CONSTRUCTING COPYRIGHT AND LITERARY CREATIVITY IN KENYA
CULTURAL POLITICS AND THE POLITICAL ECONOMY OF TRANSNATIONAL
INTELLECTUAL PROPERTY

A DISSERTATION
SUBMITTED TO THE SCHOOL OF LAW
AND THE COMMITTEE ON GRADUATE STUDIES
OF STANFORD UNIVERSITY
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
DOCTOR OF THE SCIENCE OF LAW

Bernard M. Shanya

June 2003
ABSTRACT

Copyright and the infrastructure for literary creativity in Kenya are sub-optimal. I evaluated this through three related hypotheses. First, the public, private and non-profit sectors do not efficiently support training of authors, writing, publishing, distribution and access to literature.

Second, the construction of literary copyright denies (budding) authors, composers, and performers efficient and equitable, recognition, compensation or protection. Free riders exploit creativity and investment of skill, judgment, time, money and labour. This regime covers subject matter, scope, and term of copyright that benefit Western and local corporate copyright holders, especially publishers and cultural entrepreneurs. Thus, under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), software is copyrightable yet moral rights and folklore are excluded. Access by readers, authors, and researchers is also constrained through technologies and laws like the digital anti-circumvention laws enacted under the World Intellectual Property Organisation's (WIPO's) WIPO Copyright Treaty, 1996, and the Kenya Copyright Act, 2001.

Third, because of path dependence, lock-in, and rent-seeking, Kenya has not designed a balanced, equitable, and efficient regime for literary creativity and copyright.

I have proved all the three hypotheses by analysing quantitative and qualitative data from field, library, documentary and web research. The empirical evidence indicates that the textured nature of copyright, creativity, and socio-cultural development requires interdisciplinary approaches among creative writers, comparativists, cultural historians, political economists, and constitutionalists.

Other proposals for reconstructing copyright and the infrastructure include conducting a cost-benefit analysis of the industry for efficient investment; strengthening community libraries; encouraging authors through training, prizes, and commissions; facilitating transnational co-publishing arrangements; registering and documenting Kenyan creativity.
and copyright; and ensuring the new Kenya Copyright Board operates efficiently and with integrity.

My findings, conclusions and proposals require further empirical research, using the following conceptual, epistemological and methodological parameters: first, evaluating benchmarks for literary creativity in pre-colonial and (post-)colonial Kenya, including recognition and compensation systems; second, examining the nexus in national and transnational copyright among creativity, originality and copyright; third, assessing the scope and contribution of literary copyright and cultural industries in Kenya in terms of personal, corporate, and national welfare and development.
TABLE OF CONTENTS

ABSTRACT
DEDICATION
ACKNOWLEDGEMENTS
   Dependence upon specific scholars
   Research advisory, grants and infrastructure support
PREVIOUS WRITINGS
IMPORTANT DATABASES
   Research assistance
PREFACE: THE EVOLUTION OF A JSD DISSERTATION
NOTE ON STYLE AND DISCOURSE
NOMENCLATURE OR GLOSSARY OF SOME (KENYAN) EXPRESSIONS
ABBREVIATIONS AND ACRONYMS
LISTS OF CASES, LAWS AND POLICY INSTRUMENTS

PART 1: METHODOLOGY OF KENYA'S CREATIVITY AND COPYRIGHT
   Prolegomenon to the dissertation

CHAPTER 1: INTRODUCTION AND RESEARCH PROPOSAL
   .................................................. 4
   1.0 Introduction
   1.1 Research question and statement of the problem
      1.1.1 The research question
      1.1.2 Statement of the problem or objectives
   1.2 Research design
      1.2.1 Library and Internet research
      1.2.2 Archival research
      1.2.3 Interviews and consultations
      1.2.4 Field and survey research
   1.3 Justification and literature review
   1.4 Tentative hypotheses
   1.5 Chapter outline

PART 2: SCHOLARSHIP, R&D, AND CREATIVE WRITING IN KENYA

CHAPTER 2 SCHOLARSHIP, RESEARCH AND DEVELOPMENT IN KENYA
   .................................................. 55
   2.1 Creative research, scholarship and development
      2.1.1 Natural or physical science research
      2.1.2 Social science and legal scholarship
      2.1.2.1 Political economy and cultural studies
      2.1.2.2 Constitutional and legal research
   2.2 Historical writing
   2.3 Biographies
   2.4 Ethnographies
   2.5 Historical biographies
CHAPTER 3 CREATIVE WRITING IN KENYA

