

**[Revenue Administration for Musical Works in the Digital Space in Kenya]**

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**DECLARATION**

I, SYLVIE KARUGA, 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 degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

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

Signed: .....

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## **ABSTRACT**

This paper seeks to investigate revenue generation, collection and distribution through digital platforms in the music industry in Kenya. While conducting the study, the researcher has been able to understand the disruption of the music industry by the digital space. The significant disruption being the distribution of music and earnings from it. The second being the negative effect the digital space has had on the music industry, especially with regard to the infringement of intellectual property through the illegal, downloading and distribution of music which result to the loss of earnings. It is equally a space where artists without legal representation or understanding can be exploited by companies that have these resources which consequently lead to artists signing off their rights, causing them a major loss in revenue whilst the company's profit.

The author relied on the theories of agency and utilitarianism in the effort to suggest the institutionalisation of policy and regulation that shall govern music revenue in the digital space which in turn has the potential to create opportunities which could bolster the economy of the whole country. The gap that the law currently has is that of a legal framework to govern and regulate the administration of revenue of musical works derived from the digital space. Due to the nature of the digital space, digitised works can be easily infringed upon or exploited if there is no legal framework in place to protect the digitised works. Therefore, the administration of revenue generated from musical works in the digital space needs to be governed and protected through a legal framework.

## **LIST OF ABBREVIATIONS**

AAPS: Applications

CISAC: International Confederation of Societies of Authors and composers

CMSs: Collective Management Societies

CoK: Constitution of Kenya

DRM: Digital Rights Management

DMCA: Digital Millennium Copyright Act

EU: European Union

KAMP: Kenya Association of Music Producers

KECOBO: Kenya Copyright Board

KOPIKEN: Reproduction Rights Society of Kenya

IP: Intellectual Property

MCSK: Music Copyright Society of Kenya

PRISK: Performers Rights Society of Kenya

PRSPs: Premium Rate Service Providers

TRIPS: Trade-Related Aspects of Intellectual Property Rights

UMG: Universal Music Group

WCT: WIPO Copyright Treaty

WIPO: World Intellectual Property Organisation

WPPT: WIPO Performances and Phonograms Treaty

WTO: World Trade Organisation

## **LIST OF LEGAL INSTRUMENTS**

Constitution of Kenya, 2010

Copyright Act No. 20, 2019

Digital Millennium Copyright Act (DMCA), 1998

WIPO Convention, 1967

WIPO Copyright Treaty, 1996

WIPO Performances and Phonograms, 1996

## **LIST OF CASES**

*Cellulant Kenya LTD v Music Copyright Society of Kenya LTD* (2009) eKLR.

*Laban Toto Juma and 4 Others v Kenya Copyright Board and 9 Others* (2018) eKLR.

*Colombia Pictures Industries v Fung* (2013), The Court of Appeal for the Ninth Circuit of the United States.

## CHAPTER ONE: INTRODUCTION

### 1.1 Background

The digital space has brought a myriad of new ways in which revenue can be generated. It has also been the cause of disruption to many traditional industries, some of which have become obsolete.<sup>1</sup> The music industry has equally been affected by the advancements in the digital space. The ease of access to markets, through social media and streaming platforms and easier means of content creation (for instance: apps that are able to create beats) has forced the music industry to innovate and regulate with the changing times.

The attempts by legislators in Kenya to keep abreast with the technological advancements have so far proved to be insufficient.<sup>2</sup> To aid in the development of revenue collection and distribution operations in Kenya, the author seeks to examine the current legal framework governing musical works. This is with the aim of suggesting a possible legal framework which will be instrumental in improving revenue collection and distribution in the digital space within the music industry.

### 1.2 Statement of the Problem

In this digital age, transactions have become faster and more efficient, leading to the creation of opportunities on digital platforms such as Spotify, YouTube, Songa, Skiza tunes among other platforms. This study focuses on the emergence of the digital space which creates an array of opportunities for artists in Kenya for the generation, collection and distribution of revenue in musical works.

This paper carries economic significance because the purpose of law is to govern an industry to avoid any chaos. Such chaos would normally emanate from the mismanagement of funds, exploitation of artists which may impede the basic fundamental regulations that ensure just and fair dealings within the industry. Thus, the aim of this paper is to examine the gap that the law

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<sup>1</sup> iHub, 'Shaping Kenya's digital future through positive legislation' iHub, 1 March 2019 <<https://ihub.co.ke/blogs/33832/shaping-kenya-s-digital-future-through-positive-legislation>> on 14 December 2019.

<sup>2</sup> Kenya Human Rights Commission, *The internet legislative and policy environment in Kenya*, 2014, 19-38



has and to emphasise that said gap of administration of revenue generated from musical works in the digital space would be filled through a legal framework.

The institutionalisation of a legal framework that protects the economic interest of artists, through the efficient collection and distribution of revenue, will be of great benefit to the development of the entertainment industry in Kenya.

### **1.3 Statement of Objectives**

- a. To examine the contemporary legislation, regulations and policies pertaining to digital rights.
- b. To assess whether the legislations, regulations and policies available provide sufficient protection for collection and distribution of revenue in the digital realm.
- c. To identify the various digital platforms on which music in Kenya is published and distributed.

### **1.4 Hypothesis**

This dissertation aims to test the following hypothesis;

- a. Inadequate legal framework governing the digital space has impeded revenue collection and distribution for Kenyan musicians who utilise this platform for the generation of revenue.

### **1.5 Research Questions**

- a. What are the changes that have emerged from the digital space that challenge traditional revenue generation for musicians in Kenya?
- b. What is the current challenge facing Collective Management Societies (CMSs) that encourages authors of musical works to opt to sign with digital platforms for revenue generation?
- c. What are the current policies or legislation in place to govern the remuneration derived from the digital space in the international community?
- d. What are the recommendations that the legal framework would serve to protect the rights of authors whilst contracting in the digital space?

## 1.6 Justification of study

The Constitution of Kenya 2010 (CoK) in Article 11 (2) (c) provides for the State to promote the Intellectual property of Kenyans.<sup>3</sup> Article 19 (1) supports the spirit of Article 11 by stating that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.<sup>4</sup> The drafters of the Constitution created the Bill of Rights to be inalienable for the purpose of ensuring societal developments.

Article 33 (1) (b) CoK, provides for the freedom of expression.<sup>5</sup> The freedom of expression guarantees artists the liberty to create and perform without the fear of facing legal sanctions, thus, encouraging individuals to engage in artistic creative expression which results in the promotion of the economy. The implementation of legislation and policy in the digital space with respect to musicians will streamline the revenues of the music industry which will result in more youth being able to monetize their talents to generate a consistent revenue stream. This has the effect of budding other industries that are auxiliary to the music industry such as; studios, producers, sound engineers, photography and videography (due to content production for music videos, and promotions), the cosmetic products and fashion industry (through make-up artists and designers who shall help with boosting the image of the musicians), the marketing industry (through branding and endorsement of the musicians).

It is therefore, paramount that the administration of revenue generated from musical works in the digital space should be governed and protected through a legal framework. This legal framework would outline the rights and duties owed to each individual involved in the industry with clarity which results in an efficient economy.

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<sup>3</sup> Article 11 (2) (c), *Constitution of Kenya* (2010).

<sup>4</sup> Article 19 (1), *Constitution of Kenya* (2010).

<sup>5</sup> Article 33 (1) (b), *Constitution of Kenya* (2010).

## 1.7 Scope and limitations of the study

This paper seeks to analyse the correlation between the protection of musical works in the digital space and the promotion of positive economic growth. This paper will investigate the legal framework used in the developed world where musicians have been generating revenue through digital platforms in comparison to that in Kenya and the possible legal improvements that can be applied in the administration of revenue of musical works in the digital space in Kenya.

