

COPYRIGHT LAW IN KENYA

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I. PROLEGOMENON

This article looks at the role of copyright in technological, economic and cultural innovation, creativity and development in Kenya.¹ The article focuses on the following interrelated themes: development of substantive copyright law; copyright and the Kenyan economy; copyright and cultural development and cultural politics, with specific reference to the cultural industries in Kenya; and copyright enforcement in Kenya.

II. DEVELOPMENT OF SUBSTANTIVE COPYRIGHT IN KENYA

This Part evaluates the historical, cultural, political, economic and technological factors, which have influenced the development of Kenya's copyright principles, doctrine, policy, and practice.

A. Historical Development of Copyright in Kenya

Generally, Kenya's copyright law and practice have deep roots in the colonial and neo-colonial experience. Copyright law is largely a 20th and 21st century phenomenon, beginning with the declaration of Kenya as a British protectorate from June 15, 1895 and a colony in 1920.² Kenya's copyright law evolved from the 1842, through the 1911 and 1956 UK Copyright Acts. These statutes were applied together with the English common law by virtue of the reception clause under the East African-Order-in-Council 1897. The reception clause applied to Kenya the substance of the English common law, the

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¹ This article is informed by my ongoing research: B. Sihanya *Constructing Copyright and Creativity in Kenya: Cultural Politics and the Political Economy of Transnational Intellectual Property*, Doctoral Dissertation, Stanford Law School, 2003 [Hereinafter, *Constructing Copyright and Creativity in Kenya*]; *Intellectual Property and Innovation in Kenya and Africa: Transferring Technology for Sustainable Development* (Innovative Lawyering & ©copyright Af@ica, Nairobi, 2009).

² June 15, 1895 is the date Kenya was declared a British Protectorate pursuant to, *inter alia*, the Berlin Conference of 1884 on the Partition of Africa (otherwise called the Scramble for Africa). Ghai and McAuslan, J.B. Ojwang, and Okoth-Ogendo have discussed the political, economic, and juridical process of annexing, declaring, and exercising jurisdiction over the protectorate and colony of Kenya. See Y.P. Ghai & J.P.W. McAuslan, *Public Law and Political Change in Kenya*, (Nairobi: Oxford University Press, 1970); J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change*, (Nairobi: ACTS Press, 1990), pp. 29-34; H.W.O. Okoth-Ogendo, *Tenants of the Crown* (ACTS Press: Nairobi, 1990).

doctrines of equity and statutes of general application in force in England as at that date,³ and was later re-enacted under the Kenya Judicature Act, 1967.

B. Sources of Kenyan Copyright Law

In Kenya, Uganda, Tanzania, Ghana, Nigeria, South Africa, and Africa generally, the applicable copyright laws are found in statutes, the English common law and international treaties.⁴ Beginning in the late 1960s African states enacted or reformed copyright laws with increasing rapidity. This consolidation has received greater impetus from the late 1990s with many states being pressured or seeking to comply with the World Trade Organisation's Agreement on the Trade Related aspects of Intellectual Property (TRIPs).

There are five main sources of copyright law in Kenya, that is:

- i. The Constitution⁵ does not make any specific provision on copyright. Some of its provisions may, however, be read as legislation by metaphor, largely providing a broad framework within which copyright is to be constructed. These include the protection of property (s. 75),⁶ and freedom of expression and access to information (s. 79).

The few contexts in which constitutional doctrines have been invoked in Kenya include Richard Kuloba's reading of the copyright law under the shadow of the Constitution's equal protection clause (s. 82). He argues that although the Constitution does not specifically deal with copyright, its spirit can be taken to prohibit discrimination against illiterate innovators who may not be protected under the doctrine of materiality under the Copyright Act.⁷

- ii. The second source of law in s. 3 of the Judicature Act. This is statute law. As already indicated, since 1966, Kenya has had an Act on copyright. This is the only statute, which specifically applies to copyright.⁸

³ Section 3 of the Judicature Act (Chapter 8, Laws of Kenya) would simply re-enact the clause in the Order-in-Council. See Ghai & McAuslan *supra* note 2 at 19-25; Ojwang *supra* note 2 at 32-33.

⁴ Local African case law is still limited in quantitative terms. Moreover, *qualitatively*, the cases have not developed any clear principles or doctrines to capture the experience and nuances in the cultural, educational and publishing industries. This can also be attributed to the lack of copyright expertise among the members of the Bar and the Bench. For an attempt to study these copyright laws in the context of Africa's political economy and cultural politics, see B. Sihanya, *Constructing Copyright and Creativity in Kenya*, *supra* note 1.

⁵ See Act No. 5 of 1969.

⁶ This extensively protects private property. It provides for relief including compensation in case of compulsory acquisition or licensing.

⁷ See R. Kuloba, *Principles of Injunctions*, (Nairobi: Oxford University Press, 1987), pp. 124-134. Under the doctrine of materiality, only original works which are expressed in tangible, fixed or material form are protectable and promotable.

⁸ Some statutes have an incidental mandate on copyright. Examples include Kenya's Communications Act, 1998-2008; the Films and Stage Plays Act, Cap 222; the Kenya Broadcasting Corporation Act, Cap 221; the Books and Newspapers Act, Cap 111; the Public Archives and Documentation Service Act, Cap 19; Media Act, 2007; Anti-counterfeit Act, 2008; and Kenya National Library Services Board, Cap 225.

- iii. A number of doctrines developed under UK copyright statutes continue to apply, especially those under the 1956 UK Copyright Act. In addition, the procedural and evidentiary rules regarding copyright administration and litigation (especially in collecting societies and courts), are drawn directly or indirectly from UK legislation or practice, pursuant to the Schedule referred to in s. 3(1)(b) of the Judicature Act.⁹ Kenyan laws which further the application of English law and procedure include the Civil Procedure Act,¹⁰ the Evidence Act,¹¹ the Appellate Jurisdiction Act,¹² rules of court, as well as judicial precedents.
- iv. The applicability of the common law, which is identified as a source of law in s. 3(1) (c) of the Judicature Act, to copyright, is seriously contested.¹³ Kenya and most African states liberally apply the common law of copyright, despite the provisions found in some copyright statutes that purport to abrogate the common law of copyright.¹⁴ Such statutes seek to limit what laws apply to copyright. S. 51 of the Kenyan Copyright Act, 2001 states: “No copyright, or right in the nature of copyright, shall subsist otherwise than by virtue of this Act or of some enactment in that behalf.” This was first enacted in Kenya as s. 17 of the Copyright Act, 1966, the clause having been copied from the 1911 UK Copyright Act.¹⁵ The marginal note to the section reads, “Abrogation of common law rights.”

In the context of Kenya’s property jurisprudence, it is arguable whether the section only abolished non-statutory (common law) *right* in copyright, or the entire non-statutory (common) *law* of copyright. The latter would mean that non-statutory rights as well as remedies and procedures are also abrogated and that copyright would be the subject of strict (literal) interpretation. But such strictness does not always apply to Kenyan copyright.

