

DIGITAL PIRACY AND AN ANALYSIS OF THE LEGAL FRAMEWORK
GOVERNING MUSICAL COPYRIGHTS IN KENYA

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DECLARATION

I, JOAN MAINA, 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:.....

Sarah Ochwada

ABSTRACT

This research paper will be a medium within which knowledge of Intellectual property meets information technology law. The main aim is to place the issue of digital piracy in music under scrutiny and establish whether there is indeed a problem of regulation. This will mean that there will be a need to examine the laws governing digital music distribution. The paper highlights the loopholes in Kenya's legal mechanisms aimed at regulation of the cyber space where contemporary artists make a living from the distribution of their creative works, seeing as the main method of musical packaging in the contemporary world is in digital form. Therefore, there will be an investigation of the legal loopholes that have led to the predicament of piracy and the gaps within the Kenyan law that create this problem. The effects of piracy in Kenya will be thoroughly elaborated in the later chapters of the paper which will help to illuminate on the intensity of this problem of piracy and how it actually denies artists their right to property under Article 40 of the Kenyan Constitution. The importance of this research lies in its purpose to identify the gaps in Kenyan law that allow for piracy and finally attempt to formulate plausible solutions that would finally remedy the law and lessen the instances of copyright infringement through piracy. In order to carry a comprehensive study, there will be a study of the Kenyan laws and the United States of America (USA) will act as the comparative jurisdiction.

List of Abbreviations

Collective Management Organizations	CMO's
Communications Authority of Kenya	CAK
Digital Millennium Copyright Act	DMCA
Gross Domestic Product	GDP
International Journal of Advanced Research and Publications	IJARP
Internet Service Providers	ISP's
Kenya Copyright Board	KECOBO
Music Copyright Society of Kenya	MCSK
Recording Industry Association of America	RIAA
Trade-Related Aspects of Intellectual Property Rights	TRIPS
United States Code	USC
United States of America	USA
World Trademark Organization	WTO

List of Cases

Kenyan Case Law

Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.

Bernsoft Interactive & 2 Others v. Communications Authority of Kenya & 9 Others [2014].

Nonny Gathoni Njenga & Another v. Catherine Masitsa & 2 Others [2014] eKLR.

Foreign Case Law

UPC Telekabel Wien GmbH v Constantin Film Verleih (2014), Court of Justice of the European Union

List of Legal Instruments

International and Regional Instruments

WIPO Copyright Treaty, 20 December 1996, 2186 UNTS 121.

WTO TRIPS Agreement, 15 April 1994, 1869 UNTS 299.

African Commission on Human and People's Rights, 27 June 1981, 1520 UNTS 217.

Copyright Act 1976 (USA)

Digital Millennium Copyright Act

United States Code

Online Copyright Infringement Liability Limitation Act

Kenyan Instruments

Constitution of Kenya (2010)

Kenyan Copyright Act (Act No 12 of 2001)

Judicature Act (Act No. 16 of 1967)

Copyright (Amendment) (Act No. 20 of 2019)

CHAPTER 1

INTRODUCTION

Background

Kenya's artistic industry has been growing over the years, which has necessitated governmental intervention in this section of the economy and particularly the music industry. However, despite government efforts which is reflected in the 2001 Copyright Act, there still remains a growing criminal industry of copyright violators who take advantage of the gaps in law especially those that arise from the lack of law enforcement. The lack of enforcement is largely attributed to ineffectiveness of the un-contemporized institutions set in place and their capacity gaps given the nature of copyright material as well as the Copyright law which holds an archaic place in reference to the current state of affairs.¹

Kenya is faced with copyright infringement in form of illegal distribution via piracy due to the unprogressive nature of the institutions set in place to combat this. Additionally, because the world of technology is such a fast-paced sector, piracy is made easy by the increasing availability of internet services and technological means that simplify distribution. Simply put, the institutions set in place have not caught up with the type of technology governing this particular industry. Many of the institutions have archaic ways of overseeing the activities in the industry and therefore have a difficult time getting hold of culprits who take advantage of this poor oversight.

Essentially, digital works are the form in which music is packaged in today's age and the laws set in place within the Copyright Act do not address the regulation of digital use and ownership of musical works. The Act allows for legal remedies such as injunctions among others when there is infringement but there is no rule that gives guidance on getting hold of the perpetrators. With the advancement of technology, the pirates are able to easily hide behind the different technological loopholes that the law fails to address. For instance, some of the loopholes among others later discussed in the paper, are that the methods of monitoring the cyberspace are not provided, there is lack of clarity on who is mandated to carry out this much needed oversight on in the online sphere or where liability lies when different

¹ Gitonga-Karuoro A and Njenga G, *Copyright Infringement and Piracy Threats to Creativity* Private Sector Division, 2018 -< <https://kippra.or.ke/copyright-infringement-and-piracy-threats-to-creativity/>>- on 30 November 2018.

stakeholders such as Internet Service Providers (ISP's) are involved. These loopholes create a large risk of propagating piracy to a more advanced level than it already has and consequently this goes to the detriment of not only artists but the country as well.

Statement of problem

For years, Kenya has been having a problem with securing revenue for its musicians in regard to digital music played and downloaded. There are many forums in which Kenyans can avail their music digitally, but this is compromised by the existence of illegally downloaded music which automatically means that the musicians are not able to garner profits from their digital product. Despite the given situation, the law does not sufficiently provide mechanisms that can prevent loss of money from this activity. In fact, the system is laissez-faire to the extent that internet service providers are completely absolved from any responsibility pertaining piracy, which leaves a gap in regulation and allows piracy to prevail. Artists are left with only the option of taking their own initiative and report the cases of copyright infringement that they come across²; a task that would prove difficult if the law requires evidence of actual download of the work.³ Over the years, this has proved to be extremely difficult given the extremely vast nature of the internet. Vigilance is therefore necessitated from both the artist who seeks to protect his/her work as well authorities who should be guided by law. Failure to regulate digital piracy of music would mean a failure of the state to secure the property rights of its citizens, specifically musicians, under Article 40 of the Constitution.

1. *Statement of Objectives*

This paper seeks to investigate the following:

- Identify some of the forums within which Kenyan musicians propagate their music online;
- Investigate whether there are any mechanisms set in place within these mediums by the government, through law, to curtail copyright infringement
- Identify the parties involved in the process that leads to piracy
- Investigate the reasons for the failure and lack thereof structures to secure musician's copyrights in Kenyan cyberspace.
- Examine the possibility of a legal solution to this digital problem of piracy

² Sihanya B, Copyright Laws in Kenya Innovativelawyer.com, 17, Para 3.

³ Sterk D, 'P2P File-Sharing and the Making Available War' *North-western Journal of Technology and Intellectual Property*, 7, 2011,496.

2. *Hypothesis*

The absence of an elaborate and effective legal framework regulating the ever-changing digital space encourages piracy and therefore prevents musicians from enjoying their copyright and economic development at both personal and industrial level. However, this can be stopped if the government can begin to take a closer look at the digital and global trends and therefore set up an effective system in place.

3. *Research Questions*

- i. Is there a legal framework involving music acquisition/procurement and distribution in the digital sphere?
- ii. Are there institutions involved in regulation of digital music to prevent the piracy conundrum and what forms of regulation exist in the country?
- iii. What are the effects of piracy and factors preventing the realization of a legal framework that effectively protects musicians from copyright infringement of their digital works?
- iv. Is there a possibility for a long-term solution to the problem of piracy in Kenya given the rapid progression of the digital sphere?

