

6. LANDSCAPES IN THE AUDIOVISUAL SECTOR IN KENYA: CONSTRUCTING A FRAMEWORK FOR THE COLLECTIVE MANAGEMENT OF RIGHTS

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ABSTRACT

The Locke's Labour theory¹ rhymes well with the concept of the collective management of rights. The concept not only provides a platform for rights-holders to exploit the fruits of their labour, but also helps in the realization of economic growth for the general welfare of society. In Kenya, the audio sector has done relatively well compared to their ill-fated cousin, the audio-visual industry. Indeed, Kenya has yet to establish an audio-visual collective management organisation (CMO) despite the existence of a robust Intellectual Property regime; the emergence of internet and digital broadcasting; as well as content aggregation technology. There are about five CMOs,² albeit one of them has been denied a practicing license by the Kenya Copyright Board.³ The registered CMOs largely manage the collective rights of other copyright-based industries other than the audio-visual sub-sector. Against this background, this paper explores and provides insights into Kenya's national and international legislative

frameworks, touching on the collective management of audio-visual rights. The paper also makes several recommendations on reviewing the respective legislative and policy frameworks for the regulation of CMOs, the most important being the urgent need for establishment of an audio-visual CMO to insulate Kenyan audio-visual artists from the vagaries of unregulated free market.

Keywords: audio-visual, collective management organization, copyright, performances, intellectual property, broadcasting

1. INTRODUCTION

Following the digital switch on 17 June 2015,⁴ there is increased demand for local content on television and other audio-visual industry platforms in Kenya. As of June 2017, Kenya had 66 free-to-air Digital Terrestrial TV⁵ stations and 178 FM radio stations.⁶ This, coupled with the amendments to the Kenya Information and Communication Act (KICA)⁷ which fixed the quantum for local content for TV broadcasters at 40% and 60% by 2018, has created great potential for the film and other audio-visual sectors. The country has also witnessed the emergence of digital platforms whose survival depends on the constant supply of content. These platforms include vernacular TV stations, the Safaricom's BIGbox,⁸ content aggregators such as Viusasa,⁹ and internet platforms such as YouTube, Web TV, and VOIP.¹⁰ The

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¹ According to Rahmatian, on page 70: "Locke's Theory of the origin and justification of property is rooted in natural law and in the theological premise that in a state of nature, God has given world inhabitants reason to make use of it, hence the right to derive rewards from their laborious endeavour."

² According to the Kenya Copyright Board (KECOBO), the Collective Management Organization is a legal entity formed to obtain collective licenses on behalf of its members in relation to accruing royalties.

³ Kenya Copyright Board: The Board is established pursuant to Section 3 and is empowered to license Collective Management Organizations (CMO) to collect and distribute copyright royalties on behalf of their members. Section 46 gives effect to the establishment of Collective Management Organization (CMO).

⁴ According to John Burgess, digital switch involves transition from analogue to digital broadcasting. Worldwide, the process took place in June 2015, by which time several countries including Kenya, were expected to make the transition.

⁵ Ibid, Burgess: he defines Digital terrestrial television (DTTV or DTT) as a technological evolution of broadcast television and an advancement over analog television. DTTV broadcasts are land-based signals.

⁶ Communications Authority of Kenya. (2017). *Fourth Quarter Sector Statistics Report for The Financial Year 2016/2017 (April-June 2017)*. Nairobi.

⁷ Kenya information and Communication Act (KICA) is the law that establishes the Communication Authority of Kenya, a body charged with overseeing the broadcast services, radio communications, electronic transactions and telecommunications sector in the country.

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https://www.safaricom.co.ke/TheBigBox/theBIGbox_Quick_Installation_Guide.pdf The Guide defines the device as an android powered device operated by Safaricom (Kenya's leading Telecom provider). It offers over 30 TV channels including free-to-air local channels.

⁹ Viusasa is a mobile based application that allows users to access audio-visual content at a fee. It is jointly operated by Royal Media Services and Content Aggregation Limited (CAL).

¹⁰ Mathew Desantis, 'Understanding Voice over Internet Protocol,' *Journal of US-CERT*, (2006), 1-5. He defines VOPI as Voice Over Internet Protocol is a methodology and group of technologies for delivery of voice communications and

proliferation of these platforms has created a fertile ground for the appropriation or misappropriation of Intellectual Property Rights (IPRs) in the country.

2. LEGAL FRAMEWORK FOR THE COLLECTIVE MANAGEMENT OF RIGHTS IN KENYA

The Kenyan national legal framework is comprised of the Constitution¹¹ and the Acts of Parliament, common law, the doctrine of equity, African customary law, and international legal instruments. This legal framework collectively provides for IPR administration and dispute resolution. The protection and administration of copyright is anchored in the 2010 Constitution and is administered through the Copyright Act¹² and other legal and policy frameworks. The paper discusses the status of administration of audio-visual works within the confines of the country's legal framework.

A. CONSTITUTION OF KENYA¹³

The Constitution of Kenya was passed through universal suffrage and promulgated in 2010. It is considered to be one of the most pragmatic constitutions in Africa to have enshrined the protection of IPRs. Other Constitutions that have overtly provided for IP protection include the Egyptian Constitution of 2014¹⁴ (Article 69) and Tunisian Constitution¹⁵ (Article 41). The Kenyan Constitution mentions the protection of IPRs in the Bill of Rights.¹⁶

multimedia sessions over internet protocol (IP) networks, such as the internet.

