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TITLE:

**ENHANCEMENT OF COPYRIGHT PROTECTION IN MUSICAL WORKS AND
SOUND RECORDINGS ON THE DIGITAL PLATFORM: A CASE STUDY OF THE
KENYA COPYRIGHT BOARD**

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DECLARATION

I Abubakar Mariam Adam, do hereby declare that this thesis is my original work and has not been submitted to any other university or institution for any award. I hereby now submit the same for the award of Master of Laws Degree of the University of Nairobi.

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Firstly, I thank the Almighty for bestowing me with grace, patience, tenacity and wisdom through the process of conducting the study.

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DEDICATION

I dedicate this work to my beloved husband and brother whose support and encouragement were positive motivating forces. I love you both dearly.

GLOSSARY OF ACRONYMS

CA 2001	Copyright Act 2001 (Kenya)
CD	Compact Disc
CMOs	Collective Management Organizations
CDPA 1988	Copyright, Designs and Patents Act 1988 (United Kingdom)
GDP	Gross Domestic Product
I.P	Intellectual Property
ISP	Internet Service Provider
IPRs	Intellectual Property Rights
KAMP	Kenya Association of Music Producers
KECOBO	Kenya Copyright Board
M-Commerce	Mobile Phone Commerce
MCSK	Music Copyright Society of Kenya
PRISK	Performers Rights Society of Kenya
TRIPS	Trade Related Aspects of Intellectual Property Rights
TCP	Transmission Control Protocol
UK	United Kingdom

VAS	Value Added Services
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty

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- Designers Guild Limited v Russell Williams (Textiles) Limited (2001) 1 WLR 2416
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- Elanco Products Limited v Mandops (Agrochemical Specialists) Limited CA 1979
- EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd (2011) 191 FCR 444
- Gramophone Limited v. Stephen Carwardine (1934) 1 Ch 450
- Ladbroke (Football) Ltd v William Hill (Football) Ltd (1964) 1 WLR 273
- LB Plastics Limited v Swish Products Limited CHD 1979
- Ludlow Music v Robbie Williams (2002) EWHC 638 (Ch)
- Mazer v. Stein 347 U.S 201 (1954)
- Metro Goldwyn-Mayer Studios Inc. v. Grokster, Ltd. 545 U.S. 913 (2005)
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- Sony Corp. of America v Universal City Studios, 464 U.S. 417 (1984)

- Temple Island collections ltd. v New English Teas ltd (2012) EWPCC 1

LIST OF STATUTES REFERRED TO

1. Constitution of Kenya 2010
2. Copyright Act (Amendment) Regulations 2015 - Kenya
3. Copyright Act (Amendment) (No.2) Regulations 2015 – Kenya
4. The Copyright (Amendment) Act 2012 – India
5. Copyright, Designs and Patents Act 1988 – United Kingdom
6. Digital Economy Act 2010 – United Kingdom
7. Ghana Copyright Act 2005
8. Indian Copyright Act 1957
9. Kenya Copyright Act 2001
10. Judicature Act 1967 - Kenya

LIST OF CITED INTERNATIONAL LEGAL INSTRUMENTS

1. Convention Establishing the World Intellectual Property Organization
2. The Berne Convention for the Protection of Literary and Artistic Works 1886
3. The Electronic Commerce (EC Directive) 2002
4. United Nations Universal Declaration of Human Rights 1948

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CHAPTER ONE: A BACKGROUND ON UNDERSTANDING THE NEED TO PROTECT COPYRIGHT IN MUSICAL WORKS AND SOUND RECORDINGS, BY THE KENYA COPYRIGHT BOARD (KECOBO)

1.0 Introduction

This chapter will set an agenda for a general understanding of the need for protection of copyright in musical works and sound recordings, by KECOBO. This study aims at enhancing the ability of the Kenya Copyright Board (KECOBO) in protecting copyright in musical works and sound recording on the digital platform. The study focuses on KECOBO because it is the state agency in Kenya that has the mandate to administer and implement copyright. The study will focus mainly on Kenyan music meant for the Kenyan market; although it should be appreciated from the onset that music does not have borders, especially today with the existence of the social media landscape and development in digital technology.

1.1 Back ground to the study

The term intellectual property has been used for over 150 years to refer to creations of the intellect or human mind.¹ Defining the extent of rights in tangible and real property is quite straight forward; for this is normally done by existence of beacons.² This scenario is not the same for intellectual property rights, because there are no beacons. This has led to each field of intellectual property coming up with its own parameters to define the extent and limit of

¹ L. Bently and Sherman, *Intellectual Property Law* (Oxford University Press 2009, '3rd edn)

² *ibid*

intellectual property rights.³ For example patents need to be registered and for one to enjoy copyright in musical works they need to express their ideas in tangible form.

Intellectual Property (IP) refers to creations of the mind; inventions; literary works and artistic works; and symbols, names and images used in commerce.⁴ Intellectual property rights protect the interests of creators by giving them property rights over their creations.⁵ Though the cited articles by the World Intellectual Property Organization (WIPO) have tried to define intellectual property; the term ‘intellectual property’ (IP) has no universally agreed definition. Rather than define IP the various treaties and conventions on IP refer to various categories of IP. For instance the WIPO Convention of 1967 establishing the WIPO does not offer a formal definition of IP rather it defines IP broadly as including rights relating to:⁶

“literary artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic field.”⁷

³ above n.1

⁴ ‘What is Intellectual Property’ WIPO www.wipo.int/edocs/en/intproperty/450/wipo_pub_450.pdf accessed 10 November 2014

⁵ ‘Understanding copyright and related rights’ WIPO www.wipo.int/edocs/pubdocs/en/intproperty/909/wipo_pub_909.pdf accessed 10/11/14

⁶ Moni Wekesa & Ben Sihanya, *Intellectual Property Rights in Kenya* (Konrad Adenauer Foundation 2009)

⁷ Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967, article 2, viii

Though there seems to be no agreed definition of IP, one thing that seems to be accepted by all in intellectual property is the meaning of ‘to create’.⁸ It is accepted that the creation of works is done by an individual and not by a machine or a god. An individual is the one who manipulates the raw material to enable them come up with a creation capable of giving raise to intellectual property rights. This view was well noted by John Locke in his property theory; he argues that goods are granted by God as bounty to humanity for its enjoyment and they are held in common, but these goods cannot be enjoyed in their natural state.⁹ The individual must modify these goods and add value to them, by exerting labor upon them, it is only by doing this that the goods are turned into private property and they can be enjoyed by a human being.¹⁰ Locke’s property theory is discussed in detail below at the theoretical framework.

In Kenya intellectual property is divided into four wide categories; Industrial Property, Copyright, Traditional Knowledge (governed by the Traditional Knowledge and Cultural Expressions Act) and Plant Breeders’ Rights (governed by the Seeds and Plants Varieties Act). Industrial property includes patents, trademarks, industrial designs and processes. These are registered by the Kenya Industrial Property Institute (KIPI).¹¹

Copyright encompasses original literary works, musical works, artistic works, audio visual works, sound recordings and broadcasts.¹² The Copyright Act, 2001 (Cap. 130) governs matters of copyright and it establishes the Kenya Copyright Board under section 3.

⁸ above n. 7

⁹ Justin Hughes, ‘The Philosophy of Intellectual Property’ [1988] 77 George Town Law Review 287 www.law.harvard.edu/faculty/tfisher/music/Hughes1988.html accessed 4 November 2015

¹⁰ ibid

¹¹ Mister NV, ‘Demystifying copyright and intellectual property in Kenya’ 18 July, 2011 <http://diasporadical.com/2011/07/18/demystifying-copyright-and-intellectual-property-in-kenya/> accessed on November 19 2014

¹² Copyright Act 2001, s. 22 (Kenya)

This study seeks to look at the challenges encountered by KECOBO in implementing the Copyright Act, mainly in relation to Kenyan musical works and sound recordings. It seeks to address the question whether protection of copyright in musical works and sound recordings by KECOBO can be enhanced. The study will look at the efficiency of KECOBO in protecting copy right of these works in the digital era; at this juncture it will focus on the internet and digital technology. The study will conclude by proposing ways of empowering KECOBO in its mandate to protect copyright in musical works and sound recording.

The country has appreciated the need to protect copyright. This was demonstrated on 21st July, 2014 at an inter-ministerial meeting held between cabinet secretaries dealing with creative industries and the Honorable Attorney General.¹³ The meeting's main agenda was to implement a directive by the president; which aimed to structure the arts industry in a way that rewards talent and creativity in Kenya.¹⁴ The directive is aimed at reforming the arts industry to ensure it utilizes and promotes talent as a way of creating jobs and wealth.¹⁵ Protection of copyright and I.P is paramount to realization of this vision. The creative industries are set to contribute over 10% of GDP by 2017.*

¹³ KECOBO 'Press release on the Inter-Ministerial copyright meeting' <<http://www.copyright.go.ke/about-us/who-we-are/2-uncategorised/75-kecobo-inter-ministerial-copyright-meeting.html>> accessed on October 28, 2015

¹⁴ *ibid*

¹⁵ *ibid*

* Former Executive Officer KECOBO Marisella Ouma at the Inter- Ministerial copyright meeting held on July 21, 2014

According to a study conducted by WIPO it was established copyright industries in Kenya contribute close to 5.3% to the Gross Domestic Product (hereinafter referred to as GDP).¹⁶ It was also noted that the industry contributed to over 3.3% to the overall employment in Kenya.¹⁷

Protection of I.P has been recognized as a human right worthy of protection. This is observed in the provision of Article 27(2) of the United Nations Universal Declaration of Human Rights 1948 which provides:-

“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”¹⁸

Unlike the previous constitution, the Constitution of Kenya 2010 seeks to promote and protect I.P.¹⁹ Article 260(c) includes I.P in the definition of property. Article 40(5) makes it an obligation on the state to support, promote and protect the IPRs of the people of Kenya. Article 11(1)(c) provides that the state recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Under this article the state is obligated to promote the IPRs of the people of Kenya.

This study is inspired by the belief that an author of musical works and sound recordings should be protected to enable them benefit from the product of their intellect and effort. One of the major ways of protecting copyright in musical works and sound recordings is by appreciating the

¹⁶ KECOBO ‘Kenya Copyright Board Celebrates five years’ issue 11 Copyright News
<<http://www.copyright.go.ke/awareness-creation.html?download...copyright...>> accessed on 29 October, 2015

¹⁷ ibid

¹⁸ United Nations ‘United Nations Universal Declaration of Human Rights’ 1948
<<http://watchlist.org/wordpress/wp-content/uploads/Universal-declaration-of-human-rights.pdf>> accessed on 30 October, 2015

¹⁹ IP Kenya ‘Intellectual Property from a Kenyan Perspective’ 9 January, 2011
<<https://ipkenya.wordpress.com/2011/01/09/constitutional-protection-of-intellectual-property-in-kenya/>> accessed 16 November 2015

existence of Intellectual Property Rights, which need to be respected and enforced. IPRs are the only way an author can have property rights in intangible work. IPRs aim to protect and reward innovative activity.²⁰

Society has no problem of granting exclusive rights in tangible or real property which are deemed as scarce, there seems the need to justify granting of IPRs for they mainly grant rights in intangible property, which do not seem scarce.²¹ Further the author of intellectual work does not seem to suffer detriment when his or her IPRs are infringed on.

Allocating IPRs to the creator of a work balances the private interests of the creator, by ensuring that they have an incentive to create, against those of the society at large in having the information available for its use. Even though the information does not diminish once it is shared, the role of IPRs is to ensure that the information providers, do not lose rights to the information by disclosing it; since such information can be used by an infinite number of persons simultaneously. Indeed one of the philosophical underpinnings of IPRs is to ensure disclosure of information. The assumption being that lack of such right would discourage information holders from sharing their information for fear of losing it.²²

1.2 Statement of the Problem

The Copyright Act 2001 establishes KECOBO under section 3, whose main mandate is to ensure implementation of the Copyright Act. It is through implementation of the Copyright Act that authors of musical works and sound recordings can benefit from copyright. This Act states the

²⁰Dr. Patricia Kameri Mbote, 'intellectual property protection in Africa an assessment of the status of laws, research and policy analysis on intellectual property rights in South Africa International Environmental Law Research Centre working paper 2005-3 <<http://www.ielrc.org/content/w0503.pdf>> accessed November 21 2014

²¹ above n. 1

²² above n. 20

functions of KECOBO, and section 5(a) provides that one of the functions of the Kenya Copyright Board is to “*Direct, coordinate and oversee the implementation of the laws and international treaties and conventions to which Kenya is a party to and which relate to copyright and other rights recognized by the Act and ensure observance thereof.*” The board is therefore responsible of overseeing matters related to copyright.

The problem I have observed is that despite Kenya having a Copyright Act whose main aim is to protect the authors of musical works and sound recordings by bestowing upon them exclusive economic and moral rights and empowering KECOBO to oversee the same, the authors seem not to enjoy total protection. One of the indicators of this argument is that pirated copies of Kenyan music compact discs (CDs) are available on the streets of Nairobi at unrealistically low prices. Although on the surface this seems to be a trivial act, it potentially infringes on all of the economic and moral rights that should be enjoyed exclusively by the author.

The economic rights of copyright include; exclusive rights to control reproduction of the work, distribution to the public by way of sale, rental, lease or hire, rights of communication of the work to the public and broadcasting of the work and the right to export or import the work.²³

Moral rights of copyright on the other hand aim to protect the reputation and personal value of a work the author has to his or her work. These rights endeavor to enable the author have control over the eventual fate of their works.²⁴ Moral rights include giving the author the right to claim ownership of the work, protecting the work from distortion, mutilation, modification or

²³ Japhet Otike, ‘Copyright Law in Kenya’ (2011) <<https://www.mu.ac.ke>> accessed on 19 January 2016

²⁴ Betsy Rosenblatt, ‘Moral Rights Basics’ Harvard Law School last modified March 1998 <http://cyber.law.harvard.edu/property/library/moralprimer.html> accessed 29 February 2016

derogatory act.²⁵ Having pirated copies of the author's music available denies both the author of musical works and sound recording control of any of the aforementioned economic rights, and may jeopardize their moral rights. Further the author may not be able to make a living out of his labour, therefore the arts industry will not only fail to nurture talent and creativity, but also the industry cannot be used as a source of livelihood.

1.3 Justification of the problem

The study is justified because musical works and sound recordings are a form of IP consequently the authors of these works should be protected to enable them benefit fully from their creation. Further protection of copyright in musical works and sound recordings will encourage more innovation. It is also morally wrong for one to benefit in any way from the work of another without the authority of the author. This has been appreciated by Murray Rothbard who indicated in a paper submitted to the Daily Paul Liberty Forum; that when a man produces a piece of music and on top of the first sheet he imprints the word "copyright". This imprint indicates that any man who agrees to purchase the music also agrees as part of the exchange not to recopy or reproduce this work for sale. Hence the music is sold on this condition and a breach of this condition leads to an infringement of copyright.²⁶

There is a need to address the problem of piracy because copyright ideally is meant to grant exclusive rights to the right holders/owners and protect creativity. Labor needs to be rewarded by granting exclusive rights to the author with an intention to promote creation of products that enable society enjoy. These exclusive rights include; the rights to reproduce, distribute, sell, hire

²⁵ Copyright Act(2001) s.32(1) Kenya

²⁶ Dennis York, 'Murray Rothbard defends intellectual property' (Daily Paul Liberty Forum, 7 November 2012) <<http://www.dailypaul.com/244209/murray-rothbard-defends-intellectual-property>> accessed 21 November 2014

and communicate to the public, import or broadcast.²⁷ Piracy is a big problem in Kenya especially in music works; a substantial percent of music works are pirated.²⁸ It is alleged that sometimes pirated copies of music are released in to the market even before the genuine product hits the market.²⁹ Dr. Kalyan C. Kankanala the author of Genetic Patent - law and strategy said “piracy begins where creativity ends.” Hence among the reasons why piracy should be curbed is to ensure creativity of the society is nurtured. Further it defeats logic having a law that aims to protect copyright but it seems not to fulfill its aim.

The above observation hence begs the question why is KECOBO unable to fully curb piracy? Is it that the Board lacks mechanisms? Is the language of the Copyright Act, 2001 too technical for the layman to understand? Do authors understand and appreciate their rights?

1.4 Objectives of the study

Main objective:

How can KECOBO best address music piracy hence ensuring copyright in musical works and sound recordings is protected on the digital platform.

Specific objectives:

- (a) To assess the ability of the Kenya Copyright Board in protecting copyright in musical works and sound recordings on the digital platform. It will do this by looking at the functions of the board as set out in the Copyright Act 2001, and assessing the challenges

²⁷ KECOBO ‘*The scourge of piracy a menace to investors in Kenya*’ (2011) (3) Copyright News <[www.copyright.go.ke/awareness-creation .html](http://www.copyright.go.ke/awareness-creation.html)> accessed on 11 November 2014

²⁸ ibid

²⁹ ibid

and shortcomings faced by the Kenya Copyright Board, in implementing the Copyright Act in digital works.

