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**ENFORCEMENT OF COPYRIGHT IN INFORMATION COMMUNICATION
TECHNOLOGY (ICT) ERA: HOW EFFECTIVE?**

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ENFORCEMENT OF COPYRIGHT IN ICT ERA: HOW EFFECTIVE?

DECLARATION

I, **ANTONY MAINA MACHARIA** do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

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This thesis has been submitted with my approval as the University of Nairobi Supervisor

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DEDICATION

This thesis is dedicated to my beloved wife Caroline Muthoni Macharia and my lovely daughters Wanjiru and Nyawira .

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Acronyms

ACA-Anti-Counterfeit Agency

CD – Compact Disc

CONTU- Commission On New Technological Uses

DRM – Digital Rights Management

DVDs – Digital Versatile Discs

DMCA-Digital Millennium Copyright Act

ICT – Information Communication Technology

IP – Intellectual Property

ISPs - Internet Service Providers

IT – Information Technology

KAMP-Kenya Association of Music Production

KECOBO-Kenya Copyright Board

KOPIKEN-Reproduction rights society of Kenya

MCSK-Music copyright Society of Kenya

PRISK-Performers Rights society of Kenya

RMS – Right Management Systems

TPM – Technological Protection Measures

TRIPS – Trade Related Aspects of Intellectual Property

WIPO – World Intellectual Property Organization

WTO – World Trade Organization

CHAPTER BREAKDOWN

Chapter 1 - Background and Introduction

This chapter will define the issue in general, state the problem and state the hypothesis to be tested. It will also give the background of the problem.

Chapter 2- Copyright Infringement in the ICT era in Kenya

The chapter will conceptualize copyright infringement within the context of ICT era in Kenya. It will try to explain what is meant by copyright infringement in the ICT era and the regulatory challenges it presents.

Chapter 3–Existing Policy, Legal and Institutional Frameworks on Copyright in Kenya

This chapter examines the existing policy, legal and institutional frameworks governing copyright in Kenya. The chapter will examine the existing legal provisions dealing with copyright infringement and point out the weaknesses in the law. It will also highlight the regulatory weaknesses in the existing institutional framework that are exploited by copyright infringers in the ICT era.

Chapter 4–Best Practices in Regulating Copyright Infringement through the ICT

This chapter will discuss best practices in the regulation of copyright infringement arising from developments in the ICT. The chapter will seek to find out what practices are most appropriate to the Kenyan context.

Chapter 5 – Conclusion and Recommendations

The chapter contains the recommendations of the study and the conclusions.

CHAPTER ONE

1.0 INTRODUCTION

The study aims at discussing the challenges facing copyright and in particular the infringements that have come with the rise of technology in Kenya. We shall study, the copyright infringement and enforcement regime in Kenya. The question we shall be asking is whether what we have as a system or regime is adequate, efficient and/or effective in this ICT era.

We shall also look at how other jurisdictions deal with copyright infringement and the challenges they face as a result of technological advancement. We shall be inquiring as to what we can learn from these other jurisdictions and in what way it can assist in dealing with issues of infringement of copyright in our system.

The study will aim at providing some relevant solutions to the issue that shall be identified. It will also aim at suggesting what needs to be done in terms of reforms and recommendations. In so doing the study hopes to provoke further research in this interesting area that has emerged and is continuing to evolve as new technology continues to emerge in the area of ICT.

1.1 BACKGROUND TO THE PROBLEM

The law governing copyright is to be found in the Copyright Act 2001.¹ Prior to the 2001 Act, the law was to be found in the Copyright Act, Chapter 130 which was enacted in 1966.² The 1966 Act was literally speaking the declaration of Kenya independence as far as copyright law is concerned.³ Previously the law of copyright was basically what was applicable in England.

Although the law has been in place for many years, there is little to show with respect to its administration and enforcement.⁴ Cases on infringement of copyright have rarely been taken to court.⁵ However, there has been one case that was successfully prosecuted and where damages

¹The Copyright Act 2001.

²The copyright Act 1966, act No. 3 of 1966.

³Shihanya copyright law in Kenya

⁴Ouma Marisella, a new era for copyright protection in Kenya

⁵Ibid.

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were awarded for copyright infringement by the court.⁶ This was quite an achievement for the reason that the court explicitly appreciated the importance of copyright protection.⁷

There has been lack of efficient administrative infrastructure and enforcement mechanisms, which are seen as the main reasons for the state of affairs in the field of copyright protection which is relevant in the copyright industry. The current Act came into force in February 2003 and it repealed the 1966 Act. While incorporating provisions of the TRIPS Agreement⁸ and the 1996 WIPO Treaties,⁹ the new law also provides for the setting up of more efficient administrative structures and enforcement mechanisms.¹⁰ It is obvious that there was recognition of the shortcomings in the law and the mechanisms for the enforcement of copyright.

In Part 1 thereof the 2001 Act contains interpretation and definitions of various terms used in the Act, including a new definition of the term literary works that encompasses computer programs as well as tables and completions of date.¹¹ In view of the fact that ICT is central to copyright, the question that begs an answer is whether the law in its current state has the ability to handle the emergence of new avenues for copyright infringement.

It is worth noting that Kenya has witnessed significant growth in the ICT Sector as demonstrated by the number of telephone lines, internet service providers (ISPs), the number of internet users and broadcasting stations. Additionally, the respective market share has grown incrementally. According to the Quarterly Sector Statistics Report mobile subscriptions reached 31.8 million by March 2014, Internet/data market segment subscriptions were 13.3 million, and the number of internet users grew to 21.6 million in the same period.¹² While according to the quarterly sector statistics for December 2008, mobile subscriptions were 16.2 million, internet/data market segment subscription was 392,694 and internet subscription was 3.4 million capturing the higher increase in use of ICT.¹³ Accordingly the possibility of committing acts of infringements of

6Microsoft –vs- Microskills (Civil Suit Case No. 323 of 1999)

7Ibid note 5.

8WTO (Trips Agreement)

9The WIPO Copy rights Treaty (WCT) and the WIPO performances and phonograms Treaty (WPPT) and 2001 Act incorporates the key provisions on the two treaties.

10Ibid note 7.

11Section 2 of the Act contains definitions and incorporates terms that previously did not exist in the repealed Act, especially terms that have come into existence with the advances in digital technology and the internet.

12<http://www.ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q3%202013-2014.pdf>

13<http://www.ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q2%202008.pdf>

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copyright has risen. This has been drastic and there is no evidence that the enforcement machinery has grown at the same rate. Indeed the technology has grown faster while the law has been left behind. While taking into cognizance the fact that issues of copyright enforcement have been slow as we saw earlier, the advent of ICT has not only complicated matters but has also raised serious doubts as to how well prepared the enforcement machinery is, faced with the sophistication that comes with new technologies.

Sihanya observes that as technology develops, many authors are at the risk of their copyrighted and other IP related works being infringed. This is because technological developments have made access to and reproduction of copyrighted materials easier and very difficult to protect.

Infringement of copyright occurs when a person, other than the copyright owner, assignee or licensee carries out or causes to be carried out, any act that is covered by copyright without the authorization of the right holder. This applies to the exclusive rights in literary, artistic and musical works, provided for under section 26, to the exclusive rights in sound recordings under section 28, as well as to the rights of broadcasters and performers set out in section 29 of the Act. With the emergence of the new technologies, provisions on anti-circumvention measures¹⁴ and Rights Management Systems (RMS) had to be included in the Act. Section 35 (3) makes illegal the circumvention of any technical measure that has been put in place to protect the work, as well as the manufacturing and the distribution of anti-circumvention devices, the removal or alteration of any rights management system, as well as making available to the public of works that have been obtained by way of removing the electronic rights management system.

The foregoing notwithstanding, Kenya has not been robust in copyright infringement enforcement. It is not surprising to come across material that is subject to copyright being exchanged and or traded under circumstances that comprise outright infringement of copyright. Institutionally, the enforcement of copyright laws falls under the Kenya Copyright Board, which is in charge of the administration of all matters concerning copyrights and related rights in Kenya.¹⁵ Another body that is mandated to deal with issues of copyright is the Anti-Counterfeit Agency (ACA) established under the Anti-Counterfeit Act, 2008, Laws of Kenya. It should be noted that although the Board has trained personnel, their numbers may not be sufficient to administer and enforce copyright infringement especially in view of the wide area that has been

¹⁴See Article 18 of the WPPT and Article 11 of the WCT. Although Kenya has yet to ratify these two treaties the Act has incorporated provisions from the two treaties.

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created by the rise in penetration of the new technology. There is therefore a need for capacity building. It is without a doubt that technological change has complicated the issue of copyright and the infringement of the same.¹⁶ There are new industries such as numerous printers and publishers, video libraries, photocopying shops or centers, software development and distribution corporations, internet service providers (ISPs) and art dealers.¹⁷ This and the increasing role of information, technology and cultural products in the context of liberalization of international trade pose new challenges.¹⁸

Today a lot of digital material is available and easily accessible via the internet.¹⁹ In actual fact digital material are quickly becoming the tools of choice in particular for learners.²⁰ It is without a doubt a fact that the new information and communications technologies (ICTs), and in particular the internet enable unauthorized creation of unlimited, perfect and costless copying of protected works, as well as their almost instantaneous and worldwide distribution.²¹ Internet users can now access a vast variety of digital information on the internet by use of a modem with an ISP.²² This poses an unprecedented challenge to copyright law.²³ For instance technologies for accessing music on the web include streaming and downloading.²⁴ Again, the borderless and transnational character of the Internet poses serious challenges to copyright protection and enforcement.²⁵ For these reasons some believe that the solution lies in the use of technology based protection, in form of encryption and anti-circumvention measures, supplemented by contract law and sui generis forms of IP protection for data bases.²⁶ The broad array of capabilities, almost all of which can currently be obtained with the purchase of a moderately priced microcomputer and a modest monthly subscription charge for connection to an internet service provider has afforded consumers unprecedented power to access, store, manipulate, reproduce and distribute contents

¹⁵Section 5 of the Act.

¹⁶Sihanya Constructing Copyright and creativity in Kenya: Intellectual property and innovation in Kenya and Africa; Transferring Technology for sustainable Development (Innovative Lawyering and copyright Africa; Nairobi, 2009.

¹⁷Ibid.

¹⁸Ibid.

¹⁹Ibid.

²⁰C Armstrong, J De Beer, D Kawooya, A Prabhala, T Schonwetter Access to Knowledge in Africa The Copyright role 2010 UCT Press.

²¹http://www.iatp.org/files/Integrating_Intellectual_Property_Rights_and_D.htm%3C

²²Ibid.

²³ Ibid note 21

²⁴Ibid.

²⁵Ibid.

²⁶ Ibid note 23

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downloaded from the internet.²⁷ No one really controls the Internet, and this has broad legal implications as copyright enforcement is essentially territorial.²⁸

The advances in digital technology have brought, at affordable cost, nearly unlimited access to high quality content virtually anytime anywhere.²⁹ This creates a fertile ground for unauthorized transfer or downloading of digital materials like music and programs into CDs, digital versatile discs (DVD's); and illegitimate uploading of the copyrighted materials websites without the consent of the copyright owners.³⁰

Copyright enforcement of digital works faces various challenges. First, the new technology here made piracy cheaper, faster, simpler and more rewarding. Secondly, it is possible to reproduce copies of legitimate products by downloading from the internet. Third pirates are developing technologies that are specifically designed to facilitate copyright infringement. Fourthly ICT, especially the internet has brought legitimate products and services closer to the consumer and by so doing the pirates and counterfeits have also benefited from the availability of these technologies. This has in turn enabled the pirates to become anonymous and thus tracing the perpetrator becomes difficult. Arising from this situation, gathering evidence to support anti-counterfeiting and anti-piracy suits has also become a complex venture.³¹ All of this poses a serious challenge to the enforcement of copyright law which invites the research herein.

1.2 STATEMENT OF THE PROBLEM

The growth experienced in the ICT Sector in Kenya has rendered the enforcement and compensation in copyrights and related industries difficult. The Kenya Copyright Board which has the responsibility of enforcement is still dependent on the Attorney General's office for funding and implementation of major decisions.³² The Laws and the Board's efficiency capacity in securing enforcement and compensation in copyrights are therefore still limited.³³

²⁷Ibid note 20

²⁸Ibid.

²⁹ Ibid note 20

³⁰Ibid.

³¹Ibid

³²Ibid.

³³Ibid.

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1.3 OBJECTIVES OF RESEARCH

- To evaluate the effectiveness of the existing legal and policy framework in curbing copyright infringement arising from new developments in ICT in Kenya.
- To examine whether the existing copyright enforcement agencies have the capacity to monitor and control copyright infringement via new developments in ICT in Kenya.
- To examine and highlight the challenges faced in curbing copyright infringement in Kenya and propose recommendations on the way forward.

1.4 HYPOTHESIS

The current policy, legal and institutional framework does not seem to address the issue of enforcement of copyright in light of the rapid developments in the ICT sector .(copyright in the digital environment).There is as a result inadequate enforcement of copyright infringement under the law as currently exist as a result of the shortcoming in law.

1.5 RESEARCH QUESTIONS

- How does the current legal and administrative regime address the issues of copyright infringement in the digital environment?
- How are the existing copyrights enforcement agencies equipped to monitor and control copyright infringement arising as a result of developments in ICT in Kenya?
- Why are there challenges in enforcing copyright infringement in Kenya and how can the situation be addressed?

1.6 THEORETICAL & CONCEPTUAL FRAMEWORK

The theoretical premise for the research is the utilitarian theory, public interest theory and also the property theory. With respect to the utilitarian perspective, the philosophy is that copyright is relevant to availing copyrighted products to the public. The theory conceives copyright as a necessary incentive for authors to invest time, intellectual effort and money into producing works of creative expression, including learning materials for the benefit of the public at large.

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Publishers and other intermediaries that acquire assignments or licenses from right-holders can also exploit copyright protection to support business models that generate financial returns, some of which are reinvested to support the production of additional works. In other words copyright protection facilitates the production and distribution of more copyrightable works. The argument goes that without copyright there would be fewer works and those that would exist would be of lower quality.³⁴ According to a survey by KECOBO, Kenya loses about shillings 30 billion annually to copyright infringement.³⁵ This is due to the fact that the Kenya IP regime is still lacking in many aspects.³⁶

As it is Kenya, does not have a way of monitoring copyright transactions and the role of tracking the infringers is left to the copyright owners.³⁷ It is therefore necessary that the acts of infringement against copyright be dealt with to encourage creativity and also to ensure that only the right owners, licensees and assignees benefit, unlike in a situation where it is the infringers who end up profiting from such infringements. The Kenyan economy also loses enormous amounts of revenue due to copyright infringement and piracy. It would thus be in the public interest if copyright infringement and piracy are put under control through stricter enforcement of existing laws. In addition, the growth of the economy and in particular the provision of services is dependent on availability of funds which would be greatly improved were the revenue lost due to infringements collected and channeled towards service delivery.

It is therefore a matter of public interest that infringement of copyrights be put under more serious scrutiny. Furthermore, it is better to ensure that the society appreciates the need to respect other people's property and by so doing encouraging people to be creative on their own and also to be law abiding. Unless there is strict observance of the law irrespective of how harmless the breaking of the same may look, the society may breakdown to anarchy where people would assume anything goes. The other theory is the theory of property. Copyright falls under what is known as intellectual property (IP) and in our view though not the property in the traditional sense it is a property nevertheless. According to Jeremy Bentham, property is created and regulated by the law. In the sense that rights are a creature of law and absence of law is the absence of property. The existence of property is also justified on the utilitarian grounds. As per

³⁴Ibid note 20

³⁵Marisela Ouma ,Chief Executive Officer Kecobo ,

³⁶Ibid.

³⁷Ibid. note 33

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Bentham property exists for a specific purpose and that purpose is to tap individual energies in order to make society prosperous.³⁸ The importance of IP and for our purpose the copyright and the rights that inhere to the rights owner cannot be overstated.

1.7 LITERATURE REVIEW

Intellectual property rights protection as an area has attracted considerable attention from eminent scholar's world over. However, in Kenyan jurisdiction literature on legal issues is limited. There is however some commentary on domestic regulation and legislation that address infringements of copyrights.

The challenges of enforcing infringement of copyright have been compounded by the emergence of new technologies which has facilitated the ease with which infringement of copyright can occur and that too without ease of detection.