### Limitations:

- a. Due to the fact that the musical works in the digital space is a relatively new field, exhaustive research will pose as a challenge as there is not enough existing prior data for Kenya.
- b. Personal bias of the author as she forms her own opinions on the subject matter.

## 1.8 Literature Review

The focus of this study is to analyse a possible legal framework for the administration of revenue of musical works in the digital space. The music industry is at the forefront of the rapidly evolving digital market place.<sup>6</sup> The disruption caused by the digital space is due to the opportunities that this advancement in technology has created for an artist. These opportunities are: streaming and downloading among others. These two developments captivate artists as they are seen to be in control of their revenue streams without the unnecessary intermediaries. The digital space hosts Premium Rate Service Providers (PRSPs) to be an agent of an artist. For instance: Ngomma which is essentially a ‘one-stop’ shop providing the services of: YouTube management and monetization, *Skiza* service provider, collection of song writing royalties and licencing of music among other services offered.<sup>7</sup>

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<sup>6</sup> Rechart L, ‘Streaming and copyright: a recording industry perspective’ WIPO Magazine, May 2015 < [https://www.wipo.int/wipo\\_magazine/en/2015/02/article\\_0001.html](https://www.wipo.int/wipo_magazine/en/2015/02/article_0001.html)> on 10 November 2019.

<sup>7</sup> < <https://www.ngomma.com/services.php>> o 10 November 2019.

The Switzerland-based International Federation of the Phonographic Industry (IFPI) said in its annual State-of-the-industry analysis that in 2015, global music sales rose 3.2% as digital music revenue surpassed those from all physical music formats for the first time.<sup>8</sup> This rise is as a result of a 45% increase in streaming which has grown roughly four-fold since 2010 and now accounts for some \$2.9 billion, nearly half of all digital music revenue.<sup>9</sup> For all parties in the music industry, record labels and artists, streaming services have become an increasingly important sales medium and a source of revenue.<sup>10</sup>

The World Intellectual Property Organisation (WIPO) Internet Treaties of 1996 recognised exclusive rights.<sup>11</sup> These Treaties, WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), enabled these positive developments. Although this was a vital improvement, the digital market space is not balanced. This is because, even with the broad availability of music which drives innovation and growth of new digital services, it has been observed that music right holders are not benefitting fairly or proportionally from the increased use of their music.<sup>12</sup> One can then argue that creating and implementing a measure that would seek to restore the balance to the digital market place should be a high priority.

The 1996 WIPO Internet Treaties have facilitated the global expansion of digital music services as the legal and commercial certainty afforded by these treaties has aided in making the launch of digital services possible as well as in reaching consumers in new markets.<sup>13</sup> These treaties have equally enabled the process of clearing and licensing rights easier in a large number of territories as these rights are now broadly recognised.<sup>14</sup> This recognition has resulted in right holders having a greater confidence in licensing their rights to digital services in new

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<sup>8</sup> Dillow C, 'Digital music just outsold physical music for the first time' Fortune, 12 April 2016 < <https://fortune.com/2016/04/12/digital-music-sales-report/>> on 10 November 2019.

<sup>9</sup> Dillow C, 'Digital music just outsold physical music for the first time' Fortune, 12 April 2016 < <https://fortune.com/2016/04/12/digital-music-sales-report/>> on 10 November 2019.

<sup>10</sup> Rechartd L, 'Streaming and copyright: a recording industry perspective' WIPO Magazine, May 2015 < [https://www.wipo.int/wipo\\_magazine/en/2015/02/article\\_0001.html](https://www.wipo.int/wipo_magazine/en/2015/02/article_0001.html)> on 10 November 2019.

<sup>11</sup> Rechartd L, 'Streaming and copyright: a recording industry perspective' WIPO Magazine, May 2015 < [https://www.wipo.int/wipo\\_magazine/en/2015/02/article\\_0001.html](https://www.wipo.int/wipo_magazine/en/2015/02/article_0001.html)> on 10 November 2019.

<sup>12</sup> Rechartd L, 'Streaming and copyright: a recording industry perspective' WIPO Magazine, May 2015 < [https://www.wipo.int/wipo\\_magazine/en/2015/02/article\\_0001.html](https://www.wipo.int/wipo_magazine/en/2015/02/article_0001.html)> on 10 November 2019.

<sup>13</sup> Rechartd L, 'Streaming and copyright: a recording industry perspective' WIPO Magazine, May 2015 < [https://www.wipo.int/wipo\\_magazine/en/2015/02/article\\_0001.html](https://www.wipo.int/wipo_magazine/en/2015/02/article_0001.html)> on 10 November 2019.

<sup>14</sup> Rechartd L, 'Streaming and copyright: a recording industry perspective' WIPO Magazine, May 2015 < [https://www.wipo.int/wipo\\_magazine/en/2015/02/article\\_0001.html](https://www.wipo.int/wipo_magazine/en/2015/02/article_0001.html)> on 10 November 2019.

territories.<sup>15</sup> The Swedish music industry recorded a rise in revenues from \$144.8 million in 2008 to \$194.2 million in 2013.<sup>16</sup>

Another outstanding transformation is that during the same period, the digital's share of total revenues increased from 8% to 70% with subscription services accounting for 94% of the digital market.<sup>17</sup> This increase of revenue through streaming was introduced in 2009, when the effect of The Pirate Bay Trial (this was a case concerning the illegal distribution of content online, including musical works) and new anti-piracy law persuaded many consumers to try out the new Spotify service.<sup>18</sup> The positive effect of streaming has combated illegally downloaded music thus, migrating music from a piracy regime to a licensed one.<sup>19</sup>

Spotify is a service offered on the basis of subscription with different packages dependant on the budget of the consumer. This has equally influenced the manner in which artists are paid. This is because you find that the way right holders are paid, with artists whose music is continuously listened to on Spotify accords them a constant revenue stream.<sup>20</sup> This is because the consumption model encompassed in the subscription system enables a much longer product life cycle, subsequently generating more revenues over time for most artists.<sup>21</sup>

Streaming has created an opportunity for the growth of new artists and their content as streaming in the United States continues to grow at 30% per year; it has been seen that the growth of artists is more than this.<sup>22</sup> It has been reported that over 14.6 million new tracks are uploaded to Spotify every year and millions more to other platforms across the globe.<sup>23</sup>

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<sup>15</sup> Rechartd L, 'Streaming and copyright: a recording industry perspective' WIPO Magazine, May 2015 <[https://www.wipo.int/wipo\\_magazine/en/2015/02/article\\_0001.html](https://www.wipo.int/wipo_magazine/en/2015/02/article_0001.html)> on 10 November 2019.

<sup>16</sup> <<https://ifpi.org/sweden.php>> on 10 November 2019.

<sup>17</sup> <<https://ifpi.org/sweden.php>> on 10 November 2019.

<sup>18</sup> <<https://ifpi.org/sweden.php>> on 10 November 2019.

<sup>19</sup> <<https://ifpi.org/sweden.php>> on 10 November 2019.

<sup>20</sup> <<https://ifpi.org/sweden.php>> on 10 November 2019.

<sup>21</sup> <<https://ifpi.org/sweden.php>> on 10 November 2019.

<sup>22</sup> <<https://ifpi.org/sweden.php>> on 10 November 2019.

<sup>23</sup> <<https://ifpi.org/sweden.php>> on 10 November 2019.

In the Kenyan context, there is a subscription platform known as *Skiza*. Skiza platform is by Safaricom, a service provider, where it is used for downloading digital content by Safaricom service subscribers.<sup>24</sup> Safaricom works with PRSPs such as Liberty Afrika and Cellulant among others who are responsible for sourcing, formatting and uploading digital content onto *Skiza*.<sup>25</sup>

These PRSPs are third-party distributors who have the capacity to submit the artist's music to YouTube, as well as collect money from ads and YouTube Premium.<sup>26</sup> These distributors charge a set-up fee and percentage of revenue although business models vary.<sup>27</sup> This third-party involvement creates an agency relationship between the artist and the PRSPs.