- (b) To examine the mechanisms the Kenya Copyright Board has put in place to implement the Copyright Act 2001; particularly in protection of copyright in musical works and sound recordings on the digital platform. It will focus on the efforts applied by KECOBO to protect copyright in musical works and sound recordings produced in Kenya by Kenyan authors.

1.5 Research questions

The study will attempt to answer the following questions:-

- (a) What are the mechanisms put in place by KECOBO in protecting copyright in musical works and sound recordings on the digital platform, and what are the challenges faced by the Kenya Copyright Board in implementing copyright in these works?
- (b) Can the mechanisms in (a) above be improved and are there better mechanisms that can be proposed, which can make the Kenya Copyright Board be in a better position to protect copyright in musical works and sound recordings on the digital platform?

1.6 Hypothesis

This study proceeds on the presumption that there seems to be a problem or challenge(s) in the implementation of copyright in musical works and sound recordings on the digital platform, because despite having legislation and a body aimed to protect copyright, copyright in these works is still being infringed.

It focuses its attention on the Kenya Copyright Board because this is the body that is established to “*Direct, coordinate and oversee the implementation of the laws and international treaties and conventions to which Kenya is a party to and which relate to copyright and other rights recognized by the Act and ensure observance thereof.*”³⁰

1.7 Literature Review

Although there is immense literature on I.P and IPRs few of the literature have suggestions on how enforcement of copyright in musical works and sound recordings can be enhanced. Further with the fast development in technology new ways of protecting copyright need to be created, to ensure protection of these works on the digital platform. The existing literature brings out the fact that IPRs need to be recognized, appreciated, protected and enforced. This study aims to propose ways of how copyright in musical works and sound recordings can be enforced on the digital platform. I argue one of the ways this can be done is by assessing the challenges encountered by the Kenya Copyright Board in enforcing copyright in these works. After assessing these challenges the study will propose ways of how to address them.

Ben Sihanya in his work titled *Copyright Law in Kenya* notes that although there is a law that deals with copyright and which provides for both civil and criminal remedies, there is a need to ensure there is enforcement of copyright; because for example remedies like damages and fines respectively will not be sufficient if enforcement of copyright is not addressed.³¹ He goes further to note that Kenya’s IP regime is still lacking in many aspects and it faces challenges in enforcing copyright; one such challenge is that the government does not appreciate IPRs and it

³⁰ Copyright Act, 2001 s.5(a) (Kenya)

³¹ Professor Ben Sihanya, ‘Copyright in Kenya’, (2001)

http://musicinafrica.net/sites/default/files/copyright_law_in_kenya_-_prof_ben_sihanya_0.pdf accessed 30 July 2016

handles copyright infringement in a casual manner, further the country lacks mechanism of monitoring copyright transactions leaving this task to copyright owners who cannot reach all the parts of the country.³² The gap this study aims to fill is propose ways of how copyright can be enforced at least in a substantial part of the country, using Internet Service Providers and other stakeholders. Ben Sihanya's sentiments are echoed in the article titled *Copyrights Royalties and Music Piracy in Kenya*, where the author indicates Collective Management Organizations have to rely on their members to report acts of copyright infringement to KECOBO for investigation and prosecution.³³ These writings clearly demonstrate there are challenges in enforcing copyright making KECOBO have to rely on copyright owners reporting cases of copyright infringement before it can investigate and prosecute the cases. The question is what happens in cases where the copyright owners are not well conversant with their rights? Will they recognize cases where their copyright is being infringed so that they can report the same? The study will propose ways on how to make the citizenry appreciate and in turn be willing to protect copyright.

Ben Sihanya in chapter 6 of the book *Intellectual property in Kenya*; notes another challenge faced by the Kenyan music industry in implementing copyright laws is the attitude the police have towards IPRs.³⁴ The police despite being one of the main stakeholders in the enforcement of copyright; do not seem to appreciate IPRs; they consequently do not give copyright infringement the seriousness it deserves, because no bodily harm seems to have been occasioned.³⁵ He also notes KECOBO which is mandated with enforcement of copyright, faces challenges such as understaffing, low budget and lack of technical support because it is under the

³² ibid

³³ Victor Nzomo, 'Copyrights Royalties and Music Piracy in Kenya', (2015) Music In Africa <http://musicinafrica.net/copyrights-royalties-and-music-piracy-kenya> accessed 30 July 2016

³⁴ above n. 6

³⁵ ibid

Office of the Attorney General and not autonomous.³⁶ In addressing some of these challenges KECOBO carries out education of copyright matters to the police, who are enlightened about the provisions in the Constitution of Kenya 2010 pertaining to protection of IPRs, with an intention of making them be better placed in enforcing these rights.³⁷ Hopefully teaching the police about copyright matters will aid in changing their attitude towards copyright matters and make them handle copyright infringement with more seriousness. Further the government has hiked the renewal license fee and registration fee payable by Collective Management Organizations to KECOBO.³⁸ This increases the amount of finances KECOBO gets and it may enable it be better placed in running its administration affairs. The government has also introduced ‘a blank tape levy’ this is a levy which is payable to copyright owners by manufacturers and importers of recording equipment which can be used by individuals to store music for their private use.³⁹ The blank tape levy paid to copyright owners can be a form of compensation incase the users of these equipments end up using the equipment for infringement of copyright, although this may be the case the author argues that this levy should not be a substitute to enforcement of copyright. From the writings of Ben Sihanya the author concurs the country does have challenges in enforcing copyright, but holds the view the future of copyright is not grim because the government together with other stakeholders is making efforts to address these challenges. It is from this background that this study seeks to propose ways protection of copyright in musical works and sound recordings can be enhanced.

³⁶ above n.6

³⁷ above n. 33

³⁸ Kenya Law, ‘Copyright Act (Amendment) Regulations 2015’, Legal Notice No. 26
<http://kenyalaw.org/kl/index.php?id=5186> accessed 30 July 2016

³⁹ Kenya Law, ‘Copyright Act (Amendment) (No.2) Regulations 2015’, Legal Notice No. 191
<http://kenyalaw.org/kl/index.php?id=5204> accessed 30 July 2016

KECOBO in its publication titled *Enforcement of Copyright and Related Rights* acknowledges that enforcement of copyright is challenging, due to the unique nature of IPRs which consequently reflects in the complaints and cases. Further mechanisms put in place by KECOBO in addressing copyright infringement in musical works and sound recordings is not always welcomed.⁴⁰ A good example is when KECOBO introduced the Anti Piracy Security Device in 2001 which comes in form of a barcode sticker that is to be affixed on original CDs before they are put out for sale; both retailers and copyright owners were against the device, copyright owners claiming it makes their products more expensive due to the cost of buying the device, leading to a reduction of the price by KECOBO.⁴¹ Despite the challenges faced by KECOBO it appreciates if I.P is to thrive, enforcement of I.P is crucial, it further notes that Article 40(5) of the Constitution provides “*the state shall support, promote and protect the IPRs of the people of Kenya*”.⁴² The writings by KECOBO make this study appreciate the body indeed puts in place mechanisms to combat piracy and tries to address challenges faced when protecting copyright in musical works and sound recordings. Further in protecting music and sound recording copyright KECOBO is not only fulfilling its mandate but also carrying out a constitutional duty; therefore in proposing ways of enhancing copyright this study aims to assist KECOBO be better placed in carrying out its mandate.

In the quarterly publication by KECOBO titled *scourge of piracy; a menace to investors in Kenya*, it was noted, the Kenyan music industry is worst hit by piracy consequently a substantial percent of music is pirated and at times counterfeit music hits the market before the genuine

⁴⁰ George Mbaye, ‘Role of the Judiciary, Police and Anti-Counterfeit Agency in the Enforcement of Copyright and Related Rights’, (2012) (7) Copyright News <http://www.copyright.go.ke/media-gallery/newsletters.html> accessed 31 July 2016

⁴¹ Marisella Ouma, ‘Enforcement of Copyright and Related Rights’, (2012) (7) Copyright News <http://www.copyright.go.ke/media-gallery/newsletters.html> accessed 31 July 2016

⁴² *ibid*

product is produced.⁴³ Piracy has an effect on the author, consumer and economy, to understand this, one needs to appreciate the stages an author of musical works has to go through before his work is converted to a sound recording. These stages are mandatory if the author of musical works is to benefit economically for the work, because it is only through dissemination and distribution of his musical works that the author gets economic benefit.⁴⁴ An author of music works expends a lot of time and effort in coming up with an album, typically the author comes up with lyrics of a song; he pays somebody to arrange the lyrics and come up with a suitable melody.⁴⁵ The person who comes up with the melody finds vocalists and instrumentalists who rehearse for at least one to two weeks, after rehearsals a studio is hired and the author pays hourly between Kshs. 1,200 and Kshs. 1,300 where mixing and recording takes place; audio recording costs between Kshs. 80,000 to Kshs. 350,000 per album.⁴⁶ The master copy is prepared and it is taken with the lyrics to a printer, for preparation of the album cover and a photographer is hired to take photos of the album cover. Alternatively the author may go directly to the producer who does the arranging of lyrics, melody and recording; through this venue the author will pay between Kshs. 8,000 and Kshs. 30,000 for an album of 8 to 10 songs.⁴⁷ If the authors work becomes subject of piracy they most probably will end up not recouping the cost of the production nor make any profit. Most pirated works are substandard therefore they cannot compete in the international markets. This affects the work the author produces for it seems their name will already be tarnished even before their works hits the international market, hence affecting sales. When music is put out on the market it is usually marked ‘copyright’ this implies

⁴³ above n.27

⁴⁴ ibid

⁴⁵ KECOBO, Interview with Japheth Kassanga, Music Producer (September, 2011)
<http://www.copyright.go.ke/media-gallery/newsletters.html> accessed 31 July 2016

⁴⁶ ibid

⁴⁷ above n.45

the author owns the copyright. Therefore any person who buys the music buys it with this condition and is expected not to infringe on the copyright. Kenyan music has the mark of copyright but still the public infringes on the copy right. This study will not only acknowledge piracy is a menace to Kenyan music but it will discuss the reasons why people pirate music, because the author believes understanding the reasons, places the study in a better position to propose ways of addressing piracy.

Marisella Ouma attempts to answer the question whether copyright has a place in the digital environment, opponents of copyright indicate copyright only aims to stifle dissemination and access of works, while proponents argue copyright is still relevant and the law just needs to be modified to ensure authors retain control over their works.⁴⁸ With all the technological developments the copyright law seems to be lagging behind and is struggling to catch up; after passage of the WIPO internet treaties the CA 2001 incorporated some of the provisions to address online copyright infringement, but albeit this, the question is the law adequate? Or has it been overtaken by technology beg to be answered?⁴⁹ She notes unlike the days when one had to visit a store to buy a music CD, today one can download the same without the author's authority, courtesy of development in technology, which has made it easier for authors to reproduce and disseminate their work, she acknowledges it is true the copyright law faces challenges in its attempt to catch up with technology, but these challenges need to be addressed and the CA 2001 should be amended when necessary to ensure copyright stays relevant in the digital environment.⁵⁰ The author agrees with the proponents of copyright and believes the CA 2001

⁴⁸ Marisella Ouma, 'Copyright in the Digital Environment', (2012) (5) Copyright News <http://www.copyright.go.ke/media-gallery/newsletters.html> accessed 1 August 2016

⁴⁹ ibid

⁵⁰ above n.48

needs to be amended to ensure protection of copyright in musical works and sound recordings in the digital environment. Marisella acknowledges there is need to amend the CA 2001 to make it address music piracy in the digital environment. This study also does so but the difference is that it will go further and propose amendments to the Act to make it respond to the developments in technology therefore making it relevant on the digital platform.

Edward Sigei notes digitization of works has made it possible to store huge amount of data in a small space, further digital works can be easily and perfectly copied while dissemination of these works is easy, cheap and quick.⁵¹ This challenges the purpose of copyright and is a threat to both the moral and economic rights of the author; although in response the CA 2001 included usage of technical protection measures by authors it has not provided for exceptions and limitations in their usage, further Internet Service Providers need to be made liable for secondary copyright infringement.⁵² The author agrees with the points brought out by Mr. Sigei, but the difference with this study is that it will go a step further and analyze how other jurisdictions have placed obligations on Internet Service Providers, with an intention to enhance protection of copyright in musical works and sound recordings in the digital environment, and propose the best practices Kenya can adopt.

Lysander Spooner in his writings on intellectual property titled *an essay on the right of authors and inventors to a perpetual property in their idea* advocates for the idea that an author has a natural and absolute right hence perpetual right of property in his ideas, he argues that an idea is a source of wealth because it is from this idea that an author can create something that is tangible

⁵¹ Edward Sigei, 'Copyright Challenges in the Digital Platform', (2012) (5) <http://www.copyright.go.ke/media-gallery/newsletters.html> accessed 1 August 2016

⁵² *ibid*

capable of bringing wealth; hence it should be protected.⁵³ The author agrees with Spooner in so far as he argues that an idea can be a source of wealth, because musical works and sound recordings are works of the intellect and they start as ideas before they are finally expressed in tangible form. Although the author disagrees with Spooner on his argument that ideas are worthy of copyright, on this point I agree with the CA 2001 that provides for a musical work to be eligible for copyright it has to be written down, recorded or reduced to material form and sufficient effort must have been expended on making the work to give it an original character.⁵⁴ The moment these preconditions are satisfied copyright is automatic and hence one cannot have a copyright in an idea or concept. This study will therefore discuss the concept of an idea/ expression dichotomy to make readers appreciate the difference between an idea and an expression and why this difference is relevant in the grant of copyright in works of IP including musical works and sound recordings.

Patricia Kameri Mbote in her working paper titled *Intellectual Property Protection in Africa An assessment of the status of laws, research and policy analysis on intellectual property rights in South Africa* Indicates IPRs are property rights in something intangible and protect innovative activity, granting IPRs to the creator of works ensures they have an incentive to continue creating new works while simultaneously enabling the public use the works, without the author fearing losing rights over his works.⁵⁵ In its recommendations the study will therefore propose ways of

⁵³ Lysander Spooner, *The Law of Intellectual Property; on An Essay on the Right of Authors and Inventors to a Perpetual Property in their Ideas* (Vol. 1 Boston: Bela Marsh, 1855). <http://oll.libertyfund.org/titles/2243> accessed on November 24 2014

⁵⁴ Copyright Act 2001 s.22(3) (Kenya)

⁵⁵ Professor Patricia Kameri Mbote, 'Intellectual Property Protection in Africa An assessment of the status of laws, research and policy analysis on intellectual property rights in South Africa' (2005) International Environmental Law Research Centre Working Paper 3/2005 https://www.researchgate.net/publication/242313580_INTELLECTUAL_PROPERTY_PROTECTION_IN_AFRIC

how best the interest of copyright owners in musical works and sound recordings can be protected, while at the same time their works are made available to the users.

In her writings Patricia Kameri Mbote notes KECOBO is among the major stakeholders in IP, but it is faced with challenges such as inadequate infrastructure both in human resource and finances, retaining staff is difficult due to the more lucrative pay packages offered by international and regional institutions dealing with IP thus trained staff leave for greener pastures.⁵⁶ She appreciates that Kenya has invested in IP institutions and IP laws but little research has been done to establish the impact these laws and institutions have on the development of the country; she writes it would be interesting to explore the impact widening of exclusive rights, extension of duration of protection and strengthening enforcement mechanisms would have in the development of Kenya.⁵⁷ The author agrees with professor Mbote that KECOBO is one of the major stakeholders in IP matters; this is the reason why the study focuses on KECOBO and aims to propose how the body can enhance protection of copyright in musical works and sound recordings.

The above literature review demonstrates existing literature appreciates KECOBO faces challenges in enforcement of copyright protection, but it has not addressed the issue of how copyright protection in musical works and sound recordings can be enhanced in the digital platform. This study aims to propose ways in which copyright protection in musical works and sound recordings can be enhanced in the digital form; this is the gap this study intends to fill.

[A AN ASSESSMENT OF THE STATUS OF LAWS RESEARCH AND POLICY ANALYSIS ON INTELLECTUAL PROPERTY RIGHTS IN SOUTH AFRICA](#) accessed 2 August 2016

⁵⁶ Professor Patricia Kameri Mbote, 'Intellectual Property Protection in Africa: An Assessment of the Status of Laws, Research and Policy Analysis on Intellectual Property Rights in Kenya' (2005) International Environmental Law Research Centre Working Paper 2/2005 <http://www.ielrc.org/content/w0502.pdf> accessed 3 August 2016

⁵⁷ *ibid*

1.8 Theoretical Framework

Although there are several arguments that justify protection of intellectual property and in turn copyright in musical works and sound recordings. This paper will be centered on the natural law school of thought as propounded by John Locke and Hegel whose arguments seem to intertwine.