4. *Justification of Study*

The reason for carrying out this study is to establish whether it is possible for Kenya to maximize on musical copyrights in today's digital age so that musical artists can finally find solace in the law's protection of their economic rights which is primal to their livelihood. The issue stands to be that the laws made in relation to the collective acts of downloading, sending and receiving musical works in the digital sphere remains unattended to, given the dynamic forms in which this type of action manifest themselves with changing technology. The musical industry is growing and can be a great source of income not only for individuals but for the country if the law is adamant on securing copyrights.

Research Design

1. Research Methodology

The study is mainly to observe how various digital platforms have aided in the problem of piracy in order to determine the extent to which the digital age has caught up with the inadequacy of our copyright laws. This will therefore necessitate a scrutiny of the various laws that have proved ineffective and the reason for their ineffectiveness. There will also be a comparative study with another country in order to establish the situation of digital piracy in a different jurisdiction and seek to find the mechanisms that Kenya can adopt to improve its current situation.

Secondary data will be the main source of information for this paper, which will include statutes, cases, scholarly writings and journals among others.

2. Assumptions

The assumption in this research will be that the secondary sources used will be accurate enough to portray the real situation at hand and that the sample digital platforms that will be used as examples will give an accurate representation of how piracy exists in Kenya

3. Limitations

The main problems that may be encountered within the research methods highlighted above will be:

- a. Determining the accuracy of some of the various secondary sources.
- b. Limited data from secondary sources as this is not a well-covered area of law in Kenya in terms of research.
- c. Time taken to do the research will be fairly limited.

Chapter Breakdown

i. Introduction

The introductory chapter will introduce the problem discussed in the paper via the background and statement of the problem. The hypothesis, objectives of the paper and research questions will be included to outline the direction in which the paper will take. The chapter will also include the research methods that will be utilized for this study and their limitations. This chapter will basically serve the purpose of putting the research into context and giving a rationale for the study.

ii. Literature Review

The second chapter will essentially cover the theoretical framework and literature review combined. Under these categories the philosophical and scholarly aspects of the problem of piracy will be covered.

iii. An observation of the digital platforms where piracy is propagated therefore reflecting the inadequacy of our copyright laws; Establishing the current legal framework vis-à-vis music acquisition/procurement and sharing in the digital sphere

Within this chapter, the online platforms or software used to share music will be under scrutiny. In order to realize a comprehensive study, a number of platforms will be used as samples.

The chapter will also entail finding out the current legal systems set in place to curb the problem of piracy; the specific laws governing digital musical copyrights, the key players of the industry involved and affected by the piracy problem, the institutions that are supposed to be involved in regulation of piracy and copyright infringement, the powers they possess and whether these powers include a capability to improve the situation at hand.

This will be the backbone of the problem as it is the section that will dig deeper into how the authorities are concerning themselves with the matter and later, the following chapter will attempt to find the reasons why there may still be a gap existing in the law.

iv. Analyze the Effects and subsequent problems caused by Piracy, and the factors preventing the realization of a mechanism/framework to combat Piracy infringement.

In terms of effects, this chapter will highlight how digital piracy has manifested itself as a challenges for Kenyans and the problem it poses for artists especially in the economic dimension.

The paper will analyze both the internal and external factors preventing governmental institutions from creating a working and effective solution to the problem of piracy. It will consider factors such as the possibility of lack of funding of the projects assigned to this problem, lack of clarity in the state of affairs or dynamics of technology and the digital sphere required to face this challenge, and even the possible incompetency of officials entrusted to deal with the problem among others.

- v. *Examine the possibility of a long-term solution to the problem of piracy in Kenya given the rapid progression of the digital sphere.*

With all the factors considered above, this chapter will constitute a summarized analysis of the reality concerning the problem. The chapter will attempt to establish if there is indeed a possibility for a solution to be brought forth, who will be involved in this resolution and whether it can be actualized given the numerous circumstances discussed in the previous chapter.

Timeline

The research will be carried out through a period of approximately 5 months in 2019 with each chapter being submitted individually. With the advice and direction of the supervisor, Chapter 1 will be submitted in July, Chapter 2 will be submitted in August, Chapter 3 will be submitted in September, and Chapter 4 and Chapter 5 will be submitted in November.

CHAPTER TWO

THEORETICAL FRAMEWORK

The artistic industry has been growing over the years, which has necessitated some level of governmental intervention in the music industry. However, there still remains an unregulated growing criminal industry of copyright violators who take advantage of the gaps in law especially in the area of law enforcement.

The lack of enforcement stemming from un-contemporized institutions and dated laws reflects a certain ideology that the Kenyan government is employing to govern its citizens.

This theoretical framework will be founded on a number of theories. It will include theories supporting the concept of the right to property, expressly recognized by the Kenyan Constitution,⁴ in order to explain why piracy is a real problem for musicians and why digitized music is a resource to be safeguarded. Secondly, it will also include theories related to government styles in an effort to explain why the law and governmental instruments are still not addressing the issue of piracy with a more effective and current hands-on approach.

Firstly, it is important to note that, musical works of the artists are the property of the artists by virtue of the number of rights conferred to them by the Act; 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.⁵ These can be termed as a collection of rights (propounded by James Waldron) which translate into property in something. Property is a package of legally recognized rights held by one person in relationship to others in respect to something and the state should enforce those rights.⁶

Honore's theory of property as a bundle of sticks proposes that a person owns property by virtue of the legal entitlements granted by law to that person.⁷ These legal entitlements are what Honore describes as 'sticks'. Following the premise of this theory, it can be argued that

⁴ Article 40, *Constitution of Kenya* (2010).

⁵ Section 26 *Copyrights Act* (2001).

⁶ Waldron J, 'Property Law' A companion to philosophy of law and legal theory, 2 ed, Blackwell Publishing, Oxford, 2010, 9.

⁷ <<https://www.iep.utm.edu/prop-con/>>- on 27 December 2019.

there is property in digital musical works because by virtue of the Act, artists are entitled to the rights of exclusion, transfer, possession and use.

John Locke's Labour theory of property states that what one obtains through their labour is rightfully theirs. Any effort exerted to create a particular work of art should have the benefits attributed to the creator first and then the creator can decide to disperse the benefits of his/her work. The labour put into the finished product should not therefore end up in the hands of piracy.

Locke's Natural Rights theory to property also entitles artists, as part of the natural dimension, to property and proper control over it. 'Sustenance is for all; excluding or favouring no one.'⁸ Natural theorists like Aristotle justify this notion by informing us that the right to property is inherent in the moral order.

This brings us to the second monumental concept in explaining the problem discussed within this paper. Self actualization is one of the fundamental needs a human is subject to in order to exist fully as a person. This idea is a propagation of Abraham Maslow's hierarchy of needs theory. The theory states that; Actually, in some respects, one could tie the revenue obtained from the musical digital works as the revenue used to achieve the psychological needs Maslow highlights in his theory; food, shelter, and clothing among others. The hierarchy of need's theory suggests that humans have a behavioural motivation directed to secure their needs and the motivation would be even more when the need is linked to sustenance, which Locke highlights above. This explains why there is a pressing need for musicians to secure their property rights in their works and the necessitation for operational laws.

Thirdly, the problem associated with the government's slow reaction to the contemporary issues facing piracy can be explained by the laissez-faire theory. The Kenyan government has over the years adopted an interesting approach to governance,⁹ which involves the passive approach to matters concerning the economy. The fundamental principle behind the laissez faire theory is that; the less involved the government is in the economy the better any

⁸ Pope John Paul II, Encyclical Letter, *Centesimus annus* (1 May 1991), 831.

