

INTELLECTUAL PROPERTY LAW

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

RESEARCH TOPIC

ANALYZING THE LEGAL PROTECTION OF MUSIC COPYRIGHT IN KENYA.

By

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G62/68579/2013

**A Project Submitted in Partial Fulfillment of the Requirements for the Award of Master of
Laws Degree, LL.M, of the University of Nairobi.**

Submitted on November 2014

DECLARATION

This Project is my original piece of work and it has never been submitted to any other learning institution for the award of any Diploma or Degree Certificate, by either me or any other person, whatsoever.

Signature:.....this.....day of....., 2014.

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This Project is being submitted to the University of Nairobi, Kenya, for examination with my approval as the Student Supervisor:

Signature:.....this.....day of..... 2014.

PROF. PATRICIA KAMERI MBOTE

DEDICATION

To my wife: Thank you for your unconditional support in the course of our marriage. Over time, I have observed you taking various courses ranging from Diplomas to Degree in an effort to enhance your intellectual capacity. This is in spite of your other duties as a wife and mother. You are my inspiration and I dedicate this project to you. May God guide you as you pursue your current degree programme.

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ABSTRACT

The Kenya Society has placed immense emphasis on tangible property such as land as a means of production and as a development mode. Intellectual property rights have hitherto been ignored. It is only in the year 2001 that Kenya legislated on Copyright matters.

Although the Government has enacted laws regarding protection of music copyrights, the enforcement and implementation of these laws have not been wholly effective. This is due to deliberate non-adherence to the law, a situation that is encouraged by a weak enforcement mechanism.

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

The data and information pertaining to this study was obtained through documentary research. Relevant literature from books, academic papers, journals, newspapers and the internet. The data obtained has been presented and analysed both qualitatively and quantitatively. The use of percentages has been employed as much as possible. Key informant interviews and consultations with KECOBO, the Judiciary and the Police were carried out in a bid to gather information from the relevant Government institutions.

The findings of this research are significant to the stakeholders in the music industry and the Government as we seek to effectively protect Intellectual Property Rights. In due time, the music copy right holders will be able to reap the justifiable fruits of their sweat.

The research offers solutions necessary to enhance the protection of music copyrights in Kenya so as to motivate the artistes and spur growth within the industry hence increase revenues to the individual musicians and the government thus leading to overall development.

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

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ABBREVIATIONS

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

TRIPS	Trade-Related Aspects of Intellectual Property Rights
UCC	Uniform Commercial Code
UDHR	Universal Declaration of Human Rights
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

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CHAPTER ONE

1.0 INTRODUCTION

In Kenya all matters related to copyright are regulated by an Act of Parliament¹ and the Regulations² made there under. There exists a constitutional underpinning that obliges the state to support, promote and protect the intellectual property rights of the people of Kenya.³ The gist of the Copyright Act, 2001 and the regulations made there under is to provide for administration of copyright and other related rights; to identify forms of infringement; and to prescribe penalties for such breaches as well as to provide for a modality for the implementation.

Apart from the domestic laws, Kenya is also bound by the international treaties and conventions, which set out wide ranging provisions for regulating intellectual property rights, to which it is a signatory.⁴ In spite of legal framework, the Kenya Society has placed immense emphasis on tangible property such as land as a means of production and as a development mode. Intellectual property rights have hitherto been ignored and it is only in the recent past from 2010 that our society has realized that it has been sleeping on a goldmine.⁵

Although the Government has enacted laws regarding protection of music copyrights, the enforcement and implementation of these laws have not been wholly effective. This could be due

¹ The copyright Act 2001, Laws of Kenya, an Act of Parliament to make provision for copyright in literary, musical and artistic works, audio-visual works, sound recordings, broadcasts and for connected purposes.

² The copyright Regulations 2004 made pursuant to Section 49 of the copyright Act 2001

³ The Kenya Constitution, 2010, Article 40(5).

⁴ Some of the Treaties Kenya has ratified included The WIPO Performances and Phonogrammes Treaty, 1996; WIPO Copyright Treaty, 2001 and The Trade Related Aspects of Intellectual Property (TRIPS), 1994.

⁵ Kenya only legislated on Copyright matters in 2001 through the enactment of the Copyright Act 2001. The Constitutional underpinning thereof was only achieved via the Kenyan Constitution 2010, Article 40(5) specifically provides that “the state shall support, promote and protect the intellectual property rights of the people of Kenya.” Unlike the old Constitution, that contained general provisions protecting persons against unlawful deprivation of property of any description.

to deliberate non-adherence to the law, a situation that has been encouraged by a weak enforcement mechanism.

The findings of this research will be significant to the stakeholders in the music industry and the Government to seal the apparent lacuna for effective protection of these rights. In due time, the music copy right holders will be able to reap the fruits of their sweat. Moreover, the study will also contribute to the field of legal research in general and intellectual property law in particular. Legal scholars may deem the findings useful to develop further research, which could lead to eventual elimination of music copyright infringement.

The study will analyze the efficacy of the Kenyan Copyright Law in curbing music piracy. The main research area will be Nairobi County where the researcher hypothesizes experiences of high levels of this vice. Additionally, the research will analyse the role and effectiveness of the following agencies;

- a) The Kenya Copyright Board;
- b) The Music Copyright Society;
- c) The Kenya Police; and
- d) The Judiciary

Moreover the researcher will interrogate the extent to which the emergence of digital technology has contributed to music piracy in Kenya. This research shall be limited to issues relating to music copyright and whether our current law has effectively tackled those issues *vis-à-vis* the challenge being posed by new technologies.

1.1 BACKGROUND OF THE PROBLEM

The music industry in Kenya as part of local innovation has experienced tremendous growth since independence.⁶ The industry plays host to great Kenyan talent, which receives local and international accolades. However, accompanying the growth is a high rate of infringement of the original artistes' work. For instance, the music industry is faced with a piracy rate of 98%.⁷

The infringement takes various forms such as unauthorized copying; illegal down loading of music from the internet via you-tube; and subsequently selling of the same. The high level and many forms of infringement have rendered the original artistes unable to maximize their profits. In order to protect the rights of the artistes, legal and regulatory framework⁸ has been put in place. This framework has set out the protection mechanisms by establishing a Regulatory Board⁹ as well as providing for penalties for breaches of the rights thereto.¹⁰

The Kenya Copyright Board (KECOBO) was launched on 21st July 2003 by the then Attorney General Hon. Amos Wako at the State Law Office. During the inaugural presentation, it was noted that music piracy posed the greatest threat to the local music industry. Indeed, it was

⁶Jens Finke, Traditional Music & Cultures of Kenya (2000-2007) available at <<http://www.bluegecko.org/kenya/>> and accessed on 25 August 2014.

⁷The Kenya Publisher(Nairobi) a quarterly newsletter of the Kenya Publishers Association (2011).

⁸ ibid, 1; ibid 2.

⁹ The Kenya Copyright Board established under section 3(1) of the Copyright Act, 2001.

¹⁰ ibid 1, s. 38.

evident that many prominent recording artistes and performers died poor while their music dominated the airwaves both locally and internationally.¹¹

Throughout the years, music has been constant but the styles have changed. Benga, one of the most popular genres in Kenya, was predominant from the 1940s through the 1970s. Jazz and Rumba, came later on and played a huge part in the style of numerous start-out bands in the 70s – it formed the entertainment scene in many parts of the country. Most Kenyan bands performed their music in vernacular languages, with notable lead musicians like the late Daudi Kabaka, D.O. Misiyani and Joseph Kamaru. Music continued to evolve and more musical styles were realized from the 1980s, including Lingala, Soukous, Taarab, Reggae, Dancehall, Rhythm and Blues and Gospel (whose popularity enjoyed a steady increase with the rise of Christianity) to the current reign of hip hop and rap. The acceptance of music influenced by cultures around the world has strongly created the need to carve a niche and define Kenyan music.¹²

Music piracy dates back to the introduction of the cassettes as a major format for recorded music in the 1963. In order to create discs, a manufacturing plant was needed to process and stamp the vinyl with the recorded music. The burners to the entry (cost of a plant, cost of production, and so forth) were such that piracy of records was almost non-existence. That changed with the

¹¹ Wako, Amos (2007). *“Promoting better legislation and enforcement of intellectual property rights in Kenya”*: A paper delivered during the Third Global Conference on Combating Counterfeiting and Piracy at the International Conference Centre in Geneva, Switzerland, January, 2007.

¹² Hellen Kinuthia, Issue of Destination Magazine: Kenyan Music Build on Talent(2012) available at < <http://www.capitafm/lifestyle>> (accessed on 25 August 2014)

introduction of the tapes, first eight track and then cassettes; because setting up a manufacturing facility was relatively inexpensive and thus pirated recordings flooded the market.¹³

To combat the inherent piracy capabilities of cassettes there was the introduction of the compact discs (CD) in 1983. The major break through with the internet file sharing occurred in 1999 when Shawn Fanning created Napster, a website where users stored and retrieved songs stored in a central computer server with no payments to copyright holders. Since then piracy has become rampant and uncontrollable.¹⁴

1.2 STATEMENT OF THE PROBLEM

Although Kenya has ratified and domesticated international instruments relating to IPRs Protection, the benefits of such protection has not trickled down to the artists as purposed. Infringement of IPRs remains on the rise hence rendering the legislation and the regulations made there under toothless bulldog.

To complicate matters KECOBO¹⁵ has not fully succeeded in its mandate. From an enforcement perspective, KECOBO appears to have failed to make full head-way in the fight against piracy in Kenya. Indeed, it is difficult to zero in on any notable raids against infringers except for a few occasional crackdowns in the Nairobi Riverwood.¹⁶ Thus, from a perspective, KECOBO's enforcement actions seem to target small and medium piracy operations. It is based on this that

¹³ Don Cusic, Gregory K Faulk and Robert P Lambert (2003). 'Technology and Music Piracy: Has the Recording Industry Lost Sales?'

¹⁴ Glyn Moody (2012). '30 years of the CD, of Digital Piracy, and of Music Industry Cluelessness. Accessed at <<http://www.techdirt.com/user/glynmoody>> on 25th August, 2014.

¹⁵ The Kenya Copyright Board was inaugurated in July 2003. While the intention under the Act is to have the board delinked from the Attorney-General's chambers, the process of delinking has no occurred as yet. The Board has developed implementing regulations for the Act but has not yet begun to perform its functions in earnest.

¹⁶ Riverwood is named after River Road, a bustling creative and business hub operating around a road that bears the name in downtown Nairobi.

there has been an inter-agency approach to intellectual property (IP) enforcement led by the newly formed Anti-Counterfeit Agency (ACA) whose empowering legislation¹⁷ is much broader in scope and stringent on violations of IP rights. With ACA solely in charge of IP enforcement, it is envisaged that KECOBO will be able to re-focus its limited resources away from fighting piracy to its other functions under the Copyright Act, such as the regulation of collective management organizations (CMOs).¹⁸

Another notable failure on the part of KECOBO is its enforcement arm namely the Competent Authority.¹⁹ The Chair and members of this Tribunal were gazetted in 2009.²⁰ However, this Tribunal has never heard or determined any cases relating to copyright, as it is yet to be operationalized.²¹ KECOBO can also be cited for failure to regulate CMOs who play an important role in advancing the rights of artists. Effective regulation of CMOs will go a long way in addressing the gaps in the Copyright Act relating to licensing and supervision of CMOs.²²

¹⁷ The Anti-Counterfeit Act, 2008 being an Act of Parliament to prohibit trade in counterfeit goods, to establish the Anti-Counterfeit Agency.

¹⁸ Recently a special taskforce appointed by the President to streamline the operations of state corporations proposed that KECOBO, KIPI and ACA be merged to form a single state corporation. *See- 'Kenya Intellectual and Industrial Property Corporation' Daily Nation* (Nairobi Kenya 7 October 2013).

¹⁹ Section 48 (1) creates the competent authority which is a Tribunal with original jurisdiction to deal with disputes emanating from the administration of the Act.

²⁰ Kenya Gazette Notice No. 6385 of 2009.

²¹ High Court in the *Republic v Kenya Association of Music Producers (KAMP) & 3 others Ex- Parte Pubs, Entertainment and Restaurants Association of Kenya (PERAK) [2014] eKLR*: “The only reason advanced by the Kenya Copyright Board why the Competent Authority cannot fulfill its said statutory duty is that the Competent Authority is yet to be operationalized owing to budgetary and administrative challenges and hence the same is not functional.”

²² Kenya Copyright Board and Collecting Societies: Myths and Facts, available at <http://cipitlawstrath.wordpress.com/2013/08/14/kenya-copyright-board-and-collecting-societies-myths-and-facts> (accessed 27 August 2014).

It is clear that KECOBO lacks the resources and the technical capacity to discharge its mandate.²³ The sad reality is that despite the fact that Kenya has ratified various international conventions such as the Berne Convention for the Protection of Literary and Artistic Works of 1886;²⁴ and the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement,²⁵ there has been little success in protecting musical works from piracy.

1.3 THEORETICAL FRAMEWORK

1.3.1 Introduction

The focus of this project is the need to remedy the injustice occasioned to original music artistes due to wanton breach of their copyright by unscrupulous merchants. Kenya relies heavily on written law to drive its economy and our Judicature Act²⁶ is categorical that any unwritten rules of culture and customs are only applicable to the extent that they are not inconsistent with the written law and not repugnant to morality and justice.

The Kenyan economy leans towards a capitalist model of free market where citizens are free to indulge in market enterprise for individual gain. Subject to payment of the relevant taxes, the individual entrepreneur retains all the profit. It is upon the government to put in place measures to ensure that the general social security and economic welfare of its citizenry is secured. Thus, under our system, an individual ought to derive “Maximum benefits from his/her sweat.”

²³ Copyright News a Publication of the Kenya Copyright Board Issue 11 *available at* <<http://www.copyright.go.ke/awareness-creation.html?download=31:issue-11>> and accessed on 27th August, 2014.

²⁴ Article 2 (3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

²⁵ Article 9 provides that Copyright must be granted automatically, and not based upon any formalities, such as registrations, as specified in the Berne Convention.

²⁶ The Judicature Act, Cap 8 Laws of Kenya.

1.3.1.1 Intellectual Property Rights (IPRs) Theories Generally

A number of theories have been propounded to lay the grounds for justification of IPRs. There are four perspectives that currently dominate theoretical writings on intellectual property: Utilitarianism or Consequentialist; Deontological or Natural Rights Theory; Personality Theory; and Social Planning Theory. For the purposefulness of this research, I will concentrate mainly on Natural Rights Theory and the Utilitarianism Theory.

1.3.1.2 The Natural Rights Theory

The Natural Rights Theory explains that a person has a natural right to their creation irrespective of the consequences. In view of this, an inventor is rewarded for working hard. What a person produces with her own intelligence, effort and perseverance ought to belong to her and no one else.²⁷ English philosopher, John Locke,²⁸ propounded this theory. The theory can be summarized as follows:²⁹

- i) God gave the earth to people in common.
- ii) Every person has a property interest in their own person.
- iii) Every person owns their own labour.
- iv) Whenever a person mixes their labour with something in the common they make it their property.

²⁷ Edwin C. Hettinger, Justifying Intellectual Property, 19 phil. and pub.aff. 31, 36 (1989).

²⁸ *ibid.*

²⁹ John Locke, Second Treatise on Civil Government, in Two Treatises of Government ch. V (Peter Laslett ed., Cambridge Univ. Press 1988).

- v) The right to private ownership is conditional upon a person leaving in the common enough and as good for the other commoners.
- vi) A person cannot remove more out of the commons that they can make use of (the “non-waste” condition).

It has been argued that in the context of intellectual property, propertization of ideas can be justified by the following propositions:³⁰

- i) Production of ideas requires a person’s labour;
- ii) These ideas are appropriated from a “common” which is not significantly devalued by the idea’s removal; and
- iii) Ideas can be made property without breaching the non-waste condition.

Based on this proposition a person who labours upon resources that are either un-owned 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.³¹ Consequently a music artist has the natural right to recoup the fruits of his/her labour.

Locke’s theory builds upon the primacy of personhood that promotes the notion of the inseparability of the creator from their creation. The inventors or creators are hence entitled to their works or creations as a matter of right and this right is not contingent upon any law. It is

³⁰ Justin Hughes (1993). ‘The Philosophy of Intellectual Property, 77 GEO. L.J. 287; Jeremy Waldron, From Authors to Copiers: Individual Rights and Social Values in Intellectual Property,’ (68 CHI.-KENT. L. Rev. 842 Gordon)

³¹ Justin Hughes (1988). “The Philosophy of Intellectual Property,” (Georgetown Law Journal77) 287, at pp. 299-330.

universal and inalienable and the State is under an obligation to protect and enforce it.³² However, by its definition this rationale is immediately limited by one problem: if a person has a right to receive a reward for his inventions, how should we measure the amount of the reward?