John Locke's (1632 – 1704) school of thought has its roots on morality and is a proponent of the *Natural Rights/ Justice Argument* which justifies granting of IPRs to authors aims not to benefit the society, but instead argue IPRs should be granted to authors for it is the right thing to do.⁵⁸

The argument Locke puts forth is that *a person has a natural right over the labor and/or products which is produced by his/her body, appropriating these products is viewed as unjust.*⁵⁹

It should be appreciated that Locke never stated explicitly that a natural right applied to products of the mind, although it is possible to apply his argument to intellectual property rights, in which it would be unjust for people to misuse another's ideas without their consent to benefit economically.⁶⁰

Locke tried to link natural rights to a theory of property, he propounds that god gave earth to mankind in common and that each individual has 'property' in his/her own 'person' and the 'labour' of his/her body and the 'work' of his/her hands; he therefore argues that every individual should own what he/she produces from the commons.⁶¹ He further argues that if man expends labor which is more than what an ordinary man would expend. Then the resulting

⁵⁸ Brigitte Andersen , 'The Rationales for Intellectual Property Rights: The Twenty – First Century Controversies ' (2003) http://www.druid.dk/conferences/summer2003/Papers/B_ANDERSEN.pdf accessed on January 5 2016

⁵⁹ Wikibooks, '*intellectual property and the internet/intellectual property* http://en.wikibooks.org/wiki/Intellectual_Property_and_the_Internet/Intellectual_property#cite_note-23 accessed on November 24 2014

⁶⁰ ibid

⁶¹ above n.6

product is worth granting such a man IPRs.⁶² Therefore as long as a person has expended labour and used the commons to add value to them; this person is entitled to the creation.

Locke's sentiments are echoed in the book *Intellectual Property Rights in Kenya* which is edited by Moni Wekesa and Ben Sihanya. Moni Wekesa states Locke propounds that God gave the earth to mankind in common and that each individual has 'property' in his/her own 'person' and the 'labour' of his/her body and the 'work' of his /her hands.⁶³ Moni Wekesa quotes the following passage from Locke's Two Treatise of Government:-

Whatsoever, then, he removes out of the state that nature has provided and left it in, he has mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it has by this labour something annexed to it that excludes the common right of other men.

According to the avoidance theory of labour, labour is thought to be uncomfortable and therefore many people would rather avoid it; consequently those who sacrifice to 'labour' should be rewarded with property rights, Locke's theory can also be seen in terms of 'value-addition' that deserves to be rewarded.⁶⁴

Locke's argument is based on the idea that laborers have the right to control that which they create; he argues that the laborers own their bodies and this right to own extends to what they

⁶² above n. 6

⁶³ ibid

⁶⁴ ibid

create.⁶⁵ Further the state has a duty to respect and enforce the right to property ownership once one has expended labour to goods held in common to create a product.⁶⁶

This study is motivated and relies on the natural law school of thought developed by Locke in his theory of property ownership, where he argues that labor should be rewarded with property rights, and which is echoed by Professor Moni Wekesa in his work above. It is with this breath that this study aims to propose recommendations to ensure copyright in musical works and sound recordings is protected in the digital platform as it is in the non digital platform.

Hegel propounds The “*Personality Argument*”: personality theorists believe that intellectual property is an extension of an individual, they base this argument on the quote from Hegel: “*Everyman has the right to turn his will upon a thing or make the thing an object of his will.*” This means that an individual has a right to set aside a thing and recreate it as his own. European intellectual property law is shaped by the notion that “ideas are an extension of oneself and of one’s personality.”⁶⁷

Personality theorists argue that by being a creator of something one is inherently at risk and vulnerable for having their ideas and designs stolen or altered, Intellectual property aims to protect these moral claims for one’s creations are considered to be an extension of one’s personality.⁶⁸

The above theories support the idea/expression dichotomy for they provide a person is entitled to that which they create. A creation can only be seen once it moves from being an idea to being

⁶⁵ above n.53

⁶⁶ William Fisher, ‘Theories of Intellectual Property’, <http://www.law.harvard.edu/faculty/tfisher/iptheory.html> accessed 4 August 2016

⁶⁷ above n.6

⁶⁸ Meenakshi Chahal, ‘Intellectual Property Rights for Intangible Assets’ (2013) 1(3) View of Space www.viewofspace.org/june2013/7.pdf accessed 4 August 2016

expressed, for example a piece of music. Copyright law protects illustration or expression of ideas and not ideas.⁶⁹ For copyright to exist, ideas need to be expressed in tangible form.⁷⁰ Creating a scenario where ideas are protected would lead to people not sharing information, and this would have a negative effect on development. The idea/expression dichotomy was solidified in the cases of *Dymow v. Bolton*⁷¹ and *Mazer v. Stein*⁷² where the court held that copyright does not protect the idea itself but protection is given to the expression of an idea.⁷³

This study relies on the above natural law theories because it not only advocates for protection of copyright in musical works and sound recordings, but goes further to propose ways on how this protection can be enhanced in the digital platform. The study supports granting of copyright once an individual has expended his labour and skill to create a musical work or sound recording. Further the study advocates for granting of copyright in musical works and sound recordings because they are a form of IP, thus originate from an author's intellect and it can be argued as Hegel does, they are an extension of the author, thus without usage of the author's intellect these works would never have been created in the first place. The study relies on case law and legislation that supports Locke's and Hegel's arguments for granting of copyright. The study in proposing ways of enhancing protection of copyright in musical works and sound recordings aims to protect both economic and moral rights of the author.

⁶⁹ Japhet Otike, 'Copyright:- The challenges posed by Reproduction Rights Organizations (RROs) in the provision of information to users with special reference to Kenya' (2012) <http://www.mu.ac.ke/informationsscience/images/Publications/copyright-thechallengesposedbyrros.pdf> accessed on 4 January 2015

⁷⁰ Copyright Act 2001 s. 22(3)(b) (Kenya)

⁷¹ *Dymow v. Bolton* 11F.2d 690 (2d cir.1926)

⁷² *Mazer v. Stein* 347 U.S 201 (1954)

⁷³ Richard H. Jones 'The myth of the Idea/Expression Dichotomy in Copyright Law (1990) 10(3) Pace Law Review <http://digitalcommons.pace.edu/plr/vol10/iss3/1> accessed 4 January 2015

1.9 Chapter breakdown

Chapter one introduces and sets the agenda for a general understanding of the need for protection of music copyright and sound recordings, by the Kenya Copyright Board (KECOBO). In this chapter I outline the background of the topic, mainly why I.P needs to be appreciated, recognized and further why IPRs need to be protected. I argue that musical works and sound recordings need not only be viewed as modes of entertainment but more importantly as ways the authors create wealth for themselves and in turn revenue for the government. The chapter also sets out the jurisprudential theories upon which the research is founded. I set out the problem I have observed, why it needs to be addressed and the questions this study seeks to answer.

Chapter two examines the definitions of musical works, sound recording and literary works as provided for by the Kenya Copyright Act 2001. This is done in a bid to make it clear what types of works the study aims to protect. Further the definitions of the different types of works also make one appreciate that in the context of IP musical works are different from sound recordings and both works are worthy of enjoying copyright. I have also discussed the concept of infringement and the idea/ expression dichotomy which seem elusively simple but in reality are technical. It is important to understand these concepts because the study deals with music piracy which is a form of copyright infringement. The reader also needs to understand the idea/expression dichotomy because ideally the cornerstone of copyright is that ideas are not protected but the form in which the idea is expressed is the one that is protected. At the end of this chapter the study answers the question whether KECOBO looks into copyright infringement before registering works.

In chapter three I have examined how copyright infringement happens in the digital platform; especially looking at the internet which offers music on a click of a button. It is important to consider infringement of music copyright in the digital platform because access to technology and having knowledge in technology makes piracy easier than it was before. The chapter defines piracy, gives a background and effect of piracy on the Kenyan music industry in a bid to make the reader appreciate piracy ‘cripples’ the artists and the music industry. I have looked at the reasons for piracy with the hope understanding why people pirate music will make the study be better placed in providing recommendations to curb the vice. Lastly the chapter closes by looking at the mechanisms KECOBO has put in place to protect copyright in musical works and sound recordings and the challenges these mechanisms encounter. This is done by way of reporting interviews that I carried out amongst the state counsel working at KECOBO. I chose state counsels at this juncture of the study because they are the personnel that handle legal issues in copyright and hence are better versed with the CA 2001 and the challenges they face when striving to curb piracy, therefore they can propose ways to address these challenges using the law.

Chapter four consists of a comparative study and discusses protection of copyright in musical works and sound recordings on the digital platform in other jurisdictions. This chapter is embarked on with the purpose of evaluating some of the reforms the chosen jurisdictions have introduced in curbing on line music piracy. The study uses the United Kingdom India and Ghana for the comparative study. The reasons for choosing these jurisdictions are explained below in the subtitle research methodology.

Chapter five captures the overall conclusions and the way forward. This chapter proposes recommendations on the way forward to improving implementation of copyright. These recommendations are made after appreciating the mechanisms put in place by KECOBO in addressing music piracy, the challenges these mechanisms face and the law and practice in the United Kingdom, India and Ghana. These recommendations can not only be used by KECOBO but also by all agencies involved in implementation of copyright.

1.10 Research Methodology

In carrying out this study I have relied on both primary and secondary sources.

Primary sources will be through structured interviews targeting State Counsels working at KECOBO; this is because the study aims to establish the mechanisms put in place by this body in the protection of musical works and sound recordings, the challenges the body faces in implementing copyright in these works and proposals on how these challenges can be addressed. The targeted respondents are best placed to answer the questions because they are the personnel that interact with the CA 2001 in carrying out their duties and hence are better conversant with it than other personnel. This makes them best placed to identify loop holes in the law and propose recommendations of addressing these loop holes.

I will also rely on literary works which will be accessed by physical visits to the library and also internet searches. Literary works relied on will include but not limited to the Constitution of Kenya 2010, journal articles, legislations, treaties, related studies, KECOBO newsletters, judicial

precedents and working papers; analyzing literary works will enable the author have an in depth understanding of the topic and issues to be addressed.

I have also chosen to do a comparative study; because comparative studies are usually motivated by the need to borrow, evaluate and curiosity motivated need to discover practices in other jurisdictions.⁷⁴ This will enable the author analyze how the chosen jurisdictions have tackled on line piracy and managed to enhance enforcement of copyright in musical works and sound recordings in their jurisdictions, with the intent to propose adapting some of these practices back home. I have chosen the United Kingdom, India and Ghana as jurisdictions to scrutinize when conducting the comparative study.

The UK provides a good jurisdiction for a comparative study because before Kenya was declared a British Protectorate in 1895 it lacked a defined or clear legal system, but after being under the British administration for over six decades it ended up borrowing heavily from the English legal system.⁷⁵ The Judicature Act which stipulates sources of law in Kenya confirms this.⁷⁶ UK has also been chosen because the Copyright, Designs and Patents Act 1988 (CDPA 1988) which governs copyright in the UK aims to protect the same types of works as the Copyright Act 2001

⁷⁴Karen Evans et al. 'Comparative Successes/ Failures? Some Methodological Issues in Conducting International Comparative Research in Post – Secondary Education (paper presented at the British Educational Research Association Annual Conference, University of Sussex) (1999) <https://www.researchgate.net/publication/271121841> accessed on 23 July 2016

⁷⁵ Tom Ojienda and Leonard Obura Aloo, 'Update:- Researching Kenyan Law' (2011) Hauser Global Law Program www.nyulawglobal.org/globalex/kenya1.html accessed on 28 April 2016

⁷⁶ National Council For Law Reporting, Judicature Act 1967 s (3) *under which the mode of exercise of jurisdiction shall be in (b).....all other written laws, including the Acts of Parliament of the UK.....(c) the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date.* www.kenyalaw.org accessed on 28 April 2016

(CA 2001) in Kenya,⁷⁷ further Kenya has borrowed a lot of the provisions in the CA 2001 from the CDPA 1988.

India has been chosen as a jurisdiction for a comparative study because since inception of its Copyright Act 1957 it has undergone several amendments (in 1983, 1984, 1992, 1994, 1999 and 2012) to try and keep it up to date with technological developments; this makes it have legislation that is comparable with many developed countries worldwide.⁷⁸ Further it was also formerly a British protectorate, and when the British settlers came to Kenya they also imported British laws that had been codified in India for purpose of ease of administration.⁷⁹ This is demonstrated in the types of works the Copyright Act 1957 aims to protect which are similar to the UK.⁸⁰

Ghana has been chosen as a jurisdiction for the comparative study because the Ghana Copyright Act 2005 protects similar works as the CA 2001. The Ghana Copyright Act 2005 also establishes the Copyright Office which is akin to KECOBO. The study therefore seeks to scrutinize the practices, powers and functions of the copyright office in a bid to propose best practices KECOBO can adopt.

⁷⁷ Copyright, Designs and Patents Act 1988 (UK) SS (3) – (6) protects literary, dramatic and musical works, databases, artistic works, sound recordings, films and broadcasts. While the Copyright Act, 2001 s(22) protects Literary works, musical works, artistic works, audiovisual works, sound recordings and broadcasts

⁷⁸ N.K Nair et al. 'Study on Copyright Piracy in India' (1999)

<http://copyright.gov.in/documents/studyoncopyrightpiracyinindia.pdf> accessed 23 July 2016

⁷⁹ above n. 75

⁸⁰ Copyright Act 1957 (India) S(13) *protects original literary, dramatic, musical/artistic work, cinematograph films and sound recordings*

1.11 Limitations

This study limits its research to KECOBO and Kenyan musical works and sound recordings, because as already observed above KECOBO is the main body established under the CA 2001 that has the mandate to oversee, coordinate and implement laws, treaties and conventions which relate to copyright and ensure observance of these laws. Further the study intends to focus on enhancement of protection of copyright in relation to Kenyan musical works and sound recordings only, due to the time within which the study must be completed.

In definition of terms the research will rely mainly on the definitions as provided for by the CA 2001, because this is the main Act that makes provision for copyright in musical works and sound recordings.

CHAPTER TWO: THE CONCEPT OF COPYRIGHT INFRINGEMENT AND THE IDEA/EXPRESSION DICHOTOMY

In this chapter I have discussed the definitions of musical works, sound recordings and literary works as provided for in the CA 2001, this is in a bid to bring out the fact that in IP musical works and sound recordings are viewed as two different types of work each worthy of enjoying copyright. Further I have looked at the definition of literary works to bring to light that the CA 2001 does not clearly provide that lyrics in music are considered as literary works and one may not be too sure under which type of works they should place music lyrics.

The second part of this chapter discusses the concept of copyright infringement and analyzes the three components in copyright infringement; these are proof of ownership of the work, copying or misappropriation and substantial taking. There is need to discuss the components of copyright infringement because music piracy is a form of copyright infringement; and on the digital platform modification of musical works and sound recordings is easier; consequently enabling the person modifying these works obtain derivative works. Further it is only when these components are proved that one can be found guilty of copyright infringement. This will be done by discussing case law.

In the last part of this chapter I will discuss the concept of idea/expression dichotomy by analyzing case law; this is because the concept forms one of the cornerstones of copyright. Copyright in all protected works including musical works and sound recordings is founded on the basic principle that ideas are not protected in copyright but expression of these ideas is what is worthy of copyright. Although on the face of it, it may seem quite simple to differentiate an

idea from an expression of an idea; judges have differed on what an idea is and an expression of an idea.

2.1 Definition of musical works and sound recording

It is important to appreciate from the onset that a musical work can have distinct copyright in it consequently there may be different people claiming copyrights in the music. For example a piece of music can have copyright in literary works (these are the lyrics to a song), musical works and sound recording. A critical look at the copyright in music makes one appreciate that a piece of music is different from a mere song and a song is different from a sound recording; therefore the need to have several copyrights at the end of the production of a sound recording; the different copyrights will be different in hierarchy. The study therefore looks at how the CA 2001 has defined literary works, musical works and sound recording as they are all considered different types of works that warrant granting of copyright. This is done with an aim to make it clear the study aims to protect and or enhance protection of copyright in musical works and sound recordings.

When referring to musical works and sound recording the study adopts the definition in the Kenya CA 2001. Where *musical work* is defined to mean *any musical work, irrespective of musical quality and includes works composed for musical accompaniment*.⁸¹ The Act in defining literary works gives a list of works that constitute literary works and states works that are similar to those listed also qualify as literary works.⁸² It is the author's argument that the CA 2001 does

⁸¹ Copyright Act 2001, s.2(1) (Kenya)

⁸² The CA 2001 provides inter alia "literary work" means, irrespective of literary quality, any of the following, or works similar thereto—

not state explicitly under which type of works music lyrics fall. Further the Act is not concerned with musical quality or standard in granting copyright. It should be appreciated the definition of musical works under the CA 2001 is not the same as the definition of musical works under the CDPA 1988, which provides *musical works means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.*⁸³ In defining *literary work* the CDPA 1988 provides *inter alia* such works *means any work, other than a dramatic or musical work, which is written, spoken or sung.....*⁸⁴ From the above definitions it can be appreciated under the UK law a musical work will consist of copyright in both the musical work (tune of the music) and literary work (lyrics to the music).