3.1 Ngugi wa Thiong'o: the Kenyan novel, drama, short story and literary essay
   3.1.1 Biography and works
   3.1.2 Ngugi as a literary icon
   3.1.3 Criticism of Ngugi

3.2 Francis Davis Imbuga
   3.2.1 Imbuga's biography and works
   3.2.2 Imbuga's literary accomplishments
   3.2.3 Critiquing Imbuga's art

3.3 Marjorie Oludhe Macgoye
   3.3.0 Macgoye's creative works
   3.3.1 Macgoye's cultural and literary commentary
   3.3.2 Criticism of Macgoye’s literary creativity

PART 3 ECONOMICS OF LITERARY CREATIVITY AND COPYRIGHT
Research methodology and approaches

CHAPTER 4 WRITING AND DISTRIBUTING LITERATURE IN KENYA

4.1 Britain and writing and Kenyan publishing
4.2 Authors and publishers
4.2A Prizes, awards, commissions, and other incentives to authors
4.3 Divestment and the development of local publishing
4.4 Publishing series for national and international distribution
4.5 Access to literature: pricing, imports and exports
4.6 Creative bookshops
4.7 Libraries: Kenyan and American
   4.7.1 The Kenya National Library Service
   4.7.2 The Library of Congress in Kenya and other libraries
4.8 Universities: dissertation borrowing and copyright policies
4.9 Literary and cultural critics: book reviewers and others
4.10 Other media of cultural production and distribution

CHAPTER 5: TRANSNATIONAL COPYRIGHT ECONOMICS AND LAW

5.0 Conceptualizing innovation and copyright economics
5.1 Copyright economics
5.2 Comparative copyright economics and law
   5.2.1 Authors and owners in Western copyright
   5.2.2 English copyright economics and law
   5.2.3 American copyright economics and law
   5.2.4 Copyright economics and law in Asia, Africa, and Latin America
5.3 Transnational copyright economics and law
   5.3.1 Introducing transnational copyright law
   5.3.2 The political economy of transnational copyright
   5.3.3 GATT and World Trade Organization (WTO)
5.4 Transnational copyright laws
5.4.1 The Berne Convention and Kenya
5.4.2 The Universal Copyright Convention and Kenya
5.4.3 Kenyan interests and the rapprochement between Berne and UCC

5.5 Transnational copyright institutions
5.5.1 The United Nations Cultural, Educational and Scientific Organisation
5.5.2 World Intellectual Property Organization (WIPO)
5.5.2A The New International Economic/Information Order (NIEG/NIIO)
5.5.3 WIPO and UNESCO under attack: the copyright enforcement debate

5.6 The WIPO Internet Treaties

PART 4 COPYRIGHT LAW IN KENYA

CHAPTER 6 COPYRIGHT LAW IN KENYA ........................................... 229

6.1 Conceptualising Kenya’s copyright law
6.2 Historical development of copyright in Kenya
6.2.1 Anglo-American antecedents
6.2.2 The colonial legacy of Kenya’s copyright law
6.3 Sources of Kenyan copyright law
6.3.1 Applicable law in comparative context
6.3.2 A hierarchy in sourcing Kenyan copyright law?
6.3.3 Statutory copyright law in Kenya: the Copyright Act, 1966-2001
   6.3.3.1 The Copyright Act, 1966, Act No. 3 of 1966
   6.3.3.2 Copyright Act, 1975, Act No. 3 of 1975
   6.3.3.3 The Copyright (Amendment) Act, 1982, Act No. 5 of 1982
   6.3.3.4 The Copyright (Amendment) Act, 1989, Act No. 14 of 1989
   6.3.3.5 The Copyright (Amendment) Act, 1992, Act No. 11 of 1992
   6.3.3.6 The Copyright (Amendment) Act, Act No. 9 of 1995
   6.3.3.7 The Copyright (Amendment) Regulations, 2000 LN 125/2000
   6.3.3.8 The Copyright Bill, 1999, 2000, and 2001
6.3.4 Is common law copyright still there?
6.4 Copyright treaties in Kenya

CHAPTER 7 NATURE, SUBSISTENCE AND SCOPE OF COPYRIGHT IN KENYA ........................................................................ 261