Professor Ben Shihanya³⁹ a local eminent scholar has widely authored in the area of IP including counterfeiting acknowledges that in all systems of IP, matters that pertain to definitions, registration procedures and the duration of registration /protection are important. However these can only be useful if built upon "a foundation of enforcement".⁴⁰ The author lists some of the modes of controlling infringement of digital copyright as legislative strategies,⁴¹ litigation strategies,⁴² public awareness⁴³ and criminal sanctions.⁴⁴ In this article⁴⁵, the author deals more particularly with copyright in the digital arena. It recognizes the need to protect IPRs including by way of bringing IPRs protection into the purview of public law,⁴⁶ emphasizing the need for IPR protection for the benefit of the general public.⁴⁷

Sihanya discusses digital copyright infringement and how the problem can be tackled; the focus of this study will be to examine how the legal and institutional framework in this area is deficient in tackling the problem of infringement of copyright in ICT.

³⁸Jeremy Bentham "AnarchidFalaces in Bowring J (ED) the works of Jeremy Bentham (1983) 489, 523, 510 as quoted in Gitahi Gladys Nyokabi: LLM DISS.2008

³⁹B Shihanya 'Digital Copyright in Kenya (n 18) 132.

⁴⁰ Ibid 132

⁴¹ Ibid 136,140

⁴² Ibid 136,146

⁴³ Ibid

⁴⁴ Ibid 147

⁴⁵ ibid

⁴⁶ Ibid

⁴⁷ Ibid

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Carlos M. Correa in Intellectual Property Enforcement has observed that one of the major challenges facing developing countries governments is how to deal with the growing number of demands from intellectual property rights-holders and developed country government to reform their systems for the enforcement of intellectual property rights. The levels of protection and enforcement of intellectual property rights have been strengthened with the pace of technological change and advancement in the developed countries. However, the intellectual property systems in developing countries are remarkably different and not in line with the technological advancement. The argument has been that the developed world took over two centuries to design experiment and progressively institute a national intellectual property system, while the developing world for most part absorbed foreign-imposed intellectual property systems through colonialism. Though the post-colonial era offered developing countries greater freedom to tailor their IP systems, increasing globalization and international trade over the past decade has brought new external pressures on developing countries to reform their IP systems.⁴⁸ The upshot of this is that there have been various new developments in technology which the developing countries are required to deal with yet their legal systems do not have the capacity to deal with the challenges arising there from. As a result a lot of infringements go undetected and the right holders without a remedy. **Correa** also observes that by bringing IP rules into the multilateral trade framework all WTO members are obliged to meet minimum standards of intellectual property and enforcement.⁴⁹ From the reading it's noted that intellectual property enforcement is an area in which most developing countries lack capacity and expertise.⁵⁰ This is the situation in Kenya and this research will seek to look at how effective the existing legal and institutional framework are in enforcing infringements and the challenge posed by development in ICT.

David Bainbridge⁵¹ advocates for the protection of IP. He rationalizes that because IP is the result of the exercise of human intellect, it is a fundamental form of property that should be closely guarded.⁵² Protection will ensure that the innovator is able to reap economic rewards

⁴⁸ Ibid

⁴⁹ Ibid.

⁵⁰ Ibid

⁵¹ Bainbridge *Legal Protection Of Computer Software* (n32)

⁵² Ibid

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from his work, to which he has a bond by virtue of having created it. Further, protection and promotion encourages innovation and creativity.⁵³

Further **Bainbridge**⁵⁴, notes that there is no doubting that information technology stretches the law, which has sometimes been slow to react, and one problem has been the manner in which it has attempted to adapt existing legal paradigms to deal with the problems posed by technological development. However **Bainbridge** writes for a worldwide audience and in as much as his work has relevance to our local IP circumstances, our intention in the proposed research is to have an in-depth look at the identified local laws and see how effective they are, or they can be in dealing with enforcement of copyright.

Cornish⁵⁵ say that copyright has become the standard IT tool for preventing the copying of most types of programs. However the internet has provided an astonishingly powerful form of networked communication across the globe⁵⁶ as an instrument governed by protocols and agreements over which no government holds direct power, its relation to traditional legal patterns is problematic, and not least in relation to intellectual property, since the rapidity and cheapness with which it can transmit text, images, music, films, and data of every kind poses confrontations between freedom of access and control⁵⁷. Further, the extraordinary ease and accuracy the internet provides for storage, identification and distribution of literary, artistic, musical and audio-visual material held in digital format and the ability to transmit over and over without loss of quality makes enforcement of copyright a big challenge.⁵⁸ **Cornish** addressed the issue of copyright globally and the same issues are replicated to a great extent in Kenya.

The author wishes to examine how effectively these challenges are addressed by the laws in Kenya.

Lionel Bently in “Global Copyright” observes that there are difficulties that copyright owners face in adopting copyright law to an environment which is at the crossroads of technologies.⁵⁹ He raises a serious concern about governance of copyright law arising from what he sees as free entitlement to anything which is made available on the internet leading to a situation where it

⁵³ Ibid

⁵⁴ David Bainbridge, *Intellectual Property* (Ninth Edition pg 256)

⁵⁵ William Cornish, Llewelyn and Aplin *Intellectual Property: Patents, Copyright Trademarks and Allied Rights* 7th Edition (pg 844)

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid 885

⁵⁹ Lionel Bently *Global Copyright* Edward Elgar Cheltenham.

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appears nobody is answerable to anyone. In this research I intend to address the issue of enforcement of copyright infringement in view of development in information technologies and assess if our laws are equipped to deal with it effectively.

In **Bently & Sherman**⁶⁰ the authors acknowledge that there are many different technologies that organize and order information one such technology is the database. With development of digital technology databases have been transformed and revitalized enabling the production of facilities that enable easy and vast and easy collection of information⁶¹. The value of these facilities is the comprehensive nature of the information that they contain and the ease of access to the same they are readily copied.⁶²The authors are in agreement that ICT has created a fertile environment through which infringement of copyright can easily occur, they however do not seem to address the issue as to whether the law in place can adequately address this challenge. It is this situation created by new technology that this study wishes to address and assess how well our laws are equipped to handle the challenge.

Alain Strowel observes that the magnitude of copyright infringement through peer-to-peer and new online platforms (such as user-generated sites or online auction sites) probably requires new authorities and new remedies if one intends to tackle direct infringement by internet users.⁶³Further that although legislative changes could potentially redefine the way online infringement is dealt with, the standard rules on secondary liability as applied by the courts in civil proceedings for copyright infringement will remain the preferred way to combat peer-to-peer and other mass copyright infringement.⁶⁴

There also arises another situation triggered by the rise in technologies which would lead to secondary copyright liability in particular, the situation of internet interactions, such as hosting or access providers and technologies, such as search engines or hyper-linking.⁶⁵ From all this it is obvious that there are challenges in our copyright law that need to be addressed especially in view of the embrace of ICT by our society. We find that there has been willingness of the courts internationally to issue orders against Internet service providers and in other third parties to put a

⁶⁰ Lionel Bently & Brad Sherman; Intellectual Property Law 2nd Edition(pg. 297)

⁶¹ Ibid

⁶² Ibid

⁶³Alain Strowell Peer to Peer File sharing and secondary liability in copyright law. Edward Elgan Cheltenham Pg-10.

⁶⁴Ibid pg. 11.

⁶⁵Ibid pg. 3.

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stop to infringing internet activities.⁶⁶ Thus for instance courts in Germany have held internet account holders responsible for copyright infringements claimed to be conducted by others using their accounts.⁶⁷ The author seeks through this research to find out how the legal and institutional framework in place Kenya are dealing with the challenges occasioned by technological developments which may have been envisaged or which are well ahead of the law.

Sihanya has observed that copyright contributes to national revenue as the copyrighted products are subject to taxation and other related fees such as registration fees.⁶⁸ There is also employment created in the production and distribution of copyrighted products. With respect to copyrights, the copyright owners are losing millions of shillings due to infringement, piracy and counterfeiting which is attributed to many factors among them that Kenya lacks an effective system of monitoring copyright transactions.⁶⁹ It is obvious that the challenge of monitoring the copyright transaction is compounded by the advancement in ICT. From the foregoing, it is clear that the issue of copyright infringement in Kenya is more complex than the law has provided and therefore there is need to look into it especially with a view to addressing the challenges not anticipated but which are resultant from the advancement in technology in digital copyright in Kenya.⁷⁰

Sihanya observes that copyright enforcement faces numerous challenges in the ICT era because it has become cheaper, faster and simpler and more rewarding to pirate.⁷¹ It has also become possible to reproduce copies of legitimate products by down loading from the Internet.⁷² He further opines that pirates have developed technologies that is specifically designed to facilitate copyright infringement, and that as a result of ICT products that are legitimate and services have been taken closer to the consumer and in the process the counterfeiters have also benefited from the availability of those technologies and this has enabled pirates to become anonymous. Sihanya opines that the law seems not to be in tandem with the developments in technology. It is this area of challenge that this research is concerned with and seeks to address the challenge of enforcing copyrights under the current legal and institutional framework.

66Ibid pg. 30.

67Ibid pg. 30.

68Ben Sihanya Constructing Copyright and creativity in Kenya; Intellectual Property and innovation in Kenya and Africa transferring technology for sustainable development (innovative lawyering and copyright Africa Nairobi 2009.

69Ibid.

70Sihanya Ben Digital Copyright in Kenya (The Law Society of Kenya Journal Vol. 8 (1) 2012.

71Ibid.

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Caroline Wilson has addressed the issue of Technological Protection Measures (TPMs) this is a relatively new feature which seeks to protect by restricting the unauthorized acts in relation to copyright works.⁷³ She has described this as a complex area of copyright law and is likely to prove to be difficult to apply in practice. Another feature in this literature is that individual rights to privacy and the right to freedom of expression may be relevant to enforcement of copyright. This shows how difficult it is to enforce copyright infringement especially while facing the challenge of ICT. Wilson is dealing with the issue globally and the challenge here in Kenya is that we are probably not well equipped with the requisite technology necessary for the necessary protection to be accorded.

In **Access to knowledge in Africa, the role of copyright**, the authors have brought out the issue of copyright and access to learning materials to the fore. They have opined that digital materials are quickly becoming learning tools of choice. This has happened in that as information and communication technologies (ICTs) proliferate, the shift from hard-copy to digital learning materials should accelerate. It is argued that copyright is a natural right of authors to control their creative outputs. This point of view captures many people's sense of natural justice and is reflected for example in scholarly norms surrounding attribution of credit and prohibition on plagiarism.⁷⁴ It is further opined that the 20th century intellectual property policy making, was dominated by belief that because some protection is good, more protection is better. This attitude seems to have informed the international treaties, national laws, and local practices that continuously raised levels of copyright protection.⁷⁵ The authors seem to suggest that it would be better not to give absolute protection as this would stifle access to knowledge.

In this research I wish to assess how effectively one can enforce copyrights while at the same time allowing access to reading materials which are necessary for the country educational development.

Peter S. Menell observes that the digital revolution presents a distinct wave of technological innovation that portends significant changes in copyright protection. He argues that by bringing about new modes of expression(such as computer programming and digital sampling of music) and empowering anyone with a computer and an internet connection to flawlessly, inexpensively

⁷²Ibid.

⁷³Wilson Caroline, *Intellectual Property Law* 2nd Edition Sweet & Maxwell London)

⁷⁴C Armstrong, J De Beer, D Kawooya, A Prabhala, T Schonwetter, *Access to knowledge in Africa, The role of copyright* 2010 UCT Press.

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and instantaneously reproduce and distribute works of authorship on a wide scale, digital technology presents possibly the most profound challenge to copyright law.⁷⁶For this reason he argues that the existing law may not be adequate to offer copyright protection in the digital age. The author argues that with technological development there arises a challenge of how effectively copyright infringements can be enforced. I wish to address the issue of the effectiveness of the legal and the institutional framework in place in the enforcement of copyrights in the face of development in ICT.

1.8 METHODOLOGY

Due to the nature of the study, the research intends to dwell on primary and secondary sources of information. The study will rely on library research and internet searches. There will also be interview conducted among various stakeholders. A questionnaire with model questions will be annexed to the thesis. We shall study textbooks and article especially recent articles that give an up to date perspective on copyright infringement in the ICT era.

The primary sources for information include Acts of Parliament and Regulations, Publications of Statutory Authorities, Conventions, Treaties and Declarations.

1.9 LIMITATIONS

The area of study is evolving and thus the phenomenon keeps on changing. The area is also relatively new and as such literature especially local literature is scarce. The available literature is mainly based on issues arising in the developed world and it relates with ICT in more advanced. In this study therefore reference has to be made to practices and standards of the developed world. There is need therefore to develop Kenyan jurisprudence on issues of copyright infringement and the enforcement. We do not been a lot of cases on infringement of copyrights taken to our courts.

⁷⁵Ibid

⁷⁶Menell, Peter S., *Envisioning Copyright Law's Digital Future* (September 3, 2002). N.Y.L. School Law Review, Vol. 46, p. 63, 2002-2003. <http://ssrn.com/abstract=328561>

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The Interview Schedule /Survey Questionnaire.

Part A: Preliminary Information

Date of interview	
Settlement Area	
Name of interviewer	

My name is I am conducting a study on.....

Part B Bio-Data

1. Name of respondent..... (optional)
2. Gender:
 - i) Male
 - ii) Female
3. What is the name of the institution that you work with?
4. Have you heard or experienced incidences of copyright infringement?
5. Which items /goods are mostly prone to infringement at your institution?
6. What forms does copyright infringement take?
 - a. Internet/digital
 - b. Hardcopies
 - c. Any other
7. How is infringement of copyright through digital /ICT regulated?
8. Which government authorities regulate infringement of digital information?
 - i. Police
 - ii. Inspectors
 - iii. Any other

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Are these institutions effective in controlling copyright infringement?

9. Is the law effective in controlling or preventing the infringement of copyright through the internet?

CHAPTER TWO

2.0. What is copyright?

Copyright is the protection by law for original works of authorship fixed in tangible medium of expression. Copyright covers both published and unpublished works.⁷⁷ It is a form of intellectual property law, protects original works of authorship including literary, dramatic, musical, and artistic work, such as poetry, novels, movies, songs, computer software, and architecture. Copyright does not protect facts, ideas, systems, or methods of operation, although it may protect the way these things are expressed.⁷⁸ The TRIPS Agreement stipulates that copyright shall extend to expressions and not ideas, procedures, methods of operation or mathematical concepts as such.⁷⁹ It goes ahead to define computer program, whether in source or object code as a literary work under the Berne Convention, Article 10(2) also seeks to protect compilations of data or other material, whether in machine readable or other form, which by reason of the selection arrangement of their content constitutes intellectual creations and shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.⁸⁰

The Copyright Act, Act No. 12 of 2001 defines a copy as a reproduction of a work in any manner or form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium, by computer technology or any other electronic means⁸¹. Copyright is different from patents in that copyright protects original work of authorship, while a patent protects inventions or discoveries. Ideas and discoveries are not protected by copyright law though the way they are expressed may be. A trademark protects words, phrases, symbols, or designs identifying the source of the goods or services of one party and distinguishing them from those others.⁸²

⁷⁷ Definition of copyright, <http://www.copyright.gov/help/faq/faq-general.html> accessed on August 19, 2013

⁷⁸ *ibid*

⁷⁹ Article 9(1)TRIPs Agreement, part ii- standards concerning the availability, scope and use of intellectual property rights, http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm accessed on August 19, 2013

⁸⁰ Article 10(2)TRIPs Agreement, part ii- standards concerning the availability, scope and use of intellectual property rights, http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm accessed on August 19, 2013

⁸¹ Section 2 of the Copyright Act of 2001, *government printer*.

⁸² Definition of copyright, <http://www.copyright.gov/help/faq/faq-general.html> accessed on August 19, 2013

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For a work to be protected by copyright, it is essential to ensure that it is within the category listed by the Act, as it is now, different requirements may be required for different categories of works.

a) The very first requirement for a work is that the work need be recorded in material form; this only applies in literary, dramatic, and musical works. There is no requirement that a work need be registered for copyright to arise, as the right arises automatically. The 1988 Act had however provided that for copyright to exist the work needed to be recorded in material form. To remedy this, section 3(2) of the 1988 Act stated that the copyright does not subsist in literary, dramatic, or musical works unless and until they are recorded, in writing or otherwise. Writing is defined to include any form of notation or code regardless of the method by which, or medium in which it is recorded.⁸³ There is no requirement that broadcasts be fixed in or embodied in any particular form. Thus broadcasts are protected whether or not the broadcasts are in a permanent version or not.

b) The work need be original; this too applies in literary, dramatic, and musical works. There has been a blurred meaning as to what amounts to originality, our Copyright Act fails to define when a work is held to be original. Under copyright law it is very difficult if not impossible to state with any precision what copyright law means when it demands that works be original. In both Britain and European conceptions, originality is not concerned with whether the work is inventive, novel, or unique. In copyright sense a work is original if the author has exercised the requisite intellectual qualities (in the British version labor, skill, or effort, in European intellectual creation) in producing the work.⁸⁴ In other jurisdictions like the US, the same challenge is experienced, there have been discussions that originality means one thing for maps, and something else for pictures and yet something else for music, literature, art reproductions, computer programs and so on.⁸⁵ Courts in the US have gone ahead to define originality in two ways which Russ VerSteegen in his article "Rethinking Originality" describes as type I originality where the author must create a work independent of other pre-existing works. Type II originality is where the work exhibits at least some minimal degree of creativity.