Taking the above observation into account the study in the last chapter recommends that definitions of literary work and musical work as provided for by the CA 2001 should be amended. We can borrow a leaf from the CDPA 1988 of the United Kingdom, because in defining musical work and literary work it gives a clear distinction between these two works and one cannot therefore argue that a musical work consists of a literary work.

Sound recording has been defined to mean any exclusively aural fixation of the sounds of a performance or of other sounds, or of a representation of sounds, regardless of the method by

(a) novels, stories and poetic works; (b) plays, stage directions, film sceneries and broadcasting scripts; (c) textbooks, treatises, histories, biographies, essays and articles; (d) encyclopaedias and dictionaries; (e) letters, reports and memoranda; (f) lectures, address and sermons; (g) charts and tables;.....

⁸³ [legislation.gov.uk legislation.gov.uk Copyright, Designs and Patents Act 1988, s3\(1\) \(UK\)](http://www.legislation.gov.uk/ukpga/1988/48/section/3)
<http://www.legislation.gov.uk/ukpga/1988/48/section/3> accessed on 26 April, 2016

⁸⁴ *ibid*

which the sounds are fixed or the medium in which the sounds are embodied but does not include a fixation of sounds and images, such as the soundtrack of an audio visual work.⁸⁵

In the case of *Gramophone Limited v Cawardine and Company*⁸⁶ it was appreciated that musical works and sound recordings were different because the latter required both technical and musical skill to create. In this case the plaintiff a records company argued that its copyright was being infringed by the defendant when it played its records without its consent in its restaurants. Justice Maugham held that both the author of the musical work and the record maker had a copyright, although the author of the musical work had a ‘superior’ copyright and the record makers copyright was therefore subordinate.⁸⁷ This case apart from demonstrating musical works are distinct from sound recordings also gives a good depiction of author’s rights and neighboring rights also known as entrepreneurial or related rights. Author’s rights are rights exclusively to be enjoyed by the author of the work this can be the musical work. While entrepreneurial rights are derived from the original work; entrepreneurial rights arise from works created by entrepreneurs an example of works derived from original works is sound recordings. The rationale in the ruling that the author of musical works has a superior copyright than the record maker is plausible, because the work of the record maker is derived from the musical work. Without which the record would never be made.

For an author of musical works to benefit economically from his work, his work needs massive distribution and dissemination. One of the main ways this can be achieved is through sound recording. This adds value to the musical work for it gives the work sounds that are embodied in

⁸⁵ above n.81

⁸⁶ *Gramophone Limited v. Stephen Carwardine* (1934) 1 Ch 450

⁸⁷ Benedict Atkinson, *The True History of Copyright: The Australian Experience 1905 – 2005* (Sydney University Press 2007) <https://books.google.co.ke> accessed on 4 May 2016

mediums that can be disseminated example compact discs. Therefore when talking about music the study refers to both musical works and sound recordings and it aims to propose ways on how both these works can be protected. It seems imperative to look at musical works and sound recordings together because they are interdependent and related when studying piracy. This is because sound recordings are authored from musical works and a sound recording eventually is what ends up as a piece of music according to a layman's understanding.

2.2 Copyright infringement

Copyright in a work gives the author, rights that are distinct from the physical embodiment of the work.⁸⁸ This means that when an author of a sound recording produces compact discs and they have been sold. He does not lose rights over subsequent reproduction and dissemination of the sound recording. He is therefore still entitled to share in any profits that will be made when the sound recording is sold, irrelevant of the embodiment that the sound recording will take. This element is what probably makes it hard to justify granting of copyright to authors. Society is used to view property as something tangible, and it follows that once one has sold this tangible property they lose their rights to it, leaving all the subsequent profits to the new owner of the property.

Copyright infringement can give rise to both criminal and civil actions. The CA 2001 defines infringement as; any act which violates a right protected by the Act.⁸⁹ Therefore if a person does not have a license or is not assigned any of the rights protected by the Act but goes ahead to

⁸⁸ W. Cornish, D. Llewelyn and T. Aplin, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (8th edn Sweet and Maxwell 2013)

⁸⁹ above n.81

exercise them or enables the doing of any protected Act then he will be liable for infringement.⁹⁰ Rights that are protected under the Act include reproduction and distribution of works. Infringement like any other offence has components which need to be proved before an alleged infringer is found guilty of this offence or wrong. In theory proving a case of copyright infringement seems easy but in reality copyright infringement is a complex cause of action and not always straight forward.⁹¹ Therefore it has been accepted to apply the infringement test to different types of works including musical works and sound recordings regardless of the nature of copying; further courts have applied the components of infringement in conflicting ways leading to exceptions.⁹² This will be seen in the discussion of the copyright infringement case law below.

The constituents of copyright infringement are; proof of ownership of the alleged copyright work, misappropriation (this entails copying of the claimants work) and substantial taking which is related to copying.

In proving ownership of the work the claimant will have to show that they expended enough effort to give the work an original character further the work needs to be expressed in material form, this is explicitly expressed in s. 22(3) of the CA 2001. In the case of *Bleistein v Donaldson Lithographing Company*⁹³ the Supreme Court of USA held that for a work to be eligible for copyright it has to be “original”, that is it is the author’s own work and not copied. When dealing

⁹⁰ Copyright Act s35(1) Kenya

⁹¹ Jason E. Sloan, ‘An Overview of the Elements of a Copyright Infringement Cause of Action – Part 1: Introduction and Copying, American Bar Association http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/elements_of_a_copyright.html accessed on 31 May 2016

⁹² *ibid*

⁹³ *Bleistein v Donaldson Lithographing Company* 188 U.S. 239 (1903)

with other kind of property proving ownership seems a bit easier. This is because most property has documents that serve as proof of ownership but with musical works and sound recordings proving ownership of copyright can be a bit difficult. This is because one enjoys copyright as long as they have fulfilled the requirements of section 22(3) which make registration not a precondition for granting of copyright. One may ask if equity serves the vigilant and not the indolent then why should legislation which is usually more stern aim to serve the indolent? In answering this question one has to appreciate the difference between the protection of economic rights emphasized by the common law and the concept of *droit d'auteur* (author's right) in French civil law model which places emphasis on the protection of natural and spiritual rights, by protecting the author's moral rights.⁹⁴ This can be seen in the judgments of two French cases one in 1982 and another that arose a few years later. In the 1982 case the estate of a deceased prominent author one Albert Camus sued Hamish Hamilton Publishers for publishing a book titled *Camus: A critical study of his life and work*, because the book seemed to be so critical of Camus but it contained neither abuse nor libel, despite this the court ruled in favor of the estate on the sole ground the defendant had infringed upon Camus's IPRs.⁹⁵

Protection of authors rights (both economical and moral) without need for registration has been appreciated internationally and is reflected in the Berne Convention for the Protection of Literary and Artistic works (1886); the convention is based on three principles and one of them is the

⁹⁴ above n.1

⁹⁵ Jean-Luc Piotraut, 'An Authors' Rights – Based Copyright Law: The Fairness and Morality of French and American Law Compared', (2006), 24:549, Cardozo Arts and Entertainment www.cardozoaelj.com/wp-content/uploads/Journal accessed on 24 June 2016

principle of “automatic” protection; which provides protection of works is neither conditional nor dependent on compliance with any formality.⁹⁶

In proving misappropriation the claimant has to show that the similarity between his original work and the defendant’s alleged copied work is because the defendant copied from the original work; the law refers to this as ‘causal connection’.⁹⁷ A claimant is likely to succeed in proving causal connection if he can demonstrate that the starting point of the defendant’s work was the original work and the defendant had access to the original work.⁹⁸

There is no specific definition of ‘substantial taking or substantial part’ which is the third component in proving infringement. In deciding whether a substantial part of the claimant’s work has been copied by the defendant, the courts look at each case on its own merit and seem more concerned with the quality of the alleged copied work rather than the quantity that has been copied.⁹⁹ In deciding what constitutes substantial taking courts sometimes ask whether the ‘essence’ of the copyright was taken, therefore one may copy a small part of the original work but the courts may still hold that a substantial part has been misappropriated; as was the case in *Ludlow Music v Robbie Williams*.¹⁰⁰ In this case the claimant was the original owner of the song, Jesus in a Camper Van which contained the lyric “every son of God gets a little luck sometime”, while the parody titled I am the way contained the lyric ‘every good man gets a little hard luck sometime’ repeated three times by the lyric ‘especially when he goes round saying I am the

⁹⁶ WIPO World Intellectual Property Organization ‘Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886) http://www.wipo.int/treaties/en/ip/berne/summary_berne.html accessed on 24 June 2016

⁹⁷ above n.91

⁹⁸ James and Wells ‘Copyright Infringement – an Overview’ <http://www.jaws.co.nz/information/category/copyright/copyright-infringement-an-overview> accessed on 2 June, 2016

⁹⁹ *ibid*

¹⁰⁰ *Ludlow Music v Robbie Williams* (2002) EWHC 638 (ch)

way', therefore the parody contained the lyrics 'I suppose even the son of God gets it hard sometimes especially when he goes round saying I am the way.'¹⁰¹ The court held that in determining the question of substantiality it was not suppose to be an arbiter of good taste or merit, otherwise it would run the risk of denying copyright to artistic works that seemed to lack artistic or moral value in its eyes, the court should instead determine how important was the part copied in relation to the whole work.¹⁰²

The court has also held that where one has taken a large part of a rather short work then substantial taking can exist, as was the case in *EMI Songs Australia v Larrikin Music Publishing*.¹⁰³ In this case the question was whether what was taken was too little to constitute infringement, in answering what constituted substantial the court appreciated this word was susceptible to ambiguity, but it held the opinion that the test was not quantitative therefore if the part reproduced was vital or material then infringement will exist.¹⁰⁴ Further copyright in a musical work will be infringed if the melody taken is substantially the same as the original and it matters not if one has substituted the instrument used to create the melody in the original with another instrument, what matters is that when the ordinary reasonable listener hears the melody they can recognize it.¹⁰⁵

Although copying and substantial taking seem interrelated they are different concepts. As already discussed in proving copying one has to show 'causal connection' that is, the reason why

¹⁰¹ Humphreys and Company Solicitors 'Ludlow Music Inc v Robbie Williams' www.humphreys.co.uk/articles/ludlow-music-inc-v-robbie-williams accessed on 2 June 2016

¹⁰² *ibid*

¹⁰³ *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444

¹⁰⁴ *ibid*

¹⁰⁵ Phoebe Vertigan 'EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd (2011) 191 FCR 444' [2011] UTasLawRw 16; (2011) 30(2) University of Tasmania Law Review 155 www.austlii.edu.au/au/journals/UTasLawRw/2011/16.html accessed on 3 June 2016

the copied work resembles the original work, is because the author of the copied work used the original work as his starting point. While in proving substantial taking, courts answer the question whether the essence of the copyright has been taken; therefore copying a small part of a work may suffice to be substantial taking. This can be seen in the leading case of *Designers Guild Limited v Russell Williams (Textiles) Limited*¹⁰⁶ where the House of Lords separated the issues for determination as whether there was copying and whether if there was copying if it was substantial. The court noted that in artistic works the parts complained to have been copied must form a substantial part of the claimant's work, but they need not form a substantial part of the defendant's work; therefore the overall appearance of the defendant's work may be different from the claimants but this will not necessarily mean that the defendant did not copy the claimant's work.¹⁰⁷

Similarly the court in *Nouveau Fabrics v Voyage Decoration and Dunelm Soft Furnishings Limited*¹⁰⁸ echoed the findings in *Designers Guild Limited v Russell Williams (textiles) Limited*¹⁰⁹ and held that, although the designs in the two fabrics were not identical, one can infer there was indirect copying and taking into account the similarities it concluded a substantial part of the claimant's work had been taken.¹¹⁰ The court went further to note that when deciding whether there has been copyright infringement, one must look at the copied work as a whole and not attempt to dissect it, hence looking at the original work minus the portions that have not been

¹⁰⁶ *Designers Guild Limited v Russell Williams (Textiles) Limited* (2001) 1 WLR 2416

¹⁰⁷ House of Lords 'Designers Guild Limited v Russell Williams (Textiles) Limited (Trading as Washington DC)' session 1999 – 2000 www.publications.parliament.uk accessed on 14 June 2016

¹⁰⁸ *Nouveau Fabrics v Voyage Decoration and Dunelm Soft Furnishings Limited* (2004) EWHC 895 (Ch)

¹⁰⁹ above n. 106

¹¹⁰ above n. 108

copied was a wrong way of determining the existence of copyright infringement, as was held in the case of *Ladbroke (Football) Ltd v William Hill (Football) Ltd*.¹¹¹

Although the cases of *Designers Guild Limited v Russell Williams (textiles) Limited*¹¹² and *Nouveau Fabrics v Voyage Decoration and Dunelm Soft Furnishings Limited*¹¹³ involved artistic works in material designs they bring out the fact that the concept of ‘copying’ and ‘substantial taking’ are distinct.

2.3 Idea/ expression dichotomy

For copyright infringement to suffice the claimant must show that it is his expression of ideas that was copied and not the idea itself. In the case of *Designers Guild Limited* discussed above the court noted that although an idea maybe expressed in a form, this form may not be one of the forms that is protected under the Act, conversely an idea maybe expressed in one of the forms that the Act offers protection but that work will not enjoy copyright because it lacks enough skill and labor by the author to make it original.¹¹⁴ In *LB Plastics Limited v Swish Products Limited*¹¹⁵ the court held the view that ideas are not protected it is only the form in which the idea is expressed that is protected and this involves input of the author’s skill and labor that result in making the expression of the idea original.

¹¹¹ *Ladbroke (Football) Ltd v William Hill (Football) Ltd* (1964) 1WLR 273

¹¹² above n. 106

¹¹³ above n. 108

¹¹⁴ above n. 107

¹¹⁵ *LB Plastics Limited v Swish Products Limited* CHD 1979

In *Nichols v. Universal Pictures*¹¹⁶ the claimant alleged infringement of her right to production and distribution of her play by the defendant who had adapted it to a motion picture. The court noted although the copyright infringement and plagiarism laws were well defined, difficulty arises in their practical application, because it was hard at times to point out precisely the points of similarities and dissimilarities in two dramatic works or other compositions.¹¹⁷ Further mere ideas are not protected but the manner of expressing them maybe protected and the line differentiating the idea from the expression of the idea is not always well defined. In this case although the judge noted from the record that the defendant had tried to purchase copyright from the claimant in 1925; in writing the scenes of the motion picture the defendant had ‘studied’ the claimant’s play and one of the defendant’s magazines had indicated that the motion picture will be on the screen what the play had been on the stage, factors indicating there was strong inference the defendant had got some of its ideas from the claimant’s work, he still ruled against the claimant.¹¹⁸ The judge was of the view that emotions just like ideas cannot be preempted; therefore one cannot have a copyright in bringing out a certain emotion in a dramatic work.¹¹⁹ Consequently what is protected is the sequence of events that lead to the emotion. In the case of Nichols the court echoed the reasoning in *Eichel v Marcin*¹²⁰ that the aim of copyright is to promote science and useful arts, if an author, by originating a new arrangement and form of expression of certain ideas or conceptions, is allowed to withdraw these ideas or conceptions from the material of stock that can be used by other authors; then with each grant of copyright

¹¹⁶ *Nichols v Universal Pictures Corp* 45 F.2d 119

¹¹⁷ *ibid*

¹¹⁸ *ibid*

¹¹⁹ *ibid*

¹²⁰ *Eichel v Marcin* (D.C.) 241 F. 404

room for development of the useful arts and science will narrow, consequently hindering exploitation and development.¹²¹

In the case of *Nonny Gathoni Njenga and another v Catherine Masitsa and 2 others*¹²² the plaintiff claimed the defendant had infringed on her copyright in literary works. She had registered her literary work titled ‘weddings with Nonny Gathoni’ which was later televised by the defendants as ‘Baileys wedding show’, the court noted that although the parties had their own wedding shows the main argument by the plaintiff was that the defendant had changed the running order of its wedding show to be identical as hers.¹²³ The court held in favor of the plaintiffs and ruled that her copyright in literary works had been infringed.¹²⁴ It should be appreciated in this case the learned judge does not protect the idea of a wedding show but the sequence of which the scenes in the show are arranged, this, one can argue is the mode in which the ideas are expressed.