¹¹ The Constitution of Kenya 2010 – Kenyans held a referendum on 4 August 2010 to repeal the 1963 Constitution. The new Constitution was promulgated on 27 August 2010.

¹² Copyright Act: The Copyright Act enacted in 2001 but in effect from 2003, is Chapter 130 laws of Kenya and governs copyright law in the country. The Act complies with Kenya's obligations under the Berne Convention. But in some instances, this Act goes beyond what has been outlined in this convention as well as WIPO Internet treaties. Copyright laws protects the following: Literary works (novels, stories, poetic works, plays, stage directory, film sceneries, treatises, histories, biographies, essays and articles, encyclopedias and dictionaries; letters, reports, memoranda, lectures, addresses and sermons, charts and tables, and computer programs) - does not include written law or judicial decision; musical works; artistic works (artifacts and paintings); audio visual works, and; sound recording and broadcasts (after they have been broadcast; copyright in a Tv broadcast shall include right to control the taking of still photographs therefrom).

¹³ See *supra* footnote 11 and accompanying text.

¹⁴ Article 69 of Egyptian Constitution (2014): The state shall protect all types of intellectual property in all fields and shall establish a specialized body to uphold the rights of Egyptians and their legal protection, as regulated by law.

¹⁵ Article 41 of Tunisian Constitution: The right to property shall be guaranteed, and it shall not be interfered with except in

Article 11 requires the state to promote the Intellectual Property of the people of Kenya.¹⁷ Article 40 addresses the right to own property of any kind.¹⁸ Article 40 (5) obligates the state to promote the intellectual property rights of the people of Kenya, while Article 69(1)(c) and (e) mandate the State to protect and enhance intellectual property, traditional or indigenous knowledge of biodiversity, and the genetic resources of the communities.¹⁹ Article 20(c) includes IP in the definition of 'property.'

It can therefore be argued that the creative sector, including production and distribution of audio-visual works, is well protected under Article 11 and Article 33²⁰ which recognise culture as the foundation of the country and obligate the state to promote all forms of creative expressions such as films and literature, among others. Article 24 qualifies and gives limitations to the rights as provided for in the Bill of Rights.²¹ The Constitution notes that such rights shall only be limited by law taking into consideration the nature of the right, the importance of the limitation and the nature and extent of the limitation.

Intellectual Property does not qualify as an absolute right and is subject to the limitations as provided for in: Section 26 of the Copyright Act of 2001;²² Industrial Property Act;²³ Seeds and Plant Varieties Act;²⁴ Trademark

accordance with circumstances and with protections established by the law. Intellectual property is guaranteed.

¹⁶ The Bill of Rights has a total of 73 articles touching on various rights such as protection of right to property, intellectual property, cultural rights, freedom of media, and freedom of expression.

¹⁷ See *supra* footnote 11 and accompanying text.

¹⁸ See *supra* footnote 11 and accompanying text.

¹⁹ See *supra* footnote 11 and accompanying text.

²⁰ Article 33, The Kenyan Constitution of Kenya, sub section (b) provides that every person has the right to freedom of expression, which includes freedom of artistic creativity.

²¹ See *supra* footnote 11 and accompanying text.

²² See *supra* footnote 12 and accompanying text.

²³ Industrial Property Act, 2001: The main object of this Act is to provide for the promotion of inventive and innovative activities, to facilitate the acquisition of technology through the grant and regulation of patents, utility models, technovations and industrial designs.

²⁴ Seeds and Plant Varieties Act, CAP 326 of the Laws of Kenya regulate transactions in seeds, including provision for the testing and certification of seeds; provide guidelines for the establishment of an index of names of plant varieties and to empower the imposition of restriction on the introduction of new varieties and control the importation of seeds; provide for the grant of proprietary rights to persons breeding or discovering new varieties.

Act;²⁵ Anti-Counterfeit Act;²⁶ Competition Act,²⁷ and Traditional Knowledge & Cultural Expressions Act of 2015 and other related laws.

B. COPYRIGHT ACT CAP 130, REVISED EDITION 2014 [2012]²⁸

The Copyright Act, Chapter 130 of the Laws of Kenya (CAP 130), provides for the protection, enforcement and exploitation of copyright and related rights.²⁹ Section 22 outlines works that are eligible for copyright protection.³⁰ These rights include: literary works, musical works, artistic works, audio-visual works, sound recordings, broadcasts and computer programs.³¹ Section 2 defines audio-visual works and broadcast works to include: undertakings in press, theatrical productions including operas, motion picture, video, television, and advertising services.³²

Section 3 of the Act establishes the Kenya Copyright Board (KECOBO).³³ It also provides mechanisms for the collective administration of copyright³⁴ and allows for the establishment of a Competent Authority.³⁵ The Competent Authority, as contemplated in the Act, remains in limbo. This is despite a High Court³⁶ order in 2014 requiring the Government to operationalize the Authority stating that failure to do so amounts to a violation of the Constitution. In its judgement, the Court noted that a Competent Authority has yet to be

operationalized owing to budgetary and administrative challenges, and hence the same is not functional, although Article 47(1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.

Article 21(1) of the Constitution states that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. It is therefore upon the State to assist the Competent Authority so that it can undertake its statutory duties.

In 2012, the Attorney General via a Kenya Gazette, Notice No 4339,³⁷ appointed a five-member copyright tribunal³⁸ chaired by Professor Ben Sihanya. However, the Tribunal suffered a stillbirth; it was never consummated. This has left the copyright industry's grievances and disputes in abeyance.

