

REGULATING THE RINGTONE TECHNOLOGY IN KENYA

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REGULATING THE RINGTONE TECHNOLOGY IN KENYA

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DECLARATION

I, **Arlentrice Shirley Gulenywa** do hereby declare that this thesis is my original work except where indicated by special reference in the text. This thesis has not been submitted to any other institution for the award of a postgraduate degree or any other award in Kenya or elsewhere.

Signed _____

Date _____

Supervisor's approval

Signed _____

Date: _____

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DEDICATION

To my parents; Albert Gulenywa and Alice Gulenywa....

You are the love of my life. This is to show you that I do not take your counsel for granted.

To my siblings, Allan, Aldrinah, Anertia, Aldrin, Annick, Aloe and Alba....

I cannot imagine life without you. You make me happy.

To my beautiful family; my husband, Alex Oketch and my lovely children, Mark Williams Oketch, Annabelle Sandrah Njeri Oketch, the late Alvin Oketch and Amara Skylar Tsiyeri Oketch.

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Lastly, I would like to acknowledge my parents, Albert and Alice Gulenywa. I am grateful for the emotional and financial support.

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ABBREVIATIONS

AFRALTI Institute	Africa Region For Advanced Level Telecommunications
AMPS	Advanced Mobile Phone Service
ASCAP	American Society of Composers, Authors and Publishers
AT&T	American Telephone and Telegraph
ATU	African Telecommunications Union
PATU	Pan African Telecommunication Union
CAK	Communications Authority of Kenya
CIC	Commission for the Implementation of the Constitution
CCK	Communications Commission of Kenya
CDMA	Code Division Multiple Access
CMOs	Collective Management Organizations
CTO	Commonwealth Telecommunications Organization
EARPTO Organization	East African Regulatory Posts and Telecommunications
ETACS	Extended Total Access Communications System
ETSI	European Telecommunications Standards Institute
GSM	Global System for Mobile Communications
ICT	Information and Communication Technology
IMTS	Improved Mobile Telephone Service
INMARSAT	International Maritime Satellite Organization
INTELSAT	International Telecommunication Satellite Organization
ITU	International Telecommunications Union
KAMP	¹⁵ Kenya Association of Music Producers
KECOBO	Kenya Copyright Board
KCA	Kenya Communications Act
KP&TC	Kenya Post and Telecommunications Corporation

MSCK	Music Copyright Society of Kenya
MTA	Mobile System A
MTB	Mobile System B
MTS	Mobile Telephone Systems
NEPAD	New Partnership for Africa's Development
NMT	Nordic Mobile Telephone Network
MCTC	Multi-Country Training Centre
TDMA	Time Division Multiple Access Standard
UNDP	United Nations Development Programme
PATU	Pan-African Telecommunications Union
PROs	Performing Rights Organization
PRSK	Performing Rights Society of Kenya
RASCOM	Regional African Satellite Communication
RIAA	¹ Recording Industry Association of America Inc.
SADC	South African Development Community
SATA	Southern Africa Telecommunications Administrations
SOCAN	Society of Composers, Authors and Music Publishers of Canada
TRASA	Telecommunications Regulators' Association of Southern Africa
TKL	Telkom Kenya Limited

LIST OF CONSTITUTIONS AND STATUTES OF KENYA

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Constitution of Kenya 1963

Constitution of Kenya 1969

Constitution of Kenya, 2010

List of International Instruments

Agreement on Trade Related Aspects of Intellectual Property Rights (1994).

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Constitution and Convention of the International Telecommunication Union, 1865.

List of Statutes

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Trade Mark Act Cap 506, [Laws of Kenya](#)

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Digital Millennium Copyright Act of the United States Publication Legal Notice Number
105-304

Copyright Act, 1921 (as amended in 1988 and 1997) (Canada)

PREFACE

This thesis has been written for the members of the judiciary, parliament, students and the general public. The legal knowledge and understanding of the aforesaid groups of persons have been kept in mind and where a chapter includes a number of ideas or terms which are likely to be unfamiliar to any of them, a brief general introduction to that topic is given.

The inspiration for this study originated from various articles and in particular, a research conducted by the author and her work colleague, in respect of the case of *Cellulant Company Limited v. Music Copyright Society of Kenya*,¹ which case is *subjudice*. For this reason it may be argued that this work is merely derivative.

I am agreeable criticism. Indeed, my work is always derivative and I mean to do nothing more in this study than remind the above four groups of the concept of regulation and how best it can be applied to the ringtone technology. I take the view that the technology can be regulated to ensure justice and fairness in the use of the ringtone technology.

¹ *Cellulant Company Limited v. Music Copyright Society of Kenya* High Court Civil Case Number 159 of 2009.

CHAPTER 1

METHODOLOGY ON REGULATION OF THE RINGTONE TECHNOLOGY

This chapter seeks to give a brief background of the study, the chapter also identifies the problem that this study seeks to address and discusses the objectives and justification for conducting the research. The chapter also introduces the research methodology applied in the study and gives a review of the literature relied in arriving at the conclusions and recommendations.

1.1. Introduction to the study of the Ringtone Technology

The ringtone technology is a value-added network service in the telecommunication industry. It comprises of a musical work that is embedded on a mobile phone and is used for purposes of alerting the user of a mobile phone of an incoming call or message.² This study seeks to examine whether the technology can be regulated and if so, what regulatory mechanisms would be adopted to regulate the technology.³

The mobile phone technology is considered one of the greatest technologies that emerged in the since the 1990s.⁴ The mobile phone technology has enabled the use of advanced telecommunication services to consumers. However, the legal framework has failed to keep up with the technological advancements.

This study argues that Kenya's regulatory regime is limited in its ability to regulate the ringtone technology. There are no appropriate legal and institutional frameworks that would regulate the use of mobile phones.⁵ The Copyright Act, 2001 is intended to protect and reward original works embodied in tangible or fixed form such as discs and music tapes.⁶ The Copyright Act, 2001 did not envisage a situation where musical works would be downloaded to a mobile phone through a short message service (SMS) and would then be converted and used as a ringtones.⁷ What the Music Copyright Society of Kenya (MCSK) should ask itself

² Steve Sokolowski (1989) "Customize Your Phone," Ch. 8 "Telephone Melody Ringer," TAB Books, Blue Ridge Summit, PA. ISBN 0-8306-9354-8.

³ See Chapter 3, 4 and 5 of this study.

⁴ Mobile phone usage code prepared by the National Telecom Regulatory Authority, Egypt.

⁵ Egypt for example has in place consumer rights protection committee set up under the National Telecoms Regulatory Authority which monitors usage of mobile phones. See http://www.tra.gov.eg/presentations/crpc/Mobile_Usage_Ethics_Code_En_Last (accessed 13/2/2015).

⁶ Section 2 of the Copyright Act defines sound recordings.

⁷ Bhawan and Magh (2012) "Telecom Regulatory Authority of India Recommendations on application services," New Delhi.

is how it will ensure that copyright owners are protected and rewarded for their works as regards ringtones.⁸

Section 3 of the Copyright Act provides for the establishment of Kenya Copyright Board (KECOBO) which is mandated to license collecting societies to assist in the collection of revenue on behalf of copyright owners.⁹The Music Copyright Society of Kenya (MCSK) is an organization licensed under the Copyright Act,2001 to regulate the music industry in Kenya should ask itself is how it will ensure that copyright owners are protected and rewarded with regard to ringtones which are not in tangible or fixed form. This study examines copyright issues that arise in respect of ringtones and the challenges faced by copyright owners in enforcing their rights under the current copyright law.¹⁰

The Trade Marks Act seeks to protect marks¹¹. Section 2 of the Trade Marks Act defines a mark as a distinguishing guise, slogan, device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof whether rendered in two-dimensional or three-dimensional form. The Act does not contemplate protection of a ringtone which is simply defined as a musical composition embodied in a digital form.¹² This study examines whether it is possible to regulate ringtone technology through trademarks. The study also examines the role of the telecommunication industry can play to ensure proper regulation of ringtone technology.

1.2. Background to the study of regulation of ringtone

Just when the music industry in Kenya was trying to understand and enforce the existing copyright protection law especially in relation to the prevention of piracy through the devices such as computers and radio systems, cellular phone network companies alongside cellular phone manufacturing companies came up with a new form of technology which allows the digital embodiment of music on cellular phones which can eventually be used by consumers of the cellular phones as ringtones.¹³ These companies have also invented devices which also enable their consumers to reproduce and share songs with other cellular phone users.¹⁴ The

⁸ MCSK is a non-profit-making collecting management organisation established in 1983 whose mandate is to collect royalties. Its membership is drawn from authors, composers, arrangers and publishers of music works.

⁹ See Section 5(b) and Section 46 of the Copyright Act, 2001.

¹⁰ As provided in the Copyright Act, 2001, Act No. 12 of 2001 which came into force on 1/2/2003.

¹¹ Trade Marks Act, Cap 506, Laws of Kenya.

¹² The ringtone technology has not been defined in any law in Kenya.

¹³ Steve Sokolowski (1989) "Customize Your Phone," Ch. 8 "Telephone Melody Ringer," *op. cit.*

¹⁴ These devices include Bluetooth and infrared rays which are also embodied in the hardware of the wireless mobile phones.

cellular phone manufacturing companies also provide their consumers with cables and other devices such as memory cards that enable them to download or copy music from computer systems into their cellular phones.

These new technology raises at least three novel legal issues which this study has attempted to interrogate. These are: - First whether owner of musical songs be acknowledged and compensated for the ringtones? If so, how?

Secondly, whether consumers of the ringtones also pay performance royalties as their cellular phones are bound to ring in public? How can ringtones be regulated to ensure that copyrights are not infringed? And thirdly, what is the nature of fixation of a song on a cellular phone?

Generally, music composers, performing artistes and the producers of songs are entitled to derive a commercial benefit from their works in the form of either performance or mechanical royalties. To ensure this, ¹⁶ section 46 of the Copyright Act provides for a Collecting Society whose principle objective is to collect and distribute royalties to the copyright owners.¹⁵ The Music Copyright Society of Kenya¹⁶ is responsible for collecting royalties for about 7000 copyright owners and 96 foreign affiliates.¹⁷

The mode of regulation with respect to ringtones is not specifically provided for ² under the Kenya Information and Communications Act, the Trade Mark Act or the Copyright Act.¹⁸ The responsibility of mobile phone network operators and their consumers towards copyright owners have not been carefully considered.

¹⁵ Section 46(4)(d) of the Copyright Act.

¹⁶ Registered under Section 46 of the Copyright Act, 2001. The ²³ Music Copyright Society of Kenya was established in 1983 under ¹ the repealed Copyright Act, 1975 laws of Kenya

¹⁷ See Music Copyright Society of Kenya (MCSK) website, at <http://www.mcsk.or.ke/about.htm> (accessed 16/5/2011).

¹⁸ The Kenya Information and Communications Act was enacted in 1998 and on 15th February 1999, the government brought into operations sections 1-5 (4), 6 – 12 of the Act for purposes of establishing the regulatory to prepare the sector licences. The remaining sections of the Act came into force after July 1999 save for section 5(5). The Copyright Act No. 12 of 2001 came into force in December 2001.

1.3. Problem statement on the study of regulation of ringtones

The Copyright Act No. 12 of 2001 is inadequate to ensure the regulation of the new forms of intellectual property rights, particularly with respect to the regulation of ringtones and ringtone technology. The obligations of cellular phone network operators towards copyright owners have not been specifically provided for under the Copyright Act, 2001 and the Kenya Information and Communications Act, 1998.¹⁹

The telecommunications industry is a profit-making industry with each competing company endeavoring to come up with value addition technologies such as ringtones to attract and maintain its customers. In doing so these companies infringe on the rights of the copyright owners and as a result ought to be regulated to ensure that copyright owners are adequately compensated, and their intellectual property rights are not infringed.

1.4. Research objectives on the study of the regulation of ringtones

The objectives of this study are three pronged. Firstly, the study has examined the challenges faced by copyright owners and the Collecting Societies in protecting musical works in the emerging cellular phone technology. The study has approached this issue by identifying the relationship between telecommunications technology and copyright with great focus on musical works and ringtone technology.²⁰

The study has also set out the rights that may be infringed through ringtone technology.²¹ Secondly, the study has also, pointed out the various inadequacies in the law in protecting copyright owners from infringement by this new form of technology.²² The study has identified and proposed recommendations on policy formulation to regulate ringtones.²³

1.5. Research questions on regulation of ringtones

This study addresses the following three research questions. First, what are the challenges faced in the protection of copyright with the advancement of ringtone technology in mobile phones in Kenya? Second, are the copyright laws in Kenya adequate to regulate the new ringtone technology? If so, what role do the laws of Kenya play in regulating ringtones?

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¹⁹ As amended by the Kenya Information and Communication (Amendment) Act, 2013.

²⁰ Ben Sihanya Teaching materials on Intellectual Property and Telecommunications Law available on file at Innovative Lawyering and Sihanya Mentoring.

²¹ Ben Sihanya (2008) "Intellectual Property and Mentoring Innovations and Industrialization in Kenya," Vol. 4 Issue 1 *University of Nairobi Law Journal*, at 20.

²² Ben Sihanya Teaching materials on Intellectual Property and Telecommunications Law available on file at Innovative Lawyering and Sihanya Mentoring; Ben Sihanya (2008) "Intellectual Property and Mentoring Innovations and Industrialization in Kenya," Vol. 4 Issue 1 *University of Nairobi Law Journal*, *op.cit.*

²³ B. Melville and D. Nimmer (2009) "Compulsory Licence for Making and Distributing Phono records ("Mechanical Royalty")" Appendix 16 Chapter IX of Second Supplementary Registers Report of the General Revision of the U.S Copyright Law.

Third, what are the proposed legal solutions to ensure proper regulation of ringtones in Kenya?

1.6. Hypotheses on the study of the regulation of ringtones

The development of ringtone technology has lucrative impact on owners of copyright, but copyright owners will not be able to enjoy these benefits without an appropriate regulatory framework.²⁴ There are several challenges to the protection of copyright in light of the advancement of ringtone technology.²⁵ Copyright laws in most countries do not sufficiently regulate ringtone technology.²⁶ It is possible to regulate ringtone technology with a proper regulatory regime.²⁷

1.7. Research methodology on the study of the regulation of ringtones

One of the research methodologies adopted in this study was desk based and it involved desk top research. The literature on this study is considerable in amount particularly regarding copyright, trademarks and telecommunication law. The study relied on secondary data and library research. The writer looked at various books, Acts of Parliament, international instruments, newspapers, articles, journals and online research. Library research was University of Nairobi Law School Library; - Hamilton Harrison & Mathews Library. Research materials have also been borrowed from Professor Ben Sihanya's personal library and Innovative Lawyering Library and Professor Ben Sihanya's Mentoring website.

It was necessary to diversify the source of information and literature as this study is relatively novel in Kenya. It was important to confirm that there has been no previous study undertaken on the subject and if indeed there has been, then the study brings in a new dimension to the already existing research.

²⁴ Ben Sihanya (2008) "Intellectual Property and Mentoring Innovations and Industrialization in Kenya," Vol. 4 Issue 1 *University of Nairobi Law Journal*, *op.cit.*

²⁵ *id.*

²⁶ Marisella Ouma & Ben Sihanya (2010) "Access to Knowledge in Africa: The Role of Copyright: Kenya" a study under the auspices of the African Copyright and Access to Knowledge (ACA2K) project and International Development Research Centre (IDRC) Ac, *Innovative Lawyering* at www.innovativelawyering.com (accessed 15/5/2013).

²⁷ Arnold Vahrenwald (2005) "Reflecting the sound of ringtones," ENT. L.R. Issue 4. Sweet & Maxwell Limited, at 67.

In addition to the above, formal and informal interviews were conducted on various players in the industry as per the questionnaire attached in this thesis.²⁸ The interviews were merely intended to be instructive and only represented the interviewee's views on the subject. Intensive research was carried to arrive at the findings and the recommendations in this study.

1.8. Conceptual and theoretical framework on the regulation of ringtones

This has considered and conceptualised regulation. This study will investigate whether regulation comprises of a set of rules and institutions only or whether regulation can take other forms.

1.8.1. Conceptual framework

Conceptualisation of regulation involves understanding the meaning of regulation by considering the various definitions provided by scholarly authors. This study has analysed the various meanings of regulation. This has also contextualised the concept of regulation. Contextualisation involves placing the meaning of the concept of regulation within the boundaries of this study. Finally, this study has problematized the concept of regulation. Problematization involved identifying certain challenges this study may face in limiting the definition of regulation in the context of scholarly materials. This study has therefore adopted a three-pronged research methodology which involves conceptualisation, problematization and contextualisation²⁹

To understand the concept of regulation in relation to telecommunications technology and copyrights, this study has attempted to answer questions such as “regulation by whom?”, “Regulation to what extent?” and, regulation with what authority?”³⁰

²⁸ The questionnaire is annexed immediately after the bibliography

²⁹ This three-pronged methodology was borrowed from Ben Sihanya (2009) “Introductory lectures on Telecommunication Law, LLM,” (the candidate was a student in the Telecommunication Law LLM class of 2009. See also Peter Wasamba and Ben Sihanya (2012) “What do artists get for their skill? Reforming Compensation under Copyright,” (2012) *Journal of African Cultural Studies* Vol. 24 No. 2 page 171.

³⁰ Ben Sihanya (2000) “Infotainment and cyber law in Africa: Regulatory Benchmarks for the third millennium,” *Journal of the University of Iowa College of Law* Vol. 10:583 pages 583-639.

1.8.2. Theoretical framework

The study will show that there are various forms of regulation such as state regulation, self-regulation, market regulation and architectural control.³¹ Therefore Regulation is not all about a set of rules and is determined by other additional factors.³² One problem with literature is that of definition. Giving commonplace or dictionary meanings of this concept will without a doubt leave very many questions unanswered. The study has therefore not only identified and discussed the forms of regulation but has also placed them in the Kenyan context by identifying which form of regulation is suitable for regulation of the ringtone technology.

The study has also considered the various facets of regulation and identified which of the forms of regulation is applicable in relation to ringtone technology. The study has also offered recommendations of how best ringtones can be regulated.

1.9. Literature review: Legal and content analysis on the regulation of the ringtone technology

Various studies have been conducted regarding protection of intellectual property rights: such as patent and copyright and the loopholes of the existing laws in relation to cybercrimes, piracy and digital technology. However, the research on regulation of ringtones is limited.

The inspiration of this study is premised on an advert by one of Kenya's leading telecommunications companies offering its consumers free ringtones as a marketing strategy that would eventually boost its profits.

The study was also inspired upon the reading of a ruling delivered by Mr. Justice Luca Kimaru in the case of Cellulant Kenya Limited v. Music Copyright Society of Kenya Limited.³³

On conducting a preliminary research on this topic, I came across M.M Murungi's thesis *Protecting Copyright in the Information Age: Challenges and Opportunities*.³⁴ Murungi's thesis begins by acknowledging that protection of copyright is a difficult task especially because authors and publishers have been given enough control to protect their work while at the same time limiting the societies' access to their work.

³¹ Lawrence Lessig (1999) *Code and Other Laws of Cyberspace*, Basic Books Publishing, New York.

³² Benanya (2000) "Infotainment and cyber law in Africa: Regulatory Benchmarks for the third millennium," *Transnational Law & Contemporary Problems, Journal of the University of Iowa College of Law* Vol. 10: 33 pages 583-639.

³³ *Cellulant Kenya Limited v. Music Copyright Society of Kenya Limited*; High Court civil case number 154 of 2009 (Milimani Commercial Courts) 2009 eKLR.

³⁴ M.M. Murungi (2005) *Protecting Copyright in the Information Age: Challenges and Opportunities*, LLM thesis (unpublished), University of Nairobi, Parklands Law School Library.

The thesis by Murungi states that with the advancements in technology, intellectual property regulation is destabilized and focuses on cyberspace and digital technology. The thesis then examines the challenges faced in protecting copyright with the emergence of cyberspace and digital technology.

My study focuses on telecommunication and how to deal with ringtone technology used by mobile phone owners as a value-added network service.

Another book examined is J. W. Chege's *Copyright Law and Publishing in Kenya*.³⁵ This book gives a historical analysis of the development of copyright law in Britain and its subsequent importation to Kenya. Emphasis has been placed on the publishing industry which focuses on literary works. This book is relevant for purposes of giving a historical background of copyright law in Kenya. It does not however focus on the subject matter of this study. In addition to identifying the historical development of copyright law in Kenya, this study has, considered issues that arise with respect to regulation of ringtones.

W.R. Cornish in his book, *Intellectual Property Rights: Patents, Copyright, Trademarks and Allied Rights*³⁶ provide a wealth of information on the nature of copyright as a type of intellectual property.³⁷ The book has assisted in providing initial information on the study.

Of particular importance to this study is the chapter on copyright in particular cases such as broadcasting, in computer software, data base and output, in reprography and recording, and in cable and satellite transmission.³⁸ In the media industry and especially in news production, the book states that copyright is limited to the substantial reproduction of the actual language used in the write up as opposed to the recording of the actual words of the author.

My study is particularly interested in this book's write up on software programs as ringtones are considered software programs embodied in mobile phones. The book has mainly focused on how the computer industry ought to utilize copyright law to protect their software. Software programs in the United Kingdom are now regarded as a literary work hence

³⁵ J. W. Chege (1978) *Copyright Law and Publishing in Kenya*, Kenya Literature Bureau, Nairobi.

³⁶ William Robert Comish (2003) *Intellectual Property Rights: Patents, Copyright, Trademarks and Allied Rights*, Sweet & Maxwell, London (5th Editions) at pp. 245-367.

³⁷ This book is premised on the Copyright, Designs and Patents Act of 1988 in the United Kingdom.

³⁸ William Robert Comish (2003) *Intellectual Property Rights: Patents, Copyright, Trademarks and Allied Rights*, Sweet & Maxwell, London (5th Edition) at pp. 339-367.

copyrightable. This is also the case in Kenya.³⁹ However, can a mobile phone be regarded in the same genre as a computer? If so how should we place the act of fixing a song in the software in terms of copyright law?

Further, infringement in relation to software programs has an expanded meaning in this book to include not only copying a work but storing a work in any medium by electronic means.⁴⁰

The author of the book further observes that there are now new forms of communication technologies in cable and satellite technology apart from broadcasting and cable-casting such as facsimiles which enable people to transmit the contents of a document to another person. Facsimiles are considered to take the form of secondary infringement which involves transmitting a work by way of telecommunication system knowing well that a copy would arise. The copies from a facsimile may be lawful or illegal.⁴¹

There is no discussion in the book on content delivered through or contained in a mobile phone and how best the same can be regulated. The book rightly acknowledges that there are various technologies which impact copyrights, but it did not exhaust the list.