⁹ The World Bank defines governance as the manner in which power is exercised in the management of a country's economic and social resources for development. Farazmand A, 'Global Encyclopedia of Public Administration, Public Policy, and Governance' Springer International Publishing Switzerland, 2016, 3.

business will be and consequently, the society.¹⁰ The theory basically involves the idea that there is a natural order to systems that are successful without the aid of government hence the forbearance from government intervention.¹¹ This theory could be one of the reasons why the Kenyan government is so slow in creating detailed cyber laws protecting copyrights because of the philosophy against excessive government interference.

In essence, what the theories are trying to emphasize is that artists have property in their digital works and that it is only a natural phenomenon for people to be motivated to secure their resources (their property) in order to survive and achieve their needs, whether basic/psychological or secondary such as self-actualization. These two facts coupled together explain why there exists a problem for artists. Philosophers like Bentham propound under the legal theory that there needs to be some sort of government influence for property rights to be secured,¹² and that is why by virtue of government using the laissez faire method of governance, it has failed to protect artists rights to property and consequently the subsidiary but fundamental right to development¹³ in the perspective of an artist.

It follows that the government setting up effecting institutions and laws that are able to regulate this digital musical content that social welfare will prevail, which speaks to the social utility theory; The prosperity that comes about from the security of property among the right individuals does well for the society.¹⁴

Finally, being an artist and a creative means expression of ideas. These ideas are packaged in a form of art which in contemporary life today is in digital form. The state should safeguard these digital works for the artists because apart from the economic development this would bring, artists use this works/property as full expressions of their personality. The personhood theory of property proposes that proper ownership and control of property leads to

¹⁰ Kenton W, 'Laissez-Faire' Investopedia, 2018. -<https://www.investopedia.com/terms/l/laissezfaire.asp> on 16th February 2019.

¹¹ Fine S, 'Laissez Faire and the General-Welfare State. United States' The University of Michigan Press, 1964.

¹² Bentham J, *The theory of legislation*, Oceana Publications, New York, 1975, 69.

¹³ Recognized indirectly under Article 55, *Constitution of Kenya* (2010) and in the Preamble and Article 22, *African Commission on Human and People's Rights*, 27 June 1981, 1520 UNTS. 217.

¹⁴ Lastokwa G and Hunter D, 'The Laws of the virtual world' 92 *California Law Review*, 1, 2004, 3-17.

harmonious development of personality which is key for artists who draw from their individuality.¹⁵

LITERATURE REVIEW

Dommering refers to copyright as being ‘wasted away through an ‘electronic sieve’ because of the new chemical and electromagnetic reproduction techniques and states that —the electronic highway should be governed by information law.’¹⁶ This just goes to show that the Copyright Act may not be as fully equipped to deal with all the technological changes accompanying musical copyrights.

As Oddie points out ‘The global generation and the use of digital information over online networks has massive implications for copyright management, a situation for which few countries are well prepared.’¹⁷ These scholars highlight the crippling effect the digital sphere has had on copyrights internationally and the same applies to Kenya even more intensely seeing as the law and its enforcement mechanisms, (before the recently enacted 2019 Act) have been relying on provisions created in 2001,¹⁸ which is in a completely different technological era therefore presenting outdated solutions to copyright matters.

A report produced by the USA’s National Research Council Computer Science and Telecommunications Board highlights the challenges the progression of the internet has brought to the area of intellectual property, even as much as the internet is an invaluable resource. It also talks about the inter-relation between the legal issues in intellectual property that arise due to computer technology. The project recognized the lingering issue of illegal reproduction and distribution of content accessed through the internet which is made possible by the rapid evolution of the internet.¹⁹

¹⁵ Hobhouse, ‘The historical evolution of Property, in fact and in idea’, London Macmillan, 1931, 28.

¹⁶ Hugenholtz B, *The Future of Copyright in A Digital Environment* (Information Law Series Set), Paperback, 1996.

¹⁷ Oddie C, *Copyright protection in the digital age*, MCB UP Ltd, Sydney, 1999, 239.

¹⁸ The 2001 Copyright Act is the Principal Act for Copyright laws in Kenya and is used as a reference for the 2019 Act.

¹⁹ U.S.A.'s National Research Council's Computer Science And Telecommunications Board, *The Digital Dilemma: Intellectual Property in the Information Age*, 2000.

With the extents in which technology has grown, illegal music downloading is observed to be on the increase. Young tech-savvy individuals are the main contributor to this because of their ability to easily manipulate technologies used for download and distribution of music.²⁰ Gopal and Bhattacharjee are of the view that more established people, female and individuals with moral inclination to legitimate equity are more averse to share and download music on the web. This attestation recommends that young individuals and for the most part young males are probably going to download music on the web.²¹

According to Jeffery Valisno of Business World, many believe that, “online music has led to illegal sharing of music files to the detriment of the industry”.²²

Many authors have cited technology and digitization as promising resources but in terms of copyright law, digital and transmission of works is made too be so easy that it is to the detriment of the artist who put out their work in these platforms. The characteristic of digital technologies is that it is progressive and ever changing, making processes such as reproduction, dissemination and storage an easy affair which inevitably leads to copyright implications.²³

In the early 90’s, Goldstein noted that various analysts proposed that today’s entertainment and information products will be recorded digitally, transmitted digitally and stored digitally, which means that there would be a global reach, which is what we experience currently, facilitated by digital and telecommunication technologies.²⁴ However, this availability of

²⁰ Udenze S, ‘Assessing Music Piracy And Its Imperatives For Upcoming Artists: A Qualitative Insight’ International Journal of Advanced Research and Publications (IJARP), 2017, 273.

²¹ Bhattacharjee S, Gopal R and Lertwachara, K, ‘Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions’, Journal of Law and Economics, 2006, 91-114.

²² Stafford S, Music in the Digital Age: The Emergence of Digital Music and Its Repercussions on the Music Industry, *The Elon Journal of Undergraduate Research in Communications*, 2010, 113. - <https://www.elon.edu/u/academics/communications/journal/wp-content/uploads/sites/153/2017/06/09StaffordEJFall10.pdf> on 13 September 2019.

²³ Peters M, ‘The Challenge of Copyright In the Digital Age’ *Confrecia Pronunciada en el Seminario Sociedad de la Informacion*, Universidad Externado de Columbia, Bogota, May 2005, 59.

²⁴ Nurse K, Copyright And Music In The Digital Age: Prospects And Implications For The Caribbean” *Social and Economic Studies*, 2000, 53–81. - www.jstor.org/stable/27865180 on 13 September 2019.

music online has grown to be a problem of significance due to how easily download and reproduction has been made possible by the internet and various digital media.²⁵

Intellectual property rights have traditionally been destabilized by technological advances. Copyright laws become out of date when innovation renders the presumptions on which they were based antiquated. Unavoidably, new improvements change the pitch of the playing field.²⁶ Basically, information technology in forms such as the internet need to be keenly assessed in the formation of copyright law in the sense that it is a great contributor to the dynamics of musical copyright.

²⁵ Nurse K, Copyright And Music In The Digital Age: Prospects And Implications For The Caribbean” *Social and Economic Studies*, 2000, 62.-www.jstor.org/stable/27865180- on 13 September 2019.

²⁶ Cornish R, Intellectual Property: Patents. Copyright. Trademarks and Allied Rights New Delhi, Universal Publishing Company, 3rd Edition, para 1-34.

CHAPTER THREE

STATUS QUO OF REGULATION OF MUSIC IN KENYA

The onset of the digital era in Kenya has manifested in different ways. Jurisprudence like that of *Communications Authority of Kenya v. Royal Media Services & 5 Others*²⁷ verify this statement as an example. The case outlines the switch from analogue to digital broadcasting which is significantly important in the music industry because with the adoption of digital broadcasting, a slightly new mode of music sharing is brought to life, which brings out a need for regulation as the act of distribution has been made much easier. Also, the switch has brought about new players in the industry. Therefore, with all these changes, the question posed is still whether there is sufficient regulation fostered by law.