John Locke Theory is widely thought to be especially applicable to the field of intellectual property particularly in music, where the pertinent raw materials (facts and concepts) do seem in some sense to be “held in common” and where (intellectual) labour seems to contribute so importantly to the value of the finished product (song). Therefore, the musicians have a natural right to the fruits of their efforts and the state has a duty to respect and enforce this natural right.

According to this theory, the acquisition of property through labour is legitimate if and only if other persons do not suffer thereby any net harm. “Net harm” for these purposes would include such injuries as being left poorer than they would have been under a regime that did not permit the acquisition of property. In this case the musicians are entitled to reap maximum benefits from their labour.

1.3.1.3 The Utilitarian Theory

The Utilitarian Theory is the most popular of the four theories; it argues that property rights should be the maximization of net social welfare. Therefore, one’s creation is necessary as a means to further development.³³ Jeremy Bentham first propagated this theory.³⁴ He developed the idea of a utility and a utilitarian calculus.³⁵ In the beginning of his work, Bentham wrote:

³² This theory finds support in moral rights under copyright that are usually attached to an author. Section 32 of the Copyrights Act provides for moral rights which are independent of any economic rights that the work may attract.

³³ William Landes and Richard Posner, “An Economic Analysis of Copyright Law,” *Journal of Legal Studies* 18 (1989): 325. This argument is derived in substantial part from Jeremy Bentham, *A Manual of Political Economy*

“Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand, the standard of right and wrong, on the other the chain of causes and effects are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it.”³⁶

Therefore, the principle of utility is the ideal moral principle and that all actions are right or wrong by virtue of the value of their consequences.³⁷

The Utilitarian theory concludes that governments should enact laws that guarantee the happiness of the larger society. Accordingly, IPRs should be granted to human beings in cases where such rights guarantee happiness of the vast society. IPRs are thus granted to ensure that enough intellectual products are available to the bigger society. However, consequentialists fail to explain why some ends are more optimal than others, Nozick observed.

According to Nozick, there is no social entity with a good that undergoes some sacrifice for its own good. There are only segregated individual people with their own individual lives. Using one of these people for the benefit of others, only uses him, and benefits the others. Thus, there

(New York: Putnam, 1839); John Stuart Mill, *Principles of Political Economy*, 5th ed. (New York: Appleton, 1862); and A.C. Pigou, *The Economics of Welfare*, 2d ed. (London: Macmillan & Co., 1924).

³⁴ Bentham Jeremy (1776). ‘A Fragment on Government.’ (London).

³⁵ Jeremy Bentham, *Introduction to the Principles of Morals and Legislation (1781)*, Batoche Books, Kitchener, 2000

³⁶ *ibid.*

³⁷ *The Oxford Companion to Philosophy* 154 (Honderich Ed. 1995).

is, in reality, no such talk of an overall social good which covers up the artist-as an individual in the society- intentionally.³⁸

1.3.1.4 Conclusion

Relating to the music concept, the Government should strive to select a set of entitlements that:

- (a) induces people to behave in ways that increase socially valuable goods and services; and
- (b) distributes those goods and services in the fashion that maximizes the net pleasures people reap from them. By doing this they will promote creativity and music-making hence rewarding musicians for their efforts.

What accounts for the influence of these particular approaches in large part, is their prominence derived from the fact that they grow out of and draw support from lines of argument that have long figured in the raw materials of intellectual property law. These include constitutional provisions, case reports, preambles to legislation and so forth.

This research is therefore informed by the two theories. It is also premised on the reality that the bulk of the Kenyan laws are posited with clear procedural mechanisms for enforcement. Consequently, in adjudicating over disputes that arise, courts of law are enjoined to strictly apply the law as written. It is immaterial that other theorists may seek to justify the existence of music piracy. The natural law theory and the basic needs theorists³⁹ would not make plausible arguments in the face of blatant breach of the written laws. The research will therefore discuss

³⁸Robert Nozick, *From Anarchy, State And Utopia* (1974).

³⁹Gregory S Alexander, *Introduction to Property Theory* (Cambridge University Press 2012)

the essence of sealing all existing loopholes in the written laws and regulations in the hope that creators will eventually maximize benefits from their original ideas and works.

1.3.2 LITERATURE REVIEW

1.3.2.1 Introduction

Intellectual Property (IP) refers to the creations of the mind that include the inventions; literary and artistic works; symbols; names and images used in commerce.⁴⁰ There are two main categories of the IP, the Industrial property and Copyright. The Industrial Property includes patents for innovation, trademarks, industrial designs and geographical indications while Copyright covers literary works, films, music, artistic works and architectural design. The law of copyright protects various “original forms of expression,” including novels, movies, musical compositions, and computer software programs. For the purposes of this research, I will focus on Copyright particularly in Music.

A number of international Treaties and Conventions acknowledge the importance of the IP. Key among them is the Paris Convention⁴¹ and the Berne Convention⁴² administered by the World Intellectual Property Organization (WIPO). Whereas the Paris Convention deals with Patents, Trademarks Utility Models and Industrial Designs, the Berne Convention is specific to Copyright. The adoption of the Berne Convention was prompted by the need to bring uniformity

⁴⁰ Information sourced at Information sourced at http://www.wipo.int/export/sites/www/freepublications/en/intproperty/450/wipo_pub_450.pdf on 25t August, 2014.

⁴¹ Paris Convention for the Protection of Industrial Property(1883).

⁴² Article 2(3) Berne Convention for the Protection of Literary and Artistic Works (1886).

to the disparate bilateral treaties that existed in the nineteenth century.⁴³The importance of the Convention was increased when the United States of America abandoned the rival Universal Copyright Convention (administered by the United Nations Educational Scientific and Cultural Organization) and joined the Convention.⁴⁴Another boost for the Convention came with the signing of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Article 9(1) of TRIPS Agreement mandates Contracting States to comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.

The Berne Convention protects “literary and artistic works,” which is defined at Article 2(1) as including every production in the literary, scientific and artistic domain, irrespective of the mode or form of the production’s expression. This expression is general in the sense that it encompasses every original work of authorship, regardless of the work’s literary or artistic merit. According to Article 2 (1) of the Convention, literary and artistic works include:

books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works or entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three dimensional works relative to geography, topography, architecture or science.

⁴³Coenraad Visser and Tana Pistorius, *Essential Copyright Law*, University of South Africa/WIPO Worldwide Academy.

⁴⁴Paul Torremans and Jon Holyoak, *Intellectual Property Law*, Second Edition, Butterworths, 29.

This list is largely replicated in the Copyright Act 2001, Laws of Kenya.⁴⁵ The list outlined in Article 2 (1) of the Convention is not a closed list. A good illustration of this point can be found in the emergence of computer programs in the field of copyright protection. Computer programs have been defined as a set of instructions that direct the operations of a computer and command the computer to perform tasks such as storage and retrieval of information.⁴⁶

Although computer programs were never included in the Convention's list of protected works, it is crystal clear that such works are covered by the expression "every production in the literary, scientific and artistic domain."⁴⁷ The Copyright Act of Trinidad and Tobago, for example, protects computer programs as original intellectual creations in the literary and artistic domain.⁴⁸ In South Africa, the courts were initially of the opinion that computer programs were literary works.⁴⁹ However, the South African legislature clarified the issue in 1992 by amending the Copyright Act to create a separate category for computer programs.⁵⁰

Other examples of works which were not included in the Convention's list but which are now under the umbrella of copyright are multimedia productions. The jury is still out on an acceptable legal definition of a multimedia production, however, there is a general acceptance "that the combination of sound, text and images in a digital format which is made accessible by a computer program, embodies an original expression of authorship sufficient to justify the protection of multimedia productions under the umbrella of copyright."⁵¹

⁴⁵ The Copyright Act 2001, Laws of Kenya, s. 22.

⁴⁶ Essential Elements of Intellectual Property, Overview of the Basic Notions of Copyright and Related Rights and Treaties Administered by WIPO, CD-ROM published by the WIPO Academy, World Intellectual Property Organization, 1.

⁴⁷ *ibid.*

⁴⁸ The Copyright Act of Trinidad and Tobago, s. 5(1)(a).

⁴⁹ Northern Office Microcomputers (Pty) Ltd. and Others v. Rosentein 1981(4) SA136(c); *ibid* 47.

⁵⁰ The South Africa Copyright (Amendment) Act 1992, s. 11B.

⁵¹ *ibid* 47.

As exemplified by the list of protectable works, the IPRs in copyright especially musical works and other tangible expressions of ideas are in fact complex bundle of rights that are somewhat kindred to certain aspects of real estate and hence worth protection as outlined in the Universal Declaration of Human Rights (UDHR) that provides for the right to benefit from the protection of moral and material interest resulting from authorship of scientific, literary or artistic production.⁵²

Various authors have been in the forefront in discussing the issue of music copyright as Intellectual Property both internationally and locally from different perspectives; especially the issue of music piracy. Much of the international literature dwells on “E-Commerce” which simply refers to “a broad class of activities which we generally understand to be associated with the use of a computer (portable, wireless or other network accessible devices) and the internet to trade goods and services in a new, direct and electronic manner.”⁵³

Although the issue of music copyright infringement has been a matter of extensive debate globally, more so in this electronic age, not much research has been conducted locally. The stage for such omission seems to have been set with the enactment of the Copyright Act 2001 just after the convergence phenomenon in 2000. Indeed, the Copyright Act did not embrace the aspects of the electronic age that took the entire Globe by storm. The irony is that whereas the Kenyan Copyright Act of 2001 did not provide for digitalization, on the contrary, the US Copyright Act 1976 has provisions which adequately address digitalization.

⁵²Article 27 of Universal Declaration of Human Rights.

⁵³ Definition of E-commerce is provided by Intellectual Property and the Internet (ed Rodney D. Ryder) Lexis Nexis p. 13.

1.3.2.2 To What Extent has Piracy Impoverished the Kenyan Artist?

This question can be answered by reviewing the reported levels of music piracy. There have been concerns about whether, in the wake of the Copyright Act 2001, the music industry is sufficiently protected in this digital era. This concern raises a further fundamental question: does the Kenyan law generally have capacity to protect music copyright?

Various scholars are in consensus that musicians and copyright owners hardly benefit economically from their works due to massive infringement and piracy perpetrated over internet. Millions of copies of music are sold or downloaded for free from the internet, without the consent of the copyright owners.⁵⁴ This position is enhanced by the borderless nature of the Internet; a fact that makes the Internet pose serious challenges to copyright protection and enforcement as no one controls the internet.⁵⁵

Infringement of music copyright includes illegitimate uploading of music on websites without the consent of the copyright owner, as was held in the American case of **A & M Records Inc- vs- Napster, In , 239, F. 3d look 19th Civil 2001**. With regard to music industry in Kenya, studies have shown that 99% of music sold in Kenya is pirated and this makes it difficult to estimate the benefit music artists derive from the Kenyan music industry.⁵⁶ The loss occasioned to music artists in Kenya through Internet piracy depicts a worrisome state of affairs even as the

⁵⁴ Article by John Gross, *This Business of Music*, M. William Krosilorsky, Sidney Shemel, the Definitive Guide to the Music Industry, Bill Board Books, Michigan (2000)

⁵⁵ See note above

⁵⁶ Marisella Ouma (2008) “enforcement of Copyright in the music industry: A critical analysis of the legal and infrastructural framework of Enforcement in sub-Saharan Africa” PHD Dissertation submitted to Queen Mary University of London

World Intellectual Property Organization (WIPO) is of the considered opinion that there is a rich heritage provided by Kenya music which needs protection against piracy.⁵⁷ The failure by the Kenyan copyright law to provide adequate protection to music piracy has been identified as a key reason of underdevelopment in the Kenya music industry. One single largest music piracy den in Kenya is found in the heart of the country's Capital City, Nairobi, in the River Road area.⁵⁸

1.3.2.3 Pitfalls in the Copyright laws in Kenya

Kenyan scholars have identified the key challenges in the battle towards eradication of music piracy. Interestingly, the major accusing finger points at the Kenya Copyright Act 2001, which is the main statute providing the legal framework on copyright in the country. According Prof. Ben Sihanya,⁵⁹ the Copyright Act 2001 lacks adequate provisions for the protection and promotion of copyrighted works in Kenya. It lacks an adequate enforcement and infrastructural mechanism for effective implementation of the law.⁶⁰

Although the Copyright Act 2001 appears to have domesticated various provisions of the TRIPS Agreement and the Berne Convention, among other international instruments regarding copyright law, the dynamism of the Internet requires constant review of the Act and other attendant laws to give adequate protection to music.⁶¹ The main reason why piracy of information products such as music, movies, books, and software is difficult to eradicate, especially in this digital era is because of their non-excludability nature. Their creators face a

⁵⁷ World Intellectual Property Organization(WIPO) Magazine

⁵⁸ Rose Nganga at <http://wangui.intrablogs.com/entry/economy-why-Kenyans-entertainment-industry-has-failed>.

⁵⁹ Prof. Ben Sihanya is the leading Copyright scholar in Kenya, and arguably in Africa.

⁶⁰ M Wekesa and B Sihanya (eds) Intellectual Property Rights in Kenya (Konrad Adenauer Stiftung Nairobi 2009).

⁶¹ *ibid*, Chapter Six.

hard time excluding other persons, especially non-payers, from consuming these products. This feature greatly undermines the incentives to create, because of the difficulty in appropriating the revenues of the creation.⁶²

Consequently, digital piracy poses serious limitations to copyright owners in their ability to control how information products get to consumers; and the availability of digital copies reduces the copyright owner's products. The end result is that digital piracy of musical works places at the disposal of the infringers high profit margins that the large-scale reproduction and distribution of copy- righted products generates. This acts as an attraction to the criminal organizations in the music industry.⁶³

1.3.2.4 The US Copyright Law

The Copyright Act of the US was enacted in 1976 pursuant to the American constitutional provision of recognising the works of the mind. This was at a time when technology had not significantly embraced the Internet and its various challenges to copyright. In tracing the history of the American copyright law, scholars have pointed out that the American copyright Act was not created by public mind, but written by and for copyright lawyers who represent many, but not all, of the players. Those left out include developers of new ways of communicating copyrighted works, and, most importantly, end users.⁶⁴ This has had the effect that the American Copyright Act is too complicated and therefore counterintuitive. Thus, the US copyright law has the potential of being a constraint on users' activities.

⁶² Belleflamme Paul and Martin Peitz, *Digital piracy: Theory*. In Peitz, M and Waldfoegel J (eds) *The Oxford Handbook of the Digital Economy*, Oxford University Press.

⁶³ *ibid.*

⁶⁴ J Litman *Digital Copyright*, (Prometheus Books 2001 NY).

At the outset, the very definition of “copyright” poses a challenge. Traditionally, copyrights involved a sort of agreement between authors and the public: authors were granted certain, limited commercial rights to the works they produce, and in exchange, the public got wide rights to use those works for their own benefits. In spite of this, to date, most people do not realize what is and what is not legal under copyright laws.

A marked feature of the American copyright law, however, is that it has afforded copyright owners the ability to monitor, meter, enforce and control access in the wake of the advent of the Internet and digital technology. In addition, the American public views the copyright law as drawing a distinction between exploitation of a work for commercial purposes and consumption of a work for private purposes.⁶⁵ This requires drawing of the line between legal and illegal uses which undermine an author’s limited rights to commercially use a work and those which do not. These salient features of the American copyright law by and large provide valuable insights for a comparative analysis of the Kenya Copyright Act.

From the literature, the following stand out poignantly as the gaps that this study addresses:

- (a) What are the practical measures that require to be effected to ensure effective implementation of our current laws?
- (b) How can the Copyright Board of Kenya be strengthened to empower it to deal with enforcement challenges?
- (c) Is the current Copyright Act and the regulations made there under really adequate?

⁶⁵ *ibid.*

Most of the foregoing articles and texts analyse copyright in the context of e-commerce in Kenya. Particularly, they explore whether the music industry in Kenya is sufficiently protected in the digital era. They examine copyright law; copyright in musical works; music in the Internet; the music industry in Kenya and the challenges facing the music industry in Kenya. The literature further explores copyright enforcement in Kenya with respect to civil and criminal remedies for copyright infringement as well copyright management organizations.

The authors give rich commentaries on copyright law in Kenya analyzing the contemporary dynamics of e-commerce and IP law and explores the legal dimensions of online music.