This study has endeavored to pick up from where the book left and by determining the technological nature of a wireless mobile phone as a form of technology that impacts the copyright. This study has determined whether a mobile phone falls within the purview of computer systems. If so, whether the storage of a device in a mobile phone is that allows its customers to copy music and convert them to ringtones infringement. If so, this study has attempted to propose how best ringtones can be regulated.

H. Laddie, P. Prescott, and M. Vitoria's book, *The Modern Law of Copyright*⁴² provides a wealth of information on copyright law and especially as legislated in the United Kingdom.

Of interest to the study is the conceptualization of the term "sound recordings". This book defines sound recordings as

"The aggregate of the sounds embodied in, and capable of being reproduced by means of, a record of any description, other than soundtracks associated with cinematographs film."

³⁹ Section 2 of the Copyright Act provides that literary works to include novels, stories, poetic work, plays, stage directions, film sceneries broadcasting scripts, textbooks, treaties, histories, biographies, essays, articles encyclopaedias, letters, reports memoranda including computer programs.

⁴⁰ William Robert Cornish (2003) *Intellectual Property Rights: Patents, Copyright, Trademarks and Allied Rights*, Sweet & Maxwell, London (5th Edition), p. 353.

⁴¹ *ibid.*

⁴² H. Laddie, P. Prescott, and M. Vitoria (1980) *Modern Law of Copyright*, Butterworth & Co. Ltd, London, Chapter 6.

Section 2 of the Copyright Act defines a sound recording as

“any exclusively aural fixation of sound of a performance or a of other sounds or of a representation of sounds regardless of the method by which the sounds are fixed or the medium to which the sounds are embodied but does not include fixation of sounds and other images such as the sound track of an audio-visual work.”⁴³

An issue for consideration in this study is whether the act of placing electrical information on a mobile phone which enables it to play music in form of a ringtone can be defined as sound recording. In addition to that this study had determined whether a mobile phone can be defined as a record under our copyright law.⁴⁴

Lawrence Lessig’s book “*Code and other Laws of Cyberspace*”⁴⁵ is very important to this study. This book examines the regulability of cyberspace. It identifies various modes within which regulation of cyberspace can be achieved. These are the market, the architecture, through law and through social norms.⁴⁶ Subsequently, in the year 2006, Lawrence Lessig published a revision of his book which he titled “*Code Version 2.0*”.⁴⁷

In Chapter one of *Code Version 2.0*, Lawrence Lessig opined that the initial form of regulation that contributed to the downfall of communism in Europe was government regulation which was viewed as oppressive and an instrument of repression.⁴⁸ The former communists advocated for market and nongovernmental regulation. The argument for market and non-governmental control was predicated on the notion that if the market was to reign without government interference, there would be freedom and prosperity in the market place and there was no need of extensive state regulation.⁴⁹ This notion however did not materialize to the satisfaction of the society as in the end, it was noted that there were certain traditional state regulatory functions that nongovernmental interest could not fulfill such as the police, courts, schools and healthcare.⁵⁰

⁴³ Copyright Act of Kenya, Section 2.

⁴⁴ A record has been defined under Section 35(13) as any disc tape perforated roll or other device in which sounds, or the representations of sound are embodied which are capable of reproduction there from with or without the aid of another instrument.

⁴⁵ Lawrence Lessig (1999) *Code and other Laws of Cyberspace*, Basic Books Publishing, New York.

⁴⁶ *ibid*, p. 165.

⁴⁷ Lawrence Lessig (2006) *Code Version 2.0*, Basic Books Publishing, New York.

⁴⁸ Lawrence Lessig (2006) *Code Version 2.0*, Basic Books Publishing, New York, p.2.

⁴⁹ *ibid*.

⁵⁰ *ibid*.

In the midst of all this regulatory confusion, a new form of society known as “Cyberspace” emerged by accident and as a result of a research by US Department of Defense.⁵¹ This caused a destabilization of the traditional architectural control and all of a sudden there was much more than what the simple telephones, newspapers, radios and books could provide increasing the channels and mode of communication. This has brought additional regulatory issues, hence the third mode of regulation proposed by Professor Lessig known as architectural control. This mode of control will be discussed later in the study.⁵²

What comes out clearly in Professor Lessig’s books is that new forms of technologies such as Cyberspace and in the present case, the ringtone technology requires a new understanding of how regulation works and further that we cannot stick to the traditional form of regulation unless we want anarchy.⁵³ Lessig argues that in the Cyberspace, a different “code” regulates how the software and hardware that makes cyberspace.⁵⁴

This study has attempted to determine whether regulation of ringtones can be achieved by adopting the modes of regulation set out in Lessig’s books. Though Lessig’s focus in this book is on cyberspace law, the book has shed some light on how to regulate ringtones if there is indeed no form of regulation already in existence.

Lawrence Lessig has also written a book entitled *Free Culture; ‘How big the media uses technology and the law to lock down culture and creativity’*.⁵⁵ This book mainly focuses on piracy and the issue of property. This is a very controversial issue, yet it has enabled the study to understand how ringtone technology works. Lessig also quotes from Lord Mansfield in the case of *United States v. Causby*;

“English copyright law to include sheet music, a person may use the copy by playing it, but he has no right to rob the author of the profit, by multiplying copies and disposing of them for his own use.”⁵⁶

By analogy, do mobile phone manufacturers together with telecommunication companies use ringtones such that the authors and recorders do not benefit from the sale of the ringtones? Bernard Sihanya’s article on “*Infotainment and cyber law in Africa: Regulatory benchmarks*

⁵¹ *ibid* p. 3. Cf. Katie Hafner and Matthew Lyon (1996) *Where Wizards Stay Up Late*, New York, Simon and Schuster p. 19.

⁵² See Chapter 2 of this Study.

⁵³ Lawrence Lessig (2006) *Code Version 2.0*, Basic Books Publishing, New York, p. 2.

⁵⁴ *ibid*.

⁵⁵ Lawrence Lessig (2004) *Free Culture; How big the media uses technology and the law to lock down culture and creativity*, Penguin Press, New York.

⁵⁶ *United States v. Causby* U.S 328 (1946): 256, 261.

for the Third Millennium”⁵⁷ has been of great assistance to this study. Though the article focuses on cyber law, it does provide an exquisite typology of the concept of regulation.

This study has analyzed this conceptual framework and may borrow largely from the same. The concept of regulation will be discussed in detail in the later chapters of the study. The article emphasizes the need to regulate cyberspace and infotainment. The article has also discussed the conflicting areas between the various rights that already exist and the need to regulate cyberspace and infotainment. For instance, how to achieve a balance between regulating cyberspace and infotainment against the freedom of expression enshrined under Article 27 of the Universal Declaration of Human Rights.⁵⁸

The article also discusses the concern that arises with the regulation of cyberspace and infotainment in the economic perspective in that the regulatory authorities fail to facilitate capital accumulation through efficient regulation due to the existence of monopolistic public telephone operators.⁵⁹

The other concern raised in Professor Ben Sihanya’s article is regarding technology transfer. The article states that regulation of infotainment should facilitate technology transfer and that this can only be done through the strengthening of the intellectual property regime. Once intellectual property owners are secure, they will be willing to provide information.

This study will borrow largely from the article in discussing the concept of regulation and in determining the mode of regulation of ringtones.

Dr. Robert Kaye’s study entitled “*Regulating Parliament: The Regulatory State Westminster*” also provides a good understanding of the concept of regulation.⁶⁰

According to Dr. Kaye, regulation can best be defined by employing a three-tiered approach. The first approach is known as hard regulation which is a mandatory form of regulation that has formal institutions for purposes of enforcement. Hard regulation provides for sanctions in

⁵⁷ Ben Sihanya (2000) “Infotainment and cyber law in Africa: Regulatory Benchmarks for the third millennium” *Transnational Law & Contemporary Problems*, Vol. 10(10) *Journal of the University of Iowa College of Law* 583-639.

⁵⁸ Ben Sihanya (2000) “Infotainment and cyber law in Africa: Regulatory Benchmarks for the third millennium” *Transnational Law & Contemporary Problems*, Vol. 10 *Journal of the University of Iowa College of Law* 586.

⁵⁹ Ben Sihanya (2000) “Infotainment and cyber law in Africa: Regulatory Benchmarks for the third millennium” *Transnational Law & Contemporary Problems*, Vol. 10 *Journal of the University of Iowa College of Law* 588.

⁶⁰ Robert Kaye (2003) “Regulating Parliament: The Regulatory State within Westminster,” ESRC Centre for Analysis and Risk Regulation, Discussion Paper No. 13, London.

cases of breach. The second approach is known as intermediate regulation which is mostly advisory in nature and for incentives to prevent breach. The third approach is soft regulation which is voluntary in nature and mostly guided by morality and social norms.

This study will utilize some of the insights provided in this article to explain the concept of regulation.

Andrea Gorra's⁶¹ thesis, *An Analysis of the Relationship between Individuals' Perceptions of Privacy and Mobile Phone Location Data - A Grounded Theory Study* sets out a very good background of mobile telephony. This study will use this background to come up with a detailed write up on the development of mobile telephony in Kenya.

Michael Tyler, Janice Hughes and Helena Renfrew, *Telecommunications in Kenya; Facing the challenges of an open economy*.⁶² This article gives a detailed background of the telecommunications in Kenya. It also discusses the major policy issues that faced the telecommunication sector in the 1990s, and the development challenges. The article has also examined how the Government has responded to the development challenges in the telecommunication industry and the policy issues relating to it.

This article is very useful for this study in that it gives a good history of telecommunication in Kenya. It shall be of great assistance in giving an introductory overview of telecommunications.⁶³

1.10. Justification of the study on the regulation of ringtones

The study is justified on several grounds. First, the study is necessary for purposes of determining how best ringtone technology can be regulated. Consequently, copyright owners can determine whether they are entitled royalties or not.⁶⁴

Secondly, this study identifies the challenges posed in attempting to regulate ringtone technology and recommend whether regulation is indeed necessary with regard to ringtone

⁶¹ Leeds Metropolitan University, UK.

⁶² M. Tyler, J. Hughes & H. Renfrew (2005) "Telecommunications in Kenya: Facing the Challenges of an Open Economy," VII Papers Online article, Columbia Institute for Tele-Information (CITI) website <http://vii.org/papers/tyler.htm> (accessed on 1/5/2010).

⁶³ See Chapter 3 of this study.

⁶⁴ Ben Sihanya (2000) "Infotainment and Cyber law in Africa: Regulatory Benchmarks for Third Millennium," Vol 10(20) *Transnational Law & Contemporary Problems* 583-640.

technology.⁶⁵ Thirdly, this study has also identified the *lacunae* and other limitations in the current legal regime and in particular, copyright, trade mark and telecommunications laws and make recommendations for amendment of the said laws in order to accommodate regulation of ringtone technology.⁶⁶ The lacunae and other limitations will also offer guidance to parliament and all stakeholders on how to amend the current legislation.⁶⁷

The fourth justification is that the study will enlighten copyright owners and the public in general of the several of ways of enforcing and protecting their rights.⁶⁸ This will minimise the negative impact of ringtone technology and ensure that copyright owners are also developing economically.

1.11. Chapter outline

This study has a total of five chapters. Chapter 1 is purely introductory. The purpose of this introduction is to set out the basis for this thesis. Chapter 1 gives a background of the thesis, the problem and research questions this thesis seeks to address the objectives and justification of the thesis. Chapter 2 focuses on defining the various terms that have been used regularly in the study.

The chapter seeks to give an understanding of telecommunications technology. By understanding telecommunication, this chapter has provided an understanding how ringtone technology evolved. The chapter also defines ringtone technology for purposes of giving a basic understanding to the reader. Without telecommunication, there can be no ringtone technology.

Chapter 3 focuses on the development of cellular telephony in Kenya. The chapter will also look at the impact cellular telephony has had on the economy and socially. The chapter then concludes by looking at the achievements and challenges regarding to cellular telephony in Kenya.

Chapter 4 discusses the concept of copyright and its application in the promotion and protection of content development in cellular telephony for ringtone technology. The Chapter also discusses the nature of copyright and identifies the rights that are likely to be infringed

⁶⁵ William Robert Cornish (2003) *Intellectual Property Rights: Patents, Copyright, Trademarks and Allied Rights* ⁶ *op. cit.*

⁶⁶ Moni Wekesa and Ben Sihanya (2009) *Intellectual Property in Kenya*, Konrad Adenauer Stiftung Publishers.

⁶⁷ *ibid*

⁶⁸ Ryan Smith (2007) "Ringtones and Digital Music Players: New Media Drive changes in Copyright Laws," at <http://www.fdhlawyers.com/legal-articles/ringtones-and-digital-music-players-new-media-drive-changes-copyright-law> (accessed 1/11/2018).

by ringtone technology. The chapter also examines whether copyright offers a satisfactory regulatory regime for ringtone technology. The Chapter will also consider whether trade mark law has a role to play in regulation of ringtone technology.

Chapter 5 of this study focuses on the regulation of ringtone technology. The study identifies the various forms of regulation that exist. The chapter also identifies some of the universal principles that govern the concept of regulation. The chapter also considers what regulatory regime is in place in Kenya in so far as cellular telephony and ringtone technology are concerned. The study also considers what regulatory mechanisms are ideal for the regulation of ringtone technology because the technology cuts across two distinct areas of law being telecommunication and intellectual property.

¹⁹ Various countries such as the United States⁶⁹ and Canada have put in place legal regimes to protect their copyright owners from infringement Chapter Five of the study proposes to make recommendations to ensure that ringtone technology benefits both the cellular telephony network operators and the copyright owners as well as the consumers without infringing ²⁷ any of the parties' rights.

⁶⁹ ⁴ Section 115 of the Copyright Act, USA which permits the creation of derivative works, but this privilege under the statutory license is limited to making musical arrangements necessary to conform it to the style or manner of interpretation of the performance involved.

CHAPTER 2

CONCEPTUAL AND THEORETICAL FRAMEWORK ON RINGTONE REGULATION IN KENYA

2.1. Introduction to Conceptual and Theoretical Framework on ringtone regulation in Kenya

This Chapter addresses the definition as well as the conceptual and theoretical framework of the key terms that will be used throughout this study.⁷⁰ The Chapter seeks to partially address the first research question by establishing the nexus between telecommunication laws and copyright in as far as regulation of ringtone technology is concerned.⁷¹ The Chapter discusses the concept of regulation generally and in relation to the ringtone technology.⁷² The chapter also discusses the various forms of regulation.⁷³ The chapter concludes that the ringtone technology will take more than a set of rules by the state.⁷⁴ This Chapter also introduces mobile or cellular telephony.⁷⁵

Chapter 1 introduces the study by setting out the problem statement and the research questions that this study seeks to address. In chapter 1, it was established that the ringtone technology operates on a mobile device thereby bringing a synergy between Copyright Law and Telecommunications Law.⁷⁶ This chapter will define the common terms the study will be relying on. The Chapter will also provide a theoretical and conceptual framework for regulation of ringtones. While addressing the theoretical framework, the Chapter will consider the various models of regulation proposed by scholars and analyzing their applicability to the regulation of the ringtone technology.

⁷⁰ Ben Sihanya (2000) "Infotainment and cyber law in Africa: Regulatory Benchmarks for the third millennium," *op. cit.*

⁷¹ Ben Sihanya (2015) Teaching Materials on Intellectual Property (1997-2015), available on file at Innovative Lawyering and Sihanya Mentoring, Nairobi, Siaya.

⁷² Robert Kaye (2003) "Regulating Parliament: The Regulatory State within Westminster," *op. cit.*

⁷³ Ben Sihanya (2000) "Infotainment and cyber law in Africa: Regulatory Benchmarks for the third millennium," *op. cit.*

⁷⁴ *ibid.*

⁷⁵ M. Tyler, J. Hughes & H. Renfrew (2005) "Telecommunications in Kenya: Facing the Challenges of an Open Economy," VII Papers Online article, Columbia Institute for Tele-Information (CITI) website <http://vii.org/papers/tyler.htm> (accessed 1/5/ 2010).

⁷⁶ Ben Sihanya (2000) "Infotainment and cyber law in Africa: Regulatory Benchmarks for the third millennium," *op. cit.*

2.2. Definition and chapter formulation

The definitions provided below will help to conceptualize the issues surrounding ringtone that are subject to my research. They are also to help in coming up with the best way of regulating ringtones.

2.2.1. Telecommunications in the regulation of ringtones

Without telecommunication, there would be no ringtone. Telecommunication devices such as mobile telephones require the ringtone technology to be able to satisfactorily perform their functions. Ringtones are usually provided as a value-added network service in the telecommunication industry.⁷⁷ It is therefore important that the study defines what telecommunication is.

The term “telecommunication” is derived from a Greek word *tele* meaning distance and *communicate* which means sharing.⁷⁸ From the beginning of time, the need to communicate has been part of man’s inherent being. The human being has through several years developed different techniques to communicate depending on the circumstances and the available technology. Early forms of telecommunication included smoke signals, drums, semaphore using flags and papyrus and paper use record communications.

In modern terms telecommunication is the electronic transmission of sound, data, facsimiles, pictures, voice, video, and other information between systems using either analogue or digital signaling techniques.⁷⁹ Simply put, telecommunication is the reliable and efficient movement of information between two or more points for purposes of providing services required at a price.

Transmissions may take place over guided media such as copper cables and fiber-optic cables or unguided media such as wireless radio, microwave, and infrared.⁸⁰

⁷⁷ Ellen Rosner Feig (2009) “Do Cellular Ringtones violate the Copyright Act?” at <https://www.legalzoom.com/articles/do-cellular-ringtones-violate-the-copyright-act> (accessed 1/11/2018).

⁷⁸ Tony Wakefield, Dave McNally & David Bowler (2007) *Introduction to Mobile Telecommunications*, Auebarch Publications, Boca Raton, p. 106.

⁷⁹ § 67-6-102(A-C)(Supp.2002) of the Tennessee Legislature defines telecommunication as 1) communication by electronic transmission of impulses; 2) “Telecommunications” includes transmission by or through any media, such as wires, cables, microwaves, radio waves, light waves, or any combination of those or similar media; 3) It includes, but is not limited to, all types of telecommunication transmissions, such as telephone service, telegraph service, telephone service sold by hotels or motels to their customers or to others, telephone service sold by colleges and universities to their students or to others, telephone service sold by hospitals to their patients or to others, WATS service, paging service, and cable television service sold to customers or to others by hotels or motels.

⁸⁰ The International Telecommunications Convention, 1965, which establishes the International Telecommunications Union provides under Annex 2 of the convention that telecommunication includes any

¹² The voice telephone systems are generally referred to as the public-switched telephone network (PSTN). The phone system is also referred to as plain old telephone system (POTS). The phone system was designed from the ground up for voice. It is a circuit-switching system that sets up voice circuits across a hierarchy of digital switching systems connected by copper and optical cables.⁸¹

There are now additional services provided by network service providers in addition to the voice telephone systems. These services are referred to as value added network services (VANS). Ringtones are one of the value-added network services.

⁹ Access to telecommunication services has now become a human rights issue.⁸² Telecommunication is in turn defined as the transmission of information from one person to another. Telecommunication services involve the offering of telecommunications directly to the public through ³² voice telephony, data transmission, telex, telegraph, facsimile, private lease circuit services, fixed and mobile satellite systems, cellular telephony, mobile data services, paging and personal communication services.⁸³

Kenya like ³¹ every other member state of the International Telecommunications Union is expected to ensure that ³² all its citizens have access to telecommunication services. On February 15th, 1997, 69 ³² governments signed an agreement seeking to liberalize the world telecommunications market. The market according to Renato Ruggiero, the Director General ³² of the World Trade Organization (WTO) in a press release made on February 17th, 1997 was worth well over half a trillion dollars per day.⁸⁴ ³⁴ The liberalization of the telecommunication sector is one of the ways to ensure access to telecommunication services.⁸⁵

² The Communications Commission of Kenya (CCK)⁸⁶ was established under section 3 of the Kenya Information and Communications Act⁸⁷ has the mandate to regulate

transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio or other electromagnetic means.

⁸¹ *ibid.*

⁸² International Telecommunication Union (ITU) (1994) *Yearbook of Common Carrier Telecommunications Statistics*, ITU Geneva (21st Ed).

⁸³ Tony Wakefield and Dave Macally, (2007) *Introduction to Mobile Telecommunications*, *op. cit.*

⁸⁴ WTO News (1997) Press Release, titled "Ruggiero Congratulates Governments of Landmark Telecommunications Agreement."

⁸⁵ Liberalisation entails market opening and increasing the number of service providers but that is not enough. The purpose of liberalisation of telecommunication services is to provide competition in the provision of telephony services leading to greater choice for customers. ³³

⁸⁶ Now Communications Authority of Kenya pursuant to Kenya Information and Communications (Amendment) Act 2013.

telecommunication services in Kenya and ensure that the telecommunication services are accessible. Pursuant to the Kenya Information and Communications (Amendment) Act, 2013, the Communications Commission of Kenya changed its name to Communications Authority of Kenya.⁸⁸ Prior to the amendment of the Act, there were several debates on the impact of the amendments to the media fraternity. The Commission for the Implementation of the Constitution (CIC) mandated to oversee implementation of the Constitution of Kenya, 2010⁸⁹ issued a press statement questioning the constitutionality of the amendments in relation to media freedom.⁹⁰

2.2.2. Cellular telephony

A ringtone is a sound made by a cellular telephone to signify an incoming call or text message. Without the cellular telephone, there can be no ringtone technology. It is therefore important to define a cellular telephone as this term will be used from time to time in this study.

A cellular telephone is a wireless portable telephone with built-in antenna which operates as a two-way radio. To illustrate this, when one speaks to a cellular telephone, it picks one's voice and converts the sound emitted into radio frequency energy or radio waves.⁹¹ These radio waves travel through the air into a receiver at a base station, which then sends the call made through the telephone network into the receiver of the person called.⁹²

From its name, cellular telephony encompasses the partitioning of geographical areas into cells covered by a local radio transmitter sufficient enough to transmit voice calls and data from one mobile phone to another.⁹³ The difference between a cellular telephone and a landline telephone is that while a landline telephone is on a fixed terminal, a cellular

⁸⁷ The Kenya Information and Communications Act No. 2 of 1998, Laws of Kenya.

