



**Strathmore University**  
**Law School**

**THE EFFICIENCY OF COPYRIGHT LAW IN THE DIGITAL SPACE IN KENYA:  
A CASE OF THE MAKING AVAILABLE RIGHT IN PEER-TO-PEER FILE  
SHARING**

**OTIENO IRENE ANYANGO**

**071254**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS FOR AWARD OF DEGREE OF BACHELOR OF LAWS,  
STRATHMORE UNIVERSITY.**

**STRATHMORE LAW SCHOOL**

**JANUARY, 2016**

## Table of Contents

ACKNOWLEDGEMENT .....	ii
DECLARATION .....	iii
Abstract .....	iv
List of Abbreviations .....	v
List of Cases .....	vi
CHAPTER 1:INTRODUCTION .....	1
1.1 Background .....	1
1.2 Statement of the Problem .....	4
1.3 Research Objectives .....	5
1.4 Research Questions .....	5
1.5 Theoretical Framework .....	5
1.6 Literature Review .....	7
1.7 Research Design and Methodology .....	9
1.8 Limitations .....	9
1.9 Chapter Breakdown.....	9
CHAPTER 2:PEER TO PEER (P2P) TECHNOLOGY .....	10
CHAPTER 3:COPYRIGHT .....	15
CHAPTER 4:THE MAKING AVAILABLE RIGHT .....	20
CHAPTER 5:RECOMMENDATIONS.....	24
BIBLIOGRAPHY .....	29
Books .....	29
Book Chapters.....	29
Journal Articles .....	30
Working Papers.....	32

## **ACKNOWLEDGEMENT**

I am thankful to God for his graces that have enabled me to get this far.

I am thankful to my supervisor Mr Douglas Gichuki for his comments and direction throughout this dissertation. I also thank and appreciate my family for their support throughout my education and during this dissertation. I am especially thankful to my parents for the comments and feedback I received from them on my dissertation.

## DECLARATION

I declare that this work has not been submitted or approved for the award of a degree by this or any other university.

Signature: Otieno.

Date: 5<sup>th</sup> April 2016.

**Otieno Irene Anyango**

**Adm. No. 071254**

## University Supervisor:

This dissertation has been submitted with my approval

Signature: 

Date: 05/04/16

**Mr. Douglas Gichuki**

**Strathmore Law School**

## **Abstract**

Peer to Peer (P2P) file sharing is a phenomenon that has been brought about by the digital revolution. With its arrival came new techniques that could enable users to circumvent the copyright regime and commit acts that were seen to violate copyright holders' rights. P2P functions by granting other users on the P2P network access to files stored on one's hard drive thus enabling others to download from users who have granted them such access. This aspect of the P2P networks allowing users to make files available to other users has been argued to be a violation of the exclusive rights granted by copyright. This study argues that the absence of the making available right in Kenya makes Copyright's exclusive rights ineffective in preventing P2P file sharing of protected works. This paper therefore seeks to assess the scope of these exclusive rights by drawing reference from more advanced jurisdictions and to assess the making available right in a similar manner. It also seeks to make recommendations on how to deal with the possible copyright infringement opportunities via P2P networks which are made possible by the digital age. There is a connection between these two concepts that makes copyright laws able to deal with infringements occurring in the digital space. Consequently, the study recommends the introduction of this right into the Kenyan jurisdiction through an amendment of the Kenyan Copyright Act or through the ratification of the WIPO Copyright Treaty. This paper also briefly looks into the possible causes in delay of ratification of the WCT in an effort to bring to light issues that may need to be addressed before the ratification process is commenced. The paper goes further to suggest alternative solutions to the identified gaps such as the introduction of a non-commercial use levy on P2P file sharing as compensation to rights holders for any possible infringements that may occur on these networks.

## List of Abbreviations

BPI	British Phonographic Industry
CONTU	National Commission on New Technological Uses of Copyright Works
EU Directive	European Union Directive on the harmonisation of certain aspects of copyright and related rights in the information society
IP	Internet Protocol
KECOBO	Kenya Copyright Board
P2P	Peer to Peer
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty
WTO	World Trade Organisation
WIPO	World Intellectual Property Organisation

## **List of Cases**

### **KENYA**

*Bernsoft Interactive & 2 Ors. v. Communications Authority of Kenya & 9 Ors.*

### **U.S.A**

*A&M Records Inc. v. Napster Inc*

*Atlantic Recording Corp. v. Brennan*

*Atlantic Recording Corp. v. Howell*

*Capitol Records Inc. v. Thomas*

*Capitol Records LLC v. ReDigi, Inc.*

*Harper & Row Publishers Inc. v. Nation Enterprises*

*In re Napster*

*London-Sire Records Inc. v. Doe*

*Motown Record Co. LP v. DePietro*

*Sony BMG Music Entertainment v. Doe*

*Warner Brothers Records Inc. v. Payne*

### **U.K**

*Godfrey v Demon*

# CHAPTER 1

## INTRODUCTION

### 1.1 Background

Copyright<sup>1</sup> has its origins in the statute of Anne<sup>2</sup> enacted in England in 1710 to vest rights in book authors, which developed in response to the printing press. This right is recognised under international instruments<sup>3</sup> and contained in the Kenyan Copyright Act<sup>4</sup> which grants authors exclusive proprietary rights over the copyrighted work. The right gives authors the exclusive right to control distribution, communication to the public and reproduction of their copyright protected work. Over the years, the copyright regime has undergone changes to incorporate emerging trends, such that now it also covers photographs, motion pictures and sound recordings.<sup>5</sup> The evolution of methods of recording copyrightable materials can be attributed to the digital revolution which has also made possible widespread cultural participation and interaction on a larger scale. However, it creates a new conflict around the right to distribute material while creating opportunities for limiting and controlling cultural participation and interaction.<sup>6</sup>

Digital revolution refers to the change from content-specific distribution, provided by unique technologies, hardware, and methods to content independent distribution provided by a common infrastructure.<sup>7</sup> The essence of the technological revolution is the major development in digital communication (electronic exchange of information) and computing produced by dramatic technological advances coupled with market liberalisation and globalization to result in the digital revolution.<sup>8</sup> The digital revolution has seen the emergence of even newer technologies such as peer-to-peer file sharing which have presented conflicts with the copyright

---

<sup>1</sup> The right to copy; specifically, a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other audio-visual works; and sound recordings) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.

<sup>2</sup> Copyright Act 1709 8 Anne c.21

<sup>3</sup> World Intellectual Property Organization (WIPO) Copyright Act, Article 17, Universal Declaration of Human Rights.

<sup>4</sup> Section 26, Copyright Act (Cap 130 Laws of Kenya)

<sup>5</sup> Menell PS, 'Envisioning Copyright Law's Digital Future' 46 *New York Law School Law Review* (2002), 64.

<sup>6</sup> Danay R, 'Copyright vs. Free Expression: The Case of Peer-to-Peer File-Sharing of Music in the United Kingdom' 8 *Yale Journal of Law & Technology* 32 (2005), 2.

<sup>7</sup> Kung L, Kroll AM, Ripken B, Walker M, 'Impact of the Digital Revolution on the Media and Communications Industry' 6 *Javnost: The Public* (1999), 30.

<sup>8</sup> Kaul V, 'The Digital Communication Revolution' 2 *Online Journal of Communication and Media Technologies* (2012), 114-115.

regime.<sup>9</sup> These conflicts and their possible solutions shall be further discussed. These peer-to-peer networks are created by linking numerous individual computers each with the capacity to create a digital copy of the shared file an activity that many are engaging in on a global scale.<sup>10</sup> With the emergence of such technologies, the copyright regime was deemed inefficient to prevent dealings with protected works in the digital environment in a manner that could potentially be infringing in nature.

This challenge that the digital revolution presents to the copyright regime led to the creation of the WIPO Copyright Treaty (WCT)<sup>11</sup> as a supplement to the Berne convention<sup>12</sup> to make it more adaptable to and prevent infringement of copyright in the digital environment.<sup>13</sup> The WCT entered into force globally on March 6<sup>th</sup> 2002<sup>14</sup> while the Berne Convention entered into force globally on December 5<sup>th</sup> 1887. By virtue of Article 2(5) of the Constitution of Kenya 2010, which provides that: “*The general rules of international law shall form part of the law of Kenya.*” and Article 2(6) which provides that: “*Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.*”, international law is made applicable in Kenya. Kenya acceded to the Berne Convention on March 11<sup>th</sup> 1993 and signed the WIPO Copyright Treaty (WCT) on 20<sup>th</sup> December 1996. Though in force globally, the WCT has yet to be ratified in Kenya and therefore does not form part of the legal framework governing copyright law in Kenya<sup>15</sup> as per the requirements of article 2(6) of the Constitution of Kenya 2010. The Berne convention, however, came into force in Kenya from June 11<sup>th</sup> 1993, but does not define the scope of the exclusive rights leaving this to the purview of the courts.

Although, the Kenyan Copyright Act has adopted some WCT provisions, it has failed to clearly frame the particulars of the exclusive rights in relation to digital environment (as is the case with the WCT). Critical to the protection of copyright in the digital space are the rights to communicate to the public, the right to distribute and the right to reproduce the copyrighted works. In ensuring this protection, there needs to be clarity on the scope of these rights within copyright legislation and in the court’s interpretation. This aids copyright holders in their

---

<sup>9</sup> Benkler Y, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, Yale University Press, 2006, 51.