However, the authors fail to address adequately the interplay between the legislative and administrative framework for copyright protection in Kenya and the measures, which are necessary to improve effectiveness of the enforcement mechanisms. This study seeks to fill these literary gaps.

1.4 OBJECTIVES

The main objective of the study is to critically examine the effectiveness of the Copyright Law in Kenya with particular reference to the Music Copyright Act 2001 with a view to proffer recommendations to strengthen the agencies outlined above.

The specific objectives of the study are;-

1. To determine the extent to which music piracy has deprived the Kenyan artists of IPRs in their works
2. To assess the pitfalls in the legal frame work of copyright laws in Kenya;

3. To assess the existing enforcement mechanism of Copyright protection in Kenya; and
4. To determine practical solutions to music piracy in Kenya.

1.5 RESEARCH HYPOTHESES

1. Music piracy is, to a large extent, contributive of the deprivation of Kenyan artists' earnings from their musical works.
2. The legal framework governing copyright in Kenya is bedeviled with pitfalls and lacunas which are counter-productive to the healthy administration and protection of copyright.
3. Owing to pitfalls and lacunas in the Copyright Act 2001, Laws of Kenya, the copyright enforcement mechanism established therein is inadequate.
4. With reference to other copyright laws and governing instruments in other jurisdictions, as well as existing jurisprudence, practical solutions can be sought to address music piracy in Kenya.

1.6 RESEARCH QUESTIONS

1. To what extent has music piracy deprived the Kenyan artists of income from their musical works?
2. What are the pitfalls and lacunas in the legal frame work of copyright laws in Kenya?
3. Is the existing enforcement mechanism of copyright protection in Kenya adequate?

4. What practical solutions can be sought from copyright laws and governing instruments in other jurisdictions, as well as existing jurisprudence, to address music piracy in Kenya?

1.7 RESEARCH METHODOLOGY

1.7.1 Qualitative Method

The research proposed is aimed at analyzing, qualitatively, the legal protection of music copyright in Kenya. The primary sources of material for this research paper will be done through reviewing of the existing literature already researched. The research will be enriched through the use of statutes, subsidiary legislation, case laws, law reports and government policy papers. In addition to the primary sources, secondary sources will be used. These include text books, cases, articles, journals, the internet and other material relevant to this study.

1.7.2 Limitations

Two limitations stand out significantly in this study. One, the agencies mandated to curb piracy in music may have biased or inaccurate reports which the researcher may have relied on. This may lead to invalid data where such data suffers this limitation. Two, the research is theoretical hence no quantitative data for the research.

1.8 CHAPTER BREAKDOWN

Chapter One entails the whole array of the proposal. This will form the introduction and background of the research. It shall contain a statement of the problem that the researcher seeks to study. Moreover, it shall include the objectives of the study, scope of the study, hypothesis, research questions, justification of the study, theoretical frame work, research methodology, limitations and the literature review.

Chapter Two will be a discussion on the Copyright laws in Kenya generally and the effectiveness of the institutions created therein.

Chapter Three and Four will discuss music piracy within the digital technology and the traditional platforms respectively. Data will be presented to support the prevalence of and the effect of music piracy both on the Kenyan Musician and the economy generally.

Chapter Five gives a conclusion and offers recommendations for the study.

CHAPTER TWO

COPYRIGHT LAWS IN KENYA

2.0 INTRODUCTION

The term *music piracy* refers to the illegal duplication and distribution of sound recordings.⁶⁶ Music piracy has been an issue that society has been dealing with for many years. Online music piracy, however, is a relatively new phenomenon. Times have changed and we are now living in an era of advanced technology. There has been a boost in the popularity of mp3 players, cell phones and broadband internet and a major decrease in the demand for physical media. Online services are the future of the music industry and may one day replace physical media forever.⁶⁷

Music piracy has become so popular that some people are not even aware that what they are doing is wrong. It is time music piracy is given adequate attention for what it really is; an illegal, immoral action that has serious personal and economic consequences. Piracy has been an ongoing battle for the music industry.

Music is a hobby, a culture, an expression, and a form of therapy. Music is also a profession and a way in which some people earn their living. By downloading music illegally, we are stealing from these people. It is like hiring people without paying them for their labour. It is as simple as

⁶⁶ Sound recordings are properly defined by Part 1 of the Copyright Act 2001 as «works that result from the fixation of a series of musical, spoken or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as discs, tapes, or other phonorecords, in which they are embodied.

⁶⁷ Ted Cohen at el, The Keys to Ending Music Piracy - In a speech at SF Music Tech Summit XIV on 1st October 2013, <http://www.sfmusictech.com/past-events/sfmusictech-summit-xiv/> last accessed on 28/10/2014

this, “music lovers end up buying music.”⁶⁸ Those who truly love and appreciate music will support the artists they love so that they can continue to make it. Most musicians do not have a second job or a second income; they rely on their fans to support them but recently those fans have been coming up short. Some people may have legitimate reasons for downloading music such as to replace already purchased music or to sample music before they purchase it, but artists should have the ultimate decision of whether or not their music gets posted.⁶⁹

Artists and musicians have rights but they are not the only ones, everyone has the right to get paid for the work they do, no matter what they do for a living.⁷⁰ Artists pour their heart and soul into their work in order to provide society with a source of enjoyment and recreation and they deserve to receive compensation for their work, just like anyone else would, this is strongly supported by the Natural Rights Theory.⁷¹

“Music piracy is a delinquent form of behavior that has some negative consequences for the recording industry.”⁷² The popularity of music downloading has been causing many problems in the music industry. People don’t realize that with every song they download illegally the music industry is hurt financially. The outbreak of music piracy is costing the music industry close to one billion shillings annually to pirated music and films. Copyright Board's Tom Mshindi said

⁶⁸ Ian Condry, *Culture of Music Piracy: An Ethnographic Comparison of the US and Japan* (2004). Massachusetts Institute of Technology, Cambridge

⁶⁹ See note above.

⁷⁰ John Locke, *Second Treatise on Civil Government*, in *Two Treatises Of Government* ch. V (Peter Laslett ed., Cambridge Univ. Press 1988).

⁷¹ Edwin C. Hettinger, *Justifying Intellectual Property*, 19 *phil. and pub.aff.* 31, 36(1989).

⁷² D’Astous, A., F. Colbert, and D. Montpetit (2005), “Music Piracy on the Web – How Effective Are Anti-Piracy Arguments?: Evidence from the Theory of Planned Behaviour,” *Journal of Consumer Policy*, Vol. 28, No. 3, 289-310.

there is need for stringent laws as content piracy keeps increasing.⁷³ Not only is it costing the music industry money, but it is also costing the nation many jobs.

If piracy continues, it just might have a fatal effect on the music industry. It is up to us as a society to stop piracy now before it becomes too late. Logic says that if music is available for free, no one will pay money for it and if no one is purchasing music, artists and producers will stop creating it.⁷⁴

The opportunities offered by digital technology and the internet are endless. The internet is a powerful source that needs to be used wisely and with caution. The goal is to make the internet a place to nurture and embrace digital technology, and that can't happen unless artist and record company rights are respected.

2.1 KENYAN LAW ON CURBING MUSIC PIRACY

The Kenyan Constitution⁷⁵ which is the supreme law of the Republic recognizes the Intellectual Property and has placed specific obligation on the Government on account of Intellectual Property Rights. The Constitution also provides that any treaty or convention ratified by Kenya forms part of the law of Kenya.⁷⁶ Therefore, The Berne Convention for the Protection of Literary and Artistic Works as well as other Conventions and Treaties related to intellectual property must be enforced by virtue of this Article.

⁷³ See <<http://www.the-star.co.ke/news/article-178643/billions-lost-pirating-musicfilm#sthash.oOr4eKPQ.dpuf>> (accessed 25 August 2014)

⁷⁴ Ian Condry, Culture of Music Piracy : An Ethnographic Comparison of the US and Japan (2004). Pg 343-63.

⁷⁵ The Constitution of Kenya 2010.

⁷⁶ Article 2 (6).

The Constitution provides as follows:⁷⁷ The State shall:

- (i) 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;
- (ii) Recognize the role of science and indigenous technologies in the development of the nation; and
- (iii) Promote the intellectual property rights of the people of Kenya.

The Constitution also has acknowledged the right to property⁷⁸ and states that the State shall support, promote and protect the intellectual property rights of the people of Kenya. Therefore, the Constitution has explicitly defined the term ‘property’ to include Intellectual Property Rights.

The Government of Kenya is therefore under an obligation to provide a conducive environment for Intellectual Property to thrive for they cannot develop without enforcement. Kenya has therefore focused on reforming its laws on intellectual property to ensure that the intellectual property laws not only conform to the international laws but also incorporate the needs of the local intellectual property industries.

The main legal instrument dealing with Music Copyright infringement in Kenya is The Copyright Act⁷⁹ that works hand in hand with the Criminal Procedure Code,⁸⁰ the Evidence Act,⁸¹ and the Civil Procedure Act.⁸²

⁷⁷ The Constitution of Kenya 2010, Article 11 (2).

⁷⁸ *ibid*, Article 40 (5).

⁷⁹ The Copyright Act, No 12 of 2001.

⁸⁰ The Criminal Procedure Code, Cap. 75 Laws, of Kenya.

The Copyright Act of 2001 repealed the Copyright Act of 1966. Many deficiencies of the 1966 Act were addressed bringing Kenya's law closer to compliance with Kenya's international obligations under the TRIPS Agreement. Additionally, the law deals with certain aspects of protection of copyright in the digital age, including several of the requirements of the WIPO "Internet" treaties, the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT).

It provides specifically for administrative and enforcement structures and mechanisms for copyright and related rights. The salient features of the Act include;

- a) The creation of the Kenya Copyright Board, which is charged with the overall administration and enforcement of copyright and related rights in Kenya.⁸³
- b) The provision for both civil remedies and criminal sanctions for copyright infringement.⁸⁴
- c) The introduction of the anti-piracy security device.⁸⁵
- d) The specific provision for Anton pillar orders.⁸⁶
- e) The appointment of copyright inspectors and special prosecutors to deal with copyright infringement cases.⁸⁷

⁸¹ The Evidence Act, Cap. 80, Laws of Kenya.

⁸² The Civil Procedure Act, Cap. 21, Laws of Kenya.

⁸³ Copyright Act, No 12 of 2001, Laws of Kenya, section 3.

⁸⁴ *ibid*, sections 35(4)(6) and 38(4).

⁸⁵ *ibid*, section 36.

⁸⁶ *ibid*, section 37.

⁸⁷ *ibid*, section 39.

The Act goes further by making it illegal for one to engage in activities that are likely to encourage counterfeiting and piracy such as circumvention of technological devices used to protect copyright rights or the removal of rights management systems.⁸⁸ The Act prohibits the sale of audio or audio-visual works without the anti-piracy security device which is consistent with articles 11(2) and 40(5) of the Constitution.

2.1.1 KENYA COPYRIGHT BOARD (KECOBO)

The Kenya Copyright Board (KECOBO) is a State Corporation established under the Copyright Act⁸⁹ to administer and enforce Copyright and Related Rights protection in Kenya. The theory behind the creation of institutions like KECOBO in our laws is the Public Interest Theory of regulation propounded by Richard Posner⁹⁰ and one may term KECOBO a public interest regulator. The theory holds that institutions like KECOBO exist to correct inefficiencies and inequities in the operation of the free market. Therefore, government intervention generally is assumed to benefit society as a whole rather than particular vested interests. The regulatory body is considered to represent the interest of the society in which it operates rather than the private interests of the regulators.

The Kenya Copyright Board is comprised of members drawn from both the public and private sectors.⁹¹ The members from the private sector are nominated by associations representing software, producers of sound recordings, publishers, film distributors, performers, broadcasting stations, musicians and the audio visual industry. There are four experts on copyright and related rights and five members who are alternates to the Attorney General, Commissioner of Police,

⁸⁸ *ibid*, section 35(3).

⁸⁹ *ibid*, section 3.

⁹⁰ Richard A. Posner: *The Bell Journal of Economics and Management Science* Vol 5, No.2 (Autumn, 1974) pp 335-358.

⁹¹ *ibid* 89, section 6.

Permanent Secretary Ministry of Information, Permanent Secretary Ministry of Heritage and Culture, and the Permanent Secretary Ministry of Finance.

The Kenya Copyright Board administers and enforces copyright and related rights throughout the Republic by carrying out various functions:⁹²

- i) Registering of copyright.
- ii) Facilitates the implementation of the antipiracy security device (APSD).
- iii) Creating and maintaining a database on copyright works in Kenya
- iv) Inspection and enforcement actions.
- v) Facilitate training and awareness creation on copyright and related rights in Kenya.
- vi) Prosecution of copyright cases.
- vii) Offering free legal advice to the public on copyright law
- viii) Licensing and supervision of Collective Management Organizations
- ix) Implement Copyright laws including the provisions of international treaties.
- x) Liaise with national, regional and international organizations on matters of copyright and related rights.
- xi) Advise the government on matters of copyright and related rights
- xii) Reviewing copyright legislation

⁹² *ibid*, section 7.

Conversely, KECOBO has not been effective in administering its duties because of various reasons as discussed here under.

2.1.1.1 Piracy

KECOBO has joined other enforcement agencies such as the Weights and Measures Department of the Kenya Bureau of Standards, the Customs Department of the Kenya Revenue Authority and the Kenya Police in fighting piracy. These agencies primarily were on the spot for their lack of efficiency and effectiveness with regard to curbing copyright piracy.

The competency of KECOBO in this regard, like its predecessor, is contested on lack of sufficient personnel and good will from the public to enforce copyright protection. KECOBO's enforcement unit consists merely of 8 copyright inspectors and 5 prosecutors covering the entire country. It is not clear whether these prosecutors are competent to handle the difficult task of effective prosecution. An assessment indicated that between 2010 and 2011 software piracy levels oscillated between 78% and 79% corresponding to a commercial value of US \$85 million.⁹³ KECOBO has admitted that this insignificant change in the piracy rate is proof that slight progress has been made in reducing piracy.

2.1.1.2 Enforcement Policy

KECOBO's enforcement actions apparently target small to medium piracy operations rather than large-scale manufacturers and suppliers of pirated goods. It is based on this reality that many have argued that there must be an inter-agency approach to intellectual property (IP) enforcement led by the newly formed Anti-Counterfeit Agency (ACA) whose empowering

⁹³ Information sourced at <<http://cipitlawstrath.wordpress.com/2013/08/14/kenya-copyright-board-and-collecting-societies-myths-and-facts/>> on 14th August, 2014.

legislation is much broader in scope and stringent on violations of IP rights. With ACA solely in charge of IP enforcement, KECOBO will be able to re-focus its limited resources away from fighting piracy to its other functions under the Copyright Act such as the regulation of collective management organisations (CMOs).

2.1.1.3 Copyright Tribunal

The Chair and members of this Tribunal were gazetted in 2009. However, this Tribunal has never heard or determined any case relating copyright.

2.1.1.4 Regulation of CMOs

KECOBO has not pushed for CMO Regulations (like Nigeria and South Africa) to address the gaps in the Act relating to licensing and supervision of CMOs. The Copyright Regulations of 2004 pay little attention to important issues relating to regulation of CMOs. MCSK was deregistered in 2011 leading to court battles before reinstatement.

2.1.1.5 Amendment of the Copyright Act 2001

In the meantime, KECOBO seems to have opted for several short-term extra-statutory means of regulating CMOs including performance contracting, developing a license agreement and licensing guidelines. In 2012, KECOBO failed to seize a second opportunity to amend the Act so as to empower it to adequately monitor the activities of CMOs. The amendments to the Act in 2012 did very little to improve the shaky legal framework within which CMOs are regulated.

2.1.1.6 Smaller Board

The current board consists of between 16 and at most 20 members. It has been held that lean boards are more efficient and consistent. Considering that the board is not well funded and is not a priority for the central government, a lean board policy should be adopted in order to be efficient on the available resources and enforcement of its mandate. A board like the current one is likely to be met with the challenge of shifting blame among the board members, lack of quorum or repetition of resolutions and thereby reducing its efficacy.

2.1.1.7 New Enforcement Agency

The Copyright Office should allow the mandate of fighting piracy to be taken over by one sole agency e.g. ACA. This would allow KECOBO to concentrate better as a copyright registry through improvements and technical enhancements to the information technology platforms that support registration and recordation functions, including an online registration system. Generally, KECOBO should host new things to help make copyright law more functional; e.g. administer enforcement proceedings (such as a small copyright claims tribunal), offer arbitration or mediation services to resolve questions of law or fact, issue advisory opinions, and engage in countrywide awareness campaigns.

