

**PERFORMERS' RIGHTS: COMPATIBILITY OF MANDATORY
COLLECTIVE ADMINISTRATION IN THE COPYRIGHT ACT WITH
CONSTITUTIONALLY GUARANTEED RIGHTS AND FREEDOMS**

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the Copyright Act with Constitutionally Guaranteed Rights and Freedom**

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Declaration

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

Signed:

Date:

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

Signed:.....

DR ISAAC RUTENBERG

ABSTRACT

Collective management organisations have been widely lauded for their efficiency and near elimination of the transaction costs on the part of the rights holders that would otherwise be incurred in exploitation of copyright and related rights. However, when it comes to compulsory collective management/administration of copyright and related rights, questions have been raised about the implications on the freedom of association and the right to property.

The purpose of this project was to look into the human rights repercussions of compulsory collective management of copyright and related rights in general and the constitutionality of Section 30A in particular. The human rights in focus were the freedom of association and the right to property. The project proceeded from the normative framework of collective management organisations (CMOs) in general, the freedom of association and the right to property, looking into both local and international instruments. On establishing how compulsory collective management of rights, the freedom of association and the right to property interact, the limits and incentives of the allowable limitations on these rights for the sake of compulsory collective management of rights were discussed. Section 30A of the Copyright Act was then examined in this context in a bid to determine its permissibility in the face of the legal, political and cultural realities in Kenya. Two judgments that have been made so far on the constitutionality of Section 30A were used as tools of analysis.

The study was mainly done through desk research. It established that due to the public participation aspect that was lacking in Section 30A, it is unconstitutional as it violates Article 118 of the constitution of Kenya, but would have otherwise been an allowable limitation on the right to property and freedom of association, considering the realities of Kenya's creative sector and level of development. The study recommends amendments to the law to strengthen regulation of CMOs, as well as the enactment of a Performers' Rights Act.

LIST OF ABBREVIATIONS

ARIPO – African Regional Intellectual Property Organisation

BMDA – Bureau Marocain du Droit d’Auteur

CISAC – Confédération Internationale des Sociétés d’Auteurs et Compositeurs

CMO – Collective Management Organisation

CSP – Content Service Provider

DALRO – Dramatic, Artistic and Literary Rights Organisation

GDP – Gross Domestic Product

ICCPR – International Covenant on Civil and Political Rights

IFRRO – International Federation of Reproduction Rights Organisations

KAMP – Kenya Association of Music Producers

KECOBO – Kenya Copyright Board

KOPIKEN – Reproduction Rights Society of Kenya

MCSK – Music Copyright Society of Kenya

PRISK – Performers’ Rights Society of Kenya

PRSP – Premium Rate Service Provider

SABAM – The Belgian Association of Authors, Composers and Publishers

SOCILADRA – Société Civil des Droits de la Litterature et des Arts

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

UDHR – Universal Declaration of Human Rights

WIPO – World Intellectual Property Organisation

WPPT – WIPO Performances and Phonograms Treaty

LIST OF CASES

Xpedia Management Limited & 4 others v AG & 4 others [2016] eKLR

Mercy Munene Kingoo and Lydia Nyiva Kingai v Safaricom Ltd & AG [2016] eKLR

David Ndungo Maina v Zipporah Wambui Mathara, Bankruptcy Cause 19 of 2010

Beatrice Wanjiku & Another v the Attorney General & Another, High Court of Kenya at Nairobi, Petition 190 of 2011

Hellen Wachuka Njoroge v Attorney General and Nairobi City County, [2016] eKLR

Satinderjit Singh Matharu v Armajit Singh Gahir & 5 others, [2016] eKLR

Chapter One: Introduction

Background

A collective management organisation (CMO), or a collecting society, as per Section 48 of the Copyright Act of Kenya, is “an organisation which has as its main object, or one of its main objects, the negotiating for the collection and distribution of royalties and the granting of licenses in respect of copyright works or performer’s rights”. These are usually not-for-profit organisations.¹ CMOs are especially useful in reducing transaction costs; those of contracting, price setting, search and information costs.²

In looking at the focus of this paper, performers’ rights, we would need to first consider the distinction between copyright and related rights (which include performers’ rights). One could say that copyright generally goes to composers and authors whereas related rights go to performers, producers and broadcasting organisations.³ The former produce literary and artistic works, considered so regardless of merit.⁴ The latter, though producing work not qualifying for copyright protection in the strict sense, produce work with sufficient creativity, or technical or organisational skill to qualify for “copyright-like” rights.⁵ They enable work subject to copyright to be made to the public and so *related* rights; rights related to copyright, accrue to them.⁶

I will look briefly at the history of related rights. It could be traced to some less “respected” form of works subject to copyright. Photographs, in some quarters in the past, were thought to be merely products of mechanical processes, rather than due to the creative prowess of the photographer, and motion films the result of corporate organisations’ work rather than the ‘labours of individual authors’, and so there was some resistance to according these authors’ rights.⁷ However, after pushing and pulling, these rights were accorded to filmmakers and photographers in civil law countries, but the line was drawn here—performances, sound recordings, broadcasts and phonograms were not to be included.⁸ It was a bit like saying “see, we have made enough compromise; ask us for no more.” Even so, a new regime of rights was

¹ Sigei E, ‘The History and Future of Collective Management Organisations’ 8 *Copyright News* (2012)

² Panda A and Patel A, ‘Role of Collective Management Organisations for the Protection of Performers’ Rights in the Music Industry: In the Era of Digitalization’ 15 *The Journal of World Intellectual Property* (2012) 155-170

³ World Intellectual Property Organisation, *Understanding Copyright and Related Rights*

⁴ World Intellectual Property Organisation, *Understanding Copyright and Related Rights*

⁵ World Intellectual Property Organisation, *Understanding Copyright and Related Rights*

⁶ World Intellectual Property Organisation, *Understanding Copyright and Related Rights*

⁷ Goldstein P, *International copyright: principles, law and practice*, Oxford University Press, 2001, 10

⁸ Goldstein P, *International copyright: principles, law and practice*, 10

to be created for these ‘left out’ fields. This regime would be in neighbouring rights—*droits voisins* in France, *diritti connessi* in Italy and *Leistungsschutzrechte* in Germany.⁹

In terms of protection, authors and composers have enjoyed protection of their rights for a longer period than performers and producers.¹⁰ Unlike the case of composers and authors (whose protection in international law was established by 1886 with the Berne Convention), related rights were first internationally recognised in 1961 with the Rome Convention. Things are changing and more prominence is being given to the role of performers and producers. As Javier Bardem, a Spanish actor, said at the World Intellectual Property Organisation (WIPO) in 2011, “Since the first actor took off his mask..., the actors who have succeeded him have no longer been considered as mere instruments or puppets, fully entering into the temple of Thalia as creators.”¹¹ The law can be seen to be working in line with the realization that performers are just as indispensable as the authors. After 1960, still on the international sphere, we have further development on the recognition and remuneration rights of related rights holders through the WIPO Performances and Phonograms Treaty (WPPT) in 1996.

In Kenya, these attempts to properly recognize and remunerate the performer could be seen to have led to the introduction of Section 30A of the Copyright Act of Kenya, which in promoting these rights, involves the aforementioned CMOs rather heavily. Section 30A provides for the right to equitable remuneration for use of sound recordings and audio visual works. To this end, it stipulates that if a sound recording is published for commercial purposes or a reproduction of such recording is used directly for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer and the producer of the sound recording *shall* be paid by the user *through* the respective CMO, and the remuneration shall be shared equally between the producer of the sound recording and the performer. Furthermore, if a fixation of a performance is published for commercial purposes or a reproduction of a fixation of a performance is used for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer shall be paid by the user to the CMO.

The situation prior to this section would be, for example, that an upcoming artiste would want to get a song out and so approach a producer, but because the performer had the short end of

⁹ Goldstein P, *International copyright: principles, law and practice*, 10

¹⁰ Towse R, ‘The Singer or the Song – Developments in Performers’ Rights From the Perspective of a Cultural Economist’ *Review of Law and Economics* (2007) 745

¹¹ ‘Performers’ Rights – Background Brief’ (World Intellectual Property Organisation) <http://www.wipo.int/pressroom/en/briefs/performers.html> on 18 February 2016

the stick in terms of bargaining power, the performer would accept one-off remuneration that would sometimes turn out to be very low in comparison with the success of the song.¹² However, because of Section 30A performer *has* to get a part of the remuneration each time their performance in the sound recording or some other fixation is made publicly available, regardless of what the contractual terms between the performer and producer were. This therefore mitigates the injustices that often come about due to the lower bargaining power of the performer. In this sense, therefore, Section 30A is a great benefit for performers.

Nonetheless, Section 30A is not without its challenges. This single equitable remuneration is to be paid to the respective CMO, which could be taken to mean that any performer or producer wishing to get this single equitable remuneration needs to be a part of a CMO. This raises human rights and effectively constitutional questions. The freedom of association is captured in Article 36 of the Constitution of Kenya, and the issue posed by Section 30A can be specifically challenged by Article 36(2), which provides that a person shall not be compelled to join an association of any sort.

Furthermore, one could also use Article 40 on the right to property to challenge the constitutionality of Section 30A. Section 30A could be said to be undermining people's right to their intellectual property in the sense that my right to negotiate on how much I am paid directly with the user of my work and exploit my property in sound recordings and fixations of performances is taken from me by virtue of Section 30A. Section 30A narrows down the negotiation to be just between the CMO and the user. It also does not allow a person to let their property be freely enjoyed by his/her users under a free licence if he so wishes; because this remuneration is compulsorily paid to the CMO. The rights holder features nowhere in the negotiation of payment.

The effect on the right to enjoy one's property can be seen in the contractual issues that have arisen. Section 30A provides that sound recordings that have been made available to the public in such a way as to enable the public to access this at a place and time of their own choosing will be considered to be publishing for commercial purposes and a single equitable remuneration would need to be paid. This would therefore bring in ringtone downloads and music available for downloading from websites. Matters that were previously dealt with as between content service providers (CSPs) and telecommunications companies, for instance,

¹² 'IFPI attacking performers' remuneration rights' FIM, 21 May 2015, <https://www.fim-musicians.org/ifpi-kenya-copyright-act>, on 12 January 2017

will now necessarily involve CMOs.¹³ CSPs would initially contract with the rights holders, and then contract with telecommunications companies, but now the telecommunications companies are statutorily compelled to pay CMOs. Therefore, contractual issues come into play as the telecommunications company, for instance, will not see the need to pay the CSP for the music if they are now statutorily compelled to pay the CMOs as was the case in some of the cases discussed in this study.