⁸³ Class notes by Professor Ben Sihanya, Introduction to Copyright LLM2013.

⁸⁴ L. Bently and B. SHERMAN, Intellectual property law 3rd Edition p 93

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The case of *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*⁸⁶ articulated the standard as follows: "All that is needed to satisfy both the Constitution and the [copyright] statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own'.

Type II originality is, by its very nature, an elusive concept that is difficult to quantify, and because judges generally are not adequately trained to evaluate subjective levels of artistic merit, courts should fashion a standard that is as objective as possible. If some degree of objectivity is a goal, then courts must define these terms carefully and must determine whether a "creativity" standard or a "trivial/distinguishable variation" standard more likely will yield a practical method for evaluating Type II originality.⁸⁷ With the new technological advances, photocopying and electronic copying are faster and more accurate, making it quite difficult to differentiate between originals and copies, the advent of new copying technology has brought with it a need for an extremely low threshold of copyright-ability, and consequently, a concomitantly low threshold of originality.

c) The work should not be excluded from protection on grounds of public policy. Occasionally courts have said that works which are immoral, blasphemous, or libelous, or which infringe copyright need not be protected⁸⁸

There has been a raging debate as to whether in the digital technology there exists something like copyrights, with several theories being developed especially in the manner of sharing information in the world which is currently being referred to as the global village due to the ease of access and sharing information brought about by the ever growing technology. Property has come to mean more than just land or merchandise or money, which gives a larger and more just meaning as it embraces everything to which a man may attach value and have a right to. Property is the right to acquire, use, and dispose of the things that one has created through one's labor. This concept of property which focuses on the substantive relationship between a person and the

⁸⁵ An article by Russ VerSteege on Rethinking Originality, volume 34/ issue 3: William and Mary Law Review, <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1857&context=wmlr> accessed on August 22, 2013

⁸⁶ *In Alfred Bell & Co. v. Catalda Fine Arts, Inc* No. 271, Docket 21599. United States Court of Appeals, Second Circuit. Argued June 7, 1951. Decided July 20, 1951
<https://bulk.resource.org/courts.gov/c/F2/191/191.F2d.99.271.21599.1.html> accessed on August 22, 2013

⁸⁷ *ibid*

⁸⁸ Class notes by Professor Ben Sihanya, Introduction to Copyright LLM2013.

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thing that he has labored upon or created explains and justifies the protection of intellectual property rights regardless of whether these rights exist in tangible books or computer code.⁸⁹

Further a person's right to control the disposition of his creation and thereby to enjoy the fruits, profits of his labor is central to the legal definition and protection of property entitlements. A man may be deprived of his property in a chattel, therefore without its being seized or physically destroyed, or taken from his possession. Stealing the fruits of one's labors or directly interfering with the use of the property is sufficient; it's this concept of property that explains why copyright is in fact property rather than monopoly privileges meted out to authors at the leisure of the state's utility calculation.⁹⁰

The past evolution of copyright is notable because we are in the midst of another revolution today- the digital revolution. The impact of this digital revolution is far reaching as was the industrial revolution. It would be wrong to justify and condemn early attempts to define copyright entitlement for digital content, just as it would have been wrong to condemn attempts to define trademarks.⁹¹

Generally, Kenya's copyright law and practice have deep roots in the colonial and neocolonial experience. Copyright law is largely a 20th and 21st century phenomenon, beginning with the declaration of Kenya as a British protectorate from June 15, 1895 and a colony in 1920. Kenya's copyright law evolved from the 1842, through the 1911 and 1956 UK Copyright Acts. These statutes were applied together with the English common law by virtue of the reception clause under the East African-Order-in-Council 1897. The reception clause applied to Kenya the substance of the English common law, the doctrines of equity and statutes of general application in force in England as at that date, and was later re-enacted under the Kenya Judicature Act, 1967.⁹²

2.1 SOURCES OF COPYRIGHT IN KENYA

Applicable copyrights in Kenya are found in a number of statutes, the English common law and international treaties. Several pieces of legislation have enacted and repealed since independence

⁸⁹ An article by Adam Mossoff on; Is Copyright Property, <http://fedsoc.server326.com/FacultyDocuments/9-Mossoff-Is%20Copyright%20Property.pdf> <accessed on August 19, 2013

⁹⁰ An article by Adam Mossoff on; Is Copyright Property, <http://fedsoc.server326.com/FacultyDocuments/9-Mossoff-Is%20Copyright%20Property.pdf> <accessed on August 19, 2013

⁹¹ Ibid

⁹² Article by Prof. Ben Sihanya on Copyright in Kenya

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due to the ever changing technology and trying to match up to World Trade Organization's agreement on the Trade Related aspects of Intellectual property (TRIPs)

The main statutory sources include

2.1.1 The Constitution of Kenya 2010.

Chapter 1 Article 2(6) of the constitution provides any treaty or convention ratified by Kenya shall form part of the law of Kenya⁹³. This shall be important in analyzing international conventions and treaties that Kenya has ratified in regard to intellectual property in particular copyrights. Article 40(5) underscores the state's protection, promotion and support of intellectual property rights of the people of Kenya.

2.1.2 Judicature Act

The second source of law is in section 3 of the Judicature Act, which provides that any laws form part of the laws of Kenya. A number of doctrines developed under the UK copyright statutes continue to apply especially those under the 1956 UK Copyright Act. In addition the procedural and evidentiary rules regarding copyright administration and litigation are drawn directly or indirectly from UK legislation or practice, pursuant to the reference made in the Judicature Act.

2.1.3 COPYRIGHT ACT.

The development of Kenyan copyright law began with the Copyright Act, 1966 and has had several amendments that resulted in the Copyright Act of 2001

The Copyright Act of 2001 was drafted mainly to meet the standards established under the TRIPs Agreement of 1994 and the WIPO Internet Treaties (WCT and WPPT) of 1996, it received presidential assent on 31st December 2001. The Copyright Amendment Act, 1982, Act No. 5 of 1982, introduced the term infringing a copy and redefined infringement to include engaging in direct or indirect activities controlled by copyright, including importing or causing the importation of infringing copies. It also introduced the traditional reliefs for copyright infringement including juridical remedies like damages.

The Copyright Amendment Act, 1989, Act No. 14 of 1989 made numerous changes including the redefining the term author to include the author of a computer program, it also introduced the term audio-visual work to replace cinematographic films and specifically mentioned the copyright in a broadcast and stated that the copyright in a television broadcast was to include the

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right to control the taking of still photographs there from. Those amendments introduced the right of performers, which are protected from unauthorized broadcasting and relevant forms of performance.

The Copyright Amendment Act, No. 9 of 1995, redefined broadcasting to include wireless, wired, and satellite transmission and reception of images and sounds. It also redefined a copy to mean a reproduction of a work in any form and includes any sound or visual recordings of a work and any permanent or transient storage of a work in any medium by computer technology or other electronic means.

The Copyright Act, Act No. 12 2001 defines a copy as a reproduction of a work in any manner or form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium, by computer technology or any other electronic means⁹⁴.

This definition covers transient storage of a work in any medium; this is intended to cover new reproduction and transmission technologies relating to the production and distribution of literary and other copyrightable works. The Act recognizes non-material forms of reproduction as well; it is obvious that the protection of non-tangible forms of reproduction impacts access to digital teaching and learning materials⁹⁵

The Act emphasizes the difference between communication to the public and broadcasting. It defines “broadcast” to mean the transmission by wire or wireless means, of sounds or images or both or the representation thereof, in such a manner as to cause such images or sounds or images or representation thereof, in such a manner as to cause such images or sound to be received by the public and include transmission by satellite. Communication to the public is defined in S. 2 as a live performance; or transmission to the public, other than a broadcast, of the images or sound or both, of a work, performances or sound recording. Thus the latter covers situations where the subject matter is transmitted by any other means except through broadcasting. The doctrinal and practical distinction between broadcasting and communication to the public is,

⁹³ Article 2(6) Constitution of Kenya 2010, *government printer*.

⁹⁴ Section 2 of the Copyright Act of 2001, *government printer*.

⁹⁵ Africa Copyright and Access to Knowledge(ACA2K)Project, Country Report June 2009 http://erepository.uonbi.ac.ke/bitstream/handle/123456789/19259/154_ACA2K%20KENYA%20CR%20WEB.pdf?sequence=1

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however, being eroded by ⁹⁶Internet and related technologies such as web casting or Internet radio.

The Act has clarified instances of fair dealing with respect to each subject matter. For instance, copyright does not control reproduction, translation, or adaptation, distribution, or communication to the public “by way of fair dealing for the purposes of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of the source.” Fair dealing is further clarified under s. 26(1) (a), (d), (e), (f), (g), (h), (j), and (l). Some of these issues help construct the scope of literary copyright and were at the core of the North-South debate leading to the Stockholm Protocol to Berne, or the Special Provisions Regarding Developing Countries.

In my view the Act does not give a definition of what copyright is, but it has gone ahead to list and define copyrightable materials. In this case and for purpose of this paper we shall consider sound recording, audio visual works and computer programs. WIPO definition of copyright is a legal term describing the rights given to creators for their literary and artistic work⁹⁷. The Black laws dictionary defines copyright as the right of literary property as recognized and sanctioned by positive law, it’s a right granted to the author or originator of certain literary or artistic production, whereby he is invested, for a limited period of time with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them⁹⁸.

The copyright Act establishes a board known as the Kenya Copyright Board (Kecobo) a body corporate⁹⁹ that is responsible directly coordinating and overseeing the implementation of laws and international treaties and conventions to which Kenya is a party, and which relate to copyright¹⁰⁰. The composition of the board is professional having an expert especially from the software association to be offering technical expertise with the evolving world of ICT.

Although the law recognizes copyright in computer software, the law does not otherwise make specific provision in relation to exploitation of copyright works in the digital environment; the provisions contained in law are presumably seen to apply to the digital environment as well. Section 35(5) of the Copyright Act provides circumstances under which copyright is infringed.

⁹⁶ Article by Prof Ben Sihanya on copyright in Kenya <http://www.innovativelawyering.com/attachments/article/26/Copyright%20Law%20in%20Kenya%20-%20Prof%20Ben%20Sihanya.pdf>>accessed on August 13, 2013

⁹⁷ WIPO definition of copyright <http://www.wipo.int/about-ip/en/copyright.html>.

⁹⁸ Black laws dictionary definition of copyright, 2nd edition <http://thelawdictionary.org/copyright/>

⁹⁹ Section 3 of the copyright Act No.12 of 2001, *government printer*.

2.1.4 THE ANTI-COUNTERFEIT ACT 2008 LAWS OF KENYA

This Act was enacted to deal with matters of counterfeit. It is necessary with regard to copyright in particular because a lot of infringement of copyright is done through counterfeiting. Copyright provide the basis for continuous stream of new music and films, ever improving business , games, software, books, magazines, newspapers and other published materials , photography and many other related activities. ¹⁰¹ However, high piracy rates, poor enforcement procedures and ineffective management of IP rights inhibit domestic creative industries from realizing their full potential. For instance, although the vibrant Kenyan music scene has seen a boom in production, musicians struggle to make a living from their music. Music pirates copy CDs the moment they are released and sell them on the streets making it nearly impossible for musicians to profit from direct sales of legitimate recordings. ¹⁰²

The Act under Section 3 establishes the Kenya Anti-Counterfeit Agency (ACA) as a state corporation. The agency was established to prohibit trade in counterfeit goods. Specifically the Agency has four major functions:- to enlighten and inform the public on matters relating to counterfeiting, to combat counterfeiting trade and other dealings in counterfeit goods in Kenya; to devise and promote training programs on combating counterfeiting; and to co-ordinate with national, regional or international organizations involved in combating counterfeiting. ¹⁰³

Section 32 of the Act makes it an offence to have in possession or control in cause of trading any counterfeit goods, to manufacture, produce or make in cause of trade any counterfeit goods. It's also an offense to sell, hire out barter or exchange or offer or expose for sale, amongst others.

Under section 34 the owner of copyright who has valid grounds for suspecting that importation of counterfeit goods may take place may apply to the Commissioner in the prescribed manner to seize and detain all suspected counterfeit goods.

While section 35 sets out sentence for convicted first offender to be imprisonment for a period not exceeding 5 years and a fine, while a repeat offender may be sentenced to a sentence not exceeding 15 years or a fine not less than five times the value of the prevailing retail price of the goods or both.

¹⁰⁰ Ibid section 5

¹⁰¹ [file:///C:/Users/admin/Downloads/ValueOfIP_Kenya_031113_LR%20\(4\)%20\(1\).pdf](file:///C:/Users/admin/Downloads/ValueOfIP_Kenya_031113_LR%20(4)%20(1).pdf)

¹⁰² Ibid

¹⁰³ Ibid (abstract)

2.2 APPLICATION OF THE LAW AND THE SHORT COMINGS IN ITS ENFORCEMENT.

With Copyright information should flow freely, spread from one another to all over the globe, for moral and mutual instruction of man, and improvement of his condition, the combination of internet and digital technology presents copyright law with what has been described as a digital dilemma.¹⁰⁴

On one hand, digital technology makes it possible to make an unlimited number of perfect copies of music, books, or videos in digital form, and through the internet individuals may distribute those digital works around the world at the speed of light. The controversial peer to peer music sharing network combination makes it possible for users to share music and other works without paying for them, thus depriving copyright holders of revenue that they might otherwise have received if individuals purchased those products in tangible form. On the other hand when combined with legal sanctions, digital technology also makes it possible to control information to unprecedented degrees. Using encryption, trusted systems, digital water markings technology, distributors of digital works may not only preserve existing markets for their works but they may also create new markets. Digital technology therefore has the capacity to demonstrate a careful balancing of public good and private interest.

As a result of the digital dilemma, we find ourselves in the midst of a great debate over the proper scope of copyright in the 21st Century. At stake is the balancing of power of information age. On one side, content providers such as artists, the entertainment industry, and self-declared copyright optimists argue that copyright law should be extended and modified to allow copyright holders to control all distribution and use of digital information. For example **Professor Goldstein**¹⁰⁵ argues that copyright should be extended into every corner where consumers derive value from literary and artistic work. Critics counter that exceptions to copyright should be recognized under the fair use doctrine for certain uses of digital information.

¹⁰⁴An article by committee on intellectual property rights and the engineering information infrastructure, national research council. The digital dilemma intellectual property in the information age

¹⁰⁵https://books.google.co.ke/books?id=vo9G-0iZnQIC&pg=PA154&lpg=PA154&dq=Professor+Goldstein+argues+that+copyright+should+be+extended+into+every+corner+where+consumers+derive+value+from+literary+and+artistic+work&source=bl&ots=7EMPdOcGIm&sig=zy967so5TqExJM0Z9d7JAngpE6Q&hl=en&sa=X&redir_esc=y#v=onepage&q=Professor%20Goldstein%20argues%20that%20copyright%20should%20be%20extended%20into%20every%20corner%20where%20consumers%20derive%20value%20from%20literary%20and%20artistic%20work&f=false

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The principal question asked is whether certain uses of the copyrighted work are of sufficient value to merit the recognition of new exceptions to copyright cyberspace. The digital music experience illustrates the impact of digital technology on the copying and distribution of content. A typical song can be digitally recorded and then stored as an mp3 directly by an artist or can be converted from a CD. The music file can then be redistributed quickly and easily to others over the internet through worldwide pages, posted in news groups, shared in chat-rooms, or attached in email. Once downloaded in the internet, a user can save mp3 on a computer hard drive, burn them onto a blank CD, or save them on some other storage device.

As Professor Sihanya puts it in his paper on Copyright Law in Kenya, the Kenyan IP regime is still lacking in many aspects, and it's yet to realize the full economic benefits of IP. With regard to copyright, right owners lose millions of shillings due to infringement, piracy and counterfeiting. This is attributed to numerous factors;

- (i) Kenya does not have a way of monitoring copyright transactions. The role of looking out for perpetrators of infringing acts is largely left to the copyright owners who have neither the capacity nor the mechanism to monitor each part of the country and look out for copyright infringers.¹⁰⁶ Also mix tapes that can be downloaded from sites like mix crate are major infringement avenue for copyright and with the anonymity of up loaders brought about by the new technology it becomes almost impossible for a country like Kenya to curb this menace. A country like the US has walked the extra mile of enacting laws to redefine copyright law in response to the digital revolution; thus the Digital Millennium Copyright Act and the Electronic Theft Act. Additionally, courts have applied earlier copyright legislation to music in the online context. Big players in the music industry have also begun to develop rights management systems to control the dissemination of music and allow copyright owners to locate direct infringers¹⁰⁷
- (ii) Many creators or artist are not aware that they possess valuable IP rights. This may be blamed squarely on the institutions created by the Act i.e. Kecobo which has not come out strongly to try and educate the society on their rights. Many people also believe that

¹⁰⁶ An article by Prof. Ben Sihanya on copyright laws in Kenya
<http://www.innovativelawyering.com/attachments/article/26/Copyright%20Law%20in%20Kenya%20-%20Prof%20Ben%20Sihanya.pdf>

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in order to have one's work protected, a complex and expensive process that can only be done in the capital city Nairobi is involved and possibly one requires the services of a lawyer, which ultimately becomes very expensive and people decide to forego their rights to have copyright protected.

