

**ONLINE PIRACY OF MUSIC IN KENYA: AN ANALYSIS OF THE LEGAL AND  
REGULATORY FRAMEWORK AS WELL AS ENFORCEMENT MECHANISMS IN  
PLACE TO PREVENT IT**

**A paper submitted in partial fulfilment of the requirements of the Bachelors of Laws  
degree**

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**January 2016**

## DECLARATION

I hereby certify that this is my original work done in partial fulfilment of the requirements of the Bachelor of Laws degree at Strathmore University Law School. It has not been submitted to any other institution for any other qualification.

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## ACKNOWLEDGMENTS

I am grateful to my supervisor, Dr. Isaac Rutenberg whose expertise and support made it possible for me to successfully write this paper. I would also like to extend my deepest appreciation to the staff of Strathmore Law School for their valuable insights.

I would like to thank my parents and sisters for their moral support and invaluable advice.

Above all I thank the Almighty God for giving me the strength, patience and resources to undertake this project.

## LIST OF ABBREVIATIONS

ARIPO – African Regional Intellectual Property Organisation

CAK – Communication Authority of Kenya

CAS – Copyright Alert System

CCI – Centre for Copyright Information

CD – Compact Disc

CID – Criminal Investigation Department

CMO – Collective Management Organisation

CPC – Copyright Protection Centre

CSJP – Copyright Special Judicial Police

ICOP – Illegal Copyright Obstruction Project

ISP – Internet Service Provider

KAMP – Kenya Association of Music Producers

KCC – South Korean Copyright Commission

KECOBO – Kenya Copyright Board

MCSK – Music Copyright Society of Kenya

MCST – Ministry of Culture, Sports and Tourism

OCILLA – Online Copyright Infringement Liability Limitations Act

OMS – Open Monitoring System

PRiSK – Performers Rights Society of Kenya

TRIPS – Trade Related aspects of Intellectual Property Rights

US – United States

WIPO – World Intellectual Property Organisation

WTO – World Trade Organisation

WCT – WIPO Copyright Treaty

WPPT – WIPO Performances and Phonograms Treaty

## LIST OF CASES

1. Bernsoft Interactive & 2 Ors v. Communications Authority of Kenya & 9 Ors Petition No. 600 of 2014
2. A&M Records, Inc. v Napster, Inc. 239 F.3d 1004 (9th Cir. 2001)

## ABSTRACT

Although the internet has vast advantages, online piracy of music has posed one of the biggest threats to the music industry. Right holders to music across the world are bearing the brunt of online piracy of their music as they continue to lose revenue which would have been gained had their legitimate recordings been purchased.

Online digital platforms have greatly affected how copyrighted works of music are delivered to the public. Online tools have completely changed the nature of how creators share their works with the public, what they produce and how such works can be accessed by the public. Individuals can now access creative works for example music, through an increasing variety of illegitimate online platforms.

This therefore necessitates the presence of strong laws combating the menace of online infringement of copyright as well as efficient enforcement bodies and mechanisms to manage and enforce copyright effectively.

This paper finds that Kenya's legal, regulatory and enforcement approach to online copyright infringement is lacking. Through comparative analyses with approaches taken in South Korea and the United States of America, the author makes recommendations on how Kenya can improve its current legal, regulatory and enforcement mechanisms so as to better protect musicians from the menace that is online piracy.

## CHAPTER 1: INTRODUCTION

### 1.1. BACKGROUND TO THE STUDY

Piracy of music boasts quite an extensive history. It spans from early collectors who began to copy and preserve hot jazz recordings in the 1930s<sup>1</sup> to the 1950s and 60s when music fans in the Soviet Union fabricated bootlegged recordings of banned western music onto used X-Rays<sup>2</sup>. Piracy also extends to the invention of the blank compact cassette which allowed copying of a record<sup>3</sup> as well as to more modern methods that involve copying onto blank Compact Discs (CDs) and more recently online sharing of music.

The Kenyan music industry is no stranger to piracy and copyright infringement. DK Mwai, a popular musician from the 60s and 70s is quoted in an article commenting that the 80's were a really challenging time for Kenyan artists as cheap cassettes were introduced into the market. These cassettes were copied in Uganda and then sold cheaply in Kenya. Although many musicians tried to respond by lowering their prices as well, the pirates simply decreased theirs even further making it impossible for the musicians to compete.<sup>4</sup>

The advent of technology has seen a massive increase in copyright infringement specifically regarding music existing online. As time has gone by, it has become alarmingly clear that copyright law is unable to bear the weight of widespread online piracy of music due to the inadequacy of provisions to address stronger enforcement mechanisms.

An article published online discussing piracy and illegal file sharing examines the piracy problems that have occurred within a number of industries, the music industry being one of them. It highlights how the music industry has for a long time borne the

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<sup>1</sup> <http://reason.com/archives/2013/04/09/the-long-fruitful-history-of-music-piracy> on 5 February 2015

<sup>2</sup> <http://gizmodo.com/the-bizarre-history-of-x-ray-records-and-early-music-pi-1621176133> on 5 February 2015

<sup>3</sup> <http://musicbizadvice.com/tag/a-little-history-on-music-piracy/> on 5 February 2015

<sup>4</sup> <http://www.theguardian.com/world/2013/jul/24/kenya-special-musical-history> on 6 February 2015

brunt of online piracy due to ease of access and small files which make it a whole lot easier to download and worse still share.<sup>5</sup>

Although online piracy of local Kenyan music has not reached such grand proportions as that of online piracy of international music in Kenya, it is still very important to regard Kenya as having a growing and vibrant music scene. More and more Kenyan musicians are uploading their music onto the internet and it is simply a matter of time before it becomes a full blown pandemic.

A large majority of Kenyans musicians make their money from live performances and tours as opposed to sales from physical distribution of CD's.<sup>6</sup> Popular musician Frasha of P-Unit is quoted in an article stating that at the start of their career, they faced many problems with regards to distribution of music. The record labels that were in existence had a reputation for taking quite a large chunk from the money earned from physical distribution and as a result, artistes did not make as much as they anticipated.<sup>7</sup>

The issue of copyright infringement directly affects the owner of the copyrighted material, denying them the fruits of their labour. This is why it is important to find a solution to this problem. Unless owners of copyrighted material in the music industry are adequately protected, the costs of creating and producing new songs or tracks will simply outweigh the rewards.

This study seeks to not only acknowledge the existence of this problem but also delve deeper and take a look at the copyright laws in effect in Kenya to examine whether they can withstand the onslaught of online piracy and if not, what possible solutions can be offered to strengthen the legal and regulatory framework.

## **1.2. STATEMENT OF THE PROBLEM**

Piracy of music in Kenya is not a new phenomenon. Terrestrial piracy has been on the rise since the 80s and of late has become quite rampant. In 2011, the music

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<sup>5</sup> <http://www.practicallaw.com/1-502-7956> on 6 February 2015

<sup>6</sup> Jean-François Arrou-Vignod ( for WIPO) , Talking Copyright, Music in Kenya <https://www.youtube.com/watch?v=6j07juQj37g> on 6 February 2015

<sup>7</sup> <http://www.cnbc africa.com/news/east-africa/2014/07/22/kenyas-music-industry/> on 6 February 2015

industry was estimated to be the most affected by piracy with a piracy rate of 98%.<sup>8</sup> In 2013, IT Web Africa reported an estimated 5 million pirated copies of CD's circulating in the market, causing 47 million dollars in annual losses.<sup>9</sup>

Currently, the Copyright Act in Kenya provides for the Kenya Copyright Board (KECOBO) which according to Section 5, among its many functions, it is tasked with organising the legislation on copyright and related rights as well as administering all matters of copyright and related rights in Kenya as provided for under the Act.

In accordance with its mandate to carry out inspection, enforcement and prosecution of copyright cases, KECOBO has an enforcement unit with police copyright inspectors to investigate infringement cases.

As copyright is a private right, for any investigation to commence, the copyright owner must lodge a complaint. Where there is no complaint, no arrest and prosecution can occur. Even so, where the complaint is made and the investigations commence, the enforcement unit is rather understaffed and is unable to adequately deal with the large number of pirates. As of 2011, the enforcement unit had about 8 police officers in it.

Despite not being as rampant or widespread, online piracy of music is increasingly a growing concern in Kenya with the onset of many websites selling music by local artistes without their knowledge or consent<sup>10</sup> and others which offer free illegal downloads of sound recordings.

First, one of the concerns in the music industry at the moment is that the current legal framework is unable to adequately protect right holders in the industry from online piracy of music. This is because the current Copyright Act is neutral regarding the same despite great advancement in the area.