<sup>10</sup> Danay R, ‘Copyright vs. Free Expression’, 2.

<sup>11</sup> Sheinblatt JS, ‘The WIPO Copyright Treaty’ 13 *Berkeley Technology Law Journal* (1998), 535.

<sup>12</sup> 11850 UNTS 828.

<sup>13</sup> Sheinblatt JS, ‘The WIPO Copyright Treaty’ 535

<sup>14</sup> World Intellectual Property Organization, *The Advantages of Adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, [http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/advantages\\_wct\\_wppt.pdf](http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/advantages_wct_wppt.pdf) on 8 March 2015

<sup>15</sup> [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=16](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16) on 3 March 2015

efforts to enforce their rights where violations occur in the digital space. To remedy the ambiguity in the scope of the exclusive rights in the earlier copyright regime, the WCT introduces *the making available right* as part of the communication right and the distribution right in order to curb online infringement of copyright.<sup>16</sup> The making available right is an exclusive right introduced by the WCT which grants authors the right to authorise and control dealings with their works via the internet.<sup>17</sup> Internationally, there has been recognition and introduction of this right into various jurisdictions.

The international courts determining the conflict between copyright and P2P have been split as to the scope of the exclusive rights that the rights holders relied on to enforce their rights.<sup>18</sup> Some courts have interpreted the rights narrowly such that a plaintiff's claim would only be successful when they prove that an actual distribution, reproduction or communication to the public did in fact occur.<sup>19</sup> They argue that the mere making available of works through P2P networks does not amount to a violation of the author's exclusive rights. Other courts have determined that these exclusive rights are violated by the mere making available for download of the protected works on P2P networks.<sup>20</sup>

In addition to the above, policing efforts have been inefficient largely due to the fact that the internet-based systems can quickly regain operations following a court order to take down websites that facilitate P2P.<sup>21</sup> This lack of consensus together with the fact that P2P sites easily change domain names presents a potential enforcement problem for copyright. Enforcement is made even more difficult where the rights holders are required to prove that an actual download (amounting to a distribution, communication or reproduction) of their work was made. This becomes necessary when courts adopt a narrow interpretation of the scope of these rights. Such requirements by courts of law make it costly for rights holders to attempt to pursue individual infringers. New technologies such as P2P present opportunities for users to deal with copyrighted works in a manner that potentially infringes on rights holders' rights. This conflict

---

<sup>16</sup> Sheinblatt JS, 'The WIPO Copyright Treaty' 536-539.

<sup>17</sup> 'The WIPO Treaties: 'Making Available' Right' *International Federation of the Phonographic Industry*, March 2003 <http://www.ifpi.org/content/library/wipo-treaties-making-available-right.pdf> on 3 March 2015.

<sup>18</sup> Sterk D, 'P2P File-Sharing and the Making Available War' 9 *Northwestern Journal of Technology and Intellectual Property* (2011), 8-11

<sup>19</sup> Menell PS, 'In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age' 59 *Journal of the Copyright Society of the U.S.A.* (2012), 201

<sup>20</sup> Menell PS, 'In Search of Copyright's Lost Ark' 201

<sup>21</sup> <http://www.ag.gov.au/Consultations/Documents/OnlineCopyrightInfringement/OnlineCopyrightInfringement-AustralianFilmTVBodiesAnnexureA.pdf> on 3 March 2015

between P2P and copyright needs to be addressed so that the copyright regime confers meaningful rights to rights holders within the digital space.

## 1.2 Statement of the Problem

The digital revolution pits copyright against new technologies such as P2P because these technologies are claimed to facilitate piracy of protected works. This issue of ‘digital piracy’ via the internet is now increasingly coming to a focal point in policy and legislative debate due to increased levels of internet access in most countries coupled with the falling prices for access.<sup>22</sup> Moreover, Daniel J. Gervais observes that most users do not perceive music downloads and sharing as wrong.<sup>23</sup> Whether knowingly or not, file sharers continue to use P2P networks even where its use is illegal. The courts resolving this dispute have taken different approaches to the issues leading to an inconsistency of court rulings on whether the exclusive rights granted by copyright can prevent online infringement of copyright through P2P. The advent of the digital age brought emphasis to the need to update copyright laws and with it came the making available right which sought to tackle the challenges that copyright laws faced during this time. The introduction of this right in the digital age widened the scope of protection granted to rights holders and sought to enhance the existing copyright law framework to better adapt it to the fast changing technological era.

Kenya has yet to ratify the WCT which it signed on 20<sup>th</sup> December 1996. This means that the right of making available is not recognised in Kenya<sup>24</sup> thus making it a harder task for rights holders to enforce their rights in the digital environment within the Kenyan jurisdiction. This becomes an even bigger issue due to the lack of theoretical understanding of the exclusive rights as framed in the Kenyan copyright statutes. This lack of clarity means that the Kenyan courts will be tasked with interpreting this law, guided by the decisions of other jurisdictions whose decisions on the issue have been varied. Some courts have interpreted the exclusive rights broadly so as to include the right of making available while other courts have interpreted them narrowly to rule that the copyright holder’s exclusive rights do not include the right to

---

<sup>22</sup> ‘Comminos A: The Liability of Internet Intermediaries in Nigeria, Kenya, South Africa and Uganda: An Uncertain Terrain’ *Association for Progressive Communications*, October 2012 <https://www.apc.org/en/pubs/liability-internet-intermediaries-nigeria-kenya-so> on 4 March 2015

<sup>23</sup> Gervais D, ‘The Price of Social Norms: Towards a Liability Regime for File-Sharing’ 12 *Journal of Intellectual Property Law* (2004), 39.

<sup>24</sup> Ouma M and Sihanya B, ‘Kenya’ in Armstrong C, De Beer J, Kawooya D, Prabhala A and Schonwetter T (eds.) *Access to knowledge in Africa: The role of copyright*, University of Cape Town Press, 2010, 86.

prevent others from making their works available via digital technologies. Enforcement of copyright therefore becomes a costly endeavour for rights holders who may be discouraged from pursuing online infringers for fear of the tiresome work that such claims entail. There is therefore a need to remodel Kenyan copyright laws in an attempt to resolve the conflict between the copyright regime and the digital technologies as well as a need to investigate the reasons behind the lack of ratification of the WCT over the 20 year period from the date of its signing in order to ensure that copyright confers rights that are useful to rights holders in the digital space.

### **1.3 Research Objectives**

1. To assess the effectiveness of the existing copyright legal framework in the context of the digital era.
2. To investigate and analyse the making available right.
3. To make specific recommendations on how Kenya can deal with copyright infringement in the digital space.

### **1.4 Research Questions**

1. What is the scope of the exclusive rights granted by copyright law? What effects do these rights have on dealings with protected works via peer to peer networks?
2. What are the contents of the making available right? How does this right limit dealings with protected works on P2P networks?
3. What measure can Kenya take to deal with copyright infringement in the digital space?

### **1.5 Theoretical Framework**

Copyright is based on utilitarian considerations which is one of the foundations of the welfare theory. Specific to copyright, this theory posits that the creators of works will be motivated to produce where there is an opportunity to recover the cost of creation, which William Fisher referred to as the cost of expression.<sup>25</sup> The government provides this incentive for authors to create by granting copyrights to authors.<sup>26</sup> P2P systems are said to present a challenge to the

---

<sup>25</sup> 'Fisher W: Theories of Intellectual Property' <http://www.law.harvard.edu/faculty/tfisher/iptheory.html> on 4 March 2015.

<sup>26</sup> 'Fisher W: Theories of Intellectual Property'

copyright regime by preventing rights holders from recouping their costs of expression. Copyright holders therefore have an interest in curtailing these illegal P2P networks. This has however been argued to be a false assertion. It is claimed that these systems advance the possibility of recovering the cost of creation by presenting a new business model which rights holders can in fact take advantage of and make even more gains than are being made with their current business models.<sup>27</sup> While utilitarian theories focus on maximization of the benefit to the society, made possible by incentivising authors to create works that benefit the public, there is also an emphasis on the need for copyright protection which gives authors incentives to motivate them to create valuable works.<sup>28</sup>

Philosophical and moral foundations of Copyright are centred on the individual positing that the individual's interests should never be subordinated to the public benefit.<sup>29</sup> The labour theory by Locke posits that every man has exclusive rights in his own person and that all work or labour of his hand belong to him.<sup>30</sup> As man mixes his labour with resources found within the commons to create proprietary rights so too can an author mix his own labour (creativity, imagination etc.) with resources within the commons (in the case of intellectual property- the public domain) to create proprietary rights within the product protected by copyright.<sup>31</sup>

According to Epstein, labour represents a form of liberty because it is a form of individual conduct that purports to establish the link between a particular individual and some particular resource, tangible or intangible.<sup>32</sup> The rights accorded in copyright should therefore sufficiently enable rights holders to exercise control over that which is as a consequence of their labour. This implies that steps may need to be taken to enable rights holders to properly do so in the digital age.

