

**THE KENYAN COPYRIGHT LAW
AND
THE NEED TO PROVIDE SUBSTANTIVE
LEGISLATION AGAINST INFRINGEMENT.**

Dissertation submitted in partial fulfillment of the requirements for the degree of Bachelor of Laws (LL.B) of the University of Nairobi.

By

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DEDICATION.

To my parents David Daniel Ndung'u and Naomi Waithera Ndung'u, I find no words sufficient enough to express my gratitude for your love and care.

To my brothers and sisters, I believe our struggle was not in vain. To Jayeshkumar J. Dave, my mentor and counsellor, I hope I did you proud, many thanks to you. And to all my friends especially Ole Meseiyeki together we have seen the best and the worst, at least we tried.

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LIST OF CASES.

1. Anton Piller V Manufacturing Process Ltd (1975) Ch 55.
2. Drabble (Harroid) Ltd v Hycolite Manufacturing co. Ltd (1928) 44 TLR 264.
3. Gaston Harbour v Bwavu-Mpologoma Co-operative Ltd (1958)E.A. 549.
4. Lover v Davidson (1856) I C B NS 182.
5. Mccrum v Elsner (1917) 87 lj ch. 99
6. Millar v Taylor (1769) 4 BURR 2303; 98 E.R 201.
7. Sapra studio v Tip Top Clothing Ltd (1971) E.A 489.
8. The university of London press v the University tutoal press (1916) 2 ch 601.
9. Thrustcode Ltd v N.W. Computing Ltd (1983) FSR 502.
10. Warwick film v Elsinger (1968) 1 ch 508.

LIST OF STATUTES.

1. THE COPYRIGHT ACT, CAP 130 LAWS OF KENYA (1991).
2. THE COPYRIGHT AMENDMENT ACT (NO 13) OF 1995.
3. THE PENAL CODE, CAP 63 LAWS OF KENYA (1987).

LIST OF ABBREVIATIONS.

1. B.C - BERNE CONVENTION.
2. MCSK - MUSIC COPYRIGHT SOCIETY OF KENYA.
3. KOPIKEN- REPROGRAPHIC RIGHTS ORGANISATION OF KENYA.
4. U.C.C - UNIVERSAL COPYRIGHT CONVENTION.
5. UNESCO- UNITED NATIONS EDUCATIONAL SCIENTIFIC AND CULTURAL ORGANISATION.
6. WIPO - WORLD INTELLECTUAL PROPERTY ORGANISATION.

INTRODUCTION

Authors, musicians, artists, producers, publishers and performers incur monumental losses through illegal photocopying, imitation or reproduction of copyright protected materials in and outside Kenya.

The rights holders need to recoup their expenses and earn profits in order to live comfortably from their investment. Just like an investor in real property or estate benefits from the rents paid monthly, why not owners of intellectual property?

Copyright is a right given to holders of intellectual property (artist, authors, musicians, publishers or producers) to prevent another person from copying their work. It is a pity that almost all social and academic institutions lead in the infringement of this law. The reproduction of intellectual property happens throughout the world without the perpetrators thinking about the welfare of the rights holds and in complete disregard of copyright law.

It is estimated that three hundred billion (300,000,000,000) pages are illegally photocopied annually world-wide from copyright protected publications. Kenya has had its part of the share too. There are currently over twenty thousand (20,000) units of photocopiers placed in various institutions, private and also public companies. It is estimated that over two hundred million (200,000,000) pages of copyright protected material are copied each year in Kenya. The problem is that these copies are done without paying any royalty to the publishers or authors.

In similar vein, many song lyrics and other artistic creations, scientific or otherwise are reproduced in large numbers illegally. This situation poses a great threat to

creators of intellectual property. If it is allowed to continue, then authors, artists, musicians and producers will soon be out of business.

But the net effect is the erosion of intellectual and cultural life in the country. It is a criminal offence to reproduce such materials without paying royalties. It is therefore inevitable that stringent measures of solving this problem must be put into place. This in essence calls for the review of the provisions of the copyright Act (cap 130 laws of Kenya) so that the development and diversification of intellectual property is not stifled.

All law is enacted with reference to existing social and economic circumstances. It is the need for the regulation of society and the economic activities of men and women that prompts the enactment of norms to regulate these activities. Since law is essentially a tool to define social-economic relations of men and women in the world of property, a study of the legal regime devoid of its impact on its societal subject is necessarily incomplete.

A study of the legal regime regarding copyright in Kenya therefore implies a study of the activities of this society and the participants in these activities. Which are subject of this legislation. The needs of these participants in terms of their rights privileges and obligations, must be the prime determinants of the subject of the copyright Act. a need for the legislations relationship to the individual it is committed to, must therefore be established. Not only must this relationship be identified, but a justification for its operation in our society as it is must also be made.

To study the societal subject of copyright law is therefore a study of the conditions, social and otherwise and the intended function to be fulfilled before the Act is effective.

This research therefore contemplates inadequacies in the legal regime of copyright which reflect firstly, the absence of unity between the manifest spirit or effect of the law, and secondly, areas of regression or constraint in the creativity of intellectual property rights.

Copyright is classified as a property which is an affirmative claim or right against persons generally over a particular situation or thing. Copyright clearly falls within the realm of property for as such it is something of value created or acquired lawfully by a particular owner, who is entitled to transfer or deal with it in any way. Further, copyright embodies the designation of rights that individuals have with respect to things and further still, customs and legislation controls and guarantees the enjoyment of copyright as it does all other forms of property.

In essence then, copyright may be described as property - an affirmative right or claim against all other persons generally in respect to a particular situation or thing.

Copyright by virtue of its nature is intangible in the sense that one cannot physically possess copyright. It is described as an incorporeal chattel since it bears a merely notional existence but is recognised in law. Copyright must in its strictest sense be considered as a chose in action, since it arises out of a right in personum i.e against a particular individual. It is the subject of ownership by the author who is protected in his rights against persons generally. The essential characteristic and practical operations of the concept of copyright therefore identify it as property.

It is this identification that necessitates the protection of the copyrights holder against unfair utilisation of his creation by others more so with the rise in technological

sophistication and an increase in the methods and manner of copying copyright protected material.

Chapter one of this work elucidates on the aims and objectives of copyright protection. It discusses the main principles that underlie intellectual property rights, these being moral and economic. It is argued in this chapter that the labour and skill applied in the making of that product is actually the extension of the authors personality and therefore the law ought to guarantee that a work belongs to its author.

The right of an author to be identified with his work is inalienable, so that he can be protected against commercial pressures which he may find irresistible, particularly at the early stages of this career. The content of copyright protection and the actual nature of rights conferred by copyright are also discussed in this chapter.

Chapter two discusses the Kenyan copyright law, the rights embodied therein, the extent and duration of those rights and the remedies availed to a holder of copyright under the Kenya copyright regime in case of infringement. The chapter also looks into the categories of persons who are entitled to copyright protection, the lawful use of copyright under the doctrine of fair use for non-holders of copyright, the issue of licensing and assignment of copyright and also the offences and penalties imposed by law for persons who infringe copyright.

Chapter three discusses the limitations that beleave the Kenyan copyright regime and the possible alternatives that may remedy the limitations. The limitations as obtaining in the copyright Act are in the area of the subject matter of copyright protection, the applicable law, the registration requirement, the definition of author with respect to

literary, musical and artistic works and finally the exclusion of traditional material from the ambit of the protection of copyright law.

Chapter four entails a discussion of the recommendations and suggestions which it is envisioned would go along way in helping alleviate the myriad problems that are encountered by the creators of intellectual property in Kenya.

The chapter also incorporates the suggestion and views of the chairman of the music copyright society of Kenya (MSCK) in relation to music piracy in Kenya, and also the views of the administrators of the reprographic rights organisation of Kenya (KOPIKEN) with respect to the enormous problem that is being encountered by the publishing industry due to the influx of photocopying machines in the country.

CHAPTER ONE.

1.1 THE AIMS AND OBJECTIVES OF COPYRIGHT PROTECTION.

There are two main principles that underlie intellectual property rights, the first is moral, in which the inventor is rewarded for the act of creation. The second principle is economic, in which the act of invention is seen as one of the mainsprings of economic growth. Within this economic rationale, there is need to balance a regime of incentives which encourages inventors or authors but which also maintains the public interest with respect to the diffusion of socially useful knowledge and the price at which this is made accessible to a wider public.

The labour and skill applied in the making of that product is actually the extension of the authors personality¹. The law hence ought to guarantee that a work belongs to its author. It is also the purpose of copyright laws to encourage and reward authors, composers, artist, designers and other creative persons as well as entrepreneurs, who apply their capital in putting the products of their intellect before the public.

Moral rights theorists derive their argument from the works of the popular french jurist, Marion, who in arguing that a book cannot be printed without the permission of the author stated that just as the "Heavens and the earth belong to God because they are the work of his word ... so the author of a book is the complete master, and as such can dispose of it as he chooses"²

Therefore society should especially reward a creator of a great work of lasting value for the general contribution

he has made to social progress, a contribution that extends over and beyond the value he has provided to purchasers of his work. For this reason, copyright protection through laws is justified, the protection hence ought to be substantive and not just cursory.

The author further retains a right to protect his work against reproduction in a debased form. The author is entitled to the control of all facets of his work; his creation is a form of self-expression which reflects upon his personal reputation and integrity, hence he has a right not merely the right of commercial exploitation of his work, but the right to sustain the integrity of his relationship with the world by means of his work.

Copyright protection aims at protecting those people who risk their capital in putting their work before the public. Time, money and resources are expended in order to come up with a work that is protectable by copyright. There is an economic inducement for one to invest financial resources into production or creation of copyrightable work, only if one is able to recoup his expenses in the creation process and commercially exploit the work. This is necessary especially in the field of intellectual property. This assurance can be obtained through laws for copyright protection.

A copyright is not a right to do anything but to stop others from doing something. Thus, if a man should take an existing work the subject of copyright protection and adapt or alter it, such as, by turning a novel into a stage play, by translating a text book into a foreign language, by orchestrating a song, - he himself usually acquires a further copy - right of his own, subservient

in a sense to the original copyright. This means that he can stop any member of the public from using his adapted or altered version, even if such members be authorised by the owner of the original copyright; but he may not use his own work without the consent of the latter.

Copyright is therefore a negative right. Accordingly, a particular work or other subject matter may be covered by two or more copyrights, perhaps in the hands of different owners, for example, a person wishing to reproduce a gramophone record of musical play version of a novel might have to secure the licence of three different persons: The owner of the copyright in the actual sound recording; the owner of the copyright in the musical play; and the owner of the copyright in the original novel³.

Copyright is a property right but the subject matter of the property is incorporeal. The property in the work is justified by the fact that the right owner has created or made it. As he is the owner, he can dispose of it by outright sale (assignment of his right) or by licensing. The subject of the property is incorporeal. It give a dominium over the work, a right in the work of *erga omnes*"⁴

The property is an intellectual property in that it originates in the mind of a person or persons before it is reduced to material form.