Whether or not these are allowable limitations of the right to property and freedom of association will be part of the analysis to be undertaken in this paper.

Section 30A does try to achieve justice for the owners of related rights in music, but it is worth considering whether it is constitutional, and whether it in actual fact benefits the owners of related rights or if there could have been a better way to achieve the same ends.

Statement of Problem

The problem that arises is the constitutionality of Section 30A, in as far as it seems to compel rights holders to join CMOs in order to get their remuneration, a limitation on both the freedom of association and the right to property.

Justification of Study

The study is important in determining the status of (in terms of constitutionality) and therefore the way forward with regard to Section 30A.

Statement of Objectives

This paper will analyse the constitutionality of Section 30A.

It will also assess the suitability of compulsory collective management of rights in Kenya.

Research Questions

The research questions are as follows:

Is Section 30A unconstitutional?

Is compelling a rights-holder to join a CMO in order to collect their equitable remuneration constitutional?

Are there better ways to achieve the same goal of ensuring the enforcement of related rights?

¹³ *Xpedia Management Limited & 4 others v AG & 4 others* [2016] eKLR

Literature Review

There exists a large amount of resources on the role of CMOs worldwide as well as on related rights. I will be informed by these resources, some highlighted below, and build on them as well. However, there is scarce information on Section 30A in particular, and the discussions on this section are all in the form of blog posts and case law.

Laurence Helfer has studied the interaction of collective management of copyright and human rights.¹⁴ He has pointed out the cases in which compulsory management of copyright and related rights may be justified, and his work will be the base on which I determine suitability of compulsory collective management of copyright and related rights.

Dr Silke Lewinski has also discussed the issue of the permissibility of mandatory collective management/administration of exclusive rights.¹⁵ She considers the grounds on which CMOs in general and compulsory collective management of rights in particular are usually challenged—for instance, possibility of abuse of monopoly and the minimisation of the ability of authors to explore their rights through contracting with other businesses, but points out findings that show that CMOs barely have an impact on competition, are usually regulated quite heavily and that CMOs might actually give authors better remuneration options than businesses.

Ruth Towse has written on the developments in performers' rights.¹⁶ She points out that in the United Kingdom, before 1996, remuneration on performers' rights had been paid collectively to the Musicians' Union, (as is the case now with Section 30A) but post-1996, rights are distributed on an individual basis.¹⁷ She discusses the European Commission Rental Directive, stating that its drafters "evidently believed that one of the roles of...related rights registration was to correct the weaker bargaining position of the non-featured performers and that one way to do this was to require that equitable remuneration could only be administered by a collective society set up for that purpose."¹⁸ This paper will be considering whether, in the face of the low bargaining power she speaks about, mandatory collective administration is the way to go for us.

¹⁴ Helfer L, 'Collective management of copyrights and human rights: an uneasy alliance revisited', in Gervais D (ed), *Collective management of copyright and related rights*, 2nd ed, Kluwer Law International BV, The Netherlands, 75

¹⁵ Lewinski S, 'Mandatory collective administration of exclusive rights – a case study on its compatibility with international law' UNESCO E-Copyright Bulletin (January-March 2004)

¹⁶ Towse R, 'The Singer or the Song' 745

¹⁷ Towse R, 'The Singer or the Song' 749

¹⁸ Towse R, 'The Singer or the Song' 750

Aurobinda Panda and Atul Patel have discussed the role of CMOs in the protection of performers' rights in the music industry.¹⁹ They recognize the status of CMOs as necessary for efficient administration of copyright and related rights, and the numerous benefits accruing to rights-holders through them and call for enhanced protection of related rights in India.²⁰ I will be looking at the situation in Kenya and whether this enhanced protection might serve its ends, and under what conditions.

When it comes to Section 30A itself, much of the discussion on it has been done through blog posts. Judy Chebet, a lawyer, has made one of the significant contributions to the discussion on Section 30A.²¹ She sees Section 30A as the introduction into the Copyright Act of the contents of Article 15 of the WPPT.²² She goes on to show how Section 30A differs from Article 15 of the WPPT. First, payment through the CMOs (effectively compelling rights holders to be members of CMOs) is not contained in Article 15. This, she points out, disables the rights holder from getting his/her payment directly from the user or content service provider, which was not the import of Article 15 of the WPPT. She highlights how this would possibly compromise one's right to enjoy his/her property and protection from deprivation of property. This paper will therefore be going forward to examine whether Section 30A may fall into allowable limitations of constitutionally secured rights. Furthermore, she points out the lack of guidelines on remuneration in Section 30A, and contrasts this to the 'fair compensation' to be decided on by the CMOs in conjunction with the manufacturers and producers of audio-visual recording equipment (failing which, the role goes to the Copyright Tribunal) as provided in Section 30(6) of the Copyright Act. This paper will be examining whether Section 30A is backed by sufficient regulatory measures on remuneration.

Victor Nzomo has also addressed the issue of Section 30A.²³ He argues that taking into consideration the uses to which sound recordings and fixations are traditionally put, collective

¹⁹ Panda A and Patel A, 'Role of Collective Management Organisations for the Protection of Performers' Rights in the Music Industry' 155-170

²⁰ Panda A and Patel A, 'Role of Collective Management Organisations for the Protection of Performers' Rights in the Music Industry' 166

²¹ Judy Chebet, 'Section 30A of the Copyright Act: What's That About?' (*Judy Chebet*, 26 February 2014) <https://judychebet.wordpress.com/2014/02/26/section-30a-of-the-copyright-act-whats-that-about/> on February 19, 2016

²² Article 15 of the WPPT provides that contracting parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer by the producer of a phonogram or by both. It also provides that contracting parties may enact national legislation that, in the absence of an agreement between the performer and producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

²³ Victor Nzomo, 'Revisiting Section 30A of the Copyright Act: Right to Equitable Remuneration for Performers and Producers' <https://ipkenya.wordpress.com/2014/02/28/revisiting-section-30a-of-the-copyright-act-right-to-equitable-remuneration-for-performers-and-producers/> on February, 19 2016

management is indispensable for remuneration of performers. He does agree with Ms Chebet that Article 15 of the WPPT does not allow compulsory licensing but disagrees that this is not an allowable limitation, per Article 24 of the Constitution. He also explores compulsory licences, a household concept in the world of patent, and how they apply in the world of copyright and related rights. He talks about the 3 step test for compulsory licensing enshrined in Article 9(2) of the Berne Convention—exceptional circumstances, no conflict with the normal exploitation of the work and no unreasonable prejudice to the legitimate interests of the work. He says that only if it is proven that Section 30A goes against Article 9(2) of the Berne Convention and the allowable limitations under Article 24 of the Constitution of Kenya can Ms Chebet’s argument hold. This paper will analyse whether the compulsory licence in Section 30A adheres to the 3 step test in the Berne Convention.

Mr Nzomo goes on to point out that the bigger question is the regulatory regime of Section 30A particularly with regard to remuneration. This paper will therefore go into examining Mr Nzomo’s position that the regulation is the bigger problem within the scope of examining the import of the right to property.

This paper will be building on these arguments, from the background level of CMOs and their normative framework to the status that Section 30A gives them as organisations that one must join in order to get remuneration, and the constitutionality of this.

Hypothesis

This study proceeds on the presumption that the implied requirement by the Copyright Act at Section 30A that rights-holders must be part of CMOs to get their remuneration infringes the freedom of association protected by Article 36 of the Constitution, and the right to one’s property under Article 40, but is allowable.

Assumptions

It is assumed that compulsory management of copyright and related rights is a prima facie violation of the right to property and freedom of association, but may be allowable.

Research Design and Methodology

My research will be based on the normative framework for CMOs, the freedom of association and the right to property. Through this—that is, determining how the three concepts interact, I will mainly apply desktop research to determine the constitutionality of Section 30A.

Limitations

This study will be limited to analysis of the role of CMOs with regard to copyright and related rights, vis-à-vis Section 30A. The constitutional rights and freedoms this paper will focus on are the freedom of association and right to property.

Chapter Breakdown

This research paper will be structured as follows:

Chapter 1: Introduction

Chapter 2: Normative Framework for Collective Management Organisations, Freedom of Associations and the Right to Property

Chapter 3: The Section 30A Judgments

Chapter 4: Suitability of Compulsory Collective Management of Copyright and Related Rights in Kenya

Chapter 5: Conclusion and Recommendations

Timeline/Duration

This study will take place from April 2016 to January 2017.

Chapter Two: Normative Framework for Collective Management Organisations, Freedom of Association and the Right to Property

Introduction

In this chapter, I will examine the meaning of collective management organisations, freedom of association, the right to property and how these interact.

