Online Copyright Enforcement in Kenya: An Examination of the Prospective Use of Intermediary Liability

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Dedication

I dedicate this dissertation to my mother who continues to work tirelessly to ensure I receive nothing but the best.

Declaration

I, **Abdulmalik Adan Sugow,** 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: _____

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

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List of Abbreviations

Collective Management Organisations	CMOs
Digital Millennium Copyright Act	DMCA
European Directive on Copyright in the Single Digital Market	EUCD
European e-Commerce Directive	ECD
European Union	EU
Information Communication Technology	ICT
Internet Service Provider	ISP
Kenya Copyright Board	KECOBO
Notice-and-takedown	NTD
Political Economy of Communication	PEC
United States	US
User Generated Content	UGC

Abstract

Copyright law vests an entitlement in the owner to exclude unauthorized use in their works. The law also vests owners with the sole responsibility of enforcing this private right, often through litigation. However, trends in digital media, have made in much harder for owners to keep track of the use of their content online. These new technologies have increased both the speed and volume of information being disseminated thereby making difficult the identification of infringements, effectively rendering the analog approach to enforcement, untenable.

Regions such as the European Union (EU) and countries such as the United States (US) have enacted intermediary liability regimes so as to involve internet service providers in enforcement. These regimes have manifested in different ways: safe harbour systems which provide conditional immunity and more recently, systems which require active-preventative approaches on the parts of intermediaries. Both these regimes have raised concerns of imbalance; either in favour of intermediaries or in favour of owners. Kenya recently enacted the Copyright (Amendment) Act which adopts a safe harbour system similar to those existing in the US. In light of this, the study appraises the different approaches to intermediary liability in the context of the various interests of owners, intermediaries and users and finds that the enforcement of copyright online ought to be strengthened by wider copyright law reform in addition to intermediary liability laws. The proposed reforms include Berne compliant formalities and the encouragement of interoperability of existing copyright registries.

CHAPTER ONE

1.0 Summary of the study

1.1 Chapter 1

The first chapter of this study provided a background to the problem highlighting the difficulties faced in online enforcement of copyright. It was evinced that digital media has significantly changed the nature of creation and enforcement of copyright. An inadequate intermediary liability model was identified as hindering the effective enforcement of copyright online in Kenya particularly due to the resulting imbalance between actors on online platforms. Wider copyright law reform aimed at developing a novel intermediary liability model was identified as a potential solution to this problem.

1.2 Chapter 2

This chapter sought to address the interests that inform the regulation of copyright content online i.e., those of copyright owners, users and the intermediaries that facilitate the dissemination and sometimes infringement. Viewing copyright through a utilitarian lens, the need for control by owners was justified. On the other hand, the dual grant theory of fair use provided the justification for limiting this control. The PEC provided the framework within which these transactions take place – different actors seeking to monetise content online.

1.3 Chapter 3

In the third chapter, the study elaborated on the existing intermediary liability models with a view to possibly finding one suitable for Kenya. However, it was found that the safe harbour models as practiced in the US and in the EU were inadequate in balancing the interests discussed in the previous chapter. Existing NTD systems were found to burden owners of copyright significantly on UGC platforms while modern active-preventative approaches/licensing were found to be burdensome on intermediaries.

1.4 Chapter 4

In this chapter, the issue resulting in an imbalance of interests in online copyright enforcement was identified as the knowledge gap that subsists as a result of automatic copyright protection. This knowledge gap was shown to hinder effective rights clearance thus obstructing confident fair use and effective enforcement by intermediaries. In a bid to seal this knowledge gap, arguments regarding the reintroduction of formalities were canvassed and Berne compliant formalities were found to be indeed possible and suitable for the enhancement of online enforcement. It was further found that such formalities ought to be supplemented by facilitating the interoperability of private and public registries, bringing the former under the supervision

of the statutory copyright office. Lastly, the adoption of these changes would open up the opportunity to establish a safe harbour regime tailored to platforms that facilitate the use of these new style formalities and adopt measures to enable rights clearance.

1.5 Conclusion

With regard to addressing online enforcement of copyright, Kenya has made significant strides, adopting the Copyright Amendment Act. However, this Act as is, sets up an intermediary model that would do little to ease the burden on owners of copyright. Wider copyright law reform is necessary and is captured in the recommendations herein.

2.0 Introduction

1.1 Background

Copyright refers to the rights that accrue to authors/creators of literary and artistic creations.[1] These include the rights to: reproduce, distribute and adapt creative works.[2] Infringement of these rights would entail the perpetration of these acts without the permission of the owner of the copyright.[3] The Kenyan Copyright Act vests in copyright owners, the responsibility of enforcing rights in their creative works often through bringing claims before a court of law.[4] This model of policing content that places the burden of enforcement on owners was suitable in the analog age where infringements were easily identifiable. However, with the development of peer-to-peer communication platforms like social media, information can be shared instantaneously with millions of people.[5] Owners then find it difficult to track usage of their content on such platforms and, by extension, to enforce their rights where possible. A few decades ago, the facilitator of copyright distribution or replication was often the printing press. Currently, this facilitative role is often played by *inter alia* internet access providers, hosts, and caching services providers.[6] Collectively, these are intermediaries,[7] an apt moniker owing to

[1] WIPO, *Understanding copyright and related rights,* Publication 909, 2016, 4.
[2] Section 26, *Copyright Act*, Cap 130 Laws of Kenya.
[3] Section 35, *Copyright Act*, Cap 130 Laws of Kenya.
[4] Section 35(4), *Copyright Act*, Cap 130 Laws of Kenya.
[5] Otieno I, 'The efficiency of copyright law in the digital space in Kenya' 1(2) *Strathmore Law Review,* 2016, 27.
[6] Comninos A, 'The liability of internet intermediaries in Nigeria, Kenya, South Africa and Uganda: An uncertain terrain', Association for Progressive Communications, Intermediary Liability in Africa Research Papers, No. 1, 2012, 5 - https://www.apc.org/sites/default/files/READY%20-%20Intermediary%20Liability%20in%20Africa_FINAL_0.pdf on 5 August 2019.
[7] Nielsen R and Ganter A, 'Dealing with digital intermediaries: A case study of the relations between publishers and platforms' 20 *New Media and Society,* 4 (2018), 1602.

the role they play in such transactions. They have also been referred to as internet service providers (ISPs) or online service providers (OSPs).

Recognising this challenge in online copyright enforcement, regions such as the European Union (EU) and countries such as the United States (US) developed regulations providing for the role played by internet intermediaries in online copyright transactions.[8] This entailed the creation of intermediary liability regimes that provided for conditional immunities hinged upon their passivity in illicit content. These regimes have been referred to as 'safe-harbours'.[9] Under safe harbours, liability only accrues where intermediaries go beyond their passive role of simply hosting or transmitting content, or where they are told of infringing content and fail to act expeditiously to remove it (noticed-and-takedown or 'NTD'). The safe-harbour systems in existence in both the US and the EU are analogous to negligence-based, as opposed to strict liability, offenses.[10] Seeing as the rebuttable presumption under safe harbours is intermediary immunity, these systems do not do much in the way of shifting the heavy burden of enforcement away from copyright owners.

To address this imbalance of burdens, the EU, through the EU Directive on Copyright (EUCD), recently went a step further by imposing an obligation on intermediaries license content from owners.[11] The implication of effecting this provision would be a need for intermediaries to sift through content on their platforms to ensure all content being shared is not infringing (essentially, filtering).[12] This is further elaborated on in the third Chapter of this study. While copyright owners would welcome this as easing their burden, this directive has raised concerns regarding algorithmic enforcement and its ability to strike a balance between fair use, free speech and infringement.[13]

[8] This has been through setting up liability regimes for purposes of ensuring intermediaries also play a part in ensuring illegal content is not shared. In the EU, this is contained in the EU E-Commerce Directives of 2001, and in the US, in Section 230, *Communications Decency Act* as well as Section 512, *Digital Millennium Copyright Act.*

[9] This is the case in the *Digital Millennium Copyright Act*, and the *EU Directives on e-Commerce*.

[10] Frosio G, 'Reforming intermediary liability in the platform economy' 112 *Northwestern Law Review,* 251 (2017), 41.

[11] Article 17, *European Union, Directive on Copyright in the Digital Single Market, 2019/790*.

[12] Frosio G, 'Reforming intermediary liability in the platform economy', 34

[13] Frosio G, 'Reforming intermediary liability in the platform economy', 42.

Kenya recently recognised the need to reform its law on online copyright enforcement and as a result adopted a safe harbour approach for ISPs.[14] The provisions of the Amendment Act mirror those of the US and the EU (prior to the licensing agreement obligations) in that they provide for conditional immunities and set up an NTD system. Aside from this, the Act fails to appreciate the nuanced roles played by intermediaries, only recognising 'internet service providers.'[15]

1.2 Statement of Problem

Despite the increased debate surrounding the efficacy of the safe harbour system as practiced in the US, Kenyan copyright law recently adopted it. Such a model, would still require copyright owners to identify infringements in the midst of a significant amount of data being circulated online; their burden isn't mitigated. Further, in the event that such an infringement is identified and a notice issued, an intermediary, a private entity, has to make decision[s] that affect the rights of various parties.[16] A solution may appear to lie in the EUCD's recent provisions, but the case isn't better with the over-involvement of intermediaries to such extents; it raises concerns of free speech, fair use and economic viability of internet business models.