Second, the widespread and rampant nature of terrestrial piracy of music sheds some light on the huge gaps already present in enforcement of copyright. Even if the law is to be altered to include copyright of music online, does KECOBO have the

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<sup>8</sup> Copyright news issue 3

<sup>9</sup> <http://ukjournalism.co.uk/thehotpot/music-piracy-growing-issue-local-kenyan-musicians/> on 6 February 2016

<sup>10</sup> <http://www.balancingact-africa.com/news/en/issue-no-264/internet/kenyan-battle-royal/en> on 6 February 2016

manpower or expertise required to police online? This thus calls into question how effective the enforcement powers of the Kenya Copyright Board are and whether they will be able to effectively enforce music copyright in the online arena.

### **1.3. JUSTIFICATION OF THE STUDY**

Right holders to music across the world are bearing the brunt of online piracy of their music. They continue to lose revenue which would have been gained had the legitimate recording been purchased. The harms caused by pirating activities producing a cascading effect throughout the economy as a whole. Some of these harms include lost earnings, jobs and tax revenue.<sup>11</sup>

In 2010, Kenya Copyright Board and the World Intellectual Property Organisation conducted a study on the economic contribution of copyright based industries. It discovered that the addition to Kenya's Gross Domestic Product by these industries paled in comparison to the billions of shillings in revenue lost to piracy and copyright infringement.<sup>12</sup>

Thus we see the urgent need to critically analyse the current legislative and regulatory framework in place regarding music copyright online, in order to come up with solutions that will lead to stronger laws and better enforcement mechanisms. This will enable it to better define and protect music copyright in the face of the ever growing online music arena.

### **1.4. STATEMENT OF OBJECTIVES**

The following were the specific objectives of the study:

- a) To establish whether there is a gap in the Copyright Act which renders it unable to adequately respond to questions of online infringement of music copyright
- b) To highlight how this gap if any, is affecting the music industry.

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<sup>11</sup> Siwek, S, '*The True Cost of Motion Picture Piracy to the U.S. Economy*', Institute for Policy Innovation, Policy Report 186, September 2006

<sup>12</sup> <https://cipitlawstrath.wordpress.com/2014/10/10/kenyas-middle-income-status-requires-review-of-copyright-law> on 6 February 2015

- c) To identify strategies which can be used to overcome this problem thus strengthening the protection of copyright in the music industry.

#### **1.5. RESEARCH QUESTIONS**

The study attempted to provide answers to the following research questions:

- a) Is there a gap in the Copyright Act which renders it unable to adequately respond to questions of online infringement of music copyright?
- b) How does this gap if any, affect the music industry?
- c) What strategies can be used to overcome this problem so as to strengthen the protection of copyright in the music industry?

#### **1.6. RESEARCH METHODOLOGY**

In this study, I intend to take a critical look at the current laws protecting music copyright in Kenya in order to assess their adequacy as well as look into the current structures in place for regulation and enforcement on copyright in the music industry. I also intend to compare and contrast our current laws, regulations and enforcement mechanisms with two other sample countries in order to gain insight on how the issue on online infringement of music is tackled in other jurisdictions and what lessons Kenya can draw from them.

In order to collect such data, I intend to use secondary data. The secondary data I intend to obtain from a myriad of sources including but not limited to statutes, scholarly literature, books, journals and cases relevant to the study being conducted. A number of the secondary data will be obtained from online databases or repositories such as Jstor, Academia.eu and Lexis Nexis.

#### **1.7. LIMITATIONS**

This study focuses on a relatively new aspect of tackling music copyright in Kenya and so I expect to face the following challenges;

- a) Adequate access to secondary data
- b) Time restraints due to limited period in which the research is to be carried
- c) Lack of statistics on music sales and consumption

## **1.8. CHAPTER BREAKDOWN**

Chapter two takes a look at the philosophical underpinnings of copyright law in order to highlight how these underpinnings interplay with the infringement of music copyright on the online arena.

Chapter three takes an in depth look at the legislative, regulatory and enforcement approach Kenya takes to online copyright infringement in a bid to determine just how adequate the current framework is to withstand the onslaught of online piracy of music. It makes use of a comparative study with South Korea and the United States of America in order to learn a few lessons from the approach taken in those jurisdictions.

Chapter four analyses the shortcomings to the Kenyan approach to online copyright infringement and what effect this has on the music industry.

Chapter five, the final chapter poses final remarks and a summary of the different issues that have been discussed in the paper. It also outlines suggested recommendations that Kenya can apply to its current approach to online infringement of copyright in a bid to put up a concerted effort against the menace that is online piracy of music.

## CHAPTER 2: THEORETICAL FRAMEWORK

This chapter will provide the key philosophical justifications for copyright law in order to highlight how these justifications interplay with the infringement of music copyright online. In doing so, I will first define the term copyright and then go into the various philosophical justifications that underpin it.

Copyright is a type of property right<sup>13</sup> that confers exclusive right to a creator to publish, print, perform or copy their own original work for a specified limited period of time.<sup>14</sup>

Copyright legislation is part of the wider body of law known as intellectual property. The term intellectual property refers broadly to the creations of the human mind. Intellectual property rights protect the interests of creators by giving them property rights over their creations.<sup>15</sup>

Intellectual property has long since battled with its recognition as a legitimate form of property. Increased scholarly interest in the field has over time led to the development of theories seeking to justify its legitimacy. As copyright has become so deeply entrenched in popular thinking about the production and dissemination of culture that most now think of it as natural or inevitable.<sup>16</sup>

Online piracy of music constitutes what is termed as copyright infringement. The illegal uploading, distributing or downloading of music online violates the exclusive rights of an artist who has copyright protection over their musical works.

In order to understand how this infringement of copyright affects the copyright holder, we must in the first place seek to understand the justifications for copyright. This will enable us to gain better understanding on why the violation of a person's copyright by piracy, in this case specifically online music copyright is damaging to the copyright owner.

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<sup>13</sup> <https://www.prsformusic.com> on 6 February 2015

<sup>14</sup> 'Introduction to Copyright', University of Melbourne Copyright Office Publication (2007)

<sup>15</sup> WIPO, Understanding Copyright and Related Rights

<sup>16</sup> Murray L, Trosow S, *Canadian Copyright: A Citizen's Guide*, 2ed, 2013.

Understanding these philosophical underpinnings of copyright is also essential for understanding how copyright policies have developed over time and for assessing today's copyright environment.<sup>17</sup>

## 2.1. UTILITARIAN THEORY

Utilitarianism is a major stream of justification of copyright and is generally attributed to the nineteenth-century English philosopher Jeremy Bentham.<sup>18</sup>

The primary purpose of copyright law under the utilitarian philosophy is to encourage the widest possible production and availability of artistic works. Copyright law is designed to achieve this objective by granting to author's property rights that provide them with incentives to produce and distribute creative works.<sup>19</sup>

The utilitarian philosophy assumes that authors will only invest sufficient resources in creating and publishing new works if they will have ownership rights which enable them to control and profit from their works distribution to the public.<sup>20</sup>

Copyright is a limited monopoly granted to a person for a specified period of time. This limited duration gives the copyright owner a chance to benefit financially from its property in order to recoup its investment and earn profits, thereby encouraging the creation and dissemination of new works of authorship.<sup>21</sup>

Because copyright is limited in duration, all copyrighted works will eventually fall into the public domain and it is in this way that copyright law attempts to strike a balance between the incentives that authors and publishers need to produce original works and the freedom that creators need to draw on earlier copyrighted works<sup>22</sup>

The utilitarian justification for copyright thus basically states that copyright is necessary as it ensures that creators have enough incentives to create. Without the possibility of financial gain, distributors of creative works such as musicians or producers would not be willing to invest the often substantial sums of money

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<sup>17</sup> 'Stefan Gavrilescu ,The justification of copyright in the information society (I)' <http://www.legi-internet.ro/en/articole-drept-it/justification-of-copyright-in-the-information-society/the-justification-of-copyright-in-the-information-society-i.html> on 6 February 2015

<sup>18</sup> Murray L, Trosow S, *Canadian Copyright: A Citizen's Guide*, 2ed, 2013

<sup>19</sup> Moser D, Slay C, *Music Copyright Law*, 1ed, Cengage Learning, 2011.

<sup>20</sup> Moser D, Slay C, *Music Copyright Law*, 1ed, Cengage Learning, 2011.

<sup>21</sup> Moser D, Slay C, *Music Copyright Law*, 1ed, Cengage Learning, 2011.

<sup>22</sup> Moser D, Slay C, *Music Copyright Law*, 1ed, Cengage Learning, 2011.

required to produce, market and distribute creative works. Without that investment, far fewer works would be likely to reach the public, assuming that authors were even willing to keep creating them.<sup>23</sup>

Digital technology and networks have had a profound effect on how copyrighted works of music are delivered to the public.<sup>24</sup> The tools available in the digital environment have changed the nature of what creators are able to produce and how they share their works with the public, and the ways the public can access that content and interact with it.<sup>25</sup> Individuals can now access creative works for example music, through an increasing variety of illegitimate online platforms.<sup>26</sup> This is mostly due to the almost instant availability of vast online libraries of content, be it music or film, completely free of charge.<sup>27</sup>

The success of the music business in any country largely depends on certainty in the legal environment and copyright laws. Unlicensed services and users continue to distort the industry as they greatly contribute to a slump in content creation due to lack of incentives to continue creating works.<sup>28</sup>

Copyright law is thus justified in this sense as it seeks to protect creators and encourage production and distribution of artistic works.