Like any other property right, copyright while benefiting the individual author also benefits the society at large who are able to enjoy the works created and distributed to the public. This benefit to the public may be viewed from the perspective of P2P, it is the society's way of benefiting from the proprietary rights vested in copyright. Peer-to-peer sharing can very well

---

<sup>27</sup> Goel S, Miesing P and Chandra U, 'The Impact of Illegal Peer-to-Peer File Sharing on the Media Industry' 52 *California Management Review* (2010), 7

<sup>28</sup> Fromer J, 'Expressive Incentives in Intellectual Property' 98 *Virginia Law Review* (2012), 4.

<sup>29</sup> Afori OF, 'Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law' 14 *Fordham Intellectual Property, Media & Entertainment Law Journal* (2004), 497.

<sup>30</sup> Locke J, *Two Treatises of Government*, Awnsham Churchill, London (1823) 116.

<sup>31</sup> <http://copyx.org/lectures/> on 4 March 2015

<sup>32</sup> Epstein RA, 'Liberty versus Property? Cracks in the foundations of Copyright Law' (2<sup>nd</sup> series) *John M Olin Law & Economics Working Paper No. 204* (2003), 191.

provide means for the larger public to gain access to information. There is a need to adopt a copyright regime that effectively regulates copyright and allows maximum benefit by all parties involved i.e. users and rights holders.

### **1.6 Literature Review**

Balkin proposes that the digital age expands the ways through which individuals participate in the creation and enhancement of culture by providing a wide technological platform. This mass participation primarily through P2P connection must therefore be protected through the regulation of technology, administrative and judicial mechanisms. The proliferation of the digital technologies that are then used to infringe upon copyright have further pointed to the need to implement these technological regulations, administrative and judicial regulation mechanisms.<sup>33</sup> The response of the copyright regime, as evidenced by international developments, was to incorporate new laws aimed adapting the existing copyright laws to the emerging digital technologies. The WCT was one such effort to deal with the challenges posed to copyright by the internet.<sup>34</sup>

The popularity of P2P file sharing applications has led to an abundance of research into peer-to-peer designs. Though not clearly defined, they are systems that lack dedicated, centralised infrastructure but that depend on voluntary participation of peer contributors who then help build the network upon which the infrastructure is constructed.<sup>35</sup> In these systems, all peers can operate as a server and a client which means that one can request files from their peers and stores and servers files to its peers. This is one of the features that distinguishes P2P systems from many types of distributed system architectures.<sup>36</sup> A software is usually required which links the users by locating IP addresses of other available computers and establishing a connection with them. When connected peers can download content from each other, chat and engage in other forms of interaction.<sup>37</sup>

---

<sup>33</sup> Balkin J, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' 79 *New York University Law Review* (2004), 5.

<sup>34</sup> Zakir T, 'Overview of Changes to the Indian Copyright Law' 17 *Journal of Intellectual Property Rights* (2012), 324

<sup>35</sup> 'Saroju S, Gummati KP and Gribble DS: A Measurement Study of Peer-to-Peer File Sharing Systems' *Department of Computer Science and Engineering, University of Washington*, January 2002 <http://homes.cs.washington.edu/~gribble/papers/mmcn.pdf> on 3 March 2015

<sup>36</sup> 'Ge Z, Figueiredo DR, Jaiswal S, Kurose J, Towsley D: Modeling Peer-peer File Sharing Systems' *Department of Computer Science, University of Massachusetts*, [http://infocom2003.ieee-infocom.org/papers/53\\_03.PDF](http://infocom2003.ieee-infocom.org/papers/53_03.PDF) on 3 March 2015

<sup>37</sup> Wood J, 'The Darknet: A Digital Copyright Revolution' 16 *Richmond Journal of Law and Technology*, (2010), 5.

Pessach notes that peer-to-peer file-sharing software and platforms are classic examples of novel technological advancements that essentially restructure the physical and distribution layer of communicative and speech activities. A clear change is evident in the means and mode of communication attributable to the increasingly digitalizing world. The definition of what constitutes speech needs to be re-examined as the means and methods of communication are constantly evolving. These emerging means of communication could and should be classified as speech mechanisms because of their bearing on the speaker and audience's ability to engage in communication, creative and speech activities.<sup>38</sup> These are among some of the reasons for the increased research into and importance attributed to P2P systems which are now being viewed as tools for enhancing constitutional rights such as those of freedom of expression.<sup>39</sup>

Among the most notable developments in dealing with the problem that P2P presents to the copyright system has been the adoption of the making available right. This right was introduced by the WCT as an extension of the communication to the public right. However, the international courts in interpreting copyright's exclusive rights and determining their scope have referred to this right in order to put online infringement techniques and specifically P2P within the scope of these rights. In *Sony BMG Music Entertainment v. Doe*<sup>40</sup>, the District Court for the Eastern District of North Carolina found that distribution included making a protected work available to the public. This decision reflects judicial precedent in earlier cases presented on this similar issue. This position has not been upheld consistently by all the courts. The position that the making available amounted to distribution was rejected by the courts in *Capitol Records Inc. v. Thomas*<sup>41</sup> where the judge found the instruction to the jury erroneous. The jury had been instructed that the copyright owner's right to distribute was violated when the work was made available on a P2P network, without the owner's authorisation, for distribution on the electronic network despite there being proof of the work actually having been distributed.<sup>42</sup>

---

<sup>38</sup> Pessach G, 'An International-Comparative Perspective on Peer-To-Peer File-Sharing and Third Party Liability in Copyright Law: Framing the Past, Present, And Next Generations' Questions' 40 *Vanderbilt Journal of Transnational Law* (2007), 87.

<sup>39</sup> Balkin J, 'Digital Speech and Democratic Culture' 2-3.

<sup>40</sup> 2008 U.S. Dist. LEXIS 106088, 12-13.

<sup>41</sup> 579 F. Supp. 2d 1210

<sup>42</sup> Weissman J, 'Distribution, I Presume: A Role for Presumptions in Establishing The "Making Available" Right' 27 *Cardozo Arts & Entertainment Law Journal* (2010), 738.

### **1.7 Research Design and Methodology**

The research mainly focused on an analysis of the scope of economic rights in copyright and the making available right by drawing reference from writings of scholars on the same and how the apparent inefficiency of the Copyright Act has been addressed by courts in case law, parliaments in statutes and worldwide in international instruments. It was conducted mainly via library and desk top research methods.

### **1.8 Limitations**

- Kenya has not ratified the WCT. The analysis was therefore based on other jurisdictions which have ratified the WCT, have specific laws in place to deal with the conflict between copyright and P2P and other online systems.
- The study was also limited by the digital, political, economic and social divide that exists between Kenya and the countries that the study referred to.
- Limited or non-existent case law in Kenya with respect to the scope of economic rights granted by copyright law and the making available right.
- Limited or non-existent bibliography on the problem in the Kenyan context

### **1.9 Chapter Breakdown**

#### **Chapter 1: Introduction**

The chapter gives an overview of the research problem, objectives and methodology.

#### **Chapter 2: Peer to peer file sharing**

This chapter provides an overview of the functioning of peer-to-peer file sharing networks.

#### **Chapter 3: Copyright**

This chapter analyses of the right to copyright, the history and scope of exclusive rights granted herein.

#### **Chapter 4: The making available right**

This chapter gives an analysis of the making available right and touches on the effect that this right has on dealing in the digital age primarily peer-to-peer file sharing.

#### **Chapter 5: Conclusion and recommendation**

This chapter concludes the study and provides recommendations for the Kenyan copyright regime.

## CHAPTER 2

### PEER TO PEER (P2P) TECHNOLOGY

This chapter expounds on P2P technologies, considering the history of P2P, how P2P technologies function, the various uses that it can be used for as well as some of the justifications for its use today. P2P networks are direct exchange networks among peers which allow for resource sharing among them.<sup>43</sup> There are some key features that are present in the principle of P2P technologies.<sup>44</sup> Like the earlier Napster system, these are Self-organizing systems lack a central management. The systems now rely on peer connectivity for the storage and dissemination of resources. Also key is sharing of resources e.g., files within the network. In the P2P system each of the peers serves as both a provider and consumer of the shared resources. The information moves from user to user whenever the protocol is activated. This entire system is based on the voluntary collaboration of the peers in the system. Like many user generated content platforms, the information and resources will only be available where users willingly make it available. The users generate the torrents and grant access to other users of those torrents to facilitate the communication within the network. The system also depends on the presence of a large number of peers who all operate as equals. The speed and efficiency of the system depends on the large number of peers making a file available thus making downloads much faster.

On the technical side, the P2P infrastructure is supported by the existing telecommunications infrastructure of the web to facilitate the exchange of resources on the web. The system also includes P2P applications that facilitate the resource exchange between peers. These come in the form of software which allows computers to communicate and their users (or peers) to search for, access, download and upload material stored in shared folders on the peer's hard drive.<sup>45</sup> For users to connect to the network, all that is required is an internet connection and file sharing software installed on their computers. Examples of these software applications include Bit torrent and Napster.

Napster, developed in 1999 by Shawn Fanning, was the first system and coined the term P2P. This first generation network<sup>46</sup> was the first P2P application to really catch on. Illegal sharing

---

<sup>43</sup> Danay R, 'Copyright vs. Free Expression' 2.