⁸⁸ Section 3 of the Kenya Information and Communications (Amendment) Act 2013.

⁸⁹ Section 3 of the Commission for Implementation of the Constitution Act No. 9 of 2010 establishes the Commission for Implementation of the Constitution and its mandate is provided for under Section 4 of the Act.

⁹⁰ CIC press statement on the Kenya Information and Communications (Amendment) Bill issued on 7th November 2013, at <http://www.cickenya.org/index.php/newsroom/press-releases/item> (accessed 26/2/2015).

⁹¹ Radio frequency energy is a form of electromagnetic energy that makes up the electromagnetic spectrum. Some of the other forms of energy in the electromagnetic spectrum are gamma rays, x-rays and light. Electromagnetic energy consists of waves of electric and magnetic energy moving together (radiating) through space. The most important radio frequency is for telecommunications.

⁹² Ariel Pashtan (2009) "Telecommunication Systems and Technologies," Vol 1 *Wireless Terrestrial Communications: Cellular Telephony*, Aware Networks, Inc., Buffalo Grove, Illinois, USA.

⁹³ *ibid.*

telephone is mobile in that the owner can place and receive calls while on the move without any interruptions.

2.2.3. Ringtone technology

Mobile telephone ringtones have evolved since the late 20th century. The latest ringtones are usually song clips. A ringtone can simply be defined as a sound made by a telephone to indicate an incoming call or a text message.

Technologically, a ringtone is an excerpt of a musical composition embodied in a digital file and rendered into audio. Ringtones are stored in an end user's mobile telephone, pager, or other portable communication device activates its ring or alert function.⁹⁴

2.2.3.1. Regulation of ringtones; A theoretical and practical view

This study seeks to examine how ringtone technology can be regulated. An understanding of what regulation entails is therefore necessary.

Regulation is an ambiguous concept that can be used both in a broad and a narrow sense.⁹⁵ In the narrowest sense, regulation means formulating authoritative sets of rules and setting up autonomous public agencies or other mechanisms for monitoring, scrutinizing and promoting compliance with these rules. According to Selznick,⁹⁶ regulation is the sustained and focused control by a public agency over activities that are valued by the community. The establishment of autonomous regulatory agencies brought about by the regulatory reform movement is connected to this narrow meaning of regulation.

Public sector regulations imply that one agency seeks to shape the behavior of other organizations to the extent that there is an arms-length relationship between the overseeing agency and the target organization, and that the overseer has some formal authority or mandate for its oversight. The difficulty with Selznick's view of regulation is that it envisages a situation where there is strict and excess regulation. Further Selznick's form of regulation does not give room for other forms of regulation other than state regulation for

⁹⁴ <http://www.harryfox.com/public/infoFAQRingtones.jsp> - (accessed 12/9/2011).

⁹⁵ Ben Sihanya (2000) "Infotainment and cyber law in Africa: Regulatory Benchmarks for the third millennium," *op.cit.*

⁹⁶ P. Selznick (1985) "Focusing Organizational Research on Regulation," In R. Noll (ed.) *Regulatory Policy and the Social Sciences*, University of California Press, Berkeley.

instance, market control, architectural control, self-regulation and co-regulation.⁹⁷ Baldwin, Scott and Hood identify three distinct meanings of regulation.

These are direct state intervention in the economy, all mechanisms of state control and promulgation and enforcement of rules by government.⁹⁸ The first meaning is insufficient to cover regulation in respect of ringtone technology because limiting regulation to state intervention in the economy clearly indicates that the state alone is the regulator of all actors of the economy. Ringtone technology involves many actors whom the state may only exercise very limited regulation.

There are certain aspects of the economy that may not be regulated by the state, for instance, the changes in market patterns. , initially,, telecommunications technology was only limited to telephony services whereby telephone calls were viewed as instruments which facilitate audio communication between two people.⁹⁹ This has since changed and in addition to the audio communication services, telecommunication technology also includes provision of other value added services such as internet and ringtones.

Direct state intervention is also insufficient to offer room for self-regulation by professionals in the telecommunication industry. It has been argued that direct state intervention is applicable in the absence of economic powers that give rise to reliance on regulation.¹⁰⁰

However, Baldwin, Scott and Hood's second view of regulation is wider and covers even what we would not conventionally refer to as regulation. For instance, education or religious affiliation will generally modify the behavior of individuals in the society. For instance, if the public was educated on the importance of copyright, the rates of infringement would be reduced.

⁹⁷ B. T. Jorgensen & B. Larsen (1987) "Control – an attempt at forming a theory," Vol.10 (4) *Scandinavian Political studies*, pp 279 -299.

⁹⁸ Robert Baldwin, Collin D. Scott & Christopher Hood (edn) (1998) *A Reader on Regulation*, Oxford University Press, University of Michigan.

⁹⁹ This is what was referred to as the plain old telephony services (POTS).

¹⁰⁰ Giandomenico Majone (1994) "The Rise of the Regulatory State in Europe," Vol. 17(3) *West European Politics* 77-101.

Baldwin, Scott and Hood's third definition is unsustainable on its own. It presupposes situations where the government is at the top of a hierarchy of regulation and other regulates are below it. This view of regulation should be reconsidered to account for private self-regulatory mechanisms which exercise quasi-governmental powers but tactfully allow the government to be the last resort regulator.¹⁰¹ Regulation can also be defined broadly as all types of state intervention in the economy or the private sphere designed to steer then and to realize public goals.¹⁰² This goes beyond the rule – making to include areas like taxation, subsidies and public ownership. In this sense, regulation is an all-inclusive concept of governance.²¹ The third view of regulation is that regulation is seen as social control of all kinds including non-intentional and non-state mechanisms.¹⁰³

In this error of technological advancement, there is indeed a considerable amount of ambiguity in the term regulation giving it a thriving base for lawyers, policy makers and scholars to develop and apply their knowledge, skill and understanding to find a definitive description of what regulation entails.

Professor Lawrence Lessig is one of the greatest scholars who has taken time to analyze the regulability of Cyberspace.¹⁰⁴ Professor Lessig rightly observes that it was initially very easy for the state to control such thing as commercial gambling within its jurisdiction before the advancement of internet. However the same cannot be said with the advancement of the internet when the internet servers are located outside the jurisdiction of the state.¹⁰⁵ According to Professor Lessig, in order to exercise regulatory authority, you need to know the persons, where they come from and what they are doing and with the internet, those requirements cannot be fully met.¹⁰⁶ Professor Lessig does not completely rule out the importance of government involvement in the regulation of Cyberspace but proposes a different form of regulation. He refers to this different form of regulation as the “Code”. In Professor Lessig's view, Code is law.¹⁰⁷

¹⁰¹ Rob Baggot (1989) “Regulatory reform in Britain: the changing face of self-regulation,” 67 (4) *Public Administration*, pp 435-454.

¹⁰² *ibid.*

¹⁰³ T. Christensen, P. Læg Reid (2006) “Comparative Studies of Organizations in the Public Sector: Autonomy and regulation,” University of Bergen, Norway, p 39.

¹⁰⁴ Lawrence Lessig (2006) *Code Version 2.0*, Basic Books Publishing, New York

¹⁰⁵ Lawrence Lessig (2006) *Code Version 2.0*, Basic Books Publishing, New York. p 23.

¹⁰⁶ *ibid.*

¹⁰⁷ Lawrence Lessig (2006) *Code Version 2.0*, Basic Books Publishing, New York. P 5.

By code, Professor Lessig means the software and the hardware of Cyberspace which he fondly refers to as the architecture.¹⁰⁸ Professor Lessig delved in providing a distinction between the architecture in real -space and that of Cyberspace. Regulability of real space depends on certain architectures of identification¹⁰⁹ such as the name, sex, height, fingerprints, location among others. While in theory this may be the same for Cyberspace, practicability of it is an issue in that criminals are invisible and details in the cyberspace keep changing.¹¹⁰

Technology needed to change to be able to address this regulability issue. There was need to use technology to regulate technology. This is what is referred to as the “end to end principle”.¹¹¹ Having pointed out this, Professor Lessig further argues that while technology makes Cyberspace more regulable, it is not enough to perfectly do so. Professor Lessig further argues that though the government may not be able to directly regulate cyberspace, there are certain constraints that the government can place in the development of architecture that makes behavior regulable.¹¹²

The importance of cyberspace cannot be overemphasized. Cyberspace has brought with it new developments in commerce. Professor Lessig argues ³⁷ that the interaction between government and commerce in cyberspace will change the effective architecture of the internet. For instance, market forces encourage architectures of identity to facilitate online commerce thereby fundamentally transform cyberspace regulability with minimal government intervention.¹¹³

¹⁰⁸ *ibid.* See Chapter 4.

¹⁰⁹ These include identity, authentication and credentials. See Lawrence Lessig (2006) *Code Version 2.0*, Basic Books Publishing, New York, p 39.

¹¹⁰ ³⁷, p 43.

¹¹¹ Named by network architects, Jerome Saltzer, David Clark and David Reed. See Jerome H. Saltzer et al (1991) “End to End Argument in System Design” in *Integrated Broadband Networks*, Edited by Amit Bhargava (Norwood, Mass: Artech House), p 30-41.

¹¹² Professor Lessig refers to this as Regulatory Two Step in that in a context where behaviour seems unregulable, the state takes steps to increase regulability. See Lawrence Lessig (2006) *Code Version 2.0*, Basic Books Publishing, New York. Pg. 61-62

¹¹³ Lawrence Lessig (2006) *Code Version 2.0*, Basic Books Publishing, New York, p 77.

Professor Lessig identified four regulators of Cyberspace. These are: 1) The Law, 2) Social Norms, 3) The Market and 4) Architecture. These four regulators regulate behavior in Cyberspace. The law for instance does so by imposing sanctions for violation of legal rights.¹¹⁴ The norms regulate behavior as what you say where determines how people react towards you. Market on the other hand regulates behavior through pricing structures and Architecture regulates behavior through a set of constraints in the hardware and software that allows you to operate within certain limits for instance, use of passwords and encryptions.

Philip J. Weiser in his article “*Regulatory challenges and Models of Regulation*”¹¹⁵ discusses the regulatory challenges in information technology. In his analysis, regulation in the information technology can happen in 4 layers, that is the physical layer, the logical layer, the applications layer and the content layer.¹¹⁶

The physical layer is regarded as the bottom layer and relates to the medium through which information is transported be it in cables, telephone lines and internet access broadband facilities. The Logical layer consists of the basic standards that enables shaping of the internet.¹¹⁷ These standards facilitate the transmission of internet. The application layer is the innovation and inventions layer which enables consumers to use the internet in different ways.¹¹⁸ The content layer is the layer that most consumers interact with.¹¹⁹ According to Professor Weiser, regulation of information technology can only properly be regulated through these four layers. The issue worth pondering is how this regulation will function. While Professor Weiser identified areas in information technology that need regulation, Professor Lessig identified how regulation would be effected. These two theoretical frameworks will be of great assistance in this research.

¹¹⁴ Professor Lessig give the example of Copyright Laws and Defamation Laws.

¹¹⁵ (2003) Vol 2. Philip J. Weiser is a Professor of Law and Telecommunications, Executive Director and Founder of the Silicon Flatirons Center for Law, Technology, and Entrepreneurship, and Dean Emeritus at the University of Colorado Law School between 2011 and 2016

¹¹⁶ *ibid.* Kevin Werbach describes this as the four-layer model of internet, Kevin Werbach, *A Layered Model for Internet Policy*, 1 J ON Telecomm & High-tech L. 37

¹¹⁷ This is through the Transmission Control Protocol and the Internet Protocol.

¹¹⁸ Lawrence Lessig (2006) *Code Version 2.0*, Basic Books Publishing, New York, p 4.

¹¹⁹ *ibid.* Content layer is in form of musical and artistic works, emails and voice conversations among others.

2.2.3.2. Principles of regulating ringtones

There are five principles of regulation that have become accepted worldwide. These five principles are transparency, accountability, proportionality, consistency and targeting.¹²⁰ As regards transparency, the burden is on the regulators to show that they are necessary entities by setting up objectives and mandates to the public.¹²¹

The regulators are also expected to be accountable for their actions and there should be an efficient procedure for appeals against unsatisfactory decisions. One other form of accountability is in the preparation of the annual reports of the regulators' operations.¹²² For instance, the Kenya Copyright Board, established under section 3 of the Copyright Act is mandated to regulate copyright matters in Kenya.¹²³ The Board is required to prepare and present its books of accounts to the Auditor General for auditing purposes.¹²⁴

In as far as proportionality is concerned the regulator is required to ensure that compliance with the set-out regulations is affordable and effective. The regulator is expected to undertake an impact assessment and analyze the effectiveness of the regulations, encourage other regulatory options including de-regulation.¹²⁵ One of the challenges faced by the Copyright Board of Kenya in regulating copyright is that of enforcement. In 2006, the Kenya Copyright Board established an enforcement unit consists of 8 copyright prosecutors and 5 legal counsels for purposes of arresting and prosecuting copyright infringement.¹²⁶

Consistency is crucial in terms regulatory reforms. The new regulations should conform to previous regulatory initiatives so that there is an element of certainty that will encourage future investment and minimize capital costs.¹²⁷

Targeting requires the regulatory body to focus on specific problems affecting the sector concerned and avoiding a scattergun approach on regulation.¹²⁸ Targeting requires the regulatory body to have a goal-based approach with a view to reviewing the best regulation.

¹²⁰ Boyfield and Mather (2012) "Regulating mobile phones" – 'A fresh look' European Forum," Rand Corporation, Cambridge, UK.

¹²¹ For Example Section 5 of the Kenya Information and Communications Act, 1998 sets out the objectives of the Communications Authority of Kenya which is the regulatory body established under Section 3 of the Act and charged with the responsibility of regulating the telecommunications Industry.

¹²² Section 22 of the Kenya Information and Communications Act, 1998 requires the Communication Commission of Kenya to submit to the Minister of the daily operations of the regulator in the preceding year.

¹²³ Section 3 and section 5 of the Copyright Act, No. 12 of 2001.

¹²⁴ Section 19 of the Copyright Act, No. 12 of 2001.

¹²⁵ Boyfield and Mather (2009) "Regulating mobile phones – A fresh look" European Forum, Rand Corporation, Cambridge, UK.

¹²⁶ See www.copyrightboardofkenya.co.ke (accessed on 18/5/2013).

¹²⁷ Boyfield and Mather (2012) "Regulating mobile phones – A fresh look" European Forum, *op. cit.*

2.2.3.3. Forms of regulating Ringtones

There are three major forms of regulation adopted in various African countries including Kenya. These are state regulation, self-regulation and a hybrid of the two.¹²⁹

2.2.3.4. State Regulation of Ringtones

This is the traditional way of regulation which requires that an entity be established under an Act of Parliament to regulate a specific sector. The entity consists of members who are usually appointed by the Secretary or Minister responsible for that specific industry. A characteristic feature of the Board is that its members usually consist of persons holding Government offices, such as permanent secretaries. Their appointments are done by either the President or the Minister in charge of the specific sector. Of most importance to this study are the entities established under the Copyright Act of Kenya, 2001 and the Kenya Information and Communications Act 1998.¹³⁰

Section 3 of the Copyright Act, 2001 provides for the establishment of the Copyright Board of Kenya mandated to regulate the copyright and other related rights set out under the Act. Under section 6 of the Act, the Commissioner appoints the Chairperson of the Board and four other members.

On the other hand, Section 3 of the Kenya Information and Communications Act, 1998 provides for the establishment of the Communications Authority of Kenya. Section 6 of the Act provides for the members of the Commission. The Chairperson is appointed by the President.¹³¹ The minister appoints the Director-General and five other members of the Commission.¹³² Other members of the Commission consist of permanent secretaries.

State regulation has received various criticisms in the way it is effected. It has been argued that many boards do not have enough expertise to ensure effective regulation. For instance, the State Government appointed to the Board do not necessarily have the expertise and may approach regulation from a business-as-usual perspective.¹³³

¹²⁸

² *id.*

¹²⁹ Ben Sihanya (2000) "Infotainment and Cyber law in Africa: Regulatory Benchmarks for Third Millennium," *op. cit.*

¹³⁰

ibid.

¹³¹

Section 6(a) of the Kenya Information and Communications Act, 1998.

¹³²

Section 6(b) and (g) of the Kenya Information and Communications Act.

¹³³

Ben Sihanya (2000) "Infotainment and Cyber law in Africa: Regulatory Benchmarks for Third Millennium," *op. cit.*

State regulation requires the use of state machinery and power. This poses as a potential resource or threat to every industry in Kenya especially regarding the state's power to prohibit, compel take away or give money which power is often abused. There are rules and regulations whose net effect upon the regulated industry are undeniably onerous for instance heavy taxation, or onerous licensing requirements.¹³⁴

There is also the question of political interference and interest of the members of the boards. For instance, the chairperson of the Kenya Communication Commission is appointed by the President.¹³⁵ The Director General is appointed by the Minister.¹³⁶ There is a likelihood of interference because the appointments are made by political leaders. There is also a likelihood that members of the board would abuse their powers by making investments in the regulated sector and would manipulate their powers to the advantage of their investments. There is therefore lack of goodwill on the part of board members and other politicians.¹³⁷

2.2.3.5. Instruments of state regulation

The most common instrument of state regulation is through licensing. Once the regulations and the regulator, a Board or a Commission have been established, a license can be issued to any legally entitled juridical person that has satisfied the requirements for issuance of the license.¹³⁸ Section 24 of the Kenya Information and Communications Act requires that no person should operate a telecommunications system without a valid license. The Kenya Communications Regulations, 2001 provides that the Communications Authority of Kenya can regulate cellular telephony through the issuance of a license.¹³⁹

The other instrument used by state regulators is through price control. The Communications Authority of Kenya is mandated to put price caps for cellular telephony services to protect the interest of the consumers.¹⁴⁰

¹³⁴ Stigler G.J (1971) "The Theory of Economic Regulation," Vol. 2 Issue 1 *Bell Journal of Economics*, University of Chicago, pp 3-21.

¹³⁵ Section 6 of the Kenya Information Communication Act, 1998.

¹³⁶ *Id.*

¹³⁷ Ben Sihanya (2000) "Infotainment and Cyber law in Africa: Regulatory Benchmarks for Third Millennium," *op. cit.*

¹³⁸ *ibid.*

¹³⁹ Rules 9 – 13 of the Kenya Communication Regulations, 2001

¹⁴⁰ See Regulation 90 of the Kenya Communications Regulations.

2.2.3.6. State Regulation for ringtone technology?

As discussed earlier, ringtone technology is a value-added telecommunication network which cuts across two distinct areas of law, that is, copyright law and telecommunications law. In as much as ringtone technology is a value-added network service, it has not been included in the definition of value-added network services provided for under the Kenya Information and Communication Act¹⁴¹

The bodies charged with the responsibility of regulating these two areas are still grappling in the dark regarding how to regulate this technology. It must also be noted that ringtone technology continues to develop, and the regulatory laws continue to remain stagnant.

It is therefore not possible for ringtone technology to be subjected to the classical form of regulation only. Stakeholders of ringtone technology can get into negotiations and come up with a regulatory framework without necessarily involving state regulators. A good example is assignment agreements entered between the ringtone companies and the copyright owners.¹⁴² However, these have not been successful in Kenya.¹⁴³

No doubt that state-regulation is still important for purposes of intervention where the rights of the weak bargainers are being infringed. A good example is the case by Music Society of Kenya against Safaricom Limited, where Safaricom Limited was restrained by an order of the court from distributing ringtones to over 10 million subscribers through a value-added network service known as “Skiza” when it was shown that some of the musicians had not authorized the distribution.¹⁴⁴

¹⁴¹ Section 2 of the Kenya Information Communication Act, 1998 lists the types of value added network services to include, video text, teletext, tele action, telecomm and, tele alarm, store and forward messaging services, teleprocessing, and data processing, voice messaging etc

¹⁴² See *Cellulant Company Limited v. Music Copyright Society of Kenya*, Nairobi High Court Civil Case Number 159 of 2009.

¹⁴³ *ibid.*

¹⁴⁴ *John Boniface Maina v. Safaricom Ltd*, (2013) eKLR. Reported in the Business Daily Newspaper on 19th September 2011 accessed through the business daily website, <http://www.businessdailyafrica.com>. The court issued an injunction against Safaricom Limited and Cellulant Company Limited restraining them from distributing the ringtones. This was negotiated out of court.

2.2.3.7. Self-Regulation

Self-regulation can simply be defined as the exercise of control over oneself especially with a view to bringing the self into the preferred standards.¹⁴⁵ Self-regulation can also be defined as efforts by human self to alter any of its own inner states or responses.¹⁴⁶

2.2.3.8. Justification of self-regulation

Self-regulation is seen as a form of governing without command and control creating an element of flexibility in the form of regulation and is therefore adaptable.

Self-regulation has also been applauded in that the regulation is established based on knowledge and expertise which tend to be used effectively. This is because the nature of self-regulation requires that the actors be well versed with the specific sector which is not the case with state regulation. This means that the actors of the specific sector can come up with regulatory mechanisms that are efficient.

Self-regulation is also justified on the basis that it creates an element of loyalty among the actors; hence the level of commitment and pride in the success and development of the industry is encouraged.¹⁴⁷

Kenya, Uganda and Tanzania have adopted self-regulation in as far as their media is concerned. Uganda for example has incorporated a code of conduct or a code of ethics and etiquette into its Press and Journalist Statute of 1995.¹⁴⁸ Kenya has a similar code of conduct entrenched in the second schedule of the Media Act.¹⁴⁹

Tanzania on the other hand has taken a different approach whereby the media established a Media Council which is a non-governmental organization with a view to advocating for greater flexibility.¹⁵⁰

Self-regulation especially through social norms is now more complex. Social norms now form part of constitutional and statutory standards, ethics and integrity.¹⁵¹

¹⁴⁵ Ben Sihanya (2000) "Infotainment and Cyber law in Africa: Regulatory Benchmarks for Third Millennium," *op. cit.*

¹⁴⁶ R.F Baumeister & K.D Vohs (2004) *Handbook of Self-Regulation; Research, Theory and Applications*, Guilford Press, New York.

¹⁴⁷ Ian Bartle & Peter Vass (2005) "Self regulation and the regulatory state- A survey on regulatory policy and practice," Centre for Study of Regulated Industry Research Report Number 17, University of Bath School of Management, UK.