The international community has attempted to reinforce the power of Copyright over artistic works overtime. This has been done by the revision of some international instruments such as the TRIPS Agreement.²⁸ Under the WTO TRIPS Framework,²⁹ countries are required to provide effective procedures, remedies and enforcement mechanisms for copyright protection within their national laws. Reinforcement was recommended under the Agreement, to be in form of either the civil judicial process or in the form of any other workable and suitable means appropriate to safeguard intellectual property rights. However, despite this relatively progressive step in international law in trying to safeguard copyright protection for artists, the recommendations have not been adhered to by countries and legislation at the national levels have remained unaltered. Without proper legislation, enforcement capabilities reduce, together with the ability to deal with piracy infringements.³⁰

For this reason outlined above, there is need for an investigation within the Kenyan context to establish whether there is compliance to the international standards aimed at Copyright

²⁷ *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR.

²⁸ *TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 UNTS 299.

³⁰ Nurse K, Copyright And Music In The Digital Age: Prospects And Implications For The Caribbean” *Social and Economic Studies*, 2000, 61-62.-www.jstor.org/stable/27865180- on 13 September 2019.

protection, following the dictates of Article 2 of the Constitution³¹ and the Judicature Act³² which prescribe adherence to International law. Specifically, this chapter will entail the scrutiny of Kenya's 2001 Copyright Act (No 12 of 2001) and a subsequent comparative analysis of another country in order to juxtapose Kenya's piracy problem vis a vis the legal framework that is in force. It is vitally important to note that the study will be carried out on the 2001 Act because this is the principal Act³³ and has been the Act used in Kenya throughout up until October 2019 with the assent of the Copyright (Amendment) Act³⁴ which will also feature shortly later within this chapter.

In Kenya, there lacks a concise framework regulating the digital world, and the internet specifically. Illegal music streaming networks that propagate illegally acquired music have proved this statement. A popular network that has been around for a while now has been Wapkid³⁵. The legality of this website prominently fell into the legal debate when it was presented as a problem to the local artists in the case of *Bernsoft Interactive & 2 Others v. Communications Authority of Kenya & 9 Others*.³⁶ Internet Service Providers (ISP'S) were served with injunctions to block websites such Wapkid which acted as a medium for piracy. Additionally, there was a follow up declaratory order given in this case to show that the government had actually failed in its legal and constitutional duty to protect intellectual property rights of artists that are to be safeguarded under Article 40 of the Constitution³⁷.

From the above case, we see that indeed the Constitution of Kenya vouches broadly but comprehensively for the rights of musicians under Article 11³⁸ which prescribes that the state should promote arts as part of the culture and also safeguard the intellectual property rights that come along with the art. With equal importance, the Constitution provides Article 40³⁹ which is the pivot point of property law in that it requires the right to property to be protected. This particular provision also prescribes that Parliament shall not make laws that

³¹ Article 2, *Constitution of Kenya* (2010).

³² Section 3(c), *Judicature Act* (Act No. 16 of 1967).

³³ Section 2, *Copyright (Amendment)* (Act No. 20 of 2019).

³⁴ *Copyright (Amendment)* (Act No. 20 of 2019).

³⁵ -<<https://www.wapkids.com/downloads.htm>>- on 14 September 2019.

³⁶ *Bernsoft Interactive & 2 Others v. Communications Authority of Kenya & 9 Others* (2014).

³⁷ Article 40, *Constitution of Kenya* (2010).

³⁸ Article 11(2)(a) and (c), *Constitution of Kenya* (2010).

³⁹ Article 40, *Constitution of Kenya* (2010).

allow for the deprivation of one's property.⁴⁰ This being the case, there needs to be a scrutiny on Kenya's Copyright laws from the principal Copyright Act, in light of the recent amendments in the new Copyright Act in order to ascertain whether they conform to the provisions and spirit of the constitution as well as the outlined international laws above.

Kenya's Copyright Act (2001) so far has a number of commendable attempts at trying to abide by the international standards. The Act has tried to condemn and deal with Copyright infringement in various ways. The law stipulates a fine to guilty parties of up to four hundred thousand shillings or detainment up to 10 years or both whenever discovered at fault of making or distributing infringing copies of musical works.⁴¹ Further, selling or possessing copies for commercial use draws in a bigger fine of up to eight hundred thousand shillings or detainment not surpassing two years or both.⁴²

Additionally, the Act has a number of salient features that have relatively helped in attempting to safeguard copyright in music;

Firstly, we have the sanctions and fines outlined above which in theory are supposed to deter people from committing acts of copyright infringement with the threat of monetary penalties. Secondly, the Act has made possible the formulation of the Kenya Copyright Board which is mandated to administer over the copyright laws present within the Act. moreover, there are multiple other relief mechanisms made available in the Act to artists who have been subject to Copyright infringement. For example, the use of injunctions has been instrumental from the time of its provision in under Section 35 of the Act.⁴³ This provision also avails damages as a form of relief and gives guidance on how damages are supposed to be calculated vis-à-vis the royalties that would have been received were there no infringements.

Under Section 37, Anton Pillar orders are provided for the purposes of availing a court order that enables the court to search for infringing copies that may be in an offenders' possession.⁴⁴ Section 39 of the Act comes in to reinforce court orders such as the previously mentioned Anton Pillar orders and thus introduces officers such as inspectors who are to be

⁴⁰ Article 40(2) *Constitution of Kenya* (2010).

⁴¹ Section 38 (4), *Kenya Copyright Act* (No 12 of 2001).

⁴² Section 38 (6), *Kenya Copyright Act* (No 12 of 2001).

⁴³ Section 35(4), *Kenya Copyright Act* (No 12 of 2001).

⁴⁴ Section 37, *Kenya Copyright Act* (No 12 of 2001).

appointed by the Kenya Copyright Board and have the power to carry out any inspection necessary to establish the presence of copyright infringement.⁴⁵ Last but not least, is the Authentication device introduced by the Act. Every sound and audio-visual recording made available to the public by way of sale, lending or distribution in any other manner to the public for commercial purposes in Kenya shall have affixed on it an authentication device prescribed by the Board.⁴⁶ Essentially, any work sold/distributed that may require this authentication device and lacks the same, is said to be an infringing copy.⁴⁷

However, with all these relatively commendable efforts, the Copyright Act still has numerous loopholes which has allowed piracy to continue and progress through the years, proportionally to the growth of technology.⁴⁸ A number of the defects shall be discussed below. The loopholes will be discussed in light of the digital forum in which music is now shared. Fundamentally, the defects will be related to how the Copyright Act has failed to regulate the digital space and thus secure a conducive environment for contemporary intellectual property rights.

The main predicament plaguing the Copyright laws in Kenya is the general ignorance and limited legal literacy on copyright laws, both from the state and relevant authorities such as the legal sector or even the police.⁴⁹ Copyright laws are regarded with an attitude of un-seriousness thus the lack of enforcement.⁵⁰ For example, judges who act for the state in administering fines do so in a manner contrary to the Act.⁵¹ Fines are reduced from their

⁴⁵ Section 39, *Kenya Copyright Act* (No 12 of 2001).

⁴⁶ Section 36, *Kenya Copyright Act* (No 12 of 2001).

⁴⁷ Njengo J, *Analyzing The Legal Protection Of Music Copyright In Kenya*, Unpublished LLM Thesis, University Of Nairobi, Nairobi, 2014, 29.

⁴⁸ Gitonga A and Njenga G, 'Copyright Infringement and Piracy Threats to Creativity' Kenya Institute For Public Policy Research and Analysis, 2018 -<https://kippra.or.ke/copyright-infringement-and-piracy-threats-to-creativity/>- on 18 September 2019.