<sup>44</sup> Schoder D, Fischbach K, Schmitt C, 'Core Concepts in Peer-to-Peer Networking' in Subramanian R, Goodman BD (eds.), *Peer-to-peer Computing: The Evolution of a Disruptive Technology*, Idea Group Publishing, 2005, 2,3

<sup>45</sup> Larusson HK, 'Uncertainty in the scope of copyright: the case of illegal file-sharing in the UK' 31 *European Intellectual Property Review* (2009), 124.

<sup>46</sup> Pr'etre B, 'Attacks on Peer-to-Peer Networks', Unpublished Thesis, Swiss Federal Institute of Technology (ETH) Zurich, 2005, 4.

of copyrighted material by users was claimed to be the main driver behind its success and ultimate downfall.<sup>47</sup> The system relied on central server which controlled the functionality of the entire system. This server indexed all the files each user had and when a client queried Napster for a file, the central server would answer with a list of all indexed clients who already possessed the file. After its demise, other systems emerged which made structural adjustments to the system, doing away with the central systems.<sup>48</sup>

Newer P2P networks rely on the individual processor speed of each peer and establishes users as a network of nodes which interconnect each other.<sup>49</sup> Simply put, these are virtual networks that link different computers over the internet to facilitate data transfer among the network participants. Each computer user, known as a peer in these network, has a unique address (Internet Protocol (IP) address) which identifies their device and facilitates communication within the network.<sup>50</sup> To begin the download process, a downloader, known as a seed, must have a complete file of the resource being shared. This initial seeder creates a torrent file and uploads this file on the web.<sup>51</sup> This file has a torrent extension containing information about the uploaded file, its name, size, that enables its identification. Downloaders request this file from the network and are then connected to other downloaders (peers). As each new piece of the file is received by a peer, the peer becomes a source (of that piece) for the other peers, relieving the original seed from having to send that piece to every peer requiring a copy.<sup>52</sup> The pieces of a file are usually downloaded randomly and later rearranged into the correct order upon completion of the download. The file bits will be shared to peers on the network until all the peers have the sum of all parts of the file.

Within the network there are trackers which act as dedicated servers and are the main linkages between the peers in the network. When a request is made for a file, the tracker sends the requesting peer a list of IP (Internet Protocol) addresses of peers that have the content available.

---

<sup>47</sup> Edwards L, Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights [http://www.wipo.int/export/sites/www/copyright/en/doc/role\\_and\\_responsibility\\_of\\_the\\_internet\\_intermediaries\\_final.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf) on 24 June 2015

<sup>48</sup> Hisanari HT, 'Post-Napster: Peer-to-Peer File Sharing Systems Current and Future Issues on Secondary Liability under Copyright Laws in the United States and Japan', 22 *Loyola of Los Angeles Entertainment Law Review* (2001), 49.

<sup>49</sup> Lambrick J, 'Piracy, file sharing and legal fig leaves' 4 *Journal of International Commercial Law and Technology* (2009), 185.

<sup>50</sup> Jamie Acorn, 'Forensics of bit torrent', Unpublished MSc Thesis, Department of Mathematics, Royal Holloway University of London, 15 January 2008, 6.

<sup>51</sup> Jamie Acorn, 'Forensics of Bit torrent', 9.

<sup>52</sup> Lee J and Kim J, 'Modelling of a Copyright Protection System for the Bit Torrent Environment', in Tai-hoon K, Stoica A, Wai-chi F, Vasilakos T, Villalba JG, Arnett PK, Khan KM, Byeong-Ho K (eds.), *Computer Applications for Security, Control and System Engineering*, Springer, 2012, 48.



4shared. These provide users with a downloadable link to files which have been uploaded to their websites.

There are conflicting evidence regarding the effect of P2P on the sales in the music industry. On one hand, it has been argued that file sharing has had catastrophic effects on the entertainment industry with the music industry claiming to be most affected. Studies on this issue have however produced conflicting statistics. Oberholzer and Strumpf concluded that file-sharing had “*an effect on sales which is statistically indistinguishable from zero*”.<sup>56</sup> A Japanese study from the same year found “*very little evidence*” that file-sharing had negative effect on record sales.<sup>57</sup> On the other hand, BPI’s Digital Music Nation report in 2010 claims that illegal file sharing cost the UK music industry £219 million in 2010.<sup>58</sup> Despite this report, it is impossible to prove causation between P2P file sharing and the decline of music sales particularly because it is impossible to predict consumer behaviour and conclude that if the files were not available for free illegal download, they would translate into sales. This decline in revenue could be as a result of many factors including economic recession that has been experienced over the last decade.<sup>59</sup>

Although there is contention on the effect of P2P file sharing technologies on sales of copyrighted material,<sup>60</sup> it has a multiplicity of uses. It has been argued that P2P can act as a tool for enhancing the exercise of freedom of speech and free expression. This view has yet to receive global acceptance.<sup>61</sup> Consequently, those advocating for freedom of expression have continued to raise their increasing concerns over how regulatory and legal trends might be limiting freedom of expression “*at the very time that the Internet has become more widely recognized as a major medium for fostering global communication.*”<sup>62</sup> Aside from the freedom of expression argument, advocates for P2P technologies argue that its other uses far outweigh any potential damages it may have on intellectual property in copyright.

---

<sup>56</sup> ‘Oberholzer F and Strumpf K: The Effect of File Sharing on Record Sales An Empirical Analysis’ *University of North Carolina* March 2004 [http://www.unc.edu/~cigar/papers/FileSharing\\_March2004.pdf](http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf) on 30 May 2015.

<sup>57</sup> ‘Tastuo Tanaka: Does file-sharing reduce CD sales? A case for Japan’ *Hitosubashi University Institute of Innovation Research* December 2004 <http://www.iir.hit-u.ac.jp/iir-w3/file/WP05-08tanaka.pdf> on 30 May 2015

<sup>58</sup> Duboff A, ‘BPI Digital Music Nation – pirate wars’ 23 *Entertainment Law Review* (2011), 85.

<sup>59</sup> Danay R, ‘Copyright vs. Free Expression’, 54.

<sup>60</sup> Benkler Y, *The Wealth of Networks*, 51

<sup>61</sup> UNESCO, *Freedom of Connection – Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet*, 19 August 2010, at 11

<sup>62</sup> UNESCO, *Freedom of Connection – Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet*, 19 August 2010, at 6

P2P technologies can also be used as a tool for free content distribution.<sup>63</sup> The current trend has been for content developers to share their open-source-software to all internet users. P2P has proven to be an invaluable resource in this case as it allows users to rapidly share the content and to a much larger population than was previously possible. Software such as Linux operating systems are publicly available at no cost. When these are made available via torrents, users are able to download the software from a variety of peers connected to the P2P network.

P2P has also proven to be of great value for distribution of content that requires users to purchase to gain access. Developers of paid software are now using P2P torrent facilities to reach a much larger market for their goods. The use of P2P to share software has opened up the market to a larger number of potential clients. These software, including updates are made publicly available for download but the software developers go a step further and input payment options for users in order to gain access to the software.<sup>64</sup> Though freely available for download users can only access the software after making the required payments to the software developers. This is one of the ways in which businesses who deem themselves affected by P2P use have begun taking advantage of the system.

User generated content distribution is another of the uses of P2P technologies. P2P facilitates exchange of information, ideas and opinions as well as to critic other people's beliefs and in general to convey messages. This technology also aids in discovery of novel genres, creation and remaking remixes, sequels and user's own interpretations of works already in existence as well as enabling users unearth works which would otherwise be unavailable.<sup>65</sup> Sharing of material protected by copyright via P2P networks has been argued to be a violation of the exclusive economic rights belonging to copyright holders. This thesis is tested in the next chapters.

---

<sup>63</sup> <http://www.cs.rutgers.edu/~rmartin/teaching/fall08/cs552/position-papers/016-01.pdf> on 30 November 2015

<sup>64</sup> <http://www.cs.rutgers.edu/~rmartin/teaching/fall08/cs552/position-papers/023-01.pdf> on 30 November 2015

<sup>65</sup> <http://www.juridicas.unam.mx/wcc/ponencias/3/57.pdf> on 26 October 2015

## CHAPTER 3

### COPYRIGHT

This chapter briefly tracks the history of copyright, discusses the rights granted in copyright by drawing from select international jurisdictions briefly highlighting the scope of the exclusive rights said to be violated by P2P usage.

