy. DRM technology for instance would prevent consumers who pay for only a few rights from exercising the additional usage rights that are available to consumers who pay more.³⁷

³⁵ The Congress of the United States, “Copyright Issues in Digital Media” (Congressional Budget Office, August 2004), ix.

³⁶ Ibid.

³⁷ Ibid.

DRM technology could likewise be used to control consumers' ability to redistribute the copies that are made. While the use of DRM technologies in the regulation of digital audio-visual work is gaining currency in Kenya, the challenge lies in the fact that such models not only grant copyright holders unrestricted power to regulate the market prices for their goods, but also limit the availability of the works to low-income consumers who are the majority in Kenya. This will fuel online piracy of the digital audio-visual works as most consumers will be seeking to access the works on free or cheaper platforms without regard to their legality. Thus, while the market option of differential pricing of the digital content may seem lucrative to the copyright holders, the potential for its abuse and applicability in a developing economy like Kenya needs further examination.

Under the second option, a single flat fee would be charged for the use of copyrighted material and the revenues so generated distributed to copyright owners according to the relative use of their works.³⁸ The price of using copyrighted material would be the same for all consumers and for all works covered by the license. This option however, only assumes that the digital material will be accessed through legitimate channels by consumers. In contrast, if the target consumers feel that the uniform pricing is unfair, there will be a surge in the demand for the same content from online piracy sites. The costs for enforcement of such a policy would also be prohibitive in Kenya as it would involve tracking the private use of each copyrighted digital audio-visual work.

The third proposal presents two limbs of action by the government, one in favour of strict enforcement of copyright and the other in favour of widening the scope of exceptions to the use of the digital works. The costs to society of greater enforcement of digital property rights could potentially outweigh efficiency gains especially if the enforcement was so strict that it either

³⁸ Ibid, x.

prevented advances in digital hardware and communications or curtailed usage and development of the internet.³⁹ On the contrary, reforming the law in favour of consumers of digital audio-visual works would disincentivize copyright holders who would not be able to recoup meaningful economic returns from their investment. Therefore, in making legislative amendments to the existing copyright law, the Kenyan government must delicately balance and allocate the opposing rights of consumers and rights holders of digital audio-visual works.

5.4. Conclusion on Proposals and Recommendations to enhance protection of digital audio-visual content in Kenya

This paper has observed that online piracy is a global problem that requires active involvement of the states. From the comparative review in Chapter 4, this study also corroborates the direct relationship between the existing legislative regime and the levels of piracy of digital content. As a consequence of the rampant online piracy in digital audio-visual works, the infant Kenyan film industry has and is likely to experience massive revenue losses unless urgent remedial measures are taken by the government. This paper has noted further that the existing legal regime for the protection of digital audio-visual works is intrinsically inadequate for the kind of developments in the digital world. Additionally, there exists a weak link in the enforcement of the existing law by KECOBO in respect to digital audio-visual works.

The other obvious observation of this study is that there is need to buffer if not overhaul the existing legal framework for copyright protection to keep pace with technological developments in order to guarantee rights of investors and stakeholders in the Kenyan film industry. However, if such proposals are poorly designed, the domestic responses to online piracy of digital audio-visual

³⁹ Ibid.

content in Kenya will create more confusion as to the allocation of rights between consumers and rights holders. Any legislative proposals require careful consideration of the potential effects on efficiency, innovation and socially desirable ends such as employment creation. Forcing new digital technologies to conform to a particular security standard for digital content, for example, could impede the development of superior products.⁴⁰ On the other hand, expanding fair use exceptions would reduce supply of the digital audiovisual works if the producers feel that they are not sufficiently compensated for their efforts. That is not all. National law is obviously ineffective for the global problem of digital piracy especially in the absence of cooperation among different states. Thus, the allure of a new international legal structure is necessitated by the realities of digital works residing in electronic networks that have no respect for national boundaries or the territoriality principle of international copyright.⁴¹

On the whole, Kenya must reexamine its responses to protection of digital content and consider what options for improvement suits its present context. The continued violation of these rights will mean that Kenyan authors and audiovisual producers, broadcasters and other stakeholders suffer considerable economic loss that would be detrimental not only to the personal economic interests but also to society due to reduced creativity and loss of preservation of domestic cultural industries.

⁴⁰ Ibid, 36.

⁴¹ Johnson Ibid,10.

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