⁴⁹ Sihanya B, *Copyright Law in Kenya*, Innovativelawyer.com, 17.

⁵⁰ Miriti D, 'Are Authors of Musical Works Adequately Protected Under Kenya's Copyright Law?' Published LLM Thesis, University of Nairobi, 2017, 56.

⁵¹ Sihanya B, *Copyright Law In Kenya*, Innovativelawyer.com, 11.

prescribed amounts to lower amounts because copyright infringement is arbitrarily regarded as a minor offence and thus a failure in enforcement occurs.⁵²

There is also a lack of sufficient number of professionals in the field of copyright who are able to not only facilitate protection of copyright via the known and conventional laws found in the Copyright Act but also be able to promote research in the progressive aspect of copyright within the digital world.

Police are also another party that lack sensitization on the importance of Copyright and should be made an active party in the regulation of copyright infringement and capture of these criminals in the cyberspace.

Secondly, the Copyright Act is flawed in the sense that there are no express or rather detailed provisions that prescribe procedures ensuring the protection of copyright regarding the internet as the digital space. The Act was made in 2001, which is a different era altogether. In the digital world, things are ever changing. This means that there needs to be constant review of the laws as well as recommendations in order to keep up with the fast-paced technological world. One of the reasons why the Act is said to be insufficient is that it simply condemns digital piracy⁵³ without giving prior measures to be taken in order to prevent it.

The above problem highlights various other issues with the Act. For example, the lack of address of the digital aspect of copyright renders the Act insufficient in that there is a lack of identification, and more so an accurate account of the key players involved with digital artistic works. In this case, specific to musical works and sound recordings produced by musical artists. Lately within the digital sphere, the legal sector has been trying to push for the liability of Internet Service Providers (ISPs).⁵⁴ There has been a debate on whether ISP's should be held accountable for the material that is posted within their networks. There being any infringement, ISP's would be held accountable. For example, internet service providers such as Safaricom could be held liable for hosting streaming platforms such as Wapkid. The argument is that ISPs operate in a completely unregulated space because nobody in particular

⁵² Sihanya B, Copyright Law In Kenya, *Innovativelawyer.com*, 11.

⁵³ Section 35 (3), *Kenya Copyright Act* (No 12 of 2001).

⁵⁴ Kaindo P, 'Targeting Internet Service Providers (ISPs) as means to curtail online copyright piracy' *Standard Media*, 1 January 2018. -< <https://www.standardmedia.co.ke/article/2001264642/target-internet-service-providers-to-end-online-copyright-piracy>>- on 14 September 2019.

controls the internet,⁵⁵ especially in a country like Kenya where the digital era is just coming of age.

Another problem with the Act is that in its lack of address to digital copyright, there lacks provisions that establish officers who can monitor the cyberspace for copyright infringement. Inspectors, as per Section 39,⁵⁶ have only been appointed with the mandate of carrying out physical inspections thus do not have the power or rather any proven expertise to carry out any monitoring or inspection in the cyberspace. This consequentially leaves the digital works placed on the internet by artists susceptible to theft and illegal downloads, distribution and reproduction.

It is imperative that the 2001 Act is scrutinized in light of the developments made in the Amendment Act of 2019. The new Act is a great improvement to the principal act. It has managed to abide by some of the requirements under the WTO TRIPS Agreement. For example, the Act addresses the circumvention of technological measures; it lists this activity expressly as an infringement⁵⁷ but also purposes to outline the permissible and limited instances of circumvention.⁵⁸ Additionally, the new Act has included detailed instruction on ISP liability,⁵⁹ which essentially makes the digital space more regulated. Holding ISPs accountable for the content they allow on their networks makes it easier to reduce illegal activity such as piracy. The fines have also been slightly altered⁶⁰ to reflect a new system that will hopefully and prospectively be upheld within the courts when penalties are conveyed. And finally, in what looks like a valid attempt to enhance regulation, the new Act has established a Copyright Tribunal in replacement of Competent Authority.⁶¹ This gives artists

⁵⁵ Eriksson J, Giacomello G, Salhi, H, Cavelty, M, Singh J, and Franklin M ‘Who Controls the Internet? Beyond the Obstinance or Obsolescence of the State’ *International Studies Review*, 2009, 207. - <www.jstor.org/stable/25482060>- on 15 September 2019.

⁵⁶ Section 39, *Kenya Copyright Act* (No 12 of 2001).

⁵⁷ Amendment 27 of the *Copyright (Amendment)* (Act No. 20 of 2019) on Section 38 .

⁵⁸ Amendment 15 of the *Copyright (Amendment)* (Act No. 20 of 2019) on Section 26B.

⁵⁹ Amendment 24 of the *Copyright (Amendment)* (Act No. 20 of 2019) on Section 35A.

⁶⁰ Amendment 27 of the *Copyright (Amendment)* (Act No. 20 of 2019) on Section 38(4).

⁶¹ Amendment 33 of the *Copyright (Amendment)* (Act No. 20 of 2019) on Section 48.

a clear direction and also an alternative to take in the event of infringement when the matter need not go to court.

The Act however has failed to address some of the issues previously mentioned that plague the 2001 Act. The Act does not address how monitoring of the cyberspace is to be done and neither does it appoint any authority to do so. The new Act remains lagging behind in the era of manual collection of royalties by the Collective Management Organizations (CMO's) on behalf of artists while in the day and age of today, music is distributed via digital platforms almost predominantly.

Having all these major issues plaguing our copyright laws, it is only prudent to juxtapose Kenya's situation with a country doing much better; where we can draw examples from and possibly emulate in order to remedy our laws. For this reason, the comparative study will be based on the United States of America (USA) which is a leading state in digital and technological development.

The USA is a signatory to the WIPO Copyright Treaty (WCT)⁶² and so far, has been quite efficient in incorporating the Agreements within its laws. WIPO prescribes that there should be adequate legal protection and effective legal remedies against the circumvention of effective technological measures.⁶³ It is required that artists are able to communicate or make public their works without prejudice to the legal protection they are to have in regard to copyright protection.⁶⁴ Additionally, artists have been awarded enforcement rights under Article 14 of the Treaty and therefore it is the duty of the member state under this treaty to not only safeguard the rights of enforcement under Article 14 but also the rights previously mentioned or any other related to copyright protection under the treaty. However, these ones particularly mentioned are relevant to the discussion because they directly concern digital copyright.

For a long time, USA has been guided by the Copyright Act of 1976.⁶⁵ The law has been amended severally, with other legislations being made in order to supplement its provisions.

⁶² World Intellectual Property Organization, Member States -< <https://www.wipo.int/members/en/>>- on 15 September 2019.

⁶³ Article 11, *WIPO Copyright Treaty*, 20 December 1996, 2186 UNTS 121.

⁶⁴ Article 8, *WIPO Copyright Treaty*.

⁶⁵ *Copyright Act 1976 (USA)*.