From the foregoing case law and discussion it seems plausible to grant copyright to the form ideas are expressed rather than ideas themselves. Despite this judges have given judgments that seem to copyright ideas; for instance in the case of *Elanco Products Limited v Mandops (Agrochemical Specialist) Limited*¹²⁵, the plaintiff had developed a herbicide and with its package had included instructions. After its patent period had expired the defendant used the idea of including instructions of use in its package although they altered the words used by the

¹²¹ Justia – US law ‘Nicholas v Universal Pictures Corporation 34F 2d 145 (S.D.N.Y. 1929) www.law.justia.com/cases/federal/district-courts accessed on 18 June 2016

¹²² Nonny Gathoni Njenga and another v Catherine Masitsa and 2 others (2014) eKLR

¹²³ ibid

¹²⁴ VNZOMO, ‘Establishing Copyright Infringement: High Court Ruling in Nonny Gathoni v Samantha’s Bridal wedding Show case’ (IP Kenya, 9 April 2015) <https://ipkenya.wordpress.com/tag/wedding-show/> accessed on 23 June 2016

¹²⁵ *Elanco Products Limited v Mandops (Agrochemical Specialist) Limited* CA 1979

plaintiff.¹²⁶ The court held that the defendant was at liberty to use any technical information within the public domain to come up with its instructions of use, but they were not at liberty to use the plaintiff's label literature, thereby using the plaintiff's skill and labor and hence saving on costs.¹²⁷

In *Temple Island collections ltd. v New English teas ltd*¹²⁸ Judges seemed to over stretch the concept of an 'expression'; the claimant's photograph consisted of a bright red bus with the house of parliament and Big Ben in black and white in the background and the West Minister Bridge and the river in black and white in the foreground. The defendant's photograph was taken from a different angle and consisted also of a bright red bus with almost similar elements but it was not identical to the claimant's.¹²⁹ It was always thought that if the general layout of a photograph consisted of a public building or setting this fell more on the 'idea' end of the scale, thus another photographer could also use this setting (which consisted of an 'idea') in recreating a photograph, despite this the court held that the defendant had infringed on the claimant's copyright.¹³⁰

Although the boundary between ideas and expression of ideas is ill defined this concept finds international recognition in Article 9(2) of The Trade Related Aspects of Intellectual Property

¹²⁶ above n. 125

¹²⁷ Swarb.co.uk 'Elanco Products Limited v Mandops (Agrochemical Specialists) Limited CA 1979 <http://swarb.co.uk/elanco-products-ltd-v-mandops-agrochemical-specialists-ltd-ca-1979/> accessed on 20 June 2016

¹²⁸ Temple Island collections ltd. v new English Teas ltd (2012) EWPCC 1

¹²⁹ ibid

¹³⁰ Sarah Innes, 'Snaps: Temple Island Collections Limited v New English Teas (2012)' EWPCC1 [2012] www.lexology.com accessed on 20 June 2016

Rights 1994 (TRIPS) which provides inter alia copyright extends to expression of ideas and not ideas....¹³¹

Despite the boundary between ideas and expression of ideas being murky it is important that the distinction exist, because apart from being used to determine which work is worth being protected by copyright it can help answer such questions like: for instance where one comes up with a glass building example Lonrho House and he wants rights over all subsequent variants; how does one deal with this? With the distinction in place the answer is that the person will only enjoy rights over the work that is protected and not from the types of work that are an exemplar. So in the case of music the first author of ohangla music can only enjoy copyright in the ohangla music he authored and not other ohangla music authored by others. This nurtures creativity in other musicians for they are able to build on ideas of their colleagues. It seems unfair that the first author of ohangla music should also enjoy copyright in variants of this type of music.

2.4 Conclusion

After appreciating the constituents of copyright infringement discussed in 2.2 above it is worth asking whether KECOBO tests for copyright infringement before it registers a work. To answer this, one has to scrutinize the CA 2001. The CA 2001 provides that for a musical work to be copyrightable the author should demonstrate he or she expended enough labor to give the work an original character and the work has been recorded or reduced to material form.¹³² The Act therefore does acknowledge the idea/ expression dichotomy and requires a musical work to be

¹³¹ World Trade Organization 'Part II – standards concerning the availability, scope and use of Intellectual Property Rights' www.wto.org/english/docs_e/legal_e/27_trips_04_e.htm accessed on 18 June 2016

¹³² Copyright Act 2011 s. 22(3)(a)(b) (Kenya)

expressed in material form for the work to be copyrightable. It is interesting that although the CA 2001 requires the musical work to be original for it to be copyrightable. The same Act provides a work will still be eligible for copyright even if in the making of the work, or doing of any act in relation to the work, involved an infringement of copyright in some other work.¹³³ This infers that in registering musical works KECOBO only has to be satisfied that the work is original and it is expressed in material form. The Act does not require KECOBO to question whether in creating the musical work or sound recording there is copyright infringement of any other work. Therefore the components discussed above that need to be present to determine copyright infringement, are questions left for the courts to determine. The Act further provides, an author will automatically enjoy copyright as long as the work is affixed in material form, the work need not be registered nor satisfy any formalities.¹³⁴

¹³³ Copyright Act 2001 s.22(4) (Kenya)

¹³⁴ Copyright Act 2001 s. 22(5) (Kenya)

CHAPTER THREE: CHALLENGES ENCOUNTERED BY KECOBO IN FIGHTING PIRACY AND ENFORCEMENT OF COPYRIGHT IN MUSICAL WORKS AND SOUND RECORDINGS ON THE DIGITAL PLATFORM

This chapter discusses why copyright in musical works and sound recordings has to be examined in the digital platform; defines music piracy and the forms it takes; gives the background and effect of piracy on Kenyan music, at this juncture the study aims to establish that indeed Kenya is faced with the problem of piracy and highlights some mechanisms proponents of IP have used to circumvent the problem; why people pirate music, there is need to discuss these reasons because the author believes if she understands the reasons why people engage in piracy then the study will be better placed to propose solutions and recommendations to remedy the problem; mechanisms put in place by KECOBO in fighting piracy and challenges these mechanisms encounter, this is in a bid to propose ways of making them better and more efficient. The recommendations and way forward will be discussed in chapter five.

3.1 Why copyright has to be examined in the digital platform

Technology has made accessibility, reproduction, storage and dissemination of music much easier in this technological age than how it was before, this is because now works are available in digital form; for example today the ipod portable music player a gadget the size of a cigarette pack can be used to store up to 10,000 songs, further from one copy of a compact disc many more copies maybe reproduced without losing the quality of the music.¹³⁵ Therefore in the context of music copyright, technology is a double edged sword because an author of music or sound recording can use technology to disseminate his music cheaply and efficiently to his

¹³⁵ Marybeth Peters, 'The challenge of copyright in the digital era'[2006] <http://usinfo.state.gov/> accessed on 14 June 2016

desired clientele, while a music pirate can also use the same technology to reproduce copies of the author's music and disseminate it to the detriment of the author.¹³⁶

Professor Pamela Samuelson identified several characteristics of works in digital form that are likely to influence the future of IP and in turn copyright; these are they are easily transmittable and accessible over networks, easily modified and modifications can be easily saved thus enabling the person modifying the work obtain derivative works, the traditional distinctions between different copyright works is now blurred for one internet page can contain a combination of several works (for example a u tube video may contain photograph, lyrics, musical works and sound recording), works are linked and this makes research easier; these advances in technology call for a review of the existing laws to ensure the balance of rights enjoyed by copyright owners and users of copyright is maintained.¹³⁷ Another challenge that is posed with digital works is sometimes one cannot identify the human author and copyright is rooted on granting IPRs to an identifiable human author.¹³⁸

The landmark case of *Sony Corporation of America v Universal City Studios*¹³⁹ (1984) also known as the Betamax case set precedent on how far courts are willing to protect copyright, while simultaneously promoting technology innovation; the ruling in the case sheltered many technology innovators against law suits filed by entertainment industries. In this case the defendant had invented the Video Cassette Recorder which apart from having other legal uses, could also be used to reproduce copies of copyrighted works by taping copyrighted programs,

¹³⁶ above n. 135

¹³⁷ Stefan Gavrilescu 'Justification of Copyright in the Information Society (II)' (2002) Legile Internetului <http://www.legi-internet.ro/en/articole-drept-it/justification-of-copyright-in-the-information-society.html> accessed on 28 June 2016

¹³⁸ 'Why Digital Copyright Matters' www.hartpub.co.uk/pdf/samples/9781849464024sample.pdf accessed on 28 June 2016

¹³⁹ Electronic Frontier Foundation 'Sony Corp. of America v Universal City Studios, 464 U.S. 417 (1984)

thus infringe copyright. In its ruling the court held the company cannot be sued for creating a technology that can be used by some of its consumers for copyright infringing purposes, so long as the technology is capable of substantial non-infringing uses. Therefore where a technology has many uses the public cannot be denied its usage because some, most or many of them may use the product to infringe copyright.

Thoughts of the Betamax case were applied in *Metro Goldwyn – Mayer Studios Inc. v Grokster Limited*¹⁴⁰ but the court did not over rule the ratio decidendi instead it applied the concept of ‘inducement’ in holding the respondents liable for copyright infringement. Inducement has the effect of making a distributor of a device (in this instance a software) liable of secondary copyright infringement by users of the device when it is impossible to enforce copyright of protected works against the direct infringers. The court noted Betamax did not do away with secondary liability theories of contributory or vicarious infringement which provided one was liable if they intentionally induced or encouraged direct infringement and if they profited from direct infringement and did not take steps to stop it respectively. To support the existence of inducement the court noted the respondents had the intention of infringing copyright because they aimed to satisfy needs of Napster clientele and Napster had been successfully sued earlier for providing a software that enabled copyright infringement, they did not attempt to install filtering tools that would prevent infringement, they got income from usage of advertising space in the software and they had actual knowledge of the massive infringement by users of their software.¹⁴¹

¹⁴⁰ *Metro Goldwyn – Mayer Studios Inc. v Grokster Limited* 545 U.S. 913 (2005)

¹⁴¹ Cornell University Law School – Legal Information Institute, ‘*Metro Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* (04-480) 545 U.S. 913 (2005) <https://www.law.cornell.edu/supct/html/04-480.zs.html> accessed on 30 June 2016

A look at the rulings in the Betamax case and MGM case clearly demonstrates courts have to address the tension between supporting creativity in the entertainment industries and technological innovation by limiting copyright infringement. This is the main bone of contention when discussing copyright infringement in the technological arena. Further as technology develops new players enter the arena of copyright for example body corporates like Safaricom who offer Skiza Tunes to their subscribers, Collective Management Organizations (hereinafter referred to as CMOs) like Music Copyright Society of Kenya (hereinafter referred to as MCSK) who have the mandate of collecting royalties on behalf of its members, thus the law has to develop to ensure the rights of all the players in this dynamic arena are catered for.

As noted by Andrew J. Eisenberg, digital technology has also had an impact on the Kenyan recording industry and in the process it has reshaped it in five main areas: introduction of Digital Audio Working Studios has transformed the role of ‘analog music producers’ which entailed enabling musicians record their music by handling logistics such as searching for projects that would fund recording, distributing and marketing of their music for a share of the profits made. Today the producer has transformed into ‘the creative producer’* they not only use digital technology to mediate sound and musical works but also social relations hence setting standards in the recording industry and this has aid artists in developing their talent and creating their own style. Acknowledgment of artists of music as a form of IP has been accelerated by the establishment of CMOs which are a creation of the CA 2001 which in itself was a consequence of Kenya being a signatory of WTO on TRIPS in 1995. CMOs such as MCSK, KAMP (Kenya Association of Music Producers) and PRISK (Performers Rights Society of Kenya) collect and

* The term was coined by the MCSK and it refers to a recording engineer who uses digital technology to compose and sequence the sounds for the tracks he records

payout royalties to musicians, master recording owners and music performers respectively. MCSK managed to get new members by promising guarantee payment of royalties earned from public performances leading to demand and discussions about payment of royalties.¹⁴² In Kenya music has been used as a form of cultural identity but introduction of digital music sequencing enables faster and easier stylistic borrowing when recording, at times this has led to Kenyan music losing its style. Creation of new markets and audiences have been created due to digital technology such as the internet, Kenyans in the diaspora are now able to satisfy their need for Kenyan content by accessing music online, further Kenyan artists are able to work with producers and artists from other countries and due to the malleability of digital data, sounds can be transformed for example from acoustic sounds of a live band to electronic sounds to create sounds that satisfy international markets.¹⁴³

With the advent of digital technology has come mobile phone commerce (M-Commerce) which has led to an integration between mobile service providers and the Kenyan music recording industry, m-commerce has also introduced content providers who are key players in Value added Services (Value Added Services) such as Skiza tunes created by Safaricom which provide ‘caller ring back tones’. VAS is a source of great profit for mobile service providers and this has led to

142 Dr. Andrew J. Eisenberg, interview with John Katana (2012)
https://www.academia.edu/2222556/The_Kenyan_Recording_Industry_in_the_Digital_Age_Preliminary_notes_and_findings_from_research_in_Nairobi_2012_?auto=download accessed on 7 July 2016

143 Dr. Andrew J. Eisenberg, ‘The Kenyan Recording Industry in the Digital Age – Preliminary Notes and Findings from Research in Nairobi University of Oxford (2012)
https://www.academia.edu/2222556/The_Kenyan_Recording_Industry_in_the_Digital_Age_Preliminary_notes_and_findings_from_research_in_Nairobi_2012_?auto=download accessed on 7 July 2016

some providers striving to take up the role of managing artists in a bid to enable them access exclusive content from the artists hence increasing their profit.¹⁴⁴

Digital technology has made music producers in the Kenyan recording industry benefit from music as a source of income, leading to some producers being trademarks due to the reputation they have in the industry. The producers enter into contracts with the musicians to secure their share in the profits the sound recording will make, this has led to some artists making their personalities so strong to enable them get substantial profits from their work. In the year 2014-2015 MCSK released a list of top ten earning artists and the number one slot was taken by Robert Kamanzi also known as RKay a music producer.¹⁴⁵

The discussion above makes one appreciate access to and advancement in technology causes a challenge to KECOBO which has to ensure that music copyright is protected, to enable all the right holders benefit from their work, and at the same time it cannot deny the masses which include music pirates' access to technology. Courts will have to strike a balance between the rights of copyright owners and those of the users, because copyright does not only aim to protect the authors of copyright, but also enable the public access protected works. This is seen in the CA 2001 which grants copyright in musical works and sound recordings during the lifetime of the author and fifty years after the end of the year of the death of the author.¹⁴⁶ This enables the public be free to develop the work of the author after the lapse of the copyright period. Further

¹⁴⁴ Dr. Andrew J. Eisenberg, 'M-Commerce and the (Re)making of the Music Industry in Kenya Preliminary Notes and Findings (2012) Oxford University https://www.academia.edu/4845905/M-Commerce_and_the_Re_Making_of_the_Music_Industry_in_Kenya_Preliminary_Notes_and_Findings_Association_for_Social_Anthropology_New_Delhi_April_5 accessed 8 July 2016

¹⁴⁵ Christabell James, 'Top 10 highest paid Kenyan Musicians – you would never believe who is number 1' Buzz Kenya (10 April, 2015) <http://buzzkenya.com/top-10-highest-paid-kenyan-musicians-you-would-never-believe-who-is-number-1/> accessed 11 July 2016

¹⁴⁶ Copyright Act 2001 s.23 (Kenya)

the Act also provides for works that are eligible for copyright thus works that are not, can be enjoyed and developed by the public hence making them eligible for copyright.

3.2 Definition of music piracy

Music piracy (hereinafter referred to as piracy) in its simplest form refers to the theft of music, when one buys an original music compact disc he may see the copyright mark printed on it, thus indicating the work is protected, although when one accesses the same music on the internet the mark may not be there, despite this the work in digital form is still protected and subject to copyright, therefore the user needs to be careful when using such works.¹⁴⁷

In the digital arena, piracy takes several forms, including downloading music from unauthorized networks, buying a CD burning the same and making copies for other people and sharing music with other people on peer to peer networks. Piracy consists of all the components of copyright infringement discussed in chapter two and also entails infringing on the acts protected by the CA 2001. In musical works and sound recordings acts that are protected and enjoy copyright are reproduction either direct or indirect in any form, distribution to the public including by way of sale, lease, hire, loan and rental, communication to the public and broadcasting of the whole work or a substantial part of it either in its original form or in any form that can be recognized as being derived from the original.¹⁴⁸ As already discussed, by the time a piece of music is converted into a sound recording which gives it a tangible form, the music will have several copyrights in it. Copyright will be in the musical works and in the sound recording. Accordingly

¹⁴⁷ Recording Industry Association of America, 'Resources and Learning' <http://www.riaa.com/resources-learning/about-piracy/> accessed 2 July 2016

¹⁴⁸ Copyright Act 2001 s.26 and s.28 (Kenya)

different people will have a copyright claim of the end product. Therefore music piracy infringes on several copyrights.