2.1.1.8 Public Awareness

The functions of KECOBO are hardly known by the larger public. A number of Law students and lawyers are not aware of its existence. Public Private Partnerships (PPP) projects should be carried out by KECOBO and other private partners to publicize the importance of the protection of copyright work in development. More funds should be extended to publicize copyright awareness to the general public through partnerships with the media.

2.2 COLLECTIVE MANAGEMENT ORGANIZATIONS

These are Reproduction Rights Organizations (RROs) appointed by copyright owners to issue reproduction licence or receive reproduction fee on their behalf.⁹⁴ This is done because many copyright owners may not have the time and resources to issue licence to each and every person that requests to reproduce a copyrighted work. RROs are in a better position to do this because they have the expertise for the job. They issue reproduction licence on behalf of the copyright owners, collect the fee from the applicants and pass it to the copyright owners after deducting the administration costs. In so doing, they play a crucial role in the management of copyright in a country. They act as an important link between the copyright owner and the copyright user.

In Kenya, only one organization exists to collect reproduction fee and issue licence on behalf of copyright owners of literary works. This organization is known as the Reproduction Rights Society of Kenya (KOPIKEN).⁹⁵ The other organizations collecting reproduction fee for other categories of copyright owners are officially known as Collective Management Organizations (CMOs). They include:

a) Music Copyright Society of Kenya (MCSK).⁹⁶

b) Kenya Association of Music Producers (KAMP).⁹⁷

⁹⁴ *ibid* 92, section 48(4).

⁹⁵ KOPIKEN is a collecting society under the Copyright Act 2001, which licenses the reproduction of copyright protected literary materials against payment of fees whenever it is impractical for rights holders (authors and publishers) to license and collect fees individually. For more details please visit: <http://www.kopiken.org> as accessed on 11.4.2014.

⁹⁶ MCSK was registered in 1983 as a company under number C.5/83. It is now registered under the Companies Act (Cap 486 of the law of Kenya) as a Company Limited by Guarantee. MCSK aims at building, mobilizing, institutionalizing, and supporting the Musical fraternity within Kenya, integrating, sustaining and enhancing their earning for their works. For more details see <http://www.mcsk.or.ke/index.php/about/history> as accessed on 11.7.2014.

⁹⁷ The Kenya Association of Music Producers (KAMP) is mandated to collect for and distribute royalties to producers of sound recordings. For more details please visit: <http://www.kamp.or.ke> as accessed on 11.7.2014

c) Performing Rights Association of Kenya (PRSK).⁹⁸

The activities of collective management organizations are regulated by KECOBO through the Copyright Act, 2001. Licensing and supervision by the Board have greatly increased the collection and distribution of royalties. The Board also facilitates the training of staff of these collective management organizations by the World Intellectual Property Organisation and other international, regional and national bodies.⁹⁹ The Board has also facilitated the General Managers of KAMP, KOPIKEN and PRSK to attend training courses at in Europe with European collective management organizations such as WIPO, CISAC, NORCODE and KOPINOR.¹⁰⁰

There are various problems with the reproduction rights organizations these include;

a) The existence of too many CMOs.

This is detrimental to institutional practices and the ability to exploit licences. This defeats the purpose of having a one-stop centre for rights clearance if it is not clear who manages which rights. For instance, *Music Copyright Society of Kenya v Parklands Shade Hotel t/a Klub House*¹⁰¹ case points to the problem of proliferation of CMOs or RROs. The plaintiff in this case filed a suit against the defendant seeking an injunction restraining it from playing or broadcasting any music, either recorded or performed by a live band, which is the subject of an agreement between the plaintiff and its members. The application was based on the grounds that the

⁹⁸ Performers Rights Society of Kenya (PRISK) is a collective management organisation licensed by the Kenya Copyright Board to represent performers in musical and dramatic works. For more details please visit: <<http://www.prisk.or.ke>> as accessed on 11.7.2014.

⁹⁹ See the Copyright news letter, A Quarterly Publication of the Kenya Copyright Board, issue no. 8, available on <<http://www.copyright.go.ke/awareness-creation.html>> as accessed on 11.7.2014.

¹⁰⁰ For more details please see <<http://www.copyright.go.ke/8-program/4-cmo.html>> as accessed on 11.7.2014.

¹⁰¹ Civil Suit 1458 of 2000.

defendant had continued to publicly perform music without obtaining the required licence from the (MCSK). It further sought damages for infringement of copyright and conversion, together with costs and interest. The plaintiff simultaneously filed an application seeking a temporary restraining order pending the hearing and determination of the suit.

The defendant opposed the application on the basis that the MCSK was not the sole licensing body of copyright in all musical works in Kenya and, further, that MCSK could enforce only the rights of members who had assigned their rights to MCSK. The defendant also argued that they had continually paid satellite broadcast provider MultiChoice Africa the requisite copyright fees and that a collection of royalties would amount to double taxation. The court held that the plaintiff was not the sole licensing authority that enforces copyright in all musical works. According to the court, only the owner of copyright has the right to enforce compliance. The court did not grant the plaintiff the injunction sought on the basis that the plaintiff had not established a *prima facie* case with a probability of success and the defendant would suffer irreparable damage should the order sought be granted. It is not clear from the record, however, whether the defendant claimed to have obtained such a licence from another CMO.

- b) Lack of a firm constitutional foundation in a normative and institutional sense.
- c) Most CMOs are established under Government ministries and thus lack autonomy and independence.¹⁰²

¹⁰² See B. Sihanya, 'Imitative innovation in Kenya's literary and musical contexts: the case of hip hop, 'Copyright Africa & Innovative Lawyering Working Paper (2006)' available at Sihanya Mentoring(SM) in Nairobi and Siaya and at <www.innovativelawyering.com> (last accessed on August 18, 2014).

- d) The RROs in Kenya are more concerned in maximizing fee collection. What matters to them is being in business. The shareholders at the end of the day are interested to know what amount they have raised in the form of royalties. Its continuous stay in the office greatly depends on how much it has raised. In this regard, it is likely to use all sorts of tricks, including threats to obtain reproduction fee.
- e) RROs completely avoid educating their clients about copyright. They never reveal copyright exceptions and limitations that users are entitled to. Neither do they communicate to them about materials in the public domain that can openly be reproduced not mentioning unpublished works. They instead alert them about the consequences of not paying the fee. In developed nations, for example, users are informed about what they can pay for and what they cannot pay. RROs in the developed world are well aware about the exceptions and limitations that users are entitled to.
- f) RROs take advantage of the users' lack of knowledge about the law to realize huge profits. In Kenya, for instance, there is no legal framework on charging reproduction fee. The RROs capitalize on this to demand for unjustified amount. The organization does not concern itself to survey or find out the amount of copyrighted work a specific photocopier is exposed to before deciding on charging the owner. Any photocopier that appears to work is charged even if much of the work it does is not related to copyrighted works. The owner of a photocopier in the end has to part with two payments: one being a business licence fee and two a reproduction licence fee.

- g) RROs do not follow the rules laid down for distributing licence fee. Ideally, RROs should collect fee from works whose owners have authorized them to collect royalties of which they do not follow. Licence fee is collected from any category of works, including foreign works. The question is this: What do they do with the money collected from works whose owner has not authorized them to collect licence fee? Moreover, how does such an owner know that his/her work has attracted payment? The situation in Kenya is that the RRO collects fee blindly without telling whose work has been reproduced. This amount is normally surrendered to the shareholders of the organization. The owner of the work is ignored, yet his/her work contributed to the fee collection.
- h) Most CMOs have limited financial and technical capacity.

In an indistinguishable study performed in Kenya,¹⁰³ it was established that Reproduction Rights Organizations were essentially:

- a) Appointees of copyright owners.
- b) Exist to collect reproduction fee on behalf of copyright owners.
- c) They are not law enforcement agents. They cannot compel people to pay fees.

The best they can do is to report defaulters to the Kenya Copyright Board.

- d) That only the Board has the legal mandate to enforce the law. The Board has the powers to arrest and charge the offenders.

¹⁰³Japheth Otike, Copyright: The Challenges Posed by Reproduction Rights Organizations (RROs) In the Provision of Information to Users with Special Reference to Kenya (2011).

- f) RROs should collect fees only from organizations in the commercial sector that exist to make money.

2.3 THE POLICE

The mission of the National Police Service under the slogan "*Utumishi kwa Wote*" is to uphold the law, maintain order and keep the peace by working in partnership with the community to protect life and property, prevent crime and disorder, detect and apprehend offenders and preserve a sense of security in society. Other roles include investigation and case management.

Under the Copyright Act,¹⁰⁴ the Board is under an obligation to nominate Copyright Inspectors to conduct investigations. Currently, several police officers attached to the Board have been formally appointed through the Kenya Gazette as Inspectors under this provision. However, given this personnel limitation, they have and will continue to work closely with Police Officers based at various stations wherever they operate. In addition, the Act provides that any police officer may perform functions of a Copyright Inspector under the Act.¹⁰⁵

The Act entitles the Copyright Inspector to enter and search any premises within which infringement is suspected to be on going.¹⁰⁶ Additionally, the police are empowered to arrest without warrant any person suspected of committing an offence under the Act.¹⁰⁷ This provision reinforces the general police power to enforce any law under Section 14 of the Police Act. Under the law, the investigating officer is the custodian of exhibits. In cases investigated by KECOBO appointed Copyright Inspectors, the exhibits will remain in their custody until the matters are heard and determined.

¹⁰⁴ *ibid* 92, section 39.

¹⁰⁵ *ibid*, section 39 (2).

¹⁰⁶ *ibid*, section 40.

¹⁰⁷ *ibid*, section 42.

The Copyright Inspectors (this term refers to police officers of all ranks) however face a number of challenges in the dispensation and course of their duties. These include;

- i) Lack of knowledge of Intellectual Property laws by copyright owners, users and police officers.
- ii) Lack of properly executed contracts, deeds of assignments, licenses between parties.
- iii) Advancement of technology in the digital era which has made it easier to download and share copyright works over the internet without authority from the copyright owner.
- iv) Impersonation of copyright inspectors by unscrupulous persons.
- v) Copyright offenders resist arrest from the police officers.
- vi) Delays by the courts in hearing of copyright cases due to the lengthy time it takes to adduce evidence in court by the prosecution witnesses.
- vii) storage of exhibits is also a challenge as they require a secure and large space especially for bulk confiscated items that must be produced in court as exhibits e.g. satellite dishes, decoders, television sets, DVD players, CDs, DVDs, computers etc.

2.4 THE JUDICIARY

Rights have no value unless they can be enforced. The judiciary has the mandate to see to it that the Intellectual Property Rights of the copyright holders are protected in Kenya. However,

this has not been performed to the optimal best. The judiciary however, has achieved great milestones in compelling recognition, compliance and respect of IP rights conferred by Copyright.

Copyright Infringement cases in Kenya are heard and determined by the High Court which has got exclusive jurisdiction. This despite the creation of the Kenya Copyright Tribunal¹⁰⁸ which has never heard or determined any cases relating to copyright. In this regard, the High Court has rendered several landmark decisions that have crystallized jurisprudence on various principles of IPR law in line with international best practices and standards. These principles have now come to be recognized as part of the law of Kenya and its IPR regime.

The judiciary plays a critical role in the general organization of modern societies. The more efficient it is, the more stability will prevail and social tensions diminish. In fact, the role of the judiciary lies in securing respect for and efficient enforcement of legislation, protecting rights and freedoms. It is unsatisfactory that legislation creates rights through substantive provisions or means for acquiring such rights through procedural provisions; acquisition of rights, regardless of the means of acquisition, must be guaranteed through efficient channels of justice controlled by a solid authority capable of protecting rights against violation or abuse.

Courts under the current scheme for copyright and related rights management assume a subsidiary role in enforcement compared to administrative agencies. A number of advanced and innovative techniques are available to strengthen the role of the courts in copyright protection including civil, administrative and criminal law along with conflict of law.

¹⁰⁸ Section 48 (1) creates the competent authority which is a Tribunal with original jurisdiction to deal with disputes emanating from the administration of the Act.

Copyright cases instituted are either criminal or civil cases depending on the nature of the infringement and offense committed. With current change of the Judiciary in the administration of justice, courts have concentrated on instituting a set of classic values that include equality, fairness and integrity, independence and accountability, public trust and confidence, expedition and timeliness and Accessibility. These values serve as spotlight for the administration of justice in Kenya. In keeping check with their core values, the Judiciary acknowledges the importance of acquiring responses from the public to provide relevant performance benchmarks for the courts' strategic planning and policy development initiatives.

In view of the above observations, the main roles of the judiciary/public prosecutors in the context of intellectual property would be;

- i) To guarantee the existence and the scope of the rights in the protected subject matter.
- ii) To ensure that the rights can be properly enforced and infringements punished.

A judiciary that is properly composed and well informed of the rapidly expanding copyright law plays a vital role in the implementation and enforcement of copyright law in the following ways:

- i) Through a successful conclusion of copyright cases particularly cases of transnational crimes.
- ii) It also helps the public and civil society to appreciate judicial procedures for easier access to justice.
- iii) Through coherent networking, exchange of judgments and sharing information on local intellectual property cases and the emerging international jurisprudence.

- iv) Meting out sentences, fines and orders for destruction of exhibits. This ensures punitive measures thus discouraging others who would be offenders. Like in many other legal systems in Kenya restitution is a preferred remedy and courts have always encouraged parties to settle the matters amicably and out of court. In such cases restitution is encouraged where aggrieved parties are paid damages for infringement. A good example in this case is *John Boniface Maina v Safaricom Limited*¹⁰⁹ in this case; Safaricom reached a multi-million- shilling settlement with musician John Boniface Maina, popularly known as JB Maina, which is set to end a protracted legal battle over use of the singer's ringtones. JB Maina got KSh.15.5 million as compensation for the alleged use of his 10 songs as ringtones through the telecommunication firm's "Skiza" tunes and "Surf 2 Win Promotion" without his knowledge - a charge that Safaricom denied.

Similarly, the prosecution team as well faces a number of challenges in the dispensation of their duties. These include;

- i) Lack of knowledge of intellectual property laws, especially copyright legislation by the copyright owners, users, infringers, judicial and police officers and the general public at large.
- ii) Lack of prioritization of copyright matters by the courts as the offences are looked at as petty offences.

¹⁰⁹*John Boniface Maina v Safaricom limited [2013] eKLR*available at

<http://kenyalaw.org/CaseSearch/view_preview1.php?link=11558869494087633339324> (accessed on 3rd June, 2014).

- iii) The burden of proving copyright infringement is often difficult partly because of the absence of well-negotiated contracts between the copyright works owners and producers.
- iv) There are few copyright inspectors and prosecutors to deal with the high levels of piracy.
- v) Lack of enforcement coordination and knowledge of procedures. One illustrative example involves Kenyan Customs' handling of IP infringement claims. Once the industry has alerted Kenyan Customs that a consignment of pirated/counterfeit CDs is coming into the country, standard procedure should allow the goods to be inspected by Customs and the Kenya Bureau of Standards (KBS) and no other department or body would be needed. Nevertheless, often times Customs officers have contended that they are not in a position to determine whether or not goods are pirated/counterfeit and that they will not be responsible. While the pirated/counterfeit discs technically meet KBS standards, the goods are released unless the Commissioner of Customs, in his discretion, calls on industry experts to assist. Customs officials in Kenya are also not certain of how to deal with suspected pirated or counterfeit goods. For instance, they are not sure whether to release the goods or put them into bond; whether it is acceptable to charge duties on illegal goods; on how storage charges will be paid if an infringement case fails; who would indemnify them if an importer sued them for wrongful detention of their goods; and the like. Such

lack of knowledge of the law and agency procedures does not help right holders to defend their rights in Kenya.¹¹⁰

The principal challenge is usually in disassociation between the production lines, the policies of government, a weak public/private sector engagement and the absence of the will to enforce rights in the event of breach.

The Attorney General may appoint a Competent Authority for the purpose of exercising jurisdiction under the Act¹¹¹ where any matter is required to be determined by such authority. The “Competent Authority” means an authority of not less than three and not more than five persons, one of whom shall be a person qualified as an advocate of the High Court of Kenya of not less than seven years’ standing or a person who holds or has held judicial office in Kenya who shall be the chairman, appointed by the Attorney General for the purpose of exercising jurisdiction under the Act where any matter requires to be determined by such authority.