¹⁴⁸ Ben Sihanya (2000) "Infotainment and Cyber law in Africa: Regulatory Benchmarks for Third Millennium," *op. cit.*

¹⁴⁹ Media Act No. 3 of 2007.

¹⁵⁰ *ibid.*

2.2.3.9. Self-regulation for ringtone technology?

In as far as the regulation of ringtone technology is concerned; self-regulation may be useful for purposes of addressing issues that cannot be included in legislation. Self-regulation may also be statutory. The development of codes of conduct/practice which are entrenched in statutes can also be useful in developing a consistent approach to the regulation of ringtone technology.¹⁵² However, self-regulation alone cannot be the best mode of regulation of ringtone technology.

There is also the threat that self-regulation may be used to foster self-interests for instance, the possibility of cellular network operators using self-regulation as a tool to discourage competition in the sector are high.

2.2.3.10. Hybrid regulation

A case has been put forward to the effect that a hybrid of the industry and the Government would be the best approach to regulation of cyberspace.¹⁵³ This approach may also be a good approach for regulation of ringtone technology on the basis that the industry players have the expertise and knowledge of the industry which knowledge is essential in making regulatory policies.

2.3. The ringtone technology

Mobile telephone ringtones have evolved since the late 20th century. The latest ringtones are usually song clips. A ringtone can simply be defined as a sound made by a telephone to indicate an incoming call or a text message.

Technologically, a ringtone is an excerpt of a musical composition embodied in a digital file and rendered into audio. Ringtones are stored in an end user's mobile telephone, pager, or other portable communication device activates its ring or alert function.¹⁵⁴

¹⁵¹ Ben Sihanya (2000) "Infotainment and Cyber law in Africa: Regulatory Benchmarks for Third Millennium," *op. cit.*

¹⁵² For instance, the Media Council of Kenya, code of conduct which is now entrenched in the second schedule 2 the Media Act, No. 3 of 2007.

¹⁵³ Ben Sihanya (2000) "Infotainment and Cyber law in Africa: Regulatory Benchmarks for Third Millennium," *op. cit.*

¹⁵⁴ Harry Fox Agency (2011) "About Ringtones" at <http://www.harryfox.com/public/infoFAQRingtones.jsp> (accessed on 12/9/2011).

2.4. What is copyright?

Copyright refers to the protection granted to an original expression which is embodied in a tangible material or a fixed medium.¹⁵⁵ A work is fixed in a tangible form or a medium of expression when it is embodied in a copy or phono record, by or under the authority of the author, is sufficiently permanent to permit it to be perceived, reproduced or otherwise communicated for a period of more than the transitory duration and which work can be perceived, reproduced or otherwise be communicated either directly or with the aid of a machine or device.¹⁵⁶

Works that are eligible for copyright protection include: -

- Literary works
- Musical works
- Artistic works
- Audio-visual works
- Sound-recordings
- Broadcasts.¹⁵⁷

Literary, musical and artistic works are referred to as primary works and they were first protected under the *Berne Convention* for the protection of literary and artistic works (1886). The Convention defines literary and artistic works to include every production in the literary, scientific and artistic domain, in whatever mode or form of its expression, such as books, pamphlets and other writings, lectures, addresses, sermons and other works of the same nature; dramatic or dramatic-musical works, choreographic works and entertainment in dumb shows, musical compositions with or without words and others including drawings, sculptures, engraving and lithography.¹⁵⁸

¹⁵⁵ Ben Sihanya (2015) "Teaching Materials on Intellectual Property (1997-2015)," available on file at Innovative Lawyering and Sihanya Mentoring, Nairobi, Siaya; Ben Sihanya (2000) "Infotainment and Cyber law in Africa: Regulatory Benchmarks for Third Millennium," Vol 10(20) *Transnational Law & Contemporary Problems* 583-640; W.R. Cornish (2003) *Intellectual Property Rights: Patents, Copyright, Trademarks and Allied Rights*, 5th Edn, Sweet & Maxwell, London.

¹⁵⁶ D. F. Johnson (1978) *Copyright Handbook*, R.R Bowler Co. New York and London.

¹⁵⁷ Section 22 Copyright Act, 2001.

¹⁵⁸ Article 2 of the Berne Convention.

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Audio-visual, sound recordings and broadcasts¹⁵⁹ are classified as related works and are also protected under Berne (1971) and in the World Trade Organization's Agreement on Trade and Related Aspects of Intellectual Property Rights (TRIPs).¹⁶⁰

2.4.1. Requirements for copyright

Copyright protects the expression of an idea rather than the idea itself. Therefore, copyright protection does not extend to an idea, concept, principle, discovery, procedure, process, system or method of operation. The form of expression may be protected but not the underlying idea or concept.¹⁶¹

This is because copyright protection lasts for a long period and it would be unwise for it to cover anything as fundamental as an underlying concept or idea.¹⁶²

2.4.1.1. Requirements as to Originality.

The requirement that the work be original requires only that it be original to the author, therefore the author must not copy, and it need not be original or novel to the world.¹⁶³ It protects the expression of the experience or idea no matter how commonplace the experience is.¹⁶⁴ The emphasis is the individuality of the expression it must be associated with an identifiable personality and the author must not plagiarize.¹⁶⁵

This requirement that originality relates to the author makes it possible to have copyright too many authors who have written similar works at the same time independently and without copying.¹⁶⁶

The other test of originality is the requirement that the author in creating the work must have expended sufficient skill, judgment and labor.¹⁶⁷ This means that the intellectual creativity should be the right kind of work and the input must satisfy a certain minimum standard of

¹⁵⁹ Which were up to 1989 called cinematographical works.

¹⁶⁰ Article 9 of TRIPs negotiated in 1994.

¹⁶¹ Ben Sihanya (2005) "Copyright Law, teaching and research in Kenya," Vol. 2 *East Africa Law Journal*, (SOJ/EALJ/123/06).

¹⁶² *ibid.*

¹⁶³ *ibid.*

¹⁶⁴ Article 2 of TRIPs.

¹⁶⁵ Ben Sihanya (2005) "Copyright Law, teaching and research in Kenya," *op. cit.*

¹⁶⁶ Ben Sihanya (2015) "Teaching Materials on Intellectual Property (1997-2015)," available on file at Innovative Lawyering and Sihanya Mentoring, *op. cit.*

¹⁶⁷ *ibid.*

effort.¹⁶⁸ Skill and judgment relate to the fruits of the considerable creative or intellectual endeavor, thus copyright has been allowed in the following scenarios: -

In the case of *University of London Press v. University Tutorials Press*,¹⁶⁹ the examination papers were held to be copyrightable as their making embodies skill and judgment. This means that copyright protects work that embodies skill and judgment and the focus is not on labor, effort, enterprise, industry or the sweat of the brow.

This position of law was emphasized in the case of *Feist Publication v. Rural telephone Directory*.¹⁷⁰ In this case, the respondents published a white pages directory containing 46,878 listings of telephone numbers and physical addresses of subscribers and they were competitors with the applicants in the yellow pages. The respondent copied entries including four fictitious entries from the applicants who sued on the basis of infringement of their copyright.¹⁷¹ Melville Nimmer, counsel for the applicant argued that the test of whether copyright has been infringed or not is to look at *similarity and access*¹⁷² he argued that the entries of the directory of the respondent was similar to that of the applicant and that they had access to the applicant's directory and had therefore infringed their copyright.

Paul Goldstein however, as counsel for the respondent argued that the test to be applied should not be on similarity and access, but whether the applicant's directory embodied *sufficient skill and judgment* as to make it eligible for copyright.¹⁷³ It was held that the applicant's directory was not copyrighted and therefore there was no infringement as it embodied "the sweat of the brow" and not skill and judgment.¹⁷⁴

To this extent, it can be argued that there is no copyright in postal Kenya's white pages directory. It only embodies the sweat of the brow and does not involve skill and judgment. Paul Goldstein formula was also applied in the Canadian Supreme Court in the case of *Tele-*

¹⁶⁸ This requirement is embodied under section 22 (3) (a) of the Copyright Act 2001.

¹⁶⁹ *University of London Press v. University Tutorials Press* (1916) 2 Ch 601 at page 608.

¹⁷⁰ *Feist Publication v. Rural telephone Directory* (1991) 499 US 340.

¹⁷¹ Ben Sihanya (2015) "Teaching Materials on Intellectual Property (1997-2015)," available on file at Innovative Lawyering and Sihanya Mentoring, Nairobi, Siaya.

¹⁷² Commonly referred to as the Nimmer formula.

¹⁷³ Commonly referred to as the Goldstein Formula.

¹⁷⁴ Summary of the case content from Ben Sihanya (2015) "Teaching materials on Intellectual Property and Telecommunications Law," available on file at Innovative Lawyering and Sihanya Mentoring.

Direct Publications v. American Business Information,¹⁷⁵ where it was held that there is no copyright in the yellow pages' directory.¹⁷⁶

2.4.1.2. Issues as to the quality of work

Artistic and literary works are copyrightable irrespective of whether they are of quality or not. In the case of *Bleistein v. Donaldson Lithographing Company*,¹⁷⁷ it was held that it would be a dangerous undertaking for persons trained only in law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.¹⁷⁸

In the case of *Kenrick v. Lawrence*,¹⁷⁹ a simple drawing of a human hand showing voters where to mark their cross on a voting card was held to be copyrightable.

2.4.1.3. The Materiality, Tangibility or Fixation Test

Copyright subsists in an original work which has been expressed in a physical material or tangible medium. Section 22 (3) (b) Copyright Act 2001 provides that for a work to qualify for copyright it must be written down, recorded or otherwise reduced to material form.

Such fixed, tangible or material form should be in a material object which is sufficiently stable to permit it to be perceived, reproduced or otherwise communicated. Such materials include tape records, compact discs (CDs), digital discs or in the form of a book, a pamphlet or other written or printed matter.¹⁸⁰ However if the skills are recorded in a video, copyright will subsist on the recorded material.

2.5. Conclusion to the conceptual and theoretical framework on the ringtone technology

In Chapter 2, I have focused on clear definition or conceptualization of terms relevant to the ringtone technology. Chapter 2 thus defines the key terms in context and enables the reader to have a better understanding of the study and its relevance. The definition of terms has also given an understanding of the nexus between ringtone technology and cellular telephony.

¹⁷⁵ *Tele-Direct Publications v. American Business Information* (1997) 76 CPR at 296.

¹⁷⁶ However, in a dissenting view was taken by the Australian Federal Court in *Desktop Marketing Systems v. Telsta* (2002) 119 ECR 419 it was held that there is copyright in telephone directories.

¹⁷⁷ *Bleistein v. Donaldson Lithographing Company* 188 U.S 239, 250 (1903).

¹⁷⁸ Ben Sihanya Teaching materials on Intellectual Property and Telecommunications Law available on file at Innovative Lawyering and Sihanya Mentoring.

¹⁷⁹ *Kenrick v. Lawrence* (1890) 25 QBD 99.

¹⁸⁰ Ben Sihanya Teaching materials on Intellectual Property and Telecommunications Law available on file at Innovative Lawyering and Sihanya Mentoring.

The chapter has established the nexus between telecommunications laws and copyright law. The chapter has also concluded that the regulation of ringtone technology would not take the narrow form and would involve a hybrid form.

CHAPTER 3

LITERATURE REVIEW, LEGAL AND CONTENT ANALYSIS ON THE RINGTONE TECHNOLOGY

This chapter seeks to identify the legal framework necessary for the regulation of ringtone and identifies the inefficiencies in the said legislation.

3.1. Introduction to literature review, legal and content analysis on the ringtone technology

Chapter 2 of this study defined the key terms of the study and established the nexus between the telecommunication law and copyright law in answer to the first research question.¹⁸¹ The conclusion of the study in Chapter 2 was that regulation of the ringtone technology would not take the narrow sense but the broad sense in that the state and its organs and the copyright and telecommunication industry have a role to play in the regulation of ringtones.¹⁸²

This chapter will give an overview of the laws that are relevant to the ringtone technology in Kenya.¹⁸³ These laws include, the Constitution of Kenya, 2010, the Copyright Act, 2001, the Trade Mark Act, Cap 506, laws of Kenya and the Kenya Information and Communications Act, 1998 (KICA). This chapter seeks to examine whether the legal regime in Kenya is adequate to regulate ringtone technology.¹⁸⁴ In doing so, chapter addresses the second research question which is whether the current laws are enough to regulate the technology.¹⁸⁵

3.2. The Constitution of Kenya, 2010 in promoting innovation and copyright

The current Constitution was promulgated on 27th August 2010.¹⁸⁶ The promulgation of the Constitution is considered the most significant achievement in Kenya since independence.¹⁸⁷ The Constitution has made significant changes in the political system as well as the

¹⁸¹ Ben Sihanya (2000) "Infotainment and cyber law in Africa: Regulatory Benchmarks for the third millennium," *op. cit.*

¹⁸² Rob Baggot (1989) "Regulatory reform in Britain: the changing face of self-regulation" 67 (4) *Public Administration* 435-454.

¹⁸³ Ben Sihanya (2015) "Teaching Materials on Intellectual Property (1997-2015)," available on file at Innovative Lawyering and Sihanya Mentoring, Nairobi.

¹⁸⁴ Marisella Ouma (2012) "The role of copyright in economic development: A review from Kenya," *NIALS Journal of Intellectual Property* [NJIP].

¹⁸⁵ Ben Sihanya (2000) "Infotainment and cyber law in Africa: Regulatory Benchmarks for the third millennium," *op. cit.*

¹⁸⁶ This Constitution repealed and replaced previous Constitution which was enacted in 1969.

¹⁸⁷ Ben Sihanya "Constitutional Implementation in Kenya 2010-2015: Challenges and Prospects," FES Kenya Occasional Paper No. 5.

fundamental rights and freedoms. The Constitution now recognizes economic and cultural rights in addition to the other rights previously protected in the previous Constitution.¹⁸⁸

The Constitution of Kenya has 264 articles and is divided into 18 chapters and 6 schedules. Chapter 1 of the Constitution provides for the sovereignty of the people and the supremacy of the Constitution. The sovereign power belongs to the people and should be exercised in accordance to the Constitution.¹⁸⁹

Chapter 3 of the Constitution provides for citizenship and sets out the terms upon which persons may acquire citizenship in Kenya.¹⁹⁰ Chapter 4 of the Constitution provides for the fundamental rights and freedoms protected under the Constitution.¹⁹¹ These rights include political rights,¹⁹² civil rights,¹⁹³ social rights,¹⁹⁴ economic¹⁹⁵ and cultural rights.¹⁹⁶ The Constitution also recognizes the rights of vulnerable persons such as children, women, the handicapped, the elderly and the youth.¹⁹⁷

The provisions that are significant to this study are contained in Chapter 4 of the Constitution which sets out the Bill of Rights. Article 33 of the Constitution provides for the right to protect a person's freedom of expression and the freedom to seek, receive and impart information or ideas, the freedom of artistic creativity, academic freedom and freedom of scientific research.¹⁹⁸

Ringtones are derived from musical works. Musical works are protected under the Copyright Act, 2001.¹⁹⁹ Copyright protects original expressions of ideas, or artistic creativity.²⁰⁰ The

¹⁸⁸ Ben Sihanya (2013) "Constitutional Implementation in Kenya 2010-2015: Challenges and Prospects," *FES Kenya Occasional Paper No. 5* page 1, at <http://www.fes-kenya.org/media/publications/2013> (accessed 30/8/2014).

¹⁸⁹ *ibid.*

¹⁹⁰ Articles 12 to 18 of the Constitution, 2010; Waruguru Wagogo (2012) "Constitution of Kenya," International Centre for Not- For-profit Law, at http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf. (accessed on 28/2/2015).

¹⁹¹ Waruguru Waguongo (2012) "Constitution of Kenya" International Centre for Not- For-profit Law, at http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf. (accessed on 28/2/2015). Articles 19 to 57 of the Constitution, 2010.

¹⁹² Article 38 of the Constitution.

¹⁹³ Articles 39 – 42; 45 – 51 of the Constitution, 2010.

¹⁹⁴ Article 43 of the Constitution, 2010.

¹⁹⁵ Article 43 of the Constitution, 2010.

¹⁹⁶ Article 44 of the Constitution, 2010.

¹⁹⁷ Chapter 4 part 3, Articles 52-57 of the Constitution.

¹⁹⁸ Article 33 (1) (a, b and c) of the Constitution.

¹⁹⁹ Section 22 of the Copyright Act, 2001.

²⁰⁰ Ben Sihanya (2006) "Intellectual Property for innovation and Industrialization in Kenya," Proceedings of 2006 JKUAT scientific and technological Industrialization Conference 'Harnessing Agriculture and Technology' page 39. Later published. Ben Sihanya (2008) "Intellectual Property for innovation and

Constitution guarantees the freedom to express the ideas or artistic creativity. The musical works are therefore protected under the Constitution by Article 33 of the Constitution. It is therefore unconstitutional to infringe a copyrightable work.

Article 40 of the Constitution protects an individual's or association's right to acquire and own property. Ringtones are a product of intellectual property. Intellectual property can simply be defined as creations of the mind and includes inventions, literary and artistic works, symbols, names, images, and designs used in commerce.²⁰¹ Section 3 of the Interpretation and General Provisions Act defines the term property as follows: -

“Property includes money, goods, chose in action, land and every description of property, whether movable or immovable; and also, obligations, easements and every description of estate, interest and profit, present or future, vested or contingent arising out of or incident to property as herein defined.”²⁰²

This definition is inclusive rather than exclusive. It may therefore be argued that a product intellectual property is subject to protection under Article 40 of the Constitution. A ringtone may be considered as a product of intellectual property.

The Constitution for the first time acknowledges the socio- economic rights of the people and the fact that the said rights cannot be infringed.²⁰³ The right to derive royalties from ringtones falls among the socio-economic rights that cannot be infringed and an author, composer or publisher has the right to seek protection from the Constitutional Court in the High Court in instances where the rights have been infringed or are threatened.²⁰⁴

Chapter 5 of the Constitution sets out the principles within which land can be owned, used and managed.²⁰⁵ This chapter requires that all use of land should be equitable, efficient, productive and sustainable. The Constitutional Court in the High Court has not shied away

Industrialization in Kenya,” Convergence, Vol 4. No. 2. October 2008, pp. 185-213, Journal of the International Bar Association, London.

²⁰¹ World Intellectual Property Organization website, at <http://www.wipo.int/about-ip/en/> (accessed 22/6/2013)

²⁰² Section 3 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya.

²⁰³ Waruguru Waguongo (2012) “Constitution of Kenya” International Centre for Not- For-profit Law, at http://www.cla.up.ac.za/images/country_reports/kenya_country_report.pdf (accessed on 28/2/2015).

²⁰⁴ *Susan Waihera Kariuki & Others v. The Town Clerk, Nairobi City Council & Others* Petition Case 66 of 2010 [2011] eKLR. In this case, the petitioners sought conservatory orders to prevent unlawful eviction from informal settlement on the basis that their right to proper housing had been infringed. The court granted the conservatory orders on the basis that the one-day notice of eviction issued by the respondent was unreasonable and infringed on the petitioner's constitutional rights.

²⁰⁵ Article 60 of the Constitution.

from implementing the right to equitable, efficient, productive and sustainable ownership of land.²⁰⁶

³ Chapter 6 of the Constitution lays down the principles upon which state officers must conduct themselves and emphasizes on the fact that the power exercised by state officers is a public trust and must be exercised to serve the people.²⁰⁷

It is without in doubt that the Constitution of Kenya 2010 sought to address ills in public administration in the arms of the government such as corruption, impunity, non-accountability, nepotism, abuse of office, ineptness, nepotism, lack of integrity and accountability.²⁰⁸ This Constitution has been able to do by clearly setting out the principles of good governance which state officers must observe and also clearly point out that the state officers must always remember that they are servants of the people and not the other way round.²⁰⁹

Chapter 7 of the Constitution sets out the structure of the ³ electoral system and process. It sets out the method of conducting elections and the qualifications of persons who wish to vie for any representative seat. Chapter 8 provides for the legislature. The legislature is now divided into two, the National Assembly and the Senate.²¹⁰

Chapter 9 provides for the executive arm of government. The executive arm of government comprises of the ³ president, the deputy president and the cabinet. Other offices which form part of the executive arm of government are the office of the Attorney General and the director of public prosecution. This chapter sets out a presidential system of governance. The ¹⁸ President is the head of state and government and the commander in chief of the armed forces.

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²⁰⁶ *Ibrahim Sangor Osman v. Minister of State for Provincial Administration & Internal Security* High Court at Embu, Petition No 2 of 2011 eKLR. In this case, the court ordered the respondent to return a piece of land which they had forcefully taken away from the petitioners and in addition, the respondent was ordered to restore the land by rebuilding reasonable accommodation and amenities which existed before the forceful eviction.

²⁰⁷ Article 73 of the Constitution, 2010.

²⁰⁸ Waruguru Waguongo (2012) "Constitution of Kenya," *op. cit.*

²⁰⁹ *ibid.*

²¹⁰ Article 93 of the Constitution, 2010.

To ensure that there is impartiality in the performance of executive functions, the members of the cabinet are no longer members of parliament as was the case in the old constitutional regime.²¹¹

Chapter 10 of the Constitution sets out the structure of the judiciary, the superior courts being the Supreme Court, the Court of Appeal and the High Court. The Constitution also mandates the establishment of special courts to deal with specific matters such as land and environment and labour.²¹²

The Constitution sets up an independent, unfettered and impartial judiciary whose main function is to interpret, defend and, implement the Constitution.²¹³ The Judiciary has done a commendable job in defending, interpreting and implementing the Constitution. This can be confirmed from the various constitutional decisions including but not limited to the petition that sought to declare certain provisions of the then proposed amendments of the Kenya Information and Communication Act popularly known as “the Media Bill, 2013” (now the Kenya Information and Communications (Amendment) Act 2013 unconstitutional).²¹⁴

Chapter 11 deals with the objects and principles of the devolved governments and provides for a two-tier governance structure comprised of the national government and the county governments.²¹⁵

Kenya now has a two-tier government comprising of the national government and the county government. This structure simply seeks to decentralize government functions and ensure that the lowest member of the public can access government services.²¹⁶

Devolution has had far-reaching implications on the society. Devolution has been criticized for being a hub of corruption.²¹⁷ It is also argued that devolution has led to regressive politics with the political leaders seeking supremacy over development agenda.²¹⁸

²¹¹ Article 152(3) of the Constitution. Cf. Waruguru Waguongo (2012) “Constitution of Kenya,” *op. cit.*

²¹² Article 162 of the Constitution, 2010.