Within this context – and the larger trends in intermediary liability – this study attempts to find out the best way in which Kenya can improve its copyright enforcement mechanisms in an approach that balances the economic rights of copyright holders and intermediaries with the fair use and free speech considerations of users. The result is a determination of suitable amendments to intermediary liability model adopted by the country in relation to intermediaries generally and hosts particularly.

In particular, the study addresses whether the country ought to impose monitoring obligations on intermediaries similar to those in the EUCD, maintain its current safe harbour system or, develop a novel system altogether, incorporating wider copyright law reform in bolstering online enforcement. To do so, an appraisal of the different regimes (as practiced in the US and the EU) and how they would affect the enforcement of copyright and the interests of relevant stakeholders is conducted.

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[14] Section 35A, *Copyright (Amendment) Act*, (No. 20 of 2019).
[15] Section 2, *Copyright (Amendment) Act*, (No. 20 of 2019). The Act fails to recognise roles such as hosting and caching, roles which all raise different questions of copyright infringement.
[16] Marsoof A, ''Notice and takedown': A copyright perspective' 5 *Queen Mary Journal of Intellectual Property,* 1 (2015), 194-195.

1.3 Justification of Study

This study is an evaluation of intermediary liability regimes in order to find out the extent to which the protection of copyright and incentivisation of creativity should affect the 'open' nature of the internet and the privileges society has in creative works such as fair use in Kenya. While the problem has previously been addressed by William Auma in his analysis of Kenyan copyright enforcement in the digital age, the existing literature only goes as far as identifying the need for an intermediary liability regime, particularly one similar to the US' safe-harbour system.[17] There exists no comprehensive appraisal of available enforcement approaches in Kenya that propones an intermediary liability model and copyright law reform that sufficiently balances the rights of the different actors.

1.4 Hypothesis

This study hypothesizes that:

a. Internet intermediaries facilitate the dissemination of copyright content and more often than not, its infringement.
b. Intermediary liability is necessary to bolster online copyright enforcement.
c. Existing safe harbour models are imbalanced in favour of intermediaries and do little to enhance copyright enforcement, whereas burdensome models that require monitoring stifle free speech and fair use privileges.
d. Copyright law reform that takes into account the fair use considerations of the public and economic interests of intermediaries is necessary so as to: i) strike a balance and ii) effectively enhance copyright enforcement.

1.5 Statement of Objectives

1. To highlight the difficulties faced in online copyright enforcement.
2. To appraise the intermediary liability model in the US vis a vis that adopted in the EU in light of the interests of various stakeholders.
3. To suggest suitable reform to the Kenyan copyright law relating to intermediary involvement in enforcement of copyright.

1.6 Research Questions

1. What interests inform the application of intermediary liability regimes in online copyright enforcement?

[17] Auma W, 'Copyright in the digital age: An assessment of Kenya's legal and institutional framework for the protection and enforcement of copyright' Unpublished LLM Thesis, University of Nairobi, 2017, 1-2.

2. What would the ideal balance between the economic interests of copyright owners and intermediaries, and the fair use and free speech concerns of the public be?
3. What changes should be made to the current Kenyan copyright law so as to improve online enforcement while preserving privileges in fair use and the freedom of expression?

3.0 Literature Review

This section aims to set forth the academic and legal progress made in the development of intermediary liability in online copyright enforcement. It takes a thematic approach first delineating the status of online copyright enforcement in Kenya, then subsequently discussing general trends in intermediary liability in online copyright enforcement. In particular, it attempts to highlight the competing interests that inform the introduction and implementation of intermediary liability in copyright law. The various studies relied on in this section serve as a backdrop for this study, an attempt to show the point at which this study deviates from the existing body of knowledge is made in a bid to situate the precise scope of this study.

2.1 Status of Online Copyright Enforcement in Kenya

In a thesis tackling the challenges of online copyright enforcement, William Auma noted that with the increased internet penetration in Kenya, creatives have been conferred upon a benefit and a curse.[18] While the ease of proliferation enables creative works be enjoyed by larger audiences, it also means the possibility of infringement at a large scale. The harm of this infringement is further compounded by the anonymity the internet offers.[19] Much like this study, Auma notes that the copyright laws in Kenya have failed to offer a definitive solution to the role played by intermediaries in the facilitation of infringement.[20] This gap in the law poses salient problems as noted by the level of online piracy in Kenya.[21] Auma also noted the general absence of provisions for the involvement of intermediaries in content regulation in Kenya.[22] He even went ahead to state that as at when he was conducting this study, there was no definition of internet intermediaries or a delineation of the extent of their liability in Kenyan law.[23] Citing *Bernsoft Interactive & 2 Others v Communications Authority of Kenya & 9*

[18] Auma W, 'Copyright in the digital age', 1-2.
[19] Auma W, 'Copyright in the digital age', 1-2.
[20] Auma W, 'Copyright in the digital age', 3.
[21] Auma W, 'Copyright in the digital age', 9.
[22] Auma W, 'Copyright in the digital age',13.
[23] Auma W, 'Copyright in the digital age', 56.

Others,[24] Auma noted an existing push – based on arguments of mitigating the burden on copyright owners – to involve intermediaries in copyright enforcement.[25] According to the thesis, the rationale for this involvement is twofold: the role played in facilitation, and the ease of targeting a single intermediary as opposed to multiple infringers.[26] The thesis noted the introduction of intermediary liability in the form of a NTD system in the Copyright (Amendment) Bill.[27] However, in the course of the thesis, Auma concluded that Kenya ought to be inspired by the DMCA's NTD system in the sense that fair use considerations ought to be taken into account and a more comprehensive counter-notice system ought to be effected.[28]

Macharia, in a thesis on copyright enforcement in the information and communication technology (ICT) era also found the existing systems in place inadequate in dealing with infringement due to the absence of provisions catering to intermediaries.[29]

Since these two theses, Kenyan copyright law has undergone reform and intermediary liability was included through the Copyright (Amendment) Act. However, the amendments do not provide for hosts, an intermediary which – according to this study – plays a crucial role in the information economy. Aside from this, the provisions pertaining to intermediaries simply adopt a safe harbour approach where NTD is utilised and copyright owners are required to keep track of their content online and flag infringements. This wouldn't be a significant shift from the current system where owners are still required to identify infringements and lodge claims. In fact, the burden is considerably higher owing to the fact that the amount of content circulated on host platforms is quite large.

Much of the literature concerning the capability of Kenyan legal and policy frameworks in enforcing copyright online has been canvassed in the theses by Auma and Macharia. From them, one can glean the necessity to revise the law when it comes to online enforcement and the role of intermediaries. While Auma recommends the adoption of the NTD system as has been done to a larger extent in the Copyright (Amendment) Act, this study contends that it is

[24] Petition 600 of 2014.
[25] Auma W, 'Copyright in the digital age', 14.
[26]Auma W, 'Copyright in the digital age', 29.
[27] Auma W, 'Copyright in the digital age', 57. This Bill was subsequently enacted and is discussed in this study.
[28] Auma W, 'Copyright in the digital age', 81, 83. A counter-notice system would essentially effect Kenya's fair dealing provisions in an instance where an intermediary pulls down content that would qualify as a fair dealing. Users would simply have to issue a counter-notice explaining that the use qualifies as fair dealing.
[29] Macharia A, 'Enforcement of copyright in information communication technology (ICT) era: How effective?' Unpublished LLM Thesis, University of Nairobi, 2012.

inadequate and appraises the available intermediary liability regimes in the realm of copyright enforcement with a view to highlighting a suitable option for Kenya to adopt bearing in mind the conflicting interests at play for the various stakeholders. The regimes this study appraises are the manifestations of safe harbours in the US and the EU. The study also identifies a suitable intermediary liability model for Kenya along with other legislative measures that ought to be taken so as to comprehensively enhance online copyright enforcement.

2.2 Intermediary Liability in Online Copyright Enforcement

The internet serves to disseminate content transnationally, with ease. The resultant effect of this ubiquity has been its conversion into a frontier of piracy and copyright infringement.[30] Marsoof notes that the internet presents a more difficult challenge to authors in policing the use of their content.[31] Situating his discussion in the regulation of copyright online, Marsoof posits that the rights and interests of copyright owners necessitate the self-regulation of internet i.e., intermediaries have recognised the need to regulate content on their platforms in view of these rights.[32] The justification for this, is the positioning of intermediaries as facilitators of access to content. This facilitation, he notes, is typically neutral in that intermediaries simply provide a framework and often aren't involved in content creation and/or modification. However, the 'architecture' of the internet means intermediaries are best placed to regulate content on their platforms, hence their involvement through these liability regimes.[33] Aside from this, he lists jurisdictional reach, financial capability and the significance of ripple effects on primary wrong-doers (i.e., where an intermediary is found liable, the odds of the primary infringer being found liable increase) as reasons for imposing liability on intermediaries.[34]

Jougleux, in examining the role of ISPs in online enforcement, espoused that the advancement of technology rendered the enforcement against internet users difficult owing to the anonymity offered by the internet.[35] Additionally, he suggested that the large-scale prosecution of infringers would be untenable.[36] Noting that various rights are in conflict in the regulation of copyright infringement online, Jougleux suggested that the involvement of intermediaries in

[30] Marsoof A, '"Notice and takedown": A copyright perspective', 183-184.
[31] Marsoof A, '"Notice and takedown"', 184.
[32] Marsoof A, '"Notice and takedown"', 189.
[33] Marsoof A, '"Notice and takedown"', 189.
[34] Marsoof A, '"Notice and takedown"', 189.
[35] Jougleux P, 'The role of internet intermediaries in copyright law online enforcement' in Synodinou T, Jougleux P, Markou C and Prastitou T (eds), *EU internet law: Regulation and enforcement*, Springer International Publishing, 2017, 270.
[36] Jougleux P, 'The role of internet intermediaries in copyright law online enforcement', 270.

itself raises concerns of economic viability for these entities.[37] This naturally leads to the discussion of intermediary liability trends that take into account stakeholder concerns, such as the introduction of safe harbour.