Copyright is an exclusive right. This means that the right owner can prevent all others from copying the work. This is often referred to as a "monopoly" but that is rather misleading. It is recognised that the produce of a person's skill and labour is his property. However copyright does not create a monopoly neither is it a

monopolistic right. On the other hand holding all or most of the rights in a particular field on behalf of all or most copyright owners such as collecting societies do, may in practice constitute monopoly⁵.

Copyright law has the further object of encouragement of learning by securing an adequate reward to authors or their assigns by granting certain rights for a limited period. This rationale is reflected in the United States constitution where congress is empowered to 'promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries⁶.

The Stated objectives of copyright raise the question of the essential nature of copyright and the manner in which it should develop in order to provide a just balance between the claims of authors and the needs of society.

In the case of MILLAR V TAYLOR⁷, Lord Mansfield in commenting on the essential need of protecting an author to reap the pecuniary profits of his own ingenuity and labour stated that if there is no copyright protection, then an author may not only be deprived of any profit, but lose the expense he has been at. He is no more master of his own work. He cannot prevent additions. He cannot retract errors. He cannot amend, or cancel a faulty edition. Anyone may print, pirate and perpetuate the imperfections, to the disgrace and against the will of the author. For these reasons therefore it is just and fit to protect a copy after publication.

The subject matter of copyright and the content of copyright continue to expand with technological development and it becomes increasingly important to ask what copyright is meant to achieve. The nineteenth and

twentieth centuries have seen a continual expansion of the field of copyright protection and the nature of copyright given. The impact of development of quick and cheap techniques of photocopying which are generally available to a large section of the public has aroused particular concern in the field of copyright law. In particular, it seems necessary to indicate clearly in each particular area what the law regards as protectable work. What for example, is a literary or an artistic work as comprehended by copyright law. There is a need to provide for laws that express adequately a considered balance between the legitimate claims of authors for the recognition and protection of their interest and the claims of the public, educators, and others to secure the use and dissemination of knowledge and information and to take advantage of the enormous benefits conferred by new technology.

It is becoming increasingly important not merely to postulate a rationale for copyright in terms of incentive and reward but to elucidate its actual operation as the basis of complex contracts in the world of intellectual property, in order to answer the difficult question of justification of copyright and its function in society. Copyright is only one tool with which society seeks to secure a just return to the author for his work and to the extent that it is but imperfectly understood by those whom it is intended to benefit, it fails to achieve its purpose.

Copyright law was conceived in order to encourage the development and distribution of works of authorship. It accomplishes this by giving authors certain exclusive right to their works including the right to authorise others to excise those rights. If such protection were

absent, neither authorship nor distribution would cease, but unauthorised reproduction and distribution would be so easily accomplished that the quantity and diversity of creative activity would be inhibited⁸

Copyright itself embraces on the one hand a traditional model based on policies of encouraging creative effort and protecting the fruits of ones labour, and an alternative by-product model based principally on the traditional models secondary goal of protecting the creator against the unjust enrichment of those seeking to exploit the merchantable creation. Considerable foregone opportunities might otherwise defer development of talent and pursuit of inspiration. The nature of copyright makes the utility object in property to arise. Utility makes the property worthwhile and worth of acquisition because it satisfies a definite human want or need. And the use value is the gauge of the totality of the physical qualities in the property on which the utility is determined. This results from the skill, labour and independent or joint judgement expended on the work by authors⁹.

It has often been stated that the primary function of copyright law is to protect from annexation by the people the fruits of a man's work, labour skill or taste. This protection is given by making it unlawful, as an infringement of copyright to reproduce or copy any literary, dramatic musical or artistic work without the consent of the owner of copyright in that work. It is works that are protected and not the ideas. If ideas can be taken without copying a work, the copyright owner cannot interfere. This distinction though, is a difficult one to draw both theoretically and practically¹⁰.

It is also not the function of copyright to protect personal or business reputations, or to prevent business or professional competition. Thus its no infringement of copyright to imitate an author's literary style, or to take the title of one of his books, or to write a book about characters he has invented. Though any of these things may be unlawful for other reasons if people are misled into thinking that he is responsible for the imitation". As observed in the foregoing pages, copyright, like all other property, is a bundle of rights granted by the state either through legislation or court decision. It is only in this sense, true of all property, that copyright is a monopoly. As property, copyright is unique. Other forms of private property impose absolute restraints against public use.

A copyright does not impose these restraints. Anyone is free to use the ideas, or the facts, or the information presented in a copyright work. A copyright only protects the authors expression. Other writers can draw on these facts and ideas. Other writers are free to independently create and publish similar, almost identical works. The only prohibition copyright imposes is that the next author or the next creator, cannot substantially copy the first author's expression. Copyright does not impose any restriction contained in the work which is protected by the copyright ¹².

Copyright is classified as a property right which is an affirmative claim or right against persons generally over a particular situation or thing. Copyright clearly falls within the real of property for it is something of value created or acquired lawfully by a particular owner who is entitled to transfer or deal with it in any way. Copyright further embodies the designation of rights that

individuals have with respect to things and further still, customs and legislation controls and guarantees the enjoyment of copyright as it does all other forms of property.

Copyright by virtue of all its nature is intangible in the sense that one cannot physically possess copyright. It is described as an incorporeal chattel since it bears a merely notional existence but it is recognised in law. Copyright must in its strictest sense be considered as a chose in action since it arises out of a right in person i.e against a particular individual. It is the subject of ownership by the author who is protected in his rights against persons generally. The essential characteristic and practical operations of the concept of copyright therefore identify it as property.

It is this identification that necessitates the protection of the copyrights holder against unfair utilisation of his creation by others more so with the rise in technological sophistication and an increase in the methods and manner of copying copyright protected material. The justification for copyright protection as a form of legal protection of property may vary. As a form of intellectual property, the view is that the owner of the property or the creator of the subject matter of copyright should be a fundamental beneficiary of it.

It has been stated that nothing can with greater propriety be called a man's property than the fruit of his brains. The property is any article or substance accruing to him by reason of his own mechanical labour is never denied him. The labour of mind is no less arduous and consequently no less worth of the protection of the law ¹³.

The justification is founded on the premises that since a person wants and produces something, the product of his skill ought to belong to him. A person can keep or sell the products of his skill. It is only him who has a right to reproduce the original article and to sell the copies thus reproduced. Copyright law is thus an instrument of the state to protect private individual interests in intellectual property in much the same way as property law protects other forms of conventional property.

The basic premises of copyright protection by way of legislation is that it functions both to stimulate the creation and dissemination of public works and to give authors a general reward for their contribution to society ¹⁴.

Copyright is a commodity. One which is the subject of ownership, competition and monopoly. The existence of copyright as a commodity is affected and dependent on certain legal and technical prerequisites. These prerequisites then transform creative prototypes in the form of ideas and opinions, into a quasi-tangible" existence capable of being accredited with economic value ¹⁵.

The prerequisites include artistic value or quality, material form, originality through the expending of sufficient effort and the procedural requirements that may be necessary. They present three essential factors in the concept of property viz: labour, utility and value ¹⁶.

The implications of copyright law thus entail the creation of monopolies which give owners of copyright

the power to control the market for specific items. As with patents, copyright provides the legal foundation upon which monopoly profits can be generated, provided always that the market contains sufficient demand for the product ¹⁷.

The Kenyan copyright law has come under criticism in that it was tailored under British tutelage, and at the advent of independence, it was necessary for the transition to be effected with minimal interference of the beneficial relations that had built up in time. The current act which was enacted in 1966, brought no substantive change to copyright law in Kenya. The law therefore gives the security that will continue to attract foreign enterprise. It has been said of the current law that it remains a statutory law in Kenya not so much due to the recognition of creative potential in its citizenry, but more so as a legal foundation for rules and established institutions that seek to guide the activities of those foreign owners of capital and know-how in a direction that the government hopes will be beneficial to the economy ¹⁸.

1.2. THE CONTENT OF COPYRIGHT PROTECTION.

It is generally agreed that, that which is worth copying is worth copyright protection ¹⁹.

That which is susceptible of copyright protection is classified into "works". These are those things which are traditionally protected by the copyright laws and consist of original literary, dramatic, musical and artistic works. Other subject matter consists of creations of a kind which have come into prominence in the 20th century i.e sound recording, cinematograph, films, television sound broadcasts and programme carrying signals ²⁰.

Unless a thing can be brought into one or more of the foregoing categories, it cannot be copyright. It is only "original" literary, dramatic, musical and artistic works which are protected. This means that the work concerned must be the result of the expenditure of at least a substantial amount of independent skill, knowledge and creative labour. Absolute originality is not required. For example, second and subsequent editions of a text book will usually enjoy copyright in their own right irrespective of whether the copyright in the first edition has expired.

The first owner of a copyright is usually the author, but there are exceptions for instance in the case of an employee while in the service of an employer as part of his duties. Like other property, copyrights may be assigned bequeathed by will, transmitted by bankruptcy and so on.

An assignment, to be valid at law, must be in writing and signed by the assignor. An exclusive licence is rather like an assignment in that the grantor puts it outside his power to use the protected material and the licensee has the right to sue for infringements of the copyright. As a general rule copyright arises whenever an original artistic work is created, no formality such as registration being required. The term of copyright, once it begins to subsist, is the life of the author and fifty (50) years after his death. If copyright does not exist, its necessary to prove who is the owner. Unless a party can rely on one of the statutory presumptions, it will be necessary to trace back to the root of title, that is the first owner of the copyright. This person is *prima facie* the author ²¹.

The right of the copyright owner is to stop plagiarism, not independent creation. Therefore there will be no infringement unless there is not only a sufficiently close resemblance between the copyright work and the alleged piratical version, but the resemblance is due to copying. Although there cannot be infringement without copying, it matters not whether such derivation be direct or indirect. Copying further need not be exact imitation. A substantial degree of appropriation of an authors work suffices. What is substantial is a matter of fact and degree. The quality of what is taken is more important than the quantity. In assessing such quality, what matters is the degree of originality.

Since substantiality is an important factor, it necessary to take into account the surrounding circumstances. Thus, it is relevant whether the alleged infringing version might compete with the copyright version, or otherwise cause damage to the copyright owner.

The duration of copyright protection is from the end of the year in which a triggering event occurs, such as the author's death, or the making or publication of a work or edition. The term as required by the Berne convention for the classic forms of copyright is the author's life and fifty years thereafter ²².

However in most western countries, there has been much pressure to tip the balance in favour of the authors property and away from public interest in the free use of material. for instance the British copyright Act was changed in 1988 to accommodate transitional arrangements for existing works that were not published at the author's death. The Kenya position however is still that prior to the 1988 amendment in the United Kingdom.