The Act empowers KECOBO³⁹ to appoint an appropriate number of inspectors to investigate copyright infringement. The Attorney General is empowered to appoint public prosecutors to prosecute matters arising under the Act. The penalties provided for infringement of copyright under the Act are said to be in contravention of Article 61 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement)⁴⁰

²⁵ Trademark Act, CAP 506 of the Laws of Kenya: This law provides for the protection, promotion and registration of trade marks. The Act defines a mark to include a distinguishing guise, slogan, device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof whether rendered in two dimensional or three-dimensional form.

²⁶ The Anti-Counterfeit Act: The Act establishes the Anti-Counterfeit Agency with the mandate to administer anti-counterfeiting policy and law in Kenya.

²⁷ Competition Act, No. 12 of 2010: This is an Act of Parliament that promotes and safeguards competition in the Kenyan national economy. It protects consumers from unfair and misleading market conduct, provides for the establishment, powers, and functions of the Competition Authority and the Competition Tribunal.

²⁸ See *supra* 12 and accompanying text.

²⁹ Related Rights: This include derivative works developed from original copyrighted works.

³⁰ See *supra* 12 and accompanying text.

³¹ Gerry Gitonga, *An Overview of Contracts and The Law on The Audio-visual Industry in Kenya* (KECOBO Copyright News, 2012) Page 9.

³² Section 2 of Copyright Act, 'Audio-visual Work means a fixation in any physical medium of images, either synchronized with or without sound, from which a moving picture may by any means be reproduced and includes videotapes and videogames but does not include broadcast.' While the same Section defines 'broadcast,' as transmission, by wire or wireless means, of sounds or images or both or the representations thereof, in such

a manner as to cause such images or sounds to be received by the public and includes transmission by satellite.

³³ KECOBO: See *supra* footnote 3 and accompanying text.

³⁴ Section 46(1) provides that no person or association of persons shall commence or carry on the business of a copyright collecting society except under or in accordance with a certificate of registration granted under this section.

³⁵ Section 48(1) establishes the Competent Authority to review CMOs tariffs as well as determine appeals from the decisions of KECOBO and CMO.

³⁶ In *Republic v Kenya Association of Music Producers (KAMP) & 3 others Ex- Parte Pubs, Entertainment and Restaurants Association of Kenya (PERAK)* [2014] eKLR, the Court ruled that failure to operationalise a Competent Authority amounts to an abdication of the Constitutional duties imposed upon the State, and in applying a provision of the Bill of Rights, the Court was enjoined by Article 20(3)(b) of the Constitution to adopt the interpretation that most favours the enforcement of a right, or fundamental freedom.

³⁷ Kenya Gazette Notice No 4339 dated 2 April 2012: the Attorney General appointed Ben Sihanya (Prof) as the Chairman while the other members included: Paul Musili Wambua (Prof), Leonard Amolo Obura, John Syekei and Michi Kirimi.

³⁸ See *supra* 33 footnote and accompanying text.

³⁹ See *supra* footnote 3 and accompanying text.

⁴⁰ The TRIPS Agreement is administered jointly by the World Intellectual Property Organization (WTO) and World Intellectual Property Organization (WIPO).

because they are neither deterrent nor punitive enough.⁴¹

Additionally, the copyright enforcement role bestowed on KECOBO is viewed as a duplication of the role of the Anti-Counterfeit Agency, which is a statutory body mandated to enforce Intellectual Property Rights in line with the Anti-Counterfeit Act.⁴² The existence of two entities has created ambiguity as copyright holders are confused about whether to report copyright infringement to KECOBO or to the Agency.

C. THE PROPOSED COPYRIGHT (AMENDMENT) BILL, 2017

In September 2017, the government published the Copyright (Amendment) Bill to align the Copyright Act⁴³ with the 2010 Constitution as well as domesticate the Marrakesh Treaty.⁴⁴ The Bill amends some definitions including the re-designation of the Collective Societies to the CMO in line with other IP jurisdictions.

Section 46C subsection (1) of the Bill provides for the establishment of CMOs to represent the interest of authors, producers, performers, visual artists, and publishers, among others. The proposed amendments seek to empower KECOBO⁴⁵ to register a new collective management organization to deal with rights not provided in subsection (1).⁴⁶

The Bill contains a proposal to amend the Copyright Act of 2001⁴⁷ by inserting a new Section 30B which defines parameters for the collection and payment of royalties. The proposed changes will allow the Kenya Revenue

Authority (KRA),⁴⁸ or any other designated entity by KECOBO, to collect royalties on behalf of collective management organizations which are legally licensed to represent performers and owners of sound recordings. This will remove the encumbrance of collecting royalties from CMOs.

In the past, collecting societies have encountered hostility from some quarters while discharging their legal mandate. It is instructive to note that 80% of revenues collected by these societies come from pubs, supermarkets, public transport and the hospitality industry, while broadcasters contribute a paltry 20%.

The proposed amendments came at a time when KECOBO was embroiled in a spirited dispute with the Music Copyright Society of Kenya (MCSK)⁴⁹ after the former's license was revoked⁵⁰ in February 2017 for non-compliance with licensing terms and conditions. MCSK has been accused of failing to adhere to corporate governance structures and failure to submit audited books of accounts and poor management of the organisation which is attributable to limited management skills on the part of directors. The Kenyan CMO sector is replete with legal tussles with KECOBO taking administrative actions as per Copyright Act provisions on one hand⁵¹ and MCSK and other stakeholders escalating their dissatisfaction with KECOBO actions to courts⁵² on the other.