2.2.1 Safe Harbour

The culmination of the push for intermediary involvement in a manner that does not compromise the economic viability of the internet was the DMCA's safe harbour system in the US.[38] In essence, intermediaries were provided with conditional immunities (safe harbours) so as to propel their growth owing to their role in the enablement of the freedom of expression.[39] This appeared to be an attempt to cater to all stakeholders.[40] However, this system has been subject to criticism on the basis that it overprotects copyright at the expense of innovation and freedom of expression.[41] Marsoof notes that while the safe harbour offers considerable protections to internet access service providers and caching systems, hosts suffer a greater burden in terms of the requirement to put in place notice-and-takedown mechanisms.[42] This is particularly problematic because the efficacy of the NTD system on the internet, is in its expeditiousness. This expeditiousness has been criticised for leading to extra-judicial takedowns by private entities who shouldn't have a right to make decisions on such rights.[43] While the safe harbour system may spur the growth of the internet, it may be doing so at the cost of the free flow of information; the very nature of the internet.[44] The DMCA has been criticised for favouring intermediaries and copyright owners over users.[45] Through empirical study, Marsoof arrives at the conclusion that the NTD systems under the DMCA are often implemented extra-judicially – a manner that may have adverse effects on the free flow of information.[46]

This hasn't been the only critique of the safe harbour system under the DMCA. In a Joint Supplemental Comment to the US Copyright Office, a raft of music groups expressed that the safe harbour system, which was intended to balance the interests of copyright owners and

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[37] Jougleux P, 'The role of internet intermediaries in copyright law online enforcement', 271.
[38] Marsoof A, '"Notice and takedown"', 191.
[39] Marsoof A, '"Notice and takedown"', 191.
[40] US Copyright Office, Section 512 Study, -< https://www.copyright.gov/policy/section512/ on 9 September 2019.
[41] Marsoof A, '"Notice and takedown"', 191.
[42] Marsoof A, '"Notice and takedown"', 192-193.
[43] Marsoof A, '"Notice and takedown"', 194.
[44] Marsoof A, '"Notice and takedown"', 194.
[45] Marsoof A, '"Notice and takedown"', 203.
[46] Marsoof A, '"Notice and takedown"', 206.

intermediaries, is heavily skewed to favour the latter.[47] Of particular importance in the comments was the critique that the NTD system was akin to a game of 'whack-a-mole' in that authors have to notify intermediaries of infringing content on a pop up basis, despite the vast nature of the internet.[48]

The US wasn't the only jurisdiction to implement a safe harbour system. The EU similarly implemented conditional intermediary immunities through the e-Commerce Directive (ECD).[49] Articles 12 and 13 of the Directive provide conditional protections for access providers, termed 'mere conduits' and cache providers respectively.[50] Dr. Angelopoulos in a study on the recent trends in EU intermediary liability law focused on the existing position with regard to hosting providers.[51] The protection offered to hosts under EU law only applies on two conditions: where there was no actual knowledge of illegal content or, where when such knowledge was obtained, the content was taken down expeditiously.[52] This protection is supplemented by the bar against the imposition of general monitoring obligations.[53] While the system under the ECD somewhat lifts the burden of identifying infringements and notifying the intermediary from copyright owners, the immunity offered to hosts still means that the burden still falls on owners to actively seek out infringements. The recognition of this has led to EU reform on the area in the form of the EU Directive on Copyright in the Single Digital Market (EUCD). This is discussed in the section below.

2.2.2 Monitoring & Active-Preventative Approaches

In a communication, the EU Commission cited the 'value-gap' that exists between market players in copyright as sufficient reason to impose greater responsibility on intermediaries.[54] Revenues in copyright content online may be classed into that obtained on ad-funded platforms (those that generate revenue by selling airtime or access to an audience to advertisers) and on

[47] Joint Supplemental Comments, US Copyright Office, Docket No. 2015-7, -< http://src.bna.com/mnc on 13 February 2019.
[48] Joint Supplemental Comments, 8.
[49] European Union, E-Commerce Directive, 2000/31, 8 June 2000.
[50] Sparas D, EU regulatory framework for e-commerce, WTO Workshop, Geneva, 18 June 2013, 14-15, -< https://www.wto.org/english/tratop_e/serv_e/wkshop_june13_e/sparas_e.pdf on 14 February 2019.
[51] Angelopoulos C, 'On online platforms and the Commission's new proposal for a directive on copyright in the digital single market', Centre for Intellectual Property and Information Law, 2017, 8.
[52] Angelopoulos C, 'On online platforms and the Commission's new proposal for a directive on copyright in the digital single market', 8.
[53] Angelopoulos C, 'On online platforms and the Commission's new proposal for a directive on copyright in the digital single market', 8.
[54] European Commission, 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market', COMM (2016), Brussels, 14 September 2016.

subscription-funded platforms (those that generate revenue by requiring users to pay a membership fee).[55] While copyright licensing drives the latter, the former solely relies on NTD, which may not be very suitable for rightsholders seeking to monetise their content.[56] This is due to the fact that on ad-funded platforms, intermediaries do not have agreements with copyright owners and aren't necessarily incentivized to prevent infringements. The plug to this 'value-gap', according to the EU, would be the imposition of responsibilities to conclude agreements with rightsholders on intermediaries.[57] While not directly stated, the implication of such a provision would be an imposition of a burden to with deploy content recognition technologies by intermediaries.[58] This would be to filter content posted online, thereby effectively shifting the burden from copyright owners to intermediaries.[59]

Various criticisms have been lodged at this recent approach. Giancarlo Frosio recently analysed the impact filtering obligations would have on intermediaries.[60] Aside from critiques on the clarity of the proposal by the EU with regard to the target of the regulation and the threshold for exemption from liability,[61] Frosio sharply raised concerns over the monitoring obligations to be imposed. In particular, he criticised the proposal's contradiction with the existing ECD's bar on monitoring.[62] Citing jurisprudence,[63] Frosio notes that general filtering obligations are incongruent with the safe harbour system already in place.[64] Aside from this, these obligations may result in an inability to balance copyright and other rights.[65]

2.3 Conclusion

[55] Angelopoulos C, 'EU copyright reform: Outside the safe harbours, intermediary liability capsizes into incoherence', Kluwer Copyright Blog, 6 October 2016, -< http://copyrightblog.kluweriplaw.com/2016/10/06/eu-copyright-reform-outside-safe-harbours-intermediary-liability-capsizes-incoherence/ on 14 February 2019.
[56] Angelopoulos C, 'EU copyright reform: Outside the safe harbours, intermediary liability capsizes into incoherence.'
[57] Article 17, *European Union, Directive on Copyright in the Digital Single Market, 2019/790*. See also, Angelopoulos C, 'EU copyright reform: Outside the safe harbours, intermediary liability capsizes into incoherence'.
[58] In the initial drafts of the directive, the use of such technologies was explicitly set out.
[59] Spitz B, 'Article 17 of the new Copyright Directive: A French mission on content recognition technologies', Kluwer Copyright Blog, 11 June 2019, -< http://copyrightblog.kluweriplaw.com/2019/06/11/article-17-of-the-new-copyright-directive-a-french-mission-on-content-recognition-technologies/ on 25 June 2019.
[60] Frosio G, 'To filter or not to filter: That is the question in EU copyright reform' 36(2) *Cardozo Arts and Entertainment Law Journal*, 2018.
[61] Frosio G, 'To filter or not to filter', 343.
[62] Frosio G, 'To filter or not to filter', 350.
[63] *SABAM v Netlog NV* (2012), Court of Justice of the European Union, EU. See also, *Scarlet Extended SA v SABAM* (2011), Court of Justice of the European Union.
[64] Frosio G, 'To filter or not to filter', 351.
[65] Frosio G, 'To filter or not to filter', 356.

The existing literature on intermediary liability in online copyright enforcement highlights the difficulties that were posed by an initial absence of intermediary liability provisions in Kenya thereby proving the necessity of such provisions. Further, the attempts comparing and contrasting the intermediary liability models in place in the US and EU highlight some of the challenges faced in balancing the various interests in copyright. An appraisal of the two trends (US and EU) for the purposes of informing the discussion in Kenya has not been conducted. This study entails such an appraisal with a view to proposing suitable amendments to Kenya's copyright law in light of the Copyright (Amendment) Act.

4.0 Research Design and Methodology

3.1 Data Collection

This study relies on both primary and secondary sources. These include Acts of Parliament, directives of regional bodies, case law, scholarly works, books, newspaper articles, working papers, and institutional reports. These have been accessed via the internet and the University library. It is qualitative in nature.

3.2 Assumptions

The core assumption of this study is that online copyright infringement is prevalent in Kenya and needs to be addressed. Aside from this, the study assumes that the nature of the internet is such that online copyright infringement is markedly similar; issues identified in other jurisdictions are similar to those potentially faced in Kenya. In particular, a significant number of Kenyans make use of these online platforms that are regulated by the EU and US laws.