Collective Management Organisations

Definition and History

It has been noted that the cost of identifying owners of copyright and negotiating licences with them often exceeds the value of the intended use of the copyrighted work.²⁴ To enable licensing, something needed to be done to lower the costs of transaction to below the value of the intended use of the work.²⁵ The historical response to this problem has been the collective management organisation (CMO), also known as a collecting society.²⁶ Collective management of rights comes about where individual exercise would either be too costly or impossible, and in other cases where it is simply obligatory by law.²⁷ It allows authors, performers and publishers to concentrate on their creative activity and have another body taking care of delivering their remuneration to them wherever their works might be used all over the world.²⁸ This kind of assurance of remuneration encourages the development of the creative sector. The remuneration of producers and publishers is their return on their investment in creatives.²⁹ CMOs also assist in enforcement of rights through the courts.³⁰ They can bring actions in their own name for infringement of copyright and related rights.³¹

CMOs work by collecting vast libraries of a specific type of copyrighted work, offering blanket licences of certain rights to these works and then distributing the licence fees among the respective copyright owners who belong to the collective.³² These organisations also assist in

²⁴ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 275

²⁵ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 275

²⁶ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 275

²⁷ Lewinski S, *'International copyright law and policy'*, Oxford University Press, Oxford, 2008, 61

²⁸ World Intellectual Property Organisation, *Educational material on collective management of copyright and related rights*, August 31 2012, 19

²⁹ World Intellectual Property Organisation, *Educational material on collective management of copyright and related rights*, August 31 2012, 19

³⁰ World Intellectual Property Organisation, *Educational material on collective management of copyright and related rights*, August 31 2012, 20

³¹ World Intellectual Property Organisation, *Educational material on collective management of copyright and related rights*, August 31 2012, 20

³² Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 275

the handling of orphan works.³³ Orphan works are works which are still subject to copyright protection but whose owners cannot be reasonably traced.³⁴

Dealing in copyrighted works has been further complicated by the internet, with the “explosion” of individualised uses of works subject to copyright.³⁵ Put differently, use of copyrighted works has been even further decentralised by it, making the need for CMOs seem even more necessary.³⁶ However, the internet has also showed great potential in terms of possibilities for individual management of copyrighted works through the pay-per-use music and video distribution services available on it.³⁷ Other opportunities for individualised management of rights have also arisen due to the internet.³⁸

CMOs go back to the eighteenth century in France, with the collecting agency for authors which eventually became the Société des Auteurs et Compositeurs Dramatiques (SACD).³⁹ Half a century later, France also gave rise to the Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) whose work was to license, collect and distribute revenue under the right of musical performance.⁴⁰ SACEM is still one of the most formidable forces worldwide when it comes to collective administration of the rights of authors.⁴¹ Musical performing rights societies are, overall, the highest in number and perhaps most powerful in terms of the formation of copyright policy.⁴² The rights licensed by CMOs include performance, broadcasting, photocopying, droit de suite, graphic reproduction, cable retransmission, public lending, mechanical reproduction, digital archiving rights, making available online and online streaming rights.⁴³ For instance, in Finland, Kopiosto handles photocopying rights for literary works,⁴⁴ while in Kenya KOPIKEN does the same job.⁴⁵ Other CMOs handle several of these rights, like Belgium’s SABAM—the Belgian Association of Authors, Composers and Publishers.⁴⁶ Even if SABAM is mainly associated with music, it also protects photographers, painters, filmmakers, scriptwriters, graphic artists, journalists, cartoonists, novelists, poets,

³³ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 275

³⁴ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 275

³⁵ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 275

³⁶ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 276

³⁷ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 275

³⁸ Helfer L, ‘Collective management of copyrights and human rights: an uneasy alliance revisited’, 95

³⁹ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 276

⁴⁰ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 276

⁴¹ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 276

⁴² Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 276

⁴³ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 276

⁴⁴ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 276

⁴⁵ ‘The Reproduction Rights Society of Kenya’, Kopiken, <http://www.kopiken.org/>, on 4 January 2017

⁴⁶ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 276

dialogue writers, sculptors, choreographers, playwrights, translators, subtitle authors, illustrators, among others.⁴⁷

Internationally, there are four umbrella organisations for CMOs. The largest of these is the Confédération Internationale des Sociétés d'Auteurs et Compositeurs (CISAC), which brings together 239 collective management organisations, drawn from 123 countries, covering a wide array of copyrighted works.⁴⁸ Membership of CISAC presupposes compliance with the universally accepted rules of collective management as well as the Professional Rules and Binding Resolutions of the Confederation.⁴⁹ Kenya's MCSK is a part of CISAC.⁵⁰ Some other African countries with societies that are part of CISAC include South Africa (through DALRO, for literature), Morocco (through BMDA, for music), Cameroon (through SOCILADRA, for drama), among many others.⁵¹ The vast majority of African societies that are part of CISAC are societies that are catering to musical works, with only SOCILADRA and DALRO as the exceptions, as at January 2015.⁵²

Another umbrella society is the Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique (BIEM), which works with societies administering recording and mechanical production rights.⁵³ Kenya's MCSK is a non-voting society in BIEM.⁵⁴

The International Federation of Phonogram and Videogram Producers (IFPI) acts as the principal trade association of phonogram and videogram producers.⁵⁵ It assists in the coordination of CMOs' activities in neighbouring rights in phonograms and videograms.⁵⁶ It has 1300 members in 60 countries.⁵⁷ AI Records in Kenya is a member of IFPI, though it is not a CMO.⁵⁸

⁴⁷ 'Who are we?' SABAM, <http://www.sabam.be/en/sabam/who-are-we>, on 4 January 2017

⁴⁸ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 277, see also (for updated statistics) 'Our members', CISAC, <http://www.cisac.org/Our-Members>, accessed on 4 January 2017

⁴⁹ 'Our members', CISAC, <http://www.cisac.org/Our-Members>, accessed on 4 January 2017

⁵⁰ 'Our members', CISAC, <http://www.cisac.org/Our-Members>, accessed on 4 January 2017

⁵¹ 'Our members', CISAC, <http://www.cisac.org/Our-Members>, accessed on 4 January 2017

⁵² 'Our members', CISAC, <http://www.cisac.org/Our-Members>, accessed on 4 January 2017

⁵³ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 277

⁵⁴ 'Societies: MCSK (non-voting society)', BIEM,

http://www.biem.org/index.php?option=com_licensing&view=societes&Itemid=539&lang=en, accessed on 4 January 2017

⁵⁵ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 277

⁵⁶ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 277

⁵⁷ 'Members', IFPI, <http://www.ifpi.org/members.php>, on 4 January 2017

⁵⁸ 'Our members', IFPI, <http://ifpi.org/our-members.php>, on 4 January 2017

The International Federation of Reproduction Rights Organisations (IFRRO) deals with coordination of national collective management organisations that handle reprographic rights.⁵⁹ Kenya's KOPIKEN is a member of IFRRO.⁶⁰

CMOs need to have licences, partial assignments or powers of attorney from authors and rights holders.⁶¹ CMOs, for their effectiveness, need to represent either all or a large number of rights holders in a particular category, which could explain why in some countries the law takes care of ensuring CMOs have these numbers.⁶² An example of such a law is a law providing for compulsory collective rights management.⁶³ In numerous other countries, CMOs operate as either legal or de facto monopolies.⁶⁴

CMOs interact with each other internationally through reciprocal representation agreements, forming their own kind of private law of copyright.⁶⁵ Through reciprocal representation agreements, CMOs undertake to represent in their respective countries the works in the library of the reciprocating CMO.⁶⁶ This provides for even more efficient management of rights in places where rights holders might have faced excessively high transaction costs in administering their own rights.

International Law

National laws need to be in line with commonly accepted international and regional norms. With regard to copyright and related rights, the main treaties of interest are the Rome Convention, the Berne Convention, the TRIPS Agreement, the WPPT, the WIPO Copyright Treaty, and the Beijing Treaty on Audiovisual Performances (not yet in force). However, there are no provisions directly governing collective management in any of these; the enjoyment and exercise of copyright and related rights are in the purview of national law.⁶⁷

One of the basic principles of collective management is national treatment, and so—with regard to convention provisions—foreign rights holders are to be treated in the same way as local

⁵⁹ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 277

⁶⁰ 'RROs', IFRRO, <https://www.ifrro.org/prod/drupal/rro> on 4 January 2017

⁶¹ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 277

⁶² Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 277

⁶³ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 277

⁶⁴ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 277

⁶⁵ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 277

⁶⁶ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 278

⁶⁷ World Intellectual Property Organisation, *Educational material on collective management of copyright and related rights*, August 31 2012, 54

rights holders.⁶⁸ This would show the advantage such organisations would have to individual management; a lot of negotiation costs are already catered to.

There are various operational systems of collective management.⁶⁹ These include voluntary collective management, collective management with legislative support (which includes the extended collective licence, legal presumption and obligatory collective management) and non-voluntary collective management (which includes non-voluntary licences and private copying remuneration).⁷⁰ When it comes to exclusive rights, licensing is usually on voluntary mandates, whereas when it comes to the mere right to remuneration (such as in Section 30A), considered “the essence of a non-voluntary licence”, the consent of the rights holders is not needed but they receive equitable remuneration.⁷¹ The choice of operational system depends on the realities of the country in question.⁷²

When it comes to compulsory collective management, which would be considered compulsory licensing of copyright and related rights, it would be useful to look at the exception provided by Article 9(2) of the Berne Convention to determine whether it would be allowable—the test that Victor Nzomo suggested be used. It provides that, even though authors of literary and artistic works protected by the Convention have the exclusive right to authorize the reproduction of the works, it shall be a matter of legislation in the countries of the Union (those countries in which the Berne Convention applies) to permit the reproduction of the works in special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unnecessarily prejudice the legitimate interests of the author. If this test is passed, compulsory collective management of rights might be considered allowable. However, the use of this test has, in some quarters, been rejected.⁷³

National Law

Turning the focus on Kenya, the Kenya Copyright Board (KECOBO) is established at Section 3 of the Copyright Act of Kenya (2001). The functions of this board are listed at Section 5 of

⁶⁸ World Intellectual Property Organisation, *Educational material on collective management of copyright and related rights*, August 31 2012, 55

⁶⁹ World Intellectual Property Organisation, *Educational material on collective management of copyright and related rights*, August 31 2012, 54

⁷⁰ World Intellectual Property Organisation, *Educational material on collective management of copyright and related rights*, August 31 2012, 58

⁷¹ World Intellectual Property Organisation, *Educational material on collective management of copyright and related rights*, August 31 2012, 58

⁷² World Intellectual Property Organisation, *Educational material on collective management of copyright and related rights*, August 31 2012, 58

⁷³ Lewinski S, ‘Mandatory Collective Administration of Exclusive Rights – A Case Study on its Compatibility with International Law’ UNESCO E-Copyright Bulletin (January-March 2004)

the same Act. Among these functions, KECOBO is to license and supervise the activities of the CMOs.