Due to technological advancements, it is evident that there lies a gap in the law with regards to the administration of revenue of musical works in the digital space. Using the aforementioned literature, this paper will attempt to bridge the gap.

## 1.9 Chapter Breakdown

This research paper seeks to have five chapters, the proposed outline is as follows:

Chapter 1 will be the introduction of the study. It will address the background of study, statement of problem, objectives of the study, the hypothesis, the research questions to guide the study, the justification of the study, the scope and limitations of the study, literature review and the chapter breakdown. These will highlight the areas that the study will focus on as well as identify the gap in which the law would fill.

Chapter 2 delves into the theories of agency and utilitarianism as the lens by which this study is written.

Chapter 3 addresses the current revenue administration systems with respect to the legal frameworks available both internationally and locally. It identifies the strengths and challenges that the administration of revenue in musical works undergoes in Kenya.

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<sup>24</sup> Snolegal, 'How to get your music onto the Skiza platform' Snolegal, 14 February 2013 < <https://snolegal.wordpress.com/2013/02/14/how-to-get-your-music-onto-the-skiza-platform/>> on 10 November 2019.

<sup>25</sup> Snolegal, 'How to get your music onto the Skiza platform' Snolegal, 14 February 2013 < <https://snolegal.wordpress.com/2013/02/14/how-to-get-your-music-onto-the-skiza-platform/>> on 10 November 2019.

<sup>26</sup> < <https://creatoracademy.youtube.com/page/lesson/artist-monetization#strategies-zippy-link-2>> on 10 November 2019.

<sup>27</sup> < <https://creatoracademy.youtube.com/page/lesson/artist-monetization#strategies-zippy-link-2>> on 10 November 2019.

Chapter 4 delves into the ambit of the legal system available in the digital space.

The study concludes with Chapter 5 with a recap of the study, the recommendations proposed and the conclusion of the research paper.

## CHAPTER TWO: THEORETICAL FRAMEWORK

### 2.1. Agency Theory

An agency relationship is a contract which exists between one or more persons, one who is referred to as the principal, gives mandate to another party, referred to as an agent, to act on his/her behalf.<sup>28</sup> For example: when an owner of a company or the board of directors (principal) employ managers (agents) to run the business. This relationship is to separate ownership and control to result in an effective and efficient performance and generation of profit.<sup>29</sup> This relationship consequently forms an efficient economic organisation. This relationship can sometimes lead to potential conflict of interest when the agent does not act in the best interest of the principal.<sup>30</sup>

In the traditional context, an agency relationship exists between the Collective Management Societies (CMSs) and their members, as CMSs are mandated by the Copyright Act to collect royalties on behalf of their members.<sup>31</sup> Whereas in the digital context, an example of an agency – principal relationship is that of PRSPs such as Ngomma, and Empawa which market, license, distribute, manage and publish on behalf of their members.<sup>32</sup>

The essence of this, in both contexts would be to enable an artist to get their dues without the hustle of collecting the royalties for themselves. This is because royalties are derived from public performance, distribution and publishing of musical works. Public performance is defined as any music that is played outside a normal circle of friends or family.<sup>33</sup> Public distribution is defined as making a piece of work available to the public by sale, rent or lease<sup>34</sup> such as in: clubs and broadcasts on radio among others. Publishing of musical works is the

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<sup>28</sup> Pandey I M, *Financial management*, 10<sup>th</sup>ed, Vikas Publishing House PVT LTD, New Delhi, 2010, 11.

<sup>29</sup> Panda B, Leepsa N, 'Agency theory: review of theory and evidence on problems and perspectives' *Indian Journal of Corporate Governance*, 2017, 75 <https://journals.sagepub.com/doi/pdf/10.1177/0974686217701467> on 12 November 2019.

<sup>30</sup> Mudida R, *Financial management*, Focus Publishers Ltd, Nairobi, 2010, 16.

<sup>31</sup> Section 5 (b), *Copyright Act* (No.20 of 2019).

<sup>32</sup> < <https://www.ngomma.com/services.php> > on 10 November 2019.

<sup>33</sup> Black's Law Dictionary, 2ed.

<sup>34</sup> Black's Law Dictionary, 2ed.



distribution of copies or phonorecords of work to the public by sale or other transfer of ownership.<sup>35</sup>

For an artist to go to each institution to collect the revenue for each month, would result in inefficiency. Therefore, the relationship between the artist and the CMSs creates an efficient method of acquiring the revenue owed to the artist.

### **2.1.1. Fiduciary Duty**

An agency relationship is deemed to be one that is fiduciary in nature as an agent must transact in good faith and with utmost duty of care on matters on behalf of the principal. Therefore, this is a relevant theory in accordance with the administration of revenue in the digital space because a legal framework which would be proposed and implemented would aim to ensure, govern and achieve the rights and duties of all parties involved are fulfilled resulting in a form of efficient economic organisation.

### **2.1.2 Balancing the rights and duties of Principals and agents**

There is a socio-economic right of the agent and the fiduciary duty owed to the principal. Indeed, the agent seeks to generate profit for himself/herself. However, the generation of the profit should not violate the trust that is bestowed upon them by the principal. This means that in the digital space, most PRSPs (agents) would be the distributors of the musical works from the artists (principals), and in as much as they are owed dues which they should be paid, they should not in turn exploit the artists in a prejudicial manner.

## **2.2. Utilitarianism Theory**

Utilitarianism is one of the most dominant and influential ways to deal with regularizing morals. Despite the fact that it was not completely articulated until the nineteenth century, pro-utilitarian positions can be perceived throughout philosophy.<sup>36</sup> Despite the fact that there are

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<sup>35</sup> Cotter T, 'Toward a Functional Definition of Publication in Copyright Law', 92 *Minnesota Law Review*, 2008, 1726-[https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1159&context=faculty\\_articles](https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1159&context=faculty_articles) on 14 December 2019.

<sup>36</sup> Stanford Encyclopedia, 'The history of utilitarianism' Stanford Encyclopedia of Philosophy, 22 September 2014 <<https://plato.stanford.edu/entries/utilitarianism-history/#IdeUti>> on 12 November 2019.

numerous ways of this theory, utilitarianism is commonly held to be the view that the ethically right activity is the activity that delivers the most good.<sup>37</sup> The authorities of the theory of utilitarianism are Jeremy Bentham and John Stuart Mill. They mainly identified good with pleasure. This therefore meant that pleasure would be derived from maximising the good. The theory then is ‘the greatest amount of good for the greatest number.’<sup>38</sup>

Utilitarianism is additionally recognized by its un-prejudicial nature and lack of bias. This means that everyone’s good is important equally; my good counts no more than anyone else’s good. Further, the reason I have to promote the overall good is the same reason anyone else has to so promote the good.<sup>39</sup>

Jeremy Bentham believed that some law is bad, and the reason behind that belief was, what made them bad was their lack of utility and their tendency to lead to unhappiness and misery without any compensation. Thus, if a law or an action does not result in any good, then it is not good.<sup>40</sup>

John Stuart Mill, although he mostly agreed with Bentham, he believed that unlike Bentham, some pleasures are of a higher, better, sort than the ones that are merely sensual, and that we share with animals.<sup>41</sup> Like Bentham, Mill sought to use utilitarianism to inform law and social policy with aim of increasing happiness through the rights accorded to individuals as those rights are underwritten by utility.<sup>42</sup>

Thus, the good for everyone in this digital era is a common, efficient space to interact with one another. For example: in another arena of the digital realm, bullying through different social media platforms had become a persistent and prevalent problem; this gap in the law was remedied through the Computer Misuse and Cybercrimes Act of 2018 to eradicate

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<sup>37</sup> Stanford Encyclopedia, ‘The history of utilitarianism’ Stanford Encyclopedia of Philosophy, 22 September 2014 <<https://plato.stanford.edu/entries/utilitarianism-history/#IdeUti>> on 12 November 2019.