- v. S. 3 of the Judicature Act does not specifically mention international law, including treaties and conventions, as a source of law and, therefore, copyright law. It is not clear whether this issue has arisen and it is arguable that there was no reason to specifically mention them. Kenya follows the British transformation or dualist doctrine whereby treaties must be ratified and enacted by Parliament to become law.¹⁶ So treaties like Berne, UCC and the WTO Agreement are not automatically

⁹ See the explanation in B (v) in this article about the Judicature Act.

¹⁰ Chapter 21, Laws of Kenya.

¹¹ Chapter 80, Laws of Kenya.

¹² Chapter 9, Laws of Kenya.

¹³ No case has actually addressed this “controversy.” Only one of my former students, faced with a case in which Kenya’s Copyright Act was not clear, called to refresh himself on the arguments I had developed in class. In the discussion on the place of the common law I analyze evidence of practice which indicates that the matter is controversial, even if it has not been directly litigated. Indeed, limited copyright expertise in the Bar and the Bench has led to many assumptions.

¹⁴ Sections 20 and 51 of the 1966 and 2001 Kenyan Acts, and section 18 of the Tanzanian Copyright Act, respectively.

¹⁵ J. Chege, *Copyright Law and Publishing in Kenya*, Nairobi: Kenya Literature Bureau, 1978, at 98. The 1911 Act sought to abrogate common law copyright in the UK.

¹⁶ D.J. Harris, *Cases and Materials on International Law*, (London: Sweet & Maxwell, 1998 and 2004). See also the Vienna Convention on the Law of Treaties, 1969. It came into force, under Art 84, in 1980. Cf. Arts. 28, 29 and 29 *bis* of the Berne Convention, noting that being procedural and administrative provisions

part of Kenyan laws but would, through enactment, domestication or transformation, constitute part of the written laws of the Kenya Parliament under s. 3(1) (2) of the Judicature Act.

C. Statutory Copyright Law in Kenya: The Copyright Act, 1966-2001

The development of Kenyan copyright law beginning with the Copyright Act, 1966 essentially illustrates the (post-) colonial impact on the construction of Kenya's copyright law. This process is discernible in the amendments of 1975, 1982, 1989, 1995, and 2000, and the supersession in 2001. The provisions of the 1966 Act and most of the subsequent amendments are largely reproductions or adaptations of UK, US and transnational copyright law. The Copyright Act, 2001, which received presidential assent on December 31, 2001, and came into force on February 1, 2003 was drafted mainly to meet the standards established under the TRIPs Code of 1994 and the WIPO Internet Treaties, 1996.¹⁷

i. The Copyright Act, 1966, Act No. 3 of 1966

This was the declaration of Kenya's copyright independence. It repealed and replaced the UK Copyright Act, 1956. S.17 of the new Act of 1966 sought to abrogate the common law of copyright. This development may be regarded as an attempt to completely de-link Kenyan from English copyright, even if that provision was based on and would be interpreted in terms of the 1911 English Copyright Act.

ii. Copyright Act, 1975, Act No. 3 of 1975

The Act consolidated national imperatives in an international context: aspects of traditional cultural expressions (TCE) (then called folklore) could be protected as a literary, artistic, or musical work. The intention was to conserve the national cultural heritage and economic welfare especially in the context of an international movement to protect natural and cultural heritage, as well as promote the then incipient interest in international trade in cultural products. It was probably a reactive, half-hearted and not-well-thought-through response to perceived Western domination of major economic sectors including cultural and literary industries like books, music and film. The hand of the United Nations Educational, Cultural and Scientific Organisation (UNESCO) could

of Berne, they will not bind members of the World Trade Organization (WTO), as such, under Art. 9 of the WTO TRIPs Agreement.

¹⁷ "WIPO Internet Treaties" is the code expression for WIPO Copyright Treaty (WCT), 1996 and WIPO Performances and Phonogrammes Treaty (WPPT), 1996. The Kenya Copyright Bill went through various drafts in 1999, 2000 and 2001. The author participated in these processes. Even after passage, there were still difficulties regarding the institutional framework, especially the establishment, composition and structure of the "competent authority" that would determine some appeals from the Kenya Copyright Board. This amorphous body is a legacy of the Berne Convention which proposed its establishment and left specifics to individual states. It is also a legacy of the Act of 1966 which was not specific on the matter. Under the Berne Convention, a competent authority should fix equitable remuneration for the exploitation of broadcasting rights in case this is not agreed *inter parties* (Art 11 bis). Moreover, that authority has a mandate on translations. See Art II (9) of the Appendix to the Berne Convention (the Appendix is entitled Special Provisions Regarding Developing Countries), incorporated to Berne under Art. 21. See also Art 36 of the Berne Convention. See also C (v) below.

be seen in this process, which appeared to depart from British copyright law and practice.¹⁸

iii. The Copyright (Amendment) Act, 1982, Act No. 5 of 1982

This introduced the term infringing copy and redefined infringement to include engaging in direct or indirect activities controlled by copyright; including importing or causing the importation of infringing copies. It also introduced the traditional reliefs for copyright infringement, including judicial remedies like injunctions and damages as well as delivery up. Criminal sanctions were also reformed and under the new s. 13A, the penalty was enhanced to a maximum Kshs. 10,000 and/or one year in jail.

iv. The Copyright (Amendment) Act, 1989, Act No. 14 of 1989

The 1989 amendment made numerous changes including redefining the term author to include the author of a “computer programme.”¹⁹ It also introduced the term audio-visual work to replace cinematographic films and specifically mentioned the Kenya Broadcasting Corporation (KBC) as the broadcasting authority. Under s. 10B it introduced the rights of performers, which are protected from unauthorized broadcasting and relevant forms of performance. S. 13A was amended to enhance the penalty for copyright infringement to a maximum Kshs. 200,000 or a jail term to up to five years or both.

v. The Copyright (Amendment) Act, 1992, No. 11 of 1992

The briefest amendment so far, the amendment of s. 17, only effected one change: it redefined the *ad hoc* institution called the competent authority. The Attorney General could establish it by appointing 3 to 5 persons to hear matters pertaining to compulsory copyright licensing where a copyright holder had unreasonably refused to license or had imposed unreasonable terms.

vi. The Copyright (Amendment) Act, Act No. 9 of 1995

The 1980s and 1990s witnessed interest in the need to come to terms with technological change, especially the challenges they posed to copyright doctrine. This amendment redefined broadcasting to include wireless, wired, and satellite transmission and reception of images and sound (s. 2). It also redefined “copy” to mean “a reproduction of a work in any form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium by computer technology or other electronic means.”²⁰

Software and Internet technologies were knocking on the door, a fact recorded in s. 2’s inclusion of charts, tables, and “computer programmes” in the list of literary works. The

¹⁸ “Appeared” because the provision on folklore has not been used much. On copyrighting TCE or folklore, See Sihanya, *Constructing Copyright and Creativity in Kenya supra* note 1 at chapter 10.