## 2.2. NATURAL RIGHTS THEORY

The natural rights theory was born in the seventeenth century and gained mass currency, especially in England and France, in the eighteenth century.<sup>29</sup> Starting with the seventeenth century, authors began to realize how personal their contribution was

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<sup>23</sup> Moser D, Slay C, Music Copyright Law, 1ed, Cengage Learning, 2011.

<sup>24</sup> The Department Of Commerce Internet Policy Task Force, 'Copyright Policy, Creativity, and Innovation in the Digital Economy', July 2013.

<sup>25</sup> The Department Of Commerce Internet Policy Task Force, 'Copyright Policy, Creativity, and Innovation in the Digital Economy', July 2013.

<sup>26</sup> The Department Of Commerce Internet Policy Task Force, 'Copyright Policy, Creativity, and Innovation in the Digital Economy', July 2013.

<sup>27</sup> Duke, 'Are You a Pirate? – The Vast Scope of Copyright' 1 April 2011

<http://legalpiracy.wordpress.com/2011/04/01/are-you-a-pirate/> on 21 January 2016

<sup>28</sup> <http://musicinafrica.net/tags/piracy> on 21 January 2016

<sup>29</sup> Rose M, *Authors and Owners: The Invention of Copyright*, 1993, 28.

to the society. This increase in awareness of self-consciousness led to the emergence of metaphors to describe the relation of an author to his work.<sup>30</sup>

Authors asserted that their right was a natural one as their work was as a result of their labour. Intellectual property rights were considered even more natural than other property rights because their only source of creation was the mind.<sup>31</sup>

The two theories proposed under the umbrella of the natural rights theory are put forward by two great philosophers, John Locke and Friedrich Hegel. These theories will be considered below

### 2.2.1. Labour Theory

The labour theory by the influential John Locke is one of the most well-known theories that seeks to justify copyright. In his *Second Treatise of Government* (1690), Locke sets out a theory that justifies the private appropriation of public resources.<sup>32</sup> According to Locke's theory, a labourer who mixes his efforts with the undeveloped state of nature should therefore become the owner of the resulting object.<sup>33</sup>

Although Locke was writing about the appropriation of physical resources, i.e. land and things, his work has come to be applied to intellectual labour as well. In a Lockean view of copyright, the labour supplied by the author provides a justification for a claim to exclude others – even if the author is working with materials previously available to all.<sup>34</sup>

In the United States of America, proponents of legislative extensions of copyright or patent protection routinely make arguments like: "Our American society is founded on the principle that the one who creates something of value is entitled to enjoy the fruits of his labour."<sup>35</sup> Justice Reed of the United States Supreme Court shared these

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<sup>30</sup> 'Stefan Gavrilescu ,The justification of copyright in the information society (I)' <http://www.legi-internet.ro/en/articole-drept-it/justification-of-copyright-in-the-information-society/the-justification-of-copyright-in-the-information-society-i.html> on 6 February 2015

<sup>31</sup> 'Stefan Gavrilescu ,The justification of copyright in the information society (I)' <http://www.legi-internet.ro/en/articole-drept-it/justification-of-copyright-in-the-information-society/the-justification-of-copyright-in-the-information-society-i.html> on 6 February 2015

<sup>32</sup> John Locke, *Second Treatise of Government*, Ch. 5, <http://www.gutenberg.org> on 6 February 2015

<sup>33</sup> 'Stefan Gavrilescu ,The justification of copyright in the information society (I)' <http://www.legi-internet.ro/en/articole-drept-it/justification-of-copyright-in-the-information-society/the-justification-of-copyright-in-the-information-society-i.html> on 6 February 2015

<sup>34</sup> Murray L, Trosow S, *Canadian Copyright: A Citizen's Guide*, 2ed, 2013

<sup>35</sup> Grossman G, *Omnibus Copyright Revision*, Legislative History, vol. 5 (1976), 100.

sentiments in the case *Mazer v. Stein* when he ended his opinion with the following statement:

*“Sacrificial days devoted to . . . creative activities deserve rewards commensurate with the services rendered”*<sup>36</sup>

Piracy of music online erodes this very right proposed by Locke, as it takes away revenue from copyright holders to which they are entitled. This is unfair as the copyright holder invested a lot of time, effort and creativity in order to create works with value. Thus based on this premise by Locke, those who hold copyright in music, should be able to enforce their rights in rem. This will allow them to enjoy the fruits of their hard earned labour.

### 2.2.2. Personhood Theory

German philosopher Friedrich Hegel developed this natural rights theory justifying copyright. Under Hegel’s personhood theory, he places more importance on the personal expression of the author and his dignity, and less on the work as a fruit of labour.<sup>37</sup>

According to this theory, creators have an inherent right to protect the integrity of their creations just as they have the right to protect their own personalities. As the author embeds his personality in the work, he thus deserves recognition of the work as recognition of his personality.<sup>38</sup>

This theory is backed up by the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights which states in Article 27:

*‘Everyone has the right to benefit from the protections of both “the moral and material interests” resulting from his or her scientific, literary, or artistic creations.’*<sup>39</sup>

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<sup>36</sup> *Mazer v Stein*, 347 U.S. 201, 219 (1954).

<sup>37</sup> William Fisher, Theories of Intellectual Property, <http://cyber.law.harvard.edu/ipcoop/89land1.html> on 12 December 2015.

<sup>38</sup> Yu P, Digital Piracy and the Copyright Response, 2004.

<sup>39</sup> Art. 27(2), Universal Declaration of Human Rights, 10 December 1948; Art. 15(1), International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

The French and German copyright regimes, for example, have been strongly shaped by the writings of Hegel.<sup>40</sup> This influence is especially evident in the generous protection those countries provide for "moral rights" -- authors' and artists' rights to control the public disclosure of their works, to withdraw their works from public circulation, to receive appropriate credit for their creations, and above all to protect their works against mutilation or destruction.<sup>41</sup> This cluster of entitlements has traditionally been justified on the ground that a work of art embodies and helps to realize its creator's personality or will.<sup>42</sup>

Online piracy of music takes away the copyright owners right to protect the integrity of their work. A lot of music uploaded online and illegally distributed for free is low quality, perhaps as a result of it being ripped from CDs before being uploaded. This means that whereas the originally recorded music was of the highest possible fidelity, the copy that makes its way to the end user via these illegal sharing sites, may contain some distortion.<sup>43</sup> This takes away from the integrity of the work.

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<sup>40</sup> William Fisher, Theories of Intellectual Property, <http://cyber.law.harvard.edu/ipcoop/89land1.html> on 12 December 2015

<sup>41</sup> William Fisher, Theories of Intellectual Property, <http://cyber.law.harvard.edu/ipcoop/89land1.html> on 12 December 2015

<sup>42</sup> William Fisher, Theories of Intellectual Property, <http://cyber.law.harvard.edu/ipcoop/89land1.html> on 12 December 2015

<sup>43</sup> <http://www.quepublishing.com/articles/article.aspx?p=1946755> on 21 January 2016

### **CHAPTER 3: LEGAL AND REGULATORY APPROACH TO ONLINE INFRINGEMENT OF MUSIC COPYRIGHT IN KENYA: A COMPARATIVE STUDY WITH THE REGIMES IN SOUTH KOREA AND THE UNITED STATES OF AMERICA.**

Copyright law has served as a principal means for protecting works of authorship for nearly three centuries. It is far from being considered as a static body of law as over time it has been shaped and moulded by advances in the technologies of creating, producing and disseminating such works.<sup>44</sup>

Copyright law has always adapted to technological change, from its origin in response to the development of the printing press, through the revolution of broadcasting via radio and television, and now the transformation of creative works into digital formats available all over the world via the Internet.<sup>45</sup>

Digital technology and networks have had a profound effect on how music is delivered to the public. The tools available in the digital environment have changed the nature of what creators are able to produce and how they share their works with the public, and the ways the public can access that content and interact with it.<sup>46</sup>

Individuals can now access music through an increasing variety of legitimate online platforms. Improvements can be made to promote further development of distribution platforms and business models that can reward content creation and use, and to amplify the Internet's power to ease licensing transactions<sup>47</sup>

This chapter will do an in depth analysis of the current legal, regulatory and enforcement regimes in place in Kenya, contrasting it with that of South Korea and the United States of America in a bid to determine whether there is indeed a gap in our framework and what lessons we can thus learn from the other regimes.