<sup>38</sup> Stanford Encyclopedia, ‘The history of utilitarianism’ Stanford Encyclopedia of Philosophy, 22 September 2014 <<https://plato.stanford.edu/entries/utilitarianism-history/#IdeUti>> on 12 November 2019.

<sup>39</sup> Stanford Encyclopedia, ‘The history of utilitarianism’ Stanford Encyclopedia of Philosophy, 22 September 2014 <<https://plato.stanford.edu/entries/utilitarianism-history/#IdeUti>> on 12 November 2019.

<sup>40</sup> Stanford Encyclopedia, ‘The history of utilitarianism’ Stanford Encyclopedia of Philosophy, 22 September 2014 <<https://plato.stanford.edu/entries/utilitarianism-history/#IdeUti>> on 12 November 2019.

<sup>41</sup> Stanford Encyclopedia, ‘The history of utilitarianism’ Stanford Encyclopedia of Philosophy, 22 September 2014 <<https://plato.stanford.edu/entries/utilitarianism-history/#IdeUti>> on 12 November 2019.

<sup>42</sup> Stanford Encyclopedia, ‘The history of utilitarianism’ Stanford Encyclopedia of Philosophy, 22 September 2014 <<https://plato.stanford.edu/entries/utilitarianism-history/#IdeUti>> on 12 November 2019.

cyberbullying. The lack of sufficient regulations result in artists being exploited as they are neither employees nor contractors, therefore, there are no laws that guarantee proportionate remuneration for their labour. Due to this, artists do not have a bargaining chip and consequently can be exploited as was seen in the occurrence between Eunice Njeri, a renowned gospel artist in Kenya and her PRSP, Liberty Afrika. She had signed away her rights to her PRSP/Liberty Afrika who were contracted by Safaricom to collect the revenue made from the digital platform, *Skiza tunes*.<sup>43</sup> Her signing away her rights was in order for her to receive the buyout as it seemed like a lot of money at the time without the thought of how much it would generate in the long-run.

This consequently meant that the money that was to be split between Eunice Njeri and Liberty Afrika would be collected as revenue for Liberty Afrika. One can observe that the issue that arises from this, would be how many artists would sign off their rights with the short-term buyout in mind as opposed to them deriving a stable income, which will ensure a consistent generation of revenue.

“According to the website Hapa Kenya, Skiza royalties are split between artistes and CSPs — depending on the deal they have — the government and Safaricom. In an article by singer Dan Aceda, artistes and CSPs are paid 15 per cent, while 10 per cent goes to the government as Excise Duty and 16 per cent as VAT, with Safaricom retaining 54 per cent.”<sup>44</sup> This is the justification and lens through which the author is undertaking this study. In this particular scenario, it is evident that the artist (principal) who does most of the work receives a percentage similar to the PRSPs agent, when the agent does not put in the same effort in creating the musical work. Thus, in the context of this paper, this theory advocates for the good of both the agent and the principal, which results in efficiency and profitability of all parties involved.

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<sup>43</sup> Mosongo J, ‘The battle for Skiza millions who is to blame’ Daily Nation, 19 November 2016 < <https://mobile.nation.co.ke/lifestyle/The-battle-for-SKIZA-millions-who-is-to-BLAME/1950774-3457904-180xcf/index.html>> on 12 November 2019.

<sup>44</sup> Mosongo J, ‘The battle for Skiza millions who is to blame’ Daily Nation, 19 November 2016 < <https://mobile.nation.co.ke/lifestyle/The-battle-for-SKIZA-millions-who-is-to-BLAME/1950774-3457904-180xcf/index.html>> on 12 November 2019.

## CHAPTER 3: CURRENT ADMINISTRATION OF REVENUE IN MUSICAL WORKS

### 3.1. International Bodies and Treaties

The World Intellectual Property Organisation (WIPO) administered the Berne Convention which is an international agreement that seeks to harmonise copyright and related rights on an international level.<sup>45</sup> It was adopted in 1886 as an agreement to honour the rights of all authors who are nationals of countries that are party to the Convention.<sup>46</sup> The World Trade Organisation administered the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement which sets out standards for Intellectual Property (IP) regulation as may be applied in the context by nationals who are party to World Trade Organisation (WTO).<sup>47</sup> Kenya has ratified both the Berne Convention and TRIPS Agreement which requires Kenya's laws to be in compliance with those prescribed in the aforementioned legal instruments.

There are two ways in which right holders can exercise their rights; individual licensing and collective licensing. Individual licensing are agreements between the right holder and the user of the copyrighted work.<sup>48</sup> For instance: where these rights are exercised in normal practice such as publication of literary and artistic works, performance rights in a dramatic work and publishing of musical works in movies or series.<sup>49</sup> On the other hand, collective licensing would be exercised to aid the rights which are difficult to exercise individually such as public performance, broadcasting rights, reproduction rights and remuneration rights among other rights.<sup>50</sup> These rights are generally entrusted to Collective Management Societies (CMSs) by right holders to exercise on their behalf.<sup>51</sup>

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<sup>45</sup> Nzomo, '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>46</sup> Nzomo, '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>47</sup> Nzomo, '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>48</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 2.

<sup>49</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 2.

<sup>50</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 2.

<sup>51</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 2.

The European Union (EU) legislation defines these organisations as: ‘any organisation which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes.’<sup>52</sup> It enables creators and right holders to exercise their rights efficiently in their country or abroad.<sup>53</sup> The efficiency comes about because a right holder is not capable of monitoring his/her works as they cannot for instance, contact every radio, or television station to negotiate licenses and remuneration for the use of their copyrighted work.<sup>54</sup> Consequently, broadcasting platforms are also not able to contact each and every right holder to request for their permission to use the copyrighted work.<sup>55</sup>

### **3.2. Collective Management Societies**

Joining a CMS is open to copyright holders where they provide personal information as well as declare the works that they have done.<sup>56</sup> National or local repertoire is when works are declared by the members of the organisation while International repertoire is made up of foreign works which are managed by the CMS.<sup>57</sup>

There are two rights that are owed to the copyright holder, economic rights and moral rights. Economic rights are derived from the reproduction, broadcasting, public performance, translation, rental, and distribution of the work.<sup>58</sup> Moral rights are rights to claim authorship and or ownership of the work as well as to object any adaptation, mutilation, distortion or modification of the work that has not been authorised or that may be prejudicial to the right holders’ honour or reputation.<sup>59</sup>

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<sup>52</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 3.

<sup>53</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 3.

<sup>54</sup> WIPO, ‘The importance of collective management of copyright and related rights’, WIPO National Seminar on Copyright Related Rights and Collective Management, Khartoum, 28 February to 2 March 2005, 2.

<sup>55</sup> WIPO, ‘The importance of collective management of copyright and related rights’, WIPO National Seminar on Copyright Related Rights and Collective Management, Khartoum, 28 February to 2 March 2005, 2.

<sup>56</sup> WIPO, ‘The importance of collective management of copyright and related rights’, WIPO National Seminar on Copyright Related Rights and Collective Management, Khartoum, 28 February to 2 March 2005, 2.

<sup>57</sup> WIPO, ‘The importance of collective management of copyright and related rights’, WIPO National Seminar on Copyright Related Rights and Collective Management, Khartoum, 28 February to 2 March 2005, 2.

<sup>58</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 2.

<sup>59</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 2.