¹⁹ Computer program is a term of art independent of American or English spelling of program(me), respectively.

²⁰ Cf. definition of “copy” under s. 101 of the US Copyright Act, 1976. It excludes sound recordings, which are referred to as “phonorecords.”

term “computer programmes” (sic) had been defined in 1989 under “author” but it had not been listed as a protectable subject matter. S. 2(e) incorporated “mere data” as part of the definition of a work.²¹

vii. The Copyright (Amendment) Regulations, 2000 LN 125/2000

After Kenya acceded to Berne on June 11, 1993,²² the Attorney General exercised his rulemaking powers under s. 18 of the Act and extended the protection of the Act to literary and artistic works belonging to nationals of Berne member States. This meant that works of authors from Berne member states protected in those countries would be recognized in Kenya as well. This had been done in 1966 with respect to nationals of Universal Copyright Convention (UCC) member states.

viii. The Copyright Act, Act No. 12 of 2001

Following much discussion and lobbying through the 1990s a Copyright Bill was drafted and circulated for discussion in 1999. Subsequently, the Copyright Bill, 2000 was published in 2000. Because it had not been introduced in Parliament before Parliament went on Christmas recess, the Bill died and a new Bill was published on February 27, 2001.

The major changes in the 2001 Act include:

a) The redefinition of “a copy” to mean a reproduction of a work in any manner or form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium, by computer technology or any other electronic means.²³ It is instructive that this definition is intended to cover the new reproduction and transmission technologies relating to the production and distribution of literary and other copyrightable works. The Act underscores non-material and non-tangible forms of reproduction as well.

b) The Act emphasizes the difference between communication to the public and broadcasting.²⁴ The Act defines “broadcast” to mean the transmission by wire or wireless means, of sounds or images or both or the representation thereof, in such manner as to cause such images or sound to be received by the public and include transmission by satellite.²⁵ Communication to the public is defined in s. 2 as a live performance; or transmission to the public, other than a broadcast, of the images or sound or both, of a work, performances or sound recording. Thus the latter covers situations where the subject matter is transmitted by any other means except through broadcasting. The doctrinal and practical distinction between

²¹ Under this provision, databases such as white pages directories, which have been interrogated under US and UK copyright law, among others, were thus copyrightable!

²² See Part II E of this article below.

²³ S. 2 of the Copyright Act 2001 (emphasis mine). There was clearly a need to capture technological change.

²⁴ *Ibid.*

²⁵ The focus is on transmission, not whether it is received or not; and it focuses on point or multi-point technologies. See P. Goldstein (2001) *International Copyright: Principles, Law and Practice* New York: Oxford University Press, at 315-6.

broadcasting and communication to the public is, however, being eroded by Internet and related technologies such as web casting (or Internet radio).²⁶

c) The duration for copyright protection for photography is now 50 years just like other related subject matter of copyright.

d) The Act also specifically provides for protection of rights or activities that seem to have been ignored or excluded before: translation, adaptation, arrangement or other transformation of a work, and public performance of the work.

e) The Act has clarified instances of fair dealing with respect to each subject matter. For instance, copyright does not control reproduction, translation, or adaptation, distribution, or communication to the public “by way of fair dealing for the purposes of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of the source.”²⁷ Fair dealing is further clarified under s. 26(1) (a), (d), (e), (f), (g), (h), (j), and (l). Some of these issues help construct the scope of literary copyright and were at the core of the North-South debate leading to the Stockholm Protocol to Berne, or the Special Provisions Regarding Developing Countries. We discuss these below.

f) For the first time the copyright law contains the content of and specific limitations to a new form of literary copyright, namely, software copyright, mainly courtesy of WIPO’s and the Business Software Alliance’s (BSA’s) proposals. BSA represents software TNCs. The law allows adaptation and creation of backup copies of computer programs under certain conditions. These conditions include cases where copying of a computer program is necessary to make copies of the program to the extent necessary to correct errors; or to make a back-up copy; or for the purpose of testing a program to determine its suitability for the person’s use; or for any purpose that is not prohibited under any license or agreement whereby the person is permitted to use the program.²⁸

g) Again, for the first time, the law prohibits and regulates anti-circumvention measures so that digital rights management systems (DRMs) or technological means employed to protect works are protected under copyright law.²⁹

²⁶ The Kenya Copyright Board embarked on a comprehensive review of the Act in 2008 with a view to making appropriate proposals to the Attorney General for amendments. “Communication to the public” is one of the controversial issues. The author was a member of the Board from May 16, 2003 until June 26, 2009 as an expert, when the Attorney General appointed him the Chair of the inaugural Competent Authority (Copyright Tribunal). See Kenya Gazette No 6385 of 2009, June 26th at 1587. (Signed by the Attorney General on 2009, June 23rd.)

²⁷ S. 26(1) of the 2001 Copyright Act. Berne refers to the concept as “fair practice;” the US as “fair use;” and the UK and Kenya as “fair dealing.” The three are not coterminous. I discuss fair dealing systematically and in detail in Chapter 8 of my doctoral dissertation: Ben Sihanya, *Constructing Copyright and Creativity in Kenya*, *supra* note 1.

²⁸ See s. 26(4) of the 2001 Copyright Act. These exceptions would obviously not apply to other literary works, such as novels, plays, lectures, or sermons.

²⁹ See ss. 2 and 35(3) (c) of the Copyright Act 2001.

Circumvention of such systems is criminal under s. 36. This provision has been enacted pursuant to Art 11 of the WCT 1996.³⁰

D. Implementing the Copyright Act, 2001

The Kenya Government has set some machinery in motion to implement the 2001 Act. The Attorney-General appointed members of the Board on May 16, 2003³¹ and reappointed most of them in 2006. He appointed the Competent Authority (or Copyright Tribunal) on June, 26th 2009. There have been mixed views on copyright implementation, management and administration. Some of the views are specifically on the role of the Kenya Copyright Board established under the 2001 Act, while others regard strict copyright enforcement as having a positive effect, or the actual or potential effect of reducing employment opportunities or blocking revenue streams, particularly among the infringers and pirates.