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It is no pre-condition of the Kenyan copyright law that the author be named in any publication or work. If a work is published without attribution but with the name of the publisher, that person shall be taken to be the owner of copyright at the date of publication. If someone other than the publisher then seeks to assert copyright in the publication, he must either show that his right derives from the publisher or else he must rebut the presumption. He will not succeed in the latter case merely by showing an assignment from the alleged author ²³.

As long as a literary, dramatic, musical artistic work remains of unknown authorship, its copyright is measured without reference to the authors date of death. Instead it ha copyyright for fifty (50) years from the time it

was made available to the public.

The technological processes by which reproduction of copyrightable work can be achieved vary and new ones are constantly being added, but they are all reproductions of the work. The work which by the process of its creation becomes the property of the author gives him the right to exploit it economically (economic rights) but the work also has an intellectual and moral link with its author as his brainchild which gives him the right to publish it or not as he wishes, when he wishes and in such form as he wishes and to defend it against any distortions or abuses.

Copyright is a natural right and thus in theory, absolute and should not be restricted. Although in practice restrictions are imposed, they must be kept at a minimum. As in theory at least, the right should be perpetual, the extension of the right beyond the life of the author is justified. The moral rights are in theory also perpetual as they attach to the work which lives on after the economic rights come to an end, and continue to bear the expression of the personality of the author and his fame. The "droit moral" (moral right) occupies a place of major importance ²⁴.

It is inalienable in order to protect the author against commercial pressures which he may find irresistible, particularly at the early stages of his career. Contracts between the author and those he has to deal with such as publishers are put into a special category with safeguards for the author as the financially weaker party. Restrictions on the rights of the author such as compulsory licenses are acceptable only in exceptional circumstances ²⁵.

The general philosophy of copyright is that whoever takes the initiative in creating the material and makes the investment to produce it and market it, taking the financial risks that such activities involve should be allowed to reap the benefit. He cannot do that if he is not protected, the copyist will produce the same product at a lower cost because he does not have to take the initiative and risks or make the investment. He will therefore undersell the originator of the material in the market place. This will result in the copyist reaping an unjust enrichment, and the originator being deprived of the incentive to create similar materials, and the public will be deprived of the widest base of competitive activity.

The test of the economic value of copyright must therefore be, what measure of protection is needed to bring about the creation and production of new works and other material within the copyright sphere? The basic idea of the copyright system is to protect products of intellectual endeavour from the sublime to the most humble, demanding sometimes only modest effort of originality. To qualify as a protected work, the subject matter has to be the direct result of someone's skill and labour and capable of being reproduced.

It would be incomplete to discuss the nature and content of copyright protection without discussing the actual rights that are conferred and protected by copyright law. Broadly speaking, the major rights under copyright law are, as initially discussed, economic and moral.

These are further broken down to :-

- a. The reproduction right.
- b. The adaptation right.

- c. The distribution right.
- d. The public performance right.
- e. The broadcasting right.
- f. The cable casting right.
- g. The "droit de suite".
- h. The public lending right.

THE REPRODUCTION RIGHT.

This is the right to authorise the reproduction of a work in copies. This right is recognised both in the Berne Convention and in the Universal Copyright Convention (U.C.C).

The production right generally includes the initial fixation of a work in any material form e.g the recording of a musical or dramatic performance, as well as any subsequent duplication of the initial fixation.

THE ADAPTATION RIGHT.

This is the right to authorise the adaptation, arrangement or other alteration of a work. These include translations from one language to another, musical arrangements of the spoken or written word and dramatisations of dramatic works. Adaptation is usually understood to involve adapting a pre-existing work from one medium to another. It may also involve alterations to a work in the same medium such as revising the first edition of a book to create a second edition.

It is important to recognise that adaptation may be protected by copyright law quite independently of the original works from which they were derived. Thus two copyrights may subsist in a foreign language translation:

One in the translation itself; the other in the underlying work.

THE DISTRIBUTION RIGHT.

The right of distribution is the right to authorise the distribution to the public of copies of a work.

‘Distribution for this purpose includes sale, lease, retail, lending or any other transfer of ownership or possession of copies of the work.

THE PUBLIC PERFORMANCE RIGHT.

This is the right to authorise the performance of a work in public. The right extends only to those works that are capable of being performed namely, literary dramatic, dramatic-musical and choreographic works and pantomimes.

It embraces not only traditional live performances by actors, singers or musicians on the spot but also recorded performances.

THE BROADCASTING RIGHT.

It is the right to authorise the transmission of a work by any means of wireless diffusion. The broadcasting right applies both to sounds and visual images i.e to radio and television, and like the public performance right, there must be some communication to the public. It is immaterial whether the broadcasting signals are actually received by the public or not but only that they are intended to be received directly by the general public ²⁷.

The right extends to the right to re-broadcast the original broadcast, right to transmit the original

broadcast by cable and the right to communicate the original broadcast by means of loudspeaker, T.V, Screen or otherwise.

THE CABLE CASTING RIGHT.

There are two separate forms of cable casting : The transmission by a cable system of a pre-existing broadcast signal (cable re-transmission) and the transmission by cable of an original signal (cable origination). Both forms of cable casting require consent from the owner of copyright in any work included in the cable signal.

The 'Droit De Site' is related to the distribution right. It gives the author of original works of art and manuscripts the right to a continuing interest in any sale of the work subsequent to its first sale. The public lending right is a much later development in copyright law. It is associated with the increase in tread in borrowing from public libraries. This is based on the concept that large scale borrowing from libraries, especially of books, means that a very substantial portion of all potential readers borrow a copyright work rather than buy it, and that from the large number of people who read the book having borrowed it from a library, the author only gets one royalty from the sale of the copy to the library.

In conclusion therefore, what is of prime importance to the holder of copyright is the content of rights that he acquires in the copyright as property. With the nature of copyright as a chose, in action, the copyright owner acquires an affirmative claim or right against persons generally by way of a monopoly or exclusive right in the reproduction and publication of the work in question and the pecuniary benefits therefrom.

Hence if a musician records a song, the law recognises that he has an interest not in merely the lyrics and the words, but in the skill and labour involved in the choice of words. He may sell the recording and the purchaser of a copy can make personal use of that copy as he pleases. The law recognises further that only the original author has the right to reproduce the original recording and sell the copies thus reproduced.

FOOTNOTES

1. CHEGE J.W. COPYRIGHT LAW AND PUBLISHING IN KENYA P.9
2. BREYER P. 284 REPRINTED IN DOCK 78.
3. LADDIE PRESCOTT AND CITORIA, MODERN LAW OF COPYRIGHT P.2
4. STEWART S.M. INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS (2nd ed) P.4
5. IBID.
6. LAHORE AND GRIFFITH. COPYRIGHT AND THE ARTS IN AUSTRALIA (Quoted from Article 1. section 8).
7. (1769) 4 BURR 2303; 98 E.R 102.
8. JOHNSTON D.F COPYRIGHT HANDBOOK P.5
9. MWANGI M.N (DISSERTATION) LL.B 1992 P.12
10. BLANCO WHITE T.A et al PATENTS TRADE MARKS, COPYRIGHT AND INDUSTRIAL DESIGNS P.112.
11. IBID.
12. HERBERT S.W. (editor). THE COPYRIGHT DILEMMA P.65 (Quoted from Irwin Karp IN HIS paper " The Author's view of the new copyright Act").
13. COPINGER AND SKONE JAMES ON COPYRIGHT (11th Edition) P.4
14. GOODEVE ON PERSONAL PROPERTY P. 374
15. MWANGI K.F (1986) DISSERTATION LL.B
COPYRIGHT LAW: THE NATURE AND SCOPE UNDER THE COPYRIGHT ACT OF KENYA P.17.
16. IBID.
17. CORNISH W.R. INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS. P.11.
18. OKECH OWITI: THE TRANSNATIONAL CORPORATION AND TRANSFER AND DEVELOPMENT OF TECHNOLOGY: THE KENYA CASE.
19. THE UNIVERSITY OF LONDON PRESS V THE UNIVERSITY TUTORIAL PRESS.
20. LADDIE PRESCOTT AND VICTORIA, THE MODERN LAW OF COPYRIGHT P.3

21. IBID note 13 P. 120.
22. IBID note 17 P.283.
23. WARIWICH FILM V ELSINGER (1968) icg 508.
24. STEWART S.M. INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS (2nd ed) P.7.
25. IBID.
26. W.I.P.O GUIDE TO BERNE : Para 1 and Section 6(1) of the U.K COPYRIGHT, DESIGNS AND PATENTS ACT. 1988.
27. MUGO K.F. COPYRIGHT LAW: THE NATURE AND SCOPE UNDER THE COPYRIGHT ACT OF KENYA (Dissertation) LL.B. 1986.

CHAPTER TWO

THE COPYRIGHT LAW IN KENYA: WHAT DOES IT COVER?

INTRODUCTION

The substantive framework of copyright law in Kenya is embodied in the copyright Act, chapter 130 laws of Kenya. Section 20 of the copyright Act (herein after referred to as the Act) provides that "no copyright or right in the nature of copyright shall subsist otherwise than in accordance with the Act".

This means that the common law relating to copyright is not applicable to Kenya. Any copyright can only emanate from the statutory provisions of the copyright Act. The import of this section is that an individual who produces any work that is subject to copyright protection can only get such protection after due process of the procedures and requirements laid down in the Act.

The exclusion of the common law with all its diversity and elasticity has been held to constitute a major drawback to the Kenya copyright law (This will be discussed in chapter III under limitations of the Kenyan copyright law). The rights rested on copyright owners are those provided for under the Act. This is an essential feature of the contents of rights in copyright which are integral in assessing an analysis of the scope and application of Kenyan copyright law.

2.1 THE SUBJECT MATTER OF COPYRIGHT.

Under section 3(1) of the Act, the following works are capable of protection under the law.

- a. Literary works.
- b. Musical works.

- c. Artistic works.
- d. Audio-visual works
- e. Sound recordings
- f. Broadcastings.
- g. Programme carrying signals.

The Act goes on to define "works" as including translations, adaptations new versions, or arrangements of pre-existing works, and anthologies or collections of work which, by reason of the selection and arrangement of their content present an original character¹.

Literary works are defined to include, irrespective of literary quality: novels, stories and poetical works, plays, stage directions, film sceneries and broadcasting scripts, textbooks, treatises, histories, biographies, essays and articles, encyclopedias and dictionaries, letters, reports, memoranda, lectures, addresses and sermons. Written law and judicial decisions are however excluded from this protection².

Musical works are defined to include, irrespective of musical quality, works composed of musical accompaniment³.

Artistic works mean, irrespective of artistic quality, the following works or works similar thereto: paintings drawings, etchings, lithographs, woodcuts, engravings and prints, maps, plans and diagrams, works of sculpture, photographs not comprised in audio-visual works, works of architecture in the form of buildings or models; and works of artistic craftsmanship, pictorial, woven tissues and articles of applied hand craft and industrial art ⁴.