3.3 Background and effect of piracy on Kenyan music

Kenya indeed has a piracy problem this can be inferred by the establishment of KECOBO whose mandate includes administering and enforcing copyright in Kenya this entails protection of copyright in musical works and sound recordings, the board endeavors to fulfill this mandate by inter alia installing Anti Piracy Security Device Gadgets (APSD) in CD's and prosecution of copyright infringement cases.¹⁴⁹ Further it can be argued the CA 2001, tries to be alive to piracy in the digital platform for it protects reproduction of the original musical works in any material form while in sound recordings it protects either direct or indirect reproduction of works in any form and distribution to the public of copies.¹⁵⁰ The Act also provides inter alia copyright shall be infringed by a person who:

“circumvents any effective technical measure designed to protect works, or manufactures or distributes devices which are primarily designed or produced for the purpose of circumventing technical measures designed to protect works, or removes or alters any electronic rights management information or distributes, imports, broadcasts or makes available to the public, protected works, records or copies from which electronic rights management information has been removed or has been altered without the authority of the right holder.”¹⁵¹

¹⁴⁹ KECOBO 'Service Charter' www.copyright.go.ke/about-us/service-charter.html accessed 2 July 2016

¹⁵⁰ above n. 148 although the sections may need to be amended to explicitly provide for protection of works in digital form thus mention peer to peer networks and digital works

¹⁵¹ Copyright Act 2001 s.35 (Kenya)

This section can be invoked to curb use of devices or software that maybe used to defeat the purpose of antipiracy security devices.

An ethnographic research* carried out in Kenya by Andrew J. Eisenberg indicates renown recording labels such as CBS Records (now Sony Music Entertainment) and a record pressing plant owned by Polygram (now part of Universal Music Group) that were based in Nairobi in the 1970's had to close shop in the 1980's because of a drop in sales that was caused by; advent of the audio cassette which promoted piracy and informal sharing on a large scale, Africanization of policies which translated to ownership of production and distribution businesses being transferred from Asians to natives, which had a negative effect on the sales of records because the Africans who took over the businesses lacked contacts, trading history and reputation thus hindering their ability to do business internationally, the recording industry was hit by a slow down due to stifling import, visa and foreign exchange restrictions and loses of music artists due to AIDS in the 1990's. Although their existed other independent recording and distributing companies they had to compete with industries based at River Road that thrived in media piracy.¹⁵²

The report notes with the introduction of the CD in 2000 the local music artists had hope of better sales of their records, but this was only an illusion because the CD proved to be cheaper when bought in bulk and a better medium to make pirated copies than the analog audio cassette,

* carried out by Dr. Andrew J. Eisenberg between 2011-2012 that aimed to establish how digital technology development has affected and continues to affect music and musical practices worldwide, and Kenya was chosen as one of the country's for a case study, the research also aimed to establish how rapid development in digital technology of music production and distribution have affected economics of commercially recorded popular music in Kenya

¹⁵² Dr. Andrew J. Eisenberg, 'Digital Technology and the Music Recording Industry in Nairobi, Kenya', (2015) 'forthcoming' musdig.music.ox.ac.uk/.../EisenbergMusDigWebReport-FINAL accessed 4 July 2016

even pioneering production companies like Ogopa Deejays managed to sell only 3,000 units of their ‘successful’ CD albums.¹⁵³

WIPO notes that Kenya’s music is amongst the most diverse and vibrant in the world, but despite this the authors are unable to make a living from their music and are not recognized in the society as artists due to ineffective management of IP laws and piracy on a large scale.¹⁵⁴ The organization echoes the findings by Eisenberg above and notes piracy has led to a reduction in reproduction of CDs because the CD plants that existed in the country had to close shop due to non viability of sale for their products. Piracy although being both a crime and a civil wrong seems to have taken hold in Kenya since the 1970s with the advent of the cassette tapes, the pirates seem to command the masses into buying pirated music and the musicians are unable to break this wave of command making them unable to profit through sale of legitimate records.¹⁵⁵ This has led to some artists preferring to focus on live performances on social events than invest in recording their music, hence some are embracing River Road also known as River Wood, which although known as a hub for industries in piracy offer cheaper options for production and distribution.¹⁵⁶

Although the country’s music and recording industry seem blighted with piracy and looks grim, IP proponents try to come up with programs to assist artists nurture their creativity; an example is ‘Spotlight on Kenyan Music’ an initiative by Alliance Française in Nairobi which identifies upcoming artists of afro fusion music and gives them opportunities to perform in concerts and participation in album production, with the intention to promote and distribute their music

¹⁵³ above n. 152

¹⁵⁴ Carole Croella, ‘On the Beat-Tapping the Potential of Kenya’s Music Industry’ (July 2007) www.wipo.int/wipo-magazine/en/2007/04/article_0001.html accessed 5 July 2016

¹⁵⁵ *ibid*

¹⁵⁶ above n. 152

internationally.¹⁵⁷ Further the positive effect music as an industry has on the GDP of Kenya and as a source of employment creation especially amongst the youth is starting to be appreciated and is being promoted and supported.* Although this is a positive step towards nurturing music and protecting copyright Tabu Osusa is of the view that the country should put in place a national strategy that will preserve and aid creativity amongst Kenyans, consequently creating conditions for the music industry to flourish and raise revenues.¹⁵⁸

3.4 Reasons for piracy

I hope with the understanding of why people pirate music this research and future researches will be better placed to suggest and put in place solutions to piracy. Amongst the reasons why people pirate music include: value of the CDs, most consumers perceive buying CDs as expensive because sometimes one may only be interested in a few songs in the CD therefore buying the whole CD which usually also has tax included on the price tag seems an expensive affair; low risk in being caught also promotes piracy through usage of peer to peer networks, record companies cannot afford and possibly cannot catch and sue all the users on peer to peer networks that download and share illegal music, further when one peer to peer network is successfully sued several others mushroom to take its place and serve its consumers a good example is the case of Napster and Grokster discussed in chapter 2, this makes the time, money and effort spent in suing these networks go to waste; most music pirates do not understand that artists usually get paid through sales and royalties after the recording companies have recouped the cost of making the record, therefore when music is illegally downloaded the recording company may not recoup

¹⁵⁷ above n. 154

* ibid sentiments of Tom K' Odiyo Director of MCSK Nyanza branch

¹⁵⁸ above n.154

its costs and in turn the artist will be denied his payment.¹⁵⁹ Pirates need to appreciate that with each illegal download the artist is denied money that he could use to make more music and worst still it ends up stifling or even killing the artist's morale to create new music.¹⁶⁰ Piracy is a sad state of affair because it makes an artist endowed with talent and creativity 'handicapped' and unable to make a living from his talent. This can be compared with robbing one of all his academic qualifications making them ineligible for employment, due to lack of papers. Although the media industry has tightened copyright laws to address the issues of dropping sales since 1999, due to illegal file sharing through peer to peer networks, the industry seems to be trapped in a business model made obsolete by technological innovation.¹⁶¹ There is need for the music industry to accept and adapt to the new generation of consumers who are technological savvy, look into the reasons for piracy and create business models that will deter piracy and promote creativity.¹⁶²

Recording companies have also contributed to piracy, because as at 2016 there exists only three major recording companies, this means they can control their own systems and make their own rules; in turn they can decide which style of music would be in and which artist would be marketed.¹⁶³ It is because of this that CDs are expensive, further a consumer may not find an artist whose music they are interested in, in any of the major recording labels leading to piracy by consumers to enable them obtain the music they are interested in; recording labels seem to

¹⁵⁹ Dan Chihak, 'Why People Pirate Music' (The Day the Music Died The Effects of the Digital Age on the Music Industry and its Consumers October 2011) <https://musicindustryandp2p.wordpress.com/work-cited/> accessed 12 July, 2016

¹⁶⁰ Sanjay Goel, Paul Miesing, Uday Chandra, 'The Impact of Illegal Peer-to-Peer File Sharing on the Media Industry 2010) 52(3) California Management Review <http://cmr.ucpress.edu/content/52/3/6> accessed 14 July 2016

¹⁶¹ *ibid*

¹⁶² *above n. 159*

¹⁶³ Heather Macdonald, 'Big Three Record Labels' (updated May 24 2016) <http://musicians.about.com/od/musicindustrybasics/g/BigFour.htm#> accessed 14 July 2016

have shifted their focus from the quality of music recorded, to artists they find much easier to sell because dissemination of sound recordings is the major way for them to make money.¹⁶⁴ This is the reality and the dark side of the advent of sound recordings and recording companies, because they have also been tools which not only make it easier for an artist to disseminate and distribute his music but also tools that can be used to stifle the artist's creativity and morale to create new music.

Consumers also indulge in piracy because of lack of knowledge of digital platforms they can use to access legal music. Further the music industry has sued users of peer to peer networks who have used these networks to illegally download music directly; this has been ineffective because most of the offenders are college students who do not have the money to pay damages to the recording companies when found guilty.¹⁶⁵

In Kenya artists have created a digital platform 'Mdundo' which enables consumers access music on the internet at a price of Kshs. 100 for five songs, this platform has enabled over 3,000 artists who have registered with it disseminate their music without using recording labels.¹⁶⁶ Tim Rimbui cofounder and chief executive officer of 'Wabeeh' another digital platform blames lack of proper distribution channels for the piracy menace, this platform provides an easier way for the artists to upload and distribute their music, through this platform musicians retain almost

¹⁶⁴ Nate Clay, 'Failing the Music Industry' (The Day the Music Died The Effects of the Digital Age on the Music Industry and its Consumers October 2011) <https://musicindustryandp2p.wordpress.com/work-cited/> accessed 12 July 2016

¹⁶⁵ *ibid*

¹⁶⁶ Elayne Wangalwa, 'Tackling Piracy in Kenya's Music Industry' (CNBC Africa 22 July 2014) <http://www.cnbc africa.com/news/east-africa/2014/07/22/kenyas-music-industry/> accessed 14 July 2016

75% of the revenue hence ensuring the music keeps on coming.¹⁶⁷ Although such platforms seem to address the issue of piracy by offering affordable music, using digital platforms may cause a challenge to people who cannot access internet and lack technological knowhow. Further as already stated not many people are aware of the available digital platforms they can use to access music legally.

Although the music industry faces challenges artists hold on to hope that the industry is one worth nurturing and protecting. This can be seen in some of their sentiments;

*“People should be able to live of their royalty so that they can be more creative. If the music market is activated in Kenya, it will be the leading employer in this country, I look forward to the day that the arts and culture will not be ignored but given the place they belong.”*¹⁶⁸

*“Music has to be looked at as an industry that can add value to the economy and GDP of the country, it can create employment to the youth and wealth creation, for it is not just a social activity, it’s a profession, business and industry. Better recording industries and distribution can lead to reduction of CDs and this can help push the pirates out of the market.”*¹⁶⁹

¹⁶⁷ Elly Okutoyi, ‘Kenyan Tech Startup ‘Waabeh’ Fights Music Piracy’ (2014) IT Web Africa <http://www.itwebafrica.com/cloud/518-kenya/232349-kenyan-tech-startup-waabeh-fights-music-piracy> accessed 15 July 2016

¹⁶⁸ WIPO, ‘Talking Copyright – The Music Industry in Kenya’ Interview with Abbi Nyinza, An afro fusion musician in Kenya (1 January 2010) <https://www.youtube.com/watch?v=6j07juQj37g> accessed 16 July 2016

¹⁶⁹ Ibid Interview with Achie’ng Abura, An Afro jazz, Afro fusion and gospel musician in Kenya <https://www.youtube.com/watch?v=6j07juQj37g> accessed 16 July 2016

3.5 Mechanisms put in place by KECOBO in fighting piracy and the challenges these mechanisms encounter

KECOBO being the main state corporation mandated to administer and enforce copyright in Kenya has developed mechanisms to ensure it fulfills this crucial mandate, and realize its belief of protecting copyright and encouraging creativity.¹⁷⁰

In tackling this part of the study which answers the research questions set out in chapter one, the author decided to conduct interviews of the State Counsel at KECOBO, because they are the personnel that handle legal issues relating to copyright and are therefore better versed with the CA 2001, they appreciate the mechanisms put in place to protect copyright in musical works and sound recordings and the challenges these mechanism encounter. This part of the study restates the research questions, the questions asked under each research question and the response by each interviewee. This is done with an aim to provide an answer for each research question.

Question 1: what are the mechanisms put in place by KECOBO in protecting musical works and sound recordings on the digital platform, and what are the challenges faced by KECOBO in implementing copyright in musical works and sound recordings?

(i) Technology develops at a fast rate how often is the staff taken for training?

Okiror said on a need to need basis, on invitation by relevant stakeholders and as per the human resource training manual.¹⁷¹

¹⁷⁰ above n. 149

¹⁷¹ Interview with Okiror state counsel, KECOBO (Nairobi, Kenya 11 July 2016)

Joseph said KECOBO needs to carry out training assessments, it is done annually and those who need training are sponsored.¹⁷²

John felt training was carried out in rare occasions but most of the time they have training carried out by various experts from WIPO, who are more knowledgeable on copyright and related rights.¹⁷³

Kaindo felt training was not done as often as necessary.¹⁷⁴

(ii) What mechanisms has KECOBO put in place to protect musical works & sound recordings?

Okiror responded by saying there has been review of existing laws to curb piracy on online platforms, sensitization of both right holders and consumers of music, registration of works, maintenance of a database and the existence of anti piracy devices.¹⁷⁵

Joseph seconded Okiror but he added carrying out inspections and arrest of those who deal in pirated copyright works, prosecution of copyright infringement cases and offering legal advice on copyright and related rights.¹⁷⁶

John said KECOBO ensures genuine copies have been authenticated and any copy without authentication is presumed to be an infringing copy, but he did not explain how authentication is carried out.¹⁷⁷

¹⁷² Interview with Joseph state counsel, KECOBO (Nairobi, Kenya 6 July 2016)

¹⁷³ Interview with John state counsel, KECOBO (Nairobi 13 July 2016)

¹⁷⁴ Interview with Kaindo state counsel, KECOBO (Nairobi 11 July 2016)

¹⁷⁵ above n. 171

¹⁷⁶ above n. 172

¹⁷⁷ above n. 173

Kaindo held the same view as Okiror but added providing a complaint procedure and competent authority to try and mediate disputes.¹⁷⁸

- (iii) What challenges does KECOBO face in implementing copyright in musical works and sound recording?

Okiror said some of the people who are ignorant include musicians and producers. Further the country lack a countrywide network of enforcement officers and prosecutors, he also noted the law is inadequate in curbing online piracy.¹⁷⁹

Joseph added policymakers, issuers, law enforcement agencies and the rights holders to the list of people who are ignorant. Further KECOBO has a limited capacity both in human resource and finances to create more awareness and training on the importance of copyright on the economic growth and development in Kenya.¹⁸⁰

Kaindo added judicial officers to the list of people who were ignorant about copyright matters; he also noted KECOBO lacked enough human resource and finances to fulfill its mandate.¹⁸¹

John was of the same view as the other interviewees¹⁸²

- (iv) Are there areas in the law in relation to these challenges that have not been explored, such that the law can be amended and used to address these challenges?

Okiror said there are amendments tabled in parliament for debate.¹⁸³

¹⁷⁸ above n. 174

¹⁷⁹ above n. 171

¹⁸⁰ above n. 172

¹⁸¹ above n. 174

¹⁸² above n. 173

Joseph was of the view there is a need to revise current laws to factor online platform that is currently being used to propagate piracy.¹⁸⁴

John held the same view as Joseph.¹⁸⁵

(v) Is Kenya's music copyright law westernized and does take into account the social and cultural factor of this country?

Okiror said it is not fully westernized it takes into account the social and cultural factors of Kenya. Definitions and interpretation of the law factor the terms used locally.¹⁸⁶

Joseph held the view the copyright law is not fully westernized it takes into account the social and cultural factors of Kenya. Amendments to the law include provisions for the protection of performer's rights and traditional cultural expressions, enhanced penalties for copyright infringement.¹⁸⁷

Kaindo said the country's copyright law is westernized and has borrowed heavily from international legislation.¹⁸⁸

(vi) Do you think acquisition of copyright should be automatic or registered? Explain your answer.

Okiror was of the view registration of copyright should be mandatory; this lessens the burden of proof in suits or mediation forums.¹⁸⁹

¹⁸³ above n. 171

¹⁸⁴ above n. 172

¹⁸⁵ above n. 173

¹⁸⁶ above n. 171

¹⁸⁷ above n. 172

¹⁸⁸ above n. 174

Joseph noted acquisition of copyright is automatic once work has been reduced in material form. Although legislation is necessary so as to enhance enforcement and ensuring there is a data base of all copyright works.¹⁹⁰

John said acquisition of copyright should be both automatic and upon registration; he noted registration helps in to prove ownership.¹⁹¹

Kaindo held the view acquisition of copyright should be automatic in line with international standards, because rights should not be conditional.¹⁹²

3.6 Conclusions from question 1

From the answers to the first research question, the study has established that KECOBO has put in place mechanisms to protect musical works and sound recordings on the digital platform; although these mechanisms face challenges. The mechanisms include training of staff, review of existing laws to curb piracy on online platforms, sensitization of key stakeholders, registration of works, maintenance of a data base of copyright works, inspections and arrest of persons dealing in pirated copyright works, prosecution of copyright infringement cases, providing a complaint procedure to report cases of copyright infringement and a mediation authority to settle disputes.