²¹³ Ben Sihanya (2013) “The role of the Judiciary in the accountability and governance of the devolved Government structure,” A Presentation to the Institute of Certified Public Accountants of Kenya (ICPAK) 20th Economic Symposium at the Hilton Hotel, Nairobi, February 24, 2012.

²¹⁴ *Nation Media Group Limited & 6 others v. Attorney General & 5 others* [2014] eKLR This petition sought to challenge the constitutionality of the Multimedia Appeals Tribunal set up under the Kenya Information and Communication (Amendment) Act, 2013. The Constitutional Court granted the petitioners conservatory orders preventing the chairperson and members of the Tribunal.

²¹⁵ Articles 174 and 175 of the Constitution, 2010.

²¹⁶ Ben Sihanya (2013) “The role of the Judiciary in the accountability and governance of the devolved Government structure,” A Presentation to the Institute of Certified Public Accountants of Kenya (ICPAK) 20th Economic Symposium at the Hilton Hotel, Nairobi, February 24, 2012.

Chapter 12 sets out the principles that apply to all public funds.²¹⁹ This chapter also identifies the institutions mandated to deal with public funds and emphasizes the requirement of the government to be accountable while dealing with public funds.

Chapter 13 and 14 of the Constitution deals with public service and national security. The Constitution establishes an independent public service commission responsible for making appointments of persons to the national public service.²²⁰ The Kenya Defense Force (KDF), the National Intelligence Service (NIS) and the National Police Service (NPS) have been set up under the Constitution as the national security organs.²²¹

Chapter 15 of the Constitution establishes eleven commissions and requires parliament to establish one more.²²² Chapters 16, 17 and 18 of the Constitution provides for amendment of the Constitution.

The Constitution of Kenya, 2010 was founded on the platform of public participation and its effect has been that the public is more aware of their constitutional rights. This can be evidenced from the numerous constitutional petitions filed in court particularly in the public interest. The Constitution seeks to address historical constitutional ills such as discrimination, ethnicity, corruption, impunity and lack of integrity and accountability. Entrenching the principles of good governance in the Constitution has enlarged the expectations of the public regarding the three arms of government.²²³

It cannot be denied that there have been practical challenges in implementing certain provisions of the constitution particularly regarding the transitional provisions²²⁴

The Constitution provides a basis upon which the laws of Kenya are formulated. As we have noted above, the Constitution recognizes the right to own property and offers protection for that property. The owners of musical works have proprietary rights over their music and hence are protected under the Constitution. Ringtone technology has the potential of

²¹⁷ Robert Silikhe Simiyu, Joseph Njugi Mweru, Francis Ikapel Omete (2014) "The effects of devolved funding on socio- economic welfare of Kenyans: a case of constituency development fund in Kimilili, (Kenya)," *European Journal of Accounting Auditing and Fainance Research* Vol.2, No.7, pp.31-51.

²¹⁸ Reported in the Standard Newspaper on 5th May 2013.

²¹⁹ Article 201 of the Constitution, 2010.

²²⁰ Article 233 of the Constitution, 2010.

²²¹ Article 239, 242 and 243 of the Constitution, 2010.

²²² Article 248(2) of the Constitution, 2010.

²²³ Waruguru Waguongo (2012) "Constitution of Kenya," *op. cit.*

²²⁴ Gladwell Otieno (2014) "Taking Stock: Challenges and Prospects of Implementing the Constitution of Kenya," Africa Centre for Open Governance, Nairobi.

infringing the proprietary rights of owners of musical works and therefore the regulation of ringtones is necessary to protect the owners of musical works and at the same time enable the owners of musical works benefit from ringtones.

3.3. The Copyright Act, 2001 on Regulation of Ringtones

Copyright protects literary, musical and artistic works, audio-visual works, sound recordings and broadcast.²²⁵The first Copyright law in Kenya was passed in 1966 and it adopted the English Copyright Act of 1911.²²⁶ This Act was however repealed by the Copyright Act, 2001 after it became evident that there were new developments in copyright and the Act was insufficient to cover the new developments and also due to the fact that Kenya needed to comply with standards established under the TRIPs Code of 1994 and the WIPO Internet Treaties, 1996.²²⁷

The Copyright Act, 2001²²⁸ establishes the Kenya Copyright Board responsible for overseeing all issues pertaining to copyright in Kenya.²²⁹

The functions of the Kenya Copyright Board include ensuring compliance of laws and international treaties and conventions to which Kenya is a party relating to copyright and other rights recognized in the Act, licensing and supervising activities of collective management societies provided in the Act, devising promotion, introduction and training programmed on copyright and related rights, organizing legislation on copyright and related rights and propose other arrangements that will ensure its constant improvement and continuing effectiveness, enlightening and informing the public on matters relating to copyright and other related rights, maintaining an effective data bank for authors and their works, administering all matters of copyright and related rights in Kenya as provided under the Act.²³⁰

²²⁵ Section 22, Copyright Act, 2001.

²²⁶ This was the Copyright Act Cap 130, Laws of Kenya.

²²⁷ Ben Sihanya (2009) "Copyright Law in Kenya," Innovative Lawyering and Copyright Africa, at <http://www.musicin3frica.net/> (accessed on 16/5/2015).

²²⁸ Copyright Act No. 12 of 2001. The Act came into force on 31st December 2001.

²²⁹ Section 3 of the Copyright Act, 2001.

²³⁰ Section 5 of the Copyright Act, 2001.

One of the most significant changes that came with the ²³enactment of the Copyright Act, 2001 was making infringement of copyright a criminal offence.²³¹ The Act gives the owners of copyrightable works certain exclusive rights²³². These are the rights ²³to reproduce, distribute, communicate to the public and broadcast copyrightable works to the public. These rights are referred to economic rights and they are alienable.²³³

The Act also recognizes moral rights which accrue to the creator of a copyrightable work. These rights enable the creator of the copyrightable work to claim authorship of the works and object to any mutilation, distortion, modification or any other derogative action of the works.²³⁴ The moral rights are inalienable in nature.

The Socio-economic benefits of the protection of copyright cannot be understated. Copyright contributes to economic development through providing a source of income for the owners of copyright.²³⁵ This in turn promotes creativity while ensuring that the users of the works can access the works²³⁶

One of research questions this study seeks to examine is the challenges faced in the protection of copyright and regarding ringtones. There are challenges faced in the implementation of the provisions of the Copyright Act, it has been argued that the Government has for a long time had a casual attitude towards copyright and therefore there are limited resources in terms of finances and human capital set aside to advance protection of copyright in Kenya.²³⁷

²³¹ Section 36(6) of the Copyright Act, 2001; Ben Sihanya Teaching materials on Intellectual Property and Telecommunications Law available on file at Innovative Lawyering and Sihanya Mentoring; Ben Sihanya (2008) “Intellectual Property and Mentoring for Innovations and Industrialisation in Kenya,” Volume 4 Issue 1 *University of Nairobi Law Journal* 20.

²³² Sections 26 – 29 of the Copyright Act, 2001.

²³³ Japhet Otike (2011) “Copyright Law in Kenya,” School of Information Science, Moi University.

²³⁴ Section 32 of the Copyright Act, 2001.

²³⁵ Moni Wekesa and Ben Sihanya (2009) “Intellectual Property in Kenya,” Konrad Adenauer Stiftung, Nairobi.

²³⁶ Marisella Ouma (2012) “The role of copyright in economic development: A review from Kenya,” NIALS *Journal of Intellectual Property* [NJIP].

²³⁷ Ben Sihanya Teaching materials on Intellectual Property and Telecommunications Law available on file at Innovative Lawyering and Sihanya Mentoring.

Public ignorance on matters relating to copyright and its infringement is also a challenge to the regulation of ringtones.²³⁸ It is therefore not surprising that many education institutions encourage students to make copies of text books without the consent of the author.

The Kenya Copyright Board (KECOBO), the body mandated to ensure ²³enforcement of copyright and related rights lacks the necessary powers to run its affairs independently. KECOBO is a state corporation established under the office of the Attorney General and depends on the Attorney General for financial and administrative functions²³⁹

Ringtones are derived from musical works protected under the Copyright Act, 2011. We will in the next chapter consider whether ringtone technology constitutes an infringement of copyright. If that is the case and with all the above challenges, the regulation of ringtones under the Copyright Act, 2001 is prejudiced.

3.4. Trade Mark Act on Regulation of Ringtones²⁴⁰

This Act ¹⁵provides for protection, promotion and registration of trade marks. A trademark has been defined under section 2 of the Act as:

¹⁴“a mark used or proposed to be used;

- (a) in relation to goods for the purpose of indicating a connection in the course of trade between the goods and some person having the right either as proprietor or as licensee to use the mark, whether with or without any indication of the identity of that person or distinguishing goods in relation to which the mark is used or proposed to be used from the same kind of goods connected in the course of trade with any person;

A similar provision is provided for in relation to services in that the mark is used to indicate that a person is connected to the services.

The Act ¹⁵defines a mark to include a distinguishing guise, slogan, device, brand, heading, label, ticket, name, signature, word, letter, or numeral or any combination thereof.²⁴¹

²³⁸ ¹¹ Sihanya (2015) “Teaching materials on Intellectual Property and Telecommunications Law,” available on file at Innovative Lawyering and Sihanya Mentoring; Ben Sihanya (2008) “Intellectual Property and Mentoring for Innovations and Industrialisation in Kenya,” Volume 4 Issue 1 *University of Nairobi Law Journal* 20.

²³⁹ ¹⁵ /

²⁴⁰ Trade Mark Act Cap 506, Laws of Kenya.

²⁴¹ Section 2 Cap 506 Laws of Kenya.

Trademarks have four main purposes, first to identify and indicate the source and origin of goods, services or technologies by linking a product to its source. Secondly, to protect the goodwill or investment of a trade mark proprietor. Thirdly, to limit or eliminate confusion of customers and lastly to confirm the customers' expectations.²⁴²

Ringtones can take the form of slogans. However, ringtones do not serve the purposes set out above in relation to trade marks. A ringtone has a purely functional task of producing a sound which will attract the attention and inform the owner of a mobile phone of an incoming call, or text message or data.²⁴³

3.5. The Kenya Information and Communications Act in regulating innovation and Copyright²⁴⁴

Prior to the coming into force of the Kenya Information and Communications Act, 1998, telecommunications in Kenya was governed by the Kenya Posts and Telecommunications Act.²⁴⁵

Under the Kenya Posts and Telecommunications Act, the Kenya Posts and Telecommunication Corporation (KP&TC) enjoyed monopoly as the only telecommunication service provider. With the advent of liberalization of the telecommunication industry in Kenya, there are now numerous other telecommunication companies which are competing to provide telecommunication services in Kenya.²⁴⁶

Following the enactment of the Kenya Information and Communications Act, in 1998, the Kenya Posts and Telecommunications Corporation was restructured and split into three entities. These are the Communications Authority of Kenya which is the telecommunications sector regulator, Telkom Kenya Limited, the telecommunications network service provider and the Postal Corporation of Kenya which provides postal services.

In a bid to liberalize the industry, Telkom Kenya Limited was privatized, initially with an offer of 26% of its shares being given to a strategic partner and 20% of the shares to the

²⁴² Ben Sihanya (2008) "Intellectual Property and Mentoring Innovations and Industrialization in Kenya," Vol. 4 Issue 1 *University of Nairobi Law Journal*, *op.cit.*

²⁴³ Arnold Vahrenwald (2005) "Reflecting the sound of ringtones" *ENT. L.R. Issue 4*, Sweet & Maxwell Limited, 337.

²⁴⁴ Kenya Information and Communications Act no. 2 of 1998 as amended by the Kenya Information and Communications (Amendment) Act, 2013

²⁴⁵ Kenya Posts and Telecommunications Act Cap 411, Laws of Kenya (now repealed).

²⁴⁶ These include Safaricom Limited and Airtel among other service providers.

employees of the company.²⁴⁷ With the liberalization of the telecommunication industry, the telecommunications and even the media industries have undergone massive changes which are as a result of technological, market and arguably regulatory developments.²⁴⁸ Telecommunications development has also brought with it new forms of information communication technologies such as cellular telephony (wireless telephone services) which use cellular phones as opposed to the landline telephone system of telecommunication service provision.²⁴⁹

With the advancement of telecommunication technology and in a bid to attract customers by offering attractive value-added network services (VANS), users of cellular phones are now able to perform several other functions in addition to receiving and making calls.²⁵⁰ The users of cellular phones are also able to change the factory settings in a bid to customize their own cellular phones. Factory settings may be altered by allowing the consumer to copy music and use or convert them into ringtones.²⁵¹ Therefore contrary to the early days where ringtones consisted of simple tones, end users can now use real music (what are normally referred to as “true tones”) as ringtones.²⁵²

Pursuant to sections 59, 86, 89 and 90 of the Kenya Posts and Telecommunications Corporations Act,²⁵³ a legal framework was created which gave the monopoly of providing telephone services as well as the regulation of radio communication to the Kenya Posts and Telecommunications Corporation (KPTC).²⁵⁴

In 1992, cellular telephony was introduced in Kenya in collaboration with the NEC Corporation, an entity which was formed as a joint venture between a Japanese company

²⁴⁷ M. Tyler J. Hughes and H. Renfrew (2005) “Telecommunications in Kenya: Facing the Challenges of an Open Economy,” *op. cit.*

²⁴⁸ S. K. Chepkonga and K. Mutahi (2004) “Development of Telecommunications Fixed Line Services, 2nd National Operator tender,” (Unpublished). This course work essay was submitted to the LLM class of 2008/2009 on Telecommunications Law by Prof. Ben Sihanya at the University of Nairobi Law School. The course work is available on file at Innovating Lawyering and Sihanya Mentoring.

²⁴⁹ This is a non-mobile telecommunication service system in which the service is at a fixed terminal connected through cables.

²⁵⁰ These are accessing the Internet, conducting banking transactions, paying bills, sending and receiving money, watching videos and listening to music among others.

²⁵¹ A ringtone has been defined as an excerpt from a musical composition embodied in a digital file and rendered into audio. See <http://www.harryfix.com> (accessed on 24/8/2011).

²⁵² *ibid.* A ringtone has been defined as an excerpt from a musical composition embodied in a digital file and rendered into audio. See <http://www.harryfix.com> (accessed on 24/8/2011).

²⁵³ Postal Corporation of Kenya Act, Cap 411, now repealed and replaced by the Kenya Information and Communications Act, 1998 as amended by the Kenya Information and Communications (Amendment) Act, 2013.

²⁵⁴ M. Tyler J. Hughes and H. Renfrew (2005) “Telecommunications in Kenya: Facing the Challenges of an Open Economy,” *op. cit.*

known as Nippon Electric Company Limited and the American Telephone & Telegraph Company (AT&T).²⁵⁵ Cellular telephony relied on an analogue system known as Extended Total Access Communications System (ETACS) which was commercially launched in 1993.²⁵⁶

During this time, the corporation's financial position had deteriorated drastically so that it had a debt of about 20 billion shillings.²⁵⁷ The poor financial status was as a result of lack of accountability, poor debt collection systems especially from the Government ministries, corruption, and theft of the corporation's resources.²⁵⁸ The corporation became a major contributor of the Government's budget deficiency and there was dire need to find a solution to the sorry state of affairs.

The corporation was clearly not fulfilling social and developmental objectives. The most popular solution to the problems faced by the corporation was to privatize and reduce Government involvement in the management of the corporation.²⁵⁹

The Government of Kenya embarked on a series of initiatives to revitalize the telecommunications sector and in 1997, the Government introduced measures aimed at liberalizing the telecommunications market to ensure ³⁴availability of efficient, reliable and communications services throughout the country.²⁶⁰

In January 1997, the Government through its ministry of Transport and Communication issued the Postal and Telecommunications Sector Policy Statement which spelt out the process of liberalization and privatization of the telecommunications industry.²⁶¹ The key objectives of the policy statement were fivefold:

First, to facilitate orderly expansion and modernization of the sector for a period of 20 years from 1996 to 2015. Secondly, to ensure that the telecommunications sector develops enough capacity to meet the demands of the basic telecommunications services which demands were

²⁵⁵ *ibid.*

²⁵⁶ The Kenya Posts & Telecommunications Corporation (1994) Annual Reports.

²⁵⁷ ²² *ibid.*

²⁵⁸ Michael Tyler, Janice Hughes and Helena Renfrew "Telecommunications in Kenya; Facing the challenges of an open economy," *op. cit.*

²⁵⁹ ²² Kenya Posts & Telecommunications Corporation (1994) Annual Reports

²⁶⁰ Michael Tyler, Janice Hughes & Helena Renfrew "Telecommunications in Kenya; Facing the challenges of an open economy," *op. cit.*

²⁶¹ S. K Chepkonga & K. Mutahi (2004) "Development of Telecommunication Fixed Line Services 2nd National Operator tender," This article was submitted to the LLM class of 2008/2009 on Telecommunications Law by Prof Ben Sihanya.

34 rapidly on the rise. Thirdly, to improve the economic wellbeing of Kenyans by establishing Kenya as a hub for industrial and financial activities in Africa. Fourthly, to set out the framework for liberalization and privatization of the telecommunication sector; and finally, to optimize the telecommunication sector's contribution to the development of Kenya's economy and ensuring the availability of efficient, reliable and affordable communication services throughout the country.²⁶²

The policy was aimed at restructuring the defunct KP&TC and attracting capital from the private sector. The Kenya Postal and Telecommunications Corporation Act which established the KP&TC was repealed²⁶³ and replaced by a new Act, The Kenya Information and Communications Act.²⁶⁴ The defunct KP&TC subsequently ceased to operate except for purposes of winding up.

The Act of 1998 came into operation in 1999 by dividing KP&TC into three distinct entities and allocating specific functions to the said entities. These entities were the Communications Commission of Kenya (CCK)²⁶⁵ charged with regulatory functions, the Telkom Kenya Limited (TKL), the telecommunication service provider and the Postal Corporation of Kenya (PCK) responsible for providing postal services.²⁶⁶

Pursuant to the promulgation of the Constitution in 2010, the Kenya Information and Communications Act, 1998 has undergone numerous changes to conform with the provisions of Article 33 and 34 of the Constitution.²⁶⁷ One of the changes made was the setting of an independent body to regulate telecommunication matters. Section 2 of the Kenya Information and Communications Act was amended to provide for the establishment of the Communications Authority of Kenya (CAK) to replace the Communications Commission of Kenya (CCK).²⁶⁸

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²⁶² Michael Tyler, Janice Hughes & Helena Renfrew "Telecommunications in Kenya; Facing the challenges of an open economy," *op. cit.*

²⁶³ Formally repealed in July 1999.

²⁶⁴ Enacted in 1998 and on 15th February 1999, the government brought into operations sections 1-5 (4), 6 – 12 of the Act for purposes of establishing the regulatory to prepare the sector licences. The remaining sections of the Act came into force after July 1999 save for section 5(5).

²⁶⁵ Now Communications Authority of Kenya pursuant to Kenya Information and Communications (Amendment) Act 2013

²⁶⁶ Ben Sihanya (1997) "Telecommunication for Business in Africa: Regulating Internet Business in Kenya," *IOS Press*, Netherlands, page 124.

²⁶⁷ There are approximately 20 subsidiary legislations enacted under the Kenya Information and Communications Act, 1998 since the year 2003.

²⁶⁸ Section 2 and 3 of the Kenya Information and Communications (Amendment) Act, 2013.

The establishment of the above three entities was aimed at removing Government control as much as possible from the telecommunications sector and attracting the private sector to invest in it. However, Telkom Kenya Limited, which took over the assets and liabilities of KP&TC had both local and international debts amounting to USD 21 Billion.

To attract strategic partners in the private sector, the Act granted Telkom Kenya Limited exclusivity in respect of certain market segment for a period of 5 years.²⁶⁹ This was meant to create a safety net for prospective investors to recoup their capital while improving the infrastructure and providing inter-communication facilities to other duly licensed service network operators.

There was an improvement in TKL's switching capacity from 207,652 to 420,370 between 1999 and 2002 and its subscriber connection from 296,400 to 331,718 over the same period. This growth was considered marginal.²⁷⁰

Despite the above improvements, the growth of cellular telephony in Kenya was inhibited largely by lack of competition. This resulted not only in exorbitant hence unaffordable cost of owning mobile phones but also inefficiency due to bureaucratic procedures in the provision of the services. The delivery time, for instance, was about a month and there was a long waiting list of applications for mobile subscribers. The approximate cost of a cellular telephone line as at 1992 was KES 250,000.²⁷¹ The result of this was a slow growth witnessed by low subscriber roll out.²⁷² The Government of Kenya did not of course see anything wrong with the numbers up until it received pressure from the World Bank.

In March 1994, the first World Telecommunications Conference was held in Buenos Aires, Argentina. There was an appeal to the nations to encourage private investment, promote competition, provide open access to networks for all information providers and users, and create a flexible regulatory environment that would keep pace with technologies and market changes and ensure universal service provision.²⁷³

²⁶⁹ From 1999-2004.

²⁷⁰ Communications Commission of Kenya, (2003) Annual Report.

²⁷¹ *ibid.*

²⁷² As at 1999, there were only 20,000 cellular phone subscribers in the entire country.

²⁷³ This conference was dubbed ITU Buenos Aires Declaration on Global Telecommunications for the 21st Century.

As a result of international pressure, the Government of Kenya through the then Ministry of Transport and Communications adopted a Postal and Telecommunications Sector Policy which had the following statement: -

“Joint ventures between Telkom Kenya and private investors in cellular telephony will commence immediately. A Second cellular operator will be licensed in a year after the initial public share offering.”²⁷⁴

The broad ²² policy objective was to optimize the sector’s contribution to the development of the economy by ensuring the availability of efficient, reliable and affordable services and also to increase tele density in both rural and urban areas. As at November 2000, penetration in the rural areas stood at 0.16 lines per 100 people and in the urban areas, 4 lines per 100 people. It was the Government’s resolve to increase these lines to 5 lines and 20 lines, respectively by 2015.²⁷⁵

To achieve these goals, it was imperative that the legal framework be overhauled to get rid of monopoly and introduce competition and improve service delivery, the Kenya Information and Communication Act of 1998 was enacted.

Section 23(2)(b) of the Act mandates the Communication Authority of Kenya (CAK) to maintain and promote effective competition between persons engaged in commercial activities connected with telecommunication services in Kenya to ensure efficiency in the provision of such services and to promote research and development in relation to cellular telephony.