Audio-visual work is described as a fixation in any physical medium of images either synchronized with or without sound from which a moving picture may be any

means be reproduced and includes video tapes, and videogrammes but does not include a broadcasts ⁵.

Sound recording is defined to mean the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced but does not include a sound track associated with audio visual works ⁶.

Broadcasting works in terms of copyright protection mean a sound or television broadcast of any material and includes a diffusion over wires but does not include emission of programme carrying-signals to satellite ⁷.

Finally, the act defines programme-carrying signals under section 11(2) as electronically generated circuits transmitting live or recorded material consisting of images, sounds or both, in their original form or any form recognisably derived from the original, and emitted to or passing through a satellite situated in extra-terrestrial space.

Section 3(2) of the Act is the operative section for the commoditization of literary, musical and artistic works. Two conditions must be fulfilled for these works to be eligible for copyright protection.

- a. Sufficient effort must have been expended in making the work to give it its original character and,
- b. The work has been written down recorded or otherwise reduced to material form.

The requirement of materiality denotes that if any idea however expressed is not reduced into a tangible form, no copyright, protection can arise. originality and materiality have not been held

defined in the Act but have been in the case of originality, to mean "the form in which the idea or opinion is expressed" ⁸.

However, the court in illustrating material form found that no copyright existed in an advertisement made up of works taken from other advertisements ⁹.

The subject matter of copyright may be the subject of an affirmative claim, the right against persons generally by way of an exclusive right in reproduction, publication and any pecuniary benefits therefrom. In this sense therefore, copyright can be said to be a creation of the legal machinery. The rights held by an owner of copyright are subject to the limitation of the provisions of the copyright Act.

2.2. WHO IS ENTITLED TO COPYRIGHT PROTECTION.

Under the copyright Act, copyright protection can only be accorded to the author of the literary, artistic or musical work, or the person or authority by whom the particular work subject to copyright was undertaken.

It is therefore important to establish who or whom does the Act contemplate as an author. The Act describes an author depending on the nature of the work. In the case of a cinematograph film or sound recording means the person by whom, the arrangements for the making of the cinematograph film or recording was made ¹⁰.

In the case of a broadcast transmitted from within a country, means the person by whom the arrangements for the making of the transmission from within the country were undertaken¹¹ In the case of a programme carrying signals, means the person who decides what the programme

the signal emitted to a satellite or passing through a satellite will carry ¹².

It is surprising that the Act does not define an author in relation to literary, artistic or musical works in which case therefore resort is had to the dictionary definition, a limitation which will be discussed in context in the next chapter.

The meaning of 'Author' is varied depending on the subject of authorship in general, though the author is the person who first or originally creates the work subject to copyright protection. The author of the subject matter of copyright is entitled to the first ownership of copyright subject to licensees, assignees e.t.c. Under Kenyan Law, the originator of the subject matter is presumed to have the first ownership of copyright. Under section 4(1) of the Act, Copyright under the Act can only be confirmed to an author or authors or joint authors who at the time when the work is made is or are:-

- a. An individual who is a citizen of or is domiciled or resident in, Kenya; or
- b. A body corporate which is incorporated under or in accordance with the laws of Kenya.

If the person is under employment of the government of Kenya and he creates any work subject to copyright protection during and in the course of his employment, the author of such subject matter, shall be deemed to be the government of Kenya ¹³.

In similar vein, the same applies to certain individuals under the employ, direction or control of an international organisation.

The copyright of the subject matter and the author thereof shall be deemed to be that of the international organisation.

However, unlike the extent or duration conferred on individual authors (fifty years), section 6(2) of the Act provides that copyright conferred on Government and international bodies on literary artistic and musical works, other than a photograph, shall subsist until the end of the expiration of twenty-five years from the end of the year in which it was first published.

It is also important to note that an author may also include a translator a compiler, a composer or artist e.t.c as long as what has been created satisfies the conditions for protection under the Act. Joint authors are also entitled to copyright protection ¹⁴.

The act defines jointly produced work as "a work produced by the collaboration of two or more authors in which the contribution of each author is not referable from the contribution of the author or authors". The distinguishing feature of such work is the common effort and corporation in doing or producing the work such that no distinction can be discerned of each persons contribution ¹⁵.

Such copyright is owned in common and one of the authors cannot grant licences to others without the consent of the other author. In the case of the duration of copyright in the work of joint authorship, the Act provides that such shall be calculated from the date of the death of the author who dies last, whether or not he is a qualified person ¹⁶.

The government's entitlement to copyright derives from those creation or works created by employees of the government during their period of employment, and in cases where the government itself takes the initiative to sponsor or commission such creative works in for instance research programmes. Kenya also recognises the existence of copyright protection of other countries listed in the first and third schedule to the Act and of other international bodies protected under the umbrella of the Geneva protocol, listed in the second schedule to the Act.

Any work that does not fall within the ambit of copyrightable matter is not subject to protection under the Act.

2.3. THE NATURE OF COPYRIGHTS IN KENYAN LAW.

Copyrights confer a limited monopoly qualified in public interest while the holder of copyrights is entitled to stop anyone from copying or otherwise unlawfully exploiting the work, copyright protection offers him no protection against the person who designs or writes his own independent work.

The specific rights granted under the copyright Act are laid out in section 7 thereof. The substantive framework of these rights under section 7(1) hold that "copyright in a literary musical or artistic work or in an audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts, namely the reproduction in any material form, the distribution of (sic) the public for commercial purposes of copies by way of sale, rental lease, hire, loan or similar arrangements, the communication to the public and the broadcasting, of the whole work or a substantial part

thereof either in its original form or in any form recognizably derived from the original;...".

Subsection (2) of section 7 provides copyright protection for works of architecture in the control of erection of buildings while sub-section (3) confers upon the author, the right, during his lifetime, to claim authorship in the work and to object to any distortion, mutilation or other modification to the work which would be prejudicial to the author's reputation of honour.

In respect of sound recording, section 9(1) provides that copyright shall be the exclusive right to control the direct or indirect reproduction in any material form or the distribution to the public of copies for commercial purposes by way of sale, rental, lease, hire, loan or any similar arrangements or the communication to the public or the broadcasting of the sound recording in whole or in part either in its original form or in any form recognisably derived from the original.

Under section 10 of the Act, copyrights in broadcasting is the exclusive right to control the recording of re-broadcasting of the whole or a substantial part of the broadcast and the communication to the public in places where an admission fee is charged for the whole or a substantial part of the television broadcast either in its original form or in any form recognisably derived from the original.

The nature of copyright for programme - carrying signals are, under section 11(1) of the Act, the exclusive right to prevent the distribution in Kenya or from Kenya or such signals by any distributor for whom these signals were not intended by their author.

LAWFUL USE OF COPYRIGHTS.

Copyright protection does not prevent the use of the protected work for certain specified purposes. The rationale behind this exclusion is that the complimentary aims of copyright are the protection of individual proprietary interest in the subject matter of copyright and the idea of the stimulation of creativity upon the public. It is also an attempt to strike a balance between the private interests of the innovator and the public at large. The Act therefore allows persons who have no proprietary interests or rights in the subject matter at hand to a limited free use of copyright material.

This usage neither requires authorization by nor payment of any royalties to the copyright owner. Section 7(1) of the Act stipulates that copyright in any work shall not include the right to control the doing of any of those acts by way of fair dealing for purposes of scientific research, private use, criticism or review or the reporting of current affairs.

Section 7(1) (c) allows anyone to do without authorization the reproduction and distribution of copies or the inclusion in any work, film or broadcast situated in a way or place where it can be viewed by the public.

Section 7 (1) (d) provides that the incidental inclusion of an artistic work in a film or broadcast is free. The reproduction of a broadcast and the use of that broadcast in a school registered under the Education Act or any such university established under an Act of parliament will not result in infringement.

Under section 7(1) (e) someone may freely include in a collection of literary or musical works of not more than

two passages such other work subject to copyright, providing such work is designed for use in a school registered under the Education Act or a University established under an Act of parliament. However there must be an acknowledgement of title and authorship of the work.

Section 7(1) (f) makes it lawful to broadcast a work if the work is intended for purposes of systematic instructional activities, while clause (h) allows the importing of a sound recording of a literary or musical work and the reproduction of such sound recording, if intended for retail sale in Kenya and provided fair compensation is paid to the owner of the relevant part of the copyright in the work.

According to section 7(1) (i) one is also free to read or recite in public or in a broadcast by one person any reasonable extract from a published literary work providing that it is accompanied by sufficient acknowledgement.

Any work produced by or under the direction or control of the Government or by public libraries, non-commercial documentation centres and scientific institutions, for public interest may, under section 7(1) (j) be produced freely and no revenue may be derived therefrom nor any admission fee charged.

Section 7(1) (K) states that the reproduction of a work by or under the direction or control of a broadcasting authority is free if the reproduction or any copies thereof are intended exclusively for lawful broadcast by that broadcast authority, and also if the reproduction and any copies thereof are destroyed within six months of reproduction or any longer period agreed under a

contract. The reproduction of an exceptional documentary character may however be preserved but may not be used without the authorization of the copyright owner.

Literary, musical or artistic work or audio-visual works already made lawfully accessible to the public may, under section 7(1) (l) be broadcasted, providing the owner of the broadcasting right receives fair compensation determined, in the absence of agreement, by the authority established to deal with such works.

One may also, under section 7(1) (m) make free use of a judicial proceeding or of any report of such proceeding.

2.5 LICENCES, ASSIGNMENTS AND TESTAMENTARY DISPOSITIONS.

A "Licence" is defined in section 2(1) of the Act as a lawfully granted licence permitting the doing of an act controlled by copyright. There are two types of licences that can lawfully be acquired over copyright protected work.

- i. Licence by agreement, and
- ii. Compulsory licence ¹⁷.

A licence may also be exclusive or non-exclusive. A licence by agreement comes into being upon negotiation by the copyright holder and the licensee. Under section 14(4) where a licence is granted by contract, the licence shall not be revoked either by the person who granted it or his successor in title except as the contract may provide or by further contract.

A non-exclusive licence differs from an exclusive licence in that it need not be in writing to devolve. It may be oral or be inferred from conduct. The Act does not

however make provision for the duration of such licence and this is left for the parties to decide.

Section 17 of the Act empowers a competent authority to compulsorily grant a licence under the following circumstances:-

- i. In any case where it appears to the competent authority that a licensing person or body is
 - a. Unreasonably refusing to grant licences in respect of copyright or
 - b. Is imposing unreasonable terms or conditions in the granting of such licences. The competent body may direct that as respect the doing of any act relating to the work which the licensing body is concerned, a licence shall be deemed to have been given and the licensing body shall fix the fee and if this is not done then the competent body shall determine the fee to be paid or tender the same to the copyright holder.