E. Influence of Copyright Treaties in Kenya's Copyright Law

The UK became a party to the Berne Convention on December 5, 1887, 8 years before Kenya became a British protectorate. As was British practice, British adherence to Berne extended to Kenya and other protectorates and colonies such as Ghana, Nigeria, and India.³² On attaining independence in 1963, Kenya became bound by the Berne Convention and UCC through state succession. And after 1971 it could not renounce Berne partly because Art XVII of the UCC (the “Berne safeguard clause”) forbade it.³³ Kenya acceded to the 1971 Paris Act of Berne on June 11, 1993.³⁴

The UK and the US became parties to the 1952 original text of UCC on September 27, 1957 and September 16, 1955, respectively. They both became parties to the 1971 Paris text of UCC on July 10, 1974. Kenya “adopted the principles of UCC as contained in the British Copyright Act, 1956 which was a statute of general application.”³⁵ [Independent] Kenya’s membership to UCC was later formalised by Act No.3 of 1966....³⁶

³⁰ See J. Litman, *Digital Copyright*, (Amherst: Prometheus Books, 2001), pp. 122-150; See also M.J. Radin, J.A. Rothchild & G.M. Silverman, *Internet Commerce: The Emerging Legal Framework*, (New York: Foundation Press, 2002), pp. 799-876; P. Samuelson, ‘Technological protection for copyrighted works,’ 45 *Emory Law Journal* (1997); P. Samuelson, ‘Intellectual property and the digital economy: why the anti-circumvention regulations need to be revised,’ 14 *Berkeley Technology Law Journal* (1999), p. 519; M. Lemley, *et al.*, *Software and Internet Law* (New York: Aspen Law & Business, 2000) , pp. 891-902. This has been implemented under the US Digital Millennium Copyright Act, 1998 (the DMCA), and Art. 6 of the EU Copyright Directive, 2001. The Directive is reproduced in H. Norman, *Intellectual Property Law Statutes 2004/2005* (London: Sweet and Maxwell, 2004) pp. 555-570; P. Goldstein (2001) *International Legal Materials on Intellectual Property* (New York, NY: Foundation Press).

³¹ *Supra* note 26.

³² The same applied to other colonies such as Belgian Congo and French Senegal.

³³ It essentially provided that a country which withdrew from Berne would not be protected by UCC in any country of the Berne Union.

³⁴ See P. Goldstein, *International Legal Materials on Intellectual Property supra* note 30 at 149; B. Sihanya, *Constructing Copyright and Creativity in Kenya, supra* note 1 at chapters 1 and 5.4.3; Copyright (Amendment) Regulations, 2000, Kenya Gazette Supplement No. 47 (Legislative Supplement No. 47 of 13 October, 2000).

³⁵ See Sihanya, *Constructing Copyright and Creativity in Kenya, supra* note 1 at Chapter 6.3.1, 6.3.2 and 6.3.4 regarding the reception of British law in Kenya.

³⁶ See Legal Notice No 85 of March 24, 1966, published in Kenya Gazette Notice No. 25 of 1966; Chege *supra* note 15 at 93, 123 n. 5.

Relatedly, some examples of the extent of WIPO's involvement in Kenya can be seen in the fact that WIPO has worked with Kenya on drafting the copyright law. WIPO supplied extensive written comments and recommendations to the Government in the process of drafting the Copyright Bill 2000.³⁷ WIPO's focus was on ensuring the implementation of Berne and the 1996 WIPO Internet Treaties.

Moreover, WIPO has also exercised its mandate on enforcement.³⁸ WIPO conducts many of its activities through regional and national workshops. The former are meant for a much wider audience and have included conferences. Both have had some impact on copyright in Kenya. Some experts, commentators and pundits complain that copyright and other IP matters have geographical and cultural (con)texts and subtexts. They argue that increased use of experts on Kenyan or African IP and trade law, including on innovation and technology transfer, especially from Africa, may enhance capacity building and the development of local materials. It is remarkable that examples of equitable, efficient and sustainable partnerships are emerging between Northern and Southern governments, enterprises, experts, civil society players, *et cetera*. These are examples of appropriate collaborative strategies.

More recently, treaty law has been seen in a more textured context. Discourse on the role of copyright in trade and the nature and adverse consequences of infringement, piracy, counterfeiting and trade in counterfeit products, has cast treaty copyright law, and the transnational copyright institutions, into sharper relief.

The dynamics are changing somewhat partly because local Kenyan enterprises and individuals are creating copyrightable literary, musical, and other works. Their interest in expansive or absolute copyright protection converges with those of the erstwhile colonial power or foreign publishing or recording companies and other TNCs.

In copyright a number of policy and institutional responses are already evident, especially at the international level, through the work of the various international organizations like WIPO, UNESCO and the TRIPs Council (as seen above). This is particularly in the context of their trade, development or aid relations with Kenya.

TRIPs seeks to consolidate gains made by copyright interests in the regimes already discussed. In Kenya, the impact and significance of TRIPs, which is now regarded as the dominant copyright regime internationally, is still dubious. There is intense debate opposing it or supporting some of its provisions. Yet there is no scientific study on its impact.³⁹ Art. 9 of TRIPs reinforces the substantive provisions of Berne.⁴⁰ And Art 10 of TRIPs protects computer software as a literary work within the Berne regime. The same Article also protects the compilations of data or other materials, which by reason of the

³⁷ See Part 6.3.3.8 of my doctoral dissertation, *supra* note 1.

³⁸ Personal communications on diverse dates in 2000, 2002-03 with Ms Marisella Ouma, State Counsel, Copyright Section, Attorney-General's office, Nairobi; and with WIPO officials, Geneva, diverse dates, 2005. Dr Ouma is now the Executive Director of the Kenya Copyright Board.

³⁹ See B. Sihanya, *Constructing Copyright and Creativity in Kenya*, *supra* note 1 (proposing a framework for conducting a cost-benefit analysis of Kenyan and transnational literary copyright with a view to reforming transnational and Kenyan copyright law).

⁴⁰ It incorporates Arts 1-21 and the Appendix or Stockholm Protocol to the Berne Convention (Paris Act, 1971). TRIPs Art 9(1) expressly excludes moral rights (Art 6*bis* of the Berne Convention).

selection or arrangement of their contents constitute intellectual creation. The protection does not extend to the material itself.⁴¹ This strengthens the basic doctrines of Berne, such as *originality*, *automatic protection*, *national treatment*, and *duration*.

The term of protection for primary works (also called works of original authorship) under Berne is the life of the author plus 50 years.⁴² Derivative works, such as films (referred to as audio-visual works in Kenya), are protected for 50 years from the date they were made available, first made available to the public, or first published.⁴³ Duration of copyright is relevant to its economic utility.

III. COPYRIGHT IN ECONOMIC DEVELOPMENT IN KENYA

This section seeks to address the following questions:

1. Are there sufficient tool-kits available in Kenya to mainstream copyright in the economic development process?
2. What relevant strategies have been deployed in other economies?⁴⁴

A. Conceptual and Strategic Considerations in Copyright Economics

Copyright contributes to socio-economic development in at least two ways. First, copyright and IP are a source of royalty and related payments to creators, publishers and distributors. Second copyright and IP is a source of regular national income or revenue stream, especially in the form of taxes.