3.3 Limitations

Aside from the short duration of the study, other limitations include the small amount literature addressing online enforcement of copyright in Kenya and the contextual differences between Kenya and the other jurisdictions that shall be analysed. These limitations have been addressed by highlighting the universal aspects of the issue with a view to drawing parallels to Kenya.

3.4 Chapter Breakdown

This study contains five chapters.

3.4.1 Chapter One: Introduction to the Study

This serves as an introduction and background to the problem, detailing the hypothesis, research questions, statement of objectives and reviewing the existing literature relevant to the study.

3.4.2 Chapter Two: Theoretical Framework

This chapter outlines the theories that guide the study. It provides the lens through which I address the problem of copyright enforcement online in Kenya. Within this chapter, the interests involved in copyright enforcement are made clear.

3.4.3 Chapter Three: Intermediary Liability

In this chapter, the study identifies the different iterations of intermediary liability regimes in Europe and the US with a view to bringing out the problems faced in their implementation for purposes of copyright enforcement online. The identification of problems is guided by the interests pointed out in the previous chapter. This serves to inform the subsequent chapter by bringing out the nuanced nature of the problems faced under each regime.

3.4.4 Chapter Four: Finding Balance

Following the appraisal in the previous chapter, this chapter identifies a suitable copyright law reform that incorporates suitable elements of the appraised regimes and evaluates wider legislative and policy frameworks that may be adopted to supplement the proposed model.

3.4.5 Chapter Five: Conclusion and Recommendations

This is the final chapter. It provides the conclusion of findings and recommendations to address the problem.

CHAPTER TWO: THEORETICAL FRAMEWORK

5.0 Introduction

In this Chapter, this study has lain out the theoretical framework that informs the analysis in this study. In a bid to understand the competing interests discussed in the introduction of this study, it is necessary to canvass the philosophical underpinnings of the various actors at play *viz*; authors/creators, intermediaries and users. To that end, this Chapter highlights these theories and draws a link to the problem at hand: online copyright enforcement.

Copyright refers to the rights that accrue to authors/creators of literary and artistic creations.[66] These include the rights to or to control: reproduction, translation, adaptation and distribution of works.[67] In this sense, copyright can be viewed as property; it forms part of intellectual property. Much like all other forms of property, intellectual property connotes a bundle of rights over an intellectual creation.[68] More specifically, intellectual property connotes lawful entitlement over creative works.[69] Therefore, it is possible to draw parallels with theories of property as has been done below.

5.1 Copyright and Utilitarianism

Jeremy Bentham's utilitarian theory that private rights in property are created by law so as to maximise utility or benefit for society.[70] In viewing copyright from this utilitarian perspective, the rationale behind the incentivisation – which is exclusivity – can clearly be seen.[71] The utilitarian theory essentially holds that without the protection offered in copyright, authors may cease to create content or may not be as motivated.[72] It further ties in with the belief that social welfare must be maximised; through the creation of socially valuable works, society would ideally be enriched.[73] The same argument is employed in justifying the limited nature of the exclusivity: the eventual lapse into the public domain is necessary for societal value to be

[66] WIPO, *Understanding copyright and related rights,* Publication 909, 2016, 4.
[67] Section 26, *Copyright Act*, Cap 130, Laws of Kenya.
[68] Kariuki F, Ouma S and Ng'etich R*, Property law*, Strathmore University Press, Nairobi, 2016, 5-6.
[69] Kariuki F *et al, Property law,*112.
[70] Kariuki F *et al, Property law,* 40.
[71] Fromer J, 'An information theory of copyright law', 64(71), *Emory Law Journal,* 2014, 74-75.
[72] Fromer J, 'An information theory of copyright law', 75.
[73] Fromer J, 'An information theory of copyright law', 75.

realised.[74] The incentive justification for intellectual property also affirms this rationale; a quid pro quo between creators and the society.[75]

The utilitarian theory as set out by Bentham contemplated real property. Fisher, in addressing the application of traditional conceptions of property to intellectual property, also identified the utilitarian theory as playing a part in justifying intellectual property rights.[76] However, he did concede that this application was not as straightforward as made out to be. For example, he noted that the application of these theories to intellectual property was limited by among other things, a lack of empirical data to show that guarantees of protection would stimulate innovation.[77] Indeed, this argument has been echoed by Lemely who found that the subsequent existence of empirical data actually served to cast doubt over the applicability of this theory.[78] In particular, that guarantees of private rights would stimulate creation or innovation. His approach has however been heavily critiqued as discarding room for discourse and adhering too strictly to utilitarianism.[79]

In spite of the above, for purposes of this study, the utilitarian theory of property, applied to copyright, offers a justification for the need to improve online copyright enforcement in Kenya; to ensure authors of creative works benefit. While empirically, incentivisation may not necessarily follow legal guarantees, it follows that authors would be at considerable ease creating content where they are assured of protection. It largely fits within the incentive justification of intellectual property.[80]

5.2 Personality-based Theories

In addition to the utilitarian theory, Margaret Radin's personhood theory serves as a justification of the exclusivity and control meted over copyright content by owners. The protection offered by copyright law is not simply a means to an end. Aside from the monetary benefits, authors have another vested interest to protect. The personhood theory of property

[74] Fromer J, 'An information theory of copyright law', 76. The time and scope of the exclusivity is limited.
[75] Du Bois M, 'Justification theories for intellectual property viewed through the constitutional prism' *PER/PELJ* 21(1), 2018, 22.
[76] Fisher W, 'Theories of intellectual property', -< http://www.law.harvard.edu/faculty/tfisher/iptheory.html on 9 September 2019.
[77] Fisher W, 'Theories of intellectual property'
[78] See generally, Lemely A, 'Faith-Based intellectual property', (62) *UCLA Law Review*, 2015.
[79] See generally, Merges R, 'Against utilitarian fundamentalism', 90(3), *St. John's Law Review* 2016.
[80] Shiffrin S, 'The incentives argument for intellectual property protection', in Gosseries A, Marciano A, and Strowel A (eds), *Intellectual Property and Theories of Justice,* Palgrave Macmillan, 2008*,* 94.

views the *res* (tangible or intangible) as an extension of oneself.[81] This could not be more apt as in the case of copyright. Literary and artistic works are expressions of an author. By dint of this, the necessity of protecting their works against infringement is salient. This justification of offering protection would explain the interest authors have in ensuring they exercise control over their content, if not for monetary gain, then to ensure what they consider a part of themselves is not used without their permission. This justification would further explain the moral rights conferred on authors in most national legislation.[82]

It is therefore necessary to ensure that with advancing technology, core protections are not eroded. Authors ought to be able to control the use of their work.

5.3 The Dual-Grant Theory of Fair Use

While the previous theories justify the exclusivity and control exercised over copyright by authors and owners, other theories point to the importance of limiting this monopoly. Abraham Bell and Gideon Parchomovsky proffered a different way of viewing the exclusivity conferred upon rightsholders. In their critique of the market-failure fair use theory, they suggested that, as opposed to viewing copyright as the superior entitlement and fair use as a mere exception, one ought to construe copyright as conferring upon both rightsholders and users a right and privilege respectively.[83] Rights granted to the owner in exclusivity enable them profit, while fair use privileges enable the public utilise protected works to create 'significant follow-on utility for non-users (such as political speech and truth seeking)'.[84] The rationale behind the theory is incentivisation of creation and encouragement of efficient use.[85] The theory further recognises the tension that arises in the balance of this right and concurrent privilege and called for lawmakers to be mindful of this when granting rights.[86] In offering exclusivity, the available uses to the public are limited. On the other hand, offering the privilege of fair use may curb the exclusive control owners have to some extents.[87] In congruence with the utilitarian theory, the dual-grant theory essentially aims at striking that balance between economic rights of owners

[81] Kariuki F *et al*, *Property Law*, 38-39.
[82] Section 32*, Copyright Act,* Cap 130, Laws of Kenya.
[83] Bell A, and Parchomovsky G, 'The dual-grant theory of fair use', 83(3) *The University of Chicago Law Review,* 2016 1055.
[84] Bell A, and Parchomovsky G, 'The dual-grant theory of fair use',1055.
[85] Bell A, and Parchomovsky G, 'The dual-grant theory of fair use',1055.
[86] Bell A, and Parchomovsky G, 'The dual-grant theory of fair use',1056.
[87] Bell A, and Parchomovsky G, 'The dual-grant theory of fair use',1056.

and the societal enrichment accrued from fair use; incentivisation of creative works and the nurturing efficient use of creative works in society.[88]

In the context of this study, this theory informs the competing interests at play when discussing the enforcement of copyright and serves as a justification both for enforcement and for protection against excessive limitations on exclusivity.

5.4 The Political Economy of Communication Theory as applied in the Digital Age

Building on the competing interests connoted by the dual-grant theory, this theory situates the discourse in the digital age. The Political Economy of Communication (PEC) theory – in the context of the internet – seeks to understand the monetisation of content online and the power to make decisions regarding online content.[89] With regard to copyright, the theory views online enforcement as a competition between market actors. On the one hand content owners want to monetise their work, controlling its use and on the other, intermediaries such as ISPs benefit from the traffic of data on their platforms (lawful or otherwise).[90] In essence, the affair of copyright enforcement online is value laden, with different actors all having various interests to protect. Through this lens one is able to understand how best to address these interests. This theory serves to justify the competition that exists between the different actors *viz*, copyright owners, the public and ISP. The political economy of the media relates to the content creation process and the power plays that exist therein.[91] This entails studying the mechanisms used to regulate the production or consumption of media.[92] Copyright control laws such as those enacting intermediary liability regimes can be construed as these mechanism to exercise control and the views of the various actors involved in this process constitute the power play discussed in the PEC theory.