Intellectual property refers to the creations of the human mind or intellect and is protected through various forms of rights, among them copyright.<sup>66</sup> This is the right that protects intellectual property in literature, music and art for a set duration of time depending on the copyright laws.<sup>67</sup> It has been argued that copyright is a legal response to the new technologies in the reproduction and distribution of human expression.<sup>68</sup> The theoretical foundations of copyright law are based on the works of John Locke<sup>69</sup> who proposes a natural right in property based on the justification that the property is a result of the fruit of one's labour.<sup>70</sup> Copyright therefore serves to motivate the creation and distribution of these works.<sup>71</sup>

The first instance of legislative protection for intellectual property in copyright was the Statute of Anne.<sup>72</sup> The statute granted a 21 year period of protection to works already in existence and a 14 year protection period to new works after which the copyright re-vested in the author for a further 14 years if they were still alive. Initial copyright laws, as evidenced by the statute of Anne, were intended to vest rights in authors to prevent the manual copying of their works. The proliferation of digital technology has dramatically changed the interactions between human beings and altered the basic structure of information distribution from what was present in the "analogue world". The digital revolution has had both positive and negative implications. For instance, it has altered the course of data sharing, communication and broadened the capacity of human interaction from a physical to an international scale. At the same time it has created opportunities for criminal activities, privacy infractions and intellectual property violations. With regard to copyright, it has created opportunities for infringement far more

---

<sup>66</sup> Sihanya B, 'Copyright in E-commerce and Music Industry in Kenya' in Wekesa M and Sihanya B (eds.), *Intellectual Property Rights in Kenya*, Konrad Adenauer Stiftung and SportsLink Limited, 2009, 142-143.

<sup>67</sup> Gorman RA, *Copyright Law*, 2ed, Federal Judicial Center, 2006, 8-10

<sup>68</sup> <http://www.case.edu/affil/sce/authorship/joyce-part1.pdf> on 26 October 2015

<sup>69</sup> Locke J, *Two Treatises of Government*, 116

<sup>70</sup> 'Clement P, Dinh V & Harris J: The Constitutional and Historical Foundations of Copyright Protection', *Center for Individual Freedom*, 11 December 2012, <http://cif.org/v/index.php/commentary/42-constitution-and-legal/1679-the-constitutional-and-historical-foundations-of-copyright-protection> on 26 October 2015

<sup>71</sup> Fromer J, 'Expressive Incentives in Intellectual Property' 4

<sup>72</sup> Copyright Act 1709 8 Anne c.21

sophisticated than the manual copying that was anticipated by the earlier copyright laws such as the Statute of Anne.

In Kenya, the laws governing various aspects of the Country's legal framework were adopted from colonial laws. The East African Order-in-Council of 1897 made English common law, doctrines of equity and statutes of general application in force in England as of the reception date applicable in Kenya.<sup>73</sup> Copyright law developed from these and the 1842, 1911 and 1956 UK Copyright Acts. In the late 1960s, African states promptly began to enact and reform their copyright laws.<sup>74</sup> A major push came from pressure or their wish to comply with the provisions of the WTOs TRIPs agreement.<sup>75</sup>

Under copyright laws, an author is granted rights to exclusively control the copying, sale, distribution, communication to the public and reproduction of their work as well as the right to authorise others to do any of these acts.<sup>76</sup> Though the rights are exclusive, there are certain limitations which are incorporated into the law. These limitations commonly referred to as the exceptions to copyright include: the idea/expression dichotomy, the exhaustion principle and fair dealing. The idea/expression dichotomy is a legal principle which provides that copyright protection only covers the particular expression of an idea but does not extend to the idea itself.<sup>77</sup> This means that only the author's originality in the expression is protected and thus are prevented from preventing others from creating works in line with that idea. The exhaustion doctrine provides that certain rights of the copyright holder end after the first sale of a particular copy of a work. Fair dealing of a copyrighted work relates to acts which do not require the creator's permission. Such uses include criticism, commentary, news reporting, teaching, research and certain personal uses.<sup>78</sup>

Under Kenyan laws, the rights holder is granted these exclusive rights in the Copyright Act which provides:

*"Copyright in a literary, musical or artistic work or audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts, namely the*

---

<sup>73</sup> Ouma M and Sihanya B, 'Kenya', 86

<sup>74</sup> Ouma M and Sihanya B, 'Kenya', 86

<sup>75</sup> Sihanya B, 'Copyright Law in Kenya' 41 *International Review of Intellectual Property and Competition Law*, (2010), 939.

<sup>76</sup> Aplin T, Davis J, *Intellectual Property Law Text, Cases and Materials*, 2ed, Oxford University Press, Oxford, 2013, 161.

<sup>77</sup> Jones RH, 'The Myth of the Idea/Expression Dichotomy in Copyright Law, 10 *Pace Law Review* (1990), 551.

<sup>78</sup> [http://cyber.law.harvard.edu/wg\\_home/uploads/254/2003-05.pdf](http://cyber.law.harvard.edu/wg_home/uploads/254/2003-05.pdf) on October 31st

*reproduction in any material form of the original work or its translation or adaptation, the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement, and the communication to the public and the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognisably derived from the original... ”<sup>79</sup>*

Of particular importance are the rights to distribute, reproduce and the right to communicate to the public. These particular rights are claimed to be infringed upon by the use of P2P file sharing technologies on the internet. In this case, P2P technologies should only be deemed unlawful when the use of these systems allow P2P users to deal with copyrighted material in a manner that is exclusively reserved for the copyright holder under copyright. Scholars argue that a conflict exists between copyright and freedom of expression as exercised through the use of P2P technologies. Such a conflict will exist where the exclusive right under copyright that seeks to limit the freedom of expression extends beyond the scope of statutory rights as granted under copyright laws.

American courts have considered the questions presented herein and their decisions quoted by UK courts which, while addressing the scope of the exclusive rights, the cases did not relate to P2P use. These questions relate to whether the exclusive rights in copyright can prevent use of copyrighted works via digital technologies. Though a civil law jurisdiction, the decisions rendered by the US courts have persuasive precedent in Kenya. Moreover, some of these decisions have dealt with the scope of these rights in cases where P2P technologies are concerned and are therefore relevant to the ongoing discussion. There has been a lack of consensus in the US court decisions, discussed below, regarding the interpretation of the right to distribute. The right has been interpreted in two ways. Some courts are of the view that the right is violated when it can be proven that the work was indeed downloaded while others hold the view that the mere act of making the work available for others to access was a violation of the right to distribute.

In *A&M Records Inc. v. Napster Inc.*<sup>80</sup> the court found that Napster users who uploaded a link for other users to download material violated the copyright holder’s right to distribute the work. The implication of this was that a violation occurred by the fact of the P2P user making files available, via an offer to distribute, to other users to download or where users downloaded the

---

<sup>79</sup> Section 26(1), *Copyright Act*, (Act No. 12 of 2001)

<sup>80</sup> 239 F.3d 1004, 1014 (9th Cir. 2001)

available material.<sup>81</sup> Though lacking a statutory definition, US courts sought to equate the right to distribute with the right to publish thereby interpreting it in light of the Copyright Act to mean a copyright owner's 'right to control the first public distribution of an authorized copy of his work which requires either "*the distribution of copies... of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending,*" or alternatively, "*...offering to distribute copies... to a group of persons for purposes of further distribution.*"<sup>82</sup>

The court later changed its tune regarding the violation of the right by the mere act of making the copyrighted work available. In *In re Napster*,<sup>83</sup> the court held that distribution required there to be an actual distribution of a copy of the work. This holding would mean that to assert the right, copyright holders would have to go an extra mile to prove that the end user did in fact download the material made available to them by other users.<sup>84</sup> In another instance, the court noted that completion of all steps necessary for distribution did not mean that there was a violation of the right.<sup>85</sup> This finding further cemented the requirement of proof of actual distribution of the copies made available for the right to be infringed.

Scholars have also concurred with the latter finding of the court and are of the view that the right to distribute is not infringed upon by the mere act of availing the copyrighted works via P2P technologies. David Nimmer a distinguished copyright law scholar, author of the most influential treaties on Copyright Law and contributor to the 1978 Report of the National Commission on New Technological Uses of Copyright Works (CONTU) observes that the right to distribute is apparently not infringed on by a mere offer to distribute to members of the public.<sup>86</sup> This assertion has been relied on by the court in the *Atlantic Recording Corp. v. Howell* decision. Based on his argument, the use of P2P technology allowing access to copyrighted works via computer drives therefore does not violate the right to distribute. This requires evidence of actual downloading by those who gained access to the works for one to assert that the right was infringed upon. Paul Goldstein also opines that the right to distribute is violated only when it is proven that an actual transfer took place.<sup>87</sup>

---

<sup>81</sup> *Motown Record Co. LP v. DePietro* No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007); See also *Warner Brothers Records Inc. v. Payne* No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007).

<sup>82</sup> *Harper & Row Publishers Inc. v. Nation Enterprises* 471 U.S. 539 (1985).

<sup>83</sup> Copyright Litigation, 377 F. Supp. 2d 796, 803-04 (N.D. Cal. 2005).

<sup>84</sup> *Atlantic Recording Corp. v. Brennan* 534 F. Supp. 2d 278, 282 (D. Conn. 2008)

<sup>85</sup> *London-Sire Records Inc. v. Doe* 542 F. Supp. 2d 153 (D. Mass. 2008); *Atlantic Recording Corp. v. Howell* 554 F. Supp. 2d 976 (D. Ariz. 2008).

<sup>86</sup> Nimmer MB, and Nimmer D, *Nimmer on copyright: a treatise on the law of literary, musical and artistic property, and the protection of ideas*, M. Bender, New York, 1978.

<sup>87</sup> Goldstein P, *Goldstein on Copyright*, 3ed, Aspen Publishers Online, 2005, § 7.5.1.