Copyright contributes to national revenue as the copyrighted products are subject to taxation and other related fees such as registration fees. In addition, employment is created in the production and distribution of copyrighted products. Similarly copyright and trade mark are crucial in the advertising industry, which is a major income earner in Kenya. These IP doctrines and the related processes help secure quality and consumer confidence, which result in increased sales and translate to development.⁴⁵

Kenya, whose IP regime is still lacking in many aspects, is yet to realize the full economic benefits of IP. With regard to copyright, the copyright owners are losing millions of shillings due to infringement, piracy, and counterfeiting. This is attributed to numerous factors:

⁴¹ Thus *Make it Sing and Other Poems*, selected Poems of Marjorie Oludhe-Macgoye; or a similar poetry anthology may be protected as a compilation even though - and mainly because - the individual poems are protected in the first place.

⁴² See Art. 7 of the Berne Convention.

⁴³ S 23(2) of the Copyright Act 2001. The sound recordings and broadcasts are protected for 50 years after the end of the year in which the recording was made, or the broadcast took place, respectively.

⁴⁴ WIPO has published an excellent guide on methodological issues. See WIPO, *Guide on Surveying the Economic Contribution of the Copyright-based Industries*, WIPO, Geneva (2003). See also WIPO ON Copyright industry in Kenya See also WIPO, *Performance of Copyright Industries in Selected Arab Countries: Egypt, Jordan, Lebanon, Morocco, and Tunisia*, WIPO, Geneva (2004). WIPO recently sponsored another study on copyright contribution to the economy.

⁴⁵ B. Sihanya, *How Can We Constitutionalise Innovation, Technology and Intellectual Property in Kenya?* Africa Technology Policy Studies Network (ATPS), Nairobi, at p. 5, 2002 (available at <http://www.atpsnet.org/> (last accessed May 8, 2006)).

- i. Kenya does not have a way of monitoring copyright transactions. The role of looking out for infringers is largely left to the copyright owners who have neither the capacity nor the mechanism to monitor each part of the country and look out for copyright infringers.
- ii. Many creators or artists are not aware that they possess valuable IP rights. They therefore go about their lives believing that copyright infringement is either permissible or has no remedy.
- iii. The penalties provided for copyright infringement are not sufficient to control infringement. The Copyright Act provides a maximum penalty of Kshs. 800,000 or 10 years imprisonment.⁴⁶ The Kenyan practice has been that courts impose (lower) fines rather than the jail term. For a copyright infringer who expects to earn Kshs. 4 million from a school book, a fine of Kshs. 800,000 is like loose change, petty cash or operational expenses and would not deter him from infringing the copyright.
- iv. Kenya loses a great amount of revenue due to activities such as infringement or piracy. This has led to some arguing that it is better to permit some acts of IP infringement and tax them in order to get revenue, or better, persuade or compel the infringers to engage in appropriate legitimate business.

IV. COPYRIGHT IN CULTURAL DEVELOPMENT, CULTURAL POLITICS AND CULTURAL INDUSTRIES IN KENYA

John Chege, writing with the Kenyan context as his declared territorial and conceptual focus argued that copyright performs two tasks. First, it regulates and controls IP. Second, it propagates education, ideology and propaganda. He sees copyright performing the task of “a revenue-earning enterprise and ... an important media (sic) of mass communication.”⁴⁷ His conclusion is particularly significant here as: “Copyright law has been linked with the changes in the economic infrastructure and it has been shown that the law has always been amended to accommodate the technological and class changes in the political set-up.”⁴⁸ That perspective links the two roles copyright plays in Chege’s typology.

Granted that there is a convergence of certain values based on common humanity, Kenya’s copyright law has disproportionately remained essentially Western in substance, form and practice in spite of the divergent economic conditions and (perceived) social, political and cultural interests. The reason begs the following closely related questions.

⁴⁶ Section 38 of the Copyright Act. Cf. the Anti-Counterfeit Act 2008 which provides for a maximum penalty of Kshs 2,000,000 or imprisonment not exceeding 3 years for offences under ss. 24-31. Offences under s. 32 of the Act attract maximum penalties of 15 years or fine not exceeding five times the value of the goods. There are already fears of confusion between the new anti-counterfeit laws and the patent regime under the Industrial Property Act, 2001. Some stakeholders prefer the more severe anti-counterfeiting to the patent infringement regime. Personal communication with Dr Marisella Ouma, Executive Director, Kenya Copyright Board, Nairobi, March 2009.

⁴⁷ J. Chege, *Copyright Law and Publishing in Kenya*, *supra* note 15, at p. 24.

⁴⁸ Chege, *supra* note 15. Significantly, Chege’s analysis focuses on doctrinaire or hardcore (para) Marxist political economy of copyright and pays scant attention to the discourse on the role of copyright in cultural and educational industries. Henry Chakava’s work complements Chege’s by dealing with the educational industry. See B. Sihanya, *Constructing Copyright and Creativity in Kenya*, *supra* note 1 at chapters 1, 4 and 9. Cf. Henry Chakava (1996) *Publishing in Africa: One Man’s Perspective* East African Educational Publishers, Nairobi.

- i where did Kenya's copyright law come from? And what is its structure or social and cultural content?
- ii what factors have animated recent developments in that law? What socio-cultural factors sustain the essential characteristic of Kenya's copyright regime?
- iii why can't Kenya drop out of this regime altogether or design a more socially, economically, politically and culturally appropriate one that meets core international obligations while seeking their reform, and at the same time serving the national interest?

While seeking answers to these questions, we must consider the difficulties, concerns and challenges that have mired Kenya's copyright law. Four of these are most critical. First, there have been tensions between national and foreign interests, as illustrated by the Kenyan debate on books, folklore, software, film and artistic work. Second, there have been controversies regarding the interests of authors, creators or innovators, on the one hand, and publishers and other cultural entrepreneurs, on the other, with readers, viewers and other consumers getting caught in the crossfire. Third, technological change has complicated the picture or matrix. It has ushered in new industries such as numerous printers and publishers, video libraries, photocopying shops or centres, software development and distribution corporations, Internet Service Providers (ISPs) and art dealers. Fourth, the increasing role of information, high technology and cultural products in the context of the liberalization of international trade and investment have introduced new challenges. These relate to Internet based publishing and distribution of literary materials, including the prospect of e-learning at levels lower than the university.⁴⁹

A. **What are Cultural Industries?**⁵⁰

Cultural industries are based on creativity and accumulation of copyrighted and cultural products. They may create wealth and employment.⁵¹ This definition is founded on Britain's and the UN's definition of cultural and creative industries. Britain defines creative industries as those originated from personal creativity, skills, and talents that have potential to create wealth and employment opportunities often produced and developed through intellectual property rights." And UNESCO defines them as "industries combined with innovation, production, and commercial contents and at the

⁴⁹ In April 2003 the Ministry of Transport and Communications announced that it was consulting the Ministries of Education, Science and Technology, and of Roads, Public Works and Housing, with a view to establishing e-learning. The African Virtual University (AVU), on the other hand, was established with assistance from the World Bank and located at Kenyatta University in the 1990s. AVU has since relocated. Egerton University also has the AVU facility. See A. Ouma, 'Government to Sell 70 PC Stake in Telkom,' *East African Standard*, April 9, 2003 (Kenya). Ben Sihanya (2008) "Intellectual property, quality assurance and ISO in Kenyan universities," *Law Society of Kenya Journal* vol 4 2008 No.1, pp. 35-65.