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<sup>44</sup> Goldstein P, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, 1994; Litnan J, *Copyright Legislation and Technological Change*, 1989, 275, 353-54.

<sup>45</sup> The Department Of Commerce Internet Policy Task Force, 'Copyright Policy, Creativity, and Innovation in the Digital Economy', July 2013.

<sup>46</sup> The Department Of Commerce Internet Policy Task Force, 'Copyright Policy, Creativity, and Innovation in the Digital Economy', July 2013.

<sup>47</sup> The Department Of Commerce Internet Policy Task Force, 'Copyright Policy, Creativity, and Innovation in the Digital Economy', July 2013.

### 3.1. OVERVIEW OF THE COPYRIGHT INFRINGEMENT APPROACH

#### SOUTH KOREA

In South Korea, the approach that is taken is one where both the individual subscriber undertaking copyright infringement and the online content providers that provide access to infringing material are the focus of legislative and enforcement efforts.<sup>48</sup>

In 2009, the South Korean Copyright Act was amended, giving the Ministry of Culture, Sport and Tourism (MCST) new and improved powers to combat online infringement of copyright. These powers included a notice and take down approach for content providers and an effective notice and desist to individual subscribers.<sup>49</sup>

The MCST under the amended act is able to dole out extra judicial sanctions such as termination of internet access for up to six months. Aggrieved right holders are also able to pursue copyright infringers through the court system, where the penalties include heavy fines or imprisonment.<sup>50</sup>

In South Korea, identification of online infringement of copyright is the active responsibility of not just right holders, but also a number of state and quasi-state actors as well as the general public who are able to participate through a reporting system.<sup>51</sup>

#### USA

In the United States of America, the approach taken is one that protects online service providers from being liable for copyright infringement by providing a safe harbour<sup>52</sup>. The online service providers are protected so long as:

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<sup>48</sup> The Intellectual Property Office, *International Comparison of Approaches to Online Copyright Infringement: Final Report*, 2015.

<sup>49</sup> The Intellectual Property Office, *International Comparison of Approaches to Online Copyright Infringement: Final Report*, 2015.

<sup>50</sup> The Intellectual Property Office, *International Comparison of Approaches to Online Copyright Infringement: Final Report*, 2015.

<sup>51</sup> The Intellectual Property Office, *International Comparison of Approaches to Online Copyright Infringement: Final Report*, 2015.

<sup>52</sup> The Intellectual Property Office, *International Comparison of Approaches to Online Copyright Infringement: Final Report*, 2015.

- They ensure that measures are taken to remove infringing material or access to it as soon as they are aware of its availability on the network. Although it is possible for the service providers to become aware of the infringing material on their own, the likelier scenario is one where the copyright owner notifies the service provider of infringement of their work/s. This is usually done by a notification of infringement. Upon receipt of this notification, the service provider must remove or disable access to the material.<sup>53</sup>
- They adopt and implement a policy which allows them to terminate repeat infringers access to their network. In an instance where a copyright owner wants the identity of an alleged infringer uncovered, the service provider has to co-operate with any subpoenas for such information.<sup>54</sup>

Through a Copyright Alert System (CAS), service providers are able to notify individual infringers regarding their illegal behaviour as well as repeat infringers, who are usually also informed of the consequences of their illegal acts.<sup>55</sup>

Despite the purpose of this scheme being merely educational, repeat offenders can be punished and thus the service providers are required to keep records of notices sent and infringing behaviour identified, so as to provide such information to any copyright owner who may seek it by use of a subpoena.<sup>56</sup>

Rights holders under this approach can also take legal action against infringers by claiming statutory damages or actual damages and profits.<sup>57</sup>

## KENYA

For a long time, as copyright is considered a private right, the approach Kenya has taken to copyright is one where it is considered a personal and private affair that is to

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<sup>53</sup> The Intellectual Property Office, *International Comparison of Approaches to Online Copyright Infringement: Final Report*, 2015.

<sup>54</sup> The Intellectual Property Office, *International Comparison of Approaches to Online Copyright Infringement: Final Report*, 2015.

<sup>55</sup> The Intellectual Property Office, *International Comparison of Approaches to Online Copyright Infringement: Final Report*, 2015.

<sup>56</sup> The Intellectual Property Office, *International Comparison of Approaches to Online Copyright Infringement: Final Report*, 2015.

<sup>57</sup> The Intellectual Property Office, *International Comparison of Approaches to Online Copyright Infringement: Final Report*, 2015.

be pursued by copyright owners.<sup>58</sup> The police are the main agency charged with prosecution of infringement of copyright. Due to a lack of regard of intellectual property as anything important, copyright infringement as a crime is considered not very serious.<sup>59</sup>

Also tasked with the overall administration and enforcement of copyright and related rights in Kenya is the Kenya Copyright Board.<sup>60</sup> It is a statutory board that is established in the Copyright Act under section 3.<sup>61</sup> It is vested with the powers to regulate copyright in Kenya, however it is not completely autonomous and has to rely on funds from the minister out of monies provided by parliament.<sup>62</sup> Unfortunately, since the board is understaffed, it makes it difficult for it to manage and enforce copyright effectively.<sup>63</sup>

For purposes of enforcing the Act, KECOBO appoints inspectors who shall be responsible for ascertaining whether there is contravention of the Act.<sup>64</sup> Aggrieved parties mostly pursue copyright infringement cases as civil cases as opposed to criminal cases. There are limited sanctions provided for copyright prosecutions in Kenya and these may not have the desired deterrent effect as some offenders may view them as merely the incidental cost of transaction.<sup>65</sup>

### **3.2. CONTEXTUAL BACKGROUND**

#### SOUTH KOREA

South Korea ranks highly in terms of accessibility, penetration and broadband speeds. The 2014 Akamai 'State of the Internet' report ranks South Korea highly in terms of having the fastest average broadband connection speed in the world. When

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<sup>58</sup> Sihanya B, *Intellectual Property and Innovation in Kenya and Africa*, Konrad Adenauer Stiftung, 2009.

<sup>59</sup> Sihanya B, *Intellectual Property and Innovation in Kenya and Africa*, Konrad Adenauer Stiftung, 2009.

<sup>60</sup> Ouma M, *The Copyright Act 2001: A New Era for Copyright Protection in Kenya*, e-Copyright Bulletin, July-September 2004.

<sup>61</sup> Section 3, Copyright Act (No. 12 of 2001)

<sup>62</sup> Section 16, Copyright Act (No. 12 of 2001)

<sup>63</sup> Ben Sihanya, "Copyright law, teaching and research in Kenya," *East African Law Journal*, 2005.

<sup>64</sup> Section 39, 41, Copyright Act (No. 12 of 2001)

<sup>65</sup> Ben Sihanya, "Copyright law, teaching and research in Kenya," *East African Law Journal*, 2005.

it comes to penetration of broadband in the country, the number of broadband mobile accounts outnumber the actual population.<sup>66</sup>

Regarding access to legal online music services, South Korea is not doing too badly as it has 17 legal online music services, despite the fact that the biggest players in provision of online music worldwide (Google Play, Spotify and iTunes) are not operational in the country.<sup>67</sup> This signals the easy availability of online music that is legal and affordable to counter the need for piracy of music online.

### USA

Penetration of broadband in residential areas in the US is generally well developed.<sup>68</sup> A report by the Federal Communications Commission showed an average subscribed speed of 21.2 Mbps in 2013, representing an increase of about 36% from the 15.6 Mbps average the previous year.<sup>69</sup>

In the United States of America, music consumers have access to all major legal online music services, including Netflix, Spotify, iTunes, Google Play, YouTube as well as a number of growing alternative services, coming to a total of about 56.<sup>70</sup>

The Centre for Copyright Information (CCI) provided research on internet users attitudes towards online infringement of music copyright. This research showed that the presence of large amounts of authorized music content online has led to an increase in the number of people accessing the music from authorised sources.<sup>71</sup>

### KENYA

There are 29.6 million internet users in Kenya, representing a 69% penetration rate, while mobile internet penetration stands at 84%.<sup>72</sup> According to the July 2015 sector updates by the Communications Authority of Kenya (CAK), the amount of

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<sup>66</sup> <https://www.stateoftheinternet.com/resources-connectivity-2014-q4-state-of-the-internet-report.html> on 22 January 2016

<sup>67</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>68</sup> 'Measuring Broadband America Report on Fixed Broadband', <http://www.fcc.gov/reports/measuring-broadband-america-2014> on 22 January 2016

<sup>69</sup> 'Measuring Broadband America Report on Fixed Broadband', <http://www.fcc.gov/reports/measuring-broadband-america-2014> on 22 January 2016