Another exclusive right connected to P2P activities is the author's right to communicate the work to the public. The right is contained in the Berne Convention and similarly contained in the WCT. The Berne convention does not define the scope of the right to communicate to the public. Kenyan copyright laws and courts have also not defined nor determined the scope of this right. Therefore, reference has to be made to other jurisdictions for a definition of the scope of the right.<sup>88</sup> The Judicature Act at section 3<sup>89</sup> lists the sources of law in Kenya, among them is common law. The UK courts have considered the scope of the right though not in relation to cases involving P2P. Via judgments of the European Court of Justice which are considered good law in the UK, the court determined that the right is not violated when one provides links to users which can be used to access and download copyright protected material. Such an act according to the court does not amount to communication to the public as contemplated in article 3(1) of the EU Directive.<sup>90</sup> This right is violated when a communication to the public is made to an audience beyond that which the copyright holder authorized.

The last right connected to P2P activities is the author's right to reproduce the work. This right is said to be violated where any communication of copyrighted works via electronic means that results in another copy being created on the device of the recipient of the communication occurs.<sup>91</sup> In *Capitol Records LLC v. ReDigi Inc.*,<sup>92</sup> the court held that when a user downloads a digital music file to their hard disk, the file is reproduced on a new phonorecord within the meaning of the Copyright Act. Like the right to distribute, the right can only be successfully asserted if the plaintiff is able to prove that a copy of their work was created on the recipient user's computer. If such evidence is absent, then the right to reproduce contained in the Copyright Act cannot be claimed to have been violated.

Having reviewed some decisions regarding the effect of copyright's exclusive rights on dealings with copyrighted material via P2P networks, the next chapter provides an overview of the right of making available.

---

<sup>88</sup> see page 20 of this dissertation.

<sup>89</sup> 3 (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with -

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date

<sup>90</sup> Council Directive 2001/29/EC of 22 May 2001 Official Journal (L167) 10.

<sup>91</sup> WIPO-Standing Committee on Copyright and Related Rights (SCCR), *Study on Copyright Limitations and Exceptions for the Visually Impaired*, 20 February 2007, at 52.

<sup>92</sup> No. 12 CIV. 95 RJS, 2013

the WCT are not obliged to enforce, within their jurisdictions, rights of foreigners whose countries are members of the Berne Union unless its nationals enjoy such a right in which case the principle of national treatment principle would require similar treatment of national and foreign copyright holders.<sup>99</sup>

The effect of having the making available right is that rights holders will be able to assert their rights in the digital environment without the need to prove that the defendant's conduct amounted to a distribution, reproduction or communication to the public. The earlier decision of the court in *A&M Records Inc. v. Napster Inc.* would therefore apply thus allowing users to reap the commercial benefits of copyright.

In Kenya, cases involving online infringement of copyright are already emerging. Through petition No. 600 of 2014, Kenyan copyright holders have filed a petition stating inter alia:

*“Among the exclusive rights granted to the Copyright owners under the Copyright Act are the exclusive rights to reproduce the Copyrighted Recordings and to distribute the Copyrighted Recordings to the public. The Copyright owners are informed and believe that the 4th to 10th have allowed and continue to allow online media distribution websites and systems to download the Copyrighted Recordings and to allow the distribution of the Copyrighted Recordings to the public, and/or to make the Copyrighted Recordings available for distribution to others.”<sup>100</sup>*

Similar issues, such as the scope of the right to distribute and the making available concept, as have been presented in this and in earlier chapter arise in the above cited case. On the one hand, the petitioners assert the exclusive rights independently as being violated by the respondent while on the other hand assert that by making available the protected works, a violation of the rights of copyright holders did in fact occur. The second limb of their assertions seek to demonstrate a violation of the plaintiff's rights through the defendant's act of making their copyrighted work available for distribution. It would be interesting to note the court's interpretation of the scope of the right to distribute and on its finding on the latter assertion in light of the absence of express recognition of the right in Kenya. Though such cases are not as prevalent as in the developed world, there is a need to prepare the legislation for the fast increasing use of internet facilities in Kenya.

---

<sup>99</sup> Ginsburg JC. 'The (New?) Right of Making Available to the Public', 2

<sup>100</sup> *Bernsoft Interactive & 2 Ors v. Communications Authority of Kenya & 9 Ors*

The right to distribute in other jurisdictions has been equated to the right of making available mainly because the right had been framed as incorporating the right to offer to distribute. In Kenya, the Act does not include similar provisions and reads as follows:

*“...the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement...”<sup>101</sup>*

Thus, in the Kenyan context, it will be difficult to rationalise a court conclusion that would broadly interpret the above right to include the right to make available. Conclusions on the status of the making available right needs to be made because it is a phenomenon that rights holders, as in the above quoted case, are seeking to base their infringement cases on. Currently, the exclusive rights granted by copyright in the Kenyan jurisdiction would be insufficient to prevent the use of P2P technologies in relation to protected works. Such restrictions, where the making available right is absent in the jurisdiction would be an overreach on the part of copyright law, not to mention an infringement of the right to freedom of expression of P2P users. Danay argues that in order to determine whether the restrictions to the right of freedom of expression with respect to copyright are legitimate and necessary in a democratic society, the restrictions should be useful to meet copyright’s purposes that is (i) safeguarding the author’s reward and (ii) promoting and encouraging creativity.<sup>102</sup> Further, it has been noted that while copyright as a body of law is legitimate, its particulars and interpretation should be subordinated to and influenced by the higher normative status of freedom of expression.<sup>103</sup>

Depending on whether Kenyan courts adopt a narrow or broad interpretation of the scope of these rights, copyright holders would either have to prove actual reproduction, distribution and communication of their work to the public or simply show that their work was made available without their consent in the case of a broad interpretation. Also, making a case supporting the view that the exclusive rights are inefficient in preventing P2P dealings are the scholarly views concluding that the scope of the rights discussed above are not sufficient to prevent online dealings with copyrighted materials, it will be a difficult and costly task for copyright owners to prove that a copyright violation did in fact take place online.<sup>104</sup> Scholars have identified that a forensic analyst would be necessary to prove that the P2P user did in fact download the

---

<sup>101</sup> Section 26(1), *Copyright Act*, (Act No. 12 of 2001)

<sup>102</sup> Danay R, ‘Copyright vs. Free Expression’, 19.

<sup>103</sup> Birnhack MD, ‘Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act’ 24 *Entertainment Law Review* (2003), 25.

<sup>104</sup> Menell PS, ‘In Search of Copyright’s Lost Ark’ 219

copyrighted material. Additionally, it is usually inefficient to go after infringers who mainly consist of common citizens who may not be able to pay the awards.<sup>105</sup> Furthermore, the alternative potentials as defendants (ISPs) are in most cases protected by safe harbor provisions thereby limiting the award that the plaintiff may get.

Having reviewed the making available right, the next chapter outlines some of the recommendations and possible solutions that can be adopted in Kenya to deal with the challenges presented to the governance and enforcement of copyright in light of the technological advancements of the digital age.

---

<sup>105</sup> *'Copy-wrong! Unpacking the \$1.92M Downloading Verdict'* <http://blogs.wsj.com/law/2009/06/27/copy-wrong-unpackingthe-192m-downloading-verdict> on 1 November 2015

## CHAPTER 5

### RECOMMENDATIONS

This research has revealed that the current Kenya Copyright act may prove to be insufficient to deal with the emerging trends of the digital environment depending on the court's interpretation of the scope of the exclusive rights. Since such a decision has yet to be rendered, there is a potential threat posed to copyright holders in the event that the interpretation adopted by the courts is a narrow one. Similarly, the interpretation of the scope of these rights by the Kenyan courts may be varied and conflicting like has been the case in the US and UK courts leading to uncertainty in the field of copyright.<sup>106</sup>

Kenya is not and will not be the only country to experience the challenge to copyright presented by P2P technologies. Kenya can take advantage of her later adoption of global trends and draw from the experiences of others to tackle the issues that may come with the adoption of these trends. The fast rising use of digital technologies in the developing countries means that developing countries will soon be experiencing the challenges experienced by developed nations who are far ahead with respect to some of these technologies. With the digital developments, issues such as ISP liability among others will begin to emerge. The issue of ISP liability was first litigated in the UK via *Godfrey v Demon*<sup>107</sup> in which the court found against the ISPs. In Kenya the issue only first came to court through *Bernsoft Interactive & 2 Ors v. Communications Authority of Kenya & 9 Ors Petition No. 600 of 2014*, 15 years behind the UK on a similar issue. The above Kenyan case also seeks to assert that the right to distribute has been violated through the ISPs facilitating files to be made available for download by users and seeks injunctive orders against the ISPs to prevent the same.

The options available to Kenya include: introduction of the making available right via an amendment of copyright legislations or ratification of the WCT, introducing a non-commercial use levy and shrinkage of safe harbour provisions for ISPs. These are among some of the global methods used as the conventional take down orders issued by courts to prevent P2P usage has over the years proven to be inefficient.<sup>108</sup> This is largely due the portability of domain names as has been the practise among many of the file sharing sites. Government efforts to block user

---

<sup>106</sup> Menell PS, 'In Search of Copyright's Lost Ark' 219

<sup>107</sup> [1999] 4 All ER 342

<sup>108</sup> "Site Blocking" to reduce online copyright infringement: A review of sections 17 and 18 of the Digital Economy Act' *Ofcom*, 27 May 2010 <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf> on 18 December 2015

access has also been ineffective since a change of domain names will grant users access to the material that the government intended to block access to. These options are discussed below.