⁵⁰ See the UN and European classification codes relevant to copyright-based industries. WIPO has published an excellent guide on methodological issues. See WIPO, *Guide on Surveying the Economic Contribution of the Copyright-based Industries*, WIPO, Geneva (2003). See also WIPO, *Performance of Copyright Industries in Selected Arab Countries: Egypt, Jordan, Lebanon, Morocco, and Tunisia*, WIPO, Geneva (2004).

⁵¹ *Ibid.*

same time the nature of the contents have the qualities as intangible assets and cultural concepts that are protected under intellectual property rights and presented in forms of products or services.”

Cultural industries in the WIPO and other typologies include publishing, music, audiovisual technology, electronics, video games and the Internet. In Kenya these industries relate to:

- i. Book publishing – there are famous fiction and non-fiction writers such as Ngugi wa Thiong’o, Francis Imbuga, Marjorie Oludhe Macgoye, and Margaret Ogola; as well as Yash Ghai, H.W.O. Okoth-Ogendo, and ES Atieno Odhiambo, respectively.
- ii. Cinema – a Kenyan cinema or film industry is developing. Some important films have been shot in Kenya. In some of them Kenyans are major actors or actresses, directors, or producers. These include: *Out of Africa*; *Nowhere in Africa*. There are also other audio-visual works like Prof Ali A. Mazrui’s *The Africans: a Triple Heritage*.
- iii. Some of the famous actors and actresses, as well as local movies, include – Joseph Olita (in *The Rise and Fall of Idi Amin*); Sidede Onyulo (in the German Academy (Oscar) winning *Nowhere in Africa*; *Dangerous Affairs* (Judy Kibinge), *Project Daddy* (Judy Kibinge and Njeri Karago), *Malooned* (Bob Nyanja), and *In My Genes* (Lupita Nyong’o) and *Sugar* (Lupita Nyong’o), etc
- iv. Music - composition, performance, recording and publishing, for instance, Fadhili Williams in *Malaika*.
- v. Cultural handicrafts – Akamba carvings, Gusii soapstone, Ciondo (hand-woven basket), Kikoi, Lesso, Maasai artefacts, etc.⁵²

Kenya has not sufficiently defined cultural or creative industries in the IP context. As a result cultural industries do not realize the full economic benefits that would otherwise accrue to them if granted adequate IP protection and promotion. Thus the role of IP in the development of cultural industries in Kenya continues to be minimal.

In an optimal context cultural industries add lots of value. And because they are knowledge and labour-intensive, they create employment and wealth, nurture creativity and foster innovation in production and commercialization processes. At the same time, cultural industries are central in promoting and maintaining cultural diversity and in ensuring democratic access to culture and information. This twofold character – both cultural and economic – builds up a distinctive profile for cultural industries. During the 1990s they grew exponentially, both in terms of employment creation and contribution to GNP (or Gross National Income). Today, globalization offers new challenges and opportunities for their development.⁵³

⁵²Ben Sihanya (2007) “Kikoi and the commercial exploitation of geographical indications and traditional knowledge in Kenya,” published in the Law Society of Kenya (LSK) Magazine, *The Advocate*, Nairobi; The study was accepted by and peer reviewed for the Kenya Law Review a journal of the National Council for Law Reporting (Kenya) (forthcoming 2010). The author also presented this study at the Maasai Market Empowerment Trust’s (MMET’s) Public Forums on Regesha (return) Kiondo/Regesha Kikoi at the Goethe Institut on 31/07/2007 Tuesday. Cf. I. Ndegwa, ‘Character Merchandising in Kenya: The Case of the Maasai,’ LLB Dissertation, University of Nairobi, 2000 (Unpublished). The author supervised the work.

⁵³ One of the more eloquent studies on the theme is UNESCO *Our Creative Diversity* Report of the World Commission on Culture and Development, (Paris: UNESCO Publishing, 1996).

There is need for Kenya to define cultural industries and cultural creativity within the context of IP. Thus, such industries and the innovators would receive the protection and promotion granted to other IP owners. The industries protected in Kenya are those protected under TRIPs with a meager attempt at protection of folklore by the Copyright Act. Maasai artifacts, *ciondo* baskets and Akamba handicrafts are not sufficiently protected or promoted. Therefore there is need to review TRIPs to include these industries as well as traditional cultural expressions (TCE) (or folklore) more specifically.

IMITATIVE INNOVATION IN CULTURAL INDUSTRIES?⁵⁴

There is debate on the preservation, conservation, protection, sustainable use or exploitation of traditional cultural expressions (TCE) or folklore. A major concern is that foreigners and locals (and particularly young) artists and cultural entrepreneurs are inappropriately exploiting traditional cultural expressions (TCEs) or folklore by ripping, mixing and burning TCEs. This is especially used in Kenyan hip hop (*aka kapuka, boomba, genge, or kapungala*). While some see this as part of freedom of expression, artistic freedom, artistic creativity or academic freedom, others regard this as misappropriation of Kenyan cultural heritage or others' creativity.

Folklore or TCE have been added by statute since an amendment in 1975, under the Copyright Act (s. 18 of the repealed Copyright Act, Cap. 130). This is now regulated under s. 2 and s. 49(d) of the Copyright Act, 2001 and Regulation 20 of the Copyright Regulations, 2004.⁵⁵ The Copyright Act and Regulation 20 provide a basis for compensation for folklore, and TCE, especially for commercial purposes.

The Kenya Copyright Board, launched in July 2003, proposed and the Attorney-General gazetted the Regulations partly to provide for payment for the use of folklore or TCE.⁵⁶ However, the Board is not yet independent as anticipated under the Act as it is still dependent on the Attorney-General's office for funding, and the implementation of (major) decisions.⁵⁷ The law's and the Board's efficacy in securing enforcement and compensation in copyright and related cultural industries is thus still limited.

VI. ENFORCEMENT OF COPYRIGHT LAW IN KENYA

Copyright Infringement and Enforcement

Enforcement is important in all systems of intellectual property, including copyright, because while definitions, procedure of registration and duration of protection are

⁵⁴ See B. Sihanya, 'Imitative innovation in Kenya's literary and musical contexts: the case of hip hop,' ©Copyright Africa & Innovative Lawyering Working Paper (2006); an early draft is available at Sihanya Mentoring^(SM) in Nairobi and Siaya and at www.innovativelawyering.com. (last accessed on April 7, 2009).