A creation of branches, increased advertisement on IP rights will go a long way to helping individuals safe guard their work and reap maximum benefits. In case one is enlightened enough to start up a case they pursue the civil bit of it doing away with the criminal aspect of the infringement. This is because the copyright prosecutions are limited and some offenders may view the sanctions as negligible transaction costs rather than penalties. Thus more needs to be done in training employees of prosecutorial agencies and the general public on the rights that accrue to copyright holders and on copyright management, prosecution and enforcement generally.¹⁰⁸

(iii) Of the staff employed in the institutions expected to protect IP rights, most are not qualified or experienced enough to help individuals protect their work in the right manner. Thus, Right holders deposit their work believing it is safe until they find that others have exploited their work and used it gainfully thus making the original author lose economic benefits that may have accrued were the work not infringed.

(iv) The penalties provided for copyright infringement are not sufficient to control infringement. The Copyright Act provides a maximum penalty of Ksh. 800,000/= or 10 years imprisonment.¹⁰⁹ The Kenyan practice has been that courts impose lower fines rather than jail terms. These small fines do not deter copyright infringement by offenders who stands to reap more from the infringement than the amount fined.¹¹⁰ Kenya loses a great amount of revenue due to activities such as infringement and piracy. Thus an argument has arisen that it is better to permit some acts of IP infringement and tax them

¹⁰⁷ Article by Wendy Pollack on Tuning In; The Future of Copyright Protection for Online Music in the Digital Millenium, Fordham Law Review Volume 68/ Issue 6 Article

11 <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3655&context=flr> <accessed on August 14, 2013

¹⁰⁸ An article by Professor Ben Sihanya on Copyright Law in Kenya

¹⁰⁹ The Copyright Act and Anti Counterfeit Act 2008 check section 38 and section 32

¹¹⁰ An article by Professor Ben Sihanya on Copyright Law in Kenya

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in order to get revenue, or better, persuade or compel the infringers to engage in appropriate legitimate business.¹¹¹

2.3 WHY COPYRIGHT LAW IS PREFERRED IN THE ICT ERA AS COMPARED TO OTHER MODES OF INTELLECTUAL PROPERTY PROTECTION.

Technological development in the computer industry has outrun the pace of legal change. In the 1960s and early 1970s computer software were not protected under intellectual property, as a result , software vendors attempted to protect their programs in two ways through trade secrets and by contract. The biggest challenge to the vendors was if they were selling multiple copies of a program to whomever wanted them, how could the program be a secret? As a result of this challenge they came up with the licensing of software whereby the buyer was obligated to keep the software confidential, and because of this some courts held that some computer software could in fact retain their trade secret status.¹¹² Copyright is the most suitable mode of legal protection for computer programs and software. Patent and trade secrets have traditionally been associated with protection of utilitarian works. The ease with which trade secrets status could be lost has been a deficiency in protecting computer programs.¹¹³ With copyright's low requirement for protection and lengthy duration its better suited for protecting software.

2.3.1 INTERNATIONAL CONVENTIONS AND TREATIES

Kenya is party to some international treaties and conventions dealing with copyright and related rights. These are;

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

Kenya is yet to accede to the WIPO Internet Treaties of 1996 but has incorporated some provisions in the Copyright Act of 2001.

¹¹¹ ibid

¹¹² An article by Mark A. Lemley, on Convergence in the Law of Software Copyright, Berkeley Technology Law Journal, University of California

¹¹³ A book by Peter S. Menell, An Analysis of the Scope of Copyright Protection for Application Programs

2.3.2 BERNE CONVENTION OF 1886(PARIS ACT 1971)

Kenya is a member of the Berne Convention (Paris Act 1971) of 1886. The Copyright Act of 2001 incorporates provisions of the Berne Convention, which provides for a minimum standard of copyright protection in Berne member states.

2.3.3 TRIPS AGREEMENT OF 1994

Kenya is a member of WTO and was therefore required to be TRIPs compliant by January 2000. It did, however, not meet the deadline in most aspects of IP. The Copyright Act of 2001 was passed to ensure that the copyright law was in line with existing international laws on copyright and related rights.

2.4 WIPO- WORLD INTELLECTUAL PROPERTY ORGANIZATION

Although Kenya participated in the WIPO Diplomatic conference of 1996, which adopted the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonographs Treaty (WPPT), the country has not yet ratified these treaties. The Copyright Act has, however, made provisions to incorporate some sections of the treaties into Kenya's copyright law. For instance Section 35(1) already contains far reaching anti circumvention provisions, which are becoming a major barrier for accessing digitized educational material.

This treaty was adopted in Geneva on December 20, 1996 and has close relations with the Berne convention in regard to Article 20 which allows member countries to enter into such agreements that grant the authors more extensive rights than those granted by the convention, or contain provisions not contrary to Berne convention¹¹⁴. The scope of copyright protection as per the WIPO agreement extends to expressions and not ideas, procedures, methods of operation or mathematical concepts¹¹⁵. Article 4 of the treaty provides for computer programs which are protected as literary works within the meaning of Article 2 of the Berne convention, and this applies to whatever the mode or form of their expression.¹¹⁶ Article 5 provides for data base

¹¹⁴ Article 20 of Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 http://www.wipo.int/treaties/en/text.jsp?file_id=283698

¹¹⁵ Article 2 of WIPO copyrights Treaty adopted in Geneva on December 20, 1996 http://www.wipo.int/treaties/en/text.jsp?file_id=295166

¹¹⁶ Ibid article 4

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compilations or other material in any forms, which by reason of the selection or arrangement of their contents constitute intellectual creations and are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.¹¹⁷

There has been the desire to unify the laws regarding copyright especially in the European countries whereby differences in national laws relating to copyright proved to be a major barrier in copyright protection. An example is the *EMI Electrola GmbH V Patricia Im-und Export*¹¹⁸ which grew out of the fact that due to the differences of copyright in sound recordings in Germany and Denmark, the sound recording rights in the song by Cliff Richard had expired in Denmark but not in Germany. Patricia attempted to import the records from Denmark back into Germany. The European court of Justice held that even though the copies were lawfully marketed in Denmark, the Germany right holder was entitled to prevent the importing of the recordings into Germany where copyright continued to subsist because the copyright owner had not exhausted their rights. The court observed that 'in the present state of the community characterized by an absence of harmonization, it's for the national legislations to specify the conditions and rules of such protection. Such restrictions are justified by Article 30 EC (formerly Article 36 of the Treaty) if the period of protection is inseparably linked to the existence of the exclusive rights¹¹⁹

Majority of nations protect intellectual property "in an attempt to balance the interests of their copyright industry's desire to capitalize on its investments ... with society's rights to benefit from the knowledge and resources of its country."

Generally speaking, copyright laws exist for three basic reasons: (1) to reward authors for their creative works, both economically (US theory) and morally (EU theory), thereby (2) encouraging the proliferation and availability of creative works; and (3) to facilitate the access and use of creative works by the general public in appropriate situations.

¹¹⁷ Ibid article 5

¹¹⁸Case 341/87 EMI Electrola GmbH v Patricia Im- und Export and Others (reference for a preliminary ruling from the Landgericht Hamburg)

¹¹⁹<http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30dbfe0d1badcb4848468205d86c337af919.e34KaxiLc3qMb40Rch0SaxuLax50?text=&docid=95640&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=980883>

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Copyright laws grant authors of creative works certain exclusive rights of ownership, including the "authority to regulate how and under what terms protected works are sold, bought, used, and otherwise transmitted."

The author may also assign these ownership rights to another, in whole or in part. In an attempt to balance the public's need for free movement of creative works with the necessary task of first rewarding and incentivizing creators, governments agree to protect copyrights for a limited time only. Thus, a limited monopoly of sorts is created to balance copyright's competing interests. The rights protected by copyright laws are "quintessential property rule entitlements". Thus, the copyright holder must grant permission in order for another to exploit one or more of the rights. Typically, permission is granted in exchange for the payment of a licensing fee. When a copyright holder's rights are circumvented, several avenues of redress are generally available.

Usually, copyright holders may seek injunctions to halt or prevent the unauthorized use of their works and then, damages for compensation and deterrence of future violations.¹²⁰

This desire for harmonization led to publication of the Green paper *copyright and challenge of technology*. This set out the basic plan to harmonize specific areas of copyright particularly those relating to new technologies.

2.5 COMPUTER PROGRAMS DIRECTIVE OF 1991

This was the first European initiative in copyright field which had to be implemented by 1st January 1993. It was meant to address the issue whether computer programs should be protected by copyright, patents or sui generis right. It was decided that they should be protected as copyright. This is reflected in the fact that the directive requires member states to protect computer programs as literary work under the Berne Convention. The directive required member states to confer certain rights on the owner of the copyright in computer programs, including the right to control temporary reproduction, the running and storage of the program, the translation and adaptation, redistribution or rental of programs as well as liabilities for secondary infringement. The directive required member states to recognize certain exceptions to the exclusive rights.

¹²⁰An article by Sarah E. Henry : The First International Challenge to U.S. Copyright Law: What Does the WTO Analysis of 17U.S.C. § 110(5) Mean to the Future of International Harmonization of Copyright Laws Under the TRIPS Agreement? 20 Penn State International Law Review 301 (2001) <http://cyber.law.harvard.edu/people/tfisher/IP/Henry%202001.pdf> accessed on August 19, 2013

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One of the major areas affected by copyright infringement in regard to ICT is the scholarly work, where most of the articles are downloaded from the internet. Some of these materials are copyright protected but with the evolving technological advancement experts have been able to circumvent and acquire such materials to the detriment of the author of the work. Examples of these are the eBooks. In America and even other countries people have turned to electronic mode of teaching and learning, and with the introduction of sophisticated versions of e-readers they are able to access cracked e-books meaning that though these eBooks were meant for sale, they can be downloaded or accessed for free without the consent of the owners. Cracked eBooks usually are stripped of the security features that protect them from resale enabling them to be sold by unauthorized third parties. While these third parties may have originally purchased the books that they offer for sale in order to scan them to their database, they don't own the rights to the material and as such they are technically in violation of copyright law¹²¹.

Technology has enhanced access to copyright protected material in Kenya because it facilitates cheaper production and dissemination, especially for students in open distance and electronic learning. However, the Kenya Copyright Act makes it illegal to circumvent technological protection measures and provides no exception to this provision, which in effect blocks certain electronic content which would have otherwise been accessible.¹²²

The music industry is in crisis with the digital revolution especially on copyright infringement. The layering of copyright law ownership interest and the complexity of copyright law, particularly as it applies to music, has played a major role in the inability of the industry to respond to the changing nature of the ways in which digital works can be distributed and otherwise exploited.

One of important aspect of copyright law is to promote the progress of knowledge and learning. As such there arises an issue of public interest especially on education matters, which is the need for incentives to authors and this can only be achieved by protecting the works so that the authors can derive benefits from their work. As to how much protection to be offered to the work becomes a fundamental issue. Thus, when elements of the copyright system hinder dissemination

¹²¹ Article by James Hirby, Can you Download Cracked eBooks or iBooks on a jail broken ipad fact checked by the law dictionary featuring Black's law dictionary 2nd edition <http://thelawdictionary.org/article/can-you-download-cracked-ebooks-or-ibooks-on-a-jailbroken-ipad/>

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of copyrighted works without providing adequate benefits to the creators or distributors of works, then those elements should be eliminated. The fast paced world of digital delivery of music needs a different structure for facilitating downstream use and assuring compensation to authors. The peer-to-peer file sharing phenomenon exemplifies infringement of copyrights.

2.6 CHALLENGES VIS' A VIS' BENEFITS OF COPYRIGHT LAWS IN KENYA IN REGARD TO ICT

The fundamental principle of copyright law is unauthorized copying is not permitted. Copying in violation of the law includes not only the literal taking of the words or expression of another, but also what is called 'non-literal infringement'-the taking of the essence off the author's expression without using the author's actual words.

¹²³Section 4 of the Copyright Act provides that a person who is in lawful possession of a computer program may do any of the following acts without the authorization of the right holder whereby copies are necessary for the use of the computer program in accordance with its intended purpose-;

- a) To make copies of the program to the extent necessary to correct errors; or
- b) To make a back-up copy, or
- c) For the purpose of testing a program to determine its suitability for the person's use or
- d) For any purpose that is not prohibited under any license or agreement whereby the person is permitted to use the program

This is the first time the copyright law contains the content of and specific limitations to a new form of literary copyright, namely, software copyright, mainly courtesy of WIPO's and the Business Software Alliance's(BSA's) proposals.¹²⁴ BSA represents software TNCs, with the law allowing backup copies of computer program under certain conditions as illustrated above.

¹²² Africa Copyright and Access to Knowledge(ACA2K)Project, Country Report June 2009http://erepository.uonbi.ac.ke/bitstream/handle/123456789/19259/154_ACA2K%20KENYA%20CR%20WEB.pdf?sequence=1

¹²³ ibid

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Protection of computer software involves non-literal infringement in that when only concepts and not actual language have been copied, courts need to distinguish the idea from the expression. Computer programs having been written for utilitarian purpose expression in the code or structure and organization of a program is normally only incidental to that purpose. Courts therefore need to identify and protect that incidental material, while leaving functional aspects of the program free for all to duplicate. The second biggest challenge that the courts face is that computer programs are technically complex and inaccessible to lay people, who include judges, who are forced to rely on second hand knowledge and testimony about programming process to a far extent than in other literary cases.¹²⁵

Fair dealing has increasingly been interpreted to give offenders the right to engage in some copying of computer programs for socially useful purpose. Most courts where this jurisprudence has evolved have permitted copying of software to ensure compatibility or interoperability between computer programs¹²⁶.

2.7 JURISPRUDENCE OF COPYRIGHT PROTECTION IN OTHER JURISDICTIONS

2.7.1 The law in the United States

The U.S is not only the largest producer and exporter of computer software, but its jurisprudence on software questions and disputes is the most influential of any in the world; hence an appreciation of even the basics of the international legal regime requires an understanding of US law.

CONTU(Commission on New Technological Uses of Copyrighted works) is a body that was established after the law making body was unable to agree on language regarding the scope of protection for computer programs, they were to study the issue and make recommendations. The Commission recommended that copyright protection extend to computer software, including software in object- code form.

124A paper by Prof. Ben Sihanya on Copyright law in Kenya

<http://www.innovativelawyering.com/attachments/article/26/Copyright%20Law%20in%20Kenya%20-%20Prof%20Ben%20Sihanya.pdf>.

125An article on Convergence in the Law of Software Copyright Op. cit

126 ibid

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Though there were fears that copyrighting software would result into the few firms that existed dominating and hindering innovativeness in the industry the contrary is seen to have been achieved with software firms of all sizes routinely relying on copyright law to prevent unauthorized reproduction and distribution of their programs rather than entrenching the leading IT firms in the market.¹²⁷

The U.S copyright statute provides copyright protection for original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of machine or device. The US government has gone ahead to enact Computer Software Rental Amendments Act of 1990. It is an infringement under the Act to distribute a computer program for direct or indirect commercial advantage by way of rental, lease or lending.¹²⁸

In order for one to succeed in a claim of copyright infringement in ICT sector the Supreme Court in *Sony Corporation of America v Universal City Studios*¹²⁹ held it was necessary to demonstrate that there are no substantial non-infringing uses' of the materials or equipment in question.

The U.S Copyright office has provided for the registration of computer programs since 1964, however, the practice was on the basis that it was the duty of the Copyright Office to give applicants the benefit of doubt as to whether computer programs were protectable by law.

The Computer Software Copyright Act 1980 which repealed original section 117 was to remove doubts as to whether the broad definition of section 102 extends to software. Furthermore, a new section 117 was enacted which provided that the owner of a computer program had a limited right to copy or adopt that program if this was necessary to ensure that the program could be used in a particular computer, the new Act went ahead to define a computer program as 'a set of statement or instructions to be used directly or indirectly in a computer in order to bring about a certain result'.¹³⁰

Under U.S law the author of the work is automatically the owner of the copyright in the work. If an employee creates a work as part of his employment, the employer is considered the author for

¹²⁷ An article by Mann, Susan O, Innovation and intellectual property protection in the software industry; an emerging role of patents. University of Chicago Law Review, Jan 1, 2004.