The proposed changes will enable audio-visual players to formulate and establish a standalone CMO dedicated to the welfare of filmmakers, broadcasters and other audio-

⁴¹Christopher Seuna, 'Collective Management Bodies in Cameroon,' e-copyright Bulletin, (Geneva: WIPO 2004) (AUTHOR TO INSERT PINPOINT) notes that Kenya has a slack penalty which pronounces a maximum fine of Kenya Shillings 800,000 (about 8,000 US dollars) to offenders.

⁴² See *supra* footnote 24 and accompanying text.

⁴³ See *supra* footnote 12 and accompanying text.

⁴⁴ Marrakesh Treaty: The Treaty is officially known as the Marrakesh Treaty to Facilitate Access to Published Works to Visually Impaired Persons and Persons with Print Disabilities.

⁴⁵ See *supra* 3 footnote and accompanying text.

⁴⁶ Section 46C(1): Authors, producers, performers, visual artists and publishers.

⁴⁷ See *supra* footnote 12 and accompanying text.

⁴⁸ The Kenya Revenue Authority (KRA) was established by an Act of Parliament, Chapter 469 of the laws of Kenya, which became effective on 1 July 1995. The Authority is charged with the responsibility of collecting revenue on behalf of the Government of Kenya.

⁴⁹ MCSK was established in 1983 as a company limited by guarantee under the Companies Act Cap 489 of the Laws of Kenya. Prior to the revocation of its license by KECOBO, the society had the exclusive right to collect and administer the

public performance, and the broadcasting rights, in musical works of copyright owners in Kenya.

⁵⁰ In a Kenya Gazette Notice No 3239 and dated March 22, 2017 Kenya Copyright Board (KECOBO) declared the Kenya Association of Music Producers to be a collecting society for all producers of sound recordings of copyright owners for a period of one (1) year, with effect from the 20th February 2017 effectively rendering Music Copyright Society of Kenya licence null and void.

⁵¹ *Laban Toto & David Amunga v Kenya Copyright Board (KECOBO) & 2 others Ex-Parte* [2017] eKLR. The court granted conservatory orders staying the decision of the 1st respondent on 27 March 2017, approving the licence of the 2nd Interested Party (MPAKE), and revoking the licence of the 1st Interested Party (MCSK) pending the inter-parties hearing of the petition herein.

⁵² In *Kisumu Bar Owners Association & another v Music Copyright Society of Kenya & 2 others* [2017] eKLR, the orders were issued following a petition by Kisumu Bar Owners Association and Kisumu Green Garden Restaurant. The duo had urged the court to restrain MCSK from harassing music users and businesses in the name of collecting royalties when they were not licensed to do so by KECOBO.

visual producers. The proposed changes will assist the CMO by promoting sound corporate governance, improving efficiency in royalty collection and distribution as well as ensuring that the creative industry in Kenya makes real and tangible contribution to the economy.

3. THE INTERNATIONAL LEGAL FRAMEWORK GOVERNING AUDIO-VISUAL SECTORS

Internationally and regionally, Kenya is party to various treaties and protocols relating to the protection and enforcement of IPRs. These treaties and protocols are key to the protection of IPRs because they create common rules and regulations for the member states. Kenya is a member of the World Intellectual Property Organisation (WIPO), Africa Regional Intellectual Property Organization (ARIPO) and the World Trade Organisation (WTO) which implements international treaties related to IP protection and IPR disputes.

Kenya is also a party to the Convention establishing WIPO. The Convention effectively establishes WIPO as a global forum for IP policy, services, information and cooperation. So far, WIPO administers twenty-six treaties on IP.

For its part, Kenya has adopted several WIPO-administered treaties including: the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention); the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention);⁵³ WIPO Copyright Treaty (WCT);⁵⁴ and WIPO Performances and Phonogram Treaty (WPPT).⁵⁵ The country is also a signatory to UNESCO's Universal Copyright Convention (UCC)⁵⁶ and to the TRIPS Agreement which is administered by the WTO. Kenya is also party to the Lusaka Agreement⁵⁷ that establishes the ARIPO.

The Berne Convention⁵⁸ provides for the automatic protection of copyright and prohibits formalities, such as registration, as a prerequisite to the subsistence, enjoyment, exercise, protection and enforcement of copyright. The Convention provides for the seizure of imported copies that infringe on copyrighted works of a

copyright holder in accordance with the law of the respective member state.

On the other hand, the TRIPS Agreement, which came into force in 1995 upon establishment of the WTO, provides for minimum standards for the protection of IPRs including: copyright, patents, geographical indications, industrial designs, undisclosed information, and trademarks. Member states are required to legislate on minimum standards regarding the protection and enforcement of IPRs, including effective border measures and penalties for IPR infraction.

The member states are also required to ensure that the border measures are effective and that seizure, forfeiture and destruction of infringing goods are available to IPR holders. Where criminal proceedings are filed, the penalties should be deterrent and the enforcement proceedings should be affordable and prompt.