The rationale of compulsory licences is the need for copyright law to balance the interest of the copyright owner and the public at large. It provides copyright protection to the owner and the public at large. It provides copyright protection to the owner in the hope that he shall apply the work to the benefit of the wider public. If the copyright owner does not utilise the work to the public's benefit then the law comes in place and compulsorily takes away the licence granted or accorded and in its place a reasonable fee is given as compensation. In this case the right to copyright protection is transformed into a right to receive reasonable fees.

Under section 14(3) an exclusive licence shall have effect only if it is in writing signed by or on behalf of the licensor. For the non-exclusive licence necessity for the licence to be in writing is not a pre-requisite for validity. In relation to co-owners, where one of them grants a licence, this has the effect of binding his co-owner too.

The Act, under section 14(6) also makes it possible to effectively grant a licence in respect of future work, or an existing work in which copyright does not yet subsist and the prospective copyright in any such work shall be transmissible by operation of law as movable property.

Assignment of copyright is provided for under section 14 of the Act. Subsection (2) thereof provides that an assignment may be limited as to apply to some only of the acts which the owner of the copyright has the exclusive right to control, or to a part only of the period of the copyright, or to a specified country or other geographical area.

By testamentary disposition, the holder of copyright transfers his right to his successor in title by way of transmission. Section 14(7) provides that a testamentary disposition of the material on which a work is first written or otherwise recorded shall, in the absence of contrary indication, be taken to include the disposition of any copyright or prospective copyright in the work which is vested in the deceased.

2.6 DURATION OF COPYRIGHT PROTECTION.

The copyright Act has provided for the duration of the subsistence of copyright protection, under three factors.

The first is on the type of work which is the subject matter of copyright protection. The second is with reference to the proprietor of the copyright and the third is in relation to the country where the subject matter is created.

In relation to the subject matter, section 4(2) establishes five (5) domains, and gives the time frame within which copyright protection shall subsist. These are :-

- a. For literary, musical or artistic work other than photographs, the duration of copyright is determined fifty years after the end of the year in which the author dies.
- b. For audio-visual works and photographs, the duration is determined fifty years after the end of the year in which the work was first made lawfully accessible to the public.
- c. For sound-recordings, the duration is determined fifty years after the end of the year in which the recording was made.
- d. For broadcasts, the duration is determined fifty years after the end of the year in which the signals were first emitted by satellite.

In the conferment of copyright protection in relation to a proprietor of copyright, a distinction is made between single and joint authorship. Section 4(4) provides that in the case of a work of joint authorship, reference in relation to the duration provided for under section 4(2) shall be taken to refer to the author who dies last, whether or not he is a qualified person under the Act.

The Act also provides, under section 4(3) that in the case of anonymous or pseudonymous literary, musical or artistic works, the copyright therein shall subsist until the end of the expiration of fifty years from the end of the year in which it was first published. However the proviso to the section states that in the event of the identity of the author becoming known, the term of protection of a copyright shall be calculated with reference to the procedure laid down in section 4(2).

Section 6(2) gives copyright protection for works of Government and international bodies for literary, musical or artistic work, other than photographs, protection for a period of twenty five (25) years from the end of the year in which it was first published. Subsection (3) of the same section however confers a duration of fifty years on works of Government and international bodies in case of any audio-visual work, photograph, sound recording, broadcast or programme-carrying signal.

The third criteria of duration of protection is provided for under section 5 of the Act with reference to the country of origin. Under this section with the exception of broadcasts, other works which include literary, musical or artistic work or any audio-visual work first published in Kenya, or a sound recording made in Kenya, or a programme-carrying signal emitted to a satellite v from a place in Kenya, is subject to protection for the same duration as that provided for under section 4(2) of the Act.

Before the turn of the century the various countries which were members of the Berne convention of 1886, had various terms of duration which were not standard. However presently a majority of the member states have

accepted a term of the life of the author and fifty (50) years after his death, which was accepted and written into the Berne convention in 1908. Though this met with several reservations, in 1948 the fifty years post death term was made a convention obligation¹⁸.

However, the life of the author and fifty years after his death is not applicable to an original owner which is not a natural person but a legal entity. In such case, the term is calculated from the time the work is made accessible to the public.

2.7 INFRINGEMENT OF COPYRIGHT.

The copyright Act has not made a specific definition of infringement, but has instead defined "infringing copy" as meaning, a copy whose manufacture constituted an infringement of copyright or the rights of the performer and in case of a copy which is imported, would have constituted infringement of copyright, or the rights of the performer had the copy been manufactured in Kenya by the importer¹⁹.

The Act states what infringement of copyright is. This means that infringement of copyright involves the doing or performance of authorization of those acts which are the negation of the rights of the copyrights owner subject to the Acts of fair dealing provided for under section 7 of the Act.

Section 15(1) of the Act enumerates the particular acts which constitute infringement as :-

- a. Any act the dealing of which is controlled by copyright.

- b. Importing or causing to be imported otherwise than for private use, an article which one knows to be an infringing copy.
- c. Any act done without the authorization of the performer which infringes his rights by broadcasting his performance or, communication to the public of his performance or, fixation of a previously unfixed performance or the reproduction of a fixation of the performance.

In the absence of an express authority from the holder of copyright, and in the absence of the lawful fair uses authorised under section 7(1) of the Act, any other dealing in copyright work i.e reproduction, distribution to the public, rental, lease, hire loan or similar arrangements, communication to the public and the broadcasting of the whole work or a substantial portion thereof either in its original form or in any form recognisably derived from the original, would constitute infringement.

2.8 REMEDIES FOR BREACH OF COPYRIGHT.

An action for the breach of copyright can only be brought by the owner of copyright. Section 15(2) of the Act provides that infringement of copyright shall be actionable at the suit of the owner of copyright.

In essence therefore no person can claim remedies for infringement of copyright unless he can establish that, or the court may presume that, he is the holder of the title thereof. The remedies available are stipulated under subsection (2) of section 15 of the Act as follows :-

- a. The relief by way of damages, injunction, accounts or otherwise that is available in any corresponding proceedings in respect of infringement of other proprietary rights, and
- b. Delivery to the plaintiff of any article in the possession of the defendant which appears to the court to be an infringing copy or any article used or intended to be used.

A further remedy is provided for under section 15(4) (b) which empowers the court to "... award such additional damages by virtue of this sub-section as the court may consider appropriate in the circumstances".

The remedies may further be broadly categorised as civil, criminal and administrative. The civil remedies for infringement of copyright are of two kinds. Preventive and compensatory. The preventive remedies are the power of search and seizure of infringing material and an injunction to stop the defendant from committing breaches or further breaches. The power of seizure serves the purpose of discovering infringing copies of the work and the equipments for making them and preventing infringements or further infringements by seizing them.

Injunctions are granted in some cases to prevent an infringement of copyright before it is committed. The granting of an injunction is always at the discretion of the court and the court has to weigh the possible damage to the plaintiff if the injunction is not granted against the possible damage to the defendant if the injunction is granted. The plaintiff must prove a casual connection between the identity or similarity of the defendants work and his own.

In the case of Sapra Studia v Tip Top Clothing Co²⁰. The defendants had manufactured and sold scarves similar to those of the plaintiff infringing the latter's copyright. The court ruled that an injunction is an appropriate remedy in copyright and issued an injunction to restrain further sales of the scarves.

Compensatory remedies are : the award of damages to the plaintiff, delivery up and an order for accounts. Damages are the main remedy in civil infringement actions. These may be damages actually suffered which must be proved, or exemplary damages. The quantum of damages is measured with respect to the injury suffered by the plaintiff.

Delivery up is an additional remedy consisting of an order to hand over infringing copies and the machinery made or used for the purpose of making these infringing copies. This remedy, like an injunction, is granted or awarded at the discretion of the court.

An order for accounts mainly entails directing the defendant to account for all the profits that he has gained as a result of the sale or commercialisation of the infringing work. The profits thereof are then awarded as compensation to the plaintiff.

Another remedy which may be awarded by the court, is embraced under section 15(2) (a) of the Act in the words " the relief ... of otherwise that is available in any corresponding proceedings in respect of infringement of other proprietary rights" This remedy is known as the Anton Pillar order²¹.

In this case the court, without prior notice to the defendant, allows the plaintiff accompanied by his lawyer

to inspect the premises of the defendant and seize infringing copies or make copies or take photographs which are relevant to his case.

To obtain such an order, the plaintiff must show that :-

- (1) There is a very strong prima facie case of infringement.
- (2) The potential damage to the plaintiff is very serious.
- (3) There is clear evidence that the defendant has in his possession materials or documents which prove the infringement; and
- (4) There is a real possibility of the defendant removing the incriminating evidence if he is forewarned by an ordinary hearing of the application inter-partes.

Criminal remedies come into play where infringement is likened to theft of intellectual property and involves sanctions and fines and also imprisonment. They may also include seizure followed by delivery up of the infringing copies or destruction of such copies.

Administrative measures are mainly aimed at preventing the importation of infringing copies and this is mainly dealt with by the customs authorities. The Berne Convention provides for seizure of infringing copies in any country of the union where the work enjoys legal protection ²².

Section 15(3) of the Act however exempts any liability on the part of the defendants where it is proved that at the time of the infringement, the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work to which the action relates. This position was re-stated in the case of Gaston Harbour v Bwavu Mpologoma Co-operative Ltd²³, where the court held that the co-defendants were only "innocent infringers" and were therefore exempt from paying damages.

In such a situation, the plaintiff will only be entitled to an account of profits. The court may award further remedies as it deems fit. In the Bwavu Mpologoma Co-operatives Case²⁴, the court ordered that the plaintiffs be compensated by the amount which they would have earned had they been in charge of the work with their own plans.

As copyright is a proprietary right, in cases of direct infringements, ignorance is not a defence, or the plaintiff does not have to show that the defendant knew he was infringing. On the other hand, in the case of indirect infringements which are committed by sale, importation or other dealings in copies of the work, as a rule the plaintiff has to show that the defendant knew that the goods he was selling or importing were infringing copies.

However in cases of indirect infringement, the burden of proof becomes vital in two respects; proving that the plaintiff is the copyright owner and proving that the defendant knew he was handling infringing material.

The Act has however made an exception to the granting of an injunction under section 15(5) in the case of

proceedings for infringement of copyright which requires a completed or partly built building to be demolished or prevents the completion of a partly built building. In such a case no injunction can be awarded, and damages shall be an adequate compensation.

All proceedings for recovery of damages for infringement of copyright must be made to the High Court²⁵.

COPYRIGHT OFFENCES.

The offences and the subsequent penalties for a person who does any of the acts prohibited by copyright are provided for under section 16 of the Act.

Section 16(1) of the Act provides that any person who, at a time when copyright or the rights of a performer subsists in a work -

- (a) Makes for sale or hire any infringing copy; or
- (b) Sells or lets for hire or by way of trade exposes or offers for sale or hire any infringing copy; or
- (c) Distributes infringing copies; or
- (d) Possesses otherwise than for his private and domestic use any infringing copy; or
- (e) Imports into Kenya otherwise than for his private and domestic use any infringing copy; or
- (f) Makes or has in his possession any contrivance used or intended to be used for the purpose of making infringing copies, shall be guilty of an offence.