<sup>70</sup> <http://www.ifpi.org/about.php> on 22 January 2016

<sup>71</sup> <http://www.copyrightinformation.org/> on 22 January 2016

<sup>72</sup> Communications Authority Statistical Report, 2014/2015

international internet bandwidth available in the country grew to 1.6Gbps. The used bandwidth increased by 57% to 783,761 mbps.<sup>73</sup>

Kenya's online music market does not have many legal online music services from which Kenyans can purchase and download Kenyan music legitimately. Some of the services present include Skiza Tunes, Mdundo.com, kenyavideos.com, get mziki, kentunes and iTunes.<sup>74</sup>

Although there are a number of legal online music services, albeit few, they face stiff competition from unauthorised online music providers and. Consumers with limited budgets, such as those in rural areas, choose to download music free rather than pay, despite the fairly low prices charged by these services.<sup>75</sup>

### **3.3. BACKGROUND AND POLICY PROCESS**

#### **SOUTH KOREA**

In South Korea, the main legal basis for dealing with copyright infringement is the Copyright Act. Their original Copyright Act was enacted in 1957 and since then it has undergone 14 amendments and two consolidations, one in 1986 and the other in 2006. These amendments and consolidations have made the act become more restrictive.<sup>76</sup>

In 2009, the Act was revised to give the Ministry of Culture, Sports and Tourism (MCST) and the South Korean Copyright Commission (KCC) the power to delete illegal reproductions, warn copyright infringers and suspend their online access through a three strikes policy. This revision is considered to be the most substantial so far.<sup>77</sup>

At first, the identification of copyright infringement started off by targeting the most popular infringing technology, a file sharing software known as Webhards. This

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<sup>73</sup> Communications authority Q3 Report, 2014/2015  
<http://www.ca.go.ke/images/downloads/STATISTICS/%20Sector%20Statistics%20Q3%202014-2015.pdf>

<sup>74</sup> <http://buzzkenya.com/download-kenyan-music-online/> on 22 January 2016

<sup>75</sup> PWC, *South African entertainment and media outlook: 2013-2017*, 2015.

<sup>76</sup> The Intellectual Property Office, *International Comparison of Approaches to Online Copyright Infringement: Final Report*, 2015.

<sup>77</sup> The Intellectual Property Office, *International Comparison of Approaches to Online Copyright Infringement: Final Report*, 2015.

gradually expanded to monitoring of peer to peer networks due to the evolution of online copyright infringement methods.<sup>78</sup>

### *Institutional Configuration*

The copyright protection system in Korea comprises public bodies such as the Ministry of Culture, Sports and Tourism (MCST), the South Korean Copyright Commission (KCC), Collection Management Organisations (CMO) and the Copyright Protection Centre which is a unique public-private initiative between the MCST and the CMO's.<sup>79</sup>

The MCST established the Copyright Special Judicial Police (CSJP) who are in charge of crackdowns and investigations into copyright infringement cases in their respective jurisdictions.<sup>80</sup> In 2010, the MCST also introduced a digital copyright forensics team which was to advance criminal investigations of those who were suspected of engaging in copyright infringement with the aim to make money.<sup>81</sup>

The KCC operates a special online piracy reporting portal website on which rights holders can lodge complaints and on which they issue correction recommendations based on those complaints.<sup>82</sup> The KCC has also operated a national Open Monitoring System (OMS) since 2010 through which ordinary citizens can report any websites that are distributing illegal content. This eases identification of infringers.<sup>83</sup>

The Copyright Protection Centre (CPC) managed between the MCST and the CMOs uses what is known as the Illegal Copyrights Obstruction Project (ICOP) system to search and gather evidence of illegal reproductions automatically.<sup>84</sup> This system then

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<sup>78</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>79</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>80</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>81</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>82</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>83</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>84</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

sends requests to content providers to suspend the reproduction and transmission of any infringed content.<sup>85</sup>

## USA

In the United States of America, the main legislation that deals with the enforcement of copyright online is the 1988 Digital Millennium Copyright Act (DMCA) that was signed into law on October 28<sup>th</sup> 1998. This Act transposes the two 1996 World Intellectual Property (WIPO) treaties into US national law.<sup>86</sup>

The main changes that these two treaties incorporated into the DMCA were the recognition of copyrighted work from other countries, making foreign works exempt from any requirement to register them in the US first before being able to file a suit regarding infringement of that work. The changes to the DMCA also made it illegal to circumvent any technological measures that had been taken to prevent people from accessing or copying work to which they do not have a right.<sup>87</sup>

The DMCA was also inclusive of provisions which had the effect of updating US copyright law to include matters of how to deal with online copyright infringement.<sup>88</sup> OCILLA is the act which grants ISPs copyright liability limitation based on certain conditions set out in the act.<sup>89</sup>

## KENYA

### *History and background of copyright law*

The main legal basis for dealing with copyright infringement in Kenya is the Copyright Act.<sup>90</sup> Kenya's copyright law and practice is deeply rooted in the colonial experience. Copyright law is largely a 19th- and 20th-century phenomenon,

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<sup>85</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>86</sup> The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty

<sup>87</sup> <https://futureofmusic.org/article/full-summary-digital-millennium-copyright> on 22 January 2016

<sup>88</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>89</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>90</sup> Copyright Act (No.12 of 2001)

beginning with the declaration of Kenya as a British Protectorate on 15 June 1895 and a colony in 1920.<sup>91</sup>

Kenya's copyright law evolved from the 1842 United Kingdom (UK) Copyright Act through to the 1911 and 1956 UK Copyright Acts.<sup>92</sup> These statutes were applied together with the English common law by virtue of the reception clause under the English East African-Order-in-Council 1897 (which applied to Kenya the substance of the English common law, the doctrines of equity and the statutes of general application in force in England as at that date)<sup>93</sup>. The reception clause was substantially re-enacted as the Kenya Judicature Act of 1967.

Kenya enacted its first domestic Copyright Act in 1966. The 1966 Kenyan Act consisted of only 20 sections, the last of which declared that the Act and 'any other written law' are the sole copyright regime.<sup>94</sup>

During the late 1990s and into the 2000s, over 30 African countries updated their intellectual property rights laws. The push to update these laws, many of which had been in place since the colonial era, came from several interests. Local artists, record companies and musicians' organizations in Kenya, Uganda and Tanzania, for instance, brought concerns about the outdated laws in their countries to government officials and ministers of trade. In Kenya for example, artists established organizations and lobbied for better enforcement.

In response, several elected officials in East Africa stated that they understood the cultural significance of the arts but were reluctant to acknowledge the economic potential of local music and, therefore, the need to update laws to protect the rights

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<sup>91</sup> Ghai Y, McAuslan J, *Public law and political change in Kenya*, Oxford University Press, 1970; Ojwang J.B, *Constitutional development in Kenya: institutional adaptation and social change*, ACTS Press, 1990, 29-34; Okoth-Ogendo H.W.O, *Tenants of the crown: evolution of agrarian law and institutions in Kenya*, ACTS Press, 1991.

<sup>92</sup> Ghai Y, McAuslan J, *Public law and political change in Kenya*, Oxford University Press, 1970, 19-25 and J.B, *Constitutional development in Kenya: institutional adaptation and social change*, ACTS Press, 1990, 32-33; Seidman R, *The reception of English law in colonial Anglophone Africa revisited*, East Africa Law Review, 1968, 1.

<sup>93</sup> Ghai Y, McAuslan J, *Public law and political change in Kenya*, Oxford University Press, 1970; Ojwang J.B, *Constitutional development in Kenya: institutional adaptation and social change*, ACTS Press, 1990, 29-34; Seidman R, *The reception of English law in colonial Anglophone Africa revisited*, East Africa Law Review, 1968, 1.

<sup>94</sup> Ghai Y, McAuslan J, *Public law and political change in Kenya*, Oxford University Press, 1970; Ojwang J.B, *Constitutional development in Kenya: institutional adaptation and social change*, ACTS Press, 1990, 29-34; Seidman R, *The reception of English law in colonial Anglophone Africa revisited*, East Africa Law Review, 1968, 1.

of artists. The prevailing push to update copyright legislation in African countries eventually came from the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

TRIPS is a World Trade Organization (WTO) agreement that requires any member country to update laws pertaining to patents, trademark and copyright. On January 1, 1995, many countries, including Kenya, became members of the WTO, which meant that they officially had to update their intellectual property rights legislation by a given deadline. Developing countries such as Kenya needed to comply with TRIPS by 2005.

Each of these countries also became members of the African Regional Intellectual Property Organization (ARIPO), which required countries to harmonize their laws with other member countries, and the East African Community (EAC), which aimed to promote national and regional protection of intellectual property rights.<sup>95</sup>

In 1999, the then Attorney General of Kenya, Amos Wako brought new copyright and related rights legislation to the Kenyan Parliament. Despite being six years in advance of the TRIPS deadline, this decision was prompted by the glaring deficiencies of the existing intellectual property rights enforcement and administrative framework.<sup>96</sup>

Wako drafted and redrafted the Kenya Copyright Bill between 1999 and 2001 in consultation with the World Intellectual Property Organisation (WIPO). The Bill ultimately passed in November 2001. It was signed into law a month later, and came into force in February 2003.