In the context of this proposed study, the PEC offers insight into the difficulties that may be faced in involving intermediaries in regulating content bearing in mind the economic interests they have. It serves to inform the discourse on the revision of copyright enforcement to suit the

[88] Bell A, and Parchomovsky G, 'The dual-grant theory of fair use',1056.
[89] Meyer T, *The politics of online copyright enforcement in the EU,* Palgrave Macmillan, Brussels, 2017, 14.
[90] Meyer, *The politics of online copyright enforcement in the EU*, 14.
[91] Sirios A, and Wasko J, 'The political economy of the recorded music industry: Redefinitions and new trajectories in the digital age', in Wasko J, Murdock G, and Sousa H (eds), *The Handbook of Political Economy of Communications*, Wiley-Blackwell, Chichester, 2011, 332.
[92] Meyer, *The politics of online copyright enforcement in the EU*, 17.

trends in technology as discussed by Meyer.[93] Additionally, it highlights the relevance of intermediary involvement in copyright enforcement in Kenya.

5.5 Conclusion

Having established: that copyright owners have a vested interest in controlling the use of their work; that society benefits from fair use in copyright content; and intermediaries have an interest in content regulation that often has economic repercussions, the theories outlined above guide this study in analysing the various approaches to online copyright enforcement.

With this perspective in mind, in the next Chapter, this study sets out two broad approaches undertaken in the US and the EU, highlighting the practical difficulties faced in online copyright enforcement within each approach from the perspectives of copyright holders, intermediaries and users.

[93] See generally, Meyer, *The politics of online copyright enforcement in the EU.*

CHAPTER THREE: INTERMEDIARY LIABILITY

6.0 Introduction

The introduction of intermediary liability as a regulatory aid may be attributed to the increased influence of technology on information sharing. Following the rapid development of technology (peer-to-peer networks in particular), regulators adopted various laws that detail an intermediary's liability for content shared or posted by its users.[94] This essentially makes up the body of intermediary liability law.

In instances of transmission of illicit content, be it hate speech, protected content or defamatory speech, questions regarding the role played by the facilitator of transmission often come up. Intermediary liability in essence, entails holding a facilitator of content responsible for the content published or shared by its users.[95] Where analog means of communication were dominant, it made sense to target infringers directly.[96] However, in the digital age, enforcement becomes significantly difficult due to the ease of one-to-many communication by anyone with an internet connection.[97] It is therefore sometimes necessary to target platforms or network providers where the role they play exceeds the parameters contemplated in intermediary liability law (i.e., neutrality and expedition in taking down content following reports).[98] This targeting ought not be through blanket liabilities for intermediaries simply for facilitation. Consequently, most intermediary liability regimes provide conditional immunities to these entities as is detailed in this Chapter.

Intermediaries are involved in the regulation of content ranging from hate speech to copyright infringement,[99]the latter being the focus of this study. The specifics of this involvement reflect

[94] Amirmahani A, 'Digital apples and oranges: A comparative analysis of intermediary copyright liability in the United States and European Union', *Berkeley Technology Law Journal,* 30(4), 2015, 875.
[95] Association for Progressive Communications, FAQs on Intermediary Liability, May 2014, -< https://www.apc.org/en/pubs/apc%E2%80%99s-frequently-asked-questions-internet-intermed on 9 September 2019.
[96] Jansen M, 'The protection of copyright works on the internet – an overview', 38(3), *The Comparative and International Law Journal of South Africa*, 2005, 346.
[97] Centre for Democracy and Technology, *Shielding the messengers: Protecting platforms for expression and innovation,* 2012, 2-3 -< https://cdt.org/files/pdfs/CDT-Intermediary-Liability-2012.pdf on 5 August 2019.
[98] Comninos A, 'The liability of internet intermediaries in Nigeria, Kenya, South Africa and Uganda: An uncertain terrain', 3.
[99] Comninos A, 'The liability of internet intermediaries in Nigeria, Kenya, South Africa and Uganda: An uncertain terrain', 6.

the legislative history of each jurisdiction, as has been discussed in this Chapter. For example, the EU generally favours stronger protections for content owners at the cost of intermediaries.

The two broad approaches taken in the US and EU have informed the developments of intermediary liability law, for example, Kenya's intermediary liability provisions mirror those in the US and EU. Consequently, in this Chapter, they are elaborated and analysed in the context of online copyright enforcement with a particular view to bringing out the practical problems encountered. Prior to this, the Chapter sets out the context of these laws and how they manifested in a bid to bring out the interests that inform online copyright enforcement.

6.1 Legislative Process and Interests

In the adaptation of copyright and media laws to cater for advancements in technology, a large number of intermediary liability laws were enacted following the provisions of the WIPO Copyright Treaty which mandated signatories' guarantee of protections from technological circumvention of (copyright) protections.[100] The treaty also vested in authors the right to communicate to the public their works through wire or wireless means,[101] effectively recognising transmission of content online. The result was the adoption of the DMCA in the US and the E-Commerce and Copyright Directives in the EU.[102] In the legislative process, certain lobbies came out stronger in each jurisdiction and this is reflected in the substance of the various pieces of legislation. For example, in the US, the intermediary lobby was particularly strong, leading to a wide range of protections for Online Service Providers (OSPs). Meanwhile, in the EU, representatives of copyright owners outnumbered user groups in their lobbying efforts, and this is reflected in the significant level of protection offered to copyright holders.[103] As explained in the previous Chapter, the competing interests in online copyright enforcement heavily influence the manifestation of these liability regimes.

6.2 The US' NTD System

Intermediary liability law in the US is set out in the DMCA and the CDA. These two acts set up 'safe harbours', i.e., where intermediaries conform to certain standards of conduct, they are immune from liability for third party content.[104]

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[100] Article 11, *WIPO Copyright Treaty,* 20 December 1996, 2186 UNTS 121.
[101] Article 8, Article 11, *WIPO Copyright Treaty,* 20 December 1996, 2186 UNTS 121.
[102] Amirmahani A, 'Digital apples and oranges: A comparative analysis of intermediary copyright liability in the United States and European Union', 872.
[103] Amirmahani A, 'Digital apples and oranges: A comparative analysis of intermediary copyright liability in the United States and European Union', 875.
[104] Centre for Democracy and Technology, *Shielding the messengers: Protecting platforms for expression and innovation, 6.*

The CDA, sets up a safe harbour which protects online service provider from being treated as the publisher or speaker of information provided by its users.[105] This offers significant protection to platforms that host user-generated content (UGC platforms) thereby safeguarding the freedom of expression and spurring creativity.[106] The magnitude of content on these platforms justify the existence of this safe harbour. The protections are broad but exclude certain criminal and intellectual property-based claims.[107] The large number of claims are often defamation-based.[108] These protections have enabled UGC platforms such as YouTube, Twitter and Amazon grow and expand operations without the fear of liability for third-party content.[109]

More particular to copyright, are the protections enshrined in the DMCA. Section 512 offers protection to four classes of intermediaries: conduits, caching, hosts and information location tools.[110] These intermediaries are protected from monetary relief (payment of damages) fully and injunctive relief only partially.[111] The safe harbour in this case was established to mitigate copyright infringements while still offering protection to the growing technology industry.[112] In order to qualify for the safe harbour protections under this legislation, an intermediary which does any of the abovementioned roles, generally: must have no knowledge of, or derive financial benefit from, the infringing activity on its network; and once apprised of this content, must act expeditiously to take down the content or disable access to it,[113] hence the phrase 'notice-and-takedown'.

6.2.1 Knowledge under the DMCA

For purposes of apportioning liability, the knowledge contemplated under the DMCA has been categorised into actual and 'red-flag' knowledge.[114] While the former is the intermediary's subjective awareness of infringing content, the latter refers to awareness of facts and circumstances which would objectively lead to an inference of existence of infringing

[105] Section 230, *Communications Decency Act*, 47 USC 230.
[106] Electronic Frontier Foundation, *Section 230 of the Communications Decency Act,* -< https://www.eff.org/issues/cda230 on 5 August 2019.
[107] Section 230(e), *Communications Decency Act*, 47 USC 230.
[108] See *Blumenthal v Drudge* (1998), District Court of Columbia, *Green v America Online* (2003), District Court of New Jersey, and *Parker v Google Inc.* (2007), District Court for the Eastern District of Pennsylvania.
[109] Electronic Frontier Foundation, *Section 230 of the Communications Decency Act.*
[110] Section 512, *Digital Millennium Copyright Act*, 17 USC 512.
[111] Section 512(a), *Digital Millennium Copyright Act*, 17 USC 512.
[112] Asp E, 'Section 512 of the Digital Millennium Copyright Act: User experience and user frustration', 103(2), *Iowa Law Review*, 2018, 753.
[113] Section 512(a-d), *Digital Millennium Copyright Act*, 17 USC 512.
[114] *Capital Records, LLC v Vimeo, LLC* (2016), US Court of Appeal, 2nd Circuit.

content.[115] In both instances, the burden is on claimants to prove that an intermediary had either actual or constructive knowledge, and refused to act.[116]

In essence, this means that the system is not much different from traditional copyright enforcement as rights holders are still required to detect infringements and lodge complaints with intermediaries who then have to act upon such notices. From the perspective of copyright holders, this protection is insufficient as they would still have to remain vigilant for infringement.[117] Further, following a notification of infringement, the fact that a private entity (ISP) would have to vet the legality of content has raised concerns, in particular, that these bodies may err on the side of caution and excessively take down posts out of a fear of liability.[118] This concern is exacerbated by the expedition expected of this process.