Subsection (2) of the same section makes it an offence for anyone to perform or outhorise the performance of any literary, musical, audio-visual or a sound recording in public while copyright subsists, without the authorization of the owner or holder of copyright.

However the stated offence can be negated by proving that he had acted in good faith and had no reasonable grounds to suppose that copyright existed.

The Act makes a presumption under section 15(3) where a person found in his possession, custody or control, three or more copies of a work in the same form, shall be presumed to be in possession of imported copies otherwise than for private use unless the contrary is proved.

The penalties for the above offences are laid out in section 15(4), (5) and (6). Section 15(4) provides that any person guilty of an offence under paragraph (a) (c) or (e) of section 15(1) shall be liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding five years or both.

Section 15(5) provides for a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding five years or both, for any person guilty of an offence under paragraph (b) or (d) of section 15(1).

Section 15(6) provides a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding five years or both for any person guilty of any offence under paragraph (f) of section 15(1).

The court is empowered under subsection (7) of section 15, to order the destruction or delivery up to the copyright owner in question, any article which appears to the court to be an infringing copy, or an article used or intended to be used in making infringing copies. The court can act under this section irrespective of whether the person charged with the offence is convicted or not.

A limitation period of three (3) years is imposed under section 18(a) within which a charge has to be brought under section 17 of the Act. Section 18(b) provides that such proceedings can only be placed before the High Court or the Resident Magistrates Court. It is also noteworthy to realise that no proceedings for an offence under this section shall be instituted without the consent of the Attorney General.

The penal code ²⁶ recognises copyright as a trademark under section 380 (b). Under section 381(1) of the penal code, any person who forges or counterfeits a trade mark or applies, attaches or encloses or places any chattel falsely or to which any forged or counterfeit trade mark has been applied is guilty of a misdemeanour, unless he proves that he acted without intent to defraud.

Under section 380(2) every person guilty of such misdemeanour shall forfeit all chattels and articles and every instrument used in such a process.

FOOTNOTES

1. Section 2(1), cap.130 laws of Kenya.
2. I bid
3. I bid
4. I bid
5. I bid
6. I bid
7. I bid
8. MCCRUM V EISNER (1917) 87 LJ ch. 99.
9. DRABBLE (HARROLD) LTD V HYCOLITE MANUFACTURING CO.LTD (1928) 44 J.L.R 264.
10. Section 2(1) cap 130 laws of Kenya
11. I bid
12. I bid
13. Section 6(1) cap 130 laws of Kenya
14. I bid note 10.
15. Mugo K.F Copyright law: The nature and scope under the copyright Act of Kenya. Dissertation LL.B, 1986, P.35.
16. Section 4(4) cap 130 laws of Kenya.
17. Section 14(1) cap 130 laws of Kenya.
18. Stewart S.M International copyright and neighbouring rights P.90.
19. Section 2(1) cap 130 laws of Kenya.
20. (1971) E.A. 489.
21. ANTON PILLER V MANUFACTURING PROCESSES (1975) ch.55.
22. Article 16(1) of the Berne Convention.
23. (1958) EA 549.

24. Supra note 22.
25. Section 22 cap 130 laws of Kenya.
26. Cap. 63 laws of Kenya.

CHAPTER THREE

THE LIMITATIONS AND SHORTCOMINGS OF THE COPYRIGHT ACT.

INTRODUCTION.

All laws are enacted in contemplation of defined circumstances. The main function of law is to regulate the existing socio-economic and political relations in society. It is therefore necessary to assess the structure, efficacy and content of the existing law relating to intellectual property in the ever changing dynamism that social conditions bear, and as such, time has rendered functionally incompetent in the face of changing societal structures.

The limitations existing in the copy right Act will therefore be discussed in the light of the particular field where it is envisioned that the Act ought to be reviewed in order to attain a certain level of efficiency in relation to the requirements thereto.

3.1 THE SUBJECT MATTER OF COPYRIGHT

The copyright Act protects seven (7) categories of subject matter within its ambit. section 3(1) of the Act stipulates the types of works eligible for the copyright protection. A major category of work not included is computer programs, or software.

The non-protection of computer software is a major limitation in technology. Use of computers is rapidly emerging as a major form of data and information storage, or transmission of information. the absence of protection to programs or software that aid in computer technology is a major lacuna in the copyright Act that needs redress.

Computer programs are not even protected under the industrial property Act as patents¹. A computer may be defined as an equipment or tool used for handling and processing a large amount of scientific data, with great speed and accuracy. In order to accomplish this, a series of instructions are fed into it in order to process the raw information. These instructions are termed in the language of computer as a "Program".

A program may hence be defined as a series of instructions for controlling or conditioning the operations of a computer so as to make it perform certain desired tasks.

A program may be written or printed as sequences of instructions in some language or drawn as logical flow diagrams, a term called algorithm. They may be punched as holes in cards or paper tape and may be stored as recordings on magnetic tapes, discs or cards².

Some other forms of storage may include optical, electro static or acoustic devices.

Although large scale use of computers in Kenya started only a few years ago, significant progress and development have been made ³. It is the governments intention to introduce computer education in the schools education curriculum.

The surprising wording of the copyright Act is that whereas it does not include computer programs as a subject matter of copyright protection, it nevertheless does define an author in relation to a computer program as " The person by whom the arrangements for the making of the audio-visual work, computer program or sound recording were undertaken ⁴.

This is a curious clause in that the Act does recognize the existence of an author of computer programs but not the product of his intellect. However, some writers have argued that a computer program is indeed protected under the Act as an artistic work. It is argued that "As regards artistic works, we have indicated that a computer program may be drawn as a logical flow diagram i.e. an algorithm. It may therefore be argued that an algorithm or flow chart is an artistic work within the meaning of section 2(1) of the Act so long as those conditions as to sufficient effort and reduction to material form-fixation are fulfilled"⁵.

It is however inappropriate to embrace this argument because the Act does not provide any particular nature of rights conferred on computer programs nor what would amount to infringements, neither does it lay down any penalties for breach or infringement with respect to computers as it does for the other seven (7) categories of works. In any case, the Act specifically states that no copyright or right in the nature of copyright shall subsist otherwise than in accordance with the Act or some other enactment in that behalf ⁶.

Since computer programs are not specifically listed as protected works, they are outside the ambit of the Act and this exclusion is a major limitation of the copyright act.

It has on the other hand been argued too that computer programs may be protected as trade-secrets under the law of confidence, or laws of contract, a method which has proved to be inadequate, especially in the countries with advanced development in computer technology ⁷.

The Kenyan legal system has not evolved any formal rules or institutions to deal specifically with computers, a phenomenon affecting regulations in science and technology in general. In relation to protection of computer works, reference can only be made to existing legal rules and institutions in so far as they may, incidentally apply to computer-based relationships.

The bone of contention in the quest as to whether computer programs ought to be protected by copyright has also arisen out of controversy as to whether programs can be regarded as literary works and thus be protected under existing copyright law. This question arose out of the holding in the case of TRUST CO LTD. V. W.W COMPUTER LTD⁸. It was held that copyright can exist in a program being a literary work. A computer program however cannot be regarded as a literary work since it is not, in its final form, capable of perception by the human eye.

If programs are accepted as literary works, to qualify for copyright protection, they must meet the eligibility requirements provided for under the Act. They must therefore be reduced to writing and be in a tangible form.

It has been controversial as to whether the various stages of program development can be treated as mere reproduction of the original program or as adaptations resulting in the creation of new works⁹. However, a working group of the world intellectual property organization (W.I.P.O) was of the view that the conversion of a source program into an object program (object code) is comparable to the transformation of a written text into binary code, and such transformation could be regarded as an adaptation rather than a mere reproduction¹⁰.

The committee however stated that this was not a serious set-back since computer programs would not be alone in this ¹², to detect infringers would not be entirely impossible as each program has specific characteristics, measurable quanta, and patterns of logic that permit its identification and thus proving that a program is a copy of the original is possible.

In conclusion therefore, there is a need to redress the deficiency of protection of computer programs in order to enhance Industrial and commercial development through the application of computer technology.

3.2 THE APPLICABLE LAW

Section 20 of the copyright Act provides that no copyright, or right in the nature of copyright, shall subsist otherwise than by virtue of the Act or some other enactment in that behalf.

This section therefore expressly excludes the common law relating to copyright protection. Therefore no right can subsist unless procedures or subject matter as provided for in the Act is observed. The exclusion of the common law relating to copyright implies that works protectable under the common law would not get recognition or protection in Kenya.

In an action for breach or infringement of copyright, an author would as a result therefore, be hard pressed to show that the copyright he has is not in the nature of common law rights which have been abrogated by the Act. Common law rights however need no registration or enactment for existence. these rights developed over a long period in England and copyright owners relied on

their common law rights to protect their copyright in perpetuity after the copyright term give by statute expired ¹³.

Probably with an aim of limiting perpetuity of the rights coffered by copyright, the U.K. copyright Act of 1911 was enacted. Its aims were to encourage the diffusion of socially useful knowledge to the wider public and not only protecting the interest of the copyright owner such that the copyright owner benefits from his copyright during the copyright term only and not in perpetuity.

3.3. THE REGISTRATION PROCESS.

The copyright Act makes neither the provision nor the procedure by which copyright protection can be acquired. There is no formal requirement for registration and it is not easy to ascertain what works are protected by copyright.

But the Act provides that the burden of proof as to whether a copyright does not exist rests with the defendant. Thus there is a presumption in favour of the plaintiff, that copyright exists over a certain work. It is argued that a mere absence of express provisions for registration or the non deliberation of the registration requirement has not brought proof that the absence of registration procedures results in limited works being made.

The Act does not provide a method, process or requirement for registration of copyright. In spite of this glaring absence of procedure, the Act confers copyright¹⁴. In all that work which is eligible for copyright protection under section 3 of

the Act. It would have been easy to determine subsistence of copyright and ownership if it were a requirement that copyright be registered.

Probably it would have been prudent to make provisions in the Act similar to those obtaining in the Books and Newspapers Act ¹⁵, where in any book or newspaper, before it can be placed in the market for sale must be registered with the registrar of books and newspapers by filling for instance a return of Book¹⁶, by this process it would be deemed that a work is dully registered for purposes though other than copyright registration.

In a return of Books, the applicant is required to state the proprietor of copyright, but the mere stating thereof does not connote copyright registration. This assertion is supported by the fact that in proving infringement of copyright, one need not show such registration as evidence of subsistence or ownership of copyright ¹⁷.

Under the copyright Act, copyright inheres automatically without any formalities e.g deposit of registration. In similar vein international obligations do not make such formalities a pre-condition for copyright protection ¹⁸.

The Act, under section 15(6) always presumes the ownership or subsistence of copyright in favour of the plaintiff unless the defendant disputes the plaintiff's claim.