Part VII of the Copyright Act deals more thoroughly with CMOs. Copyright collecting societies (the CMOs) require a certificate of registration under/according to which the CMO will commence or carry on its business as a copyright collecting society.⁷⁴ This certificate is valid for a year from the date of issue.⁷⁵ The principal objectives of a CMO should be the collection and distribution of royalties and its accounts should be regularly audited by independent external auditors.⁷⁶ As per our regime, there cannot be two or more CMOs with respect to the same class of rights and category of works if the one that came up first is licensed and works to the satisfaction of its members.⁷⁷ KECOBO can de-register a CMO if it is satisfied that it is not functioning adequately, among other reasons.⁷⁸

Section 30 of the Copyright Act provides for the rights of performers. It provides that a performer shall have the exclusive right to broadcast his performance except in the case that the broadcast is made from a fixation of the performance authorised by the author. The performer also has the exclusive right to communicate his performance to the public except where the communication is made from a fixation of the performance authorised by the author or is made from a broadcast of the performance that has also been authorised by the author. Further, the performer is also entitled to the exclusive right to make a fixation of a previously unfixed performance, among several other rights. Section 30A lays out the interaction between CMOs and performers' rights.⁷⁹

⁷⁴ Section 46(1), *Copyright Act* (Act No. 12 of 2001)

⁷⁵ Section 46(3), *Copyright Act* (Act No. 12 of 2001)

⁷⁶ Section 46(4), *Copyright Act* (Act No. 12 of 2001)

⁷⁷ Section 46(5), *Copyright Act* (Act No. 12 of 2001)

⁷⁸ Section 46(9), *Copyright Act* (Act No. 12 of 2001)

⁷⁹ Section 30A: (1) If a sound recording is published for commercial purposes or a reproduction of such recording is used directly for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer and the producer of the sound recording shall be paid by the user through the respective collective management organization, and the remuneration shall be shared equally between the producer of the sound recording and the performer. (2) If a fixation of a performance is published for commercial purposes or a reproduction of a fixation of a performance is used for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer shall be paid by the user to the collective management organization. (3) The right of equitable remuneration under this section shall subsist from the date of publication of the sound recording or fixed performance until the end of the fiftieth calendar year following the year of publication, provided the sound recording or fixed performance is still protected under section 28 and 30. (4) For the purposes of this section, sound recordings and fixations of performances that have been made available by wire or wireless means in such a way that members of the public may access them from a place and a time individually chosen by them shall be considered as if they have been published for commercial purposes.

As per the Copyright Act, only one collecting society can exist in respect of the same class of rights and category of works.⁸⁰The Performers Rights Society of Kenya (PRISK) is the CMO for performers in Kenya.⁸¹ It represents performers in musical and dramatic works.⁸² The Act does not define who a performer is. PRISK provides a kind of definition of performers on its website, and this includes singers, instrumentalists and actors.⁸³ The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention) does define the performer. Performers, per the Rome Convention, are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.⁸⁴ The WPPT only slightly expands this definition to include performing expressions of folklore.⁸⁵ The Beijing Treaty on Audiovisual performances also reiterates the same position.⁸⁶

Other CMOs in the country include the Music Copyright Society of Kenya (MCSK), which handles rights of authors, composers, arrangers and publishers of musical works,⁸⁷ Kenya Association of Music Producers (KAMP), which handles rights of producers of sound recordings⁸⁸ and Kopiken, which handles rights of authors (this through their respective organisations, for instance Kenya Non-Fiction Authors Association, Writers Association of Kenya, Kenya Oral Literature Association and Kenya Union of Journalists), artists and visual creators through the Kenya Association of Photographers, Illustrators and Designers, song lyricists and writers of sheet music, publishers through the Kenya Publishers Association, and international rights holders.⁸⁹

Questions around CMOs usually involve competition issues,⁹⁰ and now more frequent in our country, human rights issues.

⁸⁰ Section 46, *Copyright Act* (Act No. 12 of 2001)

⁸¹ <http://prisk.or.ke/corporate/about-prisk/> on 2 September 2016

⁸² <http://prisk.or.ke/corporate/about-prisk/> on 2 September 2016

⁸³ <http://www.prisk.or.ke/faqs/faqs-members/> on 2 September 2016

⁸⁴ Article 3, *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (26 October 1961) 496 UNTS 43

⁸⁵ Article 2, *WIPO Performances and Phonograms Treaty* (20 December 1996) Miscellaneous Series No. 8 (1997) Cm 3728

⁸⁶ Article 2, *Beijing Treaty on Audiovisual Performances* (24 June 2012) Miscellaneous Series No. 4 (2013) Cm 8699

⁸⁷ 'About MCSK', Music Copyright Society of Kenya, <http://www.mcsk.or.ke/index.php/about>, on 5 January 2017

⁸⁸ 'Who we are', Kamp, <http://www.kamp.or.ke/who-we-are/>, on 5 January 2017

⁸⁹ 'About Kopiken', Kopiken, <http://www.kopiken.org/about/index.html> on 5 January 2017

⁹⁰ Lewinski S, 'Mandatory collective administration of exclusive rights – a case study on its compatibility with international law' UNESCO E-Copyright Bulletin (January-March 2004)

Right to Property

Article 17 of the Universal Declaration of Human Rights (UDHR) provides that everyone has the right to own property alone as well as in association with others and no one shall be arbitrarily deprived of his/her property. Kenya ratified this declaration,⁹¹ and even if it is not binding as a declaration, it is in some quarters considered customary international law.⁹² Article 14 of the African Charter on Human and Peoples' rights provides that the right to property shall be guaranteed and may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws. Kenya has signed and ratified the African Charter on Human and Peoples' Rights.⁹³ By virtue of Article 2(6) of our Constitution, any treaty or convention that we ratify as a country shall form part of our law.

The right to property is enshrined in Article 40 of the constitution of Kenya.⁹⁴ Article 260 defines what property includes.⁹⁵

In *Hellen Wachuka Njoroge v Attorney General and Nairobi City County*,⁹⁶ the judge noted that the purpose of Article 40 is to protect private property rights, including the rights to acquire, use and dispose of property. When considering if one has been dispossessed of their property, the judge held that it is important for the claimant to first prove that the property is indeed 'property' per Article 40. Thereafter, it needs to be shown that there has been a deprivation of

⁹¹ 'Treaties', Kenya Law, <http://kenyalaw.org/treaties/treaties/164/Universal-Declaration-of-Human-Rights>, on 13 January 2017

⁹² Max Planck Encyclopaedia of Public International Law, see also ICJ's Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)

⁹³ 'Ratification table: African Charter on Human and Peoples' Rights', African Commission on Human and Peoples' Rights, <http://www.achpr.org/instruments/achpr/ratification/>, on 13 January 2017

⁹⁴ Article 40: (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property— (a) of any description; and (b) in any part of Kenya (2) Parliament shall not enact a law that permits the State or any person—(a) to arbitrarily deprive a person of property of any description or of any interest in, or any right over any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4). (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation— (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that— (i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law. (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land. (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya. (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

⁹⁵ Article 260 provides that property includes: ...any vested or contingent right to, or interest in or arising from— (a) land, or permanent fixtures on, or improvements to, land; (b) goods or personal property; (c) intellectual property; or (d) money, choses in action or negotiable instruments;

⁹⁶ [2016] eKLR

property. If a deprivation is shown, then it should be shown that the deprivation was justified and undertaken in accordance with the law with specific regard to article 40, which concerns due process. If all was in accordance with the law, then it must be considered whether the compensation requirement was met. The compensation should be found to be just, equitable and prompt.

Freedom of Association

Article 20 of the UDHR provides that everyone has the right to freedom of peaceful assembly and association and that no one may be compelled to join an association. This is reiterated in Article 22 of the International Covenant on Civil and Political Rights (ICCPR), with the addition of the fact that no restrictions may be placed on the exercise of the right except those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security and public safety, public order, protection of public health or morals, or the protection of the rights and freedoms of others. Kenya has ratified the ICCPR, and so it forms part of our law.⁹⁷ The African Charter on Human and Peoples' Rights provides, at Article 10, that every individual shall have the right to free association provided that he abides by the law. Furthermore, subject to the obligation of solidarity, no one may be compelled to join an association.

The freedom of association is enshrined in Article 36 of the constitution.⁹⁸

The freedom of association, like the right to property is limitable. This is in the constitution at Article 24 and has been reiterated in cases such as *Satinderjit Singh Matharu v Armajit Singh Gahir & 5 others*.⁹⁹

⁹⁷ Orago N, 'The 2010 Kenyan constitution and the hierarchical place of international law in the Kenyan system: a comparative perspective' 13 *African Human Rights Law Journal*, 2013, 420, see also *David Ndungo Maina v Zipporah Wambui Mathara*, Bankruptcy Cause 19 of 2010, *Beatrice Wanjiku & Another v the Attorney General & Another*, High Court of Kenya at Nairobi, Petition 190 of 2011

⁹⁸ Article 36 provides: (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. (2) A person shall not be compelled to join an association of any kind. (3) Any legislation that requires registration of an association of any kind shall provide that— (a) registration may not be withheld or withdrawn unreasonably; and (b) there shall be a right to have a fair hearing before a registration is cancelled.

⁹⁹ [2016] eKLR

Allowable Limitations on Rights

Under Article 24 of the Constitution, we find the allowable limitations on human rights, which apply to both the freedom of association and the right to property.¹⁰⁰ These should be kept in mind when considering the nexus between the rights and the functioning of collective management organisations.