The traditional role of CMSs is to negotiate royalty rates and other license terms, to issue said licences after which the CMS is supposed to enforce and monitor the rights in order to collect the revenue due to their members.<sup>60</sup> After the collection of said revenue, CMSs are obliged to distribute the revenue to right holders in accordance with the agreed distribution scheme based on the use of the copyrighted works.<sup>61</sup> One therefore can argue that a copyright holder is entitled to amounts that correspond with the charges that the CMSs impose on the works being used after the deduction for the costs of management/administration fees that the CMSs incur when enforcing and monitoring the users of the copyrighted works. Thus, the CMSs should ensure that they are accountable and transparent as the corresponding amounts and payments rendered should be made available to the copyright holder. This transparency and accountability strengthens good faith, as well as enables and encourages creators of works to produce more, resulting in a boost of the economy.

Article 15 of the WPPT provides for equitable remuneration for performers and producers of phonograms.<sup>62</sup> This is significant because of the legality aspect to the relationship between the CMS and the right holder. It is therefore right to say that the relationship goes beyond good faith, as the CMS should ensure that the copyright holder is remunerated according to what is due to him/her.

### **3.3. The benefits of CMSs:**

There are three main benefits, these would be: practicality, economics and legality.<sup>63</sup> As has been mentioned before, it would not be practical for an author to create the copyrighted work, negotiate terms of licencing as well as monitor and collect the revenue by himself. It would be tedious and inefficient. CMSs therefore, fill this gap by ensuring that the procedures are rightly followed and the copyright holder is rightly compensated. This is equally important as costs would be extremely expensive if an author is to partake in this management endeavour by

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<sup>60</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 3.

<sup>61</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 3.

<sup>62</sup> Article 15, WIPO Performances and Phonograms Treaty, 20 December 1996.

<sup>63</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 3.

himself.<sup>64</sup> This management being done by the CMS enables an author to have time to continue creating copyrighted works which in turn will continue to generate remuneration for him/her as the author continues to expand and grow in their craft.

With regards to economics, as has been seen, the costs are shared between the CMSs and the copyright holder.<sup>65</sup> Basically, the revenue collected by the CMSs should cater for the management/administration fees that the CMS would incur through the monitoring and collection of revenue generated from the copyrighted works. Proper management of these funds, would generate wealth for the country as well, this means that not only would right holders be remunerated, but because of this remuneration, they would be able to boost the economy of the country as a whole.

Finally, legality ensures that it is possible for users to clear rights for a large number of works from a single source with standard rates which in the long run would be cost effective as compared to acquiring a licence from multiple sources with different variation of rates.<sup>66</sup> This also enables users to accord respect and warranted professional etiquette to authors as many at times, people do not acknowledge the work and the effort that authors use in creating copyrighted works. Legality enables authors' to have confidence that they have a legal recourse in the protection of their copyrighted works.

International Confederation of Societies of Authors and composers (CISAC) has developed a set of agreement rules and organisational tools that all its members (239 authors' societies in 123 different countries) must comply with.<sup>67</sup>

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<sup>64</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 3.

<sup>65</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 3.

<sup>66</sup> International Confederation of Societies of Authors and Composers, *The importance of collective management*, 3.

<sup>67</sup> Kefalas A, 'The relevance of traditional collective management organisation in the digital age: Current challenges and future possibilities,' Unpublished Masters, University of Agder, Norway, 2017, 14-15.

### 3.4. Kenyan Legislation

CMSs are non-profit membership entities<sup>68</sup> and are registered as companies limited by guarantee.<sup>69</sup> They are established to collectively administer the rights of their members.<sup>70</sup> Kenya Copyright Board (KECOBO) licenses and supervises the CMSs in Kenya.<sup>71</sup> The creation of KECOBO can be seen as an effort in promoting the values of Article 11 (2) (c)<sup>72</sup> and Article 40<sup>73</sup> of the Constitution of Kenya. This is because KECOBO serves to support, promote and protect the rights of right holders. There are four CMSs in Kenya currently, these are: 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>74</sup> Part III of the Companies Act, 2015 refers to the Articles of Association (AoA) as the Constitution of a company.<sup>75</sup>

This is of significance as this is where the members of the CMSs stipulate the manner in which they expect the CMS to exercise the powers assigned to them.<sup>76</sup>

KOPIKEN licences the reproduction of copyrighted literary works against payment of fees whenever it is impractical for right holders to license and collect fees individually.<sup>77</sup> KAMP is the body that represents the rights and interests of producers of sound recording where collection of license fees and distribution of royalties are done in accordance with the Copyright Act of 2001.<sup>78</sup> MCSK is a CMS on behalf of authors, composers and publishers of musical works.<sup>79</sup> MCSK is tasked with the collection of royalties in public performance and broadcasting based on the professional rules of copyright Collective Management Societies.<sup>80</sup>

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<sup>68</sup> Wanjiru C, 'Regulation of collective management organisations in Kenya: Understanding the law as-is' CIPIT Blog, 27 August 2019, <https://blog.cipit.org/2019/08/27/regulation-of-collective-management-organisations-in-kenya-understanding-the-law-as-is/> on 17 November 2019.

<sup>69</sup> <https://copyright.go.ke/8-program/4-cmo.html> on 17 November 2019.

<sup>70</sup> <https://copyright.go.ke/8-program/4-cmo.html> on 17 November 2019.

<sup>71</sup> <https://copyright.go.ke/8-program/4-cmo.html> on 17 November 2019.

<sup>72</sup> Article 11 (2) (c), *Constitution of Kenya* (2010).

<sup>73</sup> Article 40, *Constitution of Kenya* (2010).

<sup>74</sup> <https://copyright.go.ke/8-program/4-cmo.html> on 17 November 2019.

<sup>75</sup> Wanjiru C, 'Regulation of collective management organisations in Kenya: Understanding the law as-is' CIPIT Blog, 27 August 2019, <https://blog.cipit.org/2019/08/27/regulation-of-collective-management-organisations-in-kenya-understanding-the-law-as-is/> on 17 November 2019.

<sup>76</sup> Wanjiru C, 'Regulation of collective management organisations in Kenya: Understanding the law as-is' CIPIT Blog, 27 August 2019, <https://blog.cipit.org/2019/08/27/regulation-of-collective-management-organisations-in-kenya-understanding-the-law-as-is/> on 17 November 2019.

<sup>77</sup> <https://copyright.go.ke/8-program/4-cmo.html> on 17 November 2019.

<sup>78</sup> <http://www.kamp.or.ke/index.php/en/> on 17 November 2019.

<sup>79</sup> <http://mcsk.or.ke> on 17 November 2019.

<sup>80</sup> <http://mcsk.or.ke> on 17 November 2019.



PRISK is tasked with the negotiation and setting of tariffs for different users of sound recordings and audio-visual works.<sup>81</sup> PRISK is required to collect equitable remuneration from users of sound recordings, and audio-visual works for purposes of broadcasting to the public.<sup>82</sup>

### 3.5. Challenges facing CMSs in Kenya

It is evident that the CMSs that function in Kenya are in accordance with the Copyright Act of 2019. This means that Kenya does have a legal and institutional framework for CMSs which are mandated to govern, regulate and protect the rights of all parties involved in the administration of revenue in musical works. Although the framework is present and has assisted in the management of the efficient collection of revenue of musical works, these societies still face challenges in the realm of collection, supervision and distribution.<sup>83</sup> For example: in 2010, MCKS is reported to have collected one hundred and eighty five million shillings (KES 185 million).<sup>84</sup> Of this amount, they consumed one hundred and thirty seven million shillings (KES 137 million) as administration costs and distributed forty eight million shillings (48 million) in royalties to the members.<sup>85</sup> This has brought about the question of accountability and transparency as the amount dispensed to right holders is not equitable to the total amount generated.

The distribution rules stipulated by KECOBO with regard to royalties to members is based on a 70:30 ratio.<sup>86</sup> This means that 70% of the revenue from royalties collected should be received by the members of MCKS.<sup>87</sup> For instance: in the year 2017, it was reported that MCKS had budgeted two hundred and sixty two million shillings (KES 262 million) from a reported

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<sup>81</sup> <http://www.prisk.or.ke/index.php/en/about-prisk/what-we-do> on 17 November 2019.