¹²⁸ <http://www.copyright.gov/title17/92chap1.html>

¹²⁹ Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417 (1984)

¹³⁰ *ibid*

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copyright purposes. The author acquires copyright in a work as soon as it is fixed in a tangible medium of expression, which in this case means as soon as it's written down in a paper, or electronically on the computer, in some readable form. Copyrights last for the life of the author plus 50 years if the author is a natural person or for 150 years if the author is a corporation. The author of software can exercise the rights granted to him or her under copyright law themselves, or they can sell or license those rights to others. The rights granted under copyright law may be transferred individually, or all of the rights transferred together, i.e. the right-holder may sell or license the right to make and sell copies to another person but retain the right to create derivative works. The rights may be licensed on a non-exclusive basis i.e. other licensees may also have the opportunity to exercise the licensed rights, or on an exclusive basis which means the licensee will be the only person allowed to exercise those rights.¹³¹

Unlike in most European countries, in the U.S, once a copyrighted work has been sold, the copyright owner has no further distribution or sale with regard to that particular copy of the work. This is known as the 'first sale doctrine'. Thus, the initial purchaser of copyrighted work is free to sell or give away his copy of the work at any time, regardless of the wishes of the copyright owner. In the case of commercial software, which can involve sales, there is a potential large loss in revenue because of the first sale doctrine. For this reason, most commercial software transactions in the U.S are in the form of licenses, rather than outright sales, with the buyer of the software being restricted from transferring the software to others.¹³²

The biggest challenge faced by the US courts has been getting the balance right between the developer's need for protection, on the one hand as against acts of unauthorized copying that promote interoperability, on the other, particularly due to a process of reverse engineering software known as de-compilation is a challenge.¹³³

Computer programs are typically written as a series of formal instructions known as source code. Access to a program's source code can promote interoperability by revealing a program's interface specifications, which allow subsequent developers to ensure that their own programs can share data with the original program. Where a developer does not have access to these specifications, the developer may seek to 'decompile' a program by translating the object code

¹³¹An article by Marc S. Friedman, Esq and Lindsey H. Taylor, Esq on Protection for Software under the U.s law <http://www.shk-dplc.com/cfo/articles/copyrite.htm>.

¹³² An article by Marc S. Friedman, Esq and Lindsey H. Taylor, Esq on Protection for Software under the U.s law <http://www.shk-dplc.com/cfo/articles/copyrite.htm>

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into a human legible form that resembles the source code. De-compilation can also make it simpler for subsequent developers to imitate the program and develop close substitutes that compete directly with the original program.¹³⁴

Despite initial doubts that copyright law permitted such copies, U.S courts generally came to endorse the view that, to the extent necessary to promote interoperability, unauthorized de-compilation normally does not violate copyright. In *Atari Games Corp V Nintendo's hardware console*¹³⁵ the Federal Circuit Court held that Atari's de-compilation of software embedded in Nintendo's hardware console, for the purpose of ensuring that the Atari's video games could run on the console, was excused under the Copyright Act's fair use provision. The court however emphasized on the narrowness of its holding by noting fair use to discern a work's ideas does not justify extensive efforts to profit from replicating protected expression. Any reproduction of protectable expression must be strictly necessary to ascertain the bounds of protected information within the work¹³⁶.

Over the years, several courts have agreed that decompiling software for the purpose of revealing information necessary to achieve interoperability may be excused as fair use under the Copyright Act. For one to claim copyright infringement, they must prove that the infringer has copied *protectable expression*.

In particular a copyright owner may not lay claim to the ideas within their work, but only to their particular means of expressing those ideas.¹³⁷ In *Synercom Technology v. University Computing Co.*, Synercom had designed a series of 'input formats' which would accept data from users in conjunction with a program which analyzed engineering problems with the design of buildings. EDI, the defendant wrote a program in a different language which accepted information in the same format as Synercom's program and the court held that the sequencing and ordering of data inputs constituted the idea of Synercom's program, rather than its expression and therefore found no infringement in the copying of those sequences. A conflicting judgment by the 3rd circuit court was issued in *Whelan Associate Inc v. Dental Laboratory Inc*. Here the court had been

¹³³Ibid

¹³⁴Ibid

¹³⁵Atari Games Cord. V. Nintendo of America, Inc. 30 U.S.P.Q.2d 1401 (N.D. Cal. 1993) (Atari II)

¹³⁷ An article by Mark A. Lemley, on Convergence in the Law of Software Copyright, Berkeley Technology Law Journal, University of California

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called upon to evaluate a claim of infringement of a custom computer program for record keeping in a dental laboratory. Whelan was a computer company that had developed a program to the specifications of its customer, Jaslow. When Jaslow developed and started marketing its own program in competition with Whelan, Whelan sued. The record indicated that Jaslow had not copied Whelan's code, but that the two programs were similar in their overall structure, sequence and organization. In Whelan the court began their analysis by concluding that the non-literal expressive elements of a computer program were entitled to copyright protection, citing the universal rule with regard to other types of works, and then the court set forth to distinguishing the protectable and non-protectable elements. The court was of the opinion that developing a computer program is in designing the structure and logic of the program and therefore the method it was to apply had to provide a proper incentive for programmers by protecting their most valuable efforts.¹³⁸

The court's application of its test to the case before it was straightforward. The court described the "idea" of the computer program as "the efficient management of a dental laboratory (which presumably has significantly different requirements from those of other businesses)." The choice of this basic concept as "the" idea of the Dentalab program made application of the idea-expression dichotomy quite simple: "Because that idea could be accomplished in a number of different ways with a number of different structures, the structure of the Dentalab program is part of the program's expression, not its idea." The court acknowledged that its approach was at odds with *Synercom*, but felt that there was no merger of idea and expression in the case before it, since the "idea" of efficiently managing a dental laboratory was separable from the many possible ways of accomplishing this goal.¹³⁹ In determining what aspects of software are copyrightable, *Atlai* adopted a three step procedure that has come to be known as the abstraction-filtration-comparison approach. Rather than treating the non-literal elements of a computer program as a unified whole, the *Atlai* approach uses analytic dissection' to break the program to constituent parts, and then evaluates the copyright-ability of each of those parts. At first it filters the unprotected elements out of a program at each level of abstraction. With the court now left with the protectable expression, the court in *Atlai* case applied the traditional infringement test of comparing the equivalent structures in the two works to determine whether they are substantially

¹³⁸Ibid

¹³⁹Ibid

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similar and, if so, whether the copying was substantial. The case of *Feist Publication V Rural Telephone Services* makes it clear that substantial effort alone cannot confer copyright status on an otherwise un-copyrightable work, the court noted that the interest of copyright law is not in simply conferring a monopoly on industrious persons, but in advancing the public welfare through rewarding artistic creativity, in a manner that permits the free use and development of non-protectable ideas and processes.¹⁴⁰ In *Gates Rubber* the court identified six levels of generally declining abstraction;-

- The main purpose of computer program
- The structure or architecture of a program, generally as represented in a flow chart
- ‘modules’ which comprises particular program operations or types of stored data
- Individual algorithms or data structures employed in each of the modules
- The source code which instructs the computer to carry out each necessary operation on each data structure and,
- Object code which is actually read by the computer-the court uses this levels of abstraction to facilitate its analysis of the program at issue’

In the same case the court came up with six not protectable elements;-

- Ideas
- The process or methods of the computer program
- Facts
- Material in the public domain
- Expression which has merged with an idea or process
- An expression which is so standard or common as to be a necessary incident to an idea or process

In the US, the Digital Millennium Copyright Act (DMCA) of 1998 enacted the WIPO Treaty but went beyond it. In particular it gave a strong boost to the use of technological protection by making it illegal to circumvent technological protection used by publishers, or to develop or distribute devices that do so. Such acts are illegal even for uses that would not hitherto have infringed on copyright (which is not the case with the WIPO treaty). This deeply compromises the principles of “fair use” which have been established under copyright, as also the principle of

¹⁴⁰Ibid

first sale. In the case of a book you are free to resell it to someone else – technological protection may prevent the equivalent digital act.¹⁴¹

2.7.2 COPYRIGHT IN AUSTRALIA

Australia is a developed country and a member of commonwealth and therefore it has a shared heritage as far as the law is concerned. It has a good system of law hence the consideration.

There has been the need by the Australian government to evaluate the importance of emerging digital economy and ensuring individual's rights in regard to copyright are protected. There need be incentives in innovation and at the same time the need to allow appropriate access to information and content in this internet age. They have come up with a term digital economy to mean global network of economic and social activities that are enabled by information and communication technologies, such as the internet and sensor networks. Copyright law is important to Australia's digital infrastructure and is relevant to commercial, creative and cultural policy.

The Australian government has enacted Copyright Act of 2000 with the intention of attaining the requirements and standards set by the Berne convention. There has been a debate between public interest and a private right, that though the Copyright Act appreciates property right in creative effort of mental labor that is also supported by Article 27(2) Universal Declaration of Human Rights, public interest cannot stand ignored as the public need to learn through dissemination of knowledge and this will aid to enhance their general welfare¹⁴².

In 2011 a copyright Council Expert Group saw the need to recognize the importance of encouraging the endeavors of authors, performers, and creators by recognizing economic rights and moral right subject to limitations and in a manner which takes into account evolving technologies, social norms and cultural values.

The purpose of the inquiry by the Australian inquiry was to try and find and develop a digital environment which supports the creation of copyright material so that right holders benefit from having a population and economy capable of making productive ideas and information thereby generating the income needed to cover the costs for developing new ideas.¹⁴³

¹⁴¹Story, A. (2002) "*Copyright, Software and the Internet*", Commission Background Paper 5, London, p.11.

Source: <http://www.iprcommission.org>

¹⁴² Copyright and the digital Economy, Australian Law Reform commission: issue paper 42(1p42) August 2012 .

¹⁴³ *ibid*

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Like most countries the Australian Copyright Act has exceptions and limitations to copyright. These are for socially useful purposes these include.

- Advancing knowledge through research
- Commentary by way of critics or review
- Reporting news
- Administration of justice
- Fair dealing
- Educational purposes

There has always been a question as to whether these are adequate and effective in the digital environment.

2.7.3 Copyrights in China

China has been notoriously known for infringement of copyrights, it would not be a surprise for a layman out there to believe that there are no laws in China protecting intellectual properties. Analyzing the Chinese policy on intellectual property, one comes to learn of the existence of two eras i.e. the Maoist era and the Open Door Policy era.¹⁴⁴ The Maoist era believed in the moral rights, the rights were owned by the state, while the Open Door Policy era adopted the individual and exclusionary ownership of intellectual rights. The open door policy was falling in line with the western countries. It was becoming clear for the Chinese that they also needed to comply with the law on intellectual property rights.

Unlike in the US whereby in case of copyrights infringement one goes to courts for relief, in China it is more of the government role to punish other than the courts. The government will punish serious infringement of copyrights that do not rise to the level of a crime.¹⁴⁵ This begs the question whether copyright infringement is a crime in China as per its local statutes. A clear look of the Chinese Copyright Act of 2010 specifically article 47 and 48, one will note that infringement under article 47 will purely attract relief in form of damages but does not amount to a criminal offence whereas infringement under article 48 can attract both damages and also be

¹⁴⁴ Natalie P, The Influence of the WTO over China's Intellectual Property Regime, http://sydney.edu.au/law/slr/slr_34/slr34_1/SLRv34no1Stoianoff.pdf accessed on 13/09/2014

¹⁴⁵ Daniel D, "Differences in Copyright Enforcement between the US and China" <http://resources.infosecinstitute.com/copyright-enforcement-the-u-s-and-china/>

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open to prosecution for a criminal offence.¹⁴⁶ For example, the Chinese law does not criminalize copyright infringements where the infringer does not have the intention to make profits from the infringement.

This legal aspect makes it very difficult for the Chinese to effectively protect copyrights. An administrative approach to dealing with copyright infringers may not be the most effective method; it may be fast but not efficient.

It is very difficult for administrative sanctions to be effective in a corrupt country especially where bigwigs in the society are involved. Criminal sanctions also ensure that people comply, as they will always be afraid of being imprisoned as compared to paying of fines. The important thing to note from the big economies in the world is that at some point they were notorious of copyright infringements. The question that arises then is, would a total copyright protection regime in developing countries aid in the growth of the country or will it hamper its growth for the benefit of the already developed economies?

2.8 DOCTRINE OF FAIR USE IN DIGITAL ERA

Protecting author's rights had been the main reason of the existence of copyright law, which however is not the ultimate objective of copyright law; it is as well a method to achieve the purpose of ensuring the public's access to copyrighted material and promoting the public welfare. Fair use is traditionally defined as a privilege given to another person who is not the owner of the copyright to use the copyrighted material in a reasonable manner without his consent. Nowadays it means that the use of a work shall be allowed without the consent of the author and without remuneration, however with the obligatory mention of the author's name and the origin of the work, provided that it is not of prejudice to the normal exploitation of the work and legitimate interests of the author to his work.¹⁴⁷

The purposes of copyright exceptions are various. The author's consent to a reasonable use of his copyright work has always been implied by the courts as a necessity to reach the objective of promoting the progress of science and the useful arts, since prohibition of such use would prevent subsequent authors from attempting to improve upon prior works. The exceptions may

¹⁴⁶ Copyright Law of the People's Republic of China (2010)

http://en.wikisource.org/wiki/Copyright_Law_of_the_People%27s_Republic_of_China_%282010%29

¹⁴⁷ An article by Khanh Pham and ShushikMkhitarian on Fair Use of Copyrighted Works in the Digital Age.

<http://www.squ.edu.om/Portals/175/PDF/WIPO%20Publication.pdf>

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be used for some public interest of more significance than private benefit of the copyright owner. In this case, the realization of copyrights should not be dependent on the latter's consent. Some exceptions that reflect these wider interests include education, news reporting, efficient public service or the protection of the right of the disabled.

Another justification is that copyright must come to an end somewhere. The rights should not extend into the regulation of wholly private or non-commercial activities, to over protecting the right holders interest. Exceptions should cover common and socially beneficial uses of copyrighted works where formal permission requirements would impose excessively burdensome transaction costs on all parties.

2.9 FAIR USE IN INTERNATIONAL TREATIES

The Berne Convention and Trips Agreement permit exceptions for fair use of copyrighted works. The availability and scope of the exception remain for most part, subject to national legislation.

The Berne Convention, being the first international convention on the protection of literary and artistic works, provides that any type of use, but for purposes of private use, educational and scientific research etc. shall be subject to authorization and payment. Exceptions for fair use have been mentioned in various specific conditions, namely Article 2bis (3) regarding ephemeral recording by broadcasters. However the three step test set out in Article 9(2) of the convention is the general guidance for member states to codify the fair use doctrine. Member states of the convention can provide exceptions (i) in certain cases, (ii) which do not conflict with a normal exploitation of the works, and (iii) do not unreasonably prejudice the legitimate interest of the author.

Although the Trips Agreement require all the WTO members to comply with Article 1 to 21 of the Berne Convention(which includes Article 9(2), the Three step test has been reinforced in Article 13 of this agreement which does not confine exceptions only to the right of reproduction but to all internationally recognized exclusive rights.

Under WIPO Internet Copyright Treaty the need to balance between the rights of authors and the larger public interest, particularly Convention has been proclaimed. The three step test has been adopted again in Article 10 WCT.

2.10.1 FAIR USE IN THE US, UK AND CONTINENTAL EUROPEAN COUNTRIES.

As early as 1848 in *Folsom v Marsh*¹⁴⁸, the fair use doctrine has been recognized in the US. The Congress adopted the Copyright Act (1976) to codify the common law doctrine. Section 107 of the Act requires a case to case determination of whether or not a particular use is fair. It allows limited use of copyrighted materials without requiring permission from the right holders. The factors to determine fairness includes:-

- i. Purpose and character of the use, including whether the use is for commercial or nonprofit educational purpose, transformative and productive or duplicative
- ii. Nature of the work or adaptation
- iii. The amount and substantiality of the part copied taken in relation to the whole work or adaptation
- iv. The effect of the use upon the potential market for, or value of the work or adaptation

However the distinction between fair use and infringement may be unclear and not easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission. Acknowledging the source of the copyrighted work does not exempt the users from obtaining permission.

With the coming of digital era there arise conflicts between the fact that new digital technologies provide incentive for the free flow of ideas, knowledge, and information, while the fundamental design of copyright law is to limit the flow of copyrighted work. From the copyright holder's perspective, the digital environment brings danger to copyright protection. Information in digital form is intangible and can be reproduced instantaneously. Digital copies are different from printed copies as there is little or no difference between the original and a copy. Digital technology also eases the retrieval and distribution of works via internet. This led to the introduction of WIPO 'internet' Treaties whose aim was to control access to content or to control the copying of content.