The Nexus

It is not too often that the connection between human rights and intellectual property interests is considered.¹⁰¹ When it comes to CMOs, whether or not rights holders should be compelled to join CMOs (from the angle of human rights) is no easy question.¹⁰² On one hand, mandatory membership goes a great way in guaranteeing the economic efficiencies CMOs are designed for.¹⁰³ These economic efficiencies include the issuance of blanket licences, royalty distribution, reduction of negotiation costs and enforcement actions, which could be argued to actually be an enhancement of the right to property.¹⁰⁴ On the other hand, mandatory membership bears the danger, in its strictest strains, of its capacity to preclude the rights holders from issuing individual licences for their works (an affront to their right to property), compelling participation in an organisation whose policies they might not want to have to deal with, policies which they might not legally or practically be able to challenge (an affront to their freedom of association), and also might require association with rights holders with whom they may not be willing to be affiliated.¹⁰⁵

Similar fears have been curbed with regard to trade unions, where it has been held that requiring employees to join trade unions to gain or retain employment (the rights holders' remuneration, which they would have to get through the CMOs, could be taken to be their maintaining their employment in producing musical/artistic/literary works) is a violation of freedom of association, and an impermissible one at that.¹⁰⁶ In coming to such a conclusion, the employee's

¹⁰⁰ 24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose

¹⁰¹ Helfer L, 'Collective management of copyrights and human rights: an uneasy alliance revisited' in Gervais D (ed) *Collective management of copyright and related rights* 2nd ed, Kluwer Law International, 2010, 76

¹⁰² Helfer L, 'Collective management of copyrights and human rights: an uneasy alliance revisited', 93

¹⁰³ Helfer L, 'Collective management of copyrights and human rights: an uneasy alliance revisited', 93

¹⁰⁴ Helfer L, 'Collective management of copyrights and human rights: an uneasy alliance revisited', 93

¹⁰⁵ Helfer L, 'Collective management of copyrights and human rights: an uneasy alliance revisited', 93

¹⁰⁶ Helfer L, 'Collective management of copyrights and human rights: an uneasy alliance revisited', 93

freedom of association is weighed against the competing interests of the individual and community as a whole.¹⁰⁷

It has been argued that in developing countries, it might be necessary to have such a concentrated government effort as compulsory/mandatory collective rights administration to boost the creative industry as the industry is smaller, less experienced and much more lacking in income.¹⁰⁸ This limitation of the freedom of association may be necessary, even if for a time, in order to boost the creative economy in a more centralised, concentrated way.¹⁰⁹ Indeed the mandatory membership is a constraint on freedom of association, but can be justified with regard to the need to create a national copyright culture and distribute royalties effectively in a developing nation on a balance of interests.¹¹⁰

The more developed the creative sector is in a country, the harder it gets to justify mandatory collective administration of rights.¹¹¹ It is also argued that people might join anyway, even if it was not mandatory, due to the obvious benefits of collective management of rights, and compelling them to join is overreaching.¹¹²

The emergence of online licensing of copyrighted works (technological) as well as legal developments have brought the matter of compulsory collective administration vis-à-vis human rights to the fore.¹¹³ The ease with which digital communications can be carried out as well as the increasing labelling of works with rights management information have made it easier for rights holders to carry out individual negotiation and licensing of their works, enhancing their right to property and protecting their freedom of association.¹¹⁴

Conversely, this increased ability to justify not having mandatory membership may also work with the reverse effect vis-à-vis human rights—at least for some groups.¹¹⁵ The ‘bigger’ rights holders may opt to leave and ask for higher prices which the CMO may not be able to negotiate for them, and global media companies controlling large portfolios of work may withdraw the works from collective licensing, and the one likely to suffer in both these instances would be the ‘smaller’ rights holder.¹¹⁶ If the possibility of non-mandatory collective administration of

¹⁰⁷ Helfer L, ‘Collective management of copyrights and human rights: an uneasy alliance revisited’, 93

¹⁰⁸ Helfer L, ‘Collective management of copyrights and human rights: an uneasy alliance revisited’, 95

¹⁰⁹ Helfer L, ‘Collective management of copyrights and human rights: an uneasy alliance revisited’, 95

¹¹⁰ Helfer L, ‘Collective management of copyrights and human rights: an uneasy alliance revisited’, 95

¹¹¹ Helfer L, ‘Collective management of copyrights and human rights: an uneasy alliance revisited’, 95

¹¹² Helfer L, ‘Collective management of copyrights and human rights: an uneasy alliance revisited’, 95

¹¹³ Helfer L, ‘Collective management of copyrights and human rights: an uneasy alliance revisited’, 95-96

¹¹⁴ Helfer L, ‘Collective management of copyrights and human rights: an uneasy alliance revisited’, 96

¹¹⁵ Helfer L, ‘Collective management of copyrights and human rights: an uneasy alliance revisited’, 96

¹¹⁶ Helfer L, ‘Collective management of copyrights and human rights: an uneasy alliance revisited’, 96

rights poses a danger to the small rights holders' having an adequate standard of living, mandating collective administration may be necessary and focus placed instead on regulation of the CMOs and accountability measures.¹¹⁷

Creative Commons licensing has also worked to question whether compulsory collective administration is really necessary. Creative Commons licences allow users to exercise some or all of a rights holder's exclusive rights without remuneration, enabling more sharing of creative work.¹¹⁸ Not being able to license one's work through Creative Commons may be seen as another affront to one's right to property. A solution to this problem has been suggested to be non-exclusive assignment of work to the CMOs, enabling the rights holders to license their work elsewhere on other terms.¹¹⁹ A more nuanced answer would be having rights holders transfer their rights for *some* years to the CMO exclusively, or having them transfer their rights on a work-by-work basis, allowing them to freely negotiate on certain works.¹²⁰

Conclusion

The matter of mandatory collective administration of copyright and related rights vis-à-vis human rights can be looked at in two ways. On one hand, it can be seen to truly enhance access and enjoyment of the right to one's property through the reduction of transaction costs involved in accessing the benefits that accrue to one due to others' exploitation of their property. The monitoring capabilities that CMOs have enable one to curb infringement of one's intellectual property. It could, on the other hand, be an undesirable limit to one's right to property through limiting what one can do with their creative works in terms of licensing and individual contracting. When it comes to one's freedom of association things get even murkier. What is necessary, in my opinion, is for jurisdictions to weigh the costs versus benefits of a mandatory collective copyright and related rights administration system, the state of industrialisation of the country and the suitability of mandatory collective administration, examine what can and cannot be done within this framework of mandatory administration, and the more restrictive it would be on the right to property and freedom of association, the more likely it is to be unconstitutional. The limits to constitutional rights and freedoms should only be to the extent indispensable for the effectiveness of CMOs' acting as tools for enhancement of enjoyment of intellectual property rights. In an ironic sense, you can only limit the right to property to the extent that it enhances the same right. Developing countries can justify these limitations to a

¹¹⁷ Helfer L, 'Collective management of copyrights and human rights: an uneasy alliance revisited', 96

¹¹⁸ Helfer L, 'Collective management of copyrights and human rights: an uneasy alliance revisited', 96

¹¹⁹ Helfer L, 'Collective management of copyrights and human rights: an uneasy alliance revisited', 96

¹²⁰ Helfer L, 'Collective management of copyrights and human rights: an uneasy alliance revisited', 96

greater extent, but even so, these justifications may only be along the lines of creation of national copyright culture and ensuring royalty distribution. Proper regulation and accountability measures must accompany this.

Chapter Three: The Section 30A Judgments

Introduction

Section 30A is an amendment to the Copyright Act that introduces compulsory collective management of performers' rights. Considering the human rights challenges that come with compulsory collective management of copyright and related rights, it was unsurprising that the section was challenged in court as unconstitutional to the extent that it would seem to violate freedom of association and the right to property.

I will examine two judgments in this chapter. One of these was delivered by Justice Mumbi Ngugi, another by Justice S.J. Chitembwe. I will attempt to analyse what they mean for Section 30A going forward.

Xpedia Management Limited & 4 others v AG & 4 others¹²¹

Facts

Xpedia Management Limited and Liberty Africa Technologies Limited were companies engaged in the promotion and distribution of musical and artistic works through digital platforms. They were the first two petitioners. The other three are creators and performers of musical works. The first two petitioners entered into contracts with mobile phone service providers to provide musical works to the public in the form of downloadable content, and entered separate contracts with the creators and performers of musical works for use of their works. They would therefore pay the creators and performers of the musical works their part of the proceeds from the mobile phone service providers' use of their works.

However, with the introduction of Section 30A into the Copyright Act, CMOs began to collect the money from the mobile phone service providers on behalf of the rights-holders of the musical works. The petitioners argued that the section took away their rights and those of other related rights' holders to collect payments from the users of their works. They averred that CMOs represent their members and therefore would collect remuneration due to non-members but not remit the remuneration to the non-members. This would, they said, compel non-members of CMOs to become members in order to get their money, which is an infringement of their Article 36 freedom of association. They also pointed out that CMOs retain a certain proportion of the funds collected on behalf of copyright holders regardless of what the copyright holder may want. This would create confusion, they argued, as Section 30A says that the single remuneration should be shared equally between the performer and producer. They

¹²¹ [2016] eKLR

said that KECOBO, having not given direction as to the collection and distribution of the payment violates their right under Article 47 of the constitution of Kenya to fair administrative action, resulting in overpayments and no clear mode of sharing and distribution. They point out that rights owners need to join each CMO to get remuneration under the particular class of rights which they seek to get remuneration for, which is quite taxing. They also highlight the fact that they did not assign all their rights to MCSK, nor did they cede their rights to contract with other parties. The terms that the 3rd-5th petitioners agreed with the 1st and 2nd petitioners allow them some control over their works, and they did not wish to have CMOs interfere.

KECOBO, the second respondent, argued that no person or association could carry out the business of a copyright collecting society unless certified under Section 46 of the Copyright Act, and only KECOBO can issue these certificates. It reiterated that only KAMP, PRISK and MCSK were so certified. They also argued that they have been guided by Articles 11 and 40 in certifying these CMOs as their major aim is to maximize the bargaining power of rights holders.

PRISK argued that the agreements between the petitioners providing that the first two petitioners would collect royalties on behalf of the rights holders was illegal with regard to Section 46 of the Copyright Act as this was already within the purview of the CMOs. Being illegal agreements, no action could be founded on them nor could the court give effect to such agreements.

The respondents also argued that the mandate to collect royalties was not limited to just their members; they collect for all rights holders. There is therefore no requirement to become a member of a CMO to receive one's royalties. They argue that collection through CMOs increases bargaining power as opposed to getting into individual engagements. They noted the situation prior to 2012 (when Sec 30A came in): producers could not get royalties through any provision of the law and performers' rights were not recognized at all. Having each artist—considering the number that doubled as producers or performers—negotiate with each user was argued to be untenable.

According to Safaricom, managing rights collectively is the only feasible way.

Issue

Most pertinent to this paper, the petitioners argued that Section 30A was unconstitutional as it infringes Articles 36 and 40 of the Constitution. They also argued that Section 30A does not permit CMOs to collect royalties from users of copyright works. Another issue was whether

the 3rd, 4th and 5th respondents were exceeding their Section 30A mandate by collecting royalties from users.