The essential factors that are required to be proved in a claim for copyright ownership must meet the criteria laid down in section 3(2) of the Act. What is essential is that the work must qualify for copyright protection, i.e that sufficient effort

must have been expended on marking the work to give it an original character, and the work has been written down, recorded or otherwise reduced to material form. Under section 3(3), The Act even confers copyright protection to works created out of an infringement in some other work.

Any name appearing on a copy or copies of a copyright work and purporting to be the name of the author is presumed to be the true name of the owner ¹⁹.

In essence that is all that the plaintiff is required to show. What may be inferred, therefore is that proof of ownership under the copyright law is subject to the provision of the Act and is largely an issue of factual determination by the court.

The absence of clear and express formalities for registrations is however one of the limitations that ought to be remedied if true meaning to be given to the letter and spirit of the purpose of the Act.

3.4 AUTHORSHIP IN RELATION TO LITERARY, ARTISTIC AND MUSICAL WORKS.

The copyright Act has a limitation in that definition of "author" is not exhaustive. Whereas the Act defines "author" in relation to sound recordings, broadcasts, audio-visual works and program-copying signals, It does not define author in respect of literary, musical and artistic works.

Therefore the dictionary definition is used as a rough or guiding principle of the definition of the word author. The longman Dictionary of contemporary English defines the word "author" as "A person who begins or creates a thing". The problem of the dictionary definition is that it cannot cover

certain categories of works. For instance a photograph is an artistic work, but who is the author? is it the one who person who presses the shutter or is it he organizes for the photograph to be taken? or where the photograph of a person is taken, the taker of the photo, or the person who is taken?

The dictionary definition cannot answer these questions. If the dictionary definition is resorted to or adopted, it is apparent that ownership of copyright will rest in different persons.

In this sense, the Act fails to provide clearly what persons are entitled to copyright ownership. The Act provides that ownership of copyright shall rest in the author²⁰. But from the foregoing deliberations it is clear that the word author has not been adequately, defined under the Act. for lack of judicial caselaw, there will be no alternative but to turn to the general dictionary definition as the one applying in that respect i.e. the creator of a work. So due to such an inexact definition, the copyright Act is said to suffer limitation. The Act should therefore provide for a clear definition of author for all works protected by copyright.

3.5. NON-INCLUSION OF TRADITIONAL MATERIAL.

For any work to have copyright protection, the Act requires such work to be published and to exist in a tangible form. The requirement of tangibility implies that a work is not protected by copyright if it is not fixed in a permanent form.

Thus oral works such a traditional songs, folklore or riddles are not subject to copyright protection.

These works have been passed orally from generation to generation. By virtue of this, no person can easily claim copyright because these works are deemed to be in public domain and hence free to copy.

Non protection of traditional material implies that practically, most songs from developing countries are not subject to copyright protection or can be copied freely or sung by anyone without infringing any copyright.

However, section 18(3) of the Act empowers the Attorney-General to make regulations authorizing, and prescribing terms and conditions governing any specified use of folklore, except by a national public entity for non-commercial purpose, or the importation of any work made abroad which embodies folklore.

This discretion has yet to be exercised. The importance of collected folklore in the legal field cannot be overlooked. Folk music has grown over the years with an increasing incursion of folk music into popular commercial sphere. It would be important as such to determine what rights if any subsist in a transcription with or without modification of traditional words and music recited or played to a transcriber.

The difficulty occasioned herein is that folk songs, dances, stories and plays exist in oral form and do not derive from any written copy. No copyright ordinarily attaches to them for lack of fixity. However in most cases, the words and melody of a song are taken down in writing form from the mouth of a living traditional singer by collectors of

music. The question therefore is whether such a collector can be said to have expended some sufficient effort to give his transcript original character as required by section 3(2)(a) of the Act, in which case he would acquire copyright protection for his song.

It is also important to note that musical works are protected only to the extent that it is the melody that gets the protection and not the words of the songs. The words may be protected as literary work.

It has been argued as a result that one may infer that since the melody or tune of a folksong is passed from one generation to another orally, a collector who writes down a song acquires no copyright in the musical work as such, since it is not a creation of his mind and he has not exercised independent skill, judgement or creative, labour in reproducing the tune or melody²¹.

However, it was observed in the case of *LOVER V DAVIDSON*²², that even though, seemingly, no copyright in musical work exists in the folk song in the first instance, a person who makes an arrangement for an old tune by the exercise of a substantial amount of his own skill useful labour or judgement acquires copyright in that arrangement.

Copyright law in its theoretical scenario contemplates the field of creativity which in its nature has no recognizable frontiers. Law and copyright is no exception, invariably has bounds of application. Often then there exists disharmony between the spirit and the letter of the law, and limitations borne of such resultant friction invariably arise.

Kenya is a member of the universal copyright convention (U.C.C.) which was formed under the auspices of the United Nations Agency for Educational Scientific and cultural Activities (U.N.E.S.C.O) in 1947.

The aim of the U.C.C. was to supplement existing copyright laws and copyright agreements already entered into between countries. The pre-ambule to the convention states "The contracting states, moved by the desire to assure in all countries copyright protection of literary, scientific and artistic works, convinced that a system of copyright protection appropriate to all nation of the world and expressed in a universal convention, additional to and without impairing international systems already in force will ensure respect for the rights of individuals and encourage the development of literature, the sciences and the art".

By virtue of membership to the U.C.C, certain rights and obligations arise. These obligations create a restraint or limitation on the copyright regime in Kenya which is largely responsible for the enactment of various provisions in the Act which have provided not only positive legal sanction for multi-national and international exploitation of intellectual property in Kenya, but also internal limitations to the law.

The Kenyan copyright regime is therefore restricted and limited in terms of its enactment and application due to the bounds created by the demands of the universal copyright convention.

It has been expressed that the U.C.C. was a compromise between Western Europe and America with

their pan-American copyright union as represented by the United States of America, for the exploitation of the third world, with the resultant idea that African and third world countries for that matter ought to shake-off this yoke of dependence and, come-up with their own intellectual property law systems that are home-grown and more suited to the demands of their people.

The copyright Act similarly suffers a limitation by restricting itself exclusively to the seven (7) defined subject matters (which have been discussed previously). This has the effect of smothering, rather than expanding creativity. The field should be left open to any type of material that may be creatively made so as to, in a sense, open up new horizons in the field of creativity.

The Act also fails to delineate the bounds and limits to the free use of copyright material by omitting to define the extent of publication and hence shrouds in darkness the freedom offered in the dissemination of knowledge. The act obscures the content of the right held by owners of copyright in restricting free users from illegally appropriating their property.

The Act²³ provides that for a work to be eligible for copyright protection sufficient effort must have been expended in its production. What the Act however fails to define is what is the quantum of effort required to give a work sufficiency in order to impart upon it an original character.

Section 3(2) (b) of the Act provides that no copyright protection will be accorded to literary, musical or artistic work unless " The work has been written down, recorded or otherwise reduced to

material form".

This in essence means that the Act is limited exclusively to published material. Unpublished works are not protected. These latter works can only be protected by common law rules of tort, and equity as other chooses in action but however the common law rights in the form of copyright are abrogated by section 20 of the Act. To this extent therefore, the copyright Act is limited to the extent that it makes no provision for the protection of unpublished works.

A further area of limitation in the Act is found in section 7, with respect to the right of fair dealing (fair use). The doctrine of fair use seeks to balance the interests of the owner of copyright on the one hand, and those of the consumer public on the other. It contemplates the free uses of copyrighted works which require neither authorization, nor payment to the copyright owner.

Private use, criticism, review and public broadcast for instructional activities are some of the various acts of the fair use which one may perform without payment to the copyright owner or breach or infringement of copyright. However, this right, as existing in the Act is not really a right to copy under certain criteria but is rather limited and restricted to a defence. It can be said, as in estoppel, to be a shield and not a sword, and can only be evoked in the face of suit.

Its use may therefore easily invited unnecessary and unjustified suit between owners of copyright and the users, probably it would be appropriate to construct this doctrine as a right and not a defence.

On the other hand, this doctrine when viewed from the perspective of the owner of copyright is largely oppressive as according to the Act, a manifest infringement of rights under copyright may be justified if the intention of infringement falls within the rubric of "fair dealing".

This means that the exclusive proprietary rights bestowed upon an owner of copyright are not really a legal guarantee but are rather subject to the rights of another totally different large and unclarified degree of third person in the subject matter. To this extent, these rights can hardly be said to be exclusive.

If therefore strangers to the subject matter of intellectual property are allowed to have almost "unlimited" access to copyright work and then hide under the cloak of fair use, one is left at a loss as to the content of the rights if any established by the Act, and meant to encourage and stimulate the development of creativity on the part of innovators.

As if non-infringement of copyright under fair use is not enough, not only is the requirement for a license dispensed with under section 7(1)(i) of the Act, but the use does not confer a duty to enumerate the copyright owner in any way. The only obligation is that there must, in the case of a public performance and broadcast, be sufficient acknowledgement of title and ownership.

This is a limitation to the Act as such property rights which are subject to use by third parties with little restriction if any and no enumeration to the owners can hardly be termed a private proprietary rights. Therefore the aim of copyright

law being to reward individuals for their intellectual skill and labour is abrogated by these provisions. The Act has also failed to define appropriately, what is meant by "right in the nature of copyright" i.e what are these other rights. This is left hanging and unclarified.

In conclusion, these limitations have had a stifling and disturbing effect on the Kenyan copyright law. It is necessary therefore that the existing law need a redress if it is to match with the dynamism that is the hallmark of the intellectual world.

FOOTNOTES

1. Section 6(3) (b) Cap 509
2. Cmmd Pg. 1244 -125.
3. Okech Owiti (1989) Regulating Technology : "The case of computers in Kenya" Innovation and sovereignty. Pg. 271
4. Section 2(1) Cap 130.
5. Nyakundi G.M. Intellectual property : The adequacy of copyright law in Kenya LLB (1995).
6. Section 20. Cap 130.
7. Calestus J et al (ed). Innovation and sovereignty. Acts press, Nairobi (1989 P.221.
8. (1983) FSR 502.
9. Stewart S.M. International copyright and Neighbouring Rights .London, Butterworths (1989) Pg. 121.
10. Ibid P 306.
11. Section 7, Cap 130.
12. The whitford committee : Report of the committee to consider the Law on copyright and Designs 6732 paragraph 488.
13. Pforzheimer Pg.21.
14. Sections 4, 5 and 6 Cap 130.
15. Cap 111 Laws of Kenya.
16. Section 6(2)(1) Cap 130.
17. Ibid section 15
18. Geneva convention, Article 111, Berne Convention Art 15.
19. Section 15(7) Cap 130.
20. Ibid Section 13(1).
21. Laddie P et al. The modern law of copyright. Butterworths, London (1980) Pg. 19.