The Beijing Treaty⁵⁹ grants audio-visual performers moral rights and four kinds of economic rights for their performances fixed in audio-visual fixations, such as motion pictures: the right of reproduction; the right of distribution; the right of rental; and the right of making available. These provisions in the Treaty call for the establishment of a framework for the management and appropriating of these rights through a collective management entity. Closely related to the Beijing Treaty are the WCT and WPPT which are collectively regarded as internet treaties.⁶⁰

A. BEIJING TREATY: AN INTERNATIONAL LEGAL GOLDMINE FOR KENYAN AUDIO-VISUAL ARTISTS

The Beijing Treaty presents copyright owners with a world of possibilities. This is because, the audio-visual sector players will be able to form the collective management organisations and benefit from the use of their works both locally and at the international level.⁶¹

The performers will also generate income from sharing proceeds with the producers as they will no longer be at the mercy of the producers and production houses because their rights are clearly delineated and recognized

⁵³ The Rome Convention secures protection in performances for performers, in phonograms for producers of phonograms and in broadcasts for broadcasting organizations.

⁵⁴ The WIPO Copyright Treaty (WCT) deals with the protection of works and the rights of their authors in the digital environment.

⁵⁵ The WIPO Performances and Phonograms Treaty (WPPT) deals with the rights in the digital environment.

⁵⁶ The UCC was concluded in 1952 under the auspices of the United Nations Education, Science and Cultural Organisation (UNESCO) to incorporate a greater number of countries into the international copyright community.

⁵⁷ The Lusaka Agreement was adopted at a diplomatic conference at Lusaka (Zambia) on 9 December 1976 and establishes ARIPO at Article 1 thereof.

⁵⁸ Berne Convention for the Protection of Literary and Artistic Works-Paris Act of 24 July 1971, as amended on 28 September 1979.

⁵⁹ See *supra* footnote 54 and accompanying text.

⁶⁰ The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Though Kenya has yet to ratify the two treaties, the 2001 Act incorporates the key provisions from the two treaties.

⁶¹ Raquel Xalabarder, *International Legal Study on Implementing an Unwaivable Right of Audiovisual Authors to Obtain Equitable Remuneration for the Exploitation of Their Works*, (Barcelona: CISAC 2018) pp. 34.

worldwide. Furthermore, the Treaty provides a clear international framework for the protection of the rights of audio-visual performers.

Performers in the audio-visual industry including those in the movie industry, television, and advertising, among others stand to benefit economically from the use of their works whether in Kenya or internationally. The protection of their moral rights will clearly safeguard their works from distortion and mutilation.

The Treaty will ensure that the revenues collected are equitably distributed including to the audio-visual performers. Additionally, the Treaty fixes the precarious position of performers (namely singers, musicians, dancers and actors) in the audio-visual industry by providing a clearer international legal framework for their protection.

Notably, for the first time, it provides performers with protection in the digital environment.⁶² This instrument will contribute to safeguarding the rights of performers against the unauthorized use of their performances in audio-visual media, such as television, film and video.⁶³

4. STATUS AND CHALLENGES AFFECTING THE AUDIO-VISUAL INDUSTRY IN KENYA

The Economic Pillar under Vision 2030⁶⁴ seeks to achieve, a sustained economic growth of 10% per year over the next 25 years while the Social Pillar envisions a just and cohesive society enjoying equitable social development in a clean and secure environment. The audio-visual industry fits well within the ambits of both the economic and social pillars of the Vision 2030.

Cultural theory views human beings as being creative and culturally continuous and they seek to make and re-make their world through commerce, cultures, science and spirituality.⁶⁵ Nonetheless, many performers are not

aware of their Intellectual Property Rights. Many artists in developing countries do not appreciate having an IP system which has the capacity to create “cultural diversity.”⁶⁶

A study carried out by the African Regional Intellectual Property Organization,⁶⁷ found that contribution by the copyright industries to the Gross Domestic Product (GDP), currently stands at 5.3%. The study notes that the country whose royalty collections make the highest share of the GDP is Zimbabwe at 0.009%, followed by Kenya at 0.0066% and Malawi at 0.0065%.⁶⁸

Kenya was identified as having the greatest number of registered CMOs in Africa. These CMOs include, the MCSK (1983); Kenya Association of Music Producers (KAMP) (2003); The Production Rights Society of Kenya (KOPIKeN) (2005); and Performers Rights Society of Kenya (PRISK) (2009).⁶⁹

However, KECOBO declined the renewal of MCSK’s license for the year 2017 for failure to comply with statutory licensing requirements. Following this revocation, KECOBO licensed another CMO, the Music Publishers Association of Kenya (MPAKE)⁷⁰ in early 2017.

In Kenya, there is a disproportionate focus towards the rights of performers in the audio industry, with little or no attention being given to the performers in the audio-visual industry. KECOBO acknowledges that producers of audio-visual work in Kenya do not have a collective management organisation. The authors and publishers can however collect licenses through relevant collecting societies, but only in relation to musical works within audio-visual works.⁷¹ This view is accentuated by a study carried out by WIPO⁷² which notes that there is no CMO representing the rights holders of audio-visual works,⁷³ a fact that has resulted in the infringement of artists’

⁶² Kenyan Copyright to Benefit from the WIPO Protection of Audio-visual Performance Treaty. Kenya Copyright Board Press Release. <https://www.copyright.go.ke/copyright-applies-to/10-press-releases/9-kenyan-artistes-to-benefit-from-the-wipo-protection-audio-visual-performances-treaty.html> [Accessed on 14 April 2018]

⁶³ www.copyright.go.ke/about-us/vision-mission/10-press-releases/9-kenyan-artistes-to-benefit-from-the-wipo-protection-audio-visual-performances-treaty.html (accessed 17 May 2018).