⁵⁵ These were enacted and applied to make Kenya TRIPs compliant. The Act and Regulations also implement certain provisions of the WCT and WPPT, such as Digital Rights Management Systems (DRMS) or technological measures of protecting copyright (e.g. s. 35 on DRMs).

⁵⁶ The Board has representation from the Government, the various copyright industries, and three experts. From May 16, 2003 to June 26, 2009 the author was a member of the Kenya Copyright Board in the category of "expert in copyright and related matters." See text accompanying *supra* notes 26 and 31.

⁵⁷ Delinking of the Board has been controversially negotiated since 2003. The offices were physically relocated from the State Law Office to the NHIF Building in Community in March/April 2009. Ongoing discussions indicate that the Copyright Tribunal (Competent Authority) may be located there too.

important these can only be said to exist in real terms when and if they are built upon a foundation of enforcement.⁵⁸ Enforcement arises in numerous contexts, including infringement.

Infringement refers to the dealing with copyrighted material in a manner inconsistent with the copyright owner's interests. It occurs where the defendant does any of the activities protected or restricted by copyright without right holder's licence.⁵⁹ Copyright infringement is both a civil wrong and a criminal offence and it attracts both civil and criminal remedies and sanctions.

A. Civil Remedies for Copyright Infringement in Kenya

The civil remedies available under Kenya's copyright laws include injunctions, damages, account of profits and delivery up, search and seizure.

a) Injunctions

An injunction is the most popular relief and may be the most effective. This is partly because most of the copyright works, such as pop music, have a very short shelf life. Moreover, new technologies have made copying so fast that waiting for damages, account of profits or related remedies may occasion greater damage to the innovator.

b) Damages

Damages are largely compensatory. They are intended to restore the plaintiff to the position she would have been had infringement not occurred. Additional or punitive damages may be awarded where the defendant's conduct is flagrant or scandalous or where the defendant had benefited from the infringement. Your author is not aware of any Kenyan decision on this point.⁶⁰ Copying or publishing someone's diary or intimate photographs may provide cause for additional damages. Another is where a (sole) licensee abuses the copyright. In Kenya damages are largely governed by general English common law principles received in Africa under the reception clauses.⁶¹

c) Account of profits

Sometimes account of profits is considered an alternative to damages. The former is considered very important in copyright law, as damages may be insufficient. This remedy stops unjust enrichment or situations where it would be more lucrative to infringe copyright and pay (limited) damages later.⁶² Right holders often view damages and financial penalties as insufficient to deter infringers. In fact they think that in context, damages are just another "incidental cost of doing business" as far as infringement is concerned. Where the quality of the infringing items is widely different from that of the protected items keeping accounts by the infringer is also not sufficient.⁶³

⁵⁸ Ben Sihanya, *Intellectual Property and Innovation in Kenya and Africa...* *supra* note 1.

⁵⁹ S. 15 of the Kenyan Copyright Act, 1966-2000 as amended over the years and s. 35 of the 2001 Act.

⁶⁰ See *Williams v. Settle* [1960] WLR 1072; D. Bainbridge *Intellectual Property*, at 118-49 (1999). Cf. s.15 (4) of the Act and s. 35(5) of the Copyright Act, 2001. See also D. Bainbridge (2007) *Intellectual Property*, Pearson Education Limited, England (6th Ed.) at 125,129 &179.

⁶¹ For instance, s. 3 of the Kenyan Judicature Act, discussed in Part II A and B above.

⁶² Ben Sihanya (2005; published 2006) "Copyright law, teaching and research in Kenya," *East African Law Journal* Vol 2 2005 at pp. 28-62; Ben Sihanya (2003) *Constructing Copyright and Creativity in Kenya...* doctoral dissertation, *supra* note 1.

⁶³ See, for example, *Sapra Studio v. Tip Top Clothing* [1971] EA 489, at 492.

d) *Delivery up and search and seizure*

The defendant may be ordered to deliver up either the infringing copies or any material used to make them. And an order permitting search and seizure may be granted where the plaintiff fears the defendant may abscond, or destroy or dispose of the evidence so as to defeat the cause of justice. Microsoft benefited from this relief in 2000 in its case against Microskills, a Kenyan software corporation. However, judges have generally been reluctant to grant such orders. According to a source close to Microsoft, one of the features in this case was that the judge could not reportedly follow the basis of the application: what is software copyright infringement where it is copied into CD ROMs?⁶⁴

B. Criminal Sanctions for Copyright Infringement in Kenya

Sanctions are important in copyright. First, part of the rationale for providing criminal sanctions for copyright infringement is that the state wishes to protect creators, innovators, copyright entrepreneurs and consumers by bringing these matters under the purview of public law. Second, this also epitomises the Kenyan Government's interest in maintaining the revenue stream from taxes paid by producers and consumers of legitimate copyright materials.

Third, criminal sanctions are also recognition that individuals or corporations may not have sufficient human and financial resources to address copyright infringement and piracy. Fourth, it is an acknowledgement that copyright is as much a public good as it is a private good. In certain situations private individuals and corporations may not have sufficient incentives to address the social costs of infringement, which may include loss of tax revenue and the reduction of incentives for innovation as infringement or piracy decreases the prospects of investment.⁶⁵

In Kenya the 1966 Act (now repealed and replaced) provided for a maximum term of imprisonment not exceeding five years and a maximum fine of Kenya Shillings 200,000. The jail term was to be in addition or alternative to the fine, depending on the court's decision. Authors, creators and special interest groups like the Kenya Publishers Association (KPA), Music Copyright Society of Kenya the (MCSK), the Business Software Alliance (BSA), Kenya Films Commission, and also Kenya Film Censorship Board argued that these penalties were inadequate.⁶⁶

In response thereto, the Kenya Copyright Act 2001 provides that a person shall be liable to a fine not exceeding Kshs 400,000/- or imprisonment for a term not exceeding 10 years or to both. A person is guilty of an offence if he deals with or in infringing copies in the

⁶⁴ *Microsoft Corporation v. Mitsumi Garage Ltd & Anor*, NBI HCCC 810 of 2001; See also *Paul Odalo Abuor v. Colourprint & Text Book Centre Ltd* (unreported, Nairobi, per Norbury Dugdale, J_reported and discussed in Ben Sihanya (2003) *Constructing Copyright and Creativity in Kenya...supra* note 1 at 324. The court granted the Plaintiff search and seizure orders on the basis of copyright infringement in the book *White Highlands No More: A Political History of Kenya*. See Sihanya, *ibid*; see also Alfred Omondi, "Court stops printing of book," *Kenya Times* (Nairobi), Thursday, Nov. 2, 1989, at 21.

⁶⁵ See the definition of "public good," in Graham Bancroft *et al* (1992) *Dictionary of Economics*, New York; Macmillan Publishers; R.S. Pindyck and D.L. Rubinfeld (2000) *Microeconomics*, New Jersey, Princeton University Press, at 644-5.