¹⁴⁸*Folsom v. Marsh*, Massachusetts (1841), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

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Technological solutions such as digital watermarking and encryption have been used to develop copyright protection systems to limit use to a single user and to avoid redistribution or re-use of material. Though these methods may be effective to ordinary users, hackers pose a great challenge as they are able to circumvent leading to introduction of anti-circumvention legislation. At the international level Article 11 of the WCT provides an independent legal protection and effective legal remedies against circumvention of effective technological measures that are used by authors in connection with their works, which are not authorized by the authors concerned or permitted by law. It can be interpreted from this provision that the contracting parties are allowed to implement this obligation at their discretion provided that the implementation is adequate and effective to protect technological measures as required by the WCT. The U.S enacted the Digital Millennium Copyright Act (DMCA) in 1998 with a new chapter section (1201-1205) that regulates the protection of TPMs. Section 1201 covers both the protection of 'access control' and 'copy control' technologies. The protection of technological measures established under section 1201 is threefold which prohibit (i) the act of circumvention of TPMs that protect access control (ii) trafficking in devices, services, etc. that circumvent 'access control' TPMs (iii) trafficking in devices, services that circumvent 'copy control' TPMs. All contracting parties implementing the WCT face the problem that, on one hand, there is a need to protect the technological measures which right owners apply to the protected content, while on the other, the beneficiaries of 'fair use' or other exceptions or works that fall into public domain need not be restricted in realizing the benefits. As contracting party, the U.S has tried to strike a balance between both positions by not prohibiting the act of circumvention. The DMCA provides a closed list of limited exceptions permitting the circumvention of and/ or trafficking in TPMs in respect of legitimate encryption research, computer security testing, reverse engineering for computer program, libraries(for the sole purpose of determining whether to acquire a particular work), and when it is necessary to achieve interoperability and used solely for that purpose. However, the DMCA does not mention of the phrase 'fair use'. In Europe, the Infosoc Directive deals with the protection of technology measures, Article 6(1), and (2) establish the scope and Article 6(3) sets forth the definition of the technological protection measures. The scope of protection is broad and obliges member states to protect right holders against both the act of circumvention of any effective technological protection measure. The scope of protection is broad and obliges member states to protect right holders against both the act of circumvention

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of any effective technological measure Article 6(1), as well as against the trafficking in circumvention devices and services Article 6(2). The content of Article 6(2) is similar to those set forth in section 1201 of the U.S. Digital Millennium Copyright Act (DCMA).

At corporate level, shared interest of platform and content owners i.e. YouTube, Google Settlement has been created. Under those, fair use has been implemented with automated enforcement. However, there are concerns that automated system should be applied for detection only and not for removal, and that removal should be done upon notice and fair use should be considered prior to issuing a notice.¹⁴⁹

2.11 CONCLUSION

Copyright laws are territorial, however, with the internet and online distribution it becomes a global issue and it will not suffice for individual countries to regulate internally but rather international policies will go a long way in protecting individual interest and encouraging innovation while still balancing public interest.¹⁵⁰

In the digital context, the copyright law has regulated more and seeks for technology and other branches of law to regulate more effectively. With the ratification of the control that technology can impose over every use of the copyrighted works (by TPMs and anti-circumvention rules) and the supplement of standardized contractual schemes, copyrights in the digital age are thus open to control in a way that was never possible in the era gone by. However, more control of copyrighted works does not always help to promote innovation and creation. The protection of created works and their creators must always be balanced with the guarantee of public interest and fundamental freedoms. Fair use is designed to maintain such balance. The growing use of contracts and application of technological measures may threaten the fair use doctrine thus cause an unprecedented break in the balance inherent in all intellectual property system. The relationship between anti-circumvention rules and fair use has been dealt with under the U.S. DMCA as well as EU Infosoc Directive with certain exceptions to the rules. There are also court rulings that were pro-fair use. Nevertheless, fair use justifications are not strong enough in a

¹⁴⁹ *ibid*

¹⁵⁰ Green Paper On Copyright And The Challenge Of Technology COM (88) 172 Final
Brussels, 7 June 1988

[http://ec.europa.eu/greenpapers/pdf/green_paper_copyright_and_challenge_of_thechnology_com_\(88\)_172_final.pdf](http://ec.europa.eu/greenpapers/pdf/green_paper_copyright_and_challenge_of_thechnology_com_(88)_172_final.pdf)

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variety of cases regarding anti-circumvention rules under DMCA. The use of pre-described contracts has also been addressed by the U.S. courts with the principle of preventing contracts with unbalanced bargain power but preemption doctrine has not yet recognized.

The appreciation that no meaningful protection can be achieved without enforcements of rights is crucial in the digital era. There is no single solution to the problem of online infringement the US green paper on copyright appreciates that a combination of approaches need be developed not only in the legal field but also in technology sector, public education, and collaborative effort of all stakeholders. In refining enforcement tools, it becomes critical to safeguard the benefits that robust information flows have on innovation, knowledge, and public discourse.¹⁵¹

The changes that are to happen especially in assessing and improving enforcement tools to combat online infringement and promote the growth of legitimate services need to be implemented while still preserving the essential functioning of the internet.

The green paper recommends that the internet needs to be seen as a market for copyrighted works and as a vehicle for streamlining licensing.

With individuals appreciating the importance of internet and the need to pay for the information they get from it will make it easier to reduce on infringement. The mode of payment of licenses especially in developing countries is also a major challenge unlike in the US where credit cards are common. Here many would go on circumventing and even hacking since the mode of payment is complicated or they do not have the means for paying for the product. A harmonized and all considerate mode of payment would assist in reducing infringement.

The effect of anti-circumvention law is yet to be felt in the long term especially upon the expiration of the copyright period. What is expected is that copyright in the digital era will impoverish the digital public domain greatly by precluding new works or even get to a situation where development of copyrighted works will be affected. Anti-circumvention law will be undermining some of the well settled doctrines in the copyright sector such as fair use/dealing since it cannot make any determination of a purpose that is necessary to assess whether a use is privileged or not. The solution to this may be borrowed from the European Union whereby they have established a commission to establish a comprehensive approach related for effective and interoperable digital rights management. This should be in a position to consider and take into

¹⁵¹Ibid

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account the characteristics of the digital public domain and users prerogatives.¹⁵² The option that is available in regard to balancing anti-circumvention law and established copyright doctrines that stand threatened by this anti-circumvention law is to legalize circumventions to exercise user's rights and public domain works.

Another available option will be to do away with anti-circumvention laws that restrict public domain and privileged uses. We need as a country to come up with measures that will ensure these doctrines of copyright use are not infringed and that after the expiration of the copyright period the general public will have unlimited access to the copyrighted material with undue hindrance by anti-circumvention law.

Private copying is another big challenge faced when trying to combat digital copyright protection. The question arising here is how much of copying is acceptable to be done privately? How do you ensure that persons who have the authority to copy privately respect the boundaries and does not go ahead to share such information or even upload it in the internet? These are issues that policy makers need to address keenly as they may turn out to be the hardest to control. Changes speculated may either be legal or voluntary; balancing the two may be an uphill task while making the licensing process easier maybe a good incentive towards avoiding unwarranted private copying.

Various proposals need to be advocated to modify the copyright statute in various ways to promote assistance to developing countries, such as expanding the scope of compulsory licenses, relating license fee to a nation's per capita income, providing tax benefits to donors who dedicate their copyrights to the public domain, implementing micropayment schemes to provide compensation for partial use of work.¹⁵³

In addition Litman while adding to the proposals had a drastic one. She was of the opinion that the congress in the US should just do away with 'copy' as the fundamental unit in copyright law.¹⁵⁴ She suggests that we should not consider whether a copy was created or not but consider the effect a copy has on holder's ability to market his work, if substantial then the maker of the copy should be held liable. She gave an example that a teenager who downloads music for

¹⁵²<http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf%3C>

¹⁵³ Machines as readers: A solution to the copyright problem by Shamos Michael I. <http://www.ulib.org/conference/genpub/2.pdf> accessed on the August 28, 2013

¹⁵⁴ Digital Copyright by Jessica Litman

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personal, non-commercial use would not infringe the artist's copyright because his actions have little effect on the market but a large company such as Napster should be held liable because its actions would have much greater effect on the overall market for music.¹⁵⁵

The use-control scheme of copyright protection is faced with two fold problems, one being that allowing the usage of copyright material without the need for permission may at the end be detrimental and discouraging on part of the publishers and on the other side stringent control may deter learning and deep scholarship for educational and research work. Thus, rather than attempt to restrict and control copying or use of copyrighted materials, allowing unlimited copying or use and afterwards to provide evidence of any misbehavior would be much welcome. These can be attained by digital watermarking technique which secretly embeds robust marks into a material to designate its copyrights related information such as origin, owner, content, use or destinations. These as described can provide on one hand evidence for copyright infringement after the copying and on the other hand, it may serve as a deterrent to illicit copying and dissemination of copyrighted materials. The water marking technique does not act as an alternative to use control scheme but in fact compliments the system by providing defense against¹⁵⁶ misbehavior on the copyrighted materials that may have escaped from the controlled domain of usage control scheme.

¹⁵⁵ Ibid

¹⁵⁶ A WWW Service to Embed and Improve Digital Copyright Watermarks, by Jian Zhao Fraunhofer Institute for Computer Graphics Germany <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.51.4223&rep=rep1&type=pdf> accessed on September 17, 2013

CHAPTER THREE

3.0 EXISTING POLICY, LEGAL AND INSTITUTIONAL FRAMEWORKS ON COPYRIGHT IN KENYA

This chapter examines the existing policy, legal and institutional frameworks governing copyright in Kenya. The chapter will examine the existing legal provisions dealing with copyright infringement and point out the weaknesses in the law. It will also highlight the regulatory weaknesses in the existing institutional framework that are exploited by copyright infringers in the ICT era.

The law as it is on paper is not enough, institutions need be developed so as to ensure the enforcement of the law and address its shortcomings. From such institutions, room is created for the growth and development of the law. In Kenya the major law governing copyrights in Kenya is the Copyright Act. It has created various institutions that are mandated with the responsibility of enforcing copyrights. All the laws in Kenya derive their powers as provided by the constitution. The Constitution of Kenya has indeed appreciated the role that intellectual property plays in the economy. This paper will discuss the provisions of the Constitution and the impact that they have on the development and enforcement of copyright laws and then discuss the Copyright Act and any other statute and international conventions that Kenya is a party to.

3.1 THE CONSTITUTION OF KENYA 2010.

The Constitution is the mother-law, and it is a great achievement that the Kenya Constitution 2010 has addressed matters of Intellectual Property.

Article 11 of the Constitution is a big boost to the growth of intellectual property in Kenya. The Constitution recognizes the importance of promoting intellectual property from cultural expressions to the science today. Sub Article (2) (c) provides that “*the State shall promote the intellectual property rights of the people of Kenya*” the implication of this provision is far reaching. That the Constitution has your back as a copyright holder is comforting. The ICT sector especially for the software developers will not shy away from investing their time, resources and intellect to come up with new and innovative modes of software development. The

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same scenario is replicated by Article 40(5) which provides the state's protection, promotion and support for intellectual property rights of the people of Kenya.

This goes a long way in showing the State's new commitment to Intellectual Property, a concept that was not highly regarded by the old Constitution. The repealed Constitution had only broad provisions which could be construed to recognize intellectual property i.e. sections 75 on protection of property. With the debate on whether indeed there is property in IP the wave could move on either side, this maybe one of the reason for no jurisprudential progress in Kenya. The idea that copyright is a personal matter that does not involve the state is no longer a viable proposition. The Constitution being the governing instrument between the state and its people has now bestowed on the state the responsibility of promoting and protecting IP rights.

3.2 COPYRIGHT ACT OF 2001

The Act itself creates the basis upon which copyrights are protected. The Act creates various institutions upon which are bestowed with the responsibilities of protecting and registering copyrights in Kenya.

Among the institutions created by the Act is the Kenya Copyright Board referred to as "Kecobo". Previously copyright protection was under the ambit of the Attorney-General's office but with Kecobo it now a fully-fledged institution. This Board is provided under section 3(1) of the Act as a state corporation and the composition of the Board is provided for under Section 6 of the Act provides for the composition of the board.

Among the board members, there is one by a registered software association in Kenya. This by itself ensures that the necessary expertise in this complex field is provided. The requirement of the executive director to be a person versed with experience and knowledge is also an advantage for the board. The board is fairly inclusive and with the required knowledge and experience in this IP field and therefore it can achieve much.

Section 21 of the Act creates a competent authority from which appeals from the board lie by an aggrieved party. A major weakness in this institution is that the Act does not specify the composition of the competent authority or even the extent of its mandate, and who sits on the

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board. This could have been ignored by the drafters of the Act, due to the fact that few Kenyans are enlightened about copyright and hence very few would pursue the matter to an appeal level.

Section 39 provides for inspectors who will be responsible for enforcing the provisions of the Act; while section 40 thereof gives the inspectors the right to enter into premises upon production of their certificate of authority giving unlimited powers to enter and inspect premises as they perform their enforcement duties.

Section 46 provides for private institutions that are regulated by KECOBO for collective administration of copyright. These private institutions advance their members rights and collect revenues on their behalf. Currently in Kenya there are four registered in Kenya that is Music Copyright Society of Kenya (MCSK), The Reproduction Rights Society of Kenya (KOPIKEN), Kenya Association of Music Producers (KAMP) and the Performers Rights Society of Kenya (PRISK).

3.2.1 MUSIC COPYRIGHT SOCIETY OF KENYA (MCSK)

The membership under MCSK includes authors, composers, arrangers and publishers of musical work. The organization main agenda is to collect royalties on behalf of the members and also aims to build, mobilize, and support the musical fraternity within Kenya, integrating and enhancing their earnings for their works.¹⁵⁷

MCSK is the most active CMO in Kenya in relation to protecting their members' interests and tracking down copyright infringers especially in the Public Transport industry. The challenge with protecting music in the digital era is that one just requires to be connected to an ISP to be able to access copyrighted materials and then commit infringing acts at the comfort of their residence. One can upload copyrighted music on the social media making it accessible for download to third parties. It is difficult to narrow down to such an infringer and only the ISP can be held to account. Unfortunately the Copyright Act is silent on the role played by ISP.

¹⁵⁷Music Society of Kenya <http://www.mcsk.or.ke/index.php/about> accessed on 14/7/14

3.2.2 THE REPRODUCTION RIGHTS SOCIETY OF KENYA (KOPIKEN)

KOPIKEN is involved in licensing reproduction of copyright protected materials by offering blanket licenses. The license issued allows one to make copies of the copyrighted materials. The copying is subject to certain limits and exclusions. KOPIKEN derives the authority to issue licenses for the copyrighted materials from the authors and publishers. With the licenses one is not required to obtain the consent of the authors or the publishers' every time one needs to make a copy.¹⁵⁸ It is this license that give students and employees the right to make photocopies, printouts and digital copies without tracing the rights-holders and obtaining their permission.

The license gives the right to copy from all published material – Kenyan or foreign – like books, journals, magazines, newspapers etc., as well as Internet content. The license does not cover the copying of audio and audiovisual works, computer software or games, etc. The extent of reproduction for each student or employee shall be limited to 15% of a works including Books, Scientific journals, Newspapers, other journals, sheet music. The KOPIKEN license covers internal uses only. Reproduction shall not replace, but be a supplement to, the purchase of published material.¹⁵⁹

Maximum utilization of KOPIKEN may give tremendous benefit especially to the educational institutions that are limited to copying of a short passage of copyrighted material. Such a blanket license if obtained can enable students to access to such materials from the library.

A major challenge with this CMO's is that there is limited awareness as to their existence, and thus further sensitization is recommended.

Another challenge especially for KOPIKEN is that it offers very limited licenses especially for digital materials. In this digital age where everyone tends to refer to the internet for research it is essential that KOPIKEN invests more in digital copies.

¹⁵⁸The Reproduction Rights Society of Kenya ¹⁵⁸ (KOPIKEN)
<http://www.kopiken.org/copyright/index.html> accessed 14/7/2014

3.2.3 KENYA ASSOCIATION OF MUSIC PRODUCERS (KAMP) AND THE PERFORMERS RIGHTS SOCIETY OF KENYA (PRISK)

These two organizations have come together to issue a joint license. PRISK manages performer's rights through collecting remuneration on their behalf and subsequently distributes royalties to them. Performer's rights relating to public performance, broadcasting and communication to the public also falls within PRISK.¹⁶⁰

KAMP is a separately registered CMO from PRISK but due to technicalities they have joined hands with PRISK to issue a joint license. Their main mandate is to license users of sound recordings with the money collected being submitted to the producers as royalties.