The Act in itself is has a couple of similar traits to that of Kenya's Copyright Act as it outlines general provisions such as exclusive rights, provisions on fair dealing and the identification of works that are protected under copyright.⁶⁶ However, what makes USA law more robust than that of Kenya is the subsequent statutes. The most prominent of them all regarding implementation of the previously mentioned WIPO requirements is the Digital Millennium Copyright Act (DMCA).⁶⁷ This Act directly incorporates Article 11 and 14 of the WCT. It prohibits any type of circumvention of technological measures taken to safeguard copyright⁶⁸ as well as provide the remedies for infringement as a mechanism of enforcement.⁶⁹ The DMCA is also key in copyright protection for Americans because it amplifies the sanctions for copyright infringement specifically done on the internet, in conjunction with the United States Code(USC).⁷⁰ Another instrumental legislation is the

The Online Copyright Infringement Liability Limitation Act⁷¹ is a legislation that addresses ISP liability. For Kenya, this is a grey area that has not been directly addressed by parliament and thus there is lack of clarity on the role ISPs play in regard to copyright infringement. USA has laid out laws within this Act, which stipulates instances where liability falls on negligent parties and also outlines the exceptions and safe harbours for ISPs. Additionally, (insert Act), has provided a systematic breakdown explaining the liability facing online service providers in the event of online infringement of copyright.⁷²

USA is not limited to the above statutes because there are many more governing different aspects of copyright and in the different nature it manifests itself both digitally and in the traditional aspect of copyright. One can then assume that indeed, the state has made a deliberate legal effort to protect artistry in the face of the digital era.

⁶⁶ Chapter 3, Chapter 7 and Chapter 8 *Copyright Act* 1976 (USA).

⁶⁷ *Digital Millennium Copyright Act* (USA).

⁶⁸ Section 103, *Digital Millennium Copyright Act* (USA).

⁶⁹ Section 1201-1204, *Digital Millennium Copyright Act* (USA). -<

<https://www.copyright.gov/legislation/dmca.pdf>>- on 18 September 2019.

⁷⁰ Section 506, Chapter 5, Title 17 *United States Code* (2010), -<http://www.gpo.gov/fdsys/pkg/USCODE-2010-title17/html/USCODE-2010-title17-chap5-sec506.htm>- on 18 September 2019.

⁷¹ *Online Copyright Infringement Liability Limitation Act* 112 Stat. 2860 (1998) (USA).

⁷² Section 512, Chapter 5, Title 17 *United States Code* (USA).

CHAPTER FOUR

THE EFFECTS AND SUBSEQUENT PROBLEMS CAUSED BY PIRACY, AND THE FACTORS PREVENTING THE REALIZATION OF A MECHANISM/Framework

The inadequacies of the Copyright laws in Kenya have brought out some adverse effects. This will be the main discussion within this chapter. How piracy has affected both individual artists as well as the state through the economy.

The repercussions of piracy in Kenya are many and not easy to ignore, given that the creative industry contributes 5% to the country's GDP. The vice-chair of the Music Copyright Society of Kenya (MCSK) acknowledged the importance of musical creations to the economy when he stated that 'Music adds value to the GDP and creates employment for the country'.⁷³ In line with this fact is that this industry has created employment for the youths, contributing to around 3% of the country's employment.⁷⁴ This means that a deterioration in the industry leads to a subsequent fall in employment. The small percentage may seem insignificant to the much larger economy, but it is prudent to note that most of the employees referred to in this industry mainly comprises of the youth, who are a great resource for the country and offer a widespread contribution to culture. The youth therefore are directly affected.

As previously mentioned above, the country is supposed to receive a relatively significant amount of revenue from the creative industry (the 5%). According to WIPO, the figure is estimated to be approximately 85.12 billion Kenyan shillings.⁷⁵ However, Kenya loses 90% of music to piracy,⁷⁶ which translates to a large blow in the potentiality of the GDP that the industry could bring forth. If the country was able to manage intellectual property efficiently

⁷³ Croella C, 'On the Beat-Tapping the Potential of Kenya's Music Industry' WIPO Magazine, 2007. - <https://www.wipo.int/wipo_magazine/en/2007/04/article_0001.html>- on 13 October 2019.

⁷⁴ World Intellectual Property Organization, *WIPO Studies on the Economic Contribution of the Copyright Industries*, 2014, 45. - <https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf>- on 14 October 2019.

⁷⁵ Nzomo V, Copyrights, royalties and music piracy in Kenya, *Music in Africa*, 2015. -< <https://www.musicinafrica.net/magazine/copyrights-royalties-and-music-piracy-kenya>>- on 13 October 2019.

⁷⁶ Kamau I, 'Formulation of an EAC Policy on Anti-Counterfeiting, Anti-Piracy and other Intellectual Property Rights Violations,' *Academia.edu*, 2008, 5.

and limit infringement via piracy, the potential of the state to earn from the industry would be significantly greater. A study was carried out and it was determined that Kenya loses approximately 0.8 billion shillings in form of tax revenues due to piracy and counterfeiting.⁷⁷ Studies indeed show that the musical sector within the creative world suffers most at the mercy of piracy because 98% of the musical works are subject to piracy.⁷⁸ Just to show the magnitude of the economic loss that occurs from piracy, one can refer to a report in the global scene from the Recording Industry Association of America (RIAA). The report stated that 12.5 billion dollars in a country like USA is lost to global piracy every year.⁷⁹ This goes to show that if an effective system existed in the absence of piracy, then the creative sector could be a large resource for the government. Additionally, this figure shows that the creative industry also directly loses a large amount of revenue to piracy which inevitably affects the industry, the artists and subsequently, the economy at large.

Piracy is a slippery problem to deal with because given that many digital services like iTunes are legitimate and promoted, it is what happens after the music is in the hands of the buyer that music aficionados are concerned about. When that music leaves the hand of its proprietors/buyers it is regarded as stolen music. The people downloading these stolen music files are commonly alluded to as "free-riders", people who consume a good/product without paying for it. The effect of this activity which can be termed as piracy, is that the artist receives no remuneration for hard work done. This greatly undermines market efficiencies.⁸⁰

Another way in which the economy is affected is via the recession of Foreign Direct Investment. Usually, many organizations are formed around any functional industry. The organizations could be local or international depending on a country's policies. Kenya relies

⁷⁷ Gastrow P 'International Peace Institute, Termites at Work: A Report on Transnational Organized Crime and State Erosion in Kenya - Comprehensive Research Findings,' 2011, 45.

⁷⁸ Kenya Copyright Board (KECOBO), The Scourge of Piracy: A Menace to Investors in Kenya, Copyright Issue No.3, 2011.

⁷⁹ Institute for Policy Innovation Centre for Technology Freedom, *The True Cost of Sound Recording Piracy to the US Economy*' August 2007, I.

⁸⁰ Stafford SA, 'Music in the Digital Age: The Emergence of Digital Music and Its Repercussions on the Music Industry' The Elon Journal of Undergraduate Research in Communications, 2010, 113. <<
<https://www.elon.edu/u/academics/communications/journal/wp-content/uploads/sites/153/2017/06/09StaffordEJFall10.pdf>>>- on 15 October 2019.

heavily on international investors. Therefore, in the music scene, one can refer to record labels as part of the organizations that would invest in the music industry. However, with the desperate situation in Kenya in the face of piracy, record label companies would be unable to invest in the art created by Kenyan musicians when cases of piracy are only rising. Currently, the international record labels that had already set up in Kenya are now fleeing in search of better economic conditions in other countries.⁸¹

Any industry that exists in an economy does not exist in a vacuum. As it was observed by WIPO,⁸² the industry creates employment. That employment not only arises from the vibrance of the music industry itself but also from the supporting ones that compliment it. Some of the industries that have a direct link to the music industry and deserve a mention are the advertisement industry, retail industry which constitutes merchandise with music brands and consumer electronics.⁸³

The effects mentioned above highlight the impact of piracy on a large-scale for the country. For the individual artists, it is two-fold. The fact that musicians are not able to earn from their craft not only affects their incentive to create more art but more urgently affects their ability to sustain themselves.⁸⁴ Artists are living in a hand to mouth manner without any remuneration for their work and consequently, they lack the funds to invest in furtherance of their careers. The product of a musician's work is categorized under intellectual property which should be protected like any other property by virtue of Article 40 of the Constitution. The right includes the benefit of enjoying the economic advantages brought out by the property. Statistics show that the sale of records, which should be exclusively the artists property, decline with the increase of instances of piracy.⁸⁵

⁸¹ Croella C, 'On the Beat-Tapping the Potential of Kenya's Music Industry' WIPO Magazine, 2007. - https://www.wipo.int/wipo_magazine/en/2007/04/article_0001.html on 15 October 2019.