Since the redrafting of the 1966 Copyright Act, the Copyright Act 2001 has been amended again in 2012<sup>97</sup>, 2014<sup>98</sup> and most recently in 2015<sup>99</sup>, however, none of these amendments touch on the issue of online copyright infringement.

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<sup>95</sup> Perullo A & Eisenberg A, *Musical Property Rights Regimes in Tanzania and Kenya after TRIPS*, 2015.

<sup>96</sup> Ouma M, *The Copyright Act 2001: A New Era for Copyright Protection in Kenya*, e-Copyright Bulletin, July-September 2004.

<sup>97</sup> <https://ipkenya.wordpress.com/2012/05/18/performers-rights-positive-amendments-to-the-kenya-copyright-act/> on 22 January 2016

<sup>98</sup> <https://ipkenya.wordpress.com/2015/10/19/proposed-2015-intellectual-property-law-amendments-kenya-copyright-act/> on 22 January 2016

The discussion on online infringement of copyright began to take proper shape in 2014 with the filing of the case *Bernsoft Interactive & 2 Ors v. Communications Authority of Kenya & 9 Ors*<sup>100</sup>. This case, a constitutional petition, sought injunctive orders against internet service providers (ISPs) in Kenya to compel them to block any websites involved in piracy. The petition claimed that the State<sup>101</sup> had failed in its constitutional and legal obligations to protect the intellectual property rights of Kenyans.<sup>102</sup>

The petitioners cited Wapkid.com, an infamous website which allowed users to illegally download Kenyan music as a main culprit. They accused ISPs of allowing their subscribers to use their internet networks to acquire copyrighted music illegally and thus wanted the court to order ISPs to disable or block access to these types of websites.<sup>103</sup>

This issue sparked controversy over the role of ISPs and the extent of their liability as regards online copyright infringement and consequently moved KECOBO in August 2015 to propose draft amendments to the Copyright Act that would deal with the liability of ISPs as regards online infringement of copyright. These draft provisions propose a limitation of intermediary liability for mere conduits, caching, hosting, and information location tools.<sup>104</sup>

#### *Institutional configuration*

In Kenya, the copyright protection system comprises the Kenya Copyright Board (KECOBO) and three Collection Management Organisations (CMOs) namely the Music Copyright Society of Kenya (MCSK), the Performers Rights Society of Kenya (PRiSK) and the Kenya Association of Music Producers (KAMP).

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<sup>99</sup> <https://ipkenya.wordpress.com/2015/10/19/proposed-2015-intellectual-property-law-amendments-kenya-copyright-act/> on 22 January 2016

<sup>100</sup> Petition No. 600 of 2014

<sup>101</sup> Specifically the telecommunications regulator, the copyright office, Communications Authority of Kenya, the principal legal advisor to the government, KECOBO and the office of the Attorney General

<sup>102</sup> <https://ipkenya.wordpress.com/2014/12/15/test-case-on-liability-for-online-copyright-infringement-music-industry-players-sue-isps-telcos-and-government/> on 22 January 2016

<sup>103</sup> <http://www.businessdailyafrica.com/Corporate-News/Music-copyright-owners-illegal-downloads/-/539550/2605386/-/na4mbsz/-/index.html> on 22 January 2016

<sup>104</sup> <https://ipkenya.wordpress.com/2015/09/08/government-invites-public-views-on-liability-of-online-intermediaries-for-copyright-infringement/> on 22 January 2016

KECOBO is concerned with administering all matters copyright, including overall administration and enforcement of copyright and related rights<sup>105</sup> while MCSK, PRiSK and KAMP are concerned with the collection of license fees and distribution of royalties to musicians, performers and producers respectively.

Additionally, KECOBO under Section 39 of the Copyright Act is under an obligation to nominate copyright inspectors to conduct investigations to do with copyright infringement. As of 2012, there were about only 8 police officers who had been nominated as copyright inspectors.<sup>106</sup>

Finally, the judiciary also have the mandate to ensure that the rights of copyright holders are upheld as copyright infringement cases in Kenya are heard and determined by the High Court which has exclusive jurisdiction<sup>107</sup>

Although the Copyright Act under Section 48 (1) creates a Copyright Tribunal with original jurisdiction to deal with disputes emanating from the administration of the Act, it has never heard or determined any cases to do with copyright.<sup>108</sup>

### **3.4. LEGAL AND REGULATORY BASIS OF THE APPROACH**

#### SOUTH KOREA

In South Korea, the main legal basis for enforcement is the Copyright Act.<sup>109</sup> The Copyright Act gives the MCST and the KCC power to enforce copyright by deleting illegal reproductions, warning copyright infringers via a three strike process and suspension of their internet access.<sup>110</sup>

#### USA

In the United States of America, the main legal basis for dealing with enforcement and copyright infringement is the 1998 Digital Millennium Copyright Act (DMCA)

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<sup>105</sup> Ouma M, *The Copyright Act 2001: A New Era for Copyright Protection in Kenya*, e-Copyright Bulletin, July-September 2004.

<sup>106</sup> Copyright News, Enforcement of Copyright and Related Rights, Issue 7, September 2012

<sup>107</sup> Ngengo J, *Analyzing the Legal Protection of Music Copyright in Kenya*, Master's thesis, Nairobi University, November 2014.

<sup>108</sup> Ben Sihanya, "Copyright law, teaching and research in Kenya," East African Law Journal, 2005.

<sup>109</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>110</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

with particular emphasis placed on the Online Copyright Infringement Liability Limitation Act (OCILLA).<sup>111</sup>

Under their notice and takedown system, an ISP is protected from liability for any infringement on their network or for enabling access to websites that have infringing material as long as it takes appropriate measures to remove such material or access to it as soon as it becomes aware of its presence on its network.<sup>112</sup>

It is also deemed exempt from liability where it adopts and implements and communicates to its subscribers a policy that allows termination of access to its network for repeat infringers and where it cooperates with subpoenas where a legitimate copyright owner would like to identify an alleged infringer in order to take legal action.<sup>113</sup>

Additionally, artists, service providers and content creators have formed a consortium known as the Centre for Copyright Information (CCI). This consortium has established a Copyright Alert System (CAS) which is a scheme that is designed to educate consumers about the importance of copyright protection and offer information about online copyright infringement.<sup>114</sup>

### KENYA

In Kenya, the main legal basis for dealing with enforcement is the Copyright Act. The copyright act gives KECOBO the power to administer all matters copyright as well as overall administration and enforcement of copyright and related rights.

### **3.5. ENFORCEMENT PROCESS**

#### SOUTH KOREA

In South Korea, it is the joint responsibility of the MCST, CPC and KCC to identify online infringement. The burden also falls onto copyright holders and the public in

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<sup>111</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>112</sup> Section 202 (inserting §512(c) (1) (A) into the United States Code), DMCA.

<sup>113</sup> Section 202 (inserting §512 (h) (3) into the United States Code), DMCA.

<sup>114</sup> <http://www.copyrightinformation.org/about-cci/> on 22 January 2016

general.<sup>115</sup> Where infringement is identified, the processes followed are the same, regardless of the party that identified them.<sup>116</sup>

The first type of measures that can be taken are extra judicial measures. Here, MCST can authorise certain actions to be undertaken by the ISPs and the content providers. If these two do not carry out such actions, for example collection, deletion or disposal of illegal reproductions etc., they can be fined up to about the equivalent of £5,770.<sup>117</sup>

If an infringing subscriber has received more than three warnings, the MCST can order the relevant ISP to suspend the subscribers account for a period of up to 6 months. Where the infringing content is being provided by a content provider, if they receive orders to delete or suspend such infringing content more than three times, then their service can be fully or partially suspended for up to 6 months.<sup>118</sup>

The second type of measures that can be taken are judicial measures. Where a copyright holder seeks an injunction, the court may order the ISP to terminate certain accounts or take measures to block access to certain foreign internet sites. The court can also order deletion of illegal reproductions and terminate relevant accounts belonging to the infringers that are held with the ISP.<sup>119</sup>

During the course of these processes, subscribers and content providers are presented the opportunity to submit statements to defend their actions. However, the MCST gives them a short timeframe within which to submit such statements.<sup>120</sup>

## USA

In the United States of America, the enforcement process starts off when a rights holder identifies infringing material and notifies the ISP. Once this information is

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<sup>115</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>116</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>117</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>118</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>119</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>120</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

received by the ISP, they must act “expeditiously to remove or disable access to the material”<sup>121</sup>

In order to prevent or reduce the removal of non-infringing material, the DMCA includes a system of counter notifications. Once a counter notification is received by the ISP and there is clear evidence that proves that removal of the content was as a result of a mistake or misidentification, that content must be reinstated and blocking of any sites should be lifted around 10-14 days following the receipt of the counter notification.<sup>122</sup>

Under the Copyright Alert System (CAS), once copyright owners identify infringing content and obtain the infringers address, they are required to provide these details to the ISP along with the date and time of the alleged infringement. The ISP in response sends the subscriber a notification letter that contains information of copyright law and available legal sources of content.<sup>123</sup>

Once a subscriber has received multiple letters, the ISP has the discretion to temporarily affect the subscriber’s connection. The ISP is also tasked with maintaining a record of repeat offenders so that the information is available for any copyright owner with a subpoena.<sup>124</sup>

## KENYA

In Kenya, as copyright is a private right, the enforcement process starts off when an aggrieved copyright holder identifies infringing material online and notifies KECOBO. The copyright holder can either go the route of civil remedies or criminal sanctions.

