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**ADVANCED LEGAL  
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LL.B DISSERTATION**

*Payment of Royalties for Musical Works in  
Kenya*

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## DECLARATION

I LORRAINE WAMUCII IGERIA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

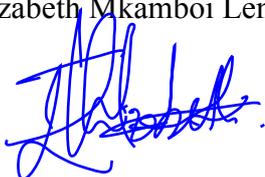
Signed:

Date: 8<sup>th</sup> January 2021.

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Elizabeth Mkamboi Lenjo.



## **ABSTRACT**

Since time immemorial, music has been viewed in the African community and as a pass time activity and not as a career. Due to this conservative belief, those who aim and pursue music as a career in this day and age have a difficult time doing so. As the years progress however, musicians are finding their place in the professional world. In Kenya, their rights are protected by legislative pieces such as the Copyright Act as well as Collective Management Organizations, which are registered under the Kenya Copyright Board. However, even in the presence of all these, musicians still face a hard time earning a sustainable living due to several loopholes present in the administration of these Collective Management Organizations, and unfair exploitation of their artistic works. Collective Management Organizations and telecommunications companies face scrutiny by the Kenyan artists, as they lack transparency as copyright users. Kenyan artists are in a constant fight to keep these organizations accountable and come up with solutions to make their careers sustainable.

## **LIST OF ABBREVIATIONS**

### **ACRONYMS**

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Association of Independent Music (AIM)

British Phonographic Industry (BPI)

Communication commission of Kenya (CCK)

Collective Management Organizations (CMO)

Featured Artists Coalition (FAC)

International federation of the Phonographic Industry (IFPI)

Kenya Association of Music Producers (KAMP)

Kenya Copyright Board (KECOBO)

Kenya Publishers Association (KPA)

Music Copyright Society of Kenya (MCSK)

Music Managers Forum (MMF)

Music Publishers Association (MPA)

Music Producers Guild (MPG)

The Musicians Union (MU)

Performing Rights Society (PRS)

Performers Rights Society of Kenya (PRISK)

Phonographic Performance Limited (PPL)

Reproduction Rights Society of Kenya (KOPIKEN)

*Société des auteurs, compositeurs et editeurs de music (SACEM)*

World Intellectual Property Organization (WIPO)

World Trade Organization (WTO)

## **LIST OF STATUTES AND CASES**

### **STATUTES**

1. Constitution of Kenya
2. The Copyright Act of Kenya, CAP 130 of the laws of Kenya
3. The Copyright (Amendment) Act, 2019.
4. Copyright, Designs and Patents Act

### **CASES**

1. *Cellulant Kenya LTD v Music Copyright Society of Kenya LTD* (2009) eKLR
2. *Music Copyright Society of Kenya v. Parklands Shade Hotel T/a Klub House* [2000] eKLR

## CHAPTER ONE

### 1.1 Background of the Problem - History of Music in Kenya

“Where words fail, music speaks.” These were the words of Hans Christian Andersen, a renowned Danish Author. Music has abiding meaning and value to people. Within cultures worldwide, music is tightly woven into the fabric of life.<sup>1</sup> It plays an irreplaceable role in providing entertainment, constructing identity, communicating feeling and emotion, and offering both a shared human experience and one that is highly individual.<sup>2</sup>

In Kenya, the evolution of music roots from as early as the pre-independence period when the Kenyan music scene began to gradually take shape. During this period, some of the artists that seemed to stand out included Otto Larsen, the late Peter Colmore and Charles Warrod.<sup>3</sup> The trio were foreigners who seemed to find themselves engulfed into the irresistible allure of Nairobi’s music circles. They were some of the pioneers of music artistry in the country, but still maintained ‘regular’ jobs. Colmore, for example, who came in to the country in 1983, was an ambitious and adventurous air traffic officer, attached to the then Wilson Airways.<sup>4</sup>

Music in Kenya also morphed traditionally. All the 47 tribes of the country had their own unique styles of music. The Luo, for example had their own style of music that was known as Benga, which was used by many other tribes to formulate their own styles of music. This shows that music is not a new phenomenon in our country, and has existed since time immemorial.

Kenya is burdened with strong conservative beliefs that are held by most people in our country. One of these beliefs is that music is a pass-time activity and a hobby. This is owed to the fact that in the olden days, most people use music to compliment their daily activities and not as an activity on its own. This is not unique to contemporary life, where the typical conservative African would use music as a way to unwind, once they have completed their formal duties. This in turn means that pursuing music, as a career would be out of the norm, owing to the fact that music is not a white-collar job.

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<sup>1</sup> See official IFPI site, -<<https://www.ifpi.org/our-industry/industry-data/>>

<sup>2</sup> See official IFPI site, -<<https://www.ifpi.org/our-industry/industry-data/>>

<sup>3</sup> <https://afro7.net/evolution-of-kenyas-music-scene/>

<sup>4</sup> <https://afro7.net/evolution-of-kenyas-music-scene/>

The Kenyan system of education has contributed greatly to this, in that most activities alongside music, such as sports and art are considered as co curricular activities and not main learning subjects. This leaves the students with the mentality that such arts can only be practised as a compliment to one's life but one may not specialize in them as their way of earning a living.

This withstanding, most of those who complete their high school studies are cornered by these beliefs into pursuing formal courses in university which at the end go to waste, forcing them to pursue music rather late in their lives. For those who are bold enough to pursue music as a career, it tends to take them longer than their peers to earn a living

## 1.2 Musicians in Kenya today

The making of music requires different parties to come together in order to make it a success. These are also the parties that can claim rights to a song and they vary depending on the type of music being created. Examples of parties that can claim rights to a song include the composer, the author, the arranger, the performer, the publisher and the producer. In some cases, one party can take up all the above roles, and in others, different people will take up different roles. Aside from those that are involved in creating the music, there are also those that come in after the music is complete, such as disk jockeys that may require rights to play the music in various settings and live performers who were not necessarily involved in the making of the songs. This shows that there is more to the production and consumption of music than meets the eye, and many people who aim to make a livelihood from this work.

Therefore, the issue in question is whether these parties have been legally defined and whether Kenyan legislation has effectively provided for their roles and rights, in order to avoid the loopholes that cause music to be unsustainable as a career. Aside from legislation, this paper is also set out to look into the four Collective Management Organizations in Kenya, namely The Reproduction Rights Society of Kenya (KOPIKEN), Kenya Association of Music Producers (KAMP), Music Copyright Society of Kenya (MCSK) and the Performers Rights Society of Kenya (PRISK)<sup>5</sup> and their roles in ensuring that the parties involved in the production and consumption of music, are able to gain results from their work.<sup>6</sup>

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<sup>5</sup> See official KECOBO site - <<https://www.copyright.go.ke/8-program/4-cmo.html>>

<sup>6</sup> *The Role of Collective Management Organizations*, International Confederation of Societies of Authors and Composers.

## **1.3 Statement Of The Problem**

### **Ideal Situation**

Ideally, music should be pursued as a career and should enable one to earn a stable living, where applicable. This is obviously dependant on several factors, such as whether the said musician has put in the adequate amount of work, and is in turn well received by their audience. The fact that there are already pre-existing bodies that are charged to ensure that the aforementioned is actualized, means that this should be a seamless process and that musicians in the country should be able to operate on a level playing field. In turn, musicians should be able to pursue their careers in a healthy working environment and get the chance to efficiently mentor those that sprouting into the same.

### **The Reality**

In the African setting, memorable music is known to have been conceived in poverty, illness and adverse circumstances.<sup>7</sup> Musicians in Kenya in this day and age work tirelessly for little or no income hoping that their work will monetize in one way or another. However, we still see their work being used in various settings. This evidently shows that there exist several loopholes in the law that obstruct them from gaining what is rightfully theirs. The legal framework that is in place to protect their rights underrepresents them. The past years have also been characterized by frequent collection of funds by CMOs which should be accorded to them as royalties, but unfortunately the cycle rarely comes to completion.

### **Proposal**

Article 41 of the Kenyan Constitution provides for every Kenyan to be entitled to fair labour practices and fair remuneration.<sup>8</sup> Considering that Kenyan musicians pay taxes as law-abiding citizens, they are therefore duly entitled to the above. This paper therefore sheds light on the loopholes present in the industry and proposes lawful measures that should followed in support of the Kenyan musicians.

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<sup>7</sup> Ratcliffe H, Social and Economic Position of the Performing Musician, (1961) [https://www.jstor.org.ezproxy.library.strathmore.edu/stable/pdf/45118628.pdf?ab\\_segments=0%252Fbasic\\_SYC-5055%252Fcontrol&refreqid=excelsior%3Ad0fc1885a9418f4198f5aa71088316f6](https://www.jstor.org.ezproxy.library.strathmore.edu/stable/pdf/45118628.pdf?ab_segments=0%252Fbasic_SYC-5055%252Fcontrol&refreqid=excelsior%3Ad0fc1885a9418f4198f5aa71088316f6)

<sup>8</sup> Article 41, *Constitution of Kenya*, (2010).

## **1.4 Purpose Of The Study**

The main beneficiaries of this study are the Kenyan musicians, who to this day are not adequately defined by the laws of Kenya. Solving this ambiguity would make the process of accordance of rights and royalties to those concerned easier. The purpose of this research is also to propose the formation of a common society that can represent musicians as seen in other professions such as teachers and doctors. This will encourage accountability of the policy makers in this industry. Thus, the main significance is to rid the industry of any grey areas and to fully make it a sector of this nation that is governable by law.

## **1.5 Aims And Objectives**

### **Aim**

This study aims to provide workable solutions by law that will streamline the workings of this industry as a whole. Moreover, it is also aims to put to halt the annual back and forth tussles had between Kenyan artists and the relevant authorities when discussing these issues, as the end of this research should suggest an efficient structure.

### **Objectives**

1. Analyse the current state of affairs and the systems used.
2. Suggest areas where the law is applicable and not been applied.
3. Benchmark how other countries that have been successful in finding solutions to such issues have made it possible.