As a result of these concerns, 'collaborative efforts' have been urged and have manifested in the form of voluntary actions on the parts of ISPs.[119] An example is YouTube's ContentID which enables copyright holders register their content with the platform so as to regulate its subsequent use. When registered content is uploaded by an unlicensed user, it is flagged and owners are given the option to monetise it or take it down.[120] This solves the primary issues: the burden on owners to be vigilant and the obligation of intermediaries to pass judgment on the legality of content. However, not all intermediaries can afford to set up such systems.

The NTD system as set up in the US remains problematic and ineffective in addressing modern day copyright infringement. The EU system is also not without qualms, as has been addressed below.

6.3 EU Intermediary Liability

The ECD[121] and Information Society Directive (ISD)[122] contains Europe's adaptation of copyright laws for the digital age. Much like the US system, these laws provide exemptions from liability to intermediaries in certain instances.

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[115] 512(c)(1)(a), *Digital Millennium Copyright Act*, 17 USC 512.
[116] *Capital Records, LLC v Vimeo, LLC* (2016), US Court of Appeal, 2nd Circuit.
[117] Joint Supplemental Comments, 8.
[118] Article19, *Internet intermediaries: Dilemma of liability*, 2013, 11-12, -< https://www.article19.org/wp-content/uploads/2018/02/Intermediaries_ENGLISH.pdf on 6 August 2019.
[119] Zimmerman D, 'Copyright and social media: A tale of legislative abdication', 35(1), *Pace Law Review,* 2014, 270.
[120] Zimmerman D, 'Copyright and social media: A tale of legislative abdication', 271.
[121] European Union, *e-Commerce Directive*, 2000/31/EC.
[122] European Union, *Copyright Directive*, 2001/29/EC. The directive is referred to, interchangeably, as the Copyright Directive or Information Society Directive.

In its development, the ECD was primarily focused on the emergence of e-commerce and entailed protections for intermediaries where; they act as 'mere conduits' who do not initiate the transmission of any infringing content;[123] they cache data simply to aid efficiency of transmission;[124] and where they host data to make protected works available.[125] These are fewer than the roles contemplated in the DMCA. Another difference is the fact that the ECD does not limit injunctive relief.[126] A hallmark of the ECD is the bar against general obligations to monitor information on intermediaries.[127] Though this is also the case in the US.[128] The conditions for immunity accruing are similar in both jurisdictions: nonparticipation in illicit content, a lack of knowledge (constructive or actual) and swift removal or disabling of access once knowledge accrues.[129]

It is prudent to note that unlike the US, the EU did not adopt a sectoral approach to regulation and as such, the provisions of the ECD – while developed in the context of e-commerce – are not tailored to any specific illegal online content.[130] These provisions are supplemented by the ISD (also known as the Copyright Directive) which is particular to copyright infringement, sets out liability exemptions for intermediaries,[131] and provides injunctive relief as a redress for infringement of copyright.[132] Under the EU system, where owners are aggrieved, they may: seek an injunction against an ISP to disable access or take down the content; notify the intermediary and request a takedown; or seek damages in certain instances.[133]

The fact that the EU system frowns upon the imposition of monitoring obligations presents a problem similar to that experienced by copyright owners in the US: the burden of vigilance. In

[123] Article 12, *e-Commerce Directive*, 2000/31/EC.
[124] Article 13, *e-Commerce Directive*, 2000/31/EC.
[125] Article 14, *e-Commerce Directive*, 2000/31/EC.
[126] Amirmahani A, 'Digital apples and oranges: A comparative analysis of intermediary copyright liability in the United States and European Union', 874.
[127] Article 15, *e-Commerce Directive*, 2000/31/EC. See also, *Scarlet Extended SA v SABAM* (2011), Court of Justice of the European Union.
[128] Section 512(m), *Digital Millennium Copyright Act*, 17 USC 512.
[129] Articles 12-14, *e-Commerce Directive*, 2000/31/EC.
[130] Brunsvig G, 'Intermediary liability for copyright infringement in the EU's digital single market', Published, University of Oslo, Oslo, 2017, 8.
[131] Article 5, *Copyright Directive*, 2001/29/EC.
[132] Article 8, *Copyright Directive*, 2001/29/EC.
[133] Brunsvig G, 'Intermediary liability for copyright infringement in the EU's digital single market', 11-12.

recognition of this difficulty, and the 'value gap' that it created, the EU enacted the EUCD which introduces active-preventative approaches to copyright infringement.[134]

6.3.1 EUCD and the Value Gap

A significant number of UGC platforms are increasingly hosting protected content, making it available to the public at no cost. The revenue model of these entities is often based on advertising and user data. This is unlike other content distributors who generate their revenue through licensing protected content and charging a nominal fee for access.[135] Increasingly, holders of copyright have found it difficult to control the spread of their content on UGC platforms. This is because these intermediaries are passive hosts and aren't incentivized to work with content owners to enforce copyright. Their inability to capitalize on this proliferation is what the European Parliament identified as the value-gap.[136]

The EU's response to this was the adoption of the EUCD which among other things, seeks to address the ephemeral nature of UGC platforms, regulate online copyright infringement as distinct from other illegal online content so as to maintain the incentivisation of copyright protection and maintain the economic viability of intermediary business models.[137] It is prudent to note that, as discussed in Chapter 2, balancing of interests features greatly as a consideration in the implementation of such regulations.

The way in which the EU sought to strike this balance and seal this value gap was Article 17 of the EUCD which sets out that content hosts which make large amounts of works or UGC available to the public ought to conclude licensing agreements with copyright holders. In absence of such agreements, intermediaries would be liable for an unauthorized act of communication.[138] The EUCD marks a shift from the ECD in that it categorises hosts as online content-sharing services and provides that they 'communicate to the public' when they make copyright content available on their platforms (think YouTube and Twitter for example).[139] As a result, these entities are required to obtain authorization from rightsholders by way of

[134] European Union, *Directive on Copyright in the Digital Single Market*, 2019/790.
[135] Brunsvig G, 'Intermediary liability for copyright infringement in the EU's digital single market', 14.
[136] European Commission, 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market', 7.
[137] Brunsvig G, 'Intermediary liability for copyright infringement in the EU's digital single market', 16.
[138] Article 17, *Directive on Copyright in the Digital Single Market*, 2019/790.
[139] Article 17, *Directive on Copyright in the Digital Single Market*, 2019/790.

licensing agreements.[140] These licensing agreements cover their users to the extent that the making available of copyright works is not commercial and does not generate substantial revenues.[141] In absence of such agreements, the ISP is held responsible for unauthorized of communication.[142] These platforms can evade liability by proving, conjunctively, that they made their best efforts to secure licenses, made their best efforts, 'in accordance with high industry standards of professional diligence', to disable access to the content following a sufficient notice and, in all cases, acted expeditiously handled notices from rightsholders.[143]

While the provision clearly provides for a maintenance of the bar against general monitoring obligations, the implication of this provision is the setting up of content recognition technologies by intermediaries.[144] Requiring that intermediaries satisfy a best efforts standard to secure authorization and act in accordance with industry standards to ensure disabling of access, presupposes a knowledge of content. In other words, this Article incentivizes intermediaries to adopt monitoring technologies so as to ensure they comply with the standards – a position inconsistent with EU law on the matter.[145] This is more so where high industry standards include technologies such as ContentID deployed by YouTube. Aside from the critiques on the wording of the provision,[146] this approach mandating monitoring has been criticized for its inconsistency with various fundamental rights including that of expression.[147] It is still too early to tell whether this approach will be successful as the EU member states are only beginning to adopt the changes in their national copyright laws. However, in the process of adoption, there are a number of concerns that have been noted as potentially hindering a

[140] Article 17(1), *Directive on Copyright in the Digital Single Market*, 2019/790.
[141] Article 17(2), *Directive on Copyright in the Digital Single Market*, 2019/790.
[142] Article 17(4), *Directive on Copyright in the Digital Single Market*, 2019/790.
[143] Article 17(4), *Directive on Copyright in the Digital Single Market*, 2019/790.
[144] Spitz B, 'Article 17 of the new Copyright Directive: A French mission on content recognition technologies', Kluwer Copyright Blog. In fact, it was provided in the initial draft where the Article in question was Article 13, but later dropped in the final Directive where the Article in question became Article 17.
[145] Article 15, *e-Commerce Directive*, 2000/31/EC. See also, *Scarlet Extended SA v SABAM* (2011), Court of Justice of the European Union.
[146] Angelopolous C, 'EU copyright reform: Outside the safe harbours, intermediary liability capsizes into incoherence', Kluwer Copyright Blog, 6 October 2016, -< http://copyrightblog.kluweriplaw.com/2016/10/06/eu-copyright-reform-outside-safe-harbours-intermediary-liability-capsizes-incoherence/?_ga=2.200097193.60956972.1565932032-1543645041.1565932032 on 10 August 2019.
[147] Angelopolous C, 'Axel Voss' JURI report on Article 13 would violate internet users' fundamental rights', Kluwer Copyright Blog, 29 June 2018, -< http://copyrightblog.kluweriplaw.com/2018/06/29/axel-vosss-juri-report-article-13-violate-internet-users-fundamental-rights/ on 10 August 2019.

standard filtration or monitoring system to be enacted by ISPs. These include the varied approaches to fair use in the different member states.[148]

6.4 Kenya's Approach

The US and EU sought to address the difficulties in online copyright enforcement by establishing safe harbour systems aimed at balancing the economic interests of both intermediaries and copyright owners while ensuring society's fair use privileges subsist. However, as elucidated in the previous Chapter, this was far from accomplished. From the perspective of a copyright holder, the burden of vigilance borne under the NTD system impacts the incentive to create. For intermediaries, heavier burdens such as those under Article 17 of the EUCD reduce the viability of their business models, particularly when content recognition software is expensive and the fines for non-compliance are punitive. Therefore, these intermediary liability models as set out in the US and EU come up short when measured against the objective of having a copyright law that incentivizes creativity while creating an environment for technological innovation.