Decision

The judge held that she found nothing in Section 30A compelling copyright holders to join CMOs (failure to which one would not be able to get royalties for their works). She insisted on the usefulness of Section 30A as she highlighted the impracticalness of having to go to each individual user to collect royalties. She therefore found that the Article 36 right to freedom of association was not derogated from by Section 30A.

As regards whether there was a violation of Article 40, the judge took into consideration the virtual impossibility of individual management of rights, and decided that there was no violation of Article 40 of the constitution.

The judge also held that no violation of Article 47 of the constitution was made out. The judge noted, however, that KECOBO is to ensure accountability to both members and non-members for whom they collect royalties, and remittance of these royalties.

Overall, no violation of constitutional rights was found.

At the time of writing, no appeal has been lodged.

Mercy Munene Kingoo and Lydia Nyiva Kingai v Safaricom Ltd & AG

Facts

The facts of this case are similar to those in the Xpedia Case. The petitioners were composers, producers and performing artists of musical work and they, through premium rate service providers (PRSPs), availed their work on the Skiza Tunes platform for download. Safaricom had been paying royalties for their work through the PRSPs. After the introduction of Section 30A in 2012, Safaricom began to remit royalties (in 2015) to CMOs which had not been contracted by the petitioners. The petitioners therefore alleged that the agreement between Safaricom and CMOs infringed on their and other artists' rights, and that Section 30A was irregularly and unlawfully enacted as there was no public participation (amounting to its unconstitutionality). The petitioners were not members of CMOs and did not intend to be. The petitioners also asserted that the CMOs, not being licensed under the Kenya Information Communication Act, to handle digital content such as that on the Skiza Tunes Platform, were ill equipped to deal with the situation. They alleged that Safaricom's entering into an agreement with CMOs forced them (the petitioners) to be part of CMOs, contrary to their Article 36

freedom. It was noted by the interested parties that the distinction between this case and the case above was that as opposed to looking at just the constitutionality of the effects of Section 30A, this case was examining the legality of the procedure through which Section 30A was enacted. They note that the process was rushed, with the introduction of numerous amendments (Section 30A being among them) on the 19th of December, 2012, and the assent to these amendments being given on the 31st of December, 2012. The issue of public participation was also said not to have been dealt with in the previous case.

The respondents argued that the petition was res judicata as the matter was already discussed in the Xpedia Case.

Decision

The judge in the instant case held that res judicata could not be applied generally in relation to interpretation of the Constitution or a statute. He held that this particular petition was not res judicata, and it could be raised on the grounds of lack of public participation and violation of constitutional rights.

The judge went to hold that there was indeed no public participation in the enactment of Section 30A. He agreed with Justice Mumbi Ngugi that there was no requirement for artists to become members of CMOs in order to receive their remuneration. He argued that the effect of this was to mean that CMOs can only pay those registered with them, and that section 30A does not prohibit one from being paid through means other than the CMOs; that Section 30A does not in fact bring about compulsory collective management of related rights into our law.

He rejected the argument that it was difficult to have individual management of rights, and his justification for this was the fact that Safaricom manages to individually handle its twenty million subscribers, as well as distribute dividends to its shareholders through their mobile phones.

The enforcement, rather than the wording, of Section 30A, seemed to be the problem for Justice Chitembwe. The first problem that Justice Chitembwe identifies is how the section was being enforced retrospectively, affecting agreements concluded before its enactment. The enforcement of it is such as to seem that royalties can only be accessed through CMOs, which should not be the case according to him. The right for one to choose how to access their royalties is being infringed. He also found the right of the petitioners to associate with PRSPs was being infringed. The judge compared this compulsory collective management to forcing employees to use a particular bank—the bank of the employer’s liking—to access their salary.

Limiting Kenyans to 3 CMOs, (supposing he was only referring to the 3 CMOs dealing directly with music) the judge held, is unconstitutional.

To the extent that Section 30A did not have the requisite public participation prior to its enactment and that it (perhaps unduly) limited freedom of association, the judge declared it unconstitutional.

Analysis

It was interesting that even though Justice Chitembwe was agreeing with Justice Ngugi on the fact that Section 30A does not require membership of the performers and producers, they were not coming from the same place. Justice Chitembwe meant that it was not mandatory to be a member of a CMO to get one's remuneration as one could access other avenues of remuneration, and so get their remuneration from those other avenues. He continued to argue, in fact, that if one was forced to only get their remuneration from a CMO (whether or not one needed to be a member of the CMO to do so), this would be unconstitutional. Considering the allowable limitations on rights provided in Article 24 of the Constitution,¹²² it would have been useful for him to illustrate how exactly this would be unconstitutional. Justice Ngugi was of the thinking that indeed CMOs were the only way to get one's remuneration—that there were no other avenues, but there was no danger to one's freedom of association as one did not need to become a member of the CMO to get their remuneration—one could get their remuneration from the CMO as a non-member—a conclusion I analyse further in the next chapter. She also found that Section 30A is no danger to one's right to property, as after all she found individual management of rights impractical.

Both these judges had some significant flaws in their arguments. Justice Ngugi seemed to simplify the problem too much. It was not only a question of whether or not the performers, in the end, get their money (just from a different source)—the question of *why* this particular source of payment and its suitability for the task should have been more deeply explored. The amendment was a major one, and even if she would end up coming to the same conclusion, it would have proved very useful if she provided her rationale—in much more depth—for thinking the amendment acceptable. If she explored the suitability of compulsory collective

¹²² 24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose

management of copyright and related rights with regard to Kenya's creative economy's status, Kenya's general status of industrialisation and national copyright culture, her argument would have been more persuasive. If, for instance, she excused the section on the grounds of Kenya's being a developing country, and provided some guidance for the time period over and conditions under which such compulsory collective administration would be necessary, this might have been a stellar judgment.

Furthermore, the fact that Section 30A does not theoretically compel performers to be members of CMOs is not enough. PRISK, for instance, charges an administrative fee of 50% on royalty payments if claimed from non-members.¹²³ This is exorbitant enough to, in practice, force one to be a member of PRISK anyway. Section 30A could be considered a de facto violation of freedom of association. It is encouraging, though, that she called for measures to ensure accountability of these CMOs if rights are to be managed collectively.

Justice Chitembwe's decision was also problematic. The justification he used to support individual management of related rights is not the least problematic aspect of his judgment. That Safaricom can manage its 20 million subscribers individually is an insufficient analogy for the rationale of collective management of copyright and related rights. He, too, has fallen victim of oversimplifying the problem, albeit in a different direction.

He also seems to question whether Section 30A calls for compulsory collective administration of related rights, even if it certainly does. The wording of Section 30A does not leave room for doubt—the use of the word 'shall' underscores this quite decidedly. Nonetheless, PRISK can no longer compulsorily collect Section 30A royalties. However, they can continue with collection of royalties they were collecting beforehand.

Conclusion

The judgments, coming to different conclusions, both have their significant shortcomings. These will be necessary to address in order to properly assess whether compulsory collective administration of copyright and related rights is necessary in Kenya and the attendant repercussions to the conclusion we come to on the matter. They have left a lot to be desired in properly determining the status of Section 30A in our country. The shortcomings of these judgments—what they failed to address, will be the matter of analysis in my next chapter.

¹²³ Email from Kivisi D, Head of Member Services at PRISK on 06 July 2016

Chapter Four: Suitability of Compulsory Collective Management of Copyright and Related Rights in Kenya

Introduction

In this chapter, I will, in answering the weaknesses of the Section 30A judgments examined in the previous chapter, analyse Kenya's suitability or readiness for compulsory collective management of copyright and related rights. I will be looking at factors such as level of industrialisation, state of the creative economy and regulatory regime available.

Kenya's Level of Industrialisation/Development

Kenya is a developing country.¹²⁴ This might excuse certain measures that might be taken to centralise control of the growth of certain aspects of the economy, at least until a certain level of development is achieved.¹²⁵ That is, in order to build the national copyright culture, it might make sense to allow compulsory collective management of copyright and related rights, if only for a time. Often in developing countries, the funds (and even the participants) are simply not available to provide for a spontaneous development of the creative industry—coordinated governmental effort may be necessary to make things work.¹²⁶ It is a collective effort towards development in a certain direction, towards the point where we can *afford* to do this otherwise.

Kenya's Creative Economy

Copyright related industries contributed to about 5.4% of Kenya's GDP, and slightly over 3% of national employment as at 2012.¹²⁷ Our royalty collections contribute one of the highest percentages of GDP among ARIPO member states.¹²⁸ We also have the highest number of CMOs among ARIPO member states, at 4.¹²⁹ Kenya has been defined as the economic and creative economy hub of East Africa.¹³⁰ It makes sense that there would be a need to harness these emerging strengths and give them a solid boost from the start, and at least *for* the start. It makes sense to put all the odds in favour of this part of the economy's development through compelling collective management of rights. In looking at the state of Kenya's creative economy, we are looking at the limb of Article 24 that requires us to examine the importance of such a limitation on the rights to property and freedom of association.

¹²⁴ 'List of developing countries,' International Union of Geodesy and Geophysics General Assembly 2015, <http://www.iugg2015prague.com/list-of-developing-countries.htm> on 9 January 2017

¹²⁵ Helfer L, 'Collective management of copyrights and human rights: an uneasy alliance revisited', 95

¹²⁶ Helfer L, 'Collective management of copyrights and human rights: an uneasy alliance revisited', 95

¹²⁷ World Intellectual Property Organisation, 'Copyright + creativity = jobs + economic growth', 2012, 2-3

¹²⁸ ARIPO, *Survey on the status of collective management organisations in ARIPO member states*, 16

¹²⁹ ARIPO, *Survey on the status of collective management organisations in ARIPO member states*, 17

¹³⁰ The British Council, 'Scoping the creative economy in East Africa', 19

Compatibility with International Law

Our compulsory collective management provisions have been interpreted, by some lawyers including Ms Judy Chebet who was mentioned earlier, as the introduction into the Copyright Act of Article 15 of the WPPT.¹³¹ Article 15 of the WPPT provides for performers' and producers' right to a single equitable remuneration for direct or indirect use of phonograms commercially or for communication to the public or for broadcasting. It further provides that the contracting parties may establish in the national laws that this single equitable remuneration will be collected from the users by the performers/producers of the phonogram or by both. In the absence of an agreement between the performers/producers and the users, the article provides that national law may provide the terms according to which the single equitable remuneration should be shared.