## **1.6 Hypothesis**

This research is based on the hypothesis that the music industry is characterized with a great deal of politics that leave Kenyan musicians at a loss of what to do, in order to earn a stable living. They have not been adequately supported by the law and are subjects to institutions that they should be benefiting from. License payers in the same industry are also victims to these politics, as they do not see the money that they put in diligently going to good use.

## **1.7 Research Questions**

1. How can the parties to the making of music be clearly defined?
2. What amendments to already existing law can be implemented to solve any ambiguity present?
3. What are other countries doing to achieve the objectives of this study? Are we able to learn from them?
4. What can CMOs do to spearhead the solving of these issues?

## **1.8 Rationale Of The Study**

This research contains equity, transparency and structure relevance. Article 10 of the Kenyan Constitution outlines the national values and principles of Kenya, amongst which are the principles of equity and transparency.<sup>9</sup> Owing to this fact, it is paramount to observe this principle in all aspects that are governable by law, such as the labour sector of the country. With regard to these principles, musicians in Kenya should be able to be accorded to what is owed to them out of the hard work they put in, while following a certain rubric, after being defined accordingly. Most of the loopholes that are present in the relevant establishments seem to be so due to lack of transparency which this paper is set out to highlight. There also seems to be a great lack of structure in the said establishments for which we may need to find solutions. With the above in mind, the study provides information to those in the profession, in order to minimize cases of exploitation when giving musicians their rights.

## **1.9 Scope And Limitations of The Study**

This study analyses the reasons as to why being a musician in Kenya is not as financially sustainable as other careers. In doing so, it also aims to find solutions how this state of affairs can be improved and eventually making music a career like any other. The study also covers the differences between musicians who have been able to make a living through music and those who have not and the reasons for these differences, be it geographical, or as a result of different forms of management. The study is limited to Kenyan musicians, not ignoring the fact, however, that several other categories of Kenyan creative persons, go through the same predicaments.

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<sup>9</sup> Article 10, *Constitution of Kenya*, (2010).

## 1.10 Definition of Terms

1. Musician – The Oxford Dictionary defines a musician as a person who plays a musical instrument, especially as a profession, or is musically talented.<sup>10</sup>
2. Composer – A composer is defined as an artist who writes music to be played or performed by musicians.<sup>11</sup> They create and arrange musical scores.
3. Songwriter – The difference between a songwriter and a composer is that a songwriter is that who is involved in the writing of the song and not the music or the melody of it.<sup>12</sup>
4. Lyricist - A songwriter that is involved in the making of the melody of the song can thus be defined as a lyricist.<sup>13</sup>
5. Performer – They can be defined as the artists who bring the work of creative art to reality.<sup>14</sup> In this case, the work of creative art is the song that has been written and composed by the aforementioned.
6. Publisher – A music publisher's role is to manage a songwriter's songs and make sure that they collect all the royalties that they are entitled to.<sup>15</sup> They then get a cut of the income that is generated by these songs.
7. Producer – This is someone who makes sure that the end result in the making of a song can be as good as it can be by ensuring that the song is well recorded and well produced.<sup>16</sup> Their job entails giving the artist advice when it comes to the aspects of their performance, or making sure that the sound engineers are doing their jobs in the best way possible.<sup>17</sup>
8. Music licensing – Recorded music is protected by copyright. Therefore, if someone wishes to include it a radio or television broadcast, on an online

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<sup>10</sup> The Oxford Dictionary

<sup>11</sup> Vocabulary.com Dictionary - <<https://www.vocabulary.com/dictionary/composer>>

<sup>12</sup> See Songpioneer official site; - <<https://songpioneer.com/songwriter-vs-composer/>>

<sup>13</sup> See Songpioneer official site; - <<https://songpioneer.com/songwriter-vs-composer/>>

<sup>14</sup> Free Music Dictionary, - <<https://www.freemusicdictionary.com/definition/performer/>>

<sup>15</sup> McDonalds H, 'What a Music Publishing Company Does', *The Balance Careers*, 2019, 1, <https://www.thebalancecareers.com/what-does-a-music-publishing-company-do-2460915> on 28th October, 2019.

<sup>16</sup> See official Career Explorer -<<https://www.careerexplorer.com/careers/music-producer/>>

<sup>17</sup> See official Career Explorer -<<https://www.careerexplorer.com/careers/music-producer/>>

service, or play it in public, legal permission is needed from all the recording right holders.<sup>18</sup>

With regard to the above definitions, it is important to note that in the music industry, one person can perform several roles in the making of a song. For example, the songwriter can be the performer of the song.

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<sup>18</sup> See official PPLUK site; -<<https://www.ppluk.com/music-licensing/>>

## 1.11 Literature Review

The main aim of literature review in this paper is without a doubt to show that this is not an issue that is unique to Kenya as a country, and the misuse or under-use of copyright law is a problem faced around the world. . A review of literature in this topic is to show that several entertainment law scholars are also striving to solve different issues in the same line of this dissertation.

1. Newspaper articles are fundamental in this research to demonstrate the push and pull that takes place in this industry. This happens between the Kenyan musicians and the bodies that are allegedly in place to protect them, but seem to be exploiting others on their behalf.
2. To help the reader understand better as to why this situation morphed into what it is today, an article by Anna M Christian is reviewed in order to compare and contrast how extra curricular activities and vocations are perceived in other countries and in Kenya.<sup>19</sup>
3. Ouma in her article then analysed whether the optimal enforcement of music copyright in sub-Saharan Africa is a reality or a myth. She set out to examine if there are legal sanctions that pertain to the lack of the copyright laws, as she believes that the said sanctions are either non-existent or nominal.<sup>20</sup>
4. Weatherhall, in her paper reimagines the approach to copyright enforcement from a regulators perspective. This is an instrumental piece of literature, as we get to understand a regulators perspective in how they carry out their functions and powers, making it possible for us to draw conclusions as why the situation at hand is so.<sup>21</sup>
5. Ratcliffe gives an elaboration of the social and economic position of the performing musician. This is fundamental in appealing to the empathy of the reader in order for them to understand why such research is important.<sup>22</sup>

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<sup>19</sup> Christian A, 'Vocations and Extra Curricular Activities in the Junior High School', (1923) [https://www.jstor.org.ezproxy.library.strathmore.edu/stable/pdf/30208908.pdf?ab\\_segments=0%252Fbasic\\_SYC-5055%252Fcontrol&refreqid=excelsior%3A58e210d2a796d1eb7428fd70314e1f18](https://www.jstor.org.ezproxy.library.strathmore.edu/stable/pdf/30208908.pdf?ab_segments=0%252Fbasic_SYC-5055%252Fcontrol&refreqid=excelsior%3A58e210d2a796d1eb7428fd70314e1f18)

<sup>20</sup> Ouma M, 'Optimal enforcement of Music Copyright in sub-Saharan Africa', (2006)

<sup>21</sup> Weatherhall K, 'A reimagined approach to Copyright from a Regulator's perspective', (2017)

<sup>22</sup> Ratcliffe H, Social and Economic Position of the Performing Musician, (1961) [https://www.jstor.org.ezproxy.library.strathmore.edu/stable/pdf/45118628.pdf?ab\\_segments=0%252Fbasic\\_SYC-5055%252Fcontrol&refreqid=excelsior%3Ad0fc1885a9418f4198f5aa71088316f6](https://www.jstor.org.ezproxy.library.strathmore.edu/stable/pdf/45118628.pdf?ab_segments=0%252Fbasic_SYC-5055%252Fcontrol&refreqid=excelsior%3Ad0fc1885a9418f4198f5aa71088316f6)

6. Mark F Shultz, in his article speaks on live performance, copyright and the future of music business, which gives reason as to why live performance may be a musicians only source of revenue, as should not be the case.<sup>23</sup>
7. Susan Coulson, in her article talks of musicians working lives and their understanding of entrepreneurship. The paper gives a broader scope on how musicians can be entrepreneurs in their own career. It is fundamental in debunking the African fallacy that one must still maintain a white-collar job.<sup>24</sup>
8. A paper by Brian J Hracs and Deborah Leslie, talks of music as aesthetic labour and brings about an interesting outlook on how viewing it as so has brought the decline of record labels. This in turn prompts the research of whether there exist any legally registered record labels in the country, and if so, what role they play in this situation.<sup>25</sup>

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<sup>23</sup> Shultz M, 'Live Performance, Copyright and the Future of Music business' (2009).

<sup>24</sup> Coulson S, 'Collaborating in a competitive world: musicians' working lives and understandings of entrepreneurship' (2012).

[https://www.jstor.org.ezproxy.library.strathmore.edu/stable/43495487?Search=yes&resultItemClick=true&searchText=paying&searchText=musicians&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dpaying%2Bmusicians%2B&ab\\_segments=0%2Fbasic\\_SYC-5055%2Fcontrol&refreqid=search%3A9dbeadefb1af825bfa16d6e966e58479&seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org.ezproxy.library.strathmore.edu/stable/43495487?Search=yes&resultItemClick=true&searchText=paying&searchText=musicians&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dpaying%2Bmusicians%2B&ab_segments=0%2Fbasic_SYC-5055%2Fcontrol&refreqid=search%3A9dbeadefb1af825bfa16d6e966e58479&seq=1#metadata_info_tab_contents)

<sup>25</sup> Hracs B, 'Aesthetic Labour in Creative Industries: the case of independent musicians in Toronto, Canada', (2013)

[https://www.jstor.org.ezproxy.library.strathmore.edu/stable/24029944?Search=yes&resultItemClick=true&searchText=paying&searchText=musicians&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dpaying%2Bmusicians%2B&ab\\_segments=0%2Fbasic\\_SYC-5055%2Fcontrol&refreqid=search%3A9dbeadefb1af825bfa16d6e966e58479&seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org.ezproxy.library.strathmore.edu/stable/24029944?Search=yes&resultItemClick=true&searchText=paying&searchText=musicians&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dpaying%2Bmusicians%2B&ab_segments=0%2Fbasic_SYC-5055%2Fcontrol&refreqid=search%3A9dbeadefb1af825bfa16d6e966e58479&seq=1#metadata_info_tab_contents)

## **1.12 Chapter Summary**

### **Chapter 1: Introduction and background to the study.**

This chapter explains the history of the music industry in Kenya, its evolution and its current situation.