Section 23(2) (c) of the Act requires the CAK to encourage private investment in the telecommunications sector. The Act underscores the resolve to encourage competition by providing that competition be ensured in the provision of international transit services and among providers of telecommunication services and those producing telecommunication equipment.²⁷⁶

²⁷⁴ Postal and Telecommunications ²² Sector Policy Statement, January 1997, issued by the Ministry of Transport and Telecommunications.

²⁷⁵ Telecommunications and Postal Sector Policy Guidelines promulgated in accordance with Section 5(4) (a) of the Kenya Information and Communications Act, 1998 and contained in Gazette Notice No. 8227 of 3-12-2001.

²⁷⁶ Section 23(d) and (e) of the Kenya Information and Communications Act; Regulation 5, 6, 7 and 8 of the Kenya Communications Regulations, 2001.

The result of the above legislation development was the licensing of the first cellular mobile operator, Safaricom Limited.²⁷⁷ Safaricom Limited's shareholding was 60% by Telkom Kenya Limited and 40% Vodafone Airtouch (UK). In January 2000, the second cellular mobile operator, Kencell Communications Limited, whose shareholding comprised of 60% Sameer Investments Group Limited and 40% Vivedi International, a France company.²⁷⁸

Though minimal, the move toward licensing of the two cellular mobile operators was a first step towards the tremendous growth of cellular telephony. At the end of 2010, there were four licensed cellular mobile operators in Kenya namely, Celtel Kenya (then Kencell and now Airtel), Safaricom Limited, Essar Telecoms Kenya Limited (Yu) and Telkom Kenya Limited (Orange).

The mobile telecommunications market registered a 15.5 percent growth in the number of subscribers and increased competition among operators. The mobile business segment registered 20.1 million subscribers up in June 2010 from 17.4 million subscribers as at 30th June 2009 while mobile penetration increased from 46.8 percent in June 2009 to 51.2 percent in 30th June 2010.²⁷⁹ There is still plenty that needs to be done to ensure that telecommunication services are made available to each individual Kenyan, however the progress made since 1999 is commendable. Below is a tabular representation of the mobile operators' capacity and subscriber connectivity as at 2015/2016.

²⁷⁷ Safaricom Limited was incorporated on 3rd April 1997.

²⁷⁸ The licence was issued through a competitive tendering process as per a Report of the Institute on Economic Affairs of the Debate held on 29/4/1997 at the Norfolk Hotel.

²⁷⁹ International Telecommunications Union, 2010.

Table 2: Mobile Operators' capacity and subscribers²⁸⁰

Year	Capacity	Mobile Subscribers
2005/2006	10,600,000	6,484,791
2006/2007	18,200,000	9,304,818
2007/2008	25,964,700	12,933,653
2008/2009	29,400,000	17,362,257
2009/2010	46,462,948	20,119,304
2011/2012	49,977,000	29,703,439
2012/2013	55,077,000	30,549,422
2013/2014	65,077,000	32,246,393
2014/2015	62,800,000	36,113,121
2015/2016	71,600,000	39,784,102

Source: Communications Commission of Kenya (2010) Annual Report for the financial year 2009-2010; Communications Authority of Kenya (2016) for the financial year (2015-2016)

3.5.1. Economic and social achievements of cellular telephony in Kenya

Cellular telephony market has proved a stunning success in Kenya. The benefits of cellular telephony are not only felt nationally but also internationally. Many companies have realigned their businesses along the value chain to realize efficiency gains through mobile technology. Individuals on the other hand have also enjoyed ubiquitous always available ICT infrastructure that gradually transforms public and private lives.

According to a report on Kenya's Information Communications Technology, as at 2005 cellular telephone operators recorded a fast revenue growth from Kshs. 6 billion to Kshs. 27 billion in a span of 3 years. In addition to the revenue growth, the mobile telephony has continued to demonstrate growth in the telecommunications sub-sector through provision of diverse services including, internet services, mobile money transfer services e.g. micro saving, micro credit services, utilities payment services, person to bank and bank to person

²⁸⁰ Source: Communications Commission of Kenya (2010) Annual Report.

transactions.²⁸¹The telecommunications therefore became the most profitable and enticing investment opportunity for new entrants in the market.²⁸²

As at the year 2000, it was reported that the telecommunication industry had generated a 1.8% growth in employment opportunities in the telecommunication sector alone.²⁸³ These statistics have increased now that there are four cellular network operators in the country.

With the liberalization of the telecommunication market, there are now four mobile operators in Kenya who are competing amongst one another for subscriber roll out. This means that the each of the mobile operator strives to offer the best tariff prices. The prices of certain cellular services have since come down to as little as Kshs. 1 per minute for voice calls and no charges whatsoever for short messages service for every purchase of a certain value of airtime.²⁸⁴ Customers are therefore able to afford cellular telephony services depending on their lifestyle.

The quality of services has also improved. The Communications Authority of Kenya ³⁴has imposed quality service obligations to ensure improved consumer services. Further with ³⁴increased choice of services, the impact of service failure has reduced considerably.²⁸⁵

Cellular mobile network operators have also come up with value added network services such as ringtones, wallpapers, music charts, horoscopes, quotes among others making cellular telephony a one stop shop regarding entertainment.²⁸⁶

Due to competition for customers and market space, mobile phone network operators opt to add some more services/products to supplement the already existing ones. These products are offered in form of promotions and special offers and are a value addition to the existing products.²⁸⁷ The value added network services are additional revenue generating services for the mobile network operators as the services are provided at a fee.²⁸⁸ Unlike the plain old

²⁸¹ Communications Authority of Kenya (2016) Annual Report

²⁸² Report prepared by the Export Processing Zone Administration in 2005.

²⁸³ East African Secretariat Report.

²⁸⁴ Yu network website.

²⁸⁵ ICT Kenya Report by Export Processing Zone Administration, 2005.

²⁸⁶ Orange website, ³⁴ at http://orange.co.ke/content/index.php?option=com_content&view=article&id=138&Itemid=159 (accessed 12/9/2011).

²⁸⁷ Communications Authority of Kenya (2016) Annual Report.

²⁸⁸ *ibid.*

telephony services (POTs) which are currently governed under the Kenya Information and Communications Act through licensing, added services were not contemplated at the time of enactment of the Kenya Information and Communications Act. The Kenya Information and Communications Act is therefore inefficient regarding regulating ringtone technology.

3.6. The National Information and Communications Technology (ICT) Policy (The ICT Policy)²⁸⁹

One of Kenya's Vision 2030 strategies is to undertake reforms in the ICT sector among seven other key sectors in Kenya.²⁹⁰ The formulation and development of the ICT Policy is one of the mechanisms employed to improve the ICT sector. The Policy is premised on the following principles:

- a. ICT is a developmental tool that should be widely accessible and utilized by the general population;
- b. There will be a technology neutral approach in the adoption and regulation of ICT systems and services in the promotion of competition;
- c. Innovation will be promoted for the benefit of consumers, producers and service providers while at the same time protecting the interest of innovators; and
- d. Investing in human resource development and capacity building will also be prioritised.²⁹¹

One of the key principles of the ICT Policy is open access in as far as ICT is concerned. This therefore means that any regulatory intervention should wherever possible be based on the open access to ensure maximised efficient and fully leveraged use of infrastructure and services through encouraging infrastructure sharing, spectrum re-farming, optimal interconnection, balanced with fair returns on investment.²⁹²

3.7. Conclusion on the legal and context analysis of the regulation of the ringtone technology

This chapter examined the regulatory framework currently in place that is relevant to the ringtone technology. The chapter successfully identified the challenges in regulation of the ringtone technology from a legal point. The chapter was therefore able to address two

²⁸⁹ Formulated and Commissioned on 20th June 2016.

²⁹⁰ The Kenya Vision 2030 is the national long-term development blue-print that aims to transform Kenya into a newly industrialising, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment. The strategy is to undertake reforms in eight key sectors that form the foundation of the socio political and economic growth being ICT, Energy, Public Sector, Ethics, Labour and Employment, Land and reform; See <http://www.vision2030.go.ke/about/> . site last visited on 5th March 2018

²⁹¹ ICT Policy, p 8.

²⁹² Formulated and Commissioned on 20th June 2016.

research questions which were whether the current regulatory regime can regulate the ringtone technology and what the challenges of regulating the technology are.

While the cellular telephony technology is fast advancing, it is questionable whether the legal regime in place can keep up with the technology. This Chapter has been able to establish that the legal regime is stagnant and due to other socio-economic issues affecting the country, the amendment of the Telecommunication Laws and enactment of the necessary legislation to regulate cellular telephony operations has been kept in the periphery. The Copyright Act also needs to be amended to ensure that the owners of copyright benefit from the ringtone technology. This is very important because the realization of each party's right is very important as this is the best way of encouraging and promoting innovation in Kenya.

There are however prospects of proper regulation of the ringtone technology particularly with the enactment of the Constitution of Kenya, 2010. There is also need for institutional reforms in addition to law reforms as we shall see in the coming chapters.

Chapter 4 attempts to find solutions to the regulation of the ringtone technology. It provides the various forms of regulation, both legal and others.

CHAPTER 4

FINDINGS ON COPYRIGHT REGULATION OF RINGTONE TECHNOLOGY AND COPYRIGHT IN KENYA

4.1. Introduction on the findings of Copyright Regulation of Ringtone Technology and Copyright in Kenya

This Chapter answers three research questions. First, whether there are challenges in the protection of copyright regarding ringtone technology.²⁹³ Secondly, whether the Copyright Act No. 12 of 2001, laws of Kenya are adequate to regulate ringtone technology and lastly, the role of telecommunication law in Kenya regarding the regulation of the ringtone technology.²⁹⁴

The Chapter identifies and discusses the rights provided for in the Copyright Act, 2001 that are capable of infringement. It has been established in this study that ringtones derive from musical works. Musical works are regulated under copyright in addition to other enabling laws such as the Kenya Information and Communications Act, 1998 and the Constitution of Kenya, 2010.²⁹⁵ The Chapter argues that the ringtone technology is capable of infringing copyright.²⁹⁶

The chapter also considers how other jurisdictions have regulated the ringtone technology to protect the rights likely to be infringed by ringtone technology.²⁹⁷ The chapter also examines whether copyright offers satisfactory regulatory regime for ringtone technology.²⁹⁸

4.2. Importance of Ringtone technology under Copyright

Ringtone technology is one of the value-added services offered by cellular network operators in the country and around the world to attract and maintain subscriber roll-out. A ringtone can

²⁹³ Marisella Ouma (2012) "The role of copyright in economic development: A review from Kenya," NIALS *Journal of Intellectual Property* [NJIP].

²⁹⁴ Moni Wekesa and Ben Sihanya (2009) "Intellectual Property in Kenya," *Konrad Adenauer Stiftung, Nairobi*.

²⁹⁵ See Chapters 1 and 2 of this study.

²⁹⁶ Ben Sihanya (2015) "Teaching materials on Intellectual Property and Telecommunications Law," available on file at Innovative Lawyering and Sihanya Mentoring; Ben Sihanya (2008) "Intellectual Property and Mentoring for Innovations and Industrialisation in Kenya," Volume 4 Issue 1 *University of Nairobi Law Journal*.

²⁹⁷ Carmen Kate Yuen (2006) *Scuffling for a slice of the ringtone pie: Evaluating legal and business approaches to copyright clearance issues*, JD candidate, Yale Law School The Grammy Foundation Entertainment Law Initiative Writing Competition.

²⁹⁸ *ibid.*

simply be defined as a ²⁴ sound made by a telephone to indicate an incoming call or a text message.²⁹⁹

Technologically, ¹⁰ a ringtone is defined as an excerpt of a musical composition embodied in a digital file and rendered into audio.³⁰⁰ Ringtones are stored in an end user's mobile telephone, pager, or other portable communication device activates its ring or alert function.³⁰¹

²⁶ There are two basic types of ringtones: the phonic ringtones and the pre-recorded ringtones. The phonic ringtones are most commonly standard sound files that are either monophonic in that notes are ²⁶ played simultaneously creating harmony and/or counterpoints.³⁰²

Pre-loaded ringtones are on the other hand actual clips from sound recordings.³⁰³ The latest ringtones are usually pre-loaded song clips. A ringtone has also been defined ⁷ as a digital file, generally no more than 30 seconds in length played by a cellular phone or mobile device to alert the user of an incoming call or message.³⁰⁴ Cellular phones typically can accept ⁴ downloads of ringtones, usually directly over the cellular telephone network.

Initially, cellular network operators and ⁴ mobile carriers and other ringtone vendors distributed ringtones that embodied versions of musical works but not actual songs by featured recording artists.

Presently, cellular network operators provide websites from which its subscribers can directly download the songs converted to ringtones into their mobile phones at a fee.³⁰⁵

⁴ 3. Ringtones and copyright in Kenya

Copyright owners describe ringtones as ten-to-thirty seconds "snippets" of full-length musical works that are created to serve as ringers for cellular phones and other mobile devices.³⁰⁶

²⁹⁹ Arnold Vahrenwald (2005) "Reflecting the sound of ringtones" ENT. L.R. Issue 4. Sweet & Maxwell Limited, page 67.

³⁰⁰ *ibid.*

³⁰¹ <http://www.harryfox.com/public/infoFAQRingtones.jsp> (accessed 12/9/2011).

³⁰² ¹⁰ *Id.*

³⁰³ It should be noted that the term pre-recorded ringtones are not the standard term used in the industry. They are also known as trutones, songtones or mastertones. https://www.harryfox.com/find_out/faq/digital_definitions.html (accessed 12/9/2011).

³⁰⁴ Recording Industry Association of America Brief.

³⁰⁵ See case of *John Boniface Maina V Safaricom Limited* High Court Civil Case Number 808 Of 2010 (2013) eKLL ⁴

³⁰⁶ Re Mechanical and Digital Phonorecord Docket No. RF 2006-1.

One of the concerns of copyright owners is whether ringtone technology infringes the economic rights of copyright owners thereby denying them royalties for their musical works. It is also clear that the nature of ringtone technology in as far as copyright issues are concerned is not clear. While ringtones are regarded in Kenya as reproductions sound recordings,³⁰⁷ other countries such as the United States of America and Canada regard ringtones as distinct works which are also copyrightable on their own. Therefore, classifying ringtones as sound recordings may not be not enough.

4.4. Rights capable of being infringed by ringtone technology

Copyright is designed to make sure that a creator of an original work is compensated for copies, whether they are exact copies of derivative works. For example, a movie based on a play or a novel must respect copyrights held by the original work because much of that derivative work comes from the original. Section 22 of the Copyright Act³⁰⁸ lists several works that are eligible for copyright protection.

Generally, a musical work may give rise to several separate distinct rights. For instance, a song writer or composer will have a copyright in the lyrics and the tunes, the musician or artist will have a separate right in the musical works arising from the performance of the song and the sound recorder or recording company that affixes the product in a tangible medium such as on a CD will have a right in a sound recording.³⁰⁹

This therefore means that anyone wishing to use a musical work will require authorization of the various right holders. It is therefore not enough for one to obtain authority of only one, or some of the right holders or pay royalties to any one or some of them. If the works involve exploitation of any of the rights separately held by the musician, sound recorder and composer, separate licenses are required.³¹⁰

A copyright owner may hold as many as six exclusive rights. These are: -

- (a) The right to reproduce copyrighted work.
- (b) The right to prepare derivative works based upon the copyrighted work.

³⁰⁷ *Cellulant Kenya Limited v. Music Copyright Society of Kenya Limited* High Court civil case number 154 of 2009 (Milimani Commercial Courts) 2009eKLR.

³⁰⁸ Copyright Act, No. 12 of 2001.

³⁰⁹ *Ih* Sihanya (2015) "Teaching materials on Intellectual Property and Telecommunications Law," available on file at Innovative Lawyering and Sihanya Mentoring; Ben Sihanya (2008) "Intellectual Property and Mentoring Innovations and Industrialization in Kenya," Vol. 4 Issue 1 *University of Nairobi Law Journal*, *op.cit.*

³¹⁰ *ibid.*

- (c) To distribute copies of the copyrighted work to the public by sale or other transfer of ownership including renting, leasing and lending.³¹¹
- (d) In the case of musical works, to perform the copyrighted work publicly.
- (e) In case of sound recordings, to perform the copyrighted work publicly by means of digital audio transmission.³¹²

In some cases, some of these rights may be assigned to one single person or body in which case the total sum of the royalty payable may be paid to the assignee without seeking to distinguish the various rights and rights holders.

¹⁶ Section 46 of the Copyright Act provides for the registration of a collecting society with the main objective of collecting royalties and distributing to copyright holders.³¹³

The creation of a ringtone using song clips involves the exploitation of musical works which are embodied in a sound recording. To determine the type of rights that may be infringed by ringtone technology, it is important to first consider whether ringtone technology is eligible for copyright protection.

Ringtones are digital recreations of sound recordings. A sound recording has been defined under Section 2 of the Copyright Act as:

“Any exclusively aural fixation of sound of a performance or of other sounds or of a representation of sounds regardless of the method by which the sounds are fixed or the medium to which the sounds are embodied but does not include fixation of sounds and other images such as the sound track of an audio-visual work.”

¹¹ Under section 26 of the Copyright Act, the nature of musical rights include the right to control the reproduction in any in any form of work and the right to control the distribution to the public by way of sale.

Ringtone technology involves transcribing the musical works into a variety of audio formats that are sometimes uploaded to a host server or website. A subscriber who has access to this website may browse the selections available and download the ringtone on his or her phone.

Ringtone companies and/or cellular mobile operators have also made ringtones available to the subscribers at a fee by way of text messages. What a subscriber is required to do is send a

³¹¹ Section 26(1) of the Copyright Act, 2001; Ben Sihanya (2008) “Intellectual Property and Mentoring Innovations and Industrialization in Kenya,” Vol. 4 Iss 1 *University of Nairobi Law Journal, op.cit.*

³¹² Section 28(1) (d) of the Copyright Act, 2001; Ben Sihanya (2008) “Intellectual Property and Mentoring Innovations and Industrialization in Kenya,” Vol. 4 Issue 1 *University of Nairobi Law Journal*, at 20.

³¹³ Section 46(4) of the Copyright Act.

text message requesting for the desired ringtone which will subsequently be made available to the subscriber's mobile phone. From the above, ringtones may infringe the following rights

4.4.1. Mechanical rights

Mechanical rights relate to sound recordings. Owners of sound records or record companies have exclusive mechanical rights over the reproduction and distribution of the sound records.³¹⁴ Copyright protects the expression and not the idea itself. One of the questions this study asks is whether the amount of creativity it takes to create a ringtone is enough to entitle copyright protection. It has been argued that there are a variety of ringtones ranging from those that are simple excerpts of pre-existing sound recordings to ones that include additional material that may be considered as original works.

For ringtones derived from pre-existing sound recordings, the ringtones are derivative works and it is safe to argue that ringtones are reproductions of sound records.³¹⁵ Owners of the sound records from which the ringtone is derived have exclusive mechanical rights over the technology and ringtone aggregators are required to obtain authority from the owners of the mechanical rights to reproduce the songs. Such simple ringtones are copies of protected works and making copies is only allowable if the owner of the copyright licenses it.

In as far as the complex ringtones which include additional material, copyright over the original derivative works exists automatically and the authors of the original derivative work are eligible for copyright protection.³¹⁶

To be held liable for the infringement of the mechanical rights, the cellular network operators and/or ringtone must be seen to engage in conducts that are in violation of this right. It is however not an easy task as copyright has certain flexibilities allowing the use of existing works without infringement of the owner's right.

Unfortunately, the Copyright Act of Kenya does not provide guidelines on how to determine whether ringtones amount to a reproduction of sound recordings or whether they are original works which require copyright protection.³¹⁷

³¹⁴ B. Melville and D. Nimmer (2009) "Compulsory Licence for Making and Distributing Phono records ("Mechanical Royalty")," Appendix 16 Chapter IX of Second Supplementary Registers Report of the General Revision of the U.S Copyright Law.

³¹⁵ Section 2 of the Copyright Act defines a reproduction as the making of one or more copies of a work in any material form and includes any permanent or temporary storage of such work in electronic or any other form.

³¹⁶ In the matter of the Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding; Docket No. RF 2006-1 page 3.

The courts in Kenya on the other hand have not been useful in setting out principles of determining whether there is infringement of copyright in as far as ringtone technology is concerned. An example can be given of the case of *Cellulant Kenya Limited v. Music Copyright Society of Kenya Limited*.³¹⁸ In this case, the plaintiff was in the business of offering cellular phone value added networks services such as ringtones, logos and pictures. The plaintiff entered into separate content distribution agreements with song artists to distribute the songs as ringtones.

The defendant, a collecting society for the music composers, authors and publishers objected to the decision of the plaintiff to enter into the distribution agreements with the individual song artists because some of the copyright holders of the songs such as the publishers had been left out of the agreements, yet they had mechanical rights over the songs.

The plaintiff and the defendant held several meetings but were unable to find an amicable solution.

While there may have been clear infringement of copyright owned by the publishers of the songs, this issue was neither raised nor dealt with. No sanctions were therefore given against the plaintiff for such infringement. The court only dealt with the issue of payment of royalties and ordered the plaintiff to pay royalties to the defendant as the collecting society.

The court did not however address other forms of rights that subsist and are likely to be infringed by ringtones. These rights are discussed below.

In yet another case, *Irene Mutisya & Anor v. Music Copyright Society of Kenya & Another*³¹⁹ two copyright owners sought to restrain the Music Copyright Society of Kenya and a leading mobile telephone network operator, Safaricom Limited from implementing a call ring-back tone license agreement between Music Copyright Society of Kenya Limited and Safaricom limited which in essence permitted Music Copyright Society of Kenya to collect royalties on their behalf on the basis that they had authorized a premium rate service provider, Cellulant Kenya Limited pursuant to a Content Provision Agreement between Cellulant Kenya Limited and Safaricom Limited.

³¹⁷ The Copyright Act No. 12 of 2001 did not contemplate technological advancement such as ringtones. The Act was enacted immediately after liberalization of the telecommunication sector. The second Mobile telephone operator had just entered the market and the aim of the mobile telephone operators was to expand their subscriber base rather than offer value added network services. See Chapter 3 of this study.

³¹⁸ *Cellulant Kenya Limited v. Music Copyright Society of Kenya Limited* High Court Civil Case Number 154 of 2009 (Milimani Commercial Courts) 2009 eKLR.