<sup>82</sup> <http://www.prisk.or.ke/index.php/en/about-prisk/what-we-do> on 17 November 2019.

<sup>83</sup> Nzomo, '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, 12.

<sup>84</sup> Nzomo, '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, 12.

<sup>85</sup> Nzomo, '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, 12.

<sup>86</sup> Wanjiru C, 'Regulation of collective management organisations in Kenya: Understanding the law as-is' CIPIT Blog, 27 August 2019, <https://blog.cipit.org/2019/08/27/regulation-of-collective-management-organisations-in-kenya-understanding-the-law-as-is/> on 17 November 2019.

<sup>87</sup> Wanjiru C, 'Regulation of collective management organisations in Kenya: Understanding the law as-is' CIPIT Blog, 27 August 2019, <https://blog.cipit.org/2019/08/27/regulation-of-collective-management-organisations-in-kenya-understanding-the-law-as-is/> on 17 November 2019.

income of three hundred and seventy nine million shillings (KES 379 million), sixty four million (KES 64 million) remained for the royalties to be distributed to its members.<sup>88</sup> This is unfortunate, and was one of the reasons that MCSK was deregistered in 2017 as it was alleged that they mismanage funds. However, they were reissued with a certificate that is valid until December 2019.<sup>89</sup>

Recently, there has been an uproar with MCSK on allegations of mismanagement of funds as their members feel as though they are short-changed. This was seen through the pandemonium that was started on twitter through Khaligraph Jones, King Kaka and other artistes who stated that they received ‘peanuts’ from MCSK, while they are aware that their songs are played and broadcasted often on different platforms.<sup>90</sup> This is because the artists mentioned and a few others received royalties in an amount of two thousand five hundred and thirty shillings (KES 2530 thousand).

Apart from mismanagement of funds, CMSs are facing a challenge that is not easily rectifiable or combatable through traditional remedies. This is a challenge posed by the digital space. Technological development is advancing and naturally, the realm of the music industry is not exempt to its influence and rapid changes that accompany said influence. The one change that is obvious is that of digitised works being easily compressed, copied and distributed through the internet.<sup>91</sup> This change is noteworthy because digitised works can be easily infringed upon or exploited if there is no framework in place to protect the digitised works.

The diversity of the internet brings light to the various challenges of exploitation in the context of management of copyrighted works.<sup>92</sup> For example: the case of *Cellulant Kenya Ltd v. Music Copyright Society of Kenya [2009]*<sup>93</sup> where the Plaintiff, as their business, offers mobile phone value added services of musical and artistic works such as phone ringtones, logos and pictures.

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<sup>88</sup> Wanjiru C, ‘Regulation of collective management organisations in Kenya: Understanding the law as-is’ CIPIT Blog, 27 August 2019, <https://blog.cipit.org/2019/08/27/regulation-of-collective-management-organisations-in-kenya-understanding-the-law-as-is/> on 17 November 2019.

<sup>89</sup> Wanjiru C, ‘Regulation of collective management organisations in Kenya: Understanding the law as-is’ CIPIT Blog, 27 August 2019, <https://blog.cipit.org/2019/08/27/regulation-of-collective-management-organisations-in-kenya-understanding-the-law-as-is/> on 17 November 2019.

<sup>90</sup> Muli D, ‘Khaligraph, King Kaka, Vivian decry ‘peanuts’ paid by MCSK’ Standard Digital, August 2019 <https://www.sde.co.ke/article/2001338092/khaligraph-king-kaka-vivian-decry-peanuts-paid-by-mcsk> on 17 November 2019.

<sup>91</sup> Liu W, ‘Models for collective management of copyright from an international perspective: Potential changes for enhancing performance’ 17 Journal of Intellectual Property Rights 17, 2012, 7.

<sup>92</sup> Liu W, ‘Models for collective management of copyright from an international perspective: Potential changes for enhancing performance’ 17 Journal of Intellectual Property Rights 17, 2012, 7.

<sup>93</sup> *Cellulant Kenya LTD v Music Copyright Society of Kenya LTD* (2009) eKLR.

The Plaintiff had entered into various mobile content distribution agreements (individual licensing) with artists in relation to the songs used in said business. For the use of the copyrighted works, the Plaintiff paid royalties to the respective right holders. The conflict was concerning Section 46 (2)<sup>94</sup> of the Copyright Act where MCSK was of the view that Cellulant was required to pay royalties to it in respect of the music that it uses in ringtones as MCSK is a collecting society for music composers, authors and publishers. The Court reasoned that the Plaintiff was exploiting the individual music artists by taking advantage of their ignorance through enticing them with the notion that Cellulant would pay the artists at a higher percentage than that offered by MCSK. The Court held that Cellulant should pay royalties to MCSK as MCSK is affiliated to CISAC and thus, are entitled to collect royalties on behalf of foreign affairs.

It goes without saying that the growth of the digital space is an attractive opportunity for many upcoming artists because: it fosters a direct relationship between the platform and the artist, it is relatively simple to use the platforms, the preferential treatment that an artist enjoys such as being put in a playlist or the homepage of a website which markets your brand, easier distribution as the internet is global and it safeguards one's copyright through measures like reporting that result in the unauthorised work being deleted or taken-down. Finally, due to the growth of the digital space, it is evident that the current CMS structure will not suffice in the administration of revenue in musical works. This therefore, is reason enough to investigate the possible legal framework that would govern, regulate and protect the digital space.

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<sup>94</sup> Section 46 (2), *Copyright Act* (No.20 of 2019).

## CHAPTER FOUR: CURRENT POLICIES OR LEGISLATION IN PLACE THAT GOVERN THE REMUNERATION DERIVED FROM THE DIGITAL SPACE

### 4.1. Digital Rights Management (DRM)

These are a set of policies, techniques and tools that govern the appropriate use of digital content.<sup>95</sup> This mechanism functions in a manner that packages content in an appropriate format that is easily distributed and tracked in order to protect the content from tampering during transmissions as well as protecting unauthorised use.<sup>96</sup> Article 11 of the WIPO Copyright Treaty (WCT) provides for adequate legal protection and effective legal remedies against the circumvention of effective technological measures in respect of copyrighted works which have not been authorised by authors or have not been permitted by law.<sup>97</sup>

Digital streaming services as well as downloading services can be said to be the future of music distribution.<sup>98</sup> Although this is the current stage, it is equally obvious to tell that the development stage is still ongoing especially with regard to the subscription prices and advertising revenues being set lower than what could be generated in a mature market.<sup>99</sup> This has been addressed in the international community where authors, performers and composers have come forward stating that they receive low payments from the services that use their copyrighted works.<sup>100</sup> In the American context, artists have been critical of Spotify, Pandora and iTunes among other services.<sup>101</sup> For example: Spotify and Taylor Swift had a recent disagreement where Taylor pulled her entire library from the site stating that music should not be free and that users should be able to start valuing art again.<sup>102</sup> This disagreement shed light on another inequality with the service as allegedly, the platform only paid an average of a penny

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<sup>95</sup> <https://www.bananaip.com/ip-news-center/digital-rights-management/> on 17 November 2019.

<sup>96</sup> <https://www.bananaip.com/ip-news-center/digital-rights-management/> on 17 November 2019.

<sup>97</sup> Article 11, WIPO Copyright Treaty, 20 December 2019.

<sup>98</sup> Lalonde P, 'Study concerning fair compensation for music creators in the digital age' International Council of Creators of Music, Nashville, 22 October 2014 to 23 October 2014, 2.

<sup>99</sup> Lalonde P, 'Study concerning fair compensation for music creators in the digital age' International Council of Creators of Music, Nashville, 22 October 2014 to 23 October 2014, 2.