### **Chapter 2: Theoretical Framework and Research Methodology**

This chapter is gives a perspective through which this paper examines this topic. The theoretical framework is the abstract, logical structure of meaning that guides the development of the study. The research methodologies refer to the strategy, plan of action, process or design, which informs the choice of data collection methods and the relation between the choice of methods and the desired outcomes.

### **Chapter 3: Copyright Law in Kenya and the provisions supporting the music industry**

This chapter explains the defined roles of the CMOs in Kenya. It also analyses various legal instruments that make up the legal framework for collective administration in Kenya, as well as international legislation that has been incorporated to Kenya's legal framework.

### **Chapter 4: Emerging business trends and the legal lacunas**

This chapter is set out to discuss the disconnect between the roles and duties that belong to CMOs and their actual workings, in order to decipher the reason as to why the members of the music industry do not experience the financial freedom that they deserve. In addition to the ineffectiveness of the CMOs, this chapter is also set out discuss the exploitation of Kenyan musicians in the digital space. It is clear that the digital space significantly disrupted the music industry. This disruption has had a negative effect on the industry, seeing as the intellectual property rights of the artists are infringed through the illegal downloading and distribution of their work.

### **Chapter 5: Comparative Analysis Of Kenya And The United Kingdom**

This chapter looks into the workings of the United Kingdom regarding copyright protection and outlines the mandates of the bodies present to ensure adequate protection of their members.

## **Chapter 6: Recommendations and Conclusions**

This chapter gives the researchers recommendations as deduced from the findings of this paper in addition to feedback collected from directly affected parties during fieldwork. It also concludes the paper as a whole.

# CHAPTER TWO: THEORETICAL FRAMEWORK AND RESEARCH METHODOLOGY

## 2.1 Theoretical Framework

The most fundamental theory that is to be analysed and looked deeply into is the aspect of the structural formations of CMOs. This is because; it is possible to find out that they are heavily carrying out their duties using out-dated structures that work towards the detriment of the industry as a whole. Over the years, several debates have taken place against the said organizations on whether they efficiently take up their roles.

Part III of the Copyright Act of Kenya, provides for the administration of this act through the Kenya Copyright Board.<sup>26</sup> This part breaks down the structure of The Board, its functions and powers, as well as the functions and powers of its individuals. The aim of this paper will be to analyse the powers vested in the board, and in turn those vested in the CMOs and compare them to what is actually taking place in the industry. The solutions thereafter that are to be suggested will entail a great deal of restructuring the administration as a whole, in order to have a workable system.

The dissertation will greatly depend on the structural-functional theory, which can also be referred to as functionalism.<sup>27</sup> Structural-functionalism is a framework theory that sees a society as complex system whose parts work together to promote solidarity and stability.<sup>28</sup>

The proponents of this theory are Herbert Spencer and Robert Merton. Herbert Spencer was an English philosopher who compared society as a human body, whose parts work in harmony with other parts in order to perform its functions.<sup>29</sup> Merton states that having the perception of society as a system, it becomes natural to see that it is composed of parts that are interrelated and whose operations have impact on the

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<sup>26</sup> Part III, *Copyright Act of Kenya*, 2012

<sup>27</sup> Moffit K, 'Structural-Functional Theory in Sociology: Definition & Examples', <https://study.com/academy/lesson/structural-functional-theory-in-sociology-definition-examples-quiz.html>

<sup>28</sup> h Moffit K, 'Structural-Functional Theory in Sociology: Definition & Examples', <https://study.com/academy/lesson/structural-functional-theory-in-sociology-definition-examples-quiz.html>

<sup>29</sup> See official CRAM site, 'Structural Functionalism: Herbert Spencer And Émile Durkheim' <https://www.cram.com/essay/Structural-Functionalism-By-Herbert-Spencer-And-Emile/FKL8WJ9GREEX>

whole unit.<sup>30</sup> He also leans toward the example of the human body, just as Spencer does.

This theory is also considered as a sociological paradigm, which is of great relevance to the study. Socialist, Émile Durkheim applied Spencer's theory to explain how societies evolve and survive over time.<sup>31</sup> Durkheim believed that society is a complex system of parts that are interrelated and interdependent, and thus work together to achieve and maintain stability.<sup>32</sup>

The theoretical framework to be applied to this paper is of great value in achieving a solution in that most of the loopholes that bring about the problems faced tend to be issues of structure as a whole. To expound on this, it means that one board that works hand in hand with several other parts in order to achieve the same objective spearheads the administration of the Copyright Act of Kenya, which is at the forefront of the protection of the Kenyan musicians. Failure to achieve harmony amongst these said parts could be a great contributor to inefficient administration that this dissertation is set out to solve.

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<sup>30</sup> See official CRAM site, 'Structural Functionalism: Herbert Spencer And Émile Durkheim'  
-<<https://www.cram.com/essay/Structural-Functionalism-By-Herbert-Spencer-And-Emile/FKL8WJ9GREEX>>

<sup>31</sup> See Lumen learning official site -<<https://courses.lumenlearning.com/alamo-sociology/chapter/functionalism/>>

<sup>32</sup> See Lumen learning official site -<<https://courses.lumenlearning.com/alamo-sociology/chapter/functionalism/>>

## **2.2 Research Methodology**

The main research methodology that will be used to fulfil the objectives of this paper will be a qualitative analysis. This is because the data collected will be based on non-quantifiable information such as industry cycles and individual experiences. Aside from literary research, this research will be dominated by interviews of the key industry players that have undergone the issues being addressed in order to get a practical understanding of the same, from the horses' mouth. In addition to those affected by the issues, those who are perceived to play a role in the issues coming to be, shall be interviewed, to keep the research as objective as possible. Qualitative analysis is seen to be subjective, meaning that the data collected needs to be analysed as objectively as possible. This means that during the analysis of the data, the research will strive to focus on issues consistently mentioned by those interviewed. A comparative analysis of Kenya and the United Kingdom will be important in this analysis due to the fact that Kenya borrows a lot from their copyright law structure. One of the main limitations to this research is the current COVID-19 pandemic, which encourages everyone to stay home and maintain social distance between them. This means that majority of the interviews would have to be conducted virtually.

## **CHAPTER THREE: COPYRIGHT LAW IN KENYA AND THE PROVISIONS SUPPORTING THE MUSIC INDUSTRY**

### **3.1 The Legal Framework For The Collective Administration In Kenya**

#### **3.1.1 Introduction**

There are various legal instruments that affect the collective administration of copyright in Kenya, both on a national and an international level.<sup>33</sup> This section is set out to discuss these legal instruments.

#### **3.1.2 International Legal Instruments**

On an international level, the following are legal instruments that affect the collective administration of copyright in Kenya.

#### **The Berne Convention for the Protection of Literary and Artistic works**

Adopted in the year 1886, the Berne convention is an international agreement that purposes to harmonise the manner in which copyright and related rights are regulated at an international level.<sup>34</sup> It is administered by the World Intellectual Property Organization (WIPO). It was to honour the rights of all authors who are nationals of countries and are party to the Convention.<sup>35</sup> As aforementioned, Kenya is subject to this convention by virtue of have been a British Colony and adopting most of its copyright laws from common law.

#### **Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIP)**

This is an international agreement that is administered by the World Trade Organization that sets out the minimum standards for intellectual property regulation as may be applied by nationals of World Trade Organization

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<sup>33</sup> Nzomo V, 'Collective management of copyright and related rights in Kenya: Towards an effective legal framework for regulation of collecting societies' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2011, 29.

<sup>34</sup> Wekesa M and Sihanya B, "Intellectual Property Rights in Kenya", 2002, 152.

<sup>35</sup> The UK Copyright Service (2004) "International copyright law - The Berne Convention", [http://www.copyrightservice.co.uk/copyright/p08\\_berne\\_convention](http://www.copyrightservice.co.uk/copyright/p08_berne_convention)

members.<sup>36</sup> This agreement includes nearly all conditions of the Berne Convention and thus bringing the laws of the WTO member states that had not signed the Berne convention into harmony with the countries that are signatories to the Berne convention.<sup>37</sup>

### **3.1.3 National Legal Instruments**

#### **The Kenyan Constitution, 2010**

The Constitution is the backbone of legal framework in Kenya, and therefore, it has a fundamental role to play in the formation of Copyright Law in Kenya. The following articles of the Constitution are examples of the role that the constitution plays in Kenya's Copyright law.

**Article 2** provides for the Constitution being the supreme law of Kenya and that it binds all persons and all State organs at both levels of government.<sup>38</sup> It also provides for any treaty or convention that is ratified in Kenya to form part of the laws of Kenya.<sup>39</sup> This in turn means that the Berne Convention and TRIP are part and parcel of the laws of Kenya.

**Article 10** provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them apply or interpret the constitution, enact, apply or interpret any law or make or implement public policy decisions.<sup>40</sup> Therefore, within the context of licensing and supervision of the CMOs, this article binds KECOBO as an office of state.<sup>41</sup>

**Article 11(2)(c)** of the Constitution states that the State shall promote the intellectual property rights of Kenyans, thus strongly relating the Constitution to Copyright Law.<sup>42</sup>

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<sup>36</sup> Nzomo V, 'Collective management of copyright and related rights in Kenya: Towards an effective legal framework for regulation of collecting societies' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2011, 30.

<sup>37</sup> Nzomo V, 'Collective management of copyright and related rights in Kenya: Towards an effective legal framework for regulation of collecting societies' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2011, 31.

<sup>38</sup> Article 2, *Constitution of Kenya*, (2010).

<sup>39</sup> Article 2, *Constitution of Kenya*, (2010).

<sup>40</sup> Article 10, *Constitution of Kenya*, (2010).