³¹⁹ Nairobi High Court Civil Case No. 262 of 2015

From the above case, there is no clear framework for the remuneration of copyright owners when their works are utilized as ringtones. An amendment to the Copyright Act in 2012 sought to cure this anomaly by introducing a single equitable remuneration to copyright owners for sound and audio recordings.³²⁰ This was through the introduction of Section 30A which provides as follows: -

“(1) If a sound recording is published for commercial purposes or a reproduction of such recording is used directly for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer and the producer of the sound recording shall be paid by the user through the respective collective management organization, and the remuneration shall be shared equally between the producer of the sound recording and the performer.”

Moreover, section 30A (2) provides,

“If a fixation of a performance is published for commercial purposes or a reproduction of a fixation of a performance is used for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer shall be paid by the user to the collective management organization.”³²¹

Section 30A (3) further provides,

“The right of equitable remuneration under this section shall subsist from the date of publication of the sound recording or fixed performance until the end of the fiftieth calendar year following the year of publication, provided the sound recording or fixed performance is still protected under section 28 and 30.”³²²

Finally, Section 30A (4) states:

“For the purposes of this section, sound recordings and fixations of performances that have been made available by wire or wireless means in such a way that members of the public may access them from a place and a time individually chosen by them shall be considered as if they have been published for commercial purposes.”³²³

The above amendment may have attempted to patch up the squabbles between the players in the ringtone technology industry, but it failed to provide a proper framework for the regulation of ringtones.

³²⁰ Amendment implemented through Act No. 12 of 2012

³²¹ Sec 30A Copyright Act 2001

³²² *ibid*

³²³ *ibid*

4.4.2. Performance rights

Performance is defined under section 30 of the Copyright Act as a representation of a work by such action as dancing, playing, reciting, singing, declaiming or projecting to listeners by whatever means. The nature of performance rights include the right to control the fixation, broadcast, communication to the public and reproduction of the fixation of the performance.

There has been an international debate on whether the playing of a ringtone on a cellular phone in public constitutes a public performance entitling the owners of performance rights of a song to claim royalties.³²⁴ Performing rights organizations (PROs) such as the American Society of Composers, Authors and Publishers (ASCAP) and the Society of Composers, Authors and Music Publishers of Canada (SOCAN) have argued that each ring of a cellular phone is a performance and insist that royalties be paid.³²⁵

Section 101 of the US Copyright Act defines a public performance as the transmission or otherwise communication of a performance to the public by means of any device or process without regard to the spatial or temporal conditions of reception.³²⁶ These PROs are evidently subscribing to three theories: (1) that the digital transmission of the ringtone file to the mobile phone constitutes public performance; (2) that the performance of the ringtone on a mobile phone in public places constitutes public performance; (3) that the on-demand digital transmission of ringtones clips by means of streaming audio to the customer from a wireless company website for purposes of promoting the sale of full ringtones constitute public performance.³²⁷

In a Memorandum of Opinion prepared by the US Copyright Office by the Copyright Royalty Board acting on the request of the Recording Industry Association of America Inc. (RIAA)³²⁸ observed that Congress recognized that digital transmission of sound recordings was likely to become an important outlet for the performance of recorded music. This led to the enactment of the US Digital Performance Rights in Sound Recordings Act of 1995 which granted owners of sound recordings exclusive rights to perform their works publicly by means of a

⁷ Carmen Kate Yuen (2006) *Scuffling for a slice of the ringtone pie: Evaluating legal and business approaches to copyright clearance issues*, JD candidate, Yale Law School The Grammy Foundation Entertainment Law Initiative Writing Competition.

³²⁵ Carmen Kate Yuen (2006) *Scuffling for a slice of the ringtone pie: Evaluating legal and business approaches to copyright clearance issues, op. cit.*

³²⁶ Section 101 of the US Copyright Act.

³²⁷ Music Reports, LLC 21122, Erwin Street, Woodland Hills California at <http://www.musicreports.com>. (accessed 12/9/2011).

³²⁸ In the matter of the Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding; Docket No. RF 2006-1.

digital audio transmission subject to certain limitations provided under Section 114 of the U.S Copyright Act.³²⁹

The Copyright Act³³⁰ provides little guidance on resolving performance royalty issues regarding this. The Kenya Copyright Board through its Executive Director had this to say when asked whether ringtones constitute public performance: -³³¹

“The author/composer/publisher has the right to authorize the fixation of their work onto a specific medium including digital media. This forms the basis of the mechanical right which is also administered by the collective management organization for authors, composers and publishers. Thus, any time a work is fixated into a medium; the person doing the fixation has to pay for the mechanical right of the author through the collective management organization. The producer of the sound recording has the exclusive right to control the reproduction, distribution, rental, hire, public performance and broadcasting of his sound recording.”³³²

Mechanical rights accrue once a work has been fixated on a specific medium which is tangible. This medium may take the form of digital media including DVDs, CDs, and regarding ringtones, the mobile phone handset. Therefore, mobile phone operators and ringtone companies are required to pay for the mechanical right of the author. The Executive Director of the Kenya Copyright Board further stated that:

“Reproduction here includes the reproduction of the work in any (sic) many or form including the digital and ephemeral recordings. Thus, in the case of real tones, your client will be expected to pay the producer of the sound recording as indicated in my previous letter. I hope this gives you the distinction between a mechanical right and the right of reproduction.”³³³

The question of whether ringtone constitutes a public performance was totally avoided and to date the same remains a mystery. It is therefore not clear whether royalties are payable when a phone rings in public. The Act did not pre-empt development of musical works to include ringtone technology.

³²⁹ Specifically the Congress wanted to reaffirm the mechanical rights of songwriters and music publishers in the new digital world technology.

³³⁰ Copyright Act No. 12 of 2001, Laws of Kenya.

³³¹ This was in response to an inquiry made by Cellulant Company Limited. By a letter dated 20th January 2009 the Executive Director, Dr. Marisella Ouma gave the above-mentioned response.

³³² This was in response to an inquiry made by Cellulant Company Limited. By a letter dated 20th January 2009 the Executive Director, Dr. Marisella Ouma gave the above-mentioned response.

³³³ *Cellulant Company Limited v. Music Copyright Society of Kenya*; High Court Civil Case Number 154 of 2009 (Milimani Commercial Courts) Reported in 2009 eKLR.

4.4.3. Right to make available to the public

Any person wishing to make or distribute ringtones from a musical work can negotiate with the Music Copyright Society of Kenya (MCSK) for a licence or the owner of the copyright if the owner of the copyright is not a member of the Music Copyright Society of Kenya. However, what happens if the Music Copyright Society of Kenya declines to grant a license or the owner of the copyright cannot be traced?

⁴ Section 115 of the United States Copyright Act provides for compulsory licensing for making and distributing of phono records.³³⁴ The compulsory licence is available to anyone as soon as the phono records have been distributed to the public in the United States and its territories under the authority of the copyright owner.³³⁵

The Copyright Act of Kenya is yet to advance to the levels of the Copyright Laws in developed countries like the United States.¹¹ There is no specific provision on compulsory licensing.³³⁶ Under section 26(h) of the Copyright Act,³³⁷ the Government or a public library may order reproduction of a work if it is in the public interest. There is no clear definition of what public interest entails.³³⁸

There is currently no imminent need to have a statutory provision requiring compulsory licensing of ringtone technology while the issue of whether the provisions of the Copyright Act sufficiently regulate ringtone technology are yet to be confirmed. Be that as it may and in view of the rapid development of ringtone technology, compulsory licensing of the technology may be an issue for consideration in the near future.

³³⁴ The Act defines phono records as material objects in which sounds other than those accompanying a motion picture or other audiovisual work are fixed.

³³⁵ B. Melville and David Nimmer (2009) "Compulsory Licence for Making and Distributing Phono records (6 Mechanical Royalty)," *op. cit.*

³³⁶ Marisella Ouma & Ben Sihanya (2010) "Access to Knowledge in Africa: The Role of Copyright: 'Kenya,'" [a study under the auspices of the African Copyright and Access to Knowledge (ACA2K) project and International Development Research Centre (IDRC) Ac], *Innovative Lawyering* at www.innovativelawyering.com (accessed 15/5/2013).

³³⁷ Copyright Act No. 12 of 2001.

³³⁸ Marisella Ouma & Ben Sihanya (2010) "Access to Knowledge in Africa: The Role of Copyright: 'Kenya,'" [a study under the auspices of the African Copyright and Access to Knowledge (ACA2K) project and International Development Research Centre (IDRC) Ac], *Innovative Lawyering* at www.innovativelawyering.com (accessed 15/5/2013).

It has already been established in Chapter 2 of this study that authors, composers and publishers in the musical composition that is made into a ringtone.³³⁹ The owner of a musical work therefore has the exclusive right to reproduce the said music in whatever form as well as the right to perform the said works in public.³⁴⁰

4.5. Ringtones and Telecommunication law

Ringtones exist because cellular telephony exists.³⁴¹ This is because, without the cellular telephony, the innovation of ringtone would have not been there. Regulation of cellular telephony is sector specific and falls within two areas of law, that is the telecommunications law and copyright law.³⁴² It is different from the general regulation due to the unique character of the telecommunication industry. In view of the nature of the telecommunication industry, there is need to regulate the market for five reasons:

- a. to preserve the market
- b. to maintain professionalism and good ethical standards
- c. to protect the interests of the consumers³⁴³
- d. to safeguard the workforce affected by telecommunications.
- e. to create a competitive market in the telecommunications industry by liberalizing the industry.

To incentivise the regulation of ringtones, an understanding of the role played by the telecommunications industry is important.

4.5.1. Role of the telecommunication Industry in the regulation of ringtone technology

Yochai Benkler and Mark Lemley developed a module for regulation of telecommunication known as the benkler and lemley model.³⁴⁴ This model is three pronged in that in as far as

³³⁹ See Chapter 2 of this study.

³⁴⁰ These are referred to as mechanical rights, performance rights and the right to make the musical works available in public. These rights have been discussed in detail in Chapter 2 of this study. See also (2005); Ben Sihanya (2000) "Infotainment and Cyber law in Africa: Regulatory Benchmarks for Third Millennium," Vol 10(20) *Transnational Law & Contemporary Problems* 583-640; W.R. Cornish (2003) *Intellectual Property Rights: Patents, Copyright, Trademarks and Allied Rights*, 5th edn, Sweet & Maxwell, London.

³⁴¹ Arnold Vahrenwald (2005) "Reflecting the sound of ringtones" *ENT. L.R. Issue 4*. Sweet & Maxwell Limited, p 67.

³⁴² Copyright Law has been discussed in detail in the previous chapter.

³⁴³ Sihanya (2015) "Telecommunication Law Teaching Materials for LLM Class University of Nairobi," available at [Innovative Lawyering & Sihanya Mentoring, Nairobi, Siaya](#). The author was a student in that class, 2008/09, *op.cit*.

³⁴⁴ Ben Sihanya (2008) "Intellectual Property and Mentoring Innovations and Industrialization in Kenya," Vol. 4 Issue 1 *University of Nairobi Law Journal*, at 20; Yochai Benkler "Wealth of networks; How social production transforms market and freedom."

regulation of telecommunication is concerned, the same can be done within three layers; the architecture, the code and the content.³⁴⁵

As regards architecture, Benkler and Lemley argue that this is the physical aspect of telecommunication and involves looking at issues such as the layers, fiber optics radio frequency spectrum through to the logical layer.³⁴⁶

Benkler treats the code as the software layer where there is intelligence in terms of coordinating and facilitating communications.³⁴⁷ According to Lawrence Lessig, the code is the most important part of the three layers of telecommunication.³⁴⁸

The content layer refers to data, images, voice in telecommunications. Content is crucial for access to the relevant appropriate information, freedom of expression, management of property and distribution of propriety content for instance, copyright.³⁴⁹ Content is the area of free competition and is mostly where telecommunication service providers generate value added network services.³⁵⁰

It is Benkler's view that regulation must be carried out within these three layers. Benkler goes further to point out that we are forcing new communication and information environment to follow the old pattern rather than experimenting with more liberal possibilities of regulating the new technologies.³⁵¹

Benkler proceeds to identify legal barriers to the new form of technologies such as the Digital Millennium Copyright Act of the United States which curtails the use of information and cultural resources. Benkler points out that these barriers may have been erected to facilitate market-based production while in actual sense they discourage the development of telecommunication technology.³⁵²

³⁴⁵ Prof. Ben Sihanya formulated this model and named it the Benkler-Lessig model of telecommunication regulation.

³⁴⁶ Yochai Benkler "Property, Commons and the First Amendment. Towards a core common infrastructure," White paper for the First Amendment Programme Brennan Centre for Justice at the New York University School of Law.

³⁴⁷ *ibid.*

³⁴⁸ Lawrence Lessig (1999) *Code and Other laws of Cyberspace, op.cit.*

³⁴⁹ Ben Sihanya (2008) "Intellectual Property and Mentoring Innovations and Industrialization in Kenya," Vol. 4 Issue 1 *University of Nairobi Law Journal*, at 20; Cf. Yochai Benkler "Wealth of networks; How social production transforms market and freedom."

³⁵⁰ Benkler, "Property, commons and the First Amendment," *ibid.*

³⁵¹ Ben Sihanya (2008) "Intellectual Property and Mentoring Innovations and Industrialization in Kenya," *op.cit.*

³⁵² *ibid.*

Lawrence Lessig discusses regulation of cyberspace using the Benkler Lemley model with focus on the code.³⁵³ According to Lessig, there are two forms of code that dominate cyberspace: The legal code (the law) and the machine code (the machinery that supports the Internet).

This study will adopt Lessig's approach towards regulation of cyberspace to determine the role of telecommunication law in regulating ringtone technology.³⁵⁴ In that regard, this study proposes that telecommunication law can play an important role in providing the necessary legal framework and the necessary architectural control measures to regulate ringtone technology.³⁵⁵

In as far as the legal code is concerned; the legal frontier is ill equipped to deal with ringtone technology although regulation is necessary and inevitable.

In as far as the machine code is concerned, this is a form of regulation that comes from within the industry and is not imposed by law. This type of regulation relates to how ringtones are created; how ringtones are exchanged from one medium to another and how access should be restricted to ensure that there is no piracy.³⁵⁶ The industry will require the following elements to implement machine code, the law, the market the norms and the architecture.

In as far as the architecture is concerned; ringtones are a product of digital exploitation which may involve uploading musical works into a server or downloading them into a computer.³⁵⁷ This constitutes a reproduction of works. The authors of the musical works have exclusive rights to reproduce their works and there is a likelihood of infringement in the process of creation of ringtones.³⁵⁸ Restrictions can be placed through significant filtering mechanisms which restrict abuse of the technology, for instance, through piracy.³⁵⁹

This can be done by blocking access to ringtone technology through restricting the number of persons who can upload or download the technology into their cellular phones. By doing

³⁵³ Lawrence Lessig (1999) *Code and Other laws of Cyberspace, op.cit.*

³⁵⁴ Ben Sihanya also adopted the conceptual framework developed by Lawrence Lessig to re-examine the regulatory framework for cyberspace in Africa. See Ben Sihanya (2000) "Infotainment and Cyber law in Africa: Regulatory Benchmarks for Third Millennium," Vol 10(20) *Transnational Law & Contemporary Problems* 583-640.

³⁵⁵ Lawrence Lessig (1999) *Code and Other laws of Cyberspace, op.cit.*

³⁵⁶ Arnold Vahrenwald (2005) "Reflecting the sound of ringtones," *op. cit.*

³⁵⁷ Carmen Kate Yuen (2006) "Scuffling for a slice of the ringtone pie: Evaluating legal and business approaches to copyright clearance issues", JD candidate, Yale Law School *The Grammy Foundation Entertainment Law Initiative Writing Competition.*

³⁵⁸ Arnold Vahrenwald (2005) "Reflecting the sound of ringtones," *op. cit.*

³⁵⁹ Lawrence Lessig (1999) *Code and Other laws of Cyberspace, op.cit.*

so, the cellular network operators will be able to determine the number of persons who have downloaded a song for purposes of determining the royalties payable.

Another mode of architectural control is making the ringtone available to individual customers upon a request by the customer at a fee.³⁶⁰ This is also a market control mechanism.³⁶¹ The cellular network operators are now able to do this. The requests for ringtone technology are done via short message services at a fee. The ringtone is then sent to the individual customer.³⁶²

In as far as norms are concerned; these are forms of behaviour adopted by the consumers of ringtone technology.³⁶³ These norms can only be created once consumers are limited in what they can do regarding ringtone technology. Hence architectural control, the market and the law play an important role in establishing norms regulating ringtone technology. Good norms can only be established if the three elements of regulation are properly in place. As far as the market is concerned, regulation can be effect through pricing.

4.6. Conclusion on the regulation of the ringtone technology in Kenya

This study determines that there are challenges to the protection of copyright because of the advancement of ringtone technology. It has been argued that when a piece of music is converted into a ringtone, it has been reproduced.³⁶⁴ There are various tools available in the internet that enable the public users of cell phone download music and convert it into ringtones. All that is needed is for the cell phone user to own a cell phone and internet services. Musical work can also be uploaded to the cell phone through hardware devices such as USB cables and software devices such as Bluetooth.³⁶⁵

It has been argued that ¹ it is difficult to ascertain whether copyright still subsists ² in works that have been downloaded from the internet.³⁶⁶

³⁶⁰ A similar regulatory system has been adopted in offering telephony services such as voice calls and short message services. See P. R. Newberg, *New Directions in Telecommunication Policy*, Duke University Press, and London.

³⁶¹ Lawrence Lessig (1999) *Code and Other laws of Cyberspace, op. cit.*

³⁶² For example the Safaricom “Skiza” service.

³⁶³ Lawrence Lessig (1999) *Code and Other laws of Cyberspace, op. cit.*

³⁶⁴ Ellen Rosner Feig (2009) “Do Cellular Ringtones violate the Copyright Act?” *op. cit.*

³⁶⁵ Arnold Vahrenwald (2005) “Reflecting the sound of ringtones,” ENT. L.R. Issue 4. Sweet & Maxwell Limited 667; Cf. Ellen Rosner Feig (2009) “Do Cellular Ringtones violate the Copyright Act?” *op. cit.*

³⁶⁶ Moni Wekesa and Ben ¹ ghanya (2009) “Intellectual Property in Kenya” Konrad Adenauer Stiftung. The article refers to the case of *Republic v. Boaz Waswa* ¹ Criminal Case Number 148 of 2005 Kiambu Senior Resident Magistrate ¹ Court. In which the accused person was charged with the offence of infringing copyright by downloading the works from the internet and copying them into CDs and DVDs. The accused person was acquitted on the basis that the prosecution had failed to prove that copyright still subsisted in the works.

A ringtone provider therefore takes copyrighted works and makes it available to consumers. Due to this, musical works are likely to be infringed by both the provider of the ringtone and the consumer. There is also the aspect of infringement of the producer's right to distribute musical works. The fact that ringtones can be easily accessed poses a threat of violation of this right.³⁶⁷

It has also been argued that violation of copyright may occur in instances where the ringtone plays in public. Unlike the United States of America's Copyright Act which expressly exempts ringtones from the category of public performance as it does not serve any commercial purpose,³⁶⁸

In this era of new technological advancements and with focus on ringtone technology, the courts, the Copyright Board of Kenya and the Music Copyright Society of Kenya are among the few bodies that are tasked with the responsibility of interpreting the Copyright Act in relation to the regulation of ringtones. There is however limited interpretation of the technology. The courts have equated the technology to sound recordings.³⁶⁹ The Music Copyright Society of Kenya is currently engaged in court battles with ringtone companies and mobile network operators over collection of royalties regarding ringtones,³⁷⁰ and the Kenya Copyright Board (KECOBO) is yet to come up with clear guidelines on how ringtones should be regulated. There is need for clarification of how the Copyright Act applies to ringtone technology and whether the copyright law can sufficiently regulate this technology because the technology cuts across two distinct areas being, intellectual property and telecommunications.

³⁶⁷ Ellen Rosner Feig (2009) "Do Cellular Ringtones violate the Copyright Act?" *op. cit.*

³⁶⁸ US Copyright Act, 17 USC § 110(4) (A) creates a specific exemption for the public performance of "a non-dramatic literary or musical work otherwise than as a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if . . . there is no direct or indirect admission charge." 17 USC § 110(4) (A). To qualify, the performance must (1) be given directly by a live performer or performers not transmitted to the public by broadcast or other means; (2) involve a nondramatic literary work or a musical work; (3) have no purpose of direct or indirect commercial advantage; (4) involve no payment of a fee or other compensation for the performance to the performer(s); and (5) require no direct or indirect admission charge.

³⁶⁹ *Cellulant Kenya Ltd v. Music Copyright Society of Kenya Ltd*, High Court Civil Case Number 154 of 2009 (Milimani Commercial Courts) 2009 eKLR.

³⁷⁰ www.businessdailyafrica.com accessed on 20th September 2011; *Cellulant Kenya Limited v. Music Copyright Society of Kenya Limited*, High Court Civil Case Number 154 of 2009 (Milimani Commercial Courts) 2009 eKLR.

The telecommunication industry has a huge role to play in the regulation of ringtone technology as the technology itself would not exist without cellular phones and cellular network providers.

It is no doubt that ringtone technology has as many consumers as there are cellular phone subscribers in Kenya. The cellular network operators can reap huge profits using the technology in the same way that copyright owners should save for the unclear regulatory regime of this technology. There must be a clear balance in this inequity to ensure that all actors, that is the cellular network operators, the copyright owners and the consumers. This balance can only be attained through regulation. In Chapter 5, recommendations will be made on how to find this balance.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS ON RINGTONE TECHNOLOGY AND COPYRIGHT IN KENYA

5.1. Introduction to the conclusion and recommendations on the regulation of the ringtone technology in Kenya.

This chapter will give a summary of the contents of all the chapters and identify issues raised. Finally, this chapter in relying on the issues will give the way forward by making recommendations with respect to the regulation of ringtone technology and copyright in Kenya.

5.2. Summary of Findings of the Study

Chapter 1 was basically an introduction to this study. The chapter gave a background of the study and identified the problem statement that formed the core of the study. The chapter also identified the research questions and sub-research questions this study sought to answer. The chapter also gave the theoretical and conceptual framework that this study adopted. The chapter also reviewed the various literature relied upon in this study. The chapter also set out the objectives and justification of this study.