Copyright law is an adaptable body of law. Since its foundation, it has adapted to deal with or attempt to deal with the challenges presented by new technologies that enable human expression.<sup>109</sup> Such adaptations are visible from the drafting of the WCT to supplement the Berne Convention, the adoption of the May 22, 2001 European Directive<sup>110</sup> and reforms to copyright legislations of numerous countries. From this, it is clear that the earlier provisions of Copyright Laws were insufficient to deal with the emerging difficulties presented by the use of the internet.<sup>111</sup> Such legislative changes point out a need for reform of the current Kenyan Act to adopt the global changes and to keep at par with the rest of the world.

Further making a case for the need for this reform are IP scholars such as Ben Sihanya who has noted the need for the Kenyan Copyright Act to capture changes in technology.<sup>112</sup> Furthermore, the notable lack of the making available right in the Copyright Act<sup>113</sup> needs to be rectified so as to guide the interpretation of the act in order to avoid any ambiguities and uncertainties. It has been noted that the enforcement of the exclusive rights would be difficult where statute requires proof of actual download of the work, a task that is difficult for the rights holder to prove.<sup>114</sup> This has possibly led to violation of these exclusive rights, such violation occurring when the defendant has made the work available. The incorporation of the making available right therefore automatically deals with the questions presented earlier regarding the ability of the scope of copyright's exclusive rights in preventing the dealings of P2P.

The copyright legislation needs to incorporate the making available right via amendment of the existing Copyright Act or by ratification of the WCT. However, before this can be done, an inquiry needs to be done to determine the reasons behind the lack of ratification of the WCT 20 years after Kenya had signed onto it. This has been noted as one of the many issues leading to the inefficiency of the copyright act and one of the root causes for continued piracy in the Kenyan context.<sup>115</sup> Though the reasons for the lack of ratification are not clear, the

---

<sup>109</sup> <http://www.case.edu/affil/sce/authorship/Joyce-part1.pdf> on 20 October 2015

<sup>110</sup> Council Directive 2001/29/EC of 22 May 2001 Official Journal (L167) 10.

<sup>111</sup> 'Wong MWS: The Exclusive Rights of "Distribution", "Communication to the Public" & "Making Available" Under the WIPO Copyright Treaty: Lessons for Other Jurisdictions From the Hong Kong Bit torrent Case' 13 March 2008 <http://ssrn.com/abstract=1118809> on 18 December 2015

<sup>112</sup> Sihanya B, Copyright Law In Kenya, 932

<sup>113</sup> Ouma M and Sihanya B, 'Kenya' 90

<sup>114</sup> Sterk D, 'P2P File-Sharing and the Making Available War', 495-496

<sup>115</sup> <http://www.iipa.com/rbc/2003/2003SPEC301KENYA.pdf> on 3 January 2016

parliamentary discussion following the second reading of the Copyright Bill 2000 on November 20, 2001 revealed some of the concerns that parliamentarians had with respect to international agreements seeking to place obligations on developing countries. Some concerns included the fact that the proposed bill had objectives that were international in character as opposed to a national outlook. Some also believed that they were more inclined towards agreements that conferred tangible benefits to the country. It was also preferred that the nation not bind itself to agreements that would prevent the undertaking of activities that while beneficial to the country were contrary to international obligations. These international obligations were also viewed as a spread of hegemony and neo imperialism of ideas. The fact that Kenya consumed a lot of external copyright material as opposed to Kenyan works consumed abroad was seen as a motivation for developed nations to seek to protect their interests through international agreements which universalised the rights of these developed nations. The benefit to Kenya and other local jurisdictions was therefore only incidental.

As much as these fears for lack of ratification of the WCT are rightly founded, the truth remains that with globalisation Kenya cannot afford to isolate ourselves by adopting policies and laws that from an international perspective are seen as archaic even when those laws serve to greatly protect our citizens. Such a position serves not only to isolate the nation, but also acts as a barrier to trade with other countries. Where Kenya has adopted weak laws that do not sufficiently protect all persons, this will discourage works from being introduced and registered in Kenya. Before ratification of the WCT can be undertaken, it is important to address these concerns which may still be what may be impeding the process towards making our Copyright Act WCT-compliant. Once the WCT is ratified, Kenya will be under the obligation to introduce the making available right as a means to make copyright laws more effective in the digital space.<sup>116</sup> In so doing the treaty will form part of the laws of Kenya and thereby allowing rights holders to rely on its provisions to protect the interests of copyright holders where P2P networks are concerned.<sup>117</sup> Scholars have also noted that the ratification of this treaty gives the signatories an obligation to incorporate this right into their copyright laws.<sup>118</sup>

---

<sup>116</sup> McGarrow AJ, 'The "Making Available" Theory and the Future of P2P Networks: Does Merely Making Files Available for Further Distribution Constitute Copyright Infringement, and is it Time for Congress to Act in Accordance with this Technology?' 88 *University of Detroit Mercy Law Review* (2011), 167.

<sup>117</sup> Article 2(6), Constitution of Kenya (2010)

<sup>118</sup> Ginsburg JC, 'The (New?) Right of Making Available to the Public', 12-13

Alternative approach has been to let the P2P networks operate subject to the payment of a levy imposed on the use of the software.<sup>119</sup> This approach mirrors the Canadian Levy imposed for the importation and manufacture of compact disks that would be used for private copying of copyright protected works, a method that has also been used in Kenya. This is evident with Kenya's recently proposed amendment to the Copyright Act through Statute Law (Miscellaneous Amendments) (No. 2) Act, 2015. The bill proposes to amend section 30(8) of the act in order to provide for structured compensation of performers and producers of sound recordings for private copying or works in line with the international norms and practices. This came after the same approach had been adopted by developed nations. A similar strategy can be adopted with respect to P2P online technologies.

The Canadian method was adopted in recognition of the fact that it would be difficult if not impossible for rights holders to go after individual infringers of copyright who made copies of works onto compact discs from the comfort of their homes.<sup>120</sup> The solution was therefore to impose a levy on every disc that was purchased and the levies turned over to the Collective Management Societies to distribute to its members. In using the same model, it is proposed that a levy be imposed on commercial suppliers of P2P software and services, on ISPs, computer hardware manufacturers, manufacturers of consumer electronic devices capable of being used to copy, store, perform, or transmit digital files, and manufacturers of storage media.<sup>121</sup> This levy should further be imposed on any new and emerging technologies. The levy allows rights holders to reap the benefits of their creations while at the same time balancing the rights of users<sup>122</sup> by allowing unhindered non-commercial use of P2P to copy, distribute, stream and make derivatives of protected works without the consent of the copyright holder.<sup>123</sup> To qualify as a non-commercial use, the user should not be selling copies, access, or engaging in advertising in connection with the copyright-protected work or any modification of the work.<sup>124</sup>

Such amounts to be levied would then be determined by statute, by the copyright office and the distribution of the levy done by the relevant collective management societies. This is a more

---

<sup>119</sup> Netanel NW, 'Impose a Non-commercial Use Levy to Allow Free Peer-To-Peer File Sharing' 17 *Harvard Journal of Law & Technology* (2003), 35

<sup>120</sup> Hagen GR and Engfield N, 'Canadian Copyright Reform: P2P Sharing, Making Available And The Three-Step Test' 3 *University of Ottawa Law and Technology Journal*, (2006), 9.

<sup>121</sup> Netanel NW, 'Impose a Non-commercial Use Levy to Allow Free Peer-To-Peer File Sharing', 43

<sup>122</sup> Hagen GR and Engfield N, 'Canadian Copyright Reform' 35-36

<sup>123</sup> Institute for Information Law, *Legalizing File-Sharing: An Idea Whose Time Has Come – Or Gone?* Information Influx Conference 2-4 July 2014, 1 October 2014, 4-6

<sup>124</sup> Netanel NW, 'Impose a Non-commercial Use Levy to Allow Free Peer-To-Peer File Sharing', 43

workable and practical approach to reaping benefits from use of protected works via P2P networks as opposed to every right holder seeking to solely enforce their rights by pursuing sole infringers and or website owners and companies that facilitate P2P. Despite the ability of the levy system to solve the conflict between copyright and digital technologies, this system is not perfect and presents some challenges. In Canada, it is noted that there is a distribution problem which results in larger represented artists benefitting more than new and independent artists.<sup>125</sup> This problem needs to be resolved to ensure that all rights holders will be able to benefit from the levy system on P2P.

Finally, another alternative solution for Kenya would be shrinking safe harbour provisions for Internet Service Providers (ISPs). The concept of safe harbour originated in the United States where the ISPs could pay statutory damages exceeding the actual loss suffered by the rights holder.<sup>126</sup> This concept reduces the liability of ISPs in relation to certain specific acts as contained in the statutes. This protection is not automatic and is granted only when the ISPs have fulfilled certain conditions set for such protections to be afforded within their jurisdiction.<sup>127</sup> In Kenya, a proposed legal framework for ISP liability<sup>128</sup> was published by the Kenya Copyright Board (KECOBO) on 23<sup>rd</sup> September 2015 inviting public comments on the same. These amendments seek to block access to international sites that allow free access to local Kenyan music.<sup>129</sup> The challenge, as noted by the KECOBO legal council is the lack of legal muscle of the copyright authority to enforce the obligations on ISPs.<sup>130</sup> In shrinking safe harbour provisions, ISPs effectively take a copyright policing role and thereby engage in deterrence as opposed to enforcement tactics.