<sup>41</sup> Nzomo V, 'Collective management of copyright and related rights in Kenya: Towards an effective legal framework for regulation of collecting societies' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2011, 32.

<sup>42</sup> Article 11(2)(c), *Constitution of Kenya*, (2010).

**Article 40** provides for protection and the right to property for every Kenyan.<sup>43</sup> It further states that the state shall support, promote and protect the Intellectual Property of Kenyans, thus providing protection to the copyright owners in Kenya.<sup>44</sup>

## **The Copyright Act of Kenya**

### **History of the copyright Act of Kenya**

Copyright Law in Kenya and its practice stems from Kenya's colonial and neocolonial experience. The Copyright Act of Kenya of 1842 was born from the 1911 and 1956 Copyright Acts of the United Kingdom.<sup>45</sup> The two statutes were applied alongside the English Common Law by virtue of the reception clause under the East African-Order-in-Council 1897, which was later re-enacted in the Kenya Judicature Act 1967.<sup>46</sup>

The Copyright Act of 2001 came to be after a long series of amendments from the year 1966. Since then, the Kenyan Government has applied measures to ensure that the act is well implemented.<sup>47</sup> These measures include the appointment of members of the Board by the Attorney general, which took place in May 2003, followed by their reappointment in 2006. The Attorney general also appointed the Competent Authority, which is also known as the Copyright Tribunal, in June 2009.<sup>48</sup>

### **Relevance of the Copyright Act to the Kenyan Music Industry**

The Copyright Act is very instrumental to the music industry in Kenya today. The following sections of the act are evidence of the same.

**Section 22** – this section provides for works eligible to copyright, and states musical works as one of them.<sup>49</sup> It also provides for the registration of these works by the KECOBO, in a manner that that they can be prescribed.<sup>50</sup>

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<sup>43</sup> Article 40, *Constitution of Kenya*, (2010).

<sup>44</sup> Article 40, *Constitution of Kenya*, (2010).

<sup>45</sup> Sihanya B, *Copyright Law in Kenya*, Unpublished, University of Nairobi, Nairobi, 2009, 1.

<sup>46</sup> Sihanya B, *Copyright Law in Kenya*, Unpublished, University of Nairobi, Nairobi, 2009, 1.

<sup>47</sup> Sihanya B, *Copyright Law in Kenya*, Unpublished, University of Nairobi, Nairobi, 2009, 8.

<sup>48</sup> Sihanya B, *Copyright Law in Kenya*, Unpublished, University of Nairobi, Nairobi, 2009, 8.

<sup>49</sup> Section 22, *The Copyright Act*, No, 12 of 2001.

<sup>50</sup> Section 10, *The Copyright (Amendment) Act*, 2019.

**Section 23** – this section provides for copyright by virtue of nationality or residence, and states that copyright shall be conferred on every work eligible for copyright of which the author, is, at the time that the work is made, a citizen of, or is domiciled or ordinarily resident in Kenya, or is a body corporate which is incorporated under or in accordance with the laws of Kenya.<sup>51</sup> This section is important as it recognizes the protection of Kenyan Artists by the Act.

**Section 26** – this section provides for the nature of copyright in literary, musical or artistic works and audio-visual works, by stating that the aforementioned shall be the exclusive right to control the doing in Kenya of any of the following acts, namely the reproduction in any material form of the original work or its translation or adaptation, the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement, and 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.<sup>52</sup> The section also gives examples whereby copyright in any such work shall not include the right to control, such as fair dealing, purposes of scientific research, private use, criticism or review, and reporting.

**Section 27** – this section provides for the broadcasting of works incorporated in audio-visual works by stating that where the owner of the copyrights in the musical work authorizes a person to incorporate the work in audio-visual works and a broadcasting authority broadcasts such works, it shall, in the absence of any agreement to the contrary, be deemed that the owner of the copyright authorized the broadcast.<sup>53</sup> It also states that where a broadcasting authority broadcasts audio-visual works in which musical work is incorporated, the owner of the right to broadcast the work shall, subject to the provisions of the Act, be entitled to receive fair compensation from the broadcasting authority, and in the absence of an agreement the amount will be determined by the Copyright Tribunal.<sup>54</sup>

**Section 30** – this section provides for the rights of performers. This section is of great importance especially to the registered members of PRISK.

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<sup>51</sup> Section 23, *The Copyright Act*, No, 12 of 2001.

<sup>52</sup> Section 26, *The Copyright Act*, No, 12 of 2001.

<sup>53</sup> Section 27, *The Copyright Act*, No, 12 of 2001.

<sup>54</sup> Section 16, *The Copyright (Amendment) Act*, 2019.

**Section 33** – this section gives several provisions on assignments and licenses, which are paramount in keeping the CMOs accountable of their duties, as this is one of their main functions.

## **3.2 History and Relevance of Collective Management Organizations (CMOS) in Kenya**

### **3.2.1 History of CMOs**

The establishment of the first CMO was a result of a legal battle in the year 1847, between a Parisian ‘café-concert’ known as ‘Ambassadeurs’ and two composers, namely, Paul Henrion and Victor Parizot and a writer, Ernest Bourget.<sup>55</sup> The success of this case led to the formation of the *Société des auteurs, compositeurs et éditeurs de music (SACEM)*, which is French for the Society of authors, composers and editors of music. The society was formed in 1850, and it is the world first and oldest CMO.<sup>56</sup> In Kenya, the formation of CMOs came about by her being a British protectorate. The Performing Rights Society (PRS) was formed in the year 1914 and was based in the United Kingdom. The formation of the PRS thus took place at the same time during which Kenya was a British protectorate, and therefore its responsibility for the collective management of copyright throughout the British Empire trickled down to Kenya.<sup>57</sup>

### **3.2.2 The Kenya Copyright Board (KECOBO)**

KECOBO is a State corporation under the Office of the Attorney General and the Department of Justice.<sup>58</sup> Section 3 of the Copyright Act of Kenya defines KECOBO as a body corporate with perpetual succession and a common seal.<sup>59</sup> It also states that in its corporate name, KECOBO is capable of suing and being sued, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property, borrowing and lending money and doing or performing all such other things or acts as may be necessary for the proper performance of its functions under the Act which may be lawfully be done by a body corporate.<sup>60</sup>

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<sup>55</sup> Fiscor M, “Collective Management of Copyright and Related Rights”, World Intellectual Property Organization, 2002, Geneva, 18

<sup>56</sup> Nzomo V, ‘Collective management of copyright and related rights in Kenya: Towards an effective legal framework for regulation of collecting societies’ Unpublished LLM Thesis, University of Nairobi, Nairobi, 2011, 43.

<sup>57</sup> Nzomo V, ‘Collective management of copyright and related rights in Kenya: Towards an effective legal framework for regulation of collecting societies’ Unpublished LLM Thesis, University of Nairobi, Nairobi, 2011, 43.

<sup>58</sup> See official KECOBO site, -<<https://www.copyright.go.ke/about-kecobo.html>>

<sup>59</sup> See official KECOBO site, -<<https://www.copyright.go.ke/about-kecobo.html>>

<sup>60</sup> See official KECOBO site, -<<https://www.copyright.go.ke/about-kecobo.html>>

### **3.2.3 Collective Management Organizations in Kenya (CMOs)**

In Kenya, CMOs are registered as companies limited by guarantee.<sup>61</sup> They are private organizations that are established to collectively administer the rights of their members such as composers, performers, authors, artists and book publishers.

One of the main functions of KECOBO is to license and supervise the CMOs in Kenya. As aforementioned, there are four CMOs in Kenya, namely The Reproduction Rights Society of Kenya (KOPIKEN), Kenya Association of Music Producers (KAMP), Music Copyright Society of Kenya (MCSK) and the Performers Rights Society of Kenya (PRISK)<sup>62</sup>, which will be looked into in this chapter.

#### **The Reproduction Rights Society of Kenya (KOPIKEN)**

This is the sole Reproductive Rights Organization collecting in the area of reprographic rights in Kenya.<sup>63</sup> Its formation was spearheaded in the early 1990s by a Kenyan publisher and it was registered in 1994 as a society under the Societies Act of the Laws of Kenya. After becoming inactive in the year 1998, the Kenya Publishers Association (KPA) began the process of reviving KOPIKEN in 2004; it started fully functioning again in 2007.<sup>64</sup> KOPIKEN derives its mandate from various pieces of legislation such as the Kenya copyright Act, which provides for the mandate of the setting up of collecting societies and from the Constitution, which provides for the respect of intellectual property.<sup>65</sup> It also draws its mandate from its membership, which is made up of rights holder associations rather than individual authors and publishers. Among the rights-holders that KOPIKEN represents are song writers and writers of sheet music, through the Music Copyright Society of Kenya.

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<sup>61</sup> Sihanya B, Copyright Law in Kenya, Unpublished, University of Nairobi, Nairobi, 2009, 18.

<sup>62</sup> Sihanya B, Copyright Law in Kenya, Unpublished, University of Nairobi, Nairobi, 2009, 18.

<sup>63</sup> See KOPIKEN's Profile on IFRRO's official website: <http://www.ifrro.org/members/reproduction-rights-societykenya>

<sup>64</sup> See KOPIKEN's Profile on IFRRO's official website: <http://www.ifrro.org/members/reproduction-rights-societykenya>

<sup>65</sup> See KOPIKEN's Profile on IFRRO's official website: <http://www.ifrro.org/members/reproduction-rights-societykenya>

## **Kenya Association of Music Producers (KAMP)**

Incorporated in the year 2003, KAMP was licensed by KECOBO to represent the rights and interest of producers of sound recordings. They do so through the collection of royalties in accordance with the Copyright Act.<sup>66</sup> KAMP's primary role is to administer rights on behalf of its members. This requires those who play recorded music in public, such as television and radio broadcasters, bars, public service vehicles, events and restaurants to get a KAMP license. Music producers or owners of sound recordings are entitled to royalties where their music is commercially used such as in the places aforementioned. KAMP then distributes the money collected to its members in the form of royalties.<sup>67</sup>

## **Performers Rights Society of Kenya (PRISK)**

This is a body that negotiates and sells tariffs with the different users of sound recordings and audio-visual works.<sup>68</sup> In respect to any exploitation of works, PRISK administers performers' rights relating to broadcasting, communication to the public, making available by wire or wireless including transmission to subscribers to a diffusion or any digital service, copying or similar reproduction such as digital copying and any form of such works.<sup>69</sup> Other functions of PRISK include the collection of equitable remuneration from users of sound recordings and audio-visual works, on behalf of its members for purposes of broadcasting or other communication to the public.