<sup>100</sup> Lalonde P, 'Study concerning fair compensation for music creators in the digital age' International Council of Creators of Music, Nashville, 22 October 2014 to 23 October 2014, 2.

<sup>101</sup> Lalonde P, 'Study concerning fair compensation for music creators in the digital age' International Council of Creators of Music, Nashville, 22 October 2014 to 23 October 2014, 2.

<sup>102</sup> Tunison K, 'Taylor Swift fought spotify for a huge win for all musicians' Showbizz Cheatsheet, 30 November 2018 <https://www.cheatsheet.com/entertainment/taylor-swift-fought-spotify-for-a-huge-win-for-all-musicians.html/> on 20 November 2019.

per play and this penny was not being paid to the artist, but rather, their record label.<sup>103</sup> The disagreement was settled when a new deal that was struck between Spotify and Universal Music Group (UMG), which is the label Taylor is signed with.<sup>104</sup> Spotify agreed to allow new albums from the artists of UMG to be restricted to its premium service for two weeks prior to it being made available to other users of the service.<sup>105</sup>

There are three important matters of concern when understanding the remuneration of the digital space. These are: first, the digital streams are currently undervalued as subscribers and platforms do not regard the effort put in by right holders such as in the case of Taylor Swift, secondly, the division of revenue between CMSs, PRSPs and right holders is not equitable or transparent and finally, this lack of transparency and accountability of the industry, especially with the inclusion of the digital space leads to a difficulty of right holders being able to ascertain the remuneration owed to them.<sup>106</sup>

Copyright-related legislation was created for purposes of defining, enforcing and protecting rights owed to authors of copyrighted works. As the digital space continues to explode the economy as well as create opportunities for the music industry, amendments must be done to the current copyright-related legislation.<sup>107</sup> For example: Digital Millennium Copyright Act (DMCA) was enacted in the United States of America (USA) in 1998.<sup>108</sup> The Copyright Directive was adopted by the European Union in 2001.<sup>109</sup> The Copyright Modernisation Act was passed in 2012 in Canada.<sup>110</sup> The areas of concern that the amendments are to clarify are: the scope of copyrights, orphan works, copyright limitations and exceptions, copyright registration and enforcement within the digital space.<sup>111</sup>

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<sup>103</sup> Tunison K, 'Taylor Swift fought spotify for a huge win for all musicians' Showbizz Cheatsheet, 30 November 2018 <https://www.cheatsheet.com/entertainment/taylor-swift-fought-spotify-for-a-huge-win-for-all-musicians.html/> on 20 November 2019.

<sup>104</sup> Singleton M, 'Spotify premium users will get some albums two weeks before free users' The Verge, 4 April 2017 <https://www.theverge.com/2017/4/4/15177004/spotify-premium-two-week-exclusive-albums-licensing-universal-music-group> on 20 November 2019.

<sup>105</sup> Singleton M, 'Spotify premium users will get some albums two weeks before free users' The Verge, 4 April 2017 <https://www.theverge.com/2017/4/4/15177004/spotify-premium-two-week-exclusive-albums-licensing-universal-music-group> on 20 November 2019.

<sup>106</sup> Lalonde P, 'Study concerning fair compensation for music creators in the digital age' International Council of Creators of Music, Nashville, 22 October 2014 to 23 October 2014, 5.

<sup>107</sup> ECD, *Enquires into intellectual property's economic impact*, 2015, 213.

<sup>108</sup> ECD, *Enquires into intellectual property's economic impact*, 2015, 213.

<sup>109</sup> ECD, *Enquires into intellectual property's economic impact*, 2015, 213.

<sup>110</sup> ECD, *Enquires into intellectual property's economic impact*, 2015, 213.

<sup>111</sup> ECD, *Enquires into intellectual property's economic impact*, 2015, 213.

The digital space can enhance piracy in situations where legislation does not address these concerns directly. This is because, the copyrighted work can be easily adapted, distributed and or reproduced without the authorisation of the right holder. This is seen in the case of *Colombia Pictures v Fung* where the defendant created and managed a torrent site.<sup>112</sup> The defendant is seen to be infringing copyrighted work by maintaining a list of movies and enabling other users to upload and download these movies without the authorisation of the right holders of said movies.

The President of Kenya, His Honourable Uhuru Kenyatta recently echoed the woes artists face with regard to CMSs.<sup>113</sup> He stated during the funeral of a popular musician, John De'Matthew that his government will move KECOBO from the Office of the Attorney General to the Ministry of ICT as part of the measures to protect musicians from exploitation.<sup>114</sup> In September 2019, amendments to the Copyright Act introduced a change in which parameters for collecting and payment of royalties will be defined in the new proposed Section 30 (b).<sup>115</sup> This is to ensure that the CMSs will not be permitted to blanket costs as administration costs. Further, this will reduce the operation cost which results in an increase on royalties paid to artists.<sup>116</sup>

In the light of this digital age, a new opportunity has emerged in Kenya. This is M-commerce which has merged mobile service providers with Kenyan artists.<sup>117</sup> An important example of this is *Skiza Tunes* which was created by Safaricom for a service known as the 'caller ring back tones.'<sup>118</sup> This means that instead of hearing the dialling tone, a song or prayer inclusive of the National Anthem is played instead.

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<sup>112</sup> *Colombia Pictures Industries v Fung* (2013), The Court of Appeal for the Ninth Circuit of the United States.

<sup>113</sup> Mbugua N, 'Addresses legal and policy issues to unlock creative sector's potential' Daily Nation, 30 August 2019 <https://mobile.nation.co.ke/blogs/-Address-legal-and-policy-issues-to-unlock-creative-sector/1949942-5255198-s412p7/index.html> on 20 November 2019.

<sup>114</sup> Mbugua N, 'Addresses legal and policy issues to unlock creative sector's potential' Daily Nation, 30 August 2019 <https://mobile.nation.co.ke/blogs/-Address-legal-and-policy-issues-to-unlock-creative-sector/1949942-5255198-s412p7/index.html> on 20 November 2019.

<sup>115</sup> Mbugua N, 'Addresses legal and policy issues to unlock creative sector's potential' Daily Nation, 30 August 2019 <https://mobile.nation.co.ke/blogs/-Address-legal-and-policy-issues-to-unlock-creative-sector/1949942-5255198-s412p7/index.html> on 20 November 2019.

<sup>116</sup> Mbugua N, 'Addresses legal and policy issues to unlock creative sector's potential' Daily Nation, 30 August 2019 <https://mobile.nation.co.ke/blogs/-Address-legal-and-policy-issues-to-unlock-creative-sector/1949942-5255198-s412p7/index.html> on 20 November 2019.

<sup>117</sup> Adam A, 'Enhancement of copyright protection in musical works and sound recording on the digital platform: a case study of the Kenya Copyright Board' Unpublished LLM, University of Nairobi, Nairobi, 2014, 50.

<sup>118</sup> Adam A, 'Enhancement of copyright protection in musical works and sound recording on the digital platform: a case study of the Kenya Copyright Board' Unpublished LLM, University of Nairobi, Nairobi, 2014, 50.