⁸² Croella C, 'On the Beat-Tapping the Potential of Kenya's Music Industry' WIPO Magazine, 2007. - https://www.wipo.int/wipo_magazine/en/2007/04/article_0001.html on 15 October 2019.

⁸³ Bender MT and Wang Y, 'The Impact Of Digital Piracy On Music Sales: A Cross-Country Analysis' *International Social Science Review*, volume 84, 2009, 158. - www.jstor.org/stable/41887409 on 16 October 2019

⁸⁴ Muriithi J, 'The Impact of Piracy on the Gospel Music Industry in Kenya' Unpublished Master in arts in Communication studies, University of Nairobi, Nairobi, 2007.

⁸⁵ Peinz M and Waelbroeck P, 'The Effects of Internet Piracy on Musical Sale: Cross Section Evidence, *Review of Economic Research on Copyright Issues* 1, 2004, 71-79.

Additionally, the artist is discouraged from making any further music once exploitation of the music by other parties is uncontrollable and to the monetary detriment of the artist. Creativity is only possible if there are funds to follow through with the ideas and there is an assurance that the ideas and works created will not be so easily subjectable to theft. Economists are of the opinion that innovation cannot be separated from the protection intellectual property is supposed to provide.⁸⁶ The gaps in copyright law which lead artists vulnerable to theft of their work stifle any motivation for creativity which results in a decline in production of music.

Moreover, music is a contribution to culture and formulates part of the country's identity for the people who listen to it. The absence/decline of it leads to a deficient culture, deprived of creativity and the character that music adds to any entertainment scene. The music industry plays a large role in fulfilling the entertainment needs of individuals and in a way reflects the values of the people, which is why it forms part of culture which is essential in any community.⁸⁷

Having scrutinized the Copyright laws in Kenya and looking at the effects that have arisen from the gaps in the law, the factors preventing the realization of an efficient framework can be discussed.

To begin with, the greatest factor which has been a large focus in this paper, that has caused the lack of an upgraded institutional framework here in Kenya is the failure to assess and analyze the stage at which copyrights has advanced in relation to advancement of technology. This failure has cost the country an updated and elaborate framework that should contain suitable roles for institutions such as KECOBO, THE CMO's, the Anti-counterfeit Authority and even the National Police who should be working together with the formerly mentioned institutions.

⁸⁶ Proserpio L, Salvemini S and Ghiringelli V, 'Entertainment Pirates: Determinants of Piracy in the Software, Music and Movie Industries' 8 *International Journal of Arts Management*, 2005, 34. -<
www.jstor.org/stable/41064861.>- on 16 October 2019.

⁸⁷ Bender MT and Wang Y, 'The Impact Of Digital Piracy On Music Sales: A Cross-Country Analysis.' 84 *International Social Science Review*, 2009, 157-156. -www.jstor.org/stable/41887409.- on 16 October 2019.

To add on the above, it is not only the institutions that lack the capacity that the digital era requires of them but also the professionals in the judiciary. Judges lack the necessary knowledge and training that the digital era needs when applying the law within its realms. For instance, in the case of *Nonny Gathoni Njenga & Another v. Catherine Masitsa*⁸⁸ the court went against precedent developed internationally for copyright through the years, by granting an injunction in favour of the plaintiffs based on minor similarities observed in two competing television series (the plaintiffs applied to the High Court for a temporary injunction restraining the Defendants from infringing in any way on the plaintiff's rights under copyright in the literary work registered as 'Weddings with Nonny Gathoni' and later televised as 'The Baileys Wedding Show with Noni Gathoni').⁸⁹ The similarity that was taken to be an infringement was too minor according to international standards and the threshold that the court used to come up with that decision was too low. This may not be a case dealing with music directly, but it just goes to show how professionals with such a pivotal role in interpreting the law require to be up to per with the current mode of operation and workings of copyright law in the advent of the digital age in Kenya.

Apart from the ignorance of the lawmakers to focus their energies constructively to make a good framework, there are other over-arching elements influencing the status of our intellectual property framework that does not directly involve government action. Theories have been developed by scholars to analyze the legal protection of intellectual property in various countries and many touch on the socio-demographic characteristics of the country in question and how it influences law-making. For example, esteemed scholars such as Rapp and Rozek came to a conclusion that intellectual property is more developed in countries where there is a high per capita income.⁹⁰ Similarly, scholars like Marron and Steel link the protection of intellectual property with the level of education of the people in the country.⁹¹ Basically, the two socio-demographic factors increase the demand for intellectual property

⁸⁸ *Nonny Gathoni Njenga & Another v. Catherine Masitsa & 2 Others* [2014] eKLR.

⁸⁹ Nzomo V, Establishing Copyright Infringement: High Court Ruling in Nonny Gathoni v. Samantha's Bridal Wedding Show Case, 9 April 2015. -< <https://ipkenya.wordpress.com/2015/04/09/establishing-copyright-infringement-high-court-ruling-in-nonny-gathoni-v-samanthas-bridal-wedding-show-case/>>- on 27 December 2019.

⁹⁰ Rapp RT and Rozek RP, benefits and Costs of Intellectual Property Protection in Developing Countries, National Economics Research Associates, Working Paper Number 3, 1990.

⁹¹ Marron DB and Steel DG, Which Countries Protect Intellectual Property; The case of Software Piracy, 38 *Economic Inquiry* 2, 2000, 159.

rights and by virtue of this, the governments are pressured to create an efficient intellectual property system that fulfills the urgent need to protect the creations and innovations that follow a well-educated and high earning society.

For Kenya, the level of education is at a low when compared to global standards. Literacy levels in Kenya are low⁹² and therefore knowledge related to copyrights among the population is almost non-existent. This brings the corresponding effect that many do not know that protection in copyrights is a realizable goal. Higher income is many times associated with the level of education therefore it makes sense that these two elements complement each other whether directly or indirectly to show how the general population is not in a position to champion for better copyright protection.

The level of education and income per capita of the demographic also speak to the level of economic growth and the level of the country's economic health. Marron and Steel go ahead to propose that countries with a good support system for safeguarding property and protection of economic instruments such as contracts usually has a corresponding framework to protect intellectual property. This theory was developed and backed up by numerous scholars and economists such as Knack and Keefer as well as Hall and Jones in their writings⁹³ where they reiterated that a solid framework for property rights increases productivity and creativity which is protected by copyright.

Last but not least is the theory that proposes that the corruption levels of a country will determine how seriously a legal framework protecting copyrights will be taken.⁹⁴ The hypothesis is that corruption in a country will affect the law enforcement system in a negative manner which will most likely lead to the gaps previously discussed. Out of all the theories, this will relate most directly to Kenya's situation due to the significant levels of corruption observed through the years. The proponents of this theory used a Corruption Perception Index formulated by the Transparency International,⁹⁵ to assess a number of countries and gauge

⁹² <http://www.uwezo.net/about-us/uwezo-findings/> on 1 November 2019.

⁹³ Knack S and Keefer P, 'Institutions and Economic Performance: Cross Country Tests Using Alternative Institution Measures' *Economics and Politics*, 207.

Hall RE and Jones CJ, 'The Productivity of Nations' The National Bureau of Economic Research, Working Paper Number 5812, 1996.

⁹⁴ Proserpio L, Salvemini S and Ghiringelli V, 'Entertainment Pirates: Determinants of Piracy in the Software, Music and Movie Industries' 8 *International Journal of Arts Management*, 1, 2005, 37.