## **Music Copyright Society of Kenya (MCSK)**

Established in 1983, this is the body that is charged with the mandate to collect royalties on behalf of authors, composers, arrangers and publishers of music in

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<sup>66</sup> KECOBO (2013) "Collective Management of Copyright and Related Rights" Copyright Newsletter Issue no. 8, Kenya Copyright Board, Nairobi

<sup>67</sup> KECOBO (2013) "Collective Management of Copyright and Related Rights" Copyright Newsletter Issue no. 8, Kenya Copyright Board, Nairobi

<sup>68</sup> KECOBO (2013) "Collective Management of Copyright and Related Rights" Copyright Newsletter Issue no. 8, Kenya Copyright Board, Nairobi

<sup>69</sup> KECOBO (2013) "Collective Management of Copyright and Related Rights" Copyright Newsletter Issue no. 8, Kenya Copyright Board, Nairobi

Kenya.<sup>70</sup> Their vision is to be the most effective and efficient music royalty collector in the world and their mission is to be a world class African society that meets their members' expectations, with a commitment to sound management, cost effective services based on business ethics and values.<sup>71</sup>

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<sup>70</sup> See the Official Website of MCK. Available at: [www.mck.or.ke/](http://www.mck.or.ke/)

<sup>71</sup> See the Official Website of MCK Available at: [www.mck.or.ke/](http://www.mck.or.ke/)

## CHAPTER FOUR: EMERGING BUSINESS TRENDS AND THE LEGAL LACUNAS

### 4.1 Introduction

Section 30A of the Copyright Act provides for the right to equitable remuneration for use of sound recordings and audiovisual works.<sup>72</sup> Without a doubt, musical works fall in this category. However, there are factors that limit the enjoyment of this right by Kenyan musicians that will be discussed in this chapter.

### 4.2 Ineffectiveness of CMOs in Kenya

As mentioned in the previous chapter, the reason for the establishment of CMOs is to bridge the gap between rights holders and the users of copyright works.<sup>73</sup> However, CMOs have failed to live up to their mandate, and have instead begun to engage in corruption, mismanagement of funds, lack of transparency and abuse of power.<sup>74</sup>

#### 4.2.1. The controversy of the MCSK

MCSK has proven to be the most notorious in failing to perform its duties to the latter. Between the Years 1984 and 2001, the amendments to the Copyright Act did not expressly provide a framework for the regulation of CMOs. Therefore, several musicians would turn to the media to voice their complaints about MCSK.<sup>75</sup> The earliest complaint of this nature was published in 1984 in the Standard Newspaper, where the members of the then MPRSK alleged that the license fees that were collected on their behalf under the collaboration agreement with PRS were not accorded to them.<sup>76</sup>

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<sup>72</sup> Section 27, *The Copyright Act*, No, 12 of 2001.

<sup>73</sup> Nzomo V, 'CMOs Behaving Badly: Kenya Featured Alongside EU and US Copyright Collecting Societies', *IP Kenya*, 2018, <https://ipkenya.wordpress.com/2018/05/10/cmoss-behaving-badly-kenya-featured-alongside-eu-and-us-copyright-collecting-societies/>, o 10<sup>th</sup> May 2018.

<sup>74</sup> Nzomo V, 'CMOs Behaving Badly: Kenya Featured Alongside EU and US Copyright Collecting Societies', *IP Kenya*, 2018, <https://ipkenya.wordpress.com/2018/05/10/cmoss-behaving-badly-kenya-featured-alongside-eu-and-us-copyright-collecting-societies/>, o 10<sup>th</sup> May 2018.

<sup>75 75</sup> Nzomo V, 'Collective management of copyright and related rights in Kenya: Towards an effective legal framework for regulation of collecting societies' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2011, 45.

<sup>76 76</sup> Nzomo V, 'Collective management of copyright and related rights in Kenya: Towards an effective legal framework for regulation of collecting societies' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2011, 45.

However, even after the enactment of the Copyright Act of 2001, the complaints of the members of MCSK have not stopped to date.

In the year 2016, the renowned trio, Elani, took to YouTube in a 12 minute video, entitled ‘Elani Speaks’<sup>77</sup> explaining to their fans where they had been for the past year. One of their main reasons was being deep in debt after holding a concert in the year 2014. After being able to clear the debt in 2015, due to the favor of well wishers, the trio realized their financial frustration that was mainly caused by MCSK, by not being accorded the royalties that they believed they deserved after their most successful year in the music industry. They claimed to have received a cheque of Kshs.31, 000, which they did not believe was their value in that year, after their musical works were played in almost every establishment that had obtained a license from MCSK.<sup>78</sup> However, MCSK dismissed Elani’s claims by saying that their actual total broadcast royalties amounted to the said Kshs. 31,000.<sup>79</sup> The back and forth continued between the two parties until Elani was thereafter paid an amount of Kshs. 300,000 only because they raised their voices on the matter.<sup>80</sup>

In 2019, MCSK received another social media attack from a number of Kenya’s famous artists such as Sauti Sol, Fena Gitu, Khaligraph Jones, Willy Paul and King Kaka, as well as their fans after it was discovered that they sent Kshs.2, 500 to each of these artists as their royalties.<sup>81</sup> They came to their own defense on social media and claimed that they had distributes royalties to all their members, amounting to 13,967 musicians. They said that this amount was Performance in Public Places distribution

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<sup>77</sup> #Elani speaks, ‘Where we have been’ <https://www.youtube.com/watch?v=oLONcjTZ9z0>

<sup>78</sup> #Elani speaks, ‘Where we have been’ <https://www.youtube.com/watch?v=oLONcjTZ9z0>

<sup>79</sup> Mukei C, ‘Which way forward for Elani, MCSK drama over unpaid royalties?’ *Standard Entertainment and Lifestyle*, 2016, <https://www.standardmedia.co.ke/entertainment/nainotepad/2000190246/which-way-forward-for-elani-mcsk-drama-over-unpaid-royalties> January 2016.

<sup>80</sup> Mukei C, ‘Which way forward for Elani, MCSK drama over unpaid royalties?’ *Standard Entertainment and Lifestyle*, 2016, <https://www.standardmedia.co.ke/entertainment/nainotepad/2000190246/which-way-forward-for-elani-mcsk-drama-over-unpaid-royalties> January 2016.

<sup>81</sup> Nyawira L, ‘Why MCSK paid Kenyan artistes Sh2,500 as royalties’, *The Star Newspaper*, 2019, <https://www.the-star.co.ke/news/2019-08-14-why-mcsk-paid-kenyan-artistes-sh2500-as-royalties/> , on 14<sup>th</sup> August 2019.

and were only collections from public places for only two months.<sup>82</sup> They added that they had not received any money from broadcasters who exploit music.<sup>83</sup>

Between the years 2001 and 2008, rights holders continued to complain about the distribution of royalties by MCSK. There were also several cases in court that involved MCSK and various categories of copyright users; there the copyright users accused MCSK of harassment, intimidation and coercion.<sup>84</sup>

In the year 2010, MCSK was reported to only have distributed 48 million shillings to rights holders, out of total revenue of 185 million shillings, with 137 million shillings being channeled towards catering for administrative costs.<sup>85</sup> Under KECOBO guidelines, only 30% of the funds collected by the CMOs can be spent on administrative costs and the remaining 70% should be distributed to the rights holders. However, MCSK did the opposite of this, when they were handling their funds and used 70% on administrative costs and 30% was distributed as royalties to the artists.<sup>86</sup> This prompted KECOBO to deregister MCSK IN 2011.<sup>87</sup>

In the year 2015, four of MCSK's accounts were frozen after allegations of fraud and complaints from its members.<sup>88</sup> The Chief Executive officer of MCSK, Maurice Okoth was arrested over these fraud related allegations and was accused of obtaining Kshs. 800 million. This court case was highly lauded by prominent music personalities such as the late Achieng' Abura who expressed her woes about MCSK leadership, and defined them as people who are after enriching themselves at the expense of artists who are suffering.<sup>89</sup>

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<sup>82</sup> Nyawira L, 'Why MCSK paid Kenyan artistes Sh2,500 as royalties', *The Star Newspaper*, 2019, <<https://www.the-star.co.ke/news/2019-08-14-why-mcsk-paid-kenyan-artistes-sh2500-as-royalties/>>, on 14<sup>th</sup> August 2019.

<sup>83</sup> <sup>83</sup> Nyawira L, 'Why MCSK paid Kenyan artistes Sh2,500 as royalties', *The Star Newspaper*, 2019, <https://www.the-star.co.ke/news/2019-08-14-why-mcsk-paid-kenyan-artistes-sh2500-as-royalties/> , on 14<sup>th</sup> August 2019.

<sup>84</sup> <sup>84</sup> Nzomo V, 'Collective management of copyright and related rights in Kenya: Towards an effective legal framework for regulation of collecting societies' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2011, 46.

<sup>85</sup> Band J, 'Cautionary Tales About Collective Rights Organizations, Part 2', *Academic Resources*, 2018, <http://infojustice.org/archives/39886>, on 22<sup>nd</sup> May, 2018.

<sup>86</sup> Band J, 'Cautionary Tales About Collective Rights Organizations, Part 2', *Academic Resources*, 2018, <http://infojustice.org/archives/39886>, on 22<sup>nd</sup> May, 2018.

<sup>87</sup> Band J, 'Cautionary Tales About Collective Rights Organizations, Part 2', *Academic Resources*, 2018, <http://infojustice.org/archives/39886>, on 22<sup>nd</sup> May, 2018.