The challenges the above mechanisms face are; lack of adequate finances to carry out trainings hence training of staff is not done as often as it should be done. Further there is need to carry out assessments before staff embark on training to ensure they get relevant training. A huge population of the citizenry consisting of key stakeholders is ignorant of copyright or has limited

¹⁸⁹ above n. 171

¹⁹⁰ above n. 172

¹⁹¹ above n. 173

¹⁹² above n. 174

knowledge on copyright and lack of adequate finances also makes it hard for KECOBO to conduct more public awareness on matters of copyright. Lack of enough human resource is also a challenge therefore KECOBO do not have a countrywide network of enforcement officers and prosecutors. Registration of copyright not being mandatory makes it hard for KECOBO to develop a comprehensive database of copyrighted works. Further although all the interviewees agree there is need to address piracy on online platforms, and KECOBO has proposed amendments the same are yet to be debated on parliament.

Question 2: Can the mechanisms put in place by KECOBO to protect musical works and sound recordings be improved and are there better mechanisms that can be proposed, which can make KECOBO be in a better position to protect copyright in musical works and sound recordings on the digital platform?

- (i) After registration of a CMO by KECOBO, are certificates renewed after a period of time or there is no requirement for renewal?

Okiror said certificates are required to be renewed annually; the CMO is expected to remit financial reports annually before renewal of the license.¹⁹³

Joseph, John and Kaindo all said certificates are renewed annually.¹⁹⁴

- (ii) Does the CA 2001 address copyright infringement in digital works? If yes how?

Okiror had no response to this question.¹⁹⁵

Joseph said no, but something is being done to address the issue.¹⁹⁶

¹⁹³ above n. 171

¹⁹⁴ above n. 172, 173 and 174

¹⁹⁵ above n. 171

John said yes, the CA 2001 incorporated the provisions of the two WIPO Internet Treaties, The WIPO Copyright Act and WIPO Performance and Phonogram Treaty. These treaties address issues that arose with the use of copyright works in the digital environment.¹⁹⁷

Kaindo said no the Act in its current form does not address copyright infringement in digital works.¹⁹⁸

(iii) Does KECOBO have any proposed amendments to the CA 2001, which will tighten protection of music copyright and sound recordings in the digital arena? If yes kindly state the proposed amendments?

Okiror, Joseph, John and Kaindo all said yes, amendments are being are worked on, although none of them indicated the amendments.¹⁹⁹

3.7 Conclusions from question 2

From the answers to the second question, the study has established the mechanisms put in place by KECOBO to protect musical works and sound recordings on the digital platform can be improved. This is inferred from the answers by the interviewees who indicated the CA 2001 in its current form does not address piracy on the digital platform, but went ahead and said amendments are being worked on; although no interviewee stated the amendments exactly. Only one interviewee out of the four was of the view the CA 2001 was amended to capture the provisions of the WIPO treaties.

¹⁹⁶ above n. 172

¹⁹⁷ above n. 173

¹⁹⁸ above n. 174

¹⁹⁹ above n. 171, 172, 173 and 174

CHAPTER 4: COMPARATIVE STUDY: PROTECTION OF MUSICAL WORKS AND SOUND RECORDINGS ON THE DIGITAL PLATFORM IN OTHER JURISDICTIONS

In chapter three I have discussed the background of music piracy and the effects it has on the music industry. Further the chapter brought out the need why piracy has to be discussed in the digital platform. The last stretch of the chapter has reported interviews carried out amongst State Counsel at KECOBO and from the interviews it has been shown that although the board has put in mechanisms to try and combat piracy, they still have challenges that need to be addressed. One of the main challenges is how piracy can be combated on the digital platform. A majority of the interviewees agreed that the CA 2001 in its current form does not address the issue well and therefore amendments may be necessary. The interviews also showed that currently there are proposed amendments tabled at Parliament awaiting debate; the author would have liked to discuss these proposals in this chapter in a bid to see whether they suffice to address the issue of piracy in the digital platform and if they seem better than what the CA 2001 has to offer currently, but chooses not to do so because save for the interviews which just indicate they exist the interviewees have not enumerated them and there lacks any other reliable source the author can rely on.

In this chapter the study will use the UK, India and Ghana in its comparative study, because despite all of them being common law countries they are also members of WIPO, which aims to promote invention and creativity for the economic, social and cultural development of all

countries through a balanced and effective international IP system.²⁰⁰ Further each country has its own unique feature that makes it a good jurisdiction for a comparative study.

The UK, India and Ghana are chosen as jurisdictions for the comparative study because the UK CDPA 1988, India's Copyright Act 1957 and the Ghana Copyright Act 2005 protect the same types of works as the CA 2001. Further the author believes India is a good jurisdiction for a comparative study because as already noted in chapter 1 the country's Copyright Act has undergone through several amendments in a bid to address contemporary issues, the latest amendments being in 2012 to make the legislation respond to the WIPO Internet Treaties.²⁰¹ Ghana is chosen because its Copyright Act 2005 establishes a copyright office which is akin to KECOBO. The study intends to propose the best practices from the copyright office which KECOBO can adopt, to enable it enhance protection of copyright in musical works and sound recordings on the digital platform.

This chapter will analyze the law and practice in the chosen jurisdictions to try and highlight legislation and practice that Kenya can adopt to enable it tackle on line piracy therefore addressing the challenges KECOBO face in protecting copyright in musical works and sound recordings as has been highlighted in chapter three. The study will discuss how these jurisdictions have handled distribution of musical works and sound recordings, because it is during this process that the artists seem to suffer the brunt of piracy.

A firm conclusion is although the copyright system has its flaws it is the best system to ensure creators are protected and hence benefit from their work, this can only be done by ensuring the

²⁰⁰ World Intellectual Property Organization, 'Member States' <http://www.wipo.int/members/en/> accessed 21 July 2016

²⁰¹ above n. 78

system is well developed at the local level.²⁰² This maybe explains why membership at WIPO constitutes of 184 states which translate to over 90% of the countries in the world.²⁰³

4.1 The United Kingdom

The UK has adopted a three tire approach in addressing the issue of piracy on the digital plat form; these are; using legal remedies, creating lawful commercial activities and increasing education and awareness.²⁰⁴

4.1.1 Legal remedies

The CDPA 1988 has provisions that can be used to combat piracy:-

Chapter 8 establishes a Copyright Tribunal which has the main mandate of arbitrating over copyright matters, the Act provides for the membership, constitution, financial provisions which provide inter alia the Secretary of State in consultation with the Treasury will determine the remuneration payable to the members of the tribunal, jurisdiction and powers of the tribunal, procedure of appeal where it provides inter alia appeal lie on points of law and will be heard at the High Court.²⁰⁵ Ideally tribunals are faster in dispensing justice and more specialized hence having a specialized tribunal that handles matters of copyright ensures this. Section 97A empowers the High Court to issue an injunction on a service provider that has actual knowledge of another person using their services to infringe copyright; the meaning of ‘service provider’ is

²⁰² Dr. Rogers Wallis and Dr. Zeliyeka Kozul Wright UNCTAD, ‘Best Practice Cases in the Music Industry and their relevance for Government Policies in Developing Countries’ (2001)

http://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/study_r_wallis.pdf accessed 21 July, 2016

²⁰³ Federico Guicciardini Corsi Salviati, ‘Supporting the Business Community to Facilitate the Effectiveness Use of IP System for Competitiveness and Growth: The Role of WIPO (2010) WIPO

http://www.wipo.int/edocs/mdocs/aspac/en/wipo_ip_nan_10/wipo_ip_nan_10_ref_t9_3.pdf accessed 21 July 2016

²⁰⁴ Practical Law, ‘Piracy and illegal File Sharing: UK and US Legal and Commercial Responses’

<http://uk.practicallaw.com/1-502-7956> accessed 22 July 2016

²⁰⁵ The National Archives, legislation.gov.uk, ‘Copyright, Designs and Patents Act 1988’

<http://www.legislation.gov.uk/ukpga/1988/48/section/152> accessed 26 July 2016

borrowed from The Electronic Commerce (EC Directive) 2002* and means any person providing an information society service.²⁰⁶ Services covered under the directive include entertainment; therefore service providers can actually have notices to consumers not to infringe copyright on works the users' access using the ISPs services. Section 160 provides the UK can deny copyright protection to citizens whose countries do not provide adequate protection to British Works, this section goes further to provide the types of works it applies to and it encompasses musical works and sound recordings.²⁰⁷

In protecting copyright, copyright owners had tried using individual and volume litigation where individual copyright infringers would be prosecuted and where a group of copyright owners would come together to sue copyright infringers respectively, but this proved to be expensive and time taxing, hence in response to outcries from the media industry due to the menace of online piracy the Government enacted the Digital Economy Act, 2010 (DEA 2010); this Act expects the Office of Communications to work with Internet Service Providers (ISPs) to protect and enforce copyright on the digital platform.²⁰⁸ The Act places a burden on ISPs to notify subscribers of reported infringements at section 3 and to provide infringement lists to copyright owners at section 4 (these two obligations are referred to as 'initial obligations').²⁰⁹ Section 3 empowers a copyright owner to make a report* to an ISP who provided the Internet Protocol (IP)

* The directive provides the legal rules that on line retailers and service provides must comply with when dealing with consumers in the EU member states, it provides the information the retailers and service providers must give the consumers and lack of providing this information can make a contract null and in breach of member retail law 206 above n. 202

207 *ibid*

208 Practical Law, 'Digital Economy Act, 2010: Summary of Main Provisions' Legal update <http://uk.practicallaw.com/9-502-0116?service=ipandit#> accessed 11 July 2016

209 The National Archives, [legislation.gov.uk](http://www.legislation.gov.uk), 'The Digital Economy Act 2010' <http://www.legislation.gov.uk/ukpga/2010/24/contents> accessed 27 July 2016

*A copyright infringement report "*a*) states that there appears to have been an infringement of the

address, where it appears to the copyright owner the user of the service is infringing on copyright or has permitted the use of the service by another person to infringe on copyright; after receiving the report the ISP must notify* the owner of the IP address of the alleged infringement.²¹⁰ Section 4 places an obligation on ISPs to provide a list of relevant subscribers (the initial obligations code defines a relevant subscriber as one who meets the threshold provided in the code, and this is determined by the number of reports the owner of copyright has sent through the ISP) involved in copyright infringement (the list is provided at the behest of the copyright owner and if an initial obligations code expects the ISP to provide the list) the list shows which reports made by the owner relate to the subscriber but does not reveal the subscribers identity.²¹¹ Under section 5 The Office of Communications is expected to come up with a Code of Initial Obligations for ISPs or alternatively approve the Codes of Initial obligations ISPs develop, the office is also suppose to develop a Technical Obligations Code, the section further empowers the Secretary of State to approve the codes or any changes to them, but either House of Parliament can pass a resolution to annul any of the Codes.²¹² Section 9 empowers the Secretary of State to direct the Office of Communication to assess whether a technical obligation (this is the obligation on an

owner's copyright; (b) includes a description of the apparent infringement; (c) includes evidence of the apparent infringement that shows the subscriber's IP address and the time at which the evidence was gathered; (d) is sent to the internet service provider within the period of 1 month beginning with the day on which the evidence was gathered; and (e) complies with any other requirement of the initial obligations code"

** A notification should contain "(a) a statement that the notification is sent under section 3 and in response to a copyright infringement report; (b) the name of the copyright owner who made the report; (c) a description of the apparent infringement; (d) evidence of the apparent infringement that shows the subscriber's IP address and the time at which the evidence was gathered; (e) information about subscriber appeals and the grounds on which they may be made; (f) information about copyright and its purpose; (g) advice, or information enabling the subscriber to obtain advice, about how to obtain lawful access to copyright works; (h) advice, or information enabling the subscriber to obtain advice, about steps that a subscriber can take to protect an internet access service from unauthorised use; and (i) anything else that the initial obligations code requires the notification to include."*

²¹⁰ above n. 209

²¹¹ *ibid*

²¹² *ibid*

ISP to impose a ‘technical measure’²¹³ on its subscriber(s) who has been using the services to infringe copyright) should be imposed on ISPs, make preparations for these obligations (at this point the office can consult inter alia copyright owners, subscribers and ISPs in deciding on the efficacy of a technical measure, in relation to a particular internet service) and send to the secretary a report of the preparations made; Parliament should be notified by the Secretary of State of any order he has made pertaining to assessment and preparation of a technical measure.²¹⁴ Section 10 empowers the Secretary of State to make an order imposing a technical obligation on an ISP after assessment by Office of Communication, the order states when the technical obligation should take effect, but before issuing this order it has to be approved through a resolution by both Houses of Parliament; when a technical obligation order is in force the Office of Communication should develop a technical obligations code for purposes of regulating those obligations. Section 12 gives the Office of Communications the power to administer and enforce the codes; this power includes resolving disputes between copyright owners and ISPs in relation to technical obligations and imposing penalties which can be amended by the Secretary of State, subject to approval by a resolution in both Houses of Parliament.²¹⁵ An aggrieved party has the right of appeal and in case of an appeal relating to a technical obligation code appeals lie to the first tier tribunal.²¹⁶ Section 17 empowers the Secretary of State to develop provisions empowering court to issue a blocking injunction order (this order directs an ISP to prevent its service being used to gain access to a certain location) such an order can only be issued when the website has been, is being or is likely to be used for or in connection with infringing

²¹³ above n. 205 “*technical measure*” is a measure that limits the speed or other capacity of the service provided to a subscriber; prevents the subscriber from gaining access to particular material or limits such use; suspends or limits the service provided to the subscriber in another way

²¹⁴ *ibid*

²¹⁵ *ibid*

²¹⁶ *ibid*

copyright, and can only be granted if the infringement has an adverse effect on consumers or businesses and it is commensurate to the harm that it causes.²¹⁷

From the above analyses of DEA 2010 it can be appreciated the Act has indeed tried to address on line piracy, by imposing obligations on ISPs. The Act further creates a system of checks and balances by expecting copyright holders, ISPs, subscribers and The Office of Communication to work in consultation. This system is strengthened by requiring approval through resolutions by both Houses of Parliament of any orders relating to imposition of technical obligations on ISPs made by the Secretary of State.

4.1.2 Lawful commercial alternatives to music piracy

In this second tire, artists provide accessible, convenient, a wide selection of music to choose from and good quality (both products and service) online content to their consumers; further apart from music, copyright owners also provide other products example interviews with the artists these act as incentives to consumers to make them download content from legal sites.²¹⁸

Sites are also developed to either allow people to download and buy the music or just stream the music and listen to it, listening can in the end lead to consumers buying the music; because music is a unique product which consumers have to ‘test’ before deciding if they are interested in it. As an incentive sites that can be used to stream music negotiate license fees and rights clearance with copyright holders, further they also make revenue from pop up advertisements or payment of monthly subscription fees from their clients, alternatively clients are sheltered from

²¹⁷ above n. 205

²¹⁸ above n. 204

having to bear the cost of paying for music each time they access it by making ISPs and device manufacturers incorporate the license fee in their products.²¹⁹

4.1.3 Education and awareness of music piracy

This third tire may not be a quick fix for the piracy problem but it will have a lasting effect. In the UK the music industry together with other stakeholders such as the British Phonographic Industry have initiatives that include providing books to schools that can be used in citizenship and media studies classes.²²⁰ Commentators note in this third tire the public should be made to appreciate what is copyright and why infringing it is wrong, further the problem should be contextualized for them to understand piracy affects real people, real jobs and it is not only about recording companies losing money, further education of copyright awareness should be started from an early age thus inculcating values that appreciate copyright in the society.²²¹

4.2 India

4.2.1 Legal remedies

The Copyright (Amendment) Act 2012 introduced amendments to the Indian Copyright legislation (Copyright Act 1957) to enable it encompass provisions of the WIPO Copyright Treaty (WCT)²²² and WIPO Performances and Phonograms Treaty (WPPT) both referred to as the internet treaties; whose main aim is to address challenges posed by digital technologies mainly dissemination of protected material over digital networks; ensuring authors still have

²¹⁹ above n. 204

²²⁰ *ibid*

²²¹ *ibid*

²²² WIPO, 'WIPO Internet Treaties' http://www.wipo.int/copyright/en/activities/internet_treaties.html accessed 23 July 2016 *The WCT aims to protect amongst other creators, creators of musical works while WPPT aims to protect producers of phonograms*

control of their works even in digital form and they are protected and adequately compensated when their works are shared on digital platforms.²²³

The amendments introduced by the Copyright (Amendment) Act 2012 include adding ‘storage’ of sound recordings as an exclusive right held by copyright holders of this type of works, before this amendment the Indian Act had already provided ‘storage’ as an exclusive right enjoyed by owners of musical works.²²⁴ S.14 provides storing of the musical work in any electronic form is an exclusive right.²²⁵ The Copyright Act 1957 now makes it an exclusive right in relation to sound recordings “*to make any other sound recording embodying it including storing of it in any medium by electronic or other means.*”²²⁶ ‘Storage’ as an exclusive right is of utmost importance in the context of digital works, because once work has been stored dissemination is made more convenient.