Despite its problematic nature, Kenya recently adopted a similar safe harbour model in its recently tabled Copyright (Amendment) Act.[149] The Act defines ISPs – for purposes of liability – as 'persons providing information system services or access software'.[150] It fails to capture the different roles that may be played by intermediaries e.g., hosting and caching – this failure is particularly glaring in relation to hosts, who often have a larger burden under intermediary liability laws. However, this distinction is later captured in Section 35A which sets out the safe harbour conditions for the different roles played, from mere transmission to provision of access.[151] The Act sets up a NTD system that requires rightsholders to lodge formal complaints to the ISP, copying in the Communications Authority and relevant umbrella association of service providers, identifying the rights which they allege have been infringed upon by means of an affidavit and other proof of ownership.[152] This system also allows for a counternotice, in the absence of which ISPs must comply within forty eight hours.[153] This is by and large similar

[148] Doctorow C, 'Europeans deserve to have their governments test – not trust – filters', Electronic Frontier Foundation, 6 February 2020, -< https://www.eff.org/deeplinks/2020/02/europeans-deserve-have-their-governments-test-not-trust-filters on 1 March 2020.
[149] Section 35A, *Copyright (Amendment) Act*, (No. 20 of 2019).
[150] Section 2, *Copyright (Amendment) Act*, (No. 20 of 2019).
[151] Section 35A (1), *Copyright (Amendment) Act*, (No. 20 of 2019).
[152] Section 35B, *Copyright (Amendment) Act*, (No. 20 of 2019).
[153] Section 35B (5), *Copyright (Amendment) Act*, (No. 20 of 2019).

to existing NTD systems' *ex post* notice regimes.[154] The problem with this system, as has been discussed in this study, is the fact that it does not do much to shift the burden of vigilance away from copyright owners in that they are still required to identify infringements, then lodge claims. Further, the fact that it enables private entities such as ISPs to vet the legality of content is problematic. On the other hand, the active-preventative approach taken recently in EU law would also not be apt as it would heavily burden intermediaries, raising issues of censorship through overcompliance, fair use privilege violations and a stifling of free speech.

6.5 Conclusion

In this Chapter, the study elaborated on the existing intermediary liability models as practiced in the US and the EU. Upon examining these systems, the study posited that both models are inadequate in addressing online copyright enforcement for a singular reason: imbalance in favour of either intermediaries or copyright owners. The importance of striking this balance cannot be understated. An ideal copyright law ought to reward expression, stimulate technological innovation and encourage follow on creative content. Bearing this in mind, regulators of the information economy are then faced with the problem at the heart of this study, which is copyright law reform in a manner that balances the interests of copyright owners, intermediaries and users of digital media. This reform is the subject of the next Chapter of this study.

[154] Greenberg A, 'More than just a formality: Instant authorship and copyright's output future in the digital age', 28 *UCLA Law Review*, 2012, 1051.

CHAPTER FOUR: FINDING BALANCE

7.0 Introduction

In the previous Chapter, this study found that that existing NTD systems fail to adequately relieve the burden on copyright owners despite the fact that digital media, particularly UGC platforms, has made it nearly impossible for owners to keep track of all the uses of their work online. Attempts by the EU at alleviating this burden by imposing larger obligations on intermediaries were also discussed and found to have been more problematic than solving. In this Chapter, the study discusses reform aimed at striking a balance between the interests of owners, users and intermediaries. It focuses on the knowledge gap regarding rights that subsists on online platforms and finds that sealing this knowledge gap and using such information to inform intermediary liability laws goes a long way to striking this balance. The reforms identified herein inform the proposals recommended in the final Chapter of the study.

7.1 Rights Clearance in Online Transactions

Copyright, much like other IP rights, is a private right i.e., enforcement ought to be the sole obligation of the owner.[155] This is reflected in the manner which intermediary liability laws developed in that, third parties would only be held responsible once they're found to have had sufficient information regarding the infringement.[156] However, with the sheer volume of content online, it is no longer feasible to saddle owners with the arduous burden of what is essentially playing a game of whac-a-mole.[157] On the other hand, it is also not appropriate to require intermediaries to take up the responsibility of searching its networks or platforms for illicit content, effectively enforcing a private right on someone's behalf. Such a responsibility may be easier, if owners had the higher burden of claiming their copyright and providing sufficient information to enable other users know that the content is protected and to aid intermediaries in their vetting of infringement claims. This has been defined as rights clearance.[158]

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[155] Section 35, *Copyright Act*, Cap 130, Laws of Kenya.
[156] See generally the provisions of Section 512 of the Digital Millennium Act and Articles 11-14 of the European e-Commerce Directives and Chapter 3 of this study.
[157] Greenberg A, 'More than just a formality: Instant authorship and copyright's output future in the digital age', 1052.
[158] Gompel S, 'Copyright formalities in the internet age: Filters of protection or facilitators of licensing', 28 *Berkeley Technology Law Journal*, 2013, 1431-1432.

As it stands, copyright law in Kenya – and around the world – provides that copyright accrues automatically i.e., once the nominal originality, fixation and subject matter requirements are met, the owner acquires copyright without the need of registration.[159] This approach to copyright is informed by the Berne Convention.[160] Prior to this, many jurisdictions such as the US, required owners to register their works with the statutory copyright office in order to be recognised as having rights over the works.[161] Aside from the natural rights component of the argument (that protection of creative works ought not be subject to formalities), the core argument against formalities that informed Berne was the cumbersome nature of meeting formalities across multiple jurisdictions.[162] The net difficulty posed by a no formalities approach, particularly in the digital age of UGC, is uncertainty regarding rights or ownership of content and a large number of orphan works.[163] Seeing as owners simply have to satisfy minimal conditions to create protected content, online platforms contain voluminous amounts of works whose origin or ownership cannot be easily traced.[164] This essentially makes it difficult for users to identify what constitutes protected content which they would have to seek permission to use, and for intermediaries to vet claims of infringement by owners who haven't sufficiently claimed the content prior to the infringement. Some argue that this automatic accrual of rights creates tension with the expectation that users ought to know if works are protected or form part of public domain.[165]

As a result, some have made arguments for the reintroduction of formalities.[166] The arguments are underpinned by two assertions. The first assertion is that the bar against formalities, was informed by the nature of the analog age being such that formalities necessarily had to be cumbersome; this is no longer the case with digital media.[167] This component of the argument dispenses of the natural rights claims to no formalities and focuses on the utilitarian approach

[159] Section 22(5), *Copyright Act*, Cap 130, Laws of Kenya.
[160] Article 5(2), *Berne Convention for the Protection of Literary and Artistic Works*, 11 June 1993, 828 UNTS 221.
[161] Samuelson P, and Members of the Copyright Principles Project, 'The copyright principles project: Directions for reform', 25 *Berkeley Technology Law Journal*, 2010, 1186.
[162] Carroll M, 'A realist approach to copyright law's formalities', 28 *Berkeley Technology Law Journal*, 2013, 1517.
[163] Greenberg A, 'More than just a formality: Instant authorship and copyright's output future in the digital age', 1039.
[164] Samuelson P, et al., 'The copyright principles project: Directions for reform', 1177.
[165] Samuelson P, et al., 'The copyright principles project: Directions for reform', 1186.
[166] Gompel S, *Formalities in copyright law. An analysis of their history, rationales and possible future,* London, Kluwer Law International, 2011, 1-8. See also, Lessig L, *Free culture: The nature and future of creativity*, London, Penguin Books, 2005, 292-293. See also generally, Samuelson P, et al., 'The copyright principles project: Directions for reform'.
[167] Carroll M, 'A realist approach to copyright law's formalities', 1517.

– ease of registration, deposit or notice.[168] Indeed, modern technology has made it significantly easier for content to be tagged with relevant metadata and databases of information to be collated and easily referenced.[169] The second assertion is that, following Berne, formalities were not abolished, they simply privatized.[170] Citing the examples of Collective Management Organisations (CMOs) requiring owners to provide details regarding their ownership and YouTube developing ContentID which requires registration, proponents of this assertion have argued that the fact that owners adhere to these formalities further buttresses the argument for formalities.[171]

Allowing owners to register copyright in order to benefit from a wide range of enforcement options or legal remedies, is not a novel argument. It is the exact reason Kenya currently maintains a register with the Kenya Copyright Board (KECOBO) where owners can deposit works for a nominal fee.[172] Transposing this argument to online platforms, one can easily see that the same would hold true – if ISPs and users had more information regarding ownership, there would be significantly less infringements or disputes regarding ownership. The essence of the Berne approach to no formalities is ensuring that registration is not a prerequisite to protection.[173] The use of formalities online, to enhance certainty of rights can be tailored to be Berne compliant as will be discussed in the next section of this Chapter.