<sup>88</sup> Mukei C, 'Which way forward for Elani, MCSK drama over unpaid royalties?' *Standard Entertainment and Lifestyle*, 2016, <https://www.standardmedia.co.ke/entertainment/nainotepad/2000190246/which-way-forward-for-elani-mcsk-drama-over-unpaid-royalties> January 2016.

<sup>89</sup> Mukei C, 'Which way forward for Elani, MCSK drama over unpaid royalties?' *Standard Entertainment and Lifestyle*, 2016,

On the other hand, there was a case in the year 2000, between MCSK and Parklands Shade Hotel alias K1 Klub House<sup>90</sup> whereby MCSK sought orders from the court to restrain this establishment from playing music without a prior license from them. They based their argument on Section 8 and 16 of the copyright Act, which provide for regulation of broadcasting musical works and the performance of musical works respectively.<sup>91</sup> K1 Klub House however contended that MCSK were not the sole copyright licensing body for musical works in the country, and they had paid all their dues to both Kenya Broadcasting Services and Multichoice Africa LTD. They also argued that only the owner of the copyrights would have the right to enforce their compliance.<sup>92</sup> The court dismissed MCSK's claims due to the fact that they had not established that they had a prima facie case with a probability of success, and that accepting their claim will greatly interfere with the business of K1 Klub House<sup>93</sup>

This coercion is also seen in an article published by the Business Daily Newspaper in the year 2017, which explained the CMOs' intentions to increase copyright charges for those who use copyright works. The affected parties included public transport operators, barbershops, gyms, and nightclubs.<sup>94</sup> The Attorney General at the time improved an increase in music tariffs and the new figures represented a six-fold rise of charges for some of the affected businesses. For example, owners of public bus transport were to pay a new rate of Kshs. 36,550 per year, from the rate of Kshs. 6,000 that they previously used to pay.<sup>95</sup> These new tariffs aggravated Kenyan artists, as they were aware that the bulk of these funds would end up catering for the operational expenses of the CMOs instead of the royalties owed to them.<sup>96</sup>

The nouvelle COVID-19 pandemic has had a great negative impact on several industries in the country, the music industry being one of them. In April 2020, President Uhuru Kenyatta announced that the government had set aside Kshs. 100

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<https://www.standardmedia.co.ke/entertainment/nainotepad/2000190246/which-way-forward-for-elani-mcsk-drama-over-unpaid-royalties> January 2016.

<sup>90</sup> *Music Copyright Society of Kenya v. Parklands Shade Hotel T/a Klub House* [2000] eKLR 1.

<sup>91</sup> *Music Copyright Society of Kenya v. Parklands Shade Hotel T/a Klub House* [2000] eKLR, 2.

<sup>92</sup> *Music Copyright Society of Kenya v Parklands Shade Hotel T/a Klub House* [2000] eKLR, 2.

<sup>93</sup> *Music Copyright Society of Kenya v Parklands Shade Hotel T/a Klub House* [2000] eKLR, 3.

<sup>94</sup> 'Playing music to cost a fortune as copyright charges go up' *Business Daily*,

<https://businesstoday.co.ke/playing-music-to-cost-a-fortune-as-copyright-charges-go-up/>, on May 13<sup>th</sup> 2017.

<sup>95</sup> 'Playing music to cost a fortune as copyright charges go up' *Business Daily*,

<https://businesstoday.co.ke/playing-music-to-cost-a-fortune-as-copyright-charges-go-up/>, on May 13<sup>th</sup> 2017.

<sup>96</sup> 'Playing music to cost a fortune as copyright charges go up' *Business Daily*,

<https://businesstoday.co.ke/playing-music-to-cost-a-fortune-as-copyright-charges-go-up/>, on May 13<sup>th</sup> 2017.

million to cushion local musicians and actors from the effects of COVID-19.<sup>97</sup> This announcement arose many questions, one of them being whether this money will be distributed by the Ministry of Sports, Culture and Heritage or whether it will be channeled to KECOBO, under which the respective CMOs fall.<sup>98</sup> The said CMOs thereafter demanded to be involved in the distribution of these funds as they termed it as one of their mandates. However, their registered members strongly refuted this suggestion, as they are now vigilant on the lack of transparency by the CMOs, as they have experienced it over the years.<sup>99</sup>

#### **4.2.2 Relevance of KOPIKEN in the music industry today**

As the years have gone by, it is evident that sheet music is rarely if no longer used in the production of music, more so music that is being created to be sold. Music is now more contemporary than it is classic, and therefore, very few of the makers of music today are able to read sheet music. This withstanding, we still see KOPIKEN performing their functions in the same manner as they have been since the time when sheet music was popular. This also means that they are still receiving the same funds, for almost little or no musical works to represent.

#### **4.3 Exploitation of the Kenyan Musician in the Digital Space**

As aforementioned, new age technology has proven to be one of the biggest disrupters of the music industry. Technology has rapidly grown over the years, leaving very little room for CMOs to come up with ways on how they will be collecting royalties from copyright users over the internet. This state of affairs adds onto the exploitation of Kenyan musicians as it blocks yet another potential channel of income for them.

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<sup>97</sup> Omondi I, 'Musicians, actors to get Ksh.5K each from Uhuru's Ksh.100M Covid-19 'gift' *Citizen Digital*, 2020, <https://citizentv.co.ke/lifestyle/musicians-actors-to-get-ksh-5k-each-from-uhurus-ksh-100m-covid-19-gift-329334/>, on April 8<sup>th</sup> 2020.

<sup>98</sup> Omondi I, 'Musicians, actors to get Ksh.5K each from Uhuru's Ksh.100M Covid-19 'gift' *Citizen Digital*, 2020, <https://citizentv.co.ke/lifestyle/musicians-actors-to-get-ksh-5k-each-from-uhurus-ksh-100m-covid-19-gift-329334/>, on April 8<sup>th</sup> 2020.

<sup>99</sup> Omondi I, 'Musicians, actors to get Ksh.5K each from Uhuru's Ksh.100M Covid-19 'gift' *Citizen Digital*, 2020, <https://citizentv.co.ke/lifestyle/musicians-actors-to-get-ksh-5k-each-from-uhurus-ksh-100m-covid-19-gift-329334/>, on April 8<sup>th</sup> 2020.

In the case of *Cellulant Kenya Ltd v. Music Copyright Society of Kenya [2009]*<sup>100</sup>, the plaintiff is a business owner who is known to offer mobile phone value added service of musical works such as ringtones, logos and pictures.<sup>101</sup> They had made several mobile content distribution agreements with artists in relation to the songs used in their business. They would then pay the royalties to the rights holders directly. MCSK claimed that Cellulant was in breach of Section 46(2)<sup>102</sup> of the Copyright Act, which provides for the collective administration of copyright, as they are the body charged with the mandate to distribute royalties to music composers, authors and publishers.<sup>103</sup> The court held that the plaintiff was exploiting these individuals and taking advantage of their ignorance by promising to pay them a higher percentage than what MCSK would pay them.<sup>104</sup>

Rosemary Wahu Kagwi, alias Wahu, one of the legends in the Kenyan music industry, wrote a thesis in the year 2014, part of which she explains the foul play by telecom companies and digital content providers. She explains the growing culture of downloading digital music by ways of ring backs and ringtones: ring backs being designed to provide entertainment to a caller as the call is connected, while ringtones designed to alert the recipient of a call that their phone is ringing.<sup>105</sup> Skiza, a brainchild of Safaricom, is popular for providing ring back services. They are the largest of such a platform with over 6 million subscribers.<sup>106</sup> The workings of Skiza involve sub contracting Content Providers or aggregators to provide content for the portal. The content that is uploaded onto this portal is the responsibility of the aggregator, which means that they must ensure to receive all licenses and clearances, including clearance from the CCK and the respective copyrights owners of the work, to use this music in the digital space.<sup>107</sup> Therefore, the first instance of foul play of this company comes in whereby the content providers end up selling the content to Skiza without the knowledge of the rights owners, thus exploiting them.<sup>108</sup> This is

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<sup>100</sup> *Cellulant Kenya LTD v Music Copyright Society of Kenya LTD* (2009) eKLR, 1.

<sup>101</sup> *Cellulant Kenya LTD v Music Copyright Society of Kenya LTD* (2009) eKLR, 1.

<sup>102</sup> *Cellulant Kenya LTD v Music Copyright Society of Kenya LTD* (2009) eKLR, 4.

<sup>103</sup> *Cellulant Kenya LTD v Music Copyright Society of Kenya LTD* (2009) eKLR, 4.

<sup>104</sup> *Cellulant Kenya LTD v Music Copyright Society of Kenya LTD* (2009) eKLR, 5.

<sup>105</sup> Kagwi R, 'An Investigation On The Copyright structure In Relation To The Kenyan Music Industry', Unpublished Thesis, University of Nairobi, Nairobi, 2014, 65.

<sup>106</sup> Kagwi R, 'An Investigation On The Copyright structure In Relation To The Kenyan Music Industry', Unpublished Thesis, University of Nairobi, Nairobi, 2014, 65.

<sup>107</sup> Kagwi R, 'An Investigation On The Copyright structure In Relation To The Kenyan Music Industry', Unpublished Thesis, University of Nairobi, Nairobi, 2014, 66.