Indeed, as Chebet pointed out, Article 15 of the WPPT did not envision the use of CMOs as middlemen. However, the wording of the article might leave room for the argument that as much as it might have been envisioning a particular direction, it did not exclude the direction that Kenya went. This direction (Section 30A) could have been excluded by stronger wording, such as "shall" instead of "may".

In considering Victor Nzomo's suggestion that Section 30A be passed through the 3-step test under Article 9(2) of the Berne Convention, I will take each of the three elements and examine them:

- a) **exceptional circumstances:** these could be taken to be the urgent need to develop the creative economy of the country
- b) **no conflict with the normal exploitation of the work:** it could be argued that compulsory licensing encourages exploitation of the work as the transaction costs that would complicate its exploitation both locally and internationally are significantly lowered
- c) **no unreasonable prejudice to the legitimate interests of the work:** compulsory licensing could in fact further respect for copyright and related rights protection, and so protection of the interests of the work that the rights holder intended

However, Lewinski argues that mandatory collective administration of exclusive rights (which could be extrapolated to related rights) does not constitute any exception or limitation within

¹³¹ Judy Chebet, 'Section 30A of the Copyright Act: What's That About?' (*Judy Chebet*, 26 February 2014) <https://judychebet.wordpress.com/2014/02/26/section-30a-of-the-copyright-act-whats-that-about/> on February 19, 2016

the meaning of the Berne Convention, TRIPS Agreement nor does it contravene the principle of minimum rights under the treaties.¹³²

Either way, I do not see international law proving an impediment to compulsory collective management of rights.

Regulatory Regime

For the proper working of CMOs, it is most desirable for there to be one society covering all persons holding the respective rights the society collects royalties for.¹³³ However, what we lose in freedom of association we must make up for in regulation. The regulatory regime for compulsory collective management of copyright and related rights should encompass the licences that CMOs offer to users, relationships between CMOs and their members and the relationships among members.¹³⁴

KECOBO is to be in charge of regulating CMOs, with the ability to deregister CMOs that are not functioning adequately as CMOs, not acting in accordance with their Memoranda and Articles of Association or in the best interests of their members, or do not comply or no longer comply with the provisions of the Act.¹³⁵ The “Competent Authority” referred to in Section 48 of the Copyright Act – the Copyright Tribunal that has been appointed by the Attorney General, is responsible for handling disputes between CMOs and KECOBO. It can handle disputes such as unreasonable refusal by KECOBO to grant a certificate of registration to a CMO, unreasonable refusals by CMOs to issue licences, etc.¹³⁶

It can be seen that our Copyright Act alludes to some of these areas that a regulatory framework should cater to. For instance, with regard to licences that CMOs offer to users, we have recourse in Article 48 in case a CMO unreasonably refuses to grant a licence. With regard to relationships between CMOs and their members, our Act provides that a CMO can be deregistered if it does not act in the best interests of its members and in fact that before a society is approved to act as a CMO by KECOBO, KECOBO should be satisfied that the rules and regulations of the entity are such as to ensure the interests of the members of the CMO are adequately protected.

¹³² Lewinski S, ‘Mandatory Collective Administration of Exclusive Rights – A Case Study on its Compatibility with International Law’ UNESCO E-Copyright Bulletin (January-March 2004)

¹³³ Goldstein P and Hugenholtz B, *International copyright: principles, law and practice*, 277

¹³⁴ Helfer L, ‘Collective management of copyrights and human rights: an uneasy alliance revisited’, 91

¹³⁵ Section 46, *Copyright Act* (No. 12 of 2001)

¹³⁶ Section 48, *Copyright Act* (No. 12 of 2001)

Nonetheless, it would be useful for a section such as 30A to provide more explicit guidance as to remuneration and how exactly royalties are to be decided on (for instance in the way that Article 15 of the WPPT suggested). I say more explicit because perhaps we have some guidance in the recourse provided if CMOs unreasonably deny licences (which could be due to disagreements as to royalty payments) but some rationale for coming to the amount of royalties/remuneration sought should be provided for if such power is going to be laid in the hands of CMOs. KECOBO's supervisory role could also do with more detail.¹³⁷ Matters such as what happens once a CMO is deregistered have not been adequately dealt with.¹³⁸ Such explicitness would provide something to check the performance of CMOs against.

If perhaps the Copyright Act could also be more explicit as to our country going the way of compulsory collective management of rights, this might help a great deal in regulation. What exactly compulsory collective management of rights means should be made clear. Certainly it means that royalties will be paid out by the CMOs, but does it mean that one needs to be a member of the CMO to obtain royalties? What about non-members who seek to obtain their royalties from the CMO—what level of administrative fees should they be subject to? How are rights holders to be identified? These questions should be easily answered within the body of the Act or through publication of guidelines.

It might also be wise to go in the way that a country like South Africa, with more or less similar circumstances to ours, has in creating a specific Act for the protection of performers—their Performers' Protection Act.¹³⁹ In doing so, we could incorporate provisions of the Beijing Treaty (not yet in force; Kenya has signed but not ratified) as concerns audiovisual

¹³⁷ Nzomo V, 'Music, money and middle men: changing dynamics between collecting societies, rights holders and the public', Centre for Intellectual Property and Information Technology Law, 22 January 2016 <http://blog.cipit.org/2016/01/22/music-money-and-middle-men-changing-dynamics-between-collecting-societies-rights-holders-and-the-public/> on 13 January 2017

¹³⁸ Nzomo V, 'Music, money and middle men: changing dynamics between collecting societies, rights holders and the public', Centre for Intellectual Property and Information Technology Law, 22 January 2016 <http://blog.cipit.org/2016/01/22/music-money-and-middle-men-changing-dynamics-between-collecting-societies-rights-holders-and-the-public/> on 13 January 2017

¹³⁹ Matu-Mureithi L, 'Listening to Skiza tunes millions: section 30A of the Copyright Act unconstitutional and role of collecting societies', Centre for Intellectual Property and Information Technology Law, 22 November 2016 <http://blog.cipit.org/2016/11/22/listening-to-the-skiza-tunes-millions-section-30a-of-the-copyright-act-unconstitutional-and-role-of-collecting-societies/> on 13 January 2017

performers.¹⁴⁰ The process towards this should involve stakeholders, to avoid the problems that Section 30A is facing.¹⁴¹

The development of a Pan-African plan for copyright and collective management, considering the similarity of circumstances of the countries, might be well in order, and an organisation such as ARIPO is well placed to undertake such a task.¹⁴²

When it comes to actual performance of the CMOs on the ground, we see that whatever flaws legislation may have are even further compounded by the general shortcomings and high-handedness of the CMOs. Complaints about CMOs in Kenya go back to as early as 1984, when there was uproar about unpaid licence fees.¹⁴³ Some of these CMOs face claims of misappropriation of funds, and have on occasion been declared illegal entities.¹⁴⁴ In fact, MCSK has been described as “the bane of musicians that has left artistes suffering as a few enrich themselves to a level that is truly despicable.”¹⁴⁵ Musicians such as the late Achieng’ Abura and Elani have stood strongly in opposition to the questionable practices at MCSK.¹⁴⁶ Elani, a popular music group, on complaining about the amount of royalties they received from MCSK (Sh. 31,000) in what they deemed a successful year for them, hastily received Sh. 300,000 from MCSK, which raised a lot of questions about what exactly was going on at MCSK.¹⁴⁷ MCSK explained that this was compensation for not communicating certain

¹⁴⁰ Matu-Mureithi L, ‘Enacting a Performers Protection Act in Kenya: possible solution in post-Beijing Treaty era’, Centre for Intellectual Property and Information Technology Law, 25 November 2016 <http://blog.cipit.org/2016/11/25/enacting-a-performers-protection-act-in-kenya-possible-solution-in-post-beijing-treaty-era/> on 13 January 2017

¹⁴¹ Matu-Mureithi L, ‘Enacting a Performers Protection Act in Kenya: possible solution in post-Beijing Treaty era’, Centre for Intellectual Property and Information Technology Law, 25 November 2016 <http://blog.cipit.org/2016/11/25/enacting-a-performers-protection-act-in-kenya-possible-solution-in-post-beijing-treaty-era/> on 13 January 2017

¹⁴² Nzomo V, ‘Is lack of transparency and accountability to blame for poor performance by African CMOs?’, Centre for Intellectual Property and Information Technology Law, 5 September 2016, <http://blog.cipit.org/2016/09/05/is-lack-of-transparency-and-accountability-to-blame-for-poor-performance-by-african-cmos/> on 13 January 2017

¹⁴³ Nzomo V, ‘Music, money and middle men: changing dynamics between collecting societies, rights holders and the public’, Centre for Intellectual Property and Information Technology Law, 22 January 2016 <http://blog.cipit.org/2016/01/22/music-money-and-middle-men-changing-dynamics-between-collecting-societies-rights-holders-and-the-public/> on 13 January 2017

¹⁴⁴ Mukei C, ‘Who is behind Music Copyright Society of Kenya (MCSK) woes?’ The Standard, 20 November 2015

¹⁴⁵ Mukei C, ‘Who is behind Music Copyright Society of Kenya (MCSK) woes?’ The Standard, 20 November 2015

¹⁴⁶ Mukei C, ‘Who is behind Music Copyright Society of Kenya (MCSK) woes?’ The Standard, 20 November 2015, see also Mukei C, ‘Which way forward for Elani, MCSK drama over unpaid royalties?’ The Standard, 2 February 2016

¹⁴⁷ Mukei C, ‘Which way forward for Elani, MCSK drama over unpaid royalties?’ The Standard, 2 February 2016

inaccuracies in log sheets.¹⁴⁸ Other artistes such as Ringtone have also stood up and rallied fellow artistes against MCSK for misappropriation of royalties.¹⁴⁹ There is clearly a problem in regulation here. Supervision of CMOs needs to get a lot more stringent if we are to achieve anything by compulsory collective management of rights.