⁶⁴ Vision 2030 is Kenya’s blue-print for development till the year 2030. It aspires to achieve “a globally competitive and prosperous nation with a high quality of life by 2030.” http://www.fao.org/fileadmin/user_upload/drought/docs/Vision%202030-%20Popular%20Version.pdf [Accessed on 13 June 2018]

⁶⁵ Sunder Madhavi, *Cultural Dissent. 54 Stanford Law Review*, (Vol 495, 2001), pp. 498-9

⁶⁶ Sunder Madhavi, *Cultural Dissent. 54 Stanford Law Review*, (Vol 495, 2001), pp. 491.

⁶⁷ Keitseng Nkhai Monyatsi, *Survey on the status of Collective Management Organizations in ARIPO Member States*, (Harare: ARIPO 2014), insert pinpoint.

⁶⁸ *Ibid.*, Monyatsi, page 16.

⁶⁹ *Ibid.*, Monyatsi, page 18 & 19.

⁷⁰ Music Publishers Association of Kenya (MPAKE) is a new CMO that was licensed in early 2017 by KECOBO to collect royalties for copyright works that hitherto was within the province of MCSK.

⁷¹ KECOBO: *Copyright and Audio-visual industry in Kenya, a Practical Guide on Copyright for film makers*, (Nairobi, KECOBO, 2016).

⁷² Tarja Koskinen-Olsson, *Study on Collective Negotiation of Rights and Collective Management of Rights in the Audiovisual Sector in Kenya, Burkina Faso and Senegal* shows that in Kenya, (Geneva: WIPO, 2014)

⁷³ *Ibid.*, Koskinen-Olsson.

copyright and related rights by users of audio-visual works.

The draft National Film Policy (2016) cites the following issues as having contributed to audio-visual dwindling fortunes: continued fragmentation of film associations and inadequate collaboration; inadequate local content in terms of quality and quantity; insufficient channels for legal redress for aggrieved parties in the industry and high levels of piracy in the industry that continue to deny producers and distributors their returns on investment in audio-visual productions.⁷⁴

The Kenya Film Commission (KFC) and Kenya Film Classification Board (KFCB) are charged with different mandates. While KFC⁷⁵ was established via Legal Notice No 47 of 2015, and later had its mandate renewed through Legal Notice No. 10 of 2005, KFCB⁷⁶ is established through the Film and Stage Plays Act and is responsible for classifying film in Kenya. The two entities are underfunded and the legal instruments under which they are premised are either weak, famished or archaic. The Film and Stage Plays Act was enacted in 1963 and out of tune with modern realities. Currently, KFC exists at the whims of the appointing authority.

Digital migration⁷⁷ has also presented a unique challenge to Kenya's audio-visual industry as far as copyright issues are concerned. Digital migration⁷⁸ has increased the use of copyright protected works over digital platforms such as TV broadcasts, live streaming, web-casting and re-broadcasting and simultaneous transmission. Online consumption of films is progressively penetrating the Kenyan market as high-speed⁷⁹ internet connections become more available, for instance, "Netflix," "BIGbox" and others.

The problem has been compounded further by the noncompliance of Section 48 of the Copyright Act which provides the establishment of a Copyright Tribunal. The Tribunal is supposed to advise and set remuneration criteria for audio-visual works, particularly where there is

no CMO dealing with specific rights, in this case the audio-visual works. The government has yet to start levying blank tape levy as provided for in Section 28(3) and (4), and Section 30(6) and (7) respectively.

The interpretation of a section of the Act provides that "author, in relation to audio-visual works, means the person by whom the arrangements for the making of the film were made". Based on this provision, it appears that copyright would customarily be vested with the producer of the audio-visual work who would be deemed the author of the audio-visual work and thus enjoy the bundle of exclusive rights set out in Section 26 of the Act.⁸⁰ In contrast, the Beijing Treaty⁸¹ is explicit as to who a performer is and goes further to outline applicable IP rights.

The Internet has compromised the effectiveness of control over a broad range of cultural industry distribution networks, making control over content increasingly difficult for many content owners.⁸² This eventually deprives owners of proprietary rights in their creations and eats into their revenue streams.

Movies and performances can now be downloaded in real time at little to no cost at all. On the one hand, it works to the advantage of the rights holder as they can disseminate the works. The illegal downloads of films which are subsequently sold at throw-away prices affects the legitimate rights holders such as the film exhibitors, owners of legitimate video shops and even the local film industry.⁸³ This affects the quality of production, thereby making it less competitive in international markets. This scenario also denies the Government revenues.⁸⁴

Kenya has yet to ratify the Beijing Treaty and Marrakech Treaty. These international legal instruments are vital in the growth and protection of audio-visual works in Kenya, particularly in relation to the collective management of rights.

⁷⁴ Government of Kenya, *National (draft) Film Policy*, (Nairobi: Government Press, 2015).

⁷⁵ The Kenya Film Commission is established under Legal Notice Number 47 of 2015 with the mandate of developing, promoting and marketing the film industry. This mandate has since been enhanced under Legal Order No. 147 of 2015.

⁷⁶ The Kenya Film Classification Board was established in 1930 by an Act of Parliament which was enacted in 1963 being the Films and Stage Plays Act (Cap 222).

⁷⁷ See *supra* footnote 4 and accompanying text.

⁷⁸ See *supra* footnote 4 and accompanying text.