<sup>108</sup> *Cellulant Kenya LTD v Music Copyright Society of Kenya LTD* (2009) eKLR.

well seen in the *Cellulant case*.<sup>109</sup> Secondly, Skiza is notorious for underpaying the content providers, which is only 15% of their monthly income of Kshs. 100 million.<sup>110</sup>

However, this exploitation seemed to take a turn in January 2002, where President Uhuru Kenyatta banned Viusasa, a digital content provider for audio visual works, and Skiza from collecting royalties.<sup>111</sup> He made this statement while addressing the nation, saying that his intent it to support the Content Service Provider sector using a multi-pronged approach due to the fact that they sit outside the CMOs. He gave the direction that that Content Service Providers would now receive their royalties through a centrally managed account at KECOBO.<sup>112</sup> In addition to this, he said that KECOBO, with the assistance of the Ministry of ICT, has already reviewed and agreed on new tariffs for the year 2020, which will be gazette and will henceforth for the basis on which compliance will be monitored.<sup>113</sup>

Another issue in the digital space that has impoverished the Kenyan artist is music piracy. This is an act that is not well addressed in the Copyright Act 2001, and thus it is frequently practiced because there are no provisions to restrict it in any way. Millions of copies of music are sold or downloaded at no charge, from the Internet and without the consent of the copyright owners.<sup>114</sup> This state of affairs is enabled by the borderless nature of the Internet, in turn causing the Internet to pose serious challenges to copyright protection in Kenya.<sup>115</sup> It has been proven that 99% of the music sold in Kenya is pirated and this makes it difficult for the Kenyan artist to reap

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<sup>109</sup> Kagwi R, 'An Investigation On The Copyright structure In Relation To The Kenyan Music Industry', Unpublished Thesis, University of Nairobi, Nairobi, 2014, 66.

<sup>110</sup> Kagwi R, 'An Investigation On The Copyright structure In Relation To The Kenyan Music Industry', Unpublished Thesis, University of Nairobi, Nairobi, 2014, 67.

<sup>111</sup> Dallah O, 'Uhuru Bans Viusasa And Skiza From Collecting Royalties', 2020, <https://ommydalla.co.ke/people/item/1379-president-uhuru-bans-viusasa-and-skiza-from-collecting-royalties>, on 14<sup>th</sup> January 2020.

<sup>112</sup> Dallah O, 'Uhuru Bans Viusasa And Skiza From Collecting Royalties', 2020, <https://ommydalla.co.ke/people/item/1379-president-uhuru-bans-viusasa-and-skiza-from-collecting-royalties>, on 14<sup>th</sup> January 2020.

<sup>113</sup> Dallah O, 'Uhuru Bans Viusasa And Skiza From Collecting Royalties', 2020, <https://ommydalla.co.ke/people/item/1379-president-uhuru-bans-viusasa-and-skiza-from-collecting-royalties>, on 14<sup>th</sup> January 2020.

<sup>114</sup> Ouma M, 'Enforcement of Copyright in the music industry: A critical analysis of the legal and infrastructural framework of Enforcement in sub-Saharan Africa,' PHD dissertation, Queen Mary University of London, 2008, 101.

<sup>115</sup> Ouma M, 'Enforcement of Copyright in the music industry: A critical analysis of the legal and infrastructural framework of Enforcement in sub-Saharan Africa,' PHD dissertation, Queen Mary University of London, 2008, 101.

the benefits of their work.<sup>116</sup> We see a legal lacuna when it comes to piracy due to the fact that Kenyan Copyright law does not provide adequate protection from music piracy.

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<sup>116</sup> Ouma M, 'Enforcement of Copyright in the music industry: A critical analysis of the legal and infrastructural framework of Enforcement in sub-Saharan Africa,' PHD dissertation, Queen Mary University of London, 2008, 101.

#### **4.4 Making a Sustainable Living As A Kenyan Musician**

The above scenarios are a clear indication that CMOs in Kenya have failed their members in carrying out their mandates, despite that they have the legal framework and the funds to do so. It also shows how there is room for exploitation of copyright owners in the digital space, as it is fairly new industry that will take time for the CMOs to get a grip of. However Kenyan musicians have been able to find different avenues through which they can earn a living, and majority of them have been successful at this.

##### **Live performances**

Over the years, this has proven to be one the most sustainable way of generating income for Kenyan musicians. Performing at entertainment events and corporate events has earned Kenyan artists a good living, as they tend to happen very frequently in Kenya. However, the spread of the global pandemic, COVID-19, has discouraged the holding of social gatherings. Therefore, this method of earning a living has proven to be unsustainable for them, as social gatherings have been eliminated not only in Kenya, but also across the world. This has pushed the artists into looking for alternative ways to make money.

##### **Brand Endorsements**

The digital space has been seen to work both for and against Kenyan musicians. On a more positive note, many brands are using the influence of Kenyan musicians to advertise their products and services in the digital space. This has proven to be one of the biggest and most fruitful ways that Kenyan artists are making money today, through platforms such as Instagram, YouTube and Facebook, these artists are able to use their influence to market what these brands have to offer, and they in turn earn an income.

##### **Sale of physical merchandise**

In the same regard, the influence of these artists enables them to sell physical merchandise such as hats, t-shirts and sweatshirts that have their names or pictures printed on them, to their fans. This has been done by quite a number of artists and has proven to also be a great way of generating income for them.

## CHAPTER 5: COMPARATIVE ANALYSIS OF KENYA AND THE UNITED KINGDOM

### 5.1 Introduction

This chapter is set out to look into the United Kingdom as a case study, due to the fact that Kenya already borrows a lot from their copyright law. This will enable the researcher to give adequate recommendations on what ought to be improved in Kenya as Kenya has looked up to and borrowed a lot from the United Kingdom in attempting to structuralize copyright law.

### 5.2 Legal Framework of copyright in the UK

The main legal framework used in the United Kingdom that governs the use of copyright is known as the Copyright Designs and Patent Act of 1988. This act gives the creators of literary, dramatic, musical and artistic works the right to control the ways in which their works are used.<sup>117</sup> The act gives provisions of rights to broadcast,<sup>118</sup> public performance,<sup>119</sup> copying,<sup>120</sup> adapting,<sup>121</sup> issuing,<sup>122</sup> renting<sup>123</sup> and lending copies to the public.<sup>124</sup> In comparison with the Kenyan Copyright Act, it is important to note the detail that the Copyright Designs and Patent Act of 1988 is written in. This then works to the advantage of the artist because there is very little room for loopholes while using the act. For example, the Copyright Designs and Patent Act of 1988 has a section on the false attribution of work, which provides for the right one has not to have a literary, dramatic, musical or artistic work falsely attributed to him as author.<sup>125</sup> In Kenya, there are some upcoming artists or producers who take part in false attribution of their work in order to give it more credit and make more money from it, thus this section would be useful to those who are victim.

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<sup>117</sup> See the UK Copyright Service official site [https://copyrightservice.co.uk/copyright/uk\\_law\\_summary#:~:text=The%20Copyright%2C%20Designs%20and%20Patents%20Act%201988%2C%20is%20the%20current,their%20material%20may%20be%20used.&text=Normally%20the%20individual%20or%20collective,will%20exclusively%20own%20the%20rights.](https://copyrightservice.co.uk/copyright/uk_law_summary#:~:text=The%20Copyright%2C%20Designs%20and%20Patents%20Act%201988%2C%20is%20the%20current,their%20material%20may%20be%20used.&text=Normally%20the%20individual%20or%20collective,will%20exclusively%20own%20the%20rights.)

<sup>118</sup> Section 6, *Copyright, Designs and Patents Act*, 1988.

<sup>119</sup> Section 16(1)(c), *Copyright, Designs and Patents Act*, 1988.

<sup>120</sup> Section 16(1)(a), *Copyright, Designs and Patents Act*, 1988.

<sup>121</sup> Section 16(1)(e), *Copyright, Designs and Patents Act*, 1988.

<sup>122</sup> Section 16(1)(b), *Copyright, Designs and Patents Act*, 1988.

<sup>123</sup> Section 16(1)(ba), *Copyright, Designs and Patents Act*, 1988.

<sup>124</sup> Section 16(1)(ba), *Copyright, Designs and Patents Act*, 1988.

<sup>125</sup> Section 84, *Copyright, Designs and Patents Act*, 1988.

### 5.3 Collective Administration in the United Kingdom

In the United Kingdom, there is a body known as UK Music. It is an industry-funded body that was established in October 2008, to represent the collective interest of the recorded, published and live arms of the British music industry.<sup>126</sup> Through collective representation, UK music promotes the interests of record labels and music publishers, songwriters, composers, lyricists, musicians, managers, producers, promoters, venues and collection societies<sup>127</sup> The roles of UK music are as follows;

1. To guide policy makers towards decision-making in the best interests of the entertainment industry and the best collective interests of their membership for now and for the future.<sup>128</sup>
2. They represent and promote the interests of every part of the British music industry.<sup>129</sup>
3. They publish research on the economic value of the music industry to the UK economy in their *Music By Numbers* report and their predecessor reports *Measuring Music* and *Wish You Were Here*.<sup>130</sup>
4. They work to ensure that the copyright, which underpins music, is recognised and valued at all levels of Government, throughout the wider economy and by consumers.<sup>131</sup>
5. They run the secretariat for the All Party Parliamentary Group for Music.<sup>132</sup>
6. They run a Skills Academy to boost the music industry's talent pipeline. This includes the Music Academic Partnership, careers advice and apprenticeship development and support.<sup>133</sup>
7. They represent their members through lobbying, education and research work.<sup>134</sup>

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<sup>126</sup> See official UK music site - <<https://www.ukmusic.org/about/>>

<sup>127</sup> See official UK music site - <<https://www.ukmusic.org/about/>>

<sup>128</sup> See official UK music site - <<https://www.ukmusic.org/about/>>

<sup>129</sup> See official UK music site - <<https://www.ukmusic.org/about/>>

<sup>130</sup> See official UK music site - <<https://www.ukmusic.org/about/>>

<sup>131</sup> See official UK music site - <<https://www.ukmusic.org/about/>>

<sup>132</sup> See official UK music site - <<https://www.ukmusic.org/about/>>

<sup>133</sup> See official UK music site - <<https://www.ukmusic.org/about/>>

<sup>134</sup> See official UK music site - <<https://www.ukmusic.org/about/>>

### 5.3.1 Members of UK Music

This body has a total of 11 members who play different roles to contribute to the organization. They include;