⁹⁵ <https://www.transparency.org/about> on 1 November 2019.

how the corruption levels have affected the respective countries' enforcement of copyrights and intellectual property. The study concluded that there is a strong correlation in the ability of a country to protect property rights in regard to the level of corruption it experiences. This could be due to many factors such as failed institutions, ignorance of the law and a general incapability to catch perpetrators, let alone cyber criminals in the internet space who have time and again proved to be more elusive.

CHAPTER FIVE

CONCLUSION

Copyright is an important resource to a state and its citizens if managed well because good Intellectual Property protection is known to bring about solid economic growth.⁹⁶ The challenge is to maintain rights-holders' incentive to create new works without the discouragement of their works being deplored by piracy in an unregulated cyberspace. This involves creating new technologies and mechanisms where digital music is distributed to paying consumers and averred from those who seek to pirate it, being that we exist in an increasingly competitive world where illicit use of technology by infringers may go unpunished.⁹⁷

One of the ways the menace that is piracy can be resolved is if the state decides to take the cyberspace seriously. The effect of this would be that the state would finally put to rest the debate on how copyright laws are to be applied in the digital age.⁹⁸ There would be initiative to have in-depth learning about Copyright needs and by virtue of this, some solutions can arise. Funds should be driven towards public awareness whereby professionals, law enforcers and the public as a whole is sensitized by the state on matters to do with copyright and the actions prohibited by the state that translate to copyright infringement.⁹⁹ Essentially, there is a great need for capacity building in order to solve the problem of piracy.¹⁰⁰ Knowledge needs to be imparted on citizens, especially given the complicated and relatively new nature of digital works on the internet within the Kenyan scene. An understanding of how copyright works in the new age of technology and especially the internet is needed.

⁹⁶ Proserpio L, Salvemini S and Ghiringhelli, V, 'Entertainment Pirates: Determinants of Piracy in the Software, Music and Movie Industries' *International Journal of Arts Management*, volume 8, 2005, 34. -< www.jstor.org/stable/41064861.>- on 27 November 2019.

⁹⁷ Peters M, 'The Challenge of Copyright in the Digital Age' Universidad Externado de Colombia, 2005, 60. -< <https://revistas.uexternado.edu.co/index.php/propin/article/download/1402/1337/>>- on 29 November 2019.

⁹⁸ Murungi M, 'Protecting Copyright In The Digital Age: Challenges And Opportunities For Kenya' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2005, 41.

⁹⁹ Njengo JM, 'Analyzing The Legal Protection of Music Copyright in Kenya' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2014, 34.

¹⁰⁰ Miriti D, 'Are Author of Musical Works Adequately Protected Under Kenya's Copyright Law' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2017, 30.

In as much as Intellectual property enforcement laws are not the only way to combat piracy; that other mechanisms are needed,¹⁰¹ the WCT recognizes that technological measures put in place by parties who are copyright holders are not sufficient protection because they can be impeded by someone who is resolved to access a certain work.¹⁰² Therefore, it is commendable that the new Copyright Act in Kenya reinforces protection via the law by condemning circumvention of technological measures, as per the WIPO requirements.

The regulation of ISP's is a step in the right direction for Kenya's copyright laws. The only aspect missing is to ensure ISP's are actually championing for the fight against piracy by making sure they follow through by blocking user access to infringing material. This has been a popular and relatively effective way of combating piracy on a global level and has worked in numerous countries.¹⁰³ So effective has this practice become, that the European Court of Justice in the case of *UPC Telekabel Wien GmbH v Constantin Film Verleih*¹⁰⁴ affirmed that blocking of infringing websites by ISP's was completely compatible and in line with European Union laws. This form of regulation can be termed as a technological control measure and is known to reduce instances of digital piracy.¹⁰⁵

¹⁰¹ Omondi FL, 'How Can Kenya Tighten Its Intellectual Property Rights Law to Ensure Maximum Benefit to the Copyright Owners?' Academia.edu, 2014

¹⁰² Peters M, 'The Challenge of Copyright in the Digital Age' Universidad Externado de Colombia, 2005, 64. -<
<file:///C:/Users/njeri/Downloads/1402-Texto%20del%20art%C3%ADculo-5064-1-10-20101011.pdf>>- on 29
November 2019.

¹⁰³ <https://www.ifpi.org/downloads/Digital-Music-Report-2015.pdf> page 39

¹⁰⁴ *UPC Telekabel Wien GmbH v Constantin Film Verleih* (2014), Court of Justice of the European Union.

¹⁰⁵ Murimi J, 'Antipiracy Practices and Their Effectiveness on Firms Performance in Online Firms in Nairobi, Kenya' Unpublished LLM Thesis, University of Nairobi, Nairobi, 12. -<
http://erepository.uonbi.ac.ke/bitstream/handle/11295/98250/Murimi_Antipiracy%20practices%20and%20their%20effectiveness%20on%20firms%20performance%20in%20online%20firms%20in%20Nairobi%2C%20Kenya.pdf?sequence=1&isAllowed=y>- on 29 November 2019.

RESOLUTIONS AND RECOMMENDATIONS

With all this said, the *recommendations* can be summarized as follows:

- a) Using technology to battle technology predicaments; piracy is a problem that was created by the advancement of technology and therefore it only makes sense to use technological means to combat the problem. The government should invest in technological means to deal with piracy. For example, software can be developed under government sponsorship for the sole purpose of managing and tracking the use of works and monitor the legitimacy of downloads and distribution of music. Alternatively, the government can contract institutions with experts in the digital field to execute inspections, monitoring and identification of perpetrators of piracy.
- b) Secondly, there should be wide-spread education of the public, professionals such as judges and advocates as well as officials like the police and those working in the enforcement institutions created by the Copyright Act, in order to create awareness of the problem of piracy and what needs to be done in order for copyright protection to be further developed from where it is at currently.
- c) Thirdly, ISP's should be made more active in the fight against piracy. Despite the fact that jurisprudence and the new Copyright Act dictates that liability should not fall on the ISP for not monitoring their cyberspaces, the laws should always be interpreted in a way that does not encourage piracy to prevail. The state should ensure ISP's are made weary of perpetrators, be open to reporting any incidences on infringement and make it easy for users to report infringements.
- d) Address the gaps in the law whereby;
 - i. Institutions such as KECOBO, and the CMO's among others have not been empowered to deal with online infringements. These institutions should be given mandates based on the current needs and the way in which Copyright works in the digital space.
 - ii. The Act does not expressly mention the procedures that are to be carried out in the cyberspace so as to ensure there is no piracy. Instead of only relying on the reports that may be made by ISP's, there should be clear provisions that give elaborate procedures for respective officials (such as those in KECOBO or CAK) who are tasked with the mandate of preventing piracy infringements.

- iii. Outline the key players in the distribution of online music so that when a case arises, there is a clear outline of who should be responsible for the failure of a particular duty and where liability may lie. In addition to identifying the players in the cyberspace, the state needs to appoint officials who are equivalent to inspectors mentioned in Section 39 of the 2001 Act. These officials would be responsible for cyber-inspection and through this, many infringements would be out in the open and presumably would reduce due to the oversight.
- e) Also drawing from the situation in USA, Kenya should try as much as possible to draft supporting legislations that deal directly with copyright in the digital age, so as to make the framework more robust and to supplement the principal Act where it lacks.
- f) Finally, the state should see to it that all the penalties and sanctions outlined are followed through because this is the pivot point of all law enforcement. Without punishment for infringement, the crime will inevitably continue regardless of other measures. The state should therefore create a follow up system that ensures justice is served to both infringing and aggrieved parties.

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