Where the copyright holder chooses criminal sanctions, KECOBOs copyright inspectors then conduct investigations into the case and prosecute any offenders caught. Where the copyright holder chooses civil remedies, they can file a case in

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<sup>121</sup> Section 202 (inserting §512(c) (1) into the United States Code), DMCA.

<sup>122</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>123</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>124</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

court against the offender seeking either an injunction to stop their infringing behaviour or damages as a result of loss caused by the infringing behaviour.

### **3.6. ENFORCEMENT MEASURES/SANCTIONS**

#### SOUTH KOREA

In South Korea, the sanction associated with the extra judicial process focuses on the deletion and blocking of sites as well as suspension of internet access.<sup>125</sup>

For judicial processes, where a case proceeds to court, a person who is found guilty of infringement of a copyright owners economic rights may be subject to imprisonment for up to five years, or a hefty fine that is equivalent to £28,000 or both.<sup>126</sup>

Any person who is found guilty of infringement of a copyright owners moral rights may be subject to imprisonment of up to 3 years or a hefty fine that is equivalent to £23,194 or both.<sup>127</sup>

#### USA

In the United States of America, rights holders can take legal action against copyright infringers by claiming actual damages and a restitution of profits made from infringements.<sup>128</sup> Rights holders also have the option to claim statutory damages instead.<sup>129</sup>

Statutory damages of not less than \$750 or more than \$30,000 can be claimed for general copyright infringement in respect of any one work for which one infringer is liable individually or two jointly. Where infringement is determined to be wilful, the court can increase the amount to \$150,000 and where the infringement occurred in the absence of awareness, the court can reduce the amount to no less than \$200.<sup>130</sup>

#### KENYA

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<sup>125</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>126</sup> The Intellectual Property Office, International Comparison of Approaches to Online Copyright Infringement: Final Report, 2015.

<sup>127</sup> Copyright Commission Annual Report, 2012, 29

<sup>128</sup> Section 504(b), Title 17 of the United States Code.

<sup>129</sup> Section 504(c), Title 17 of the United States Code.

<sup>130</sup> Section 504(c) (2), Title 17 of the United States Code.

In Kenya, the Copyright Act under section 38 provides the following penalties and sanctions for copyright infringement:

- a) Section 38(4)<sup>131</sup> provides that any person guilty of making for sale or hire any infringing copy, distributing infringing copies, importing into Kenya otherwise than for his private and domestic use any infringing copy or making or having in his possession any contrivance used or intended to be used for the purpose of making infringing copies shall be liable to a fine not exceeding four hundred thousand shillings or to imprisonment for a term not exceeding ten years or to both.<sup>132</sup>
- b) Section 38(5)<sup>133</sup> provides that any person guilty of selling or letting for hire or by way of trade exposing or offering for sale any infringing copy or possessing otherwise than for his private and domestic use, any infringing copy shall be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

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<sup>131</sup> Copyright Act (No.12 of 2001)

<sup>132</sup> Section 38(4) Copyright Act (No.12 of 2001)

<sup>133</sup> Copyright Act (No.12 of 2001)

## CHAPTER 4: SHORTCOMINGS OF THE CURRENT LEGAL AND REGULATORY FRAMEWORK GOVERNING ONLINE INFRINGEMENT OF MUSIC COPYRIGHT IN KENYA AND ITS EFFECTS ON THE MUSIC INDUSTRY

### 4.1. LEGISLATIVE, REGULATORY AND ENFORCEMENT SHORTCOMINGS

Technology has certainly become one of the biggest accomplishments of our generation, the influence of which can best be seen within the massive digital shift taking place in the entertainment industry.<sup>134</sup> However, stuck in the midst of this rapid evolution, Kenya still has outdated copyright laws which do not capture technological advances such as online piracy of music.

Although the laws were created with the well-being of creators in mind, over half a century later today's technology has destabilized them to say the least.<sup>135</sup> There is therefore an urgent need to formulate a system of laws that defines and protects copyright as a response to technological change.<sup>136</sup>

In Kenya, although the Copyright Act 2001 has tried to domesticate some provisions of the TRIPS agreement, the Berne Convention and other international instruments on copyright law, the dynamic nature of technology and the internet requires constant review and amendment of the act in order to afford adequate protection to music.<sup>137</sup> Professor Ben Sihanya, a leading copyright expert in Kenya, stated that the Copyright Act 2001 not only lacks adequate provisions for the protection and promotion of copyrighted works in Kenya but also an adequate enforcement and infrastructural mechanism for effective implementation of the law.<sup>138</sup>

The Copyright Act 2001 is neutral regarding protection of copyright in the digital arena despite a majority of current major copyright issues being centred on the right of making available, reproduction, adaptation and distribution of musical works

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<sup>134</sup> Mahoney J, *Time for a copyright law facelift*, September 2010  
<http://indieambassador.com/articles/time-for-a-copyright-law-facelift> on 22 January 2016

<sup>135</sup> Mahoney J, *Time for a copyright law facelift*, September 2010  
<http://indieambassador.com/articles/time-for-a-copyright-law-facelift> on 22 January 2016

<sup>136</sup> <https://ipkenya.wordpress.com/tag/wct-wppt-kenya/> on 22 January 2016

<sup>137</sup> Sihanya B, *Intellectual Property and Innovation in Kenya and Africa*, Konrad Adenauer Stiftung, 2009.

<sup>138</sup> Sihanya B, *Intellectual Property and Innovation in Kenya and Africa*, Konrad Adenauer Stiftung, 2009.

given the ease with which they are available online.<sup>139</sup> Such issues include rampant illegal uploading, downloading and sale of musical works online.

Kenya's music market generated revenues of US\$19.8 million in 2012, up from US\$16.5 million in 2008.<sup>140</sup> It is expected that consumer spending on digital music will grow to overtake physical spending in 2015 and that digital sales of music will increase by 7.3% in the next five years and will total an estimated US\$10.6 million in 2017.<sup>141</sup>

It is estimated that by 2017, broadband penetration of households in Kenya will increase to 4%.<sup>142</sup> This as well as the growth of the online Kenyan music market signifies a great need for online specific provisions when it comes to copyright of music and online piracy of music.

Although KECOBO is gaining strides as regard enforcement of copyright in Kenya, the most recent example being the proposed ISP liability amendments to the Copyright Act, it can still improve on the following aspects:

- a) KECOBO is mandated to direct, co-ordinate and oversee the implementation of laws and international treaties and conventions to which Kenya is a party and which relate to copyright.<sup>143</sup> Although Kenya adopted the WIPO Copyright Treaty (WCT) 1996 and the WIPO Performers and Phonograms (WPPT) 1996, jointly referred to as the WIPO Internet Treaties, it has still not ratified them.<sup>144</sup> This is a failure on the part of KECOBO as these treaties largely cover works in the digital arena including what constitutes infringement on online platforms. Adoption of these treaties would be of great use as they would provide the relevant law required to protect musicians from online piracy of their music.
- b) As regards enforcement of copyright as is their mandate under the Act, KECOBO still seems to be falling short. As of September 2012, KECOBO

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<sup>139</sup> Organization for Economic Co-operation and Development (OECD), *'Online Music Distribution Providing both Challenges and Opportunities.'* 2005

[http://www.oecd.org/document/24/0,2340,en\\_2649\\_201185\\_34995480-1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/24/0,2340,en_2649_201185_34995480-1_1_1_1,00.html) on 22 January 2016

<sup>140</sup> PWC, South African entertainment and media outlook: 2013-2017, 2015.

<sup>141</sup> PWC, South African entertainment and media outlook: 2013-2017, 2015.

<sup>142</sup> PWC, South African entertainment and media outlook: 2013-2017, 2015.