¹¹⁰ Indeed, it can be said that right holders in Kenya now aim somewhat blindly to obtain enforcement under any legal regime that is plausible and available to address their issues. At a recent seminar on this issue, the Attorney General pointed to four possible avenues by which right holders can seek redress against infringements: the Copyright Act, the Kenya Bureau of Standards (KEBS), the Trade Descriptions Act, and the Trademark Act. Obviously, it is most crucial that the government of Kenya begin serious enforcement of the Copyright Act, but the recording industry is also looking at the Trade Descriptions Act under the Department of Weights & Measures, Ministry of Trade & Industry as a potential supplemental path to get pirated product off the streets of Kenya. The Kenya Revenue Authority (KRA) has also set up a Counterfeit & Sub-Standard Committee. This Committee is supposed to liaise with all relevant departments to look into taking action against counterfeits.

¹¹¹ Ibid 108, Section 48 (1).

The jurisdiction of the Competent Authority is generally narrow and extends only to specific issues under the Act, such as disputes related to the establishment of a collecting society.¹¹² The

Competent Authority may adjudicate in any case where it appears to it that:

- i. the Kenya Copyright Board (“the Board”) is unreasonably refusing to grant a certificate of registration in respect of a collecting society; or
- ii. the Board is imposing unreasonable terms or conditions on the granting of such a certificate; or
- iii. a collecting society is unreasonably refusing to grant a licence in respect of a Copyright work; or
- iv. a collecting society is imposing unreasonable terms or conditions on the granting of such a licence.

The High Court Judges have very little or no training in IPR law and may not be able to appreciate certain core issues that affect IPR.¹¹³ From the case of *Music Copyright Society of Kenya v Parklands Shade Hotel t/a Klub House*¹¹⁴, it is clear that the courts recognize that users have to seek authority from rights-holders to use their works. Educational institutions and libraries are required to obtain a licence from the right-holders where possible, through the CMOs, in order to reproduce educational material, when reproduction does not fall under the exceptions and limitations stipulated in the Copyright Act¹¹⁵. The court in this case failed to address the copyright issues enshrined in the law and the judgment in this case is bound to have far-reaching effects on collective management in all areas of copyright, including reprographic

¹¹² Section 48 (2).

¹¹³ Justice N.R. Ombija Case Study of Kenya? Specialized Intellectual Property Rights.

¹¹⁴ *ibid* 101.

¹¹⁵Section 26(1).

rights since the decisions of the higher court are binding on subsequent cases unless overruled by the highest court.

Consequently, IPR disputes have for years, generally not been prioritized by the superior courts. This is apparent even from the administrative divisions of the judiciary where IPR disputes are lumped together with general commercial law disputes leading to delay in the adjudication of justice.

Basically, the decisions of IPR tribunals established under Section 48 of the Copyright Act are only persuasive and mainly serve to guide judges of superior courts in their considerations of disputes.¹¹⁶ These decisions cannot equip them with the required level of expertise to effectively deal with IPR disputes before them. For example, members of superior courts shy away from rendering judgments in disputes involving technical IPR matters. Issues pertaining IPR litigation at the High Court and Court of Appeal have not yielded definitive jurisprudence on Kenyan IPR law, but rather have seen courts refer IPR litigants to the IPT.¹¹⁷

Nevertheless, in other instances the principle of *stare decisis* coupled with the Kenya Judicature Act Chapter 8¹¹⁸ have meant that Kenya's Superior Courts still rely heavily on the decisions of specialized IPR courts in England on similar factual situations occurring in Kenya.

Comparably, only a few Law firms in Kenya have fully-fledged departments that offer exclusive services on IPR law. Subsequently, the number of expert legal practitioners is very low.

However, the few advocates who practice in this area have contributed immensely to the

¹¹⁶ Kenya being a common law jurisdiction, judges of the superior courts are not bound to follow the decisions of inferior courts and tribunals.

¹¹⁷ Otieno Odek, *Enforcement of Intellectual Property Rights in Kenya*, (2010).

¹¹⁸ This applies to the substance of the common law, the doctrines of equity and the statutes of general application in force in England on August 12, 1897, and the procedure and practice observed in the courts of justice in England at that date subject to and so far as written laws do not extend or apply. Kenya Judicature Act Cap 8, Section 3(1)(c).

development of jurisprudence in the decisions of the tribunals and have equally benefited from the expertise of their counterparts at the tribunals.

The membership of the Copyright Tribunal should comprise of persons who have impeccable academic and practical credentials in the country who have exhibited a proven track record in IP practice and/or are distinguished academics in that field. For this reason, their decisions will be based on pure principles and points of law and will rarely be interfered with by the appellate courts of superior record creating a quicker and more effective decision-making process. This will ensure the continuity in innovation in the IP sector which will translate to improved quality of goods and higher standards of living. In economic terms, an improvement in the standard of living of a populace directly impacts the spending power of that populace, creating a robust commercial environment for more investment.

CHAPTER THREE

DIGITAL TECHNOLOGY *VIS-À-VIS* MUSIC PIRACY

3.0 INTRODUCTION

In this chapter, we shall investigate the prevalence of music piracy and its effect on the economy as a result of the emergence of digital technology. This discussion will be succeeded in chapter four by interrogating some statistics regarding music piracy from both technological as well as traditional platforms.

The data and information pertaining to this study has been obtained through documentary research. Relevant literature from books, academic papers, journals, newspapers and the internet were used. The data obtained has been presented and analysed both qualitatively and quantitatively. The use of percentages has been employed as much as possible. Key informant interviews and consultations in KECOBO, the Judiciary and the Police were carried out in a bid to gather information from the relevant Government institutions.

3.1 CHALLENGES POSED BY DIGITAL TECHNOLOGY

Digital technology or digitization has been defined as the ability of a person or system to convert a piece of information or a representation of reality or a recording of some matter into digital form.¹¹⁹ Digitization constitutes two main steps. The first step involves developing a digital surrogate from a physical original. The second step entails launching the surrogate on the

¹¹⁹ Liebetrau P, Mitchell J (2010). 'Managing Digital Collections: A Collaborative Initiative on the South African Framework.' Accessed at <<http://www.archivalplatform.org/Resources>> on 1st August, 2014.

Internet to enable millions of users access the material.¹²⁰Therefore, as a consequence of digitization, goods and services are passed from a physical to a digital medium. This enables materials that may be subject to intellectual property to be used in many different media, copied at the same quality as original, to be altered, distorted, and distributed throughout the world cheaply, easily and speedily.¹²¹

Whereas Kenya has enacted law that seems to deal with cyberspace and the internet, the Kenya Information and Communications Act, 1998¹²² (as amended 2013)¹²³ does not in any way deal with electronic or digital copyright. The preamble to the Act sets the broad objective of the Act:

“An Act of Parliament to ... facilitate the development of the information and communications sector, including broadcasting, multimedia, telecommunications and postal services and electronic commerce ...”

Specifically, the Act makes provisions for, among others, telecommunication services, radio communication, broadcasting services, electronic transactions, and fair competition and treatment. In connection thereto, the Act mainly deals with cyber crimes, cyber terrorism and electronic crimes. Thus, there is need for Kenya to enact law that provides for digital copyright infringement and related aspects.

The fact that performance digital information which may be subject to intellectual property is easily accessible by other persons imports the necessity of protection of these works. The protection may be under any of the intellectual property regimes such as copyright, trade mark,

¹²⁰Dunning A (2004). ‘Copyright and Other Rights Issues in Digitization.’ Accessed at <<http://www.ahds.ac.uk/creating/information-papers/copyright-introduction/>> on 1st August,2014.

¹²¹ Mambi A (2010). ‘ICT Law Book’(Mikukina Byot, Tanzania). p.197.

¹²² Chapter 411A, Laws of Kenya.

¹²³ No. 41A of 2013 assented to on 11th December, 2013 and commenced 2nd January, 2014.

and domain name system. In regard to copyright, the intellectual property rights in the creation of literary, musical and artistic works are protected and promoted as a bundle of rights. The rights include reproduction, distribution, communication to the public, adaptation and translation, performance and broadcasting of the work.¹²⁴

From the view point of digitalization, creators are at a risk of digital infringements of their copyrighted works protected and promoted by intellectual property (IP). Yet digitalization represents the face of modern technology. The question, is the law adequate? Does the law serve the purpose or has it been overtaken by technology? Should we look at other ways and means beyond copyright to enforce copyright over the digital networks?

3.2 DIGITIZATION AND THE KENYA COPYRIGHT ACT 2001

Kenya Copyright Act, 2001, (the Act), protects digital information. The Act encompasses provisions of the World Trade Organization's Agreement on Trade Related Aspects on Intellectual Property (TRIPS);¹²⁵ including the 1996 World Intellectual Property Organization (WIPO) Internet Treaties.¹²⁶

The Act provides that for any digital material to be protected it should fall within the definition of what is copyrightable subject matter.¹²⁷ The subject matter of copyright consists of primary and secondary works. Primary works are also referred to as "original" works. These comprise literary, artistic and musical works. Secondary works, on their part, are referred to as

¹²⁴ Srivastava P (2008). 'Copyright in Academic Libraries in Digital Environment' (EssEss Publication, New Delhi).p. 13.

¹²⁵ The Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15th April, 1994.

¹²⁶ These include the 1996 WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. Both were adopted in Geneva on 20 December 1996.

¹²⁷ Copyright Act 2001, Laws of Kenya, section 22.

“derivative” works. These are developed or derived from another work, especially a primary or another derivative work. They include audio-visual work, sound recording broadcast as well as cable or web casts. These works are granted related, neighboring, or allied rights.

“Musical works” is defined by the Act as “any musical work, irrespective of musical quality, and includes works composed for musical accompaniment.”¹²⁸ It is the view made in this research paper that the definition of “musical works” provided by the Act is inappropriate and therefore poses a significant challenge in the protection of such works. The inappropriateness of the definition is in so far as it falls short of underscoring the complexity of musical copyright. This is so because in music, copyright relates to the lyrics, rhythm, music composition, harmony and sound recordings.

Apparently, therefore, the Act does not encompass musical works in the widest sense as to incorporate compositions with or without words. Accordingly, the Act stands on an inferior pedestal in comparison with the Berne Convention for the Protection of Literary and Artistic Works, 1886. The Berne Convention provides for copyright protection of musical composition with or without words.¹²⁹ According to commentators, Berne’s definition of “musical works” encompasses music in the widest sense.¹³⁰

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

¹²⁸ Copyright Act 2001, Laws of Kenya, section 2.

¹²⁹ Berne Convention for the Protection of Literary and Artistic Works 1886, Article 2(1).

¹³⁰ Goldestein P (2001). ‘International Copyright: Principles; Law & Practice, 3rd Edition, New York Oxford university press

tangibility refers to “work which has been written down, recorded or otherwise reduced to material form.”¹³¹

The development in the music industry has presented incremental progress in terms of means of enjoying music. Originally, live performances were the order of the day. This progressed to radio broadcasts and later, television footages. Then came the physical music carriers in the form of music cassettes, compact disks (CDs), and vinyl discs. Finally, with digitalization, one is able to stream or download their favorite tracks online through you tube as internet has become part of our daily life.¹³²

The major copyright issues currently are the right of making available, reproduction, adaptation and distribution of musical works given the ease with which they are available online. Many people download or listen to the music without the authority of the rights holders. The use of the various information communication technology (ICT) targets such as moving picture (MP3, MP4) players, tablets, computers, and telephones has further complicated the copyright protection issues. Consequently, there is need for policies that balance the interest of suppliers and users, in the protection and promotion of intellectual property rights and digital rights management (DRM) and technological protection measures (TPM) without disadvantaging innovative e-business models and new technologies.¹³³

Additionally, the borderless and transnational nature of the internet presents serious problems to copyright protection and enforcement. Nobody controls the internet and this has great legal

¹³¹ Gross J (2000). ‘This Business of Music’; Krosilorsky MW, Shemel S (2000). ‘The Definitive Guide to the Music Industry’ (Bill Board Books, Michigan).

¹³² Brinson, Radcliffe MF (2000). ‘Internet Law and Business Handbook’ (Landra Press, Victoria, Australia).

¹³³ Organization for Economic Co-operation and Development (OECD) (2005). ‘Online Music Distribution Providing both Challenges and Opportunities.’ Accessed at <http://www.oecd.org/document/24/0,2340,en_2649_201185_34995480-1_1_1_1,00.html> on 10th August, 2014.

consequences, as copyright enforcement is essentially territorial. Using computers and the internet, there can be electronic copying and transmission of digital content including music. Case law has provided some guidance in asserting digital copyright protection in the Internet. In *A & M Records, Inc. v Napster, Inc.*,¹³⁴ the Defendant provided a platform for users to upload and download music files in a compressed digital format. The Plaintiffs were major recording companies who saw the potential for this technology to affect their sales and promptly filed a suit against Napster as a “contributory and vicarious copyright infringer.” The court held that Napster was liable for contributory infringement as its website allowed users to upload and download music in digital format.¹³⁵

This case is important to the music industry as it addressed the application of copyright law to peer-to-peer file sharing. For the Defendant to be liable for contributory infringement the users of the service have to be infringing directly; and any form of such infringement cannot be considered to arise out of “fair use.”¹³⁶ As long as the ‘fair use’ amounts to infringement of any right of the copyright holder’s exclusive rights, the Defendant is liable. In the matter at hand, the Defendants had infringed the Plaintiffs’ exclusive rights when their clients sampled, space-shifted and permissively distributed recordings by both new and established artists. These acts of the Defendants’ clients amounted to infringement of the Plaintiffs’ copyright exclusive rights of reproduction and distribution. It was therefore incumbent on the Defendants to control the infringing behavior of users. This Napster ruling is often cited as precedent posing a threat to

¹³⁴*A&M Records, Inc. v Napster, Inc* 239 F.3d 1004 (9th Cir. 2001) available at <http://www.law.cornell.edu/copyright/cases/239_F3d_1004.htm> and accessed on 10th August, 2014.

¹³⁵ *ibid.*

¹³⁶ While American Fair use is largely judge-dependent, Kenyan fair dealing is largely statutory.

website authors regarding hyper linking to copyrighted content. The court granted an order against Napster to forfeit 20 million dollars on settlement with the record companies involved.¹³⁷

The digital environment nevertheless provides space for creators to create and disseminate their works and therefore should be embraced. There is no doubt that there are a number of challenges due to copyright trying to catch up with technology. However, at the end of it all, the owner of the work has the responsibility of deciding how they want to protect their works after they are uploaded online. They can use technological protection measures to protect their works online; these include encryption of signals and works, digital watermarks, and even use of access codes and passwords.¹³⁸

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

3.3 CHALLENGES IN DIGITAL TECHNOLOGY OWING TO THE INADEQUACY OF THE KENYA COPYRIGHT LAW

Copyright enforcement of the digital works is one of the many challenges. This is because preventing copyright infringement or violation over the internet has not been easy, the internet has made music piracy cheaper, faster, simpler and more rewarding. The Kenya Copyright Act 2001, though enacted at the time of the convergence in ICT, did not foresee the explosion of

¹³⁷ Ben Sihanya, 'Copyright in E-commerce and the Music Industry' in Moni Wekesa and Ben Sihanya (eds), *Intellectual Property Rights in Kenya* (Nairobi: Konrad-Adenauer-Stiftung, 2009) pp. 133-176.

¹³⁸ Lessig Lawrence (1999). "Code and Other Laws of Cyberspace" (Penguin Press, New York).

digital copyright infringement. As such, its efforts in protecting and promoting digital copyright continue to meet a myriad of technology based challenges.

Enforcement becomes a great problem because of the nature of the internet. There are a number of technologies that are adopted by infringers including Bit Torrent where the works are disseminated from different locations making it difficult to trace the offending disseminator.¹³⁹ This is a more crucial technology terrible than the initial technologies such as Napster¹⁴⁰ and Grokster.¹⁴¹ Napster can be credited for bringing the music producers/record company into the digital era, as they had to change or be left behind.

The question of where to institute a claim where infringement has occurred online is another challenge. This is because of the borderless and transnational character of the internet.¹⁴² The Kenya Copyright Act has no explicit provision to address this critical issue even with the rampant illegal downloads of works in the music industry which has rapidly developed with convergence in ICT since 2000. This contrasts sharply with the U.S. scenario where in 1998, in an attempt to catch up with fast-developing changes in technology, Congress passed the Digital Millennium Copyright Act. The Act authorizes owners of copyrighted digital media to sue those who illegally copy, distribute, or decode encrypted products. It also authorizes copyright owners to compel Internet service providers to remove online materials infringing on their copyright.¹⁴³

¹³⁹ Lilian Edwards, Charlotte Waelde. 'Online Intermediaries and Liability for Copyright Infringement' accessed at <<https://www.era.lib.ed.ac.uk/bitstream/1842/2305/1/wipo-onlineintermediaries.pdf>> on 10th August, 2014.

¹⁴⁰ *A & M Records, Inc. v Napster, Inc* 239 F.3d 1004 (9th Cir. 2001).