7.2 Berne Compliant Formalities

In discussing formalities, it is prudent to make a few distinctions. Formalities include notice, deposit, registration and other administrative requirements to ensure or enhance protection.[174] They can be either public (i.e., those administered by the copyright office) or private (those administered by CMOs).[175] They can be old style (e.g. KECOBO's registration process) or new style (like YouTube's ContentID – leveraging technology).[176] They can be mandatory (required by law) or voluntary.[177] The legal effects of formalities can be constitutive (establishing ownership), maintaining (prerequisites for continuation of protection) and declaratory which

[168] Carroll M, 'A realist approach to copyright law's formalities', 1519.
[169] Carroll M, 'A realist approach to copyright law's formalities', 1522.
[170] Carroll M, 'A realist approach to copyright law's formalities', 1525-1526.
[171] Carroll M, 'A realist approach to copyright law's formalities', 1527-1535.
[172] See -< https://www.copyright.go.ke/8-program/2-copyright-registration.html on 1 November 2019.
[173] Article 5(2), *Berne Convention.*
[174] Gompel S, 'Copyright formalities in the internet age: Filters of protection or facilitators of licensing', 1435.
[175] Gompel S, 'Copyright formalities in the internet age: Filters of protection or facilitators of licensing', 1435.
[176] Gompel S, 'Copyright formalities in the internet age: Filters of protection or facilitators of licensing', 1435.
[177] Gompel S, 'Copyright formalities in the internet age: Filters of protection or facilitators of licensing', 1437.

simply signal ownership to the world.[178] Constitutive and maintenance formalities are not Berne compliant as they affect the enjoyment of rights.[179]

With the prohibition of formalities under Berne, private formalities are now significantly dominant in the digital age – CMOs and other private entities have replaced the government in administering formalities.[180] The use of private formalities is informed by the logic that owners who would like to benefit from content online need to put in sufficient effort in claiming such work. However, private formalities do not enjoy the statutory powers that public formalities do, and as such offer owners little in the way of legal remedies as a reward for registration or notice.[181] Aside from that, there is no obligation on these private entities to make available the relevant information regarding rights to users. Additionally, the collection of this private information is often unsupervised.[182]

The current state of affairs is such that users and ISPs have minimal information on a significant number of works on online platforms due to the fact that owners are not incentivized to claim their work. This results in one of two scenarios: a chilling of fair use effectively hindering creative follow on content[183] or consistent infringement due to uncertainty of rights. In order to address this concern, proposals for Berne compliant formalities have been made and this study identifies itself with said proposals. The objective of such formalities would be rights clearance – creating certainty regarding ownership and providing an avenue to reach the author to secure a license.[184]

As alluded to in this section, technology allows the adoption of declaratory formalities for online content. Such technologies ought to be leveraged by public registries whose current registration systems are dated and prevent the possibility of interoperability.[185] These new style formalities would signal to the world that authors intend to enjoy the full benefit of their copyright. In order to facilitate the availability of information to the public, these new style formalities ought to be public as opposed to be private. An incarnation of these formalities has

[178] Gompel S, 'Copyright formalities in the internet age: Filters of protection or facilitators of licensing', 1438-1439.
[179] Gompel S, 'Copyright formalities in the internet age: Filters of protection or facilitators of licensing', 1439.
[180] Carroll M, 'A realist approach to copyright law's formalities', 1533.
[181] Carroll M, 'A realist approach to copyright law's formalities', 1532.
[182] Carroll M, 'A realist approach to copyright law's formalities', 1534-1535.
[183] Reid A, 'Claiming the copyright', 34(2) *Yale Law & Policy Review*, 2016, 462.
[184] See generally, Reid A, 'Claiming the copyright'.
[185] For example, KECOBO's database is not digital and requires the manual population of a statutory form.

been proposed by Amanda Reid who argues that owners intending to benefit from content online ought to be saddled with the burden of publicly claiming copyright by affixing (possibly through new style formalities) a prominent notice disclosing nominal details such as the name of the author and date of creation.[186] Such a notice, ought to be recorded with the public registry so as to ensure access to the relevant information thus facilitating rights clearance.[187] Satisfying the conditions of Berne, this formality would not be constitutive but merely declaratory. Failure to affix the notice would not affect the existence of copyright but would provide the unauthorized user an 'innocent infringer defence'.[188] Having a digital public registry will enable efficient recordation and search.

Recognising that the bulk of formalities complied with are private, the next step would be to facilitate interoperability of the databases maintained by private entities such as CMOs and public registries, with the latter acting as the primary point of information regarding copyright.[189] This would mean an enhancement of the role played by the statutory copyright office (KECOBO) to set standards for notice information gathered by private entities, ensure interoperability and regulate disclosure.[190]

7.3 Formalities and Intermediary Liability

The Berne compliant formalities, as discussed in the previous section, would be applicable on digital media and would facilitate rights clearance on platforms which have large amounts of UGC. Requiring owners to claim their work publicly (both by affixing a notice and by disclosing details at the public registry) would significantly reduce cases of unauthorized use due to uncertainty, provide and innocent infringer defence to unknowing users and enhance the effectiveness of ISP takedowns of content. Incorporating this into intermediary liability, the Copyright Principles Project went ahead to propose that a new safe harbour model ought to be introduced, granting immunity to ISPs which incorporate reasonable and existing measures to facilitate public claiming by owners and recognition of publicly claimed work.[191] From the fact that a number of ISPs have voluntarily adopted such measures, one may surmise that it would

[186] Reid A, 'Claiming the copyright', 460.
[187] Reid A, 'Claiming the copyright', 460.
[188] Reid A, 'Claiming the copyright', 462.
[189] Carroll M, 'A realist approach to copyright law's formalities', 1534.
[190] Carroll M, 'A realist approach to copyright law's formalities', 1534.
[191] Samuelson P, et al., 'The copyright principles project: Directions for reform', 1217-1218.

not be unwelcome.[192] This requirement would not take away from the notice and counter notice provisions of the existing safe harbour regimes.[193]

The Kenyan Copyright Amendment Act adopts an NTD system that does not tier ISPs according to the roles played and does little to lift the burden on copyright owners. While it facilitates rights clearance through the provision of a notice accompanied with proof of the rights asserted, this is *ex post* and remains in favour of intermediaries (by granting them immunity). Adopting reforms aiming to reintroduce Berne compliant formalities and developing a new safe harbour regime for platforms that facilitate new style formalities and deploy measures to recognise claimed content may be the appropriate manner to strike the balance discussed in this study. The balance in question would be a higher burden on copyright owners to take responsibility for their works (while not hindering automatic accrual of copyright) and a larger role for ISPs and KECOBO in making information available to the public for purposes of rights clearance. This is conclusively discussed in the final Chapter.

[192] See generally, Tushnet R, 'All of this has happened before and all of this will happen again: Innovation in copyright licensing', 29(3) *Berkeley Technology Law Journal*, 2015. The article discusses the voluntary adoption of licensing systems such as ContentID by YouTube and another system by Getty Images.
[193] Samuelson P, et al., 'The copyright principles project: Directions for reform', 1219.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

8.0 Conclusion

This study set out to recommend concrete changes to Kenya's copyright law so as to ensure an ideal balance between the economic interests of copyright owners and intermediaries, and the fair use and free speech concerns of the public. In addressing online enforcement of copyright, Kenya has made significant strides adopting the Copyright Amendment Act. However, this Act as is, sets up an intermediary model that would do little to ease the burden on owners of copyright. Wider copyright law reform is necessary. In particular, Kenya ought to incentivize voluntary declaratory formalities which are Berne compliant, empower KECOBO to manage a digital registry and ensure interoperability with existing private registries, and create a safe harbour regime for ISPs that facilitate the use of the voluntary declaratory formalities. These are discussed below.

9.0 Recommendations

9.1 Incentivisation of Berne Compliant Formalities

As was discussed in Chapter 4 of this study, an argument may be made that voluntary declaratory formalities are Berne compliant and incentivising their adoption can go a long way to facilitating rights clearance. This incentivisation may be achieved through enhancing the legal remedies available to those who comply with voluntary formalities. For example, content creators who publicly claim their work and notify the registry would be able to sustain an action for punitive damages against an infringer.

This incentivisation should be coupled with setting up the necessary infrastructure i.e., digitising the existing registry at KECOBO and allowing for a digital registration process.

9.2 Digitisation and Interoperability of Registries

In addition to incentivising formalities, Kenya ought to facilitate interoperability of registries so as to ensure persons who are seeking information regarding rights can access the disclosed nominal data with ease. The first step would be to digitise the existing registry as discussed in the previous subsection. Following this, KECOBO ought to regulate existing private formalities by setting the standards of disclosure and access. Regulation of private systems is necessary to avoid breaches of privacy. Aside from that, the interoperability would allow for easy rights clearance across multiple platforms. In practice, this could be KECOBO

establishing its own online database and enabling owners link their information from that database to the CMOs' when registering with the latter.

9.3 A Novel Safe Harbour for Platforms

In addition to the changes above, Kenya ought to amend the Copyright Amendment Act to include a novel safe harbour for UGC platforms that incorporate voluntary formalities for content creators and deploy existing measures (as opposed to a requirement for them to develop new systems) to enable rights clearance such as content flagging technology. This would not impose monitoring obligations. Such measures would enhance the ex post system i.e., where a notice is sent to the intermediary, the intermediary could cross reference the material with existing interoperable databases.

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