22. (1856) 1 C B N S 182.
23. Section 3 (2) Cap 130.
24. Ibid section 17.

CHAPTER 4

RECOMMENDATIONS AND CONCLUSIONS

RECOMMENDATIONS

Intellectual property is but a relatively new phenomenon in the Kenyan scene where conventional property has been the keynote of economic activity as reflected in Kenyan legislation.

With the growth of both enterprised and the rapid westernisation of Kenyan consciousness, the role of copyright has and will continue to garner impetus as the realization of potential property in the form of the intellect or creative ingenuity is accelerated. The importance of copyright law can therefore not be down-played.

In considering copyright as private or personal intellectual property, It is evident that where the law is intended to protect existing natural rights of creations, and embodying rights which would otherwise not exist, Kenyan legislation appears to have fallen short of its aim as the custodian of the rights of creators of intellectual property. If anything, the copyright created or offered in the Act wears monopolistic traits whose aims are heavily inclined to favour foreign and not local investors. In effect copyright legislation in Kenya is more of a masquerade for political and economic machinations rather than for any legitimate public policy.

The policy highlighted in the Kenyan jurisdiction is inter-alia, that copyright is the most efficient way to provide society with the tangible fruits of intellectual and creative work. However, this has been easier put in print than done. the genuiness of the intentions of copyright notwithstanding, and with the aims of, or legislators in its application kept at bay, the importance of copyright and its place in law and society cannot be belittled.

Although the rise of the demand for increased copyright protection has meant the rise of the level of suspicion and criticism of intellectual property protection, its entry into new fields of creativity does more to enhance its importance than to bring does to its credibility.

The main objective of the copyright Act is to foster the spirit of creativity in Kenya by ensuring that creators of intellectual property get rewards for their creations. This objective however has had very little achievement. The Government especially has a very crucial role to play if the desired changes are to be implemented.

With respect to music, there is the general tendency that music users are totally ignorant of the provisions of the copyright Act. this is made even worse, as observed by the chairman of the Music Copyright Society of Kenya (M.C.S.K), by the fact that even the large majority of lawyers are not conversant with copyright law.

There is a misconception that music is to be treated like personal property and therefore users see no need to obtain licences. The M.C.S.K has music inspectors who make impromptu visits to all towns in the country checking, apprehending and seizing the infringing copies. However, this is a gigantic task which calls for a large number of inspectors, with the resultant problem of requirement of heavy financing. An even larger problem arises because some of the illegal duplicators (pirators) are music producers themselves. It is suggested that the M.C.S.K should be empowered to seize the equipment used in making infringing copies.

The society should also be self regulating and be allowed to make regulations pertaining to licensing, payment of fees and royalties. Producers of music should make returns to the society and the competent authority established under section 17 of the Act. The competent authority should be manned by

independent persons.

The problem of authorship in relation to musical works should be addressed so that copyright protection does not lie with one person but the proceeds are distributed between all the persons involved in the production of the work, viz, the composer, the producer and the performer. The rights of reproduction should be properly defined, and the duration of protection thereby extended from its current span of fifty years to seventy years. This is in order to make the duration conform with the directive of the European Union, to member states in Europe.

The penalties provided for under section 16 of the Act are inadequate and should be broadened. In similar vein, section 20 of the Act should be amended in order to allow the application of common law in the Kenyan copyright law regime. The nature of the neighbouring rights under section 20 of the Act should be clearly defined in order to protect the rights of all the other categories of persons i.e actors, musicians, singers and dancers.

Moral rights should be incorporated into the Act as part of copyrights. The Berne Convention provides that states shall decide upon themselves as to the best way to provide or make rules and regulations for their members. Composers should for instance have the right to determine how their works should be used in fields such as advertisement.

The government should, through the Kenya Broadcasting Corporation (K.B.C) strive to promote local musicians, since the corporation is the only medium through which works of Kenyan musicians are brought to the public. It is disheartening that almost ninety nine (99) percent of all the music played by the corporation is foreign music hence more royalties are paid to foreign entertainers than to local artistes.

The Act should be overhauled in the field of musical works and sound-recordings since Article 20 of the Berne Convention, offers flexibility by allowing the governments of the union countries to reserve the rights to enter into their own agreements with more extensive rights if necessary than stipulated by the convention, though such agreements should not be inconsistent with those of the convention.

It is appreciated however, that the Attorney General has taken a bold step in issuing a circular to the police commissioner directing that no music should be played in public service vehicles without a license from the music copyright society. The Attorney General has ordered the arrest of such vehicles and the owners there of shall be charged with contravening the provisions of the copyright Act.

To counteract domestic piracy, a tax should be levied on the materials used in home-taping. Such tax should be forwarded to the MCSK and later distributed to the artists. Border controls which exercise control over counterfeit goods should be installed to intercept the departure and arrival of pirated musical works out of and into the country.

The law should also stipulate a clear cut method in which an agreement between a producer and an artist should embody. This is because many musicians have been robbed by producers through the agreements that they sign.

It is suggested that the copyright law as provided in the Act adopt a system which anticipates new developments in the field of copyright. The present system clearly restricts the scope of copyright expansion. The Act presumes that there are seven categories of intellectual property which need protection. The presumption is on the basis that these categories accommodate and will continue to accommodate all creative ingenuity that may in future arise.

The Act ought to deviate from its present system of "pigeon-holes" where a work will be eligible only if it falls within those categories it lists. It ought to adopt a broad ranged - system which begins with a wide and comprehensive definition of the works protected. Such an approach must be capable of adequately covering existing works and be elastic enough to embrace new categories of works which are developed with increasing sophistication of society.

The Act may for instance be reviewed to adopt a system where it is not mandatory for the works to fall within the seven stated categories but only require that the work be original and fixed. This approach has been adopted by the United States and Germany.

It is also recommended that the Act ought to be amended to incorporate protection for computer software. Computers are a relatively new phenomena in our industrial and commercial world. Until the 1980's there was very little use of computers in Kenya. However, today computer has become part of our daily working lives.

Since the copyright Act does not make provision for computers, the issue that arises is whether computer software should be protected by law of copyright.

It is suggested that any person who wishes to make use of computer software should obtain a license in order to do so. Only this way can the owners benefit from their work and skill put into software programmes.

The Kenyan copyright regime also needs to provide for the procedure by which copyright protection is to be acquired. With the absence of a formal requirement for legislation it is not easy to ascertain what works have been protected by copyright. Though the Act provides that the burden of proof as to whether copyright does not exist rests with the

defendant, this is not sufficient. In most cases, the defendant will attempt to unnecessarily put the plaintiff to strict proof as a delaying tactic. It is suggested that provision be made that a defendant putting a plaintiff to unnecessary costs in proof of the title be required to pay the costs so incurred.

The Act also ought to provide protection to unpublished works. the Geneva and Berne Conventions leave the issue of unpublished works to municipal laws of member states. Unpublished works should be protected on the basis that if they are copyrightable then they ought to receive copyright protection, as has been the practice in the United States of America.

The Act provides for damages, injunction, order for accounts and delivery up as remedies for the breach of copyright. However it is suggested that these remedies are inadequate especially in the field of musical works where a person can make infringing copies of a copyright work and never be discovered.

It is suggested that a remedy of search and seizure be availed to copyright holders. This order is known as the Anion Pillar order. The remedy was born out of the case of ANION PILLER V MANUFACTURING PROCESSES AND TWO OTHERS¹. Where Lord Denning said that the courts have inherent powers to issue an order against the defendant to allow the plaintiff to enter the defendants premises and inspect them with a view to taking the infringing articles alleged to be in the premises of the defendant.

The order is meant to ambush the defendant and ensure that he has no opportunity to hide or dispose of the infringing items. The nature of the order is that it does not entitle the plaintiff to enter the defendants premises by force or unlawfully as this amounts to trespass. It instead compels

the defendant to give permission to the plaintiff to enter the premises and execute the order. If the defendant refuses to give this permission, he can be committed to court for contempt.

Before commencing action for infringement which is expensive and time consuming, it is advisable to address a "case" and "desist" letter to the infringer warning him that his act constitutes infringement and he should stop within a given time. The letter should also require him to withdraw all the infringing articles from the market and account to the copyright owner for the profits made. It is only after the infringer has failed to comply with that letter that action should be instituted.

It is also suggested that the Act should bring within its ambit the protection of traditional material since these are works that have been passed from generation to generation orally. Traditional songs, riddles, dances or folklore are an integral aspect of our traditional heritage, and should therefore be protected in order to be utilized by the future generations.

CONCLUSION.

This research has established that the Kenya copyright law is inadequate in protecting the rights of authors in relation to copyrightable work. It is therefore inevitable that the law needs to be overhauled in order to meet the challenges of this fast changing society and to reconcile the private interest of the innovator and those of the larger public.

Intellectual property is property just like the other forms of property. Although the rights of copyright holders are clearly defined by law. It is impossible to enforce them and the law has not yet established comprehensive mechanisms for their enforcement. The owners of copyright should be given

certainty in terms of subsistence, ownership, protection and the reward of recompense which they require for their individual rights.

Any new copyright law should seek to establish more general principles of protection rather than itemise specific terms or categories. This would ensure that the principles of protection continue to exist even long after specific categories have ceased to be relevant. Thus works in any present known medium must be sufficiently protected and the provisions be broad enough to encompass the creation of works in any new or indeed, as yet unknown medium. Such a provision would go a long way in eradicating the complex copyright problems caused by advancement in technology which facilitates easy copying.

It is also evident that the existing civil and criminal remedies and sanctions availed by current laws are inadequate. These should therefore be enhanced so that the copyright holder is appropriately remedied while the infringer of copyright is substantially penalised and punished. The government should establish an equitable and workable scheme for the settlement of disputes between parties, who are either disputing the title to certain works or the nature of their rights in the created works.

The concept of copyright attempts to incorporate two distinct sets of conflicting principles. One is concerned with access and the other with monetary value. In considering access, the balance to be established lies between the general freedom of maximum competition and the idea of monopolistic restrictions inherent in the concept of copyright.

A conclusion may be drawn that in the successful enactment of copyright legislation, a clear interplay and balance between the above opposing principles must necessarily be established.

A critical look at the present copyright law in Kenya reveals manifest imbalances in the construction of these intentions.

As initially observed, international conventions - the universal copyright convention (UCC) and the Berne Convention (BC) have also played a big role in stifling the flexibility of the Kenyan copyright regime. This is because Kenya is accountable to all other member states. The net effect is the stifling of the implementation of policy directed towards the protection of the Kenyan citizenry.

In other words Kenyan law affords copyright protection to foreign interests which in their cut throat competition keep the local publisher down. The U.C.C and the B.C have therefore effected a tight rein on any development initiatives in Kenyan copyright law.

It is hoped that the weaknesses obtaining in the Kenya copyright law as enunciated in this research will meet with redress so that the disparities between what the law allegedly intends, what it states, and what it effects are harmonised.

FOOTNOTE

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