---

<sup>125</sup> [https://cippic.ca/en/FAQ/file\\_sharing#faq\\_is-file-sharing-legal](https://cippic.ca/en/FAQ/file_sharing#faq_is-file-sharing-legal) on 18 December 2015.

<sup>126</sup> 'Response to Online Copyright Infringement Discussion Paper' *Copyright Agency*, September 2014, <http://copyright.com.au/wp-content/uploads/2015/05/Online-infringement-submission-2014-09-01.pdf> on 18 December 2015

<sup>127</sup> <https://piratepartv.org.au/media/documents/Revising+the+Scope+of+the+Copyright+Safe+Harbour+Scheme+Original+Unredacted.pdf> on 18 December 2015

<sup>128</sup> <http://www.copyright.go.ke/media-gallery/news-and-updates/257-proposed-amendments-to-the-copyright-act.html> on 18 December 2015

<sup>129</sup> Kenya Copyright Board, *CopyrightNews*, issue 18, 2015, 10

<sup>130</sup> Kenya Copyright Board, *CopyrightNews*, issue 18, 2015, 10

## BIBLIOGRAPHY

### Books

- Aplin T, Davis J, *Intellectual Property Law Text, Cases and Materials*, 2ed, Oxford University Press, Oxford, 2013.
- Benkler Y, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, Yale University Press, 2006.
- Gorman RA, *Copyright Law*, 2ed, Federal Judicial Center, 2006.
- Locke J, *Two Treatises of Government*, Awnsham Churchill, London (1823).
- Nimmer MB and Nimmer D, *Nimmer on copyright: a treatise on the law of literary, musical and artistic property, and the protection of ideas*, Mathew Bender, New York, 1978.
- Goldstein P, *Goldstein on Copyright*, 3ed, Aspen Publishers Online, 2005.

### Book Chapters

- Lee J and Kim J, 'Modelling of a Copyright Protection System for the Bit Torrent Environment', in Tai-hoon K, Stoica A, Wai-chi F, Vasilakos T, Villalba JG, Arnett PK, Khan KM, Byeong-Ho K (eds.), *Computer Applications for Security, Control and System Engineering*, Springer, 2012.
- Ouma M and Sihanya B, 'Kenya' in Armstrong C, De Beer J, Kawooya D, Prabhala A and Schonwetter T (eds.) *Access to knowledge in Africa: The role of copyright*, University of Cape Town Press, 2010.
- Schoder D, Fischbach K, Schmitt C, 'Core Concepts in Peer-to-Peer Networking' in Subramanian R, Goodman BD (eds.), *Peer-to-peer Computing: The Evolution of a Disruptive Technology*, Idea Group Publishing, 2005.
- Sihanya B, 'Copyright in E-commerce and Music Industry in Kenya' in Wekesa M and Sihanya B (eds.), *Intellectual Property Rights in Kenya*, Konrad Adenauer Stiftung and SportsLink Limited, 2009.

## Journal Articles

- Afori OF, 'Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law' 14 *Fordham Intellectual Property, Media & Entertainment Law Journal* (2004).
- Arezzo E, 'Hyperlinks and making available right in the European Union: What future for the Internet after Svensson?'
- Balkin J, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' 79 *New York University Law Review* (2004).
- Birnhack MD, 'Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act' 24 *Entertainment Law Review* (2003).
- Danay R, 'Copyright vs. Free Expression: The Case of Peer-to-Peer File-Sharing of Music in the United Kingdom' 8 *Yale Journal of Law & Technology* 32 (2005).
- Duboff A, 'BPI Digital Music Nation – pirate wars' 23 *Entertainment Law Review* (2011).
- Fromer J, 'Expressive Incentives in Intellectual Property' 98 *Virginia Law Review* (2012).
- Gervais D, 'The Price of Social Norms: Towards a Liability Regime for File-Sharing' 12 *Journal of Intellectual Property Law* (2004).
- Goel S, Miesing P and Chandra U, 'The Impact of Illegal Peer-to-Peer File Sharing on the Media Industry' 52 *California Management Review* (2010).
- Hagen GR and Engfield N, 'Canadian Copyright Reform: P2P Sharing, Making Available and the Three-Step Test' 3 *University of Ottawa Law and Technology Journal*, (2006).
- Hisanari HT, 'Post-Napster: Peer-to-Peer File Sharing Systems Current and Future Issues on Secondary Liability under Copyright Laws in the United States and Japan, 22 *Loyola of Los Angeles Entertainment Law Review* (2001).
- Jones RH, 'The Myth of the Idea/Expression Dichotomy in Copyright Law, 10 *Pace Law Review* (1990).
- Jungjae L and Jongweon K, 'Piracy Tracking System of the Bit Torrent, 7 *International Journal of Security and Its Applications* (2013).

- Kaul V, 'The Digital Communication Revolution' 2 *Online Journal of Communication and Media Technologies* (2012).
- Kung L, Kroll AM, Ripken B, Walker M, 'Impact of the Digital Revolution on the Media and Communications Industry' 6 *Javnost: The Public* (1999).
- Lambrick J, 'Piracy, file sharing and legal fig leaves' 4 *Journal of International Commercial Law and Technology* (2009).
- Larusson HK, 'Uncertainty in the scope of copyright: the case of illegal file-sharing in the UK' 31 *European Intellectual Property Review* (2009).
- McGarrow AJ, 'The "Making Available" Theory and the Future of P2P Networks: Does Merely Making Files Available for Further Distribution Constitute Copyright Infringement, and is it Time for Congress to Act in Accordance with this Technology?' 88 *University of Detroit Mercy Law Review* (2011).
- Menell PS, 'Envisioning Copyright Law's Digital Future' 46 *New York Law school Law Review* (2002).
- Menell PS, 'In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age' 59 *Journal of the Copyright Society of the U.S.A.* (2012), 201
- Netanel NW, 'Impose a Non-commercial Use Levy to Allow Free Peer-To-Peer File Sharing' 17 *Harvard Journal of Law & Technology* (2003).
- Pessach G, 'An International-Comparative Perspective on Peer-To-Peer File-Sharing and Third Party Liability in Copyright Law: Framing the Past, Present, And Next Generations' Questions' 40 *Vanderbilt Journal of Transnational Law* (2007).
- Sheinblatt JS, 'The WIPO Copyright Treaty' 13 *Berkeley Technology Law Journal*, (1998).
- Sihanya B, 'Copyright Law in Kenya' 41 *International Review of Intellectual Property and Competition Law*, (2010).
- Sterk D, 'P2P File-Sharing and the Making Available War' 9 *Northwestern Journal of Technology and Intellectual Property* (2011).
- Weissman J, 'Distribution, I Presume: A Role for Presumptions in Establishing The "Making Available" Right' 27 *Cardozo Arts & Entertainment Law Journal* (2010).

Wong MWS 'The Exclusive Rights of "Distribution", "Communication to the Public" & "Making Available" Under the WIPO Copyright Treaty: Lessons for Other Jurisdictions from the Hong Kong Bit torrent Case'

Wood J, 'The Darknet: A Digital Copyright Revolution' 16 *Richmond Journal of Law and Technology*, (2010).

Zakir T, 'Overview of Changes to the Indian Copyright Law' 17 *Journal of Intellectual Property Rights* (2012).

### **Working Papers**

Clement P, Dinh V & Harris J: The Constitutional and Historical Foundations of Copyright Protection', *Center for Individual Freedom*, 11 December 2012.

Comminos A: The Liability of Internet Intermediaries in Nigeria, Kenya, South Africa and Uganda: An Uncertain Terrain' *Association for Progressive Communications*.

Edwards L, Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights.

Epstein RA, 'Liberty versus Property? Cracks in the foundations of Copyright Law' (2nd series) *John M Olin Law & Economics Working Paper No. 204* (2003).

Ge Z, Figueiredo DR, Jaiswal S, Kurose J, Towsley D: Modeling Peer-peer File Sharing Systems' *Department of Computer Science, University of Massachusetts*.

Ginsburg JC, 'The (New?) Right of Making Available to the Public', 04-78 *Columbia Public Law & Legal Theory Working Paper Group* (2004).

Oberholzer F and Strumpf K: The Effect of File Sharing on Record Sales an Empirical Analysis' *University of North Carolina* March 2004.

Saroiu S, Gummadi KP and Gribble DS: A Measurement Study of Peer-to-Peer File Sharing Systems' *Department of Computer Science and Engineering, University of Washington*, January 2002.

Sydnor II TD, 'The Making-Available Right Under U.S. Law' 16 *Progress & Freedom Foundation on Point Paper* (2009).

Tastuo Tanaka: Does file-sharing reduce CD sales? A case for Japan' *Hitosubashi University Institute of Innovation Research* December 2004.