Hiring is another exclusive right owned by the copyright owner of a sound recording, under the amendments the term ‘hire’ has been replaced with ‘commercial rental’ in the case of sound recording, this removes any possibility of ‘hire’ being interpreted as non-commercial hire, thus tightening the copyright holders right to compensation each time the work is hired.²²⁷ The amendments define commercial rental to mean it does not include rental, leasing or lending of a legally acquired copy of the sound recording to non-profit making libraries or educational

²²³ above n. 222

²²⁴ Abhai Pandey, ‘Inside Views: Development in Indian IP Laws: The Copyright (Amendment) Act 2012 (Intellectual Property Watch 22 January 2013) <http://www.ip-watch.org/2013/01/22/development-in-indian-ip-law-the-copyright-amendment-act-2012/> accessed 23 July 2016

²²⁵ Copyright Office Government of India ‘Act and Rules – Copyright Act 1957’ <http://copyright.gov.in/> accessed 11 August 2016

²²⁶ Ministry of Law and Justice (Legislative Department) (New Delhi 2012) ‘India The Copyright (Amendment) Act 2012’ http://www.wipo.int/wipolex/en/text.jsp?file_id=342028 accessed 11 August 2016

²²⁷ above n. 224

institutions.²²⁸ The Act explains non – profit libraries and educational institutions as institutions that are exempted from paying tax and do not receive grants from the government.²²⁹

Where the copyright owner in all types of protected works assigns the right to his work, the Amendment Act provides the assignment shall not include any form of exploitation or commercial use that was not in existent when the assignment was effected.²³⁰ This shelters the copyright owners from exploitation of their work through means they could not foresee; because technology develops at a fast rate. Further The Copyright act 1957 of India provides an assignment shall indicate the amount of royalty payable to the author; the amendment has however included the term ‘other considerations’ apart from royalty payable, this broadens the benefits the author can get from assigning his work.²³¹

4.3 Ghana

The study will focus on relevant provisions of the Ghana Copyright Act 2005, in a bid to propose best practices KECOBO can adopt. The study focuses on the Ghana Copyright Act 2005 because it is the legislation that establishes the Copyright Office which it can be argued is akin to KECOBO.

The Ghana Copyright Act 2005 establishes a copyright monitoring team. This team comprises of police officers, 5 representatives of copyright owners and 2 officers of the copyright office.²³² The mandate of this team is to monitor copyright works, investigate cases in respect of copyright, undertake anti piracy activity and perform other functions that are necessary to protect

²²⁸ above n. 226

²²⁹ above n. 225

²³⁰ above n. 224

²³¹ ibid

²³² Copyright Act 2005 s.50 (Ghana)

authors.²³³ The police officers in the monitoring team maybe seconded to the copyright office for a duration and on terms that will be determined by the Minister of Justice and Interior, on advice of the copyright administrator and Inspector General.²³⁴ This provision the author argues at least ensures key stakeholders are involved in enforcement of copyright matters. Further the provision allowing secondment of police officers from the monitoring team to the copyright office, enables the copyright office have enforcement and technical personnel when need be.

The Ghana Act 2005 clearly provides the headquarter of the copyright office will be in Accra,²³⁵ as the CA 2001 provides KECOBO's headquarter will be in Nairobi.²³⁶ The Ghana Act although goes further and provides regional offices maybe opened as directed by the Minister on advice of the Legal Service Board, which is the governing body of the copyright office.²³⁷ The CA 2001 should also have a provision which provides for opening of regional offices especially with devolution. This will ensure KECOBO is better placed to cover a wider region in its efforts to enhance protection of copyright in musical works and sound recordings. Further KECOBO seems to be governing itself unlike the Ghana Copyright Office which has the Legal Service Board as its governing body. Having the minister direct opening of regional offices upon advice of the Legal Service Board ensures there are checks and balances in the running of the copyright office.

The Chief Executive Officer of the Ghana Copyright Office is the Copyright Administrator and is appointed by the president, upon advice of the Legal Service Board after consultation with the

²³³ above n. 232

²³⁴ *ibid*

²³⁵ Copyright Act 2005 s.65 (Ghana)

²³⁶ Copyright Act 2001 s.4 (Kenya)

²³⁷ above n. 232

Public Service Commission.²³⁸ The author argues this ensures the person appointed as Copyright Administrator is independent in decision making. This can be contrasted with the scenario in Kenya where the Chief Executive Officer is appointed by the minister on recommendation of the board.²³⁹

The Ghana Act 2005 provides amongst the functions of the Copyright Office is to investigate and redress cases of copyright infringement, and settle disputes of copyright where those disputes have not been reserved for settlement by the Copyright Tribunal.²⁴⁰ In contrast the CA 2001 does not provide settlement of copyright infringement cases as one of the functions of KECOBO.

Taking the above provisions of the Ghana Copyright Act 2005 it can be argued plausibly the Ghana Copyright Office has practices KECOBO can borrow. The provisions discussed above make the Ghana Copyright Office better placed in enforcement of copyright.

²³⁸ Copyright Act 2005 s.68 (Ghana)

²³⁹ Copyright Act 2001 s.11 (Kenya)

²⁴⁰ Copyright Act 2005 s.66 (Ghana)

CHAPTER 5: OVERALL CONCLUSIONS AND THE WAY FORWARD

5.1 A recap of the study

Chapter one, Introduced and gave a background for a general understanding of the need for protection of copyright in musical works and sound recordings by KECOBO. The chapter outlined the background of the topic, mainly why I.P needs to be appreciated, recognized and further why IPRs need to be protected. The chapter did set out the jurisprudential theories upon which the research is founded and the problem the author observed; why it needed to be addressed and the questions this study sought to answer.

In chapter two, I discussed the concept of copyright infringement and the idea/expression dichotomy; in this chapter I looked at the definitions of musical works, sound recording and literary works as provided for by the CA 2001, in a bid to make it clear the study aims to protect copyright in musical works and sound recordings. Further the author observed there is need to understand the concept of copyright infringement and the components of copyright infringement, because digital works can be easily modified enabling the person doing this obtain derivative works. At the end of the chapter the study answered the question whether KECOBO tests for copyright infringement before registering works as copyrightable.

In chapter three I examined how copyright infringement happens in the digital platform. It was important to consider infringement of music copyright in the digital platform because access to technology and having knowledge in technology makes piracy easier than it was before. The chapter defined piracy, gave a background and effect of piracy on the Kenyan music industry. I looked at the reasons for piracy hoping understanding why people pirate music will make the study be better placed in providing recommendations to curb the vice. Lastly the chapter closed

by reporting interviews which aimed to establish the mechanisms KECOBO had put in place to protect copyright in musical works and sound recordings and the challenges these mechanisms encounter.

A comparative study was conducted in chapter four with the purpose of evaluating some of the reforms the UK, India and Ghana have introduced in curbing on line music piracy. In conducting the comparative study the author appreciated that Kenya cannot copy and paste the legislations and practices in totality from the chosen jurisdictions, hence the study borrowed legislation and practice the author believes can be well adapted in the Kenyan legal system.

5.2 Suggestions for the way forward

The study has established KECOBO has indeed put in place mechanisms to protect copyright in musical works and sound recordings, but these mechanisms face hurdles especially in the digital arena therefore there is need to tighten the protection measures. My contribution to how KECOBO can enhance protection of copyright in musical works and sound recordings is as follows:

Establishment of a Copyright Tribunal and sensitization of judicial officers on copyright:

Currently matters of copyright are heard in the Commercial Law Division of the High Court. Parliament should pass to provide for the establishment of a Copyright Tribunal with the main mandate of listening to and arbitrating over matters of copyright. This is because ideally tribunals are more specialized in the matters they hear because they focus on specific branches of law this will aid in the fast development of jurisprudence in copyright matters and there will be more efficiency in dealing with matters of copyright. Alternatively the judges that currently

preside over copyright matters should be subjected to frequent training in copyright matters to enable them keep abreast with the developments in copyright law. Practicing lawyers can also be educated on matters of copyright through the Continuous Professional Development Program, this will enable them bring informed jurisprudence to the law. KECOBO can advocate for public awareness and ensure the same is carried out. I make this recommendation because the interviews established there was lack of awareness of IP laws amongst the public including judicial officers. Further the literature review indicated courts do not prioritize IP matters because infringement seems trivial hence there is delay in prosecuting them.

Amending the definition of musical works:

The CA 2001 at s.2 defines musical works as *any musical work, irrespective of musical quality and includes works composed for musical accompaniment.*²⁴¹ The Act in defining literary works gives a list of works and states works that are similar to those listed also qualify as literary works,²⁴² this list of literary works does not include lyrics to music. It is the author's argument that the CA 2001 makes one unsure under which type of works lyrics to music fall. Taking this into account we can borrow the definitions of musical works and literary works from the CDPA 1988 and amend these definitions. The CDPA 1988 defines musical works as *a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.*²⁴³ While it defines literary works to mean inter alia *any work, other than a dramatic or musical work, which is written, spoken or sung....*²⁴⁴ The definitions of musical works and literary works as provided in the CDPA 1988 is explicit and makes one appreciate under UK law

²⁴¹ above n. 81

²⁴² above n. 83

²⁴³ above n. 84

²⁴⁴ *ibid*

a musical work will consist of distinct copyrights, this will be in the musical work (tune of the music) and literary work (lyrics to the music). Amendment of the definition can be done by the legislature for it is the supreme law making body in the country.

It is important the CA 2001 is explicit on the types of works it protects, because if a work in question is not provided for under the Act as a protected work then the work will not be afforded copyright protection under the Act.

Making ISPs responsible for copyright protection in musical works and sound recordings:

Legislation should be developed imposing obligations on ISPs to aid in protecting copyright in musical works and sound recordings, this leaf can be borrowed from the DEA 2010. This legislation should require stakeholders such as copyright owners, ISPs, subscribers and the Communications Authority to work in consultation with one another. Further the Minister (or person who will have powers equivalent to those of the Secretary in State under the DEA 2010) should work in consultation with Parliament to ensure his or her powers are kept in check, especially where technical obligations are imposed on ISPs, because technical obligations entail ISPs interfering with a subscriber's ability to access content on the internet. This will ensure public participation which is amongst the national values and principles of governance as provided for by the COK 2010 is observed.

Denial of protection of copyright in musical works and sound recordings to citizens whose countries do not offer the same protection to Kenyan works:

Legislation should be introduced by parliament declining protection of musical works and sound recordings by other citizens of countries that do not provide adequate or same protection of these

Kenyan works in their countries. This will ensure Kenyan works are protected both locally and in foreign countries. This will assist Kenya in implementing copyright in musical works and sound recordings on the digital platform, considering the internet does not have boundaries; though this should be done with caution not to offend the principle of “National Treatment” in the IP international conventions which Kenya is a party to.

Including storage in any medium by electronic or other means an exclusive right of copyright owners in musical works and sound recordings:

Parliament should amend the CA 2001 to include storing of musical works and sound recording in any medium by electronic or other means as one of the exclusive rights, owners of copyright in musical works and sound recordings enjoy; similar to what is provided for in the Copyright Act 1957 of India. The CA 2001 can further provide circumstances under which exceptions are allowed to ensure the interest of users is protected. This measure will act as a prevention measure in curbing piracy in digital works, because once worked is stored in digital form unlawful dissemination is easy.

Amendments on mode of assignment

Currently the CA 2001 grants copyright holders in all types of protected works including musical works and sound recordings the right to assign their works, but there is no proviso that shelters the copyright owner from their work being exploited through commercial means that did not exist or was not known when the assignment was effected. This leaves the copyright owners in a precarious position because technology develops fast and the musical work or sound recording may be exploited commercially using means that were nonexistent when the assignment took

effect and the owner denied compensation, therefore a proviso providing the assignment does not extend to commercial use or mode of exploitation that was not known at the time the assignment was made should be added in the Act. This amendment should be done by parliament.

5.3 Conclusion

From the findings of the study, it should be appreciated if enhancement of copyright protection in musical works and sound recordings on the digital platform is to be a reality, it should not be a precinct of KECOBO only. Major stakeholders and the government need to have good will because it is only through their support that the above can happen.

Appendices

Appendix 1

QUESTIONNAIRE BACKGROUND

Study Title: Enhancement of Copyright Protection in Musical Works and Sound Recordings on The Digital Platform: A Case Study of KECOBO

Researcher: Abubakar Mariam Adam

Supervisor: Mr. Paul Kimani Njoroge

Dear Sir/Madam,

I am currently pursuing my Masters in Law at the University of Nairobi, as part of the course complement I am required to write and present a paper in an area of interest. As indicated above my topic of study is *'Enhancement of Copyright Protection in Musical Works and Sound Recordings on the Digital Platform: A Case Study of KECOBO'*

This questionnaire is administered as part of a study on how KECOBO can enhance protection of copyright in Musical Works and Sound Recordings on the Digital Platform.

As a participant kindly note the following:

- Your participation is entirely voluntary
- In the event any question is administered and it is not clear, feel free to ask for clarification
- Your responses will be recorded on the questionnaire

Do you agree to participate in this study?

Yes _____

No _____

Please sign below confirming your decision

Signature _____

(Accept/ Decline)

Appendix 2

Topic: Enhancement of Copyright Protection in Musical Works and Sound Recordings on the Digital Platform: A Case Study of the Kenya Copyright Board

Main objective of research: How can KECOBO best fight music piracy hence ensuring copyright in musical works and sound recordings is protected

Interview Questions

Name of interviewee: _____

Date: _____

1. Is KECOBO an independent organization or a department under the Office of the Attorney General?
2. What is the structure of KECOBO?
3. What do different personnel do?
4. Is the number of staff at KECOBO enough and do they have enough expertise to handle music piracy complaints?
5. If no, then kindly explain what more expertise you need
6. Technology develops at a fast rate, how often is the staff taken for training to enable them keep at breast with improved technology?
7. What mechanisms has KECOBO put in place to protect musical works and sound recordings?
8. What challenges does KECOBO face in implementing copyright in musical works and sound recordings?
9. Are there areas in the law in relation to these challenges that have not been explored, such that the law can be amended and used to address these challenges?

10. Is Kenya's music copyright law westernized; does it take into account the social and cultural factor of this country?
11. If yes then why aren't we opting out of this regime? E.g. the Berne Convention that allows automatic copyright without registration
12. Do you think copyright should be automatic or registered?
13. Kindly explain your answer in 12 above
After registration of a collective management organization by KECOBO, are the certificates renewed after a period of time or there is no requirement for renewal?
14. Does the Copyright Act, 2001 address copyright infringement in digital works? If yes how?
15. Does KECOBO have any proposed amendments to the Copyright Act, 2001, which will tighten protection of music copyright and sound recording in the digital arena? If yes kindly state the proposed amendments.
16. Do you have anything more to add?

Thank you for your participation and time

Appendix 3

COVER LETTER

Name of Organisation _____

Address _____

Date _____

Dear Sir/ Madam,

My name is Abubakar Mariam Adam, I am currently pursuing my Masters in Law at the University of Nairobi, as part of the course complement I am required to write and present a paper in an area of interest. As indicated above my topic of study is *'Enhancement of Copyright Protection in Musical Works and Sound Recordings on the Digital Platform: A Case Study of KECOBO'*

As part of this research I would like to administer a questionnaire to some of the State Counsel in this organization. The study will look at the current legal regime of protection of copyright as provided for under the Copyright Act 2001. The mechanisms KECOBO has put in place to combat piracy, the challenges KECOBO encounters in combating music piracy and how best these challenges can be addressed. The solutions proposed to handle these challenges will be reviewed with an intention of learning from their deficiencies. Your willingness to complete the questionnaire for this study will be much appreciated.

Participants **WILL NOT** be asked to divulge any information regarding the sensitive/confidential information of the organisation. If you would be willing to take part in this research project or require any additional information about the interviews, please contact me on mariadaabu@gmail.com or **0735 – 790500**. Alternatively if you have any thoughts on my research or points you think maybe of interest your input will be highly appreciated.

Yours Faithfully,

Abubakar Mariam Adam

LLM Candidate, University of Nairobi

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