¹⁴¹ *Metro-Goldwyn-Mayer Studios Inc. (MGM) v. Grokster, LTD* 545 U.S. 913, 125 S. Ct. 2764.

¹⁴² Ian Condry (2004). 'Culture of Music Piracy : An Ethnographic Comparison of the US and Japan' pp 343-63.

¹⁴³ Digital Piracy in the 21st Century. < <http://freakonomics.com/2012/01/12/how-much-do-music-and-movie-piracy-hurt-the-u-s-economy> > accessed 24 November 2014.

The issue of identification of counterfeit and pirated products is another challenge. The copyright infringers also have the ability to reproduce copies of legitimate products in a matter of seconds by downloading them from the internet, which are identical and sometimes even better than the originals. This makes it very hard to differentiate clones from the legitimate products, especially in less sophisticated societies.

In the U.S., the Recording Industry Association of America (RIAA) which represents most of the music recording business goes after individuals illegally copying and sharing copyrighted songs. The RIAA anti-piracy arm monitors the internet to get violators. Names of suspected pirates are provided by Internet providers including universities. Using this information, the RIAA coordinates a large number of lawsuits against individuals. This has been effective in so far as it down loaders have been frightened from grabbing copyrighted music off the Internet.¹⁴⁴

The ICT has also facilitated the fragmentation of corporate production and distribution activities thus enhancing distribution and bringing legitimate products and services closer to the consumer.¹⁴⁵ On the contrary, the pirates have also taken advantage of the availability of these technologies. The Diffusion of products and related technologies is rapid and more extensive in the information society that is characterized by e-commerce contracts, mobile commerce, e-mail and related internet transactions.

The result has been a huge loss to the economy. In democracies with the technology to estimate the impact of digital music piracy to economy, figures are shocking. For instance, in the U.S., before Napster (between 1975 and 1999) the value of shipments of recorded music rose steadily

¹⁴⁴ *ibid.*

¹⁴⁵ Before the advent of ICT and trade liberalization, most production functions were located in the metropolises. Products like books and sound recordings of music were largely standard and availability of finished products and the production technologies were precarious. In a way, limited skills transfer served to control reverse engineering, decompilation, infringement, piracy and counterfeiting. Now these products are largely customized (by pirates, too).

from \$5.8 to \$12.8 billion in constant 2000 dollars.¹⁴⁶ However, between 1999 and 2008, annual US revenue from physical recorded music products fell from \$12.8 billion back to \$5.5 billion.¹⁴⁷ Even with digital sales included, U.S. revenue was a third below its 1999 level. This decline has not been confined to the U.S. alone: worldwide revenue from physical recorded music fell from \$37 billion in 1999 to \$25 billion in 2007. This figure includes the revenue decline experienced in Kenya due to digital music piracy.¹⁴⁸

In a bid to explain this huge decline in revenue from music industry, organizations representing the recording industry have argued two points. First, they maintain that digital piracy is the cause. Second, they raise a concern that the effective weakening of copyright protection for recorded music will have serious consequences for whether new artists' works will be brought to market and made available to consumers.¹⁴⁹ Knowing this, pirates are becoming incognito making tracing traders difficult. Thus, it gets more difficult for consumers, innovators and regulators to gather evidence to support anti-counterfeiting and anti-piracy suits.

The question of what law and forum apply is another challenge. In this case it is not clear who would be the defendant and enforcement in the context of trade in pirated and counterfeited products like the sound recordings. For instance if a pirate domiciled in Kenya downloads music from a website registered in South Africa or Egypt and owned by a Senegal citizen the question of law and forum arises, which country's law is to apply in this circumstance?¹⁵⁰ Therefore, Any copyright owner seeking redress for un-authorized dissemination may be faced with suing

¹⁴⁶ From the Statistical Abstract of the United States 1995, table 915, 578, deflated using the CPI from the Economic Report of the President 2010, table B-62, 262 <<http://www.nbber.org/chapters/c12454.pdf>> accessed 24 November 2014.

¹⁴⁷ <http://www.riaa.com/keystatistics.php?content_selector=keystats_yearend_report> accessed 24 November 2014.

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid.*

¹⁵⁰ Ben Sihanya (2012). 'Digital Copyright in Kenya.'

individuals in far flung jurisdictions, applying laws that may be expensive to ascertain and uncertain in application to the reproduction.¹⁵¹

The last problem is the implementation of the technical protection measures (TPMs) that were introduced through the WIPO Copyright Treaties. TPMs are software, components and other devices that copyright owners use to protect copyright material. Examples include encryption of software, passwords, and access codes. TPMs come in two main types: access control TPMs and copyright protection TPMs. Access control TPMs allow the copyright owner to control access to the copyrighted material – for example, password protections, file permissions, and encryption. Copyright protection measures are designed to control activities such as reproduction of copyright material, for example by limiting the number of copies that a consumer might make of an item. In practice, however, TPMs contain both access and copy control elements.¹⁵²

Whereas the Copyright Act 2001 does not make specific provisions for exceptions and limitations where the TPMs have been used, this is not the case in other jurisdictions. In Australia, for instance, the *Copyright Act 1968* makes provisions for TPMs. At section 10, it defines a TPM as being:

“A device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to **prevent or inhibit the infringement of copyright** in a work or other subject-matter by either or both of the following means:

- (a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or

¹⁵¹ Ginsburg, (1998) “*Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted through Digital Networks*,” WIPO paper (available as GCPIC/2 paper on the WIPO website).

¹⁵² Overview: Technological Protection Measures, Copyright in Australia, the Australia-United States Free Trade Agreement, regulation in the United States, and region coding.
<http://www.aphref.gov.au/house_committee_report_chapter2.pdf> accessed 24 November 2014.

other subject-matter) with the authority of the owner or exclusive licensee of the copyright;

(b) through a copy control mechanisms.”¹⁵³

In the U.S., the Digital Millennium Copyright Act 1998 (DMCA) amended the Copyright Act 1976 as part of the implementation of the WIPO Internet Treaties.¹⁵⁴ DMCA creates civil and criminal penalties for ‘circumventing’ encryption and other technology designed to prevent tampering or ‘hacking’ into copyrighted material.

While TPMs may appear to be valid response by copyright owners seeking to protect their intellectual property from infringement, TPMs can also be disabled or circumvented through a range of means, including the use of computer programs or devices such as microchips. This significantly diminishes their acclaimed success in deterring digital music piracy. Moreover, the decision of copyright holders to combine or ‘bundle’ the two types of TPM into one poses difficulty especially when one seeks to determine the exact nature and purpose of a TPM containing both elements.¹⁵⁵

To this end, advocates of stronger protection for copyright owners have argued that the precise nature of a given TPM is irrelevant and that all access TPMs require protection. However, the benefits to the user may also come with disadvantages that may become increasingly apparent from the enhanced control, which copyright owners can, and will, be able to exert over access to works protected by copyright and over further re-use. Copyright owners have been advancing technological protection measures through, among other methods the use of encryption to control

¹⁵³ Emphasis is the researcher’s to signify the effective use of statute to deter digital music copyright piracy.

¹⁵⁴ The World Intellectual Property Organisation (WIPO) Diplomatic Conference – the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT).

¹⁵⁵ *ibid* 145.

dissemination and copying of works. These systems, in their most advanced form allow the copyright owner to dictate when, and who, may access a work.

This is bound to put users on notice. And two consequences are subsequent from intensified control exercised by copyright owners. The first is that the public domain¹⁵⁶ will be locked away, accessible and usable only at the behest of the copyright owner. The second is that creative works will only be accessible on a pay-per-view business model, with the result that only those who can afford to pay will be granted access.

In view of this, this study strongly supports the use of TPMs in curbing digital music piracy, among other control and deterrent measure meant to achieve the same goal. The provision for internet server liability in the chain of digital music piracy may form part of substantive law which may combine well with laws regularizing TPMs in the music production industry. Amendment to the Kenya Copyright Act 2001 should therefore include provisions touching on these key aspects of protection of digital music piracy.

3.4 IS DIGITAL TECHNOLOGY A NECESSARY EVIL?

The ease of modifying or copying digitized material and the proliferation of computer networking have raised fundamental questions about copyright and patent intellectual property protections rooted in the U.S. Constitution.¹⁵⁷ This may pass to be the case even with the similar

¹⁵⁶ The term 'public domain' includes all those works and parts of works which the copyright owner does not own, the use of works for which a user has a defence to an action of infringement of copyright, and those on which the term of protection has expired. Thus, the public domain encompasses ideas, insubstantial parts of works, works which are too insubstantial to attract copyright protection, factual information, substantial parts of works which are used for the purpose of fair dealing, and works on which the term of copyright has expired.

¹⁵⁷ National Research Council (2000). "*The Digital Dilemma: Intellectual Property in the Information Age*" (The National Academies Press, Washington DC).

protection rooted in the Constitution of Kenya 2010.¹⁵⁸ Hailed for quick and convenient access to a world of material, the Internet also poses serious economic issues for those who create and market that material. If people can so easily send music on the Internet for free, for example, who will pay for the music?

The multiple facets of digitized intellectual property follow complex threads of law, business, incentives to creators, the citizen's inherent fundamental right to access to information,¹⁵⁹ the international context, and the nature of human behavior. Technology is explored for its ability to transfer content and its potential to protect intellectual property rights. All these must be taken into account if we are to resolve some of the major challenges confronting us in the digital environment. These challenges have been compounded by the fact of the special characteristics of the "odd new world" of cyberspace that create difficulties for the application of traditional concepts of copyright.

Digitalization has broken the previous boundaries demarcated by publication in the medium of print as "public," "irrevocable," and which provided a fixed copy of the work."¹⁶⁰ Before the advent of digitalization, printed works once distributed, were not readily changed (and thus fixed in their basic form), were only available to the public in libraries, and could not be taken back out of circulation easily (hence are irrevocable). However, postings on computer networks can be withdrawn at any time, can be restricted to a limited audience, and can be revised continuously, leaving no trace of the original behind. Partly for these reasons, licensing has come to be a primary legal mechanism for distributing electronic works.

¹⁵⁸ The Constitution of Kenya 2010, Article 40(3).

¹⁵⁹ The Constitution of Kenya 2010, Article 35.

¹⁶⁰ National Research Council (2000). "*The Digital Dilemma: Intellectual Property in the Information Age*" (The National Academies Press, Washington DC).p. 42.

Copyright, as part of intellectual property rights, has a constitutionally sanctioned goal to secure public access to the intellectual, cultural, and social record. Licensing, as a legal means of providing access has its promises and peril to the rights holder and a third party in equal measure. However, challenges abound with regard to issues of non-copyrightable databases and the accessibility of Government information in the wake of serious concerns of internal security. The other major concerns are the challenge of archiving and preserving materials in digital form and the contributions.

The technical mechanisms that exist for protecting intellectual property have their capabilities and limitations. Apart from the roles that law and technology play in protecting intellectual property, business models have a crucial impact on mitigating the potential damage caused by digital copying and even exploiting its special characteristics for entrepreneurial advantage. Both traditional and modern business models have been deployed especially to deal with information as product.¹⁶¹

In conclusion, digitalization has given rise to an array of complex issues involving legal, economic, technical, social, moral and how they interrelate with regard to protection of musical works. As has been illustrated, intellectual property is now impacting on the daily lives of average people more than ever before. There is need for a broad educational program to be undertaken that emphasizes the benefits that copyright law provides to all parties. We opine that a better understanding of the basic principles of copyright law would lead to greater respect for this law and greater willingness to abide by it, as well as produce a more informed public better able to engage in discussions about intellectual property and public policy.

¹⁶¹ *ibid*, note 140.

Finally, it must not be lost that the significant role of copyright is providing incentives to publishers,¹⁶² although most academic researchers advance in their careers by giving it away.¹⁶³ For university presses whose publications predominantly originate from the academic community, copyright protection provides a currently indispensable base of legal support for their operations. Thus, copyright protection provides different needs of various categories of authors.¹⁶⁴ This differential protection is necessary in ensuring that the various interests of creators are catered for so as not to deter them from pursuing their work. Likewise, the interests of publishers should also be so taken care of as not to deter them from their central role in disseminating works.

3.5 COPYRIGHT AND CYBER SPACE

In the wake of challenges posed by digitalization and the boundless existence of the Internet engineered by cyberspace, there is need to propose a change from a cyber space of anarchy to that of control.¹⁶⁵ This is in view of the fact that the basic Internet of the past is “changing from a libertarian’s utopia to a place that is controlled by commercial interests that could kill the innovative culture that fostered the Internet we see today.”¹⁶⁶ Indeed, there exist relationships between the technology, also referred to as architecture or code, and social norms, markets and laws which regulate people’s behavior.

Cyberspace raises a number of questions of constitutional law. For instance: What produced the liberty of cyber space and what will change to remake the liberty? This question brings to light the blending of Government regulation and control with a growing world of electronic

¹⁶² *ibid* 145, p. 144.

¹⁶³ *ibid* 145, p. 225.

¹⁶⁴ *ibid* 145, pp. 236-38.

¹⁶⁵ Lessig Lawrence (1999). ‘Code and Other Laws of Cyberspace’ (Penguin Press, New York).

¹⁶⁶ *ibid*.

commerce. The Government regulation and control take charge of the relationship between ‘real space’ is related to ‘cyberspace’ and the issues that surround the Internet’s future.¹⁶⁷ Thus, although even the framers of the American Constitution did not fore see the civil liberties and other values central to modern society, the limits of the technology of the time already safeguarded them.

The Internet and other new media have eliminated many physical and economic constraints on intrusive conduct like the tracking of every page that an Internet surfer views. This largely compromises personal privacy and other values fundamental to society. It may therefore be instructive that citizens take it upon themselves to defend those privacy and other values they consider fundamental, lest they be diminished if not eliminated by code. To this extent, the introduction of e-commerce-friendly Internet code is somewhat analogous to the genetic engineering of agricultural products. However, this may have widespread effects not limited to targeted product markets or by national boundaries;¹⁶⁸ and as such, may require collective decision making where code may have major consequences with respect to important societal liberties.

Evidently, therefore, the “externalities” of e-commerce code in terms of harm to social values are too significant to expect private sector code writers to design a socially optimal architecture. Democratic principles require that, prior to the adoption of important varieties of computer code, there be public discussions comparable to those associated with the adoption of a new

¹⁶⁷ *ibid*150, p. 81.

¹⁶⁸ Luke Anderson (1999). ‘Genetic Engineering: Food And Our Environment;’ Carey Goldberg, 1500 March in Boston to Protest Biotech Food, N.Y. TIMES, Mar.27, 2000, at A14 (D.C. ed.); Donald McNeil, Protest on New Genes and Seeds Grow More Passionate in Europe, N.Y. TIMES, Mar. 14, 2000, at A1; Michael Pollan, Feeding Frenzy, N.Y. TIMES, Dec. 12, 1999 §6, at 43.

constitution of a country. Decisions about how much control over information society wants to allow and by whom, call for democratic decision making.

The import of a democratic decision making in the development of a computer code is to the extent that the code ought to address the principles which regulate human behavior in regard to use of ICT. As has already been stated, human behaviour is regulated by four main principles: laws, norms, market and technology. Although these forces can work directly or indirectly in combinations, improvements in technology can dramatically alter the composite constraint on people's conduct.

The dangers cyberspace poses to copyright are to do with privacy, free speech, and sovereignty of a country. However, the society's ability, including the three branches of Government, in taking appropriate action whenever these are infringed is not certain. This has been so from a historical perspective, where the courts have served to protect liberties. When new technologies threaten liberties, courts can quickly preserve them by translating the Constitution into the present context in order to preserve the framers' original meaning.¹⁶⁹ What has come out is that in many cases, technological changes are revealing "latent ambiguities" in constitutional law, as there arise questions that cannot be resolved by translation or any other *bona fide* approach to constitutional interpretations. Such situations require judges to analyze the issues and resolve them in favour of the best public policy results.¹⁷⁰

In a nut shell, unregulated use of cyberspace is counterproductive to the gains of the right holders in copyright to the extent that has been illustrated in this paper. However, with the propounded

¹⁶⁹ This is illustrated in the decision in *Katz v. United States*, 389 U.S. 347 (1967), recognizing protection of an individual's "expectation of privacy" and overturning the originalism approach of *Olmstead v. United States*, 277 U.S.438 (1928).

¹⁷⁰ Lawrence Lessig (1999). 'Code and Other Laws of Cyberspace (basic books, New York)' p. 223.

collective participation in the development of computer code by all and sundry, there is bound to be change in the environment of Internet and Internet use. The latent ambiguities posed by the Kenyan Copyright law in the protection of music copyright may be overcome by exposing users to the ethic of the Internet and Internet use through sound Government regulation.