7.1 Subsistence of copyright
7.1.1 Originality
7.1.2 Fixation, materiality or tangibility
7.1.3 Qualified persons
7.1.4 Duration of Copyright
7.1.5 Infringing character
7.1.6 Quality and content of the literary work
7.1.7 Doctrine of substantiability
7.1.8 Multiple subsistence of copyright
7.1.8.1 Doctrine of overlap
7.1.8.2 Doctrine of fragmentation
7.2 Subject matter of copyright
7.3 Authorship and ownership of copyright
7.3.1 Definition and significance of authorship
7.3.2 Ahmed Ndiritu and the authorship conundrum
7.4 Authorship and copyright transfers
7.4.1 Contract of service and authorship and ownership
7.4.2 Commissioned works
7.4.2.1 Works commissioned by Government, international bodies or NGOs
7.4.2.2 Consultancy works
7.5 Reporters and editors
7.6 Classroom teaching and teaching materials
7.7 Crown and regulator’s copyright in the Kenyan context

CHAPTER 8 COPYRIGHT EXPLOITATION, INFRINGEMENT, AND REMEDIES
8.1 Rights in and dealing with copyright
8.1.1 Moral rights
8.1.2 Economic or material rights
8.1.3 Dealing in literary copyright
8.2 The public domain
8.3 Copyright infringement, defences and remedies
8.3.1 Infringement
8.3.2 Defences
8.3.2.1 Non-subistence of copyright
8.3.2.2 Fair dealing in literary copyright
8.3.2.3 Consent
8.3.2.4 The public interest
8.3.2.5 The public domain
8.3.2.6 Non-dereogation from grant, or licence, or implied rights
8.4 Remedies and sanctions
8.4.1 Civil remedies
8.4.1.1 Injunctions
8.4.1.2 Damages
8.4.1.3 Account of profits
8.4.1.4 Delivery up and search and seizure
8.4.2 Criminal sanctions

PART 5 COPYRIGHT INDUSTRIES IN KENYA

CHAPTER 9 COPYRIGHT IN BOOKS AND MUSIC IN KENYA.............333
9.1 The Kenyan book industry
9.1.1 The book comes to Kenya
9.1.2 United for copyright and the book: the Kenya Publishers Association (KPA)
9.1.3 KOPIKEN: defending reprographic rights
9.1.4 Creators and authors
9.1.4.1 The Kenya Non-Fiction Authors Association (KENFAA)
CHAPTER 10 FOLKLORE AND SOFTWARE INDUSTRIES IN KENYA

9.1.4.2 Kenya Union of Journalists (KUJ)
9.1.4.3 Advertising Agency: Monier 2000
9.1.4.4 Advertising Agency: The Creative Business

9.1.5 Flesh and blood: Prof. Henry Indangasi, literary scholar and author

9.2 The music industry and literary copyright
9.2.1 Structure and operations of music business
9.2.2 Musical copyright matters
9.2.3 Together as one in copyright management
9.2.4 Fighting music infringement and piracy

CHAPTER 11 ADMINISTERING KENYAN COPYRIGHT: THE ROLE OF LEGAL CULTURE AND LEGAL ACTORS

10.0 Proléromena to the discourse on folklore and software
10.1 Folklore, literary creativity and copyright in Kenya
10.2 Interest groups in the folklore industries
10.3 Copyright and access to software in Kenya
10.3.1 Software belongs to Microsoft and the Internet belongs to Africa Online
10.3.2 Microsoft brings Anton Piller to Kenya

CHAPTER 12 RECONSTRUCTING KENYAN LITERARY CREATIVITY AND COPYRIGHT

11.1 Judicial competence: constitutionalism, cultural creativity, intellectual property
11.2 Copyright in the Bench
11.3 The legal profession: is the copyright bar efficient?
11.4 The copyright academy

PART 6 CONCLUSION AND RECONSTRUCTING COPYRIGHT AND CREATIVITY IN KENYA

12.1 Concluding testament
12.2 Reconstructing and reforming copyright and creativity in Kenya
12.2.1 Cost-benefit analysis of copyright
12.2.2 Creativity and copyright: management, administration and enforcement
12.2.3 Reforming TRIPS and transnational copyright
12.2.4 Constitutional reconstruction of creativity and copyright
12.2.4.1 Integrating creativity and copyright into the Kenyan Constitution
12.2.4.2 How can Kenya integrate creativity and copyright into the Constitution?
12.2.4.3 How should the Constitution be reconstructed to incorporate creativity and copyright?

APPENDICES

BIBLIOGRAPHY