- i. Association of Independent Music (AIM) – This is a trade body that was established in 1999 to provide a collective voice for the United Kingdom’s independent music industry.<sup>135</sup> It represents over 800 member companies, from the most established labels in the world, to small start-ups and individual artists that release their own music for the first time. This body promotes this diverse sector globally and provides a range of services to its members, enabling their member companies to grow, grasp new opportunities and break into new markets.<sup>136</sup>
- ii. The Ivors Academy of Music Creators – Formally known as British Academy of Songwriters, Composers and Authors, this body is considered the home of songwriters and composers of all genres. They have represented music creators in the UK for over 70 years.<sup>137</sup> Their main mandate is to ensure that the rights of their members are protected and confer the biggest honors in the industry to giants of modern composition and songwriting via The Ivors and the Ivors Composers Awards.<sup>138</sup>
- iii. British Phonographic Industry (BPI) – this body represents the UK’s recorded music industry. It was established in 1973, with the mandate of discussing matters of common interest and representing the British record industry in negotiations with Government department, relevant unions and other interested parties, and to promote the welfare and interest of the British record industry.<sup>139</sup> BPI champions the interests of its members, as it is a trade body. Its membership includes over 300 independent music companies and the UK’s major record companies such as Universal Music, Sony Music and Warner Music.<sup>140</sup>

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<sup>135</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/aim>>

<sup>136</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/aim>>

<sup>137</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/ivors-academy>>

<sup>138</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/ivors-academy>>

<sup>139</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/bpi>>

<sup>140</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/bpi>>

- iv. The Featured Artists Coalition (FAC) – This is the UK trade body that represents the specific rights and interests of music artists.<sup>141</sup> It is formed by artists, for artists, and they place ethos at the center of what they do.<sup>142</sup> They are known to be an inclusive community that advocates, educates, collaborates and researches on behalf of artists, coming together to provide a strong collective voice, within the industry and to governments domestically and abroad.<sup>143</sup>
- v. Music Managers Forum (MMF) – Established in 1992, this body has the mandate to educate, inform and represent UK managers<sup>144</sup> as well as offering a network through which they can share their experiences, opportunities and information.
- vi. Music Publishers Association (MPA) – This is a body that represents the full range of the UK’s music publishing sector; it acts on behalf of 280 members, from the most to least established publishers in the UK.<sup>145</sup>
- vii. Music Producers Guild (MPG) – This is an independent and democratic organization that encourages the highest standards of music production, and actively engages with other music industry organizations to campaign and lobby on matters of important mutual interest.<sup>146</sup> MPG represents and promotes the interests of all those involved in the production of recorded music, including producers, engineers, mixers, re-mixers, programmers and mastering engineers.<sup>147</sup>
- viii. The Musicians Union (MU) – This organization represents over 30,000 musicians working in all sectors of the music business in the UK.<sup>148</sup> Its roles include negotiating on behalf of musicians with all the major employers in the industry and offering range of service tailored for the self-employed by providing assistance for professional and student musicians of all ages.<sup>149</sup> MU

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<sup>141</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/fac>>

<sup>142</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/fac>>

<sup>143</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/fac>>

<sup>144</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/the-mmf>>

<sup>145</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/music-publishers-association>>

<sup>146</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/the-music-producers-guild>>

<sup>147</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/the-music-producers-guild>>

<sup>148</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/the-musicians-union>>

<sup>149</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/the-musicians-union>>

also tackles the issues raised by musicians such as copyright protection to valuable contractual advice, or from the recovery of unpaid fees to crucial work in health and safety.<sup>150</sup>

- ix. Phonographic Performance Limited (PPL) – This is the UK based music licensing company which licenses recorded music for broadcast, online and public performance use.<sup>151</sup> It was established in 1934, but carries out its roles on behalf of thousands of record companies and performer members. PPL’s Broadcast and online licensing covers the use of recorded music on the BBC’s television, radio and iPlayer services and by hundreds of commercial broadcasters. These include ITV, Channel 4, Five and Sky, together with services such as Virgin Media and BT Vision.<sup>152</sup> PPL also licenses commercial radio networks such as Global, Capital, Heart and Absolute Radio, online services such as Last FM and community, hospital, student and prison radio stations.<sup>153</sup> PPL issues Public Performance licenses to hundreds of thousands of businesses and organisations from all sectors across the UK who play recorded music to their staff or customers thus requiring a license by law.<sup>154</sup> These include bars, nightclubs, shops, hotels, factories, gyms and many others. This body also licenses music service providers to copy recorded music for services such as in-store music systems, jukeboxes, fairness compilations and in-flight entertainment systems.<sup>155</sup> They also operate an international service which enables them to collect licensing revenue from the use of its members’ recorded music around the world, as they have 64 agreements with music licensing companies globally in 34 different countries.<sup>156</sup>
- x. Performing Rights Society (PRS) – PRS for music was formed as the Mechanical Copyright Protection Society (MCPS) – PRS alliance in 1997 with the PRS for Music brand adopted in 2009. The organization exists to collect and pay royalties to its members when their music is exploited in any way; from being recorded to any format and distributed to the public, or it

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<sup>150</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/the-musicians-union>>

<sup>151</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/ppl>>

<sup>152</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/ppl>>

<sup>153</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/ppl>>

<sup>154</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/ppl>>

<sup>155</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/ppl>>

<sup>156</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/ppl>>

been performed or played in the public, broadcast or made publicly available online.<sup>157</sup>

- xi. UK Live Music Group – This group was formed by the live music industry to galvanize their views and provide a means of bringing together their representative bodies to UK music.<sup>158</sup>

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<sup>157</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/ppl>>

<sup>158</sup> See official UK music site - <<https://www.ukmusic.org/about/our-members/uk-live-music-group>>

## **CHAPTER SIX: Recommendations and Conclusion**

### **6.1 Introduction**

After the analysis in the previous chapters, this chapter is to give a final conclusion on what the findings of this research have brought to light. This chapter is also set out to give a set of recommendations that were collected as fieldwork when interviewing some Kenyan musicians that are directly affected by these issues.

### **6.2 Recommendations**

The research for this paper involved interviewing a number of industry players, who voiced the same grievances that have been analyzed in this paper. In addition to that, they gave insight on recommendations that they believe would help the industry better and allow them to make a more sustainable living than they already do. The recommendations are as follows.

- i. Use of alternative pieces of legislation such as the Commission on Administrative Justice Act, which will allow them to seek legal justice when they are exploited and underrepresented by the Copyright Act. The act provides for the functions of the Commission on Administrative Justice, one of them being to investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice.<sup>159</sup> Without a doubt, CMOs fall into this category. Therefore, Kenyan artists are able to bring their grievances to the Commission before seeking actual litigation.
- ii. Creation of a society that speaks on behalf of musicians in Kenya. This was one of the most common recommendations that were given by the artists as they are convicted that it is high time that they stand together as a society. In so doing, they are also able to educate musicians from out of Nairobi who may not be aware of their rights as artists and thus suffer a lot of loss. Similar to other professions that have their societies such as the Kenya National Union of Teachers for the teachers in Kenya, the musicians need to have a society with a spokesperson in order for them to voice their issues as on fraternity.

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<sup>159</sup> Section 8, *Commission on Administrative Justice Act*, 2011.

- iii. Establishment of a Kenyan Musicians kitty that can be contributed towards regularly by the Kenyan artists. In so doing, those who seek legal action in defense of their musical works can access funds to cater for the same.
- iv. Revision of the structures of CMOs. As aforementioned, the loopholes in the administration of the CMOs can be accredited to the fact that they are still of rigid structure. The systems need to be revised in order to ease the process of administering the royalties to the artists.
- v. Better structures of management. Most Kenyan artists play all the roles in their music, as defined in chapter one, as well as the management roles

### **6.3 Conclusion**

It can be proven from the previous chapters that Kenya has developed its own copyright system by closely benchmarking the United Kingdom. However, Kenya seems to have hit a dead end in this regard due to the fact that the UK's system is characterized by consistent amelioration, whilst Kenya's seems to consistently deteriorate in efficiency.

The most common trend realized in the contents of this paper is the inconsistency in the workings of the authorities put in place to enforce Copyright Law in Kenya. The Kenyan legal system is characterized with a lot of rigidity, thus making it easier for officials who are not transparent to get away with their faults, as they would not be corrected in good time. The already existing systems in Kenya to enforce copyright law highly emulate that of the United Kingdom, however, there seems to be a disconnect between the collection of funds from copyright users, and their allocation to the rights holders. Corruption and lack of transparency still remains a big battle in the music industry especially through the CMOs and in the digital space. Until this is solved, musicians will continue to voice their issues to no avail.

# BIBLIOGRAPHY

## Journal Articles

- McDonalds H, 'What a Music Publishing Company Does', *The Balance Careers*, 2019,
- Band J, 'Cautionary Tales About Collective Rights Organizations, Part 2', *Academic Resources*, 2018,
- Dallah O, 'Uhuru Bans Viusasa And Skiza From Collecting Royalties', 2020,
- 

## Dissertations and Theses

- Nzomo V, 'Collective management of copyright and related rights in Kenya: Towards an effective legal framework for regulation of collecting societies' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2011.
- Sihanya B, Copyright Law in Kenya, Unpublished, University of Nairobi, Nairobi, 2009.
- Kagwi R, 'An Investigation On The Copyright structure In Relation To The Kenyan Music Industry', Unpublished Thesis, University of Nairobi, Nairobi, 2014.
- Ouma M, 'Enforcement of Copyright in the music industry: A critical analysis of the legal and infrastructural framework of Enforcement in sub-Saharan Africa,' PHD dissertation, Queen Mary University of London, 2008.

## Newspaper Articles

- Mukei C, 'Which way forward for Elani, MCSK drama over unpaid royalties?' *Standard Entertainment and Lifestyle*, 2016,
- Nyawira L, 'Why MCSK paid Kenyan artistes Sh2,500 as royalties', *The Star Newspaper*, 2019, January 2016.
- Playing music to cost a fortune as copyright charges go up' *Business Daily*, on May 17<sup>th</sup> 2017.
- Omondi I, 'Musicians, actors to get Ksh.5K each from Uhuru's Ksh.100M Covid-19 'gift' *Citizen Digital*, April 8, 2020.