3.6 CONCLUSION

Kenya participated in the WIPO Diplomatic Conference¹⁷¹ that adopted the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Nevertheless, Kenya has not yet ratified these treaties.

There are many sources of Kenyan Law as provided under Section 3 of the Judicature Act Chapter 8, Laws of Kenya. Since 1966, Kenya has had an Act on copyright. This is the only statute, which specifically applies to copyright.¹⁷² This section of the Judicature Act does not specifically mention international law, including treaties and conventions, as a source of law and therefore, it is not clear whether this issue has arisen and it is arguable that there was no reason to specifically mention them. Kenya follows the British transformation or dualist doctrine whereby treaties must be ratified and enacted by Parliament to become law.¹⁷³ Therefore, treaties like Berne, UCC and the WTO Agreement are not automatically part of Kenyan laws but would, through enactment, domestication or transformation, constitute part of the written laws of the Kenya Parliament under sections 3(1) (2) of the Judicature Act.

¹⁷¹ WIPO Diplomatic Conference of 1996

¹⁷² Some statutes have an incidental mandate on copyright. Examples include Kenya's Communications Act, 1998-2008; the Films and Stage Plays Act, Cap 222; the Kenya Broadcasting Corporation Act, Cap 221; the Books and Newspapers Act, Cap 111; the Public Archives and Documentation Service Act, Cap 19; Media Act, 2007; Anti-counterfeit Act, 2008; and Kenya National Library Services Board, Cap 225

¹⁷³ Harris DJ (1998 and 2004). 'Cases and Materials on International Law', (Sweet & Maxwell, London). See also the Vienna Convention on the Law of Treaties, 1969. It came into force, under Art 84, in 1980. Cf. Arts. 28, 29 and 29 ibis of the Berne Convention, noting that being procedural and administrative provisions of Berne, they will not bind members of the World Trade Organization (WTO), as such, under Article 9 of the WTO TRIPs Agreement.

The Kenya Copyright Act acknowledges copyright in computer software although it does not include specific provisions in relation to exploitation of copyright works in the digital environment. Rather, the provisions contained in the law are presumably seen to apply to the digital environment as well.¹⁷⁴ The relevant provisions include those covering communication to the public, rental and distribution of copyright protected works.

The response by the copyright owners has been to develop access protection systems (Electronic Copyright Management Systems (ECMS) and seek a legal framework to protect against third parties circumventing these systems. Electronic Copyright Management System (ECMS) is one such technology that can enable copyright owners to track, manage or prevent copying of their digital work. Several international legislations such as the Digital Millennium Copyright Act (DMCA) and the European Union Copyright Directive (EUCD) give legal backing for the use of these technical measures to control access to works.

In this connection, the Kenya Copyright Act provides additional protection to creators by making it an offence to circumvent TPMs¹⁷⁵ it states that copyright is infringed by anyone who:

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

¹⁷⁴ Lawrence Lessig (1999). 'Code and other laws of cyberspace' (Basic Books, New York).

¹⁷⁵ The Copyright Act 2001, Laws of Kenya, section 35(3).

This legal protection of technological protection measures (TPMs) is problematic. The TPMs have serious consequences for access. This is because they jeopardize existing statutory limitations and exceptions. While TPMs enhance enforcement of rights in the digital environment, they also have the potential to limit access to works that would, in the non-digital sphere, be available to users under exceptions and limitations.¹⁷⁶ TPMs, in effect, negate the purpose of exceptions and limitations, as the law makes it illegal to circumvent any technical devices that have been installed by right-holders to prevent use by third parties. Users are thus expected to seek the permission of right-holders in order to access the information, even if the intended use falls under the exceptions and limitations recognized by law.¹⁷⁷ The WCT specifically provides for member countries to enact exceptions within the confines of the three-step test.¹⁷⁸

- a) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
- b) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict

¹⁷⁶ Lawrence Lessig (2004). 'Free culture: how big media uses technology and the law to lock down culture and control creativity' (Penguin Press, New York); Radin MJ, Rothchild JA and Silverman GM (2004). 'Internet commerce: emerging legal framework' (Foundation Press, New York).

¹⁷⁷ Debate in the United States led to the proposed 'Cohen Doctrine' (named after Prof J.E. Cohen), which states that one has a right to hack copyright systems in order to secure fair use, to the effect that the US Digital Millennium Copyright Act should not criminalize measures that circumvent DRM or TPMS to facilitate access to non copyright materials. See Cohen JE 'Some reflections on copyright management systems and laws designed to protect them'; L. Lessig (2001). "*The future of ideas: the fate of commons in a connected world*" (Random House, New York).p.163; and Goldstein P (2003). 'Copyright's highway: From Gutenberg to the celestial jukebox' (Stanford University Press, Stanford, California) esp. Chapter 6 'The answer to the machine is the machine'.

¹⁷⁸ World Copyright Treaty, Article 3.

with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Furthermore, the Agreed Statement to Article 10 of the Berne Convention clarifies this and allows scope for signatory nations to extend exceptions in the digital environment. It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws, which have been considered acceptable under the Berne Convention. It is also understood that this Article ¹⁷⁹ neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

Protection of TPMs will become an even bigger issue when the exceptions and limitations accorded by the law in Kenya are expanded. Currently, the exceptions and limitations are very narrow, allowing the rights-holder to have firm control over the use of copyright-protected works. There was no clear or reasoned justification for the aforementioned legal protection of TPMs in the Kenyan context at the time of enactment of the 2001 Copyright Act. It may be that the main intention of the legislators was to bring Kenya's law in line with international standards, especially the WIPO Internet Treaties. ¹⁸⁰

¹⁷⁹ The Berne Convention for the Protection of Literary and Artistic Works 1886, Article 10(2).

¹⁸⁰ These include the WIPO Copyright Treaty 1996 and the WIPO Performance and Phonograms Treaty. Both adopted in Geneva on 20th December 1996.

CHAPTER FOUR

OTHER FORMS OF MUSIC PIRACY

4.0 INTRODUCTION

Piracy in musical works in Kenya is still a big problem, even after enactment of the Copyright Act of 2001. The Act makes provision for, *inter alia*, copyright in literary, musical and artistic works, audio visual works, sound recording, and broadcast.¹⁸¹ The emergence of digital technology and internet has posed new challenges to copyright protection. The subversion of the Internet for the unauthorized reproduction of copyrighted works is a worldwide phenomenon.¹⁸²

Digital piracy has been described as the act of copying digital goods, software, digital connections, digital audio (music and voice), and digital video for any reason other than backup without explicit permission from and compensation to the copyright holder.¹⁸³ Thus, music piracy involves illegal uploading and downloading of digital sound without the explicit permission of the legal owner.¹⁸⁴

Private individuals now have the ability to produce copies of copyrighted works and distribute them at a minimal cost. Internet users also share video files, illegally, on an unprecedented scale thus affecting the profits of the right holders. Moreover, as technology continues to improve, making of pirated copies of musical works is becoming much easier.

¹⁸¹ Preamble to the Copyright Act, 2001

¹⁸²W D Gunter (2008). 'Piracy on the High Speeds: A Test of Social Learning Theory on Digital Piracy among College Students'3 International Journal of Criminal Justice Sciences 54-68.

¹⁸³R D Gopal and others (2004) 'A behavioral model of digital piracy' (2004) 14 Journal of Organizational Computing and Electronic Commerce 89-105.

¹⁸⁴ G E Higgins 'Digital piracy: Assessing the Contributions of an Integrated Self-control Theory and Social Learning theory using the structural equation modeling' (2006)19 Criminal Justice Studies 3-22.

4.1 IMPACT OF MUSIC PIRACY ON THE KENYAN MUSICIAN AND THE KENYAN ECONOMY

Research has shown that Kenya is the biggest market for counterfeit and smuggled goods in East Africa. The statistics places the counterfeiting business in Kenya as worth KSh. 70 billion. Moreover Kenya loses about KSh. 0.8 billion in tax revenues to counterfeiting and piracy, funds which could be invested in key social sectors.¹⁸⁵

These statistics paint a grim picture for a country that ought to take advantage of IPRs as key contributor to the economy. It is not in doubt that IPRs generate economic activity, employment and growth. The benefits of IPRs cannot be gainsaid. They attract Foreign Direct Investment (FDI) and promote Research and Development (R&D), as well as technology transfer in developing countries thereby spurring significant economic growth. A sound IPR regime in thus an important component of an economy.¹⁸⁶ According to WIPO, copyright related industries generate substantial GDP and employment creation in emerging and developing countries. Relevant studies have shown that for Kenya, creative industries contribute more that 5% to GDP and over 3% to employment.¹⁸⁷

It is thus important to strengthen Kenya IPR regime. This will encourage technology transfer from foreign huge income economies and coupled with the effects of FDI the country stands to

¹⁸⁵ Gastrow, P (2011). 'International Peace Institute, Termites at Work: A Report on Transnational Organized Crime and State Erosion in Kenya - Comprehensive Research Findings,' p. 45.

¹⁸⁶ Onyancha, E (2006). 'Determinants of Foreign Direct Investment in Kenya (Abstract)' (Institute African de Development Economique et de planification) available at <<http://upan1.un.org/intra.doc.groups/public/documents/idep/unpan023352.pdf>> and accessed 12th August, 2014.

¹⁸⁷ WIPO (2012). 'Studies on the Economic Contribution of the Copyright Industries,' p. 28 Tables 6.1 & 6.2 accessed at <http://www.wipo.int/export/sites/www/ip-development/en/creative_industry/pdf/economic_contribution_analysis_2012.pdf> on 10th August, 2014; WIPO (2011). 'Economic Contribution & Mapping' accessed at <http://www.wipo.int/ip-development/en/creative_industry/economic_contribution.html> on 11th August, 2014.

gain immensely from the resultant capital and skills.¹⁸⁸ In deed economists have established a correlation between sound IPR protections regime with increased FDI. The correlation between copyright and FDI far outweighs that between trademark and FDI. According to a research done by economists, it was found that 1% improvement in Trademark and Copyright protection increases FDI by 3.8% and 6.8% respectively.¹⁸⁹

Furthermore, a strong IPR regime promotes cultural expression and diversity, dissemination of new technologies and development. It has been reported that an increase of trademark and copyright protection correlates to a 1.4% and a 3.3% increase in Domestic Research and Development (DR & D) respectively.¹⁹⁰ Thus Firms can earn substantially more from innovations that are protected by IPR. Closer home, the importance of IPR protection laws in attracting FDI has been recognized by East Africa Community (EAC).¹⁹¹ According to estimates by Frontier Economics, 2012, P.13, improving Kenya's IPR regime could be associated with between US \$ 460 and US\$ 630 of additional FDI. The effect of such an increase could be associated with increased employment of between 135,000 and 185,000 persons hence reducing the current Kenya unemployment rate by 40%.

¹⁸⁸ WIPO (2011). 'The Changing Face of Innovation,' p. 26, footnote 19, accessed at <http://www.wipo.int/export/sites/b.www/freepublications/en/intproperty/944/wipo_pub_944_2011.pdf> on 11th August, 2014.

¹⁸⁹ Park, W and Lippoldt, D. (Jan 2008). 'Technology Transfer and the , Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries, OECD Trade Policy Working Paper No. 62,' accessed at <<http://www.oecd.org/official-documents/display-documents.pdf/>> on 11th August, 2014.

¹⁹⁰ Cepeda CR, Lippoldt D and Senft J 14th September, 2010). 'Policy Complements to the Strengthening of IPRs in Developing Countries, OECD Trade Policy Working Paper No. 104,' p. 21 accessed at <http://www.oecd-library.org/trade/policy-complements-to-the-strengthening-of-iprs-in-developing-countries_5km7fmwz85d4-en.> on 11th August, 2014.

¹⁹¹ The East African Community (September, 2009), 'Policy On Anti-Counterfeiting, Anti-Piracy And Other Intellectual Property Rights Violations,' accessed at <<http://documents.jdsupra.com.ed4ac7-0ba4-40fc-9b50-15ff7765019a.pdf>>: "Granted that IPRs constitute by far the most valuable assets of most modern businesses, the creation of an enabling and secure investment climate necessary demands an effective legal regime for the protection of IPRs. The absence of such a regime inexorably drive away new investments from the East African Region."

The effects of poor IPR protection regimes are also felt by the Kenyan artist. WIPO has noted that despite the vibrant music scene in Kenya which has enjoyed a boom in production, musicians struggle to make a living from their music. Music pirates who copy CDs the moment they are released and sell them on the streets, make it nearly impossible for the Kenyan artists to profit from direct sale of their legitimate recordings.¹⁹²

In addition to the loss suffered by the local musician, counterfeit and piracy also impedes the growth and development of local creative industries in Kenya.¹⁹³ The Kenya Publishers Association (KPA) in its announcement in 2011 stated that 90% of the Kenyan music is pirated.¹⁹⁴ At national level, Kenya has experienced economic loss emanating from piracy. Between 2002 and 2003, Kenya Customs and Excise Department seized over 100,000 music CD's entering into Nairobi. A further 15,000 music CDs were seized in Mombasa. Interestingly during the same period the industry reported low sales of original CDs estimated at only 15000 music CDs.¹⁹⁵

In monetary terms, the Kenya Association of Manufacturers (KAM) estimates that the manufacturers incur an annual net loss of KSh. 30 billion while the government loses KSh. 6

¹⁹² WIPO (July 2007)> “On the Beat - Tapping the Potential of Kenya’s Music Industry,” accessed at <http://www.wipo.int/wipo_magazine/en/2007/04/article_0001.html>on 19th August, 2014.

¹⁹³ The East African Community (September, 2009), ‘Policy On Anti-Counterfeiting, Anti-Piracy And Other Intellectual Property Rights Violations,’ accessed at <<http://documents.jdsupra.com.ed4ac7-0ba4-40fc-9b50-15ff7765019a.pdf>>: “Granted that IPRs constitute by far the most valuable assets of most modern businesses, the creation of an enabling and secure investment climate necessary demands an effective legal regime for the protection of IPRs. The absence of such a regime inexorably drive away new investments from the East African Region;”Croella C (2007), “On the beat: tapping the potential of Kenya’s music industry,” WIPO Magazine (2007), WIPO, Geneva, available at <http://www.wipo.int/wipo_magazine/en/2007/04/article_0001.html>and accessed on 10th August, 2014.

¹⁹⁴ Kamau I, Maema Advocates and Mohammed Muigai Advocates Consortium (September, 2008). ‘Formulation of an EAC Policy on Anti-Counterfeiting, Anti-Piracy and other Intellectual Property Rights Violations,’ accessed at <<http://eabc.info/files/inception%20Report-on-%20the-%20Formulation-%20of-%20an-%20EAC-%20Policy-%20on-%20Anti-Counterfeiting.pdf>> p. 5 on 10th August, 2014.

¹⁹⁵ Information accessed at <<http://www.iipa.com/rbc/2003/2003SPEC301KENYA.pdf>>on 11th August, 2014.

billion in profits and tax revenue due to piracy and counterfeit trade.¹⁹⁶ Other reports estimate the annual loss emanating from piracy to be anything between KSh. 6 billion¹⁹⁷ and KSh. 40 billion.¹⁹⁸ Needless to say, such loss of revenue deprives citizens of jobs, infrastructure, social amenities and increases social costs.¹⁹⁹

4.2 THE EXTENT OF THE PITFALLS IN THE KENYAN LAW

This study establishes that the average fines meted on infringers of copyrighted musical works is KSh. 500. Whereas the Copyright Act 2001 provides for a fine of up to KSh. 400,000, or imprisonment for a term not exceeding six years for any offence proved against a first offender, the lesser punishments meted on infringers may be attributed to the framing of the law which sets upper limits instead of lower limits of the fines and jail terms. It is unfortunate that the judiciary treats copyright offences as petty offences and are therefore not prioritized. The penalties are also not stiff enough to deter the offenders.

In fact, the Anti-Counterfeit Act 2008 also provides for criminal sanctions of a jail term not exceeding five years or a fine of not less than three times the prevailing retail price of the genuine product or both for first offenders. In the case of a second or subsequent conviction, the

¹⁹⁶ Presentation by the chief executive of Kenya Association of Manufacturers, Betty Maina, “Anti-Counterfeit Bill We Count on Legislators to Act Rightfully,” available at <<http://www.kam.co.ke/index.php/opinion-pieces/147-anti-counterfeit-bill-we-count-on-legislators-to-act-rightfully>> on 11th August, 2014.

¹⁹⁷ According to the Kenya Revenue Authority, 2007. See Keynote address by the Attorney general of Kenya, Amos Wako, “Promoting Better Legislation and Enforcement of Intellectual Property Rights in Kenya,” January 30, 2007, available at <www.ccapcongress.net/archives/Geneva/Files/Wako.pdf> and accessed on 12th August, 2014.