<sup>143</sup> Section 3, Copyright Act ( No 12 of 2001)

<sup>144</sup> <https://ipkenya.wordpress.com/tag/wct-wppt-kenya/> on January 22 2016

established an enforcement department which consists of the Legal and Enforcement units. The Legal unit currently consists of five legal counsels who have been appointed as copyright prosecutors under Section 43(1) of Cap 130 and eight police officers from the Kenya Police appointed under Section 39 as copyright inspectors.<sup>145</sup> This limited number of personnel greatly impacts enforcement of copyright by KECOBO as they are only able to investigate few cases.

- c) KECOBO in collaboration with the Judiciary Training Institute and the Criminal Investigation Department (CID) Training School, has also trained over 48 Magistrates and 400 police officers since 2006.<sup>146</sup> Despite this training of law enforcement officers, copyright inspectors face a number of challenges in the dispensation and course of their duties. These include;<sup>147</sup>
- i) Lack of knowledge of Intellectual Property laws by copyright owners, users and police officers.
  - ii) Advancement of technology in the digital era which has made it easier to download and share copyright works over the internet without authority from the copyright owner.
  - iii) Impersonation of copyright inspectors by unscrupulous persons.
  - iv) Copyright offenders resist arrest from the police officers.
  - v) Delays by the courts in hearing of copyright cases due to the lengthy time it takes to adduce evidence in court by the prosecution witnesses.

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<sup>145</sup> Copyright News, *Enforcement of Copyright and Related Rights*, Issue 7, September 2012.

<sup>146</sup> <https://ipkenya.wordpress.com/2011/01/04/the-national-copyright-office-kenya-copyright-board-kecobo/> on 22 January 2016

<sup>147</sup> Ngengo J, *Analyzing the Legal Protection of Music Copyright in Kenya*, Master's thesis, Nairobi University, November 2014.

#### 4.2. EFFECT OF WEAK LEGISLATION, REGULATION AND ENFORCEMENT

Technological advancements in the music industry have led to the ability to download and stream music off the internet.<sup>148</sup> This has complicated copyright protection issues as many people are now able to download or listen to music online without permission from the rights holders. Pirates have taken advantage of these technologies and as a result, the industry has suffered huge losses.

The famous case of *A&M Records, Inc. vs Napster, Inc.*<sup>149</sup> started off the debate on digital copyright protection on the internet. It was important as it applied copyright law to online piracy of music via peer to peer file sharing.

In this case, the Defendant developed a platform for users to upload and download music files in a compressed digital format. The Plaintiffs saw the potential for this technology to affect their sales and promptly filed a suit against Napster as a “contributory and vicarious copyright infringer.” The court held that Napster was liable for contributory infringement as its website allowed users to upload and download music in digital format.

Inadequate legislation and poor regulation and enforcement has negative effects on the music industry. The major effect being felt is that to the economy.

For example, in the United States, before Napster (roughly between 1975 and 1999) it was estimated that the value of shipments of recorded music rose in a steady fashion from \$5.8 to \$12.8 billion.<sup>150</sup> Between 1999 and 2008, annual US revenue from physical recorded music products fell from \$12.8 billion back to \$5.5 billion.<sup>151</sup> Even where the figures were inclusive of revenue from digital sales, the total amount was less than what it was in 1999.

Sadly, the situation in Kenya is no different. A study conducted by the World Intellectual Property Organisation in 2010 on the economic contribution of copyright based industries discovered that the addition to Kenya’s Gross Domestic Product by

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<sup>148</sup> Organization for Economic Co-operation and Development (OECD), ‘*Online Music Distribution Providing both Challenges and Opportunities.*’ 2005  
[http://www.oecd.org/document/24/0,2340,en\\_2649\\_201185\\_34995480-1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/24/0,2340,en_2649_201185_34995480-1_1_1_1,00.html) on 22 January 2016

<sup>149</sup> *A&M Records, Inc. v Napster, Inc.* 239 F.3d 1004 (9th Cir. 2001)

<sup>150</sup> Economic Report of the President, table B-62, 262, 2010

<sup>151</sup> [http://www.riaa.com/keystatistics.php?content\\_selector=keystats\\_yearend\\_report](http://www.riaa.com/keystatistics.php?content_selector=keystats_yearend_report) on 22 January 2016

copyright industries paled in comparison to the billions of shillings in revenue lost to piracy and copyright infringement.<sup>152</sup>

In 2011, the music industry was estimated to be the most affected by piracy with a piracy rate of 98%<sup>153</sup> and in 2013, IT Web Africa reported an estimated 5 million pirated copies of CD's circulating in the market, causing 47 million dollars in annual losses.<sup>154</sup>

Poor protection regimes not only affect the musician but also impede the growth and development of the industry. A study conducted by WIPO revealed that despite the vibrant and active music scene in Kenya, musicians still struggle to make a living from their music. Piracy thus makes it near impossible for Kenyan artists to profit from the sale of their legitimate recordings.<sup>155</sup>

It is thus clear from the comparisons and the findings above that Kenya has inadequate legislation concerning online infringement of copyright, the effect of which as we have seen has a negative impact on the music industry.

Continued widespread internet usage and online music purchases in Kenya indicate the dire need for online specific provisions that are clear on Kenya's legislative and enforcement approach to tackling the menace that is online copyright infringement of music.

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<sup>152</sup> <https://cipitlawstrath.wordpress.com/2014/10/10/kenyas-middle-income-status-requires-review-of-copyright-law/> on 22 January 2016

<sup>153</sup> KECOBO, The Scourge of Piracy: A Menace to Investors in Kenya, Copyright Issue No. 3, 2011.

<sup>154</sup> <http://ukjournalism.co.uk/thehotpot/music-piracy-growing-issue-local-kenyan-musicians/> on 23 January 2016

<sup>155</sup> WIPO (July 2007)> "On the Beat - Tapping the Potential of Kenya's Music Industry," [http://www.wipo.int/wipo\\_magazine/en/2007/04/article\\_0001.html](http://www.wipo.int/wipo_magazine/en/2007/04/article_0001.html) on 23 January 2016

## **CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

### **5.1. CONCLUSION**

This study has explored the legal and regulatory framework surrounding the infringement of music copyright in the digital arena via piracy in Kenya as well as a comparison with the approach taken by South Korea and the United States of America.

The study has done so in the attempt to answer the following questions:

- i) Is there a gap in the Copyright Act which renders it unable to adequately respond to questions of online infringement of music copyright?
- ii) How does this gap if any, affect the music industry?

The study has found that indeed there is a gap in the Copyright Act which renders it unable to adequately to respond to online infringement of music copyright due to a complete lack of online specific provisions that tackle online infringement of music. This study has also found that this gap has a myriad of negative consequences not only on the economy but also on the welfare and incentive of artists and the growth and development of the music industry as a whole.

In conclusion, stronger and up to date legislation as well as improved enforcement and regulation of copyright could lead to a marked decrease in online infringement of copyright.

### **5.2. RECOMMENDATIONS**

In order to strengthen Kenya's legislative, regulatory and enforcement approach to online infringement of music, I suggest the following recommendations:

- i. Enact provisions that deal specifically with the infringement of music copyright on the internet and general provisions dealing with digital copyright infringement.
- ii. Regular review and amendment of the Copyright Act where necessary in order to keep up with the ever changing and developing music industry.

- iii. Ratify the WIPO Internet treaties in order to make them relevant and applicable under our law.
- iv. More focused interaction with industry players by legislators to try and understand the direction in which the industry is taking as a whole. This will help with the drafting of better provisions that will be relevant now and in the coming years
- v. Hire and train more enforcement and judicial officers in order to increase the number of cases handled. Specialised training on online infringement of copyright should be conducted so as to keep abreast with changes in the industry.
- vi. Conducting regular public awareness campaigns in order to educate and sensitize citizens on the scourge of music piracy be it terrestrial or online and invite their participation in its eradication.
- vii. Appointment of the competent authority envisioned under Section 48 (1) of the Copyright Act 2001 to serve as a tribunal for dispute resolution. This will lead to an increase in jurisprudence in the area
- viii. Allocation of more resources to KECOBO by the government. This will allow it to increase its capacity in terms of enforcement as well as conduct more trainings.
- ix. Borrow a leaf from the South Korean approach by encouraging more public participation in a bid to strengthen enforcement efforts. This can be done through an open monitoring system like in South Korea, which allows ordinary citizens to report any websites distributing illegal content.
- x. Review of the proposed amendments to ISP liability and incorporate best practice from countries with similar ISP liability provisions, like the US, in order to come up with a comprehensive amendment. For example, section 35A (5) seeks to impose criminal penalties on firms that fail to respond to takedown notices in 36 hours. This would be discriminatory and harmful to

small business owners who would not be able to process take down requests in such a short time.<sup>156</sup>

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<sup>156</sup> CCIA, Proposed Amendments To Provide Web Blocking Measures In Cases Of Copyright Infringements Online

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