Other challenges faced by CMOs include lack of awareness on laws on copyright on the users' part, their own unwillingness to pay royalties, piracy, and inadequate resources, both in terms of manpower and technology.¹⁵⁰

The Alternative

We look at the alternative in order to answer the limb of Article 24 that provides that, in limiting rights, it should be considered whether there are less restrictive means of achieving the same goal.¹⁵¹ The alternative to compulsory collective management of copyright and related rights would be individual management of rights. Contracting with regard to copyright and related rights involves a number of transaction costs.¹⁵² These transaction costs include initial search costs as the user and rights holder try to find each other, bargaining costs with regard to acceptable royalties, monitoring costs and costs of collection of royalties, as well as costs of ensuring the contract is respected by non-contracting users.¹⁵³ These costs are more often than not prohibitive, particularly in a developing countries such as ours, with 42% of people living below the poverty line.¹⁵⁴ People will just not contract at all in some situations, in the absence of CMOs, particularly if you consider that the users would usually have to have many similar contracts with other copyright holders whose works they would want to use (and copyright holders with many users).¹⁵⁵ This is significantly more costly than the blanket licence that

¹⁴⁸ Mukei C, 'Which way forward for Elani, MCSK drama over unpaid royalties?' The Standard, 2 February 2016

¹⁴⁹ Mukei C, 'Which way forward for Elani, MCSK drama over unpaid royalties?' The Standard, 2 February 2016

¹⁵⁰ ARIPO, *Survey on the status of collective management organisations in ARIPO member states*, 5

¹⁵¹ 24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose

¹⁵² World Intellectual Property Organisation, *Collective management as a business strategy for creators: an introduction to the economics of collective management of copyright and related rights*, 17

¹⁵³ World Intellectual Property Organisation, *Collective management as a business strategy for creators: an introduction to the economics of collective management of copyright and related rights*, 17, see also World Intellectual Property Organisation, *Educational material on collective management of copyright and related rights*, August 31 2012, 19

¹⁵⁴ 'Kenya at a glance' UNICEF, https://www.unicef.org/kenya/overview_4616.html on 10 January 2017

¹⁵⁵ World Intellectual Property Organisation, *Collective management as a business strategy for creators: an introduction to the economics of collective management of copyright and related rights*, 17

CMOs offer, with savings on both sides of the contract.¹⁵⁶ Using collective management, which provides the same services at a lower cost, is therefore more efficient than individual management. Such savings are invaluable to a growing economy.

On the flipside, collective management reduces the variety of licences one can negotiate, which might have been more advantageous to the parties and even provide further incentives for creativity.¹⁵⁷ Furthermore, with a blanket licence, users license both works that they want and do not want, whether they like it or not—they have no freedom to choose to exclude the works they do not want, which might be deemed inefficient.¹⁵⁸ However, if we were to have differential licences for different users, the users might actually be worse off because the prices paid would need to reflect the transaction costs involved.¹⁵⁹

Compulsory collective management of rights could be justified for our country as our realities do not allow a good number of us the ability to undertake individual rights management profitably. The only compromise that might seem feasible for the moment would be allowing those who may wish to do so to opt out of the compulsory collective management of rights, and even that might need to be done with caution due to the dangers it may pose to the smaller rights holders, discussed earlier. This would be in line with the Article 24 requirement to consider the nature and extent of the limitations we allow.

Conclusion

Kenya's status as a developing country allows us some room with regard to our ability to justify compulsory collective management of rights, and it is further justified with regard to our visible potential in the creative sector, potential we would be wise to harness in its nascent stages. Compulsory collective management of rights is certainly a limitation of the freedom of association and right to property (even if some arguments could be made for its enhancing the right to property) and must come with strong enough regulation to, in a sense, soften the blow, and to be in line with any arguments of promotion of the creative economy.

Moreover, for purposes of greater certainty, some amendments to the Copyright Act may be in order regarding regulation and even simply the state of affairs—that we are undertaking

¹⁵⁶ World Intellectual Property Organisation, *Collective management as a business strategy for creators: an introduction to the economics of collective management of copyright and related rights*, 17

¹⁵⁷ World Intellectual Property Organisation, *Collective management as a business strategy for creators: an introduction to the economics of collective management of copyright and related rights*, 18

¹⁵⁸ World Intellectual Property Organisation, *Collective management as a business strategy for creators: an introduction to the economics of collective management of copyright and related rights*, 18

¹⁵⁹ World Intellectual Property Organisation, *Collective management as a business strategy for creators: an introduction to the economics of collective management of copyright and related rights*, 18

compulsory collective management of rights and the terms under which we are doing so. These and perhaps other lines of argument are what would have been useful to see coming up in the Section 30A judgments. A Performers' Protection Act, as is the case in South Africa, might also prove very useful.

Chapter Five: Conclusion and Recommendations

Introduction

In this chapter, I will summarise the findings of my research. I will provide answers to my research questions and provide recommendations.

The Nexus between CMOs, the Right to Property and the Freedom of Association

Even if not oft examined, there is a connection between CMOs, freedom of association and the right to property, particularly when it comes to compulsory collective management of copyright and related rights. Both the licences issued by CMOs and the distribution framework for royalties directly involve one's right to property. With regard to licences, supervision of the CMOs on KECOBO's part has proved to be too much on the lax side and the high-handedness of CMOs in dealing with people's property has been widely reported. When it comes to compulsory collective management of copyright and related rights, there is an even bigger question as regards the right to property as this can be taken to at once be significantly limited and enhanced. The limitation comes about due to the lack of freedom one has to exploit their rights individually particularly through contracts, but the enhancement comes about due to significantly reduced transaction costs in obtaining remuneration; remuneration one might never had access to.

The freedom of association comes into play when we have compulsory collective management of rights. Rights holders are forced to associate with a particular CMO, and forced not to associate directly with users through other contracts for exploitation of their work. Compulsory collective management of rights necessitates a limitation of freedom of association, but it might be an allowable/justifiable limitation. It could be justified by the level of development of the country (with compulsory collective administration being more allowable in developing countries) which might call for centralised development of the copyright and related rights sector to adequately spur it on, considering certain attendant factors such as lack of funds and number of participants in the sector. Where compulsory collective administration is favoured, this trade off of rights for the sake of development must come with adequate regulatory measures. What was lost in freedom must be gained in regulatory control. The limitation on the rights should only be to the extent indispensable for the CMOs' acting as tools for enhancement of enjoyment of intellectual property rights. Where still in the line with the overall goal, options such as providing compulsory collective management of rights with the option for certain rights holders to opt out should be considered in order to limit the infringement of the relevant rights as much as possible.

The Constitutionality of Section 30A

The question of the constitutionality of Section 30A has been examined in the courts, with the judgments proving less than satisfactory. In one court it was declared constitutional, and most recently it was declared unconstitutional in another court and compulsory collection of royalties from CMOs put on hold. Compulsory collective management of rights can be considered an allowable limitation of our constitution with regard to the realities on the ground in Kenya. These realities include Kenya's status as a developing country (giving more allowance for the government's intervention in certain fields to hasten their development), the nascent stages in which our creative economy is at, and capacity for proper regulation.

However, the matter of public participation raised in *Mercy Munene Kingoo and Lydia Nyiva Kingai v Safaricom Ltd & AG*, cannot be ignored. Section 30A was no minor amendment, which is what usually falls under the purview of Miscellaneous Amendments Acts. Article 118 of the Constitution provides that Parliament shall facilitate public participation and involvement in the legislative business of Parliament, including its committees. Section 30A seems to have been rushed through Parliament. This is enough to declare it unconstitutional.

It is also unclear what is to happen now that distribution of royalties under Section 30A has been put on hold. Some guidance on this would be in order, perhaps from KECOBO.

Suitability of Compulsory Collective Management of Copyright and Related Rights

Compulsory collective management of copyright and related rights, justifiable in developing countries for spurring on of the creative economy and national copyright culture, is allowable in the country. There is need, however, for some changes as regards regulation. Stronger measures need to be taken particularly when it comes to KECOBO's supervisory role in checking CMOs' high-handedness. There is also a need to make clearer our distribution framework for royalties—how rights holders are to be identified and paid, and how much is to be paid. This could be done through creation or revision of guidelines. Guidance on the amount of equitable remuneration to be paid is also in order.

Recommendations

The most major recommendations to be made, and the work for those who proceed in this line of study, is the creation of guidelines and clarification of laws to fill in the gaps present and highlighted previously in the Copyright Act and its subsidiary legislation. We need guidelines on equitable remuneration and fixing of royalties. We also need guidelines as to how rights holders are to be discovered and remuneration distributed to them. The reins are also to be

tightened on the CMOs, which is under KECOBO's scope of duty, to ensure that these CMOs are not abusing their de jure monopoly position.

Enacting a Performers' Rights Act that clearly stipulates the status on licensing, collection and distribution of remuneration to performers would go a long way in promoting intellectual property rights in Kenya, which is a constitutional mandate.

Public education on copyright and related rights would also help us better both rights holders' and users' interaction with copyright and related rights machinery such as the CMOs and laws. Emphasis should also be placed on members' internal monitoring of CMOs and their holding the Boards of these CMOs to account.

Conclusion

The objectives of this research project were:

- i) to analyse the constitutionality of Section 30A and
- ii) to assess the suitability of compulsory collective management of rights in Kenya.

The research project has achieved its objectives and responded to the problems stated. With regard to the constitutionality of Section 30A, it was found that it is unconstitutional due to lack of public participation in its being enacted, but compelling a rights holder to join a CMO in order to collect equitable remuneration is justifiable in light of our circumstances in Kenya.

With regard to the suitability of compulsory collective management of rights in Kenya, it was found that for now, collective management as opposed to individual management of copyright and related rights is most favourable to the development of our creative economy, and adequate regulation must be put in place to cater for the trade-offs we have made in terms of freedom of association and right to property.

Coming to the hypothesis:

The implied requirement by the Copyright Act at Section 30A that rights-holders must be part of CMOs to get their remuneration infringes the freedom of association protected by Article 36 of the Constitution, and the right to one's property under Article 40, but is allowable

The research project has tested and proved the hypothesis to the extent of its being allowable. However, as it was enacted without public participation, the section is invalid.

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