Kenya is a party to the WIPO Treaties (WCT and WPPT) as well as the TRIPS agreement.<sup>119</sup> Currently, the Copyright Act is the legislation that Kenya utilises in matters concerning copyrighted works. It empowers KECOBO which is established and mandated by Sections 3<sup>120</sup> and 5<sup>121</sup> of the Copyright Act to govern and manage the rights of copyrighted works. The board has endeavoured to protect and prevent piracy in Kenya through the Anti-Piracy Security Device Gadgets (APSD) and ensured where necessary, the prosecution of copyright infringement cases.<sup>122</sup>

Case law, makes a huge part of the current legislation in place. In Chapter 3, this paper highlighted the *Cellulant Kenya Ltd v. Music Copyright Society of Kenya [2009]*.<sup>123</sup> This case concerned M-commerce where the Plaintiff was collecting royalties on behalf of individual copyright holders. The Court held that the Plaintiff was required to pay a percentage to the defendant. In this case, the court noted that the reason for the payment of royalties is because the defendant has the expertise and means of monitoring users in order to collect the revenue generated to assess what is owed to individual copyright individuals.<sup>124</sup> The case of *Laban Toto Juma and 4 Others v Kenya Copyright Board and 9 Others [2018]*,<sup>125</sup> sought to clarify matters of the purported unconstitutional nature of Section 46 (5)<sup>126</sup> of the Copyright Act for the prohibition of KECOBO from approving another collecting society that has been licensed.<sup>127</sup>

The contention with said Section is because the Petitioners believed that the Section is in contradiction with Article 36<sup>128</sup> of the Constitution of Kenya 2010, which provides for the freedom of association. The Court held that the Act does not restrict the rights of any copyright holder from engaging with a CMS of their choice, nor does the Act compel any artist to join an organisation against their choice.<sup>129</sup> This case then can assist artists to know that they are

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<sup>119</sup> Adam A, 'Enhancement of copyright protection in musical works and sound recording on the digital platform: a case study of the Kenya Copyright Board' Unpublished LLM, University of Nairobi, Nairobi, 2014, 49.

<sup>120</sup> Section 3, *Copyright Act* (No. 12 of 2001).

<sup>121</sup> Section 5, *Copyright Act* (No. 12 of 2001).

<sup>122</sup> <http://www.copyright.go.ke/about-us/service-charter.html> on 20 November 2019.

<sup>123</sup> *Cellulant Kenya Ltd v. Music Copyright Society of Kenya* (2009) eKLR.

<sup>124</sup> *Laban Toto Juma and 4 Others v Kenya Copyright Board and 9 Others* (2018) eKLR.

<sup>125</sup> *Laban Toto Juma and 4 Others v Kenya Copyright Board and 9 Others* (2018) eKLR.

<sup>126</sup> Section 46 (5), *Copyright Act* (No. 12 of 2001).

<sup>127</sup> *Laban Toto Juma and 4 Others v Kenya Copyright Board and 9 Others* (2018) eKLR.

<sup>128</sup> Article 36, *Constitution of Kenya* (2010).

<sup>129</sup> *Laban Toto Juma and 4 Others v Kenya Copyright Board and 9 Others* (2018) eKLR.

not mandated or subjected to one CMS. This is important with the recent development of M-commerce and the digital space in totality. The requirement is that a collecting society is licenced by KECOBO to collect royalties on behalf of the copyright holder.

It is evident that Kenya has Policies, Legislation and Case Law on matters to do with royalties and the administration of revenue in totality. However, it is equally evident that the digital space has not been explored and legal recourse has yet to be proposed with regard to the protection and generation of revenue. This is why, it is crucial to begin to analyse a possible legal framework that will define, enforce and protect the rights and administration of revenue in the digital space.



## CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION

### 5.1. A recap of the study

The digital space is an emerging sphere that is taking the world by storm. Streaming and downloads of copyrighted works are revolutionising the music industry and empowering artists to be in full control of their content as well as the management of said content. Streaming for instance has created an opportunity for the growth of new artists and vast content creation. It has also enabled the distribution of this content to be faster and readily available. For example: one need not to leave the comfort of their home to use Spotify or *Skiza Tunes*.

Through the eruption of new artists into the industry, the digital space in essence is creating employment opportunities and the desire for artists to be remunerated from the content that they create and publish on the available platforms. This subsequently creates a general boost of the economy as well as decreases the rate of unemployment.

It has been established that irrespective of whether a CMS or a PRSP is contracted on behalf of a copyright holder, there exists a fiduciary relationship. This relationship dictates that the collecting societies are required to transact with the utmost duty of care. This is in order to enhance the artist through the: just, equitable division of revenue, enforcement of their rights and the protection of said rights. Further, it can be observed that everyone's good is important equally; my good does not count more than anyone's good. This means that by securing a just remuneration framework, both the artists, their respective agents and Kenya as a whole would benefit immensely. Due to the fact that the digital era is an emerging opportunity hub, a legal regime is significant in the aim of safe-guarding the rights owed to copyright holders as well as in the promotion of the principles set out in Article 11 (2) (c) of the Constitution of Kenya 2010.

Kenya has CMSs that fulfil their duty of negotiating royalty rates and other license terms, issuing of said licences to the relevant users. After which the CMS enforces and monitors the rights in order to collect the revenue due to their members which they eventually should distribute in an equitable manner. The equitability of this division of revenue is one of the major challenges that face CMSs in Kenya. This is attributed to the mismanagement of funds.

This challenge has been a highly motivating factor for artists to opt for PRSPs whose platform is predominantly in the digital realm.

One must acknowledge that Kenya does have the relevant legislation for the protection and enforcement of copyrighted works. However, it is noteworthy to mention that in as much as the legislation is present, there exists a gap in the governance and administration of revenue derived from the digital space. This therefore, becomes the main justification of this paper. The law as has been noted, evolves after the society, and certainly as can be witnessed, the digital space is revolutionising the music industry among other sectors. The proposed shift of KECOBO by the President from the Office of the Attorney General to that of the Ministry of ICT is a reflection of the way in which technology is advancing in a manner that should not and cannot be ignored.

## **5.2. Recommendations**

Throughout this study, it has been observed that indeed Kenya through her laws have mechanisms that protect the rights of copyright holders. It is equally evident that Kenya is concerned with ensuring that the growth of her citizens in all sectors of life (Politically, Economically and Socially), are sustainable, just and beneficial to all her citizens.

Thus, in an effort to enhance the growth of this beautiful Nation, this research paper seeks to suggest a possible legal framework which can be proposed and adopted for the protection and regulation of remuneration derived from the digital space.

### **A. Nomination of a Task Force**

Task forces generally are mandated to thoroughly investigate a sector in order to increase their knowledge on the matter, but most importantly to generate efficient and effective solutions to address the matter. It is apparent that the digital space, especially with respect to the administration of generated revenue from the digital space is a relatively new sector for Kenya. Thus, there needs to be a focus group with the aim to investigate, compare and contrast the digital space and the revenue derived from it and how other jurisdictions have handled this circumstance. Finally, this Task Force would be able to then propose the best approach to addressing and filling this gap in the law.

## B. Amendment to the Copyright Act 2019

The Copyright Act is the primary legislation that addresses copyright and related rights in Kenya. In September 2019, amendments were made to the Act. Some of these amendments are Section 2, where Collective Management Organisations, publication, performance and public performance are defined. This is commendable as a step forward, however, it still falls short when it comes to matters of the definition of the digital space, the revenue derived from it, the distribution of revenue and the protection of copyrighted works in the digital realm.

## C. Sensitisation of rights of copyrighted works and the administration of the revenue derived from the rights.

The digital space as has been discussed is prone to exploitation by individuals in positions of power. It has also been observed that many Kenyans are not empowered with the rights owed to them and thus, they end up being exploited or worse, dying as paupers. It is important to sensitise artists on what contracts they are agreeing to as well as what to look for to safe-guard their rights. Essentially, the argument of this paper is that an artist can thrive off their copyrighted works and live a comfortable life. Knowledge is power, thus, I believe the more artists are informed, the better the sector shall be governed and consequently, an enhanced economy as well as a greater Kenya.

## 5.3. Conclusion

Finally, the main objective of this paper is to investigate the reasons and need for an adequate legal framework which will govern the digital space. This framework will subsequently enable a stable employment environment which will yield opportunities for the youth in Kenya. This is in contrast to the current situation in which artists have limited means of protecting the revenue that they are due from their musical works. This framework will rely on the provisions of licensing and collecting societies befitting the digital space. This is with the aim to enforce and protect copyrighted works in order to ensure that the revenue generated from the digital space is administered and distributed in an equitable manner.

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