⁶⁶ See The Kenya Publisher (Nairobi), a quarterly newsletter of the Kenya Publishers Association (KPA), Nairobi, Nov/Dec 1999-Jan 2000, pp.1-2.

following manner: makes for sale or hire; distributes; imports into Kenya otherwise for his private and domestic use or has in his possession any contrivance used or intended to be used for the purpose of making infringing copies.⁶⁷ A person who sells or lets for hire or by way of trade exposes or offers for sale any infringing copies or possesses otherwise than for his private domestic use, any infringing copy, shall be liable to a fine not exceeding Kshs 100,000/- or a term not exceeding 2 years or to both.

The challenges of copyright enforcement in Kenya

Despite the introduction of stricter penalties for infringement under the Copyright Act, 2001, Kenya still faces various obstacles in the enforcement of copyright in the criminal domain.

These challenges include the Government's cavalier attitude to copyright, general ignorance about copyright, limited resources, and limited legal literacy on copyright. For a long time, the Government's attitude has been that copyright is a personal and private affair to be pursued by individual copyright owners. Often, the main agency charged with the prosecution of copyright infringement, the police, regard copyright infringement as less serious than other crimes such as murder, theft of tangible property, battery etc as "nobody is bleeding" or has lost anything that they consider tangible or significant.

Further, there is general ignorance, literal or technical, regarding copyright and the meaning of infringement. To many enforcement officials, it makes no sense for a copyright owner to complain when their book is photocopied and yet their book is still in the shop or book shelves.

Insufficient human, technical and financial resources limit the Kenya Copyright Board's and other agencies' capacity to enforce copyright in Kenya. The Kenya Copyright Board, which is vested with the powers to administer and regulate copyright in Kenya, lacks functional autonomy and is forced to rely upon the Attorney-General's Office for financial resources and relevant administrative authority. The Board is also understaffed making management and enforcement of copyright problematic.

The widespread ignorance in the legal fraternity in Kenya on copyright matters makes the situation worse. The magistrates and judges charged with the responsibility of deciding on copyright disputes exhibit limited competence including skills, knowledge and values (SKAV) on copyright. As such, there is an urgent need to train the Bar and Bench on copyright. Similarly, the police should also be trained to ensure that they are fully conversant with the technicalities and importance of copyright.

Most copyright infringement cases are pursued in Kenya by aggrieved parties as civil rather than criminal cases. The sanctions provided for copyright prosecutions are limited and some offenders may view the sanctions as negligible transaction costs rather than penalties. Therefore, as stated, more needs to be done in training employees of prosecutorial agencies and the general public on the rights that accrue to copyright holders and on copyright management, prosecution and enforcement generally.

⁶⁷ S. 38 (4) of the 2001 Act.

C. Collective Management Organisations (CMOs) in Kenya

The exclusive right of authors to exploit their works is a basic element of copyright. In the framework of collective management organisations (CMOs), copyright owners authorise CMOs to monitor the use of their works, negotiate royalties with (prospective) users, grant licences based on appropriate conditions, collect remuneration (or royalties) and distribute the royalties among the copyright owners.⁶⁸ In the context of increasing copyright infringement in Kenya, CMOs have been established or proposed by copyright owners to try and secure the copyright holders' interests.

To qualify as a CMO under s. 46 of the Copyright Act, the agency must first be incorporated as a company limited by guarantee. The company should also be registered by the Kenya Copyright Board so as to have the authority of collecting and distributing royalties. Once a company qualifies for registration and is sufficiently enabled, the organization may perform certain CMO functions such as:

- i. monitoring copyright transactions and act as a watchdog on copyright use and infringement or piracy;
- ii. training its members on their copyright and remedies for infringement;
- iii. collecting and storing copyright products; and
- iv. collecting and distributing royalties on behalf of copyright owners.

Most CMOs in Kenya are faced with four major challenges. First, lack of a firm constitutional foundation in a normative and institutional sense. Second, most CMOs are established under Government ministries and thus lack autonomy and independence.⁶⁹ Third, most CMOs have limited financial and technical capacity. And fourth, most CMOs have inadequate copyright expertise among the managers and members of the organizations.

CMOs in Kenya include Kenya Reprographic Rights Organization (KOPIKEN), which seeks to protect and promote authors and publishers of literary works. KOPIKEN was formed in the early 1990s to fight infringement or piracy in books and music, and to ensure authors secure maximum benefits from their works. KOPIKEN was mandated to act as a collecting society and is registered as a CMO by the Kenya Copyright Board.⁷⁰

The Music Copyright Society of Kenya (MCSK) seeks to protect authors, composers, publishers of music, and musicians. MCSK was one of the earliest CMOs or collecting societies to be registered by the Kenya Copyright Board. MCSK had 680 members in 2008; and a repertoire of over 20,000 musical works.⁷¹ The major objective of MCSK is

⁶⁸ Dr Mihaly Fiscor (2002) *Collective Management of Copyright and Related Rights*, World Intellectual Property Organisation, Geneva.

⁶⁹ Sihanya, *How Can We Constitutionalise Innovation, Technology and Intellectual Property in Kenya*, *supra* note 54, at p. 6.

⁷⁰ Ben Sihanya (2003) *Constructing Copyright and Literary Creativity in Kenya: supra* note 1.

⁷¹ See generally the official website of MCSK at <http://www.mcsk.or.ke/about.htm> (last accessed on 09/11/2008; 11/12/09); Marisella Ouma (2008) *Enforcement of Copyright in the Music Industry: a Critical Analysis of the Legal and Infrastructural Framework of Enforcement in Sub Saharan Africa*, Doctoral Dissertation, Queen Mary University of London.

to collect royalties for and on behalf of its members as well as for members with whom the Society has reciprocal agreements.⁷²

Relatedly, the Society of Performing Artists of Kenya (SPAK) is interested in securing performers' interests as it pursues registration as CMO. The Kenya Copyright Board has been keen that the registered CMOs and the companies abide by the law and relevant principles governing CMOs as they pursue registration and once they are registered.

VII. CONCLUSION

Kenyan and African copyright law is largely a product of three major legacies or factors: British or French colonialism; American and transnational influence through post-colonial Western or transnational institutions and enterprises; and the internalisation or retention of Western copyright norms in Kenya and in relevant African states.

Copyright law has not sufficiently protected or promoted Kenyan creativity, and innovation, including the development and use of traditional cultural expressions (TCE). Moreover, significant normative institutional constraints pose a great challenge to copyright in the individual and collective management, exploitation and enforcement of copyright. The Kenya Copyright Board and many sectors have shown an interest in addressing most of these challenges to copyright protection and promotion in Kenya.

⁷² See Music Copyright Society of Kenya, "MCSK, the society" available at <http://www.mcsk.or.ke/about.htm>, (last accessed on 09/11/2008).