Chapter 2 of the study succeeded in defining and conceptualizing the key terms used in this study. The chapter defined cellular telephony and gave its nexus with ringtone technology. The chapter also examined regulation as a concept and attempts to contextualize regulation into this study.³⁷¹ The chapter therefore examined the principles forms and instruments of regulation. The chapter also defined ringtone technology. The chapter also defined copyright in the context of the ringtone technology and succeeded in identifying the relationship between telecommunications and ringtone technology as that of consumer and producer. Telecommunications consume ringtones from ringtone technology. The telecommunications industry keeps advancing with new technologies to improve service delivery. The chapter also identifies the role of telecommunication in the regulation of ringtone technology. Since ringtone technology would not have existed without telecommunication and, cellular telephony, there is no doubt that telecommunication plays an important role in ringtone technology regulation.

Chapter 3 dealt with the regulatory framework that is considered relevant for regulation of the ringtone technology, which is mainly copyright. The chapter addressed two research

³⁷¹ Problematization, conceptualization and contextualization of a study was formulated by Prof Ben Sihanya in his Telecommunication Law teaching materials for LLM class at the University of Nairobi.

questions, whether the telecommunication law in Kenya has a role to play in the regulation of ringtone technology and the challenges faced in the protection of ringtone technology through copyright. The chapter examined the Constitution of Kenya 2010, which acknowledges the proprietary rights of copyright owners of musical works used as ringtones. The chapter also examined the Copyright Act,³⁷² the Trademark Act³⁷³ and the Kenya Information and Communications Act.³⁷⁴

The chapter succeeded in giving a history of the development of cellular telephony since the 19th Century to date.³⁷⁵ In compliance with the objectives of the research proposal annexed to this thesis, the chapter has succeeded in giving a history of the telecommunication technology in relation to its structure and content.³⁷⁶ The chapter also succeeded in identifying the challenges faced in the telecommunication industry as a result of poor management of regulatory bodies and resources. The chapter identified the disadvantages of a monopolistic telecommunications regime to technological advancement. Cellular telephony was introduced in Kenya after the liberalization of the telecommunication industry.³⁷⁷

The chapter also succeeded in identifying the regulatory framework that is necessary for the regulation of ringtone technology.³⁷⁸ In view of the fact that ringtone technology cuts across two distinct areas of law, copyright alone may not offer the best regime for regulation.³⁷⁹

Chapter 4 dealt with the regulation of ringtone technology. The chapter examined regulation of ringtone technology through copyright and identified the challenges faced with regulation of ringtone technology in Kenya under the Copyright Act, 2001. One of the research questions this study was to answer required the identification of the challenges faced with the regulation of ringtone technology through copyright. The chapter also identifies the rights that are likely to be infringed by the ringtone technology.³⁸⁰ The findings of this chapter are that regulating ringtone with single instruments is impracticable but if all the laws available

³⁷² Copyright Act No. 12 of 2001.

³⁷³ Trademark Act, Cap 506 Laws of Kenya.

³⁷⁴ Kenya Information and Communications Act, 1998, Chapter 411A, Laws of Kenya.

³⁷⁵ Michael Tyler, Janice Hughes & Helena Renfrew "Telecommunications in Kenya; Facing the challenges of an open economy," *op. cit.*

³⁷⁶ Chapter one

³⁷⁷ Michael Tyler, Janice Hughes & Helena Renfrew "Telecommunications in Kenya; Facing the challenges of an open economy," *op. cit.*

³⁷⁸ Arnold Vahrenwald (2005) "Reflecting the sound of ringtones," *op. cit.*

³⁷⁹ *ibid.*

³⁸⁰ *ibid.*

are harmonized and coiled to work together, then all the rights of the parties involved will be easily realized.

The chapter also identified the role played by telecommunications law in the regulation of ringtone technology. The laws license all systems and services in the communication industries. As the cellular phone subscribers in Kenya increase, the consumers of ringtone technology also increase.³⁸¹ The cellular network operators are able to reap huge profits using the technology in the same way that copyright owners should save for the vague regulatory regime of this technology.³⁸² There has to be a clear balance in this inequity to ensure that all actors, that is the cellular network operators, the copyright owners and the consumers.³⁸³

There are various techniques for delivering ringtones to consumers. The most common mode of delivery of the ringtones is through downloading the songs from the Internet or computer and transferring the songs into cellular phones which can then be converted to ringtones upon command by the consumer. Ringtones may also be sent directly to a mobile phone through a short message service (sms).³⁸⁴

²⁰ The technologies for delivering music to consumers will continue to develop and there is therefore need to establish a workable regulatory regime.³⁸⁵ If the legal issues relating to the regulation of ringtone technology are not addressed, there will be inequitable distribution of profits of the technologies and the victims of the lapse in the regulatory regime are copyright owners.³⁸⁶

5.3. Recommendations on the constitutional, statutory and institutional implementation of regulation of ringtone technology

The recommendations of this study shall fall under three heads:

- i. Statutory reform and constitutional implementation;
- ii. Business solutions; and
- iii. Institutional and structural reforms.

³⁸¹ ⁷ Carmen Kate Yuen (2006) *Scuffling for a slice of the ringtone pie: Evaluating legal and business approaches to copyright clearance issues*, *op. cit.*

³⁸² *ibid.*

³⁸³ See Chapter four.

³⁸⁴ ⁷ Arnold Vahrenwald (2005) "Reflecting the sound of ringtones," *op. cit.*

³⁸⁵ Carmen Kate Yuen (2006) *Scuffling for a slice of the ringtone pie: Evaluating legal and business approaches to copyright clearance issues*, *op. cit.*

³⁸⁶ Arnold Vahrenwald (2005) "Reflecting the sound of ringtones," *op. cit.*

5.3.1. Statutory reforms and constitutional implementation

Unlike the repealed Constitution, the 2010 Constitution expressly protects Intellectual Property, technological transfers and innovations. First, Article. 260 (c) in the definition of “property”, Intellectual Property is included. Secondly, Article. 40 (5) obliges the state to support, protect and promote the Intellectual Property rights in Kenya. Consequently, Article 69 (1) (c) and (e) gives mandate to the State to protect and enhance intellectual property.

This study argues for a greater Government role in the regulation of ringtones. One way to get the Government legally involved in the regulation of ringtones is through statutory reforms. Statutory reforms can change the way the ringtone market operates, create value adding norms and improve and approve the equipment used in ringtone technology.³⁸⁷ This study proposes the statutory reforms in the Copyright Act, 2001 and the Kenya Information and Communications Act, 1998: -

5.3.1.1. Amendment of the Copyright Act, 2001

As already stated in Chapter 1 and 2, ringtone technology will continue to advance to include other forms of digital works and the issue of whether the said works are copyrightable will eventually arise.³⁸⁸ As at 2008, the regulation of the ringtone technology was the most debated copyright issue in the US.³⁸⁹ Owing to our vast technological advancements,

The Copyright Act³⁹⁰ does not mention ringtone technology and the few times in which the court has had to determine the nature of ringtone technology, the technology has been classified as a sound recording.³⁹¹ Section 2 of the Copyright Act³⁹² defines a sound recording as: -

“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 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 sound track of an audio-visual work.”³⁹³

³⁸⁷ Lawrence Lessig (1999) *Code and Other Laws of Cyberspace, op. cit.*, at 120.

³⁸⁸ Arnold Vahrenwald (2005) “Reflecting the sound of ringtones,” *op. cit.*

³⁸⁹ Jennifer Mariano Porter (2008) “Compulsory licensing and cell phone ringtones: The phone is ringing, a court needs to answer,” Volume 80 No. 3, *Temple Law Review* 907.

³⁹⁰ Copyright Act No. 13 of 2001.

³⁹¹ *Cellulant Company Ltd v. Music Copyright Society of Kenya*, High court Civil Case No. 159 of 2009 (Nairobi).

³⁹² Copyright Act No. 12 of 2001.

³⁹³ Quoted in the case of *Cellulant Company Limited v. Music Copyright Society of Kenya*, High court Civil Case Number 159 of 2009 (Nairobi).

This fall back provision will not hold water in the near future especially in view of the fact that it expressly excludes images and sound tracks of audio-visual works. No doubt that the emerging ringtone technology will resist classification under the Copyright Act if legislative action is not taken to create a workable long-term solution to the problems associated with ringtone technology.

This study proposes that the Copyright Act, 2001 be amended to define ringtones. This study also makes a case for licensing of entities that intend to venture into the business of reproducing and distribution of ringtone technology. The license should be issued by the Music Copyright Society of Kenya and any other society that collects royalties on behalf of the artists, particularly with regard to copyright owners who are registered with the societies in order to avoid court battles relating to the authority of the cellular network companies or ringtone companies to reproduce and distribute the ringtones.³⁹⁴

In Canada, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) has the statutory mandate to issue licenses to telecommunication companies to distribute ringtones to its consumers. This is pursuant to section 3 of the Copyright Act of Canada.³⁹⁵

The United States of America has made a provision for the definition of ringtone technology under Section 115 of the U.S Copyright Act.³⁹⁶ Under that Act, ringtone has been classified not as a sound recording but as a phono record which is a more complex term that is inclusive various forms of digital technologies.³⁹⁷ The U.S Copyright Act may not be conclusive as it has received several criticisms from lawyers, it is indeed a step towards better regulation of the of ringtone technology.³⁹⁸

5.3.1.2. Amendment of the Kenya Information and Communications Act

It appears from the nature of cellular telephony that legal regulation of voice data, content and value-added network services is not feasible on its own and the value-added network services can best be regulated through the market.

³⁹⁴ *ibid.*

³⁹⁵ Ryan Smith (2007) "Ringtones and Digital Music Players: New Media Drive changes in Copyright Laws," *op. cit.*

³⁹⁶ Section 115 of the US Copyright Act.

³⁹⁷ Phono records have been defined as material objects in which sound other than those accompanying a motion picture or other audio-visual work is fixed.

³⁹⁸ Carmen Kate Yuen (2006), "Scuffling for a slice of the ringtone pie: Evaluating legal and business approaches to copyright clearance issues," *op. cit.*

In as far as ringtone technology is concerned, a level of legal regulation is necessary in order to benefit the owners of musical works, the public and the mobile network operators. This study advocates for regulation of ringtone technology as this technology is relatively new in the market.

This study proposes the amendment of the Kenya Information and Communications Act to regulate the standard of the cellular telephones that are being distributed in the market. The study advocates that the regulator, the Communication Authority of Kenya (CAK) be granted powers under the Kenya Information and Communications Act to approve equipment such as cellular phone handsets and ensure that the products do not facilitate infringement of copyright before the handsets are distributed to the market.

The study also advocates for the regulation of ringtone technology through price controls. The Kenya Information and Communications Act already sets up a system for price controls in terms of tariff charges for voice calls and short message services, and the same regulatory strategy can be extended to ringtone technology.

5.3.2. Business solutions to copyright and the regulation of ringtone technology

In view of the fact the statutory laws lag behind in terms of the application and regulation of ringtone technology, the music industry alongside cellular network industry have developed innovative strategies to circumvent the lacuna provided by the law. These innovative strategies include pioneering contracts setting out royalty rates payable to copyright owners as consideration for the use of their songs.³⁹⁹

Further, copyright owners and/or their respective societies are entering into licensing agreements with ringtone companies and cellular network operators giving the two latter entities authority to use the musical works as ringtones.⁴⁰⁰

There is also need for the copyright owners and the cellular network companies to sensitize the consumers of the need to respect and protect the rights accrued in ringtone technology through advertisements, workshops and seminars among others.

³⁹⁹ <http://corp.bluefrogmobile.com/htmlcorp/news.php> (accessed 20/9/2011).

⁴⁰⁰ See Cellulant Case discussed in Chapter 3.

5.3.3. Institutional and structural reforms for copyright and the regulation of ringtone technology

There are various statutory institutions that would play a major role in the regulation of the ringtone technology. These institutions include the Judiciary, the various Copyright Agencies licensed under the Copyright Act and the National Police Service. This study makes a case for major reforms in these institutions if the proper regulation of ringtones is to take place. The study will look at the three institutions at a time

5.3.3.1. Judicial reforms relevant to the regulation of ringtones in Kenya

The copyright industry is short changed in as far as ringtone technology is concerned.⁴⁰¹ This is not a problem that affects Kenya only but also other states such as the United States, Canada, Germany and Japan, just to name but a few.

In the United States, for instance, mobile phone companies are constantly at constant loggerheads with the Performing Rights Organizations' such as American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc. (BMI), and the Society of European Stage Authors and Composers (SESAC) over payment of mechanical and performance royalties in respect of ringtones.⁴⁰²

The judicial precedents in the United States are more advanced and have contributed to regulatory reforms with respect to ringtone technology. For instance, in the case of *Cellco Partnership v. American Society of Composers, Authors and Publishers*,⁴⁰³ the plaintiff is a company that sells ringtones. The plaintiff sought the court's directions on whether it was required to pay performance royalties to the defendant. The case settled the law on this issue by finding that ringtones do not constitute public performances and hence performance royalties were not payable. This case also defined ringtone technology and identified six rights which are exclusively held by the copyright owner.⁴⁰⁴

Unfortunately, in Kenya, there are no judicial precedents that have settled the law regarding issues relating to ringtone technology. This is due to the fact that the judges and magistrates who have the responsibility of enforcing the law by interpreting and implementing the provisions of the Constitution and the Copyright Act, 2001, have limited knowledge of what

⁴⁰¹ *ibid.*

⁴⁰² <http://www.boycott-riaa.com/article/27833>

⁴⁰³ Nos 09 Civ. 7074(DLC)(MHD) 41 Civ. 1395(DLC)

⁴⁰⁴ Re Cellco Partnership, 663 F. Supp. 2d 363 (S.D. N. Y. 2009). A ringtone was defined as a digital file of a portion of a music composition or other sound that is designed to be played by a customer's telephone to signal an incoming call in the same manner as would a telephone ring.

infringement of copyright is. They therefore lack the skill and knowledge necessary to adjudicate disputes relating to infringement of copyright.⁴⁰⁵ Without the necessary knowledge and skill on matters relating to infringement of copyright, the judges and magistrates lack the ability to appreciate the socio-economic benefits of copyright protection and are therefore not keen on developing jurisprudence on copyright protection.⁴⁰⁶

Due to the lack of skill and knowledge of copyright, most criminal proceedings end up in acquittals of accused persons. In the case of *Republic v. Maurice Owino Onyango*,⁴⁰⁷ the accused was acquitted on the basis that the complainant, Music Copyright Society of Kenya had not shown that Franco was its member in spite of the fact that the appellant had admitted operating a lodge which was playing rhumba music without a license.

In another case of *Republic v. Tom Odhiambo Ogowl*,⁴⁰⁸ the accused was operating a local hall where local and international videos were displayed to the paying public. The accused admitted the offence but alleged that the complainant, MCSK had not shown that the owners of the works were its members. On this basis the magistrate acquitted the accused.

The above two cases show the lack of knowledge on the part of the magistrates who handled the cases. Section 38(2) of the Copyright Act which provides;

“Any person who causes a literary or musical work, an audio-visual work or a sound recording to be performed in public at a time when copyright subsists in such work or sound recording and where such performance is an infringement of that copyright shall be guilty of an offence unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright would or might be infringed.”

Section 35 of the Copyright Act further provides as follows: -

“Copyright shall be infringed by a person who, without the licence of the owner of the copyright—

- a. does, or causes to be done, an act the doing of which is controlled by the copyright; or
- b. imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy.”

⁴⁰⁵ Ben Sihanya (2009) “Copyright Law in Kenya,” *Innovative Lawyering and Copyright Africa* at <http://www.musicinafrica.net/> (accessed on 16/5/2015).

⁴⁰⁶ *ibid.*

⁴⁰⁷ Homa Bay Law Courts Criminal Case Number 1575 of 2009.

⁴⁰⁸ Homa Bay Law Courts Criminal Case Number 40 of 2011.

The above provisions make it a criminal offence to cause the performance of a copyrighted work in public without a license. All the prosecution was required to show was that the accused persons were causing the performance of copyrighted work without a license. Whether or not, the owner of the copyrighted work was a member of the MCSK was non-issue. However, the magistrates made it a core issue leading to the acquittal of the accused persons. This is in essence a blow to the regulation of copyright and as such, a blow the regulation of the ringtone technology.

In yet another case of ¹¹ *Music Copyright Society of Kenya v Parklands Shade Hotel t/a Klub House*⁴⁰⁹ the court declined to grant an order of injunction restraining the defendant from playing or broadcasting copyrighted work without ¹¹ an agreement between the plaintiff and its members on the basis the defendant had signed another agreement with another entity known as MultiChoice Limited. This decision did not consider the copyright owners' right to derive income from their works

Be that as it may, judicial review is a great avenue to set out regulatory principles in as far as regulation of ringtone technology is concerned.

There have recently been positive efforts by judicial officers to protect copyright. In the case *John Boniface Maina v Safaricom Limited & Others*,⁴¹⁰ The court acknowledged that copyrights are fragile rights and matters related to copyright are complex. The court awarded Anton-pillar orders ³³ against the defendant preventing them from infringing copyright through ringtones. This is a step in the right direction but there is still more to be done.

This study makes a case for training of the judicial officers on copyright laws in order for the courts to be able to implement laws relating to regulation of ringtones and copyright in general.⁴¹¹

5.3.3.2. National Police Service reforms relevant to regulation of ringtones

¹ The Copyright Act, 2001 provides for both civil and criminal remedies for infringement of copyright. The fact that the Kenya Copyright Board, lacks autonomy and solely depends on the Attorney General for its financial and administrative functions means that prosecution of criminal cases relating to infringement of copyright does not get the attention it deserves. The

⁴⁰⁹ Nairobi Civil Suit Number 1458 of 2000; (2000) eKLR.

⁴¹⁰ ⁶ Nairobi Civil Suit No. 808 of 2010 (2013) eKLR.

⁴¹¹ Moni Wekesa and Ben Sihanya (2009) "Intellectual Property in Kenya," *Konrad Adenauer Stiftung*, p 163.

Attorney General would rather focus on more “serious crimes” such as murder or corruption.⁴¹²

There is also a general lack of understanding on matters relating to infringement of copyright by the police officers charged with the responsibility of detecting, investigating and apprehending criminals⁴¹³ Due to the lack of understanding of the nature of copyright, most police officers view infringement of copyright as a civil wrong rather than a criminal offence.⁴¹⁴

The quality prosecution of offences relating to infringement of copyright has also been a challenge as the prosecutors who are expected to prosecute the cases do not have the necessary training,⁴¹⁵

In order to ensure proper regulation of the ringtone technology, this study advocates for the setting up of a special unit charged with the responsibility of investigating and collecting evidence on infringement of copyright. The study also proposes that special prosecutors be appointed to prosecute cases on infringement of copyright.⁴¹⁶

5.3.3.3. Copyright Agencies reforms relevant to regulation of ringtones

Kenyan scholars have been able to identify the challenges faced in enforcing copyright laws in Kenya.⁴¹⁷ The Kenya Copyright Board has been blamed for its failure to carry out its functions under the Copyright Act, 2001⁴¹⁸ So far, the Board has only registered three collective management organizations pursuant to its mandate set out under Section 46 of the Act,

⁴¹² Marisella Ouma (2008) *Enforcement of Copyright in the Music Industry: a Critical Analysis of the Legal and Infrastructural Framework of Enforcement in Sub Saharan Africa*, PhD thesis submitted to Queen Mary University of London.

⁴¹³ Under Section 51 of the National Police Service Act, a Police officer is charged with the above responsibilities.

⁴¹⁴ Moni Wekesa and Ben Sihanya (2009) “Intellectual Property in Kenya,” *op. cit.*

⁴¹⁵ *ibid.*

⁴¹⁶ Ben Sihanya (2009) “Copyright Law in Kenya,” *op. cit.*

⁴¹⁷ Marisella Ouma (2008) *Enforcement of Copyright in the Music Industry: a Critical Analysis of the Legal and Infrastructural Framework of Enforcement in Sub Saharan Africa*, *op. cit.*

⁴¹⁸ *ibid.*

The Music Copyright Society of Kenya is registered as a collecting society under the Act for purposes of collecting royalties for its members. In addition, the Music Copyright Society issues licenses for public performance and broadcasting of musical works.⁴¹⁹

Other collecting societies licensed by the Kenya Copyright Board is the Performance Rights Society of Kenya (PRSK)⁴²⁰ and Kenya Association of Music Producers (KAMP). The impact of the above societies to ensure that the owners of copyright owners are compensated for their works is yet to be felt. This has been blamed on the poor supervision by the Kenya Copyright Board.⁴²¹

This study proposes capacity building for the Kenya Copyright Board and the Collective Management Organizations in form of training and increase of personnel in order to ensure efficiency and effectiveness,

In addition to the above and for purposes of ensuring regulation of ringtones, this study recommends the registration of a society or agency for distributors of the ringtone technology to ensure that their functions are properly regulated.

The study also advocates for the licensing agreements to be entered into between the CMOs and Mobile Phone Companies to ensure that there is no infringement of copyright.

5.3.4. Concluding Statement on the regulation of the ringtone technology in Kenya.

Innovation is an enemy of all that prospered under the old regime, and no or little support is accorded to those that would and should prosper under the new regime. Therefore, to protect and encourage innovation, there should be introduced codes of conduct for services offered online. Instruments for regulating these services should also be harmonized to protect both the producers and consumers at different levels. This harmonization is very important since the service providers of ringtones assume freedom of contract by default that there is certainty legal methodology to certify their control over content and make their protection later. Realization of each party's right would therefore maintain the balance between the producers and consumers of ringtones.

⁴¹⁹ See Music Copyright Society of Kenya. "MCSK, the society", available at <http://www.mcsk.or.ke/about.htm>. (accessed on 26/5/2015).

⁴²⁰ See "Performance Rights Society of Kenya (PRSK)", available at <http://www.prisk.or.ke>. (accessed on 26/5/2015).

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QUESTIONNAIRE

TOPIC: REGULATION OF THE RINGTONE TECHNOLOGY IN KENYA.

INTERVIEW WITH: SHARON CHAHALE – WATA

Deputy Chief Legal Counsel-Kenya Copyright Board.

1. Is the creativity involved in ringtone technology enough to require copyright protection?

Answer:

2. Does KECOBO have a role to play in the regulation of ringtone technology?

Answer:

3. How is the ringtone technology currently regulated?

Answer:

4. Are challenges in the protection of copyright? If so, what the challenges faced?

Answer:

5. Is there an interplay between KECOBO and Mobile Phone Companies in as far as protection of the rights of copyright owners is concerned?

Answer:

6. Are there challenges that KECOBO faces in as far as policy formulation is concerned?

Answer:

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