⁷⁹ According to Communications Authority *Quarterly Report* released in October 2016, the total international bandwidth available in the country (Lit/equip capacity) rose by 17.2 percent to post 2.02 million Mbps up from 1.73 million Mbps recorded in June 2016.

⁸⁰ Victor Nzomo, <https://ipkenya.wordpress.com/2014/08/27/wipo-releases-study-on-copyright-and-the-audiovisual-sector-in-africa-recommendations-for-kenya/> [accessed on 17 May 2018]

⁸¹ Performer include actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore. (insert pinpoint in the Treaty)

⁸² Olufunmilayo Arewa, (2017). 'Nollywood Pirates and Nigerian Cinema,' In Kate Darling & Aaron Perzanowski, *Creativity without Law: Challenges and Assumptions of Intellectual Property*, New York University Press, (New York., 2017), pp. 242.

⁸³ KECOBO, *Copyright in the Digital Environment*, (Nairobi, KECOBO. 2012), Page 4.

⁸⁴ Jade Miller, Palgrave, *Nollywood Central*, Palgrave (New York/London., pp 2016), pp 55.

5. RECOMMENDATIONS FOR THE REVIEW OF LAW AND POLICIES RELATING TO THE AUDIO-VISUAL SECTOR IN KENYA

The Country should, as a matter of urgency, review the Copyright Act⁸⁵ to ensure compliance with Articles 11, 40 and 169 of the Constitution. The country should also ratify the Beijing Treaty, WCT, and WPPT treaties to pave the way for their domestication in the proposed Copyright Act amendments.

These amendments should give effect to the provisions of the Beijing Treaty in relation to economic rights for audio-visual fixed performances which include the right of reproduction, distribution, rental and making available to the public as well as economic rights for unfixed or live performances.

The Act should be reviewed to include a definition of a performer, a definite term for the protection of performers' rights; stipulated modes of payment of royalties, and the reciprocity of performers' rights to other WIPO member states.

The review process should also be subjected to public participation requirements to safeguard against delegitimation of the process akin to what befell previous amendments that introduced Section 30A⁸⁶ to the Kenya Copyright Act of 2001. This amendment was later declared unconstitutional by the High Court of Kenya.

There is need to operationalise the Copyright Tribunal, as provided for in Section 48 of the Copyright Act to deal with disputes arising in the administration of copyright. The government should also provide appropriate

avenues for collecting blank tape levies in line with Sections 28(3) and (4) and Sections 30(6) and (7).⁸⁷

It is suggested that a collective management organisation for the audio-visual sector be established. Indeed, a window for actualization of this intent exists. From as early as 2011, KECOBO⁸⁸ has expressed its willingness to set up a CMO "for the audio-visual works which will collect for the rental and use of audio visual works such as films on behalf of the rights holders."⁸⁹ Formation of a special CMO dedicated to film maker's welfare is therefore plausible.⁹⁰

The Communications Authority (CA)⁹¹ and KECOBO should sensitise film makers on their Intellectual Property Rights and ensure strict enforcement of the broadcasting code⁹² to ensure that local media stations abide by the prescribed local content quantum. This will in effect ensure that film makers receive substantial royalties for use of their works by the broadcasters.

The timely implementation of Kenya's ruling party manifesto will go a long way in transforming film fortunes. The Jubilee Party Manifesto (2017), "Continuing Kenya's Transformation", together,⁹³ has committed to fully operationalise the Kenya Film School.⁹⁴ This is meant to provide the opportunity for youth to develop film production skills and develop a local film industry. The school will develop the talent pool for the film industry and generate local content for films.

The Kenya Film Commission should either be entrenched through legislation or merged with the Kenya Film Classification Board to form a centralised agency charged with the responsibility of funding, developing, regulating and promoting the film sector in Kenya.

⁸⁵ See *supra* footnote 12 and accompanying text.

⁸⁶ Section 30A of Copyright Act was declared unconstitutional in *Mercy Muneo Kingoo & another v Safaricom Limited & another* [2016] eKLR. The judgement was delivered by Mr. Justice S.J Chitembwe on 3 November 2016. A declaration that the Statute Law Miscellaneous Amendment Act of 2012, that introduced Section 30A of the Copyright Act, Cap. 130 was irregularly and unlawfully enacted for want of public participation and therefore unconstitutional.

⁸⁷ KECOBO, *The Film Industry in Kenya comes of Age*, (Nairobi, KECOBO. Issue 13) Page 19-20.

⁸⁸ See *supra* footnote 3 and accompanying text.

⁸⁹ KECOBO, *Joint Collection Agreement for Collective Management Organisations* (Nairobi, KECOBO magazine, Issue 2) Page 3-4.

⁹⁰ In 2016, the author interviewed Dr. Marisella Ouma, the immediate past Chief Executive Officer of Kenya Copyright Board (KECOBO).

⁹¹ The Kenya Communications (Amendment) Act, 2009, provides for the establishment of a Universal Service Fund (USF),

administered and managed by the Communications Authority of Kenya. The purpose of the Fund is to support widespread access to ICT services, promote capacity building and innovation in ICT services in the country, including development of the audio-visual sector.

⁹² Broadcasting Code: Radio/Television stations shall ensure, within one year of entry into force of this Code, not less than 40% of the programming is local content. Broadcasters' local content programming should increase to 60% within three years of entry into force of this Code. The local content programming referred to in this paragraph excludes news, advertising and teleshopping. Timely implementation of this code will ensure that film makers receive substantial royalties for use of their works by the broadcasters.