Though the importance of the CMO's in Kenya is not in doubt, there is still a large gap in relation to enforcement of the Copyrights Act. Most if not all have concentrated on collecting royalties with nothing or little to show towards eradication or cessation of copyright infringements.

Further the digital era is yet to be clearly captured by these CMO's. We are yet to have any registered organization handling computer software copyright infringement or even allowing to certain extent the usage of computer software. This should not always be viewed from the side of infringing but also from the eye of public good.

3.3 SHORTCOMINGS OF THE ACT

It is not in doubt that the Copyright Act is a good law, but the issue is does it suit the present needs of Kenya as a developing country? Can one expect Kenya to have the same regulations governing copyrights as the US has? For example, when it comes to access to books and educational materials the Act provides that only two short passages of the materials can be copied and be used by schools and universities. With the levels of illiteracy and the need for Kenyans to be educated these provisions undoubtedly limit access to educational materials and research. Professor Sihanya in his paper presented on copyright exceptions and limitations for education and research environment in Ghana, presents some of the proposals by Kecobo that

¹⁵⁹<http://www.kopiken.org/license/index.html>

¹⁶⁰the Performers Rights Society of Kenya (PRISK) <http://www.prisk.or.ke/mission.html> accessed on 9/7/2014

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include allowing the making of not more than three copies of a book (including pamphlet, sheet music, map chart or plan) for the use in the libraries if such a book is not available in Kenya.¹⁶¹

Such amendment will ensure that as the country strives to be in tandem with the international standard on copyright protection, it does not do so at the expense of its people.

Secondly, section 26(5) could be read to mean to allow reverse engineering by allowing de-compilation of a program. Copyright does not protect the ideas, concept, process, principle or discovery and thus competitors in the market may by way of reverse engineering come up with a program executing the same function and this in a big way deny the original author his revenues.

As noted earlier the challenge with protecting music in the digital era is that one just requires to be connected to an ISP to be able to access copyrighted material and to infringe thereupon. One can upload copyrighted music on the social media making it accessible for download to third parties. It is a tall order to narrow down to such an infringer and the only party that can be held to account is the ISP. Unfortunately the Copyright Act is silent on the role played by ISP.

In relation to the institutions performing their duties finances are the very first hurdle that they face. The budgetary allocations to these institutions are quite limited. This disables them from executing their mandate effectively; these can only be explained by the fact that Kenyans have much more dire needs to deal with other than copyrights protection. However, reports have indicated that the amounts of revenue that is lost through piracy and copyright infringement is colossal and if the government was to curb piracy then such revenues collected would go a long way in providing basic services to Kenyans. Further, the revenues collected by copyright holders will motivate them and more innovations especially in the technological field will be experienced and this will go a long way in moving the economy from an agricultural based economy to a manufacturing and processing economy.

Inexperienced and/or inadequately trained human resources from the bench, the bar and the personnel in Kecobo who are expected to ensure copyright protection and offer remedies have been a major setback in enforcing the law.

¹⁶¹Prof Ben Sihanya, Promoting Access through Legal Reform: Kenya case

study http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.aca2k.org%2Fattachments%2F155_BS%2520PRESENTATION%2520IN%2520GHANA.ppt&ei=PGw7qdIUvw&bvm=bv.70810081,d.d2k<accessed 9/7/2014

3.4 THE ANTI-COUNTERFEIT ACT 2008 LAWS OF KENYA

The Act is relevant with respect to protection of copyright because copyrights provide the basis for continuous stream of new music, films, games, software, books, magazines, newspapers and other published materials, photography and many other related activities. The Act provides for the framework on how to deal with copyright which occurs mainly through the dealing with counterfeit products such as Music/CDs, Mp3, pirated movies among others.

Under section 3 of the Act is created the Kenya Anti-Counterfeit Agency (ACA) as a State Corporation. The agency is established to prohibit trade in counterfeit goods in Kenya

The Anti-counterfeit Act, 2008 provides criminal sanctions whereby section 35 therein stipulates that in case of a first conviction the offender will be jailed for a term not exceeding five (5) years or a fine of not less than three (3) times the prevailing value of the genuine product or both. In the case of a second or subsequent conviction, imprisonment for a term not exceeding fifteen (15) years or a fine not less than five (5) times the prevailing retail price of the genuine goods or both.

The Act does not however provide for a mandatory custodial sentence irrespective of the flagrancy of the offence, neither does it provide for minimum penalties with the result that a lot of discretion is left in the hands of the court, thus it is quite possible for a habitual offender to be sentenced to a lesser fine or jail term than a first offender.

3.5 INTERNATIONAL CONVENTIONS AND TREATIES

Kenya is party to some international treaties and conventions dealing with copyright and related rights namely;

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

3.5.1 BERNE CONVENTION OF 1886(PARIS ACT 1971)

Kenya is a member of the Berne Convention (Paris Act 1971) of 1886. The Copyright Act of 2001 incorporates provisions of the Berne Convention, which provides for a minimum standard of copyright protection in Berne member states.

3.5.2 TRIPS AGREEMENT OF 1994

Kenya is a member of WTO and was therefore required to be TRIPs compliant by January 2000. It did, however, not meet the deadline in most aspects of IP. The Copyright Act of 2001 was passed to ensure that the copyright law was in line with existing international laws on copyright and related rights.

3.6 WIPO- WORLD INTELLECTUAL PROPERTY ORGANIZATION

Although Kenya participated in the WIPO Diplomatic conference of 1996, which adopted the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonographs Treaty (WPPT), the country has not yet ratified these treaties. The Copyright Act has, however, made provisions to incorporate some sections of the treaties into Kenya's copyright law. For instance Section 35(1) already contains far reaching anti circumvention provisions, which are becoming a major barrier for accessing digitized educational material.

This treaty was adopted in Geneva on December 20, 1996 and has close relations with the Berne convention in regard to article 20 which allows member countries to enter into such agreements that grant the authors more extensive rights than those granted by the convention, or contain provisions not contrary to Berne convention¹⁶². The scope of copyright protection as per the WIPO agreement extends to expressions and not ideas, procedures, methods of operation or mathematical concepts¹⁶³. Article 4 of the treaty provides for computer programs which are protected as literary works within the meaning of Article 2 of the Berne convention, and this applies to whatever the mode or form of their expression.¹⁶⁴ Article 5 provides for data base compilations or other material in any forms, which by reason of the selection or arrangement of

¹⁶² Article 20 of Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 http://www.wipo.int/treaties/en/text.jsp?file_id=283698

¹⁶³ Article 2 of WIPO copyrights Treaty adopted in Geneva on December 20, 1996 http://www.wipo.int/treaties/en/text.jsp?file_id=295166

¹⁶⁴ Ibid article 4

their contents constitute intellectual creations and are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.¹⁶⁵

3.7 COMPUTER PROGRAMS DIRECTIVE OF 1991

The first European initiative in the copyright field was the Computer program Directive which had to be implemented by 1st January 1993. This was to address the issue whether computer programs should be protected by copyright, patents or sui generis right. It was decided that they should be protected as copyright. This is reflected in the fact that the directive requires member states to protect computer programs as literary work under the Berne Convention. The directive required member states to confer certain rights on the owner of the copyright in computer programs, including the right to control temporary reproduction, the running and storage of the program, the translation and adaptation, redistribution or rental of programs as well as liabilities for secondary infringement. The directive required member states to recognize certain exceptions to the exclusive rights.

One of the major areas affected by copyright infringement in regard to ICT is the scholarly work, where most of the articles are downloaded from the internet. Some of these materials are copyright protected but with the evolving technological advancement experts have been able to circumvent and acquire such materials that are copyrightable and meant for sale by the originator of the work. A good example where this has happened is with the eBooks. In America and even other countries people have turned to electronic mode of teaching and learning, with the introduction of sophisticated versions of e-readers they are able to access cracked e-books meaning that these eBooks meant for sale are cracked and then downloaded or accessed for free without the consent of the owners. The cracked eBooks are usually stripped of the security features that protect them from resale. This permits them to be sold by unauthorized third parties. While these third parties may have originally purchased the books that they offer for sale in order to scan them to their database, they don't own the rights to the material and as such they are technically in violation of copyright law¹⁶⁶.

¹⁶⁵ Ibid article 5

¹⁶⁶ Article by James Hirby, Can you Download Cracked eBooks or iBooks on a jail broken ipad fact checked by the law dictionary featuring Black's law dictionary 2nd edition <http://thelawdictionary.org/article/can-you-download-cracked-ebooks-or-ibooks-on-a-jailbroken-ipad/>

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ICT has enhanced access to copyright protected material in Kenya because it facilitates cheaper production and dissemination, especially for students in open distance and electronic learning. However, the Kenya Copyright Act makes it illegal to circumvent technological protection measures and provides no exception to this provision, which in effect blocks certain electronic content which would have otherwise been accessible.¹⁶⁷

The fundamental purpose of copyright law is to promote the progress of knowledge and learning. Therefore, there is public interest especially in education matters where there is need for incentives to authors and this can only be achieved by protecting the work so that the authors can derive benefits from their work. When elements of the copyright system hinder dissemination of copyrighted works without providing adequate benefits to the creators or distributors of works, those elements of the system should be eliminated. The fast paced world of digital delivery of music needs to have a different structure for facilitating downstream use and assuring compensation to authors. The peer to peer file sharing phenomenon exemplifies infringement of copyrights

¹⁶⁷ Africa Copyright and Access to Knowledge(ACA2K)Project, Country Report June 2009http://erepository.uonbi.ac.ke/bitstream/handle/123456789/19259/154_ACA2K%20KENYA%20CR%20WEB.

CHAPTER FOUR

4.0 BEST PRACTICES IN REGULATING COPYRIGHT INFRINGEMENT THROUGH THE ICT

When analyzing the issue of best practice in Kenya it is paramount to understand that Kenya is still a developing country. The question that begs an answer is what about developing countries? As discussed earlier in this paper, it is eminent that there is a thin line between public interest and private rights when it comes to the issue of copyright protection. Both of these interests need to be balanced.

This challenge was addressed by World Trade Organization in the TRIP's agreement which recognized the special requirement in developing countries i.e. their economic, financial and administrative shortcomings, as well as the need for flexibility to aid them to develop technologically.¹⁶⁸ Although Kenya does not fall under the category of the least developed countries (as per the list by WTO) we cannot as a country, be compared to the US or the EU.

The position we find ourselves in, makes it even more difficult as the rest of the members of the Berne Convention expect implementation of the treaty to the letter.

The Berne Convention under Article 1 of the appendix provides for exemptions to developing countries:¹⁶⁹

All the exemptions therein were made with the parties conscious that different countries at different stages of development cannot enforce the treaties equally; less developed countries may be condemning their citizens to a much greater problem. Taking the example in the pharmaceutical industry a lot of debate in relation to IP has arisen, on one hand developing countries are in dire need of drugs but the patented products are too expensive to afford, as a result they opt for generics which amounts to IP infringement of patents. To balance the right to access good and affordable healthcare and protecting the intellectual property, the world has taken the route allowing developing countries time and space to fully comply with the internationally set standards.

¹⁶⁸ World Trade Organization, http://www.wto.org/english/tratop_e/trips_e/ldc_e.htm<accessed on 7/8/2014

¹⁶⁹ Berne Convention for the Protection of Literary and Artistic Works of September 9, 1880 and amended on 28th September, 1979, http://www.wipo.int/treaties/en/text.jsp?file_id=283698< accessed on the 8/8/2014

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With respect to copyright it is important to note that copyright is relevant to learning materials in several important ways.¹⁷⁰ One school of thought the utilitarian perspective which conceives of copyright as a necessary incentive for authors to invest time, intellectual effort and money into producing works of creative expression, including learning materials for the benefit of public at large.

There has been clamor to unify the laws regarding copyright especially in the European countries. It should be noted that this is from already developed countries, whose economy is pegged on technology and use their economic might to sanction developing countries that do not comply with their set standards as to copyright protection whereby differences in national laws relating to copyright proved to be a major barrier in copyright protection.

Generally speaking, copyright laws exist for three basic reasons: (i) to reward authors for their creative works, both economically (US theory) and morally (EU theory), thereby (ii) encouraging the proliferation and availability of creative works; and (iii) to facilitate the access and use of creative works by the general public in appropriate situations.¹⁷¹

Copyright laws grant authors of creative works certain exclusive rights of ownership, including the "authority to regulate how and under what terms protected works are sold, bought, used, and otherwise transmitted."

The author may also assign these ownership rights to another, in whole or in part. In an attempt to balance the public's need for free movement of creative works with the necessary task of first rewarding and incentivizing creators, governments agree to protect copyright for a limited time only. Thus, a limited monopoly of sorts is created to balance copyright's competing interests. The rights protected by copyright laws are "quintessential property rule entitlements". Accordingly, copyright holder must grant permission in order for another to exploit one or more of the rights. Typically, permission is granted in exchange for the payment of a license fee. When a copyright holder's rights are circumvented, several avenues of redress are generally available.

¹⁷⁰C Armstrong, J De Beer, D Kawooya, A Prabhala, T Schonwetter Access to knowledge in Africa the role of copyright, 2010 UCT Press

¹⁷¹An article by Sarah E. Henry : The First International Challenge to U.S. Copyright Law: What Does the WTO Analysis of 17U.S.C. § 110(5) Mean to the Future of International Harmonization of Copyright Laws Under the TRIPS Agreement? 20 Penn State International Law Review 301 (2001) <http://cyber.law.harvard.edu/people/tfisher/IP/Henry%202001.pdf> accessed on August 19, 2013

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Usually, copyright holders may seek injunctions to halt or prevent the unauthorized use of their works and damages for compensation and deterrence of future violations.¹⁷² It must be noted that IP rights are not self-executing. The holder must therefore take the initiative to enforce his rights against an infringer.¹⁷³ This is one of the main challenges as far as enforcement is concerned.

The desire for harmonization led to publication of the Green paper *copyright and challenge of technology*.¹⁷⁴ This did set out the basic plan to harmonize specific areas of copyright particularly those relating to new technologies.

4.1 Kenyan context

While proposing the best practice for Kenya, this paper will be scrutinizing what is best for this country in terms of gain other than conforming to the international set standards. Will a full compliance be of any good to this country or does it act as a barrier for this country's development? As discussed earlier the Constitution of Kenya 2010, in my opinion as crafted suits the benefit of Kenyans, but on the other side it recognizes International Treaties and conventions that Kenya is a member or has adopted. The substantive law in Kenya on copyrights is the Copyright Act of 2001 and also the Anti-Counterfeit Act. The issue then is whether these laws suffice. It's my humble opinion that these laws are far much more stringent than what we need. I say so because in my research I have noted that the countries regarded as already developed countries have at one point in time been notorious in disregarding copyrights. After they become technologically equipped they began to pile pressure on other countries to strictly enforce IP as the technology becomes one of their major sources of income.

It should be noted that when America was in the development stage it disregarded the IP rights of other countries for almost two centuries, within this period the American publishers freely made copies of literary works from other countries.¹⁷⁵ These acts of infringement although lacking in moral standings played a great role in development of America.

¹⁷²An article by Sarah E. Henry : The First International Challenge to U.S. Copyright Law: What Does the WTO Analysis of 17U.S.C. § 110(5) Mean to the Future of International Harmonization of Copyright Laws Under the TRIPS Agreement? 20 Penn State International Law Review 301 (2001) <http://cyber.law.harvard.edu/people/tfisher/IP/Henry%202001.pdf> accessed on August 19, 2013

¹⁷³Nancy F. Du Charme, Robert Kemp, Copyright protection for computer software in Great Britain and United States: A comparative Analysis, Vol 3/Issue 2 Santa Clara High Technology Journal Article 2 1987

¹⁷⁴ Ibid note 132

¹⁷⁵Jaman H. Shah, Economic and Political Weekly, vol.8, No.13 (Mar.31, 1973), pp.645-648, published by Economic and Political Weekly <http://www.jstor.org/stable/4362488> Accessed: 07-08-2014 14:54

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At the present day it would be heinous to propose such actions. Indeed we cannot assume that by matching our standards to those of the developing countries in compliance to IP will not hurt our economy, development, access to education and healthcare, and maybe this could be the reason of the rampant infringement of copyrights in the country.

This paper proposes that these International Conventions and Treaties are to be adopted at a national level depending on the needs of each country. For example, the US in 2002 adopted the Teaching Act whereby it authorizes nonprofit-educational institutions copyrighted materials in distance education without permission from the copyright holder and without payment of royalties.¹⁷⁶ This would appear to have been intended to ensure access to education.

An implementation of these treaties and conventions uniformly may not be for the good of all. At this point, countries get divided and enforcement becomes problematic. My opinion is that with the treaties providing the general framework, developed countries should not put too much pressure of the developing economies, as this may act as deterrence to development in the world of technology particularly in the less developed countries.