¹⁹⁸ According to Industrialization Minister Henry Kosgey, 2009. See Anti-Counterfeiting & Piracy Initiative (ACAPI), “Kenya’s Counterfeiting Agency Starts Operations,” December 9, 2009, available at <www.ammado.com/non_profit/111840/articles/13135> and accessed on 10th August, 2014.

¹⁹⁹ According to the Kenya Revenue Authority, 2007. See Keynote address by the Attorney general of Kenya, Amos Wako, “Promoting Better Legislation and Enforcement of Intellectual Property Rights in Kenya,” January 30, 2007, available at <www.ccapcongress.net/archives/Geneva/Files/Wako.pdf> and accessed on 12th August, 2014.

Act provides for the penalties of imprisonment for a term not exceeding fifteen years or a fine not less than five times the prevailing retail price of the genuine goods or both.

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

In light of the above, it is quite possible for a habitual offender to be sentenced to a lesser or jail term than a first offender. This state of affairs does not portray the relevant statutes as being meant to provide an incentive to the copyright owners, KECOBO or the police to prosecute copyright infringers.

4.3 ADMINISTRATION AND ENFORCEMENT OF COPYRIGHT

The Kenya Copyright Act²⁰⁰ provides for the establishment of the Kenya Copyright Board, (KECOBO), a body corporate.²⁰¹ The Board is in charge of the administration of all matters concerning copyright and related rights in Kenya. The purpose is to ensure that a centralized public body will coordinate the overall administration and enforcement of copyright and related rights in Kenya.

KECOBO's enforcement unit consists solely of 8 copyright inspectors and 5 prosecutors covering the entire country. This fact alone underscores the uphill task KECOBO faces in

²⁰⁰ Copyright Act 2001, Laws of Kenya, section 3.

²⁰¹ As a corporate entity, KECOBO can sue and be sued; it has power to purchase, acquire property, borrow money, lend money and perform all other duties as specified by the Act.

dealing with the menace of piracy. For instance, in 2003 when the Attorney General launched KECOBO, software piracy levels were at 78% in Kenya.²⁰²

BSA estimates indicate that between 2010 and 2011 software piracy levels oscillated between 78% and 79% corresponding to a commercial value of US\$ 85 million. It is important to note that aside from pirated software, the overwhelmed enforcement unit at KECOBO has to deal with other forms of piracy relating to music, film, broadcasts and books.²⁰³

Additionally, KECOBO is the Government regulator of Collective Management Organizations (CMOs). Currently there exist three CMOs. Its attempts to structure a joint partnership between these three CMOs has failed with the most notable attempt in April 2011 even when it had logistical support of the Norwegian Copyright Development Association (NORCODE). The bone of contention was the power games among the CMOs. Each of them was asserting its position to be given special status than the others in the joint revenue collection venture.²⁰⁴

KECOBO has encountered challenges with fees collection and royalty payments, best exemplified by Music Copyright Society of Kenya (MCSK). KECOBO deregistered MCSK in 2011 as a collective management organisation (CMO) acting on behalf of authors and composers of music mainly because MCSK's operational costs were too high compared to the royalties it paid musicians. For instance, MCSK's expenses stood at Sh. 137 million in the year to June 2010 against revenues of Sh185 million, leaving it with a surplus of Sh. 48 million or 25 per cent of its

²⁰² Information accessed at <<http://cipitlawstrath.wordpress.com/2013/08/14/kenya-copyright-board-and-collecting-societies-myths-and-facts/>>on 10th August, 2014.

²⁰³ *ibid*

²⁰⁴ Nzomo V (9th Jan, 2012). 'The Fate of Music Copyright Society of Kenya (MCSK).' Accessed at <<http://ipkenya.wordpress.com/2012/01/09/the-fate-of-music-copyright-society-of-kenya-mcsk/>>on 11th August, 2014.

collections, which are supposed to go to musicians. Under KECOBO guidelines only 30% of monies received can be spent on administrative costs and the remaining 70% must be distributed among musicians as royalties. As the financial books showed, MCSK was doing quite the opposite: distributing 30% and spending 70%, notwithstanding the large number of complaints over unpaid royalties from musicians.²⁰⁵

Currently, the appropriation ratio of collection paid to musicians is thought to be 30% or thereabout and 70% to administrative costs. This ratio is unfortunately not in favor of the members. MCSK clearly knows that the norm for CMOs around the world is quite the opposite whereby 70% is paid to musicians and 30% is used for administrative costs. This is an issue that needs to be addressed urgently for the benefit of the musicians.²⁰⁶ The Kenyan CMOs should learn to respect their members and pay them their royalties on time. In addition, they should adhere to their organization's articles and memorandums of understanding to enable their members reap maximum benefits from their creative works.

The recent Annual Global Economic Survey of Authors' Society Royalty Collections by International Confederation of Authors and Composers Societies (CISAC) revealed that 7.8 billion Euros was collected worldwide. 75% of these collections were from public performance royalties, which is predominantly made up of collections from broadcasters. Within the CISAC African region, MCSK is ranked in the top three highest royalty earners despite broadcasters in Kenya being among the lowest royalty payers in proportion to their music usage. It is estimated

²⁰⁵ Information accessed at <<http://ipkenya.wordpress.com/2012/01/09/the-fate-of-music-copyright-society-of-kenya-mcsk/>> on 10th August, 2014.

²⁰⁶ Copyright News, A Quarterly Publication of the Kenya Copyright Board ISSUE 8 Collective Management Organisations (CMOs).

that MCSK stands to collect over KShs. 110,000,000 in royalty arrears from television and radio broadcasters spread throughout the country.²⁰⁷

4.4 CONCLUSION

In conclusion, it has been demonstrated that the Kenyan musician is incurring massive losses as a result of piracy. The situation has been worsened by the emergence of digital technology that has made copying very cheap and fast. Moreover, our country continues to lose revenues annually since the proceeds of piracy go untaxed. The Kenya Copyright Act 2001 and The Anti-Counterfeit Act do not provide the much needed stiff penalties to counter piracy. Obviously the government needs to take appropriate measures to strengthen KECOBO, the Police and the Judiciary in their enforcement efforts. These measures are discussed in the final chapter of this project which deals with recommendations.

²⁰⁷ Information accessed at <<http://www.cisac.org/CisacPortal/consultArticle.do?=1749>>on 19th August, 2014.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 CONCLUSION

This study has explored the legal protection of music copyright in Kenya. The research has been supported by two Intellectual Property theories that have been propounded to lay the grounds for justification of Intellectual Property Rights (IPRs) of copyright in musical works. These theories are the Utilitarianism Theory and Natural Rights Theory; and both postulate a consensus that musicians are entitled to reap maximum benefits from their labour in the musical works.

The study has specifically addressed four main research questions:

1. To what extent has music piracy deprived the Kenyan artists of IPRs in their works?
2. What are the pitfalls in the legal framework of copyright laws in Kenya?
3. Is the existing enforcement mechanism of copyright protection in Kenya adequate?
4. What are the practical solutions to music piracy in Kenya?

Several pieces of information were gathered from statutes, books, journals and articles that have in one way or the other addressed the issues under research. From the various sources of information obtained, it is evident that authors take a broad perspective music copyright as Intellectual Property both globally and locally.

The Constitution of Kenyan 2010 is explicit in its definition of ‘property’ to include Intellectual Property Rights and has placed specific obligation on the State on account of Intellectual Property Rights. However, Kenyan IP regime is still lacking in many respects and is yet to

realize the full economic benefits of IP. The research has revealed that Kenya loses billions of dollars due to infringement, piracy, and counterfeiting of various musical works.

Although Kenya participated in the WIPO Diplomatic Conference that adopted the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) it has not yet ratified these treaties. Perhaps that could lend a reason as to why piracy in musical works in Kenya is still rampant despite the coming into force the Copyright Right Act of 2001 more than a decade ago.

5.1 RECOMMENDATIONS

The Copyright Act 2001 is the main legal instrument dealing with music copyright infringement in Kenya. It operates hand in hand with the Penal Code, the Criminal Procedure Code, the Evidence Act, the Civil Procedure Act and the Civil Procedure Rules 2010. From the research, it is evident that these legal instruments are inadequate and therefore require amendments so as to conform to modern technology and emerging trends in IPRs.

Similarly, in order that KECOBO remains relevant in playing a central role in copyright enforcement and protection of musical works, it is imperative that its role be re-evaluated in light of emerging trends in ICT development. It is evident from the research that a lot needs to be done for KECOBO to effectively carry out its duties and realize its mandate. The Act therefore requires amendment to vest more power in KECOBO so as to carry out its mandate. In addition, KECOBO needs to be devolved to county level in line with the spirit of the Constitution so as to ensure that its presence is felt at the grass root level. This should go hand in hand with the hiring of more enforcement officers and streamlining the judiciary through special training of judicial officers in intellectual property matters as part of the wider copyright protection. In a nutshell,

KECOBO needs to be restructured so as to bring on board the wider public support and involvement in copyright protection and enforcement. This is the surest way to freeing the society of musical works piracy.

For copyright infringement to be addressed effectively in Kenya, it will require interventions that result in early wins, that can generate quick and tangible results, and that contribute to restoring public confidence and legitimacy in government institutions while these institutions are being transformed. The recommendations in this project are aimed at these objectives. They are skewed towards law-enforcement measures that can be introduced in the short to medium terms. The recommendations are made with a full appreciation that law-enforcement responses should only constitute one element in a wider range of tools and strategies used to counter copyright infringement.

At this juncture, it is apparent that music piracy has contributed greatly to the low income returns to the creators of music and to the Government of Kenya. Indeed due to the evolution of digital technology, the opportunities and ability to pirate music has increased tremendously. This has left the individual artist at the mercy of these unscrupulous elements.

Kenya has fairly adequate legal and institutional framework that provide for protection. The basic legislations are the Copyright Act, 2001 and the Anti-Counterfeit Act, 2008. Administration of the copyright Act, 2001 is done by the Kenya Copyright Board (KECOBO). Since the Competent Authority provided for under section 48 of the Act has not yet commenced its sittings, disputes relating to copyright matters are filed in the ordinary courts.

Notwithstanding the gains achieved by these two Acts, this study shows further measures need to be employed to tackle the ever increasing challenges of music piracy. The measures should

target improving legislative framework as well as strengthening enforcement mechanism. Simultaneously, a public awareness campaign should be employed to sensitize Kenyans and invite their participation and co-operation in the eradication of the piracy.

It is appreciated that a lot of recommendations have previously been made in the field of music piracy and hence ones which will emerge from this study should be treated as supplementary and not exhaustive.

5.1.1 Legislative Recommendations

- (i) The mandate accorded to KECOBO in the administration of copyright matters should be limited. Currently KECOBO has not fully succeeded in netting down large scale manufactures and suppliers of pirated goods. Perhaps it is time to delegate the function of enforcement and compliance on the Anti-Counterfeit Agency. Under such arrangement, KECOBO would then focus its efforts towards managing CMO's and performing other duties provided for in the Act.
- (ii) In order to effectively regulate Collective Management Organizations (CMOs) through licensing and supervision, the copyright Regulations 2004 should be amended to provide for more stringent requirements that would make CMOs more accountable to KECOBO.
- (iii) The current KECOBO Board consists of 16-20 persons. Such a larger number could hinder effective decision making due to disagreements and lack of quorum necessary to conduct meetings. The Board needs to be down sized.

- (iv) Whereas KECOBO enjoys wide statutory mandate in administration of copyright matters in Kenya, it is hardly known to Kenyans. As part of public awareness it may be imperative to devolve the services of the Board to the counties. Consequently KECOBO should establish offices in every county and such branch offices should be given statutory mandate to enforce the provisions of the Act without bureaucratic hindrances.
- (v) Appropriate regulations should be put in place to regulate the proliferation of Reproduction Rights Organizations (PROs) and Collective Management Organizations (CMOs). This would ensure quality of services offered by these organization as well as assist KECOBO in monitoring their activities so as to eliminate unethical practices. Further such regulations could provide for the monetary threshold conditions precedent to issuance of licenses. In effect this would enhance financial capacity of the PROs and CMOs.
- (vi) KECOBO should strive to have its own autonomous and fully fledged inspectorate arm. Sufficient inspectors should be appointed under section 39 Copyright Act 2001. This would ensure that the Board does not put over reliance on regular police in enforcement matters. Furthermore, with adequate inspectors, timely action can be taken with regard to crackdown on pirates. The inspectorate department of KECOBO should be specialized and trained to deal with copyright matters.
- (vii) It is a fact that the administration and enforcement of IPRs in Kenya is a shared responsibility. The agents involved include the office of the Registrar General in the Attorney General's Chambers, the Customs Department of the Kenya Revenue

Authority as well as the Kenya Bureau of Standards. In order to avoid the danger of conflict in decision-making and enhance coordination among these organs, it is recommended that an inter-agency office be established to offer liaison services among these departments. In the alternative, the role played by all these organs should be merged and handed over to one body. This could either be KECOBO or Anti-Counterfeiting Agency.

- (viii) Although section 48 of the Copyright Act 2001 provides for establishment of Competent Authority which is supposed to serve as Tribunal for dispute resolution, the Authority is presently not constituted. In view of the need to establish jurisprudence in this area and for expediency of dispute resolution, there is need for urgent constitution of this Competent Authority.
- (ix) The enforcement unit of KECOBO should be strengthened by increasing the number of investigators and prosecutors. There are currently nine (9) trained police officer and four (4) prosecutors. This low number has absolutely no capacity to deal with the rampant cases of music piracy.
- (x) The Government should allocate more resources to KECOBO in order to enhance its administrative and enforcement and capacity. Such funds are useful for the training of the requisite personnel such as investigators and Prosecutors. Devolution of KECOBO to the counties would also require finances to fund the necessary infrastructure and human resource.
- (xi) The sanctions and penalties imposed under the copyright Act 2001, need to be deterrent. Currently the Act provides for custodial sentences but with alternative of

finer. Since piracy has created a lucrative market (90%) of Kenyan music is pirated) the penalties imposed on offenders should be deterrent. It is recommended that any fines imposed on first offenders should be commensurate to the value of the goods pirated. Apart from first offenders all other convicted pirates should be given a mandatory custodial sentence which is long enough to be deterrent. In order to afford uniformity in sentencing, the Act should provide for minimum sentences rather than maximum sentences.

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

5.1.2 Judicial Recommendations

- (i) Given that Intellectual Property is a great contributor to the economy, IPRs should therefore be protected by having an effective legal regime. In view of the increased practice in the field of intellectual property, the Chief Justice needs to consider establishing a division within the High court to deal with the Commercial aspects of intellectual property.
- (ii) Priority hearings and determinations should be afforded for cases involving international trade. This would encourage Foreign Direct Investment in matters relating to Intellectual Property. The Division of Intellectual Property, if created could formulate rules of practice that would ensure expeditious resolution of disputes within the Division.

- (iii) Through the Judiciary Transformation Framework, the court should educate the public and Civil Society on Judicial procedures.
- (iv) The courts should also maintain a data base for judgments and vital information relating to intellectual property cases and international jurisprudence. This would ensure that the doctrines of precedence and *stare decisis* decision are adhered to and no conflicting decisions are issued on similar facts and principles of law.
- (v) The courts handling intellectual property matters should be specialized. The presiding officers in such courts should be properly trained in such matters. The Judiciary Training institute should undertake this role of training magistrates and judges to preside over the Intellectual property Division.

5.1.3 Recommendations with regard to Digital Technology

- (i) Section 36 of the copyright Act provides that no audio or visual works are to be sold or offered for sale if the works do not carry an anti-piracy security Device which ordinarily consists of a bar-code sticker and hologram. It is recommended that KECOBO through its inspectorate department should take advantage of this provision to seize and destroy all musical works in the shops which do not meet this requirement.
- (ii) The Copyright Act should be amended to make provisions for internet service provider liability as a secondary copyright infringement. This is in recognition of the fact that most instances of music piracy occurs in digital environment.

- (iii) Compelling by way of legislation the authors of musical works to protect their works using TPM such as encryption, digital watermarks, access codes and passwords.
- (iv) Amend copyright Act to make provisions for regulation of music copyright infringements arising from technological advancements. Alternatively, Kenya should enact a legislation dealing with digital copyright infringements.
- (v) Kenya should as a matter of urgency ratify the WIPO internet treaties (WCT and WPPT) to make them applicable under Article 2 of the Constitution.
- (vi) The government should use code to regulate and govern sound and ethical internet use by its citizenry so as to curb piracy.

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