The dilemma will then be finding an amicable solution of balancing innovation and creativity without stifling each other. The need to balance the interests of the innovators and the users is paramount as this will be the only solution to this technology quagmire.

Developing countries should be allowed to determine the level of protection, that their laws should provide otherwise implanting the level of protection that the developed countries are using would hinder economic, cultural and even social being of those countries that are yet to be developed.

Kenya as a developing country does not have the full machinery and even the finances to invest in curbing the rampant infringement of copyrights in the digital era. A proposed solution to this problem would be cracking down on the facilitators of the infringement rather than the infringers themselves. This will prevent such sites from uploading or entertaining any copyright infringements. The infringers here would be parties that provide tools to crackdown encryption

¹⁷⁶ UNCTAD-ICTSD Project on IPRs and Sustainable Development, "Resource Book on TRIPS and Development" http://books.google.co.ke/books?id=xADQoT9YwFMC&pg=PA195&lpg=PA195&dq=reasons+for+developing+countries+having+exemptions+under+the+berne+convention&source=bl&ots=kLNahrNbEN&sig=u2GS3VPMmYGbUEu__qrgOSLiGhk&hl=en&sa=X&ei=-VDkU_vROqrD0QXtqYHoDQ&redir_esc=y#v=onepage&q=reasons%20for%20developing%20countries%20having%20exemptions%20under%20the%20berne%20convention&f=false <accessed on 07-08-2014

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and parties providing engines that help people find copyright infringing materials. This will be extending the liability to secondary parties, other than the primary infringers.

According to Isaac Ruttenberg, the problem in Kenya is not the law but lack of enforcement and litigation.¹⁷⁷ He says that the law is not so deficient but the opportunity to litigate is not available.

To him there is a huge market for cheap materials and thus there is the incentive for infringement. One curious thing is that some right holders do use the infringement networks to distribute their works and hence making it difficult to enforce copyright infringements because would be complainant ends up teaming with the offenders. There is need to reduce the cost of the authentic materials, increase their availability and create distribution networks of the authentic products in order to beat the infringers in their game.

Looking at the law in Kenya one realizes that the laws are there but could innovatively be used and reformed. One also notices that KECOBO does large scale training of police officers. This police training is periodic and is based on what the enforcer is likely to see. The other challenge is not a problem of the law but of who is to enforce it. Currently, there are several authorities who have similar mandates in the context of copyright enforcement;

- (i) KECOBO
- (ii) Anti-Counterfeit Agency(ACA)
- (iii)Police

This is complicated operation-wise in that confusion has arisen as to which is the proper authority to enforce cases of copyright infringement against counterfeit products. As for infringements that occur online there is no one monitoring and though the law may be available, online infringements do occur regardless and rarely are there sanctions.

Ouma argues that poor coordination in fighting plagiarism, piracy and counterfeiting is to blame for the failure to tackle issues of infringements.¹⁷⁸ She says there is lack of collaboration within government agencies, inadequate funding and inadequate enforcement. The country is also lagging behind in the proposed merger of intellectual property institutions.

¹⁷⁷Dr. Isaac Ruttenberg, PhD, JD, Director, Center for Intellectual and Information Technology (CIPIT) Strathmore Law School. Also Director KECOBO.

¹⁷⁸Dr. Marisela Ouma, chief executive KECOBO. She is also a scholar in IP with wide knowledge especially on issues of copyright.

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Another issue that has affected the creative industry is poor prosecution of offenders. Though there are many arrests the number of offenders prosecuted still remains very low. This year, KECOBO has arrested more than 400 people but only 51 have been convicted¹⁷⁹. This has mainly been blamed on sluggish judicial system. This coupled by obvious and outright lack of enforcement has really provided a fertile ground for infringement. A casual check in downtown Nairobi confirms that one is able to get a counterfeited CD, MP3, or memory stick downloaded with music of choice at any time of the day and in the open. This clearly shows that there is lack of enforcement and thus these dealers have no fear of being brought to account. Indeed most of the operators of the infringing stalls appear oblivious of the fact that their undertakings are illegal. That technology more so the internet has made it possible for public to download as many as one thousand songs onto a memory stick does not help the matter.

The KECOBO Chief executive officer says that the board is planning an awareness drive against copyright infringement for the public, artistes and other intellectual property owners.¹⁸⁰ This would serve in enlightening the public to enable them obey and also enforce the law.

The war on copyright infringement is clearly frustrated by the public lack of information regarding the same. However, it is sad to note that even artists and other intellectual property owners do not have the knowledge on how to deal with copyright infringement which underscores the need for intensive training to address the matter.

That even artists are ignorant when it comes to addressing issues of infringement was captured in the words of Gerald Rangiri who complained that even where he knows of infringements to some of his works he has never reported to the police because he did not know that it is an offence.¹⁸¹ He had also never sought legal advice because to him lawyers are known to be expensive. One of the main facilitator as far as infringement of copyright is concerned has been the social media and the internet which have been blamed for escalating the problem. This is because it is very difficult to monitor copyright online. Also some companies target countries that lack copyright laws to infringe Kenya's local productions.¹⁸² As discussed earlier, the body charged with the issue of enforcing copyright infringement is KECOBO and by virtue of section 42 of the Copyright Act, the Police may arrest offenders. However, KECOBO is understaffed

¹⁷⁹ Ibid

¹⁸⁰ Ibid

¹⁸¹ Gerald Rangiri-performing artist and a state holder in the creative industry

¹⁸² Ibid note 30

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with less than ten police officers.¹⁸³ On the other hand the general police just like the public lack awareness regarding copyright infringement. This is further compounded by the low police to the population ratio. As such resources are stretched and enforcing copyright is not at the fore as far as policing is concerned. Accordingly, there is a lot of infringement occurring without any attempt to make the perpetrators accountable.

¹⁸³Marisela Ouma, chief executive officer KECOBO in an interview conducted in the course of this research.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATION

This research paper set out to examine the effectiveness and the appropriateness of the legal and the institutional framework governing the issue of copyright infringement in the face of development in ICT. This study posits that in the current state of development in ICT, enforcement is a challenge and the law may not be equal to the challenge posed by development. From our study of the issue at hand we have been able to look at the issue of effectiveness of the law pertaining to the enforcement of copyright as it is today. We have looked into the legal and institutional framework provided for the enforcement of the copyright in the ICT area.

5.1 RESEARCH FINDINGS

One of the many obvious finding that has come out is that the Law as it is presently is not the main problem but rather the enforcement of the law is. In many occasions, the Law exists but where there is infringement, the enforcement is not always effected as required.

The main cause for this failure has been the lack of capacity on the part of the institutions charged with the responsibility of enforcing and on dealing with acts of infringement.¹⁸⁴ At the fore of these institutions is; KECOBO, ACA, and the Police. On the part of KECOBO, we find that the personnel involved with enforcement namely the inspectors and the prosecutors are very few and as such they are not able to cover all the areas where infringement is taking place. This coupled with the fact that the new technologies involved have made it possible to carry out acts of infringement in circumstances that one cannot easily detect such as when infringement is carried out online. In other cases infringements are done in the comfort and privacy of one's house using a computer or such other modern technologies where it would be impossible for the inspectors to detect. With the lack of capacity on the part of the inspectors enforcement becomes almost impossible to carry out.¹⁸⁵

¹⁸⁴ Ibid

¹⁸⁵ Isaac Rutenberg, IP expert and Director of CIPIT, at an interview conducted during this research

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This phenomenon is replicated in the ACA, which is the body that is charged with dealing with counterfeit. The ACA is understaffed meaning that a huge number of infringement cases go unpunished. The situation is compounded by the fact that the very nature of intellectual property renders them vulnerable to theft, particularly through product counterfeiting and digital piracy. Without adequate capacity to enforce, there are a huge number of cases that go undetected leading to failure in enforcement.¹⁸⁶

With respect to the police who have mandate to enforce all the cases of infringement of copyright, their main undoing is the lack of technical know-how on what in particular constitutes infringement. Copyright is quite technical and thus your ordinary police officer may not be able to identify it as such. Another shortcoming as far as police are concerned is that due to the chronic shortage of police officers to deal with ordinary police duties of fighting crime enforcement of infringement on copyright is not considered serious crime and thus no serious attention is accorded to it.

The issue of IP is mainly a personal thing in that it is mainly upon the right-holder to take the steps towards enforcement. One of the main problems as far as enforcement is concerned has been that there is very limited public awareness as far as the issue of the IP rights among them the copyrights is concerned. From our investigations we found that even some right-holders are ignorant as to what they should do in the event that they found their work being infringed. Most people have no idea that it is criminal to infringe on other peoples work and that also it could attract civil liability.

Another interesting phenomenon has been the right-holders failure to consult the experts especially the lawyers because there is a misplaced assumption that the advocates' fees are very high. This flies in the face of enforcement because these right-holders opt not to do anything rather than incur an expense in form of advocates' fees. It is for this reason that we found that most of the rights holders whose work has been infringed do not even have an idea of the power they have say through use of provided mechanisms such as the use of Anton pillar orders which are very crucial in dealing with infringement.

The ignorance about IP matters by the right-holders, the police and the general public has been a huge stumbling block as far as dealing with enforcement. As far as right-holders are concerned,

¹⁸⁶ [https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=ValueOfIP_Kenya_031113_LR%20\(4\)%20ACA](https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=ValueOfIP_Kenya_031113_LR%20(4)%20ACA).

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it acts as a hindrance to enforcement mainly because when they are not aware of the options available to them it means they are not able to enforce their rights. On the other hand, when the ignorance is on part of the public, people consume or engage in activities that are of infringement in nature while oblivious of the fact that their activities are hurting someone else. This lack of knowledge creates a fertile ground in that people who would otherwise shun products obtained through infringement consume them because of their ignorance which if they were aware they would not.

When the law enforcers i.e. the police are ignorant, it also means there is no hope of enforcement because one can only enforce that which they are aware about. This is where we end up with failure in enforcement mainly caused by inability of the police officers to appreciate that infringement of copyright is a grave matter.

The challenge of enforcing copyright in the ICT era has also been compounded by lack of inter-agency approach between the different Kenyan agencies administering and enforcing copyright infringement. This is for instance where we have KECOBO, ACA and the Police all charged with the responsibility of enforcement but with no coordinated effort at enforcement, in the circumstances, there are cases of duplication of effort and as earlier noted due to the issues of lack of capacity in these agencies duplication leads to failure to address many other instances of infringement.¹⁸⁷

With the issue of capacity also comes the issue of advanced technology that is available through which infringement can be perpetrated. It requires serious investment to aid detection of those sophisticated technology for infringement and I dare say there has not been investment that match the technology and thus enforcement is always at a place where it is always doing some catching up. This leads to a lot of infringement occurring right before the eyes of the enforcer but the chance of detection is minimal.

As far as KECOBO is concerned, they introduced the use of hologram stickers in an attempt to deal with counterfeit movies and audio visual products. However, the uptake of these stickers is very poor and thus it has become almost impossible to identify what is genuine and or what is counterfeit especially in view of the fact that the technology in use makes it almost impossible to distinguish a copy from the original.

¹⁸⁷ Ibid note 2

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Another problem that arises is the leniency in the law while dealing with criminal infringement. Under section 35(4) of the Copyright Act, No. 12 of 2001, the sentence set out ranges from a fine of four hundred thousand (400,000) shillings or imprisonment for a term not exceeding two (2) years or both to a fine not exceeding eight hundred thousand (800,000) shillings or an imprisonment for a term not exceeding ten (10) years or both. This ends up being very lenient in that the Act does not provide for a mandatory minimum sentence, hence then the sentencing is left to the discretion of the court and ordinarily the court rarely sentences offenders to maximum sentence provided.¹⁸⁸ As a result, the offenders end up with very light sentence which turn their infringing activities into lucrative business. Accordingly most offenders are not afraid because they will have made more money than the fines that the court imposes.

The ignorance of the law which is widespread with respect to IP permeates deeply and you find that right holders who have knowledge of infringement of their works do not take advantage of the Law. For instance there has been very limited use of the Anton Pillar orders by right holders which is attributed to the lack of knowledge about the availability of such orders.

When dealing with enforcement more so with the issue of counterfeit copyright products there are a number of factors that have contributed to widespread infringement. The main factor has been corruption and lack of co-ordination with customs authority while seeking enforcement.

5.2 RECOMMENDATIONS

In view of the findings of this study a number of recommendations are necessary to enable the enforcement of infringement to be effective. This is important because, unless there is proper enforcement there will be serious negative implication to the Kenyan society and the economy. Some of the recommendations are as follows:-

- There is need to increase the public awareness of the negative effects of copyright infringement. Thus there is need to train the enforcers especially the Police on the various aspects of infringement to ensure that they are effective in enforcement endeavors. The general public also should to be trained in order to appreciate the importance of compliance to the public and the economy. There is also need to train the judicial officers who handle cases that are taken to court. It is important to note that the very nature of IP is technical and as such judicial officers need to be trained to be technically equipped

¹⁸⁸ Ibid 3

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while dealing with IP cases before them and only then can they be able to effectively do justice to matters before them.

- There is need to establish an Inter-Agency approach between the different agencies administering and enforcing IP rights. Thus there is need for KECOBO, ACA, and the Police to work hand in hand and also to exchange information on what one is doing to create synergy and avoid duplication of efforts. Another agency that should be involved is the customs department especially to address the issue of counterfeit products that pass through customs. It is not in doubt that the synergy created by these agencies would go a long way towards ensuring that enforcement is effectively carried out.
- There is need to expand capacity within the agencies charged with enforcement as we stand now the inspectors who are the heart of enforcement at KECOBO are only about nine¹⁸⁹. This is definitely a very low number to be expected to handle the amount of infringement that may occur in the country. Though KECOBO has been training police officers on enforcements of copyright the training ought to be intensified to cover all members of the police force and probably this would ensure that way police officers has capacity to enforce copyright infringement cases.
- When it comes to the criminal measures provided both by copyright Act and the Anti-Counterfeit Act, 2008, there is need to review the fines upwards to provide deterrence. This would be by setting minimum fines which would make it uneconomical to engage in copyright infringement. There is also need to amend both the copyright Act and the Anti-Counterfeit Act, 2008 to introduce a mandatory custodial sentence for repeat offenders.
- The Anti- Counterfeit Act should be amended to introduce comprehensive border enforcement procedural rules. Currently, the Act states that the owner of an IPR may apply to the Commissioner only when he has valid reasons for suspecting that the importation of counterfeit goods may take place. The Act should be amended to make it mandatory for customs officials to certify that goods coming in or leaving the border are not counterfeits.

¹⁸⁹ Ibid note 183

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- There should be clarity as to who is the proper authority when it comes to the issue of enforcement. Presently, there is a complication because KECOBO, ACA and the police have a role in enforcement with the duplicity existing creating room for complacency in enforcement. Indeed there should be a merger of the two entities KECOBO and ACA involved in enforcement to create a super authority to benefit from the respective strengths of the two entities.
- With respect to infringements that occur online, there is need to have an effective monitoring system. Currently, there is a lot of infringing activities taking place without any serious attempt to stop and or arrest the situation through enforcement. The correct way of dealing with it would be to require all ISPs to put in place some mechanism for monitoring the illegal activities and to require them to report to the relevant authorities these transactions with a view to having them investigated and if found culpable to institute prosecution. Such accounts should also be suspended.
- It is without a doubt that one of the reasons why infringement activities are rampant is due to the mindset of the general public. Due to the existing demand for cheap materials and the thinking that pirated material is always cheaper, many people go for these pirated products. To counter this there is need to reduce the cost of the authentic products and increase the availability and the distribution network of the same. This way it will be possible to beat the violators at their own game.
- There is need to create a copyright Tribunal to deal with disputes arising as a result of infringement. This will ensure that there is;
 - (a) Specialization and expertise in dealing with disputes relating to issues of copyright
 - (b) Speedy resolution of disputes referred to it without the delays associated with mainstream judiciary
- There should be more investments in the agencies charged with the responsibility of enforcing copyright infringement. This would help in upgrading the technical capacity and infrastructure and also to develop online network to allow the enforcement agencies

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to rapidly exchange information on enforcement issues including real-time information on suspects, pirating sites, distribution routes and key sale points. Further, investment in the sector should ensure the sector players are trained with better methods aimed at improving knowledge, developing skills, capacities and competences to ensure that there is stronger enforcement.

- Greater exposure and use of digital protection technology like digital management rights and digital locks to protect works
- Train judges in understanding and hearing cases involving new technology. This will also ensure judges can levy stiffer penalties to offenders
- Train police in cyber technology enforcement and investigations
- Create greater awareness and utility of the KECOBO hologram stickers

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