⁹³ Jubilee party is the ruling political party in Kenya. The party is headed by President Uhuru Kenyatta and has majority seats in Kenya's Senate and the National Assembly.

⁹⁴ The proposed film school which is meant to capacity build the budding talent of Kenyan film makers.

The government, through KECOBO, should help creative industries fight piracy. "We must realise the economic potential of art industry in the county. California is the richest state in America due to respect and promotion of Hollywood artists' intellectual property rights. We must as a matter of priority promote IPRs of our art-based industries."⁹⁵

6. CONCLUSION

The emergence of digital technologies is both a curse and a blessing to the audio-visual sector in Kenya. It is a curse due to the weak exploitation of intellectual property rights at a time when there is proliferation of audio-visual platforms wrought by technological advancements. The artists find themselves hemmed within a labyrinth of delicate legal frameworks that fail to address the concerns of the audio-visual sector. To date, the country does not have a CMO for this budding sector, while broadcasting stations are ambivalent towards the plight of rights owners.

It is a blessing given the fact that digital platforms have unlocked new frontiers for the creative sector. The availability of these technologies has enabled artists to make robust audio-visual productions in their local dialects, thereby generating much needed content in the age of digitization. Regarding the protection of the audio-visual creative sector, there are conspicuous efforts at both the national and international levels to insulate the sector from misuse. The development of the Beijing Treaty is transformative and signifies great prospects for artists.

Kenya should take advantage of the Beijing Treaty and embark on a process of nurturing, promoting and protecting the audio-visual sector which has the capacity to transmute the dwindling fortunes of the artists as well as contribute enormously to the country's economic landscape. Kenya should prioritize the establishment and operationalisation of a formidable legal, policy, social and economic framework that rewards and appreciates the contribution of this sector towards the social-economic transformation of the country.⁹⁶

BIBLIOGRAPHY

National & International Instruments

Anti-Counterfeit Act of 2008 Available at http://www.aca.go.ke/index.php?option=com_docman&task=doc_download&gid=9&Itemid=471 [Accessed on 18 May 2018]

Beijing Treaty on Audiovisual Performances (2012) Text Available on WIPO Website at <http://www.wipo.int> [Accessed on 18 May 2018]

Berne Convention for the Protection of Literary and Artistic Works-Paris Act of July 24, 1971. Available at http://www.wipo.int/edocs/lexdocs/treaties/en/berne/rt_berne_001en.pdf [Accessed on 18 May 2018]

Constitution of Egypt 2014. Available at https://www.constituteproject.org/constitution/Egypt_2014.pdf [Accessed on 23 June 2018]

Constitution of Kenya 2010. Available at <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010> [Accessed on 18 May 2018]

Constitution of Tunisia (2014) . Available at <https://issafrica.org/ctafrika/uploads/TunisiaConstitution2014Eng.pdf> [Accessed on 23 June 2018]

Competition Act, No. 12 of 2010. Available at Competition Act, No. 12 of 2010. <http://www.wipo.int/edocs/lexdocs/laws/en/ke/ke023en.pdf> [Accessed on 18 May 2018]

Copyright (Amendment) Bill, 2017. Available at <http://bcckkenya.org/assets/documents/The%20Copyright%20Bill%202017.pdf> [Accessed on 18 May 2018]

Copyright Act (2001). Available at <https://www.copyright.go.ke/8-program/1-the-act.html> [Accessed on 18 May 2018]

Kenya Gazette Notice No 4339-dated 2nd April 2012. Available at <http://kenyalaw.org/kl/index.php?id=3727> [Accessed on 18 May 2018]

Kenya Information and Communication Act (KISA) (2015). Available at <http://kfc.co.ke/wp-content/uploads/2016/07/Kenya-Information-and-Communications-Act.pdf> [Accessed on 9 September 2017]

Marrakesh Treaty to Facilitate Access to Published Works to Visually Impaired Persons and Persons with Print Disabilities (2013). Available at <http://www.wipo.int/treaties/en/ip/marrakesh/> [Accessed 18 May 2018]

⁹⁵ In 2016, the author interviewed and got critical copyright insights from KECOBO Chief Executive Officer Edward Sigei.

⁹⁶ Mahir Saul., and Ralph Austen, (eds.), *Viewing African Cinema in the Twenty-First Century: Art Films and the Nollywood Video Revolution*, (Athens, Ohio: Ohio University Press, 2010). Pp. 29.

Rome Convention for the Protection of Performers, Producers of Phonograms and broadcasting Organisations (1961). Available at <http://www.wipo.int/treaties/en/ip/rome/> [Accessed 18 May 2018]

Seeds and Plant Varieties Act, CAP 326 Laws of Kenya. Available at <http://kenyalaw.org/lex/sublegview.xql?subleg=CAP.%20326> [Accessed 18 May 2018]

Trademark Act, CAP 506 of Laws of Kenya. Available at http://admin.theiguides.org/Media/Documents/tm_act_cap506.pdf [Accessed 18 May 2018]

Traditional knowledge & Cultural Expressions Act of 2015. Available at

<http://www.wipo.int/edocs/lexdocs/laws/en/ke/ke030en.pdf> [Accessed 18 May 2018]

Agreement on Trade-Related Aspects of Intellectual Property Agreement (1994).

https://www.wto.org/english/docs_e/legal_e/27-trips.pdf [Accessed 18 May 2018]

WIPO Copyright Treaty (WCT) (1996). Available at <http://www.wipo.int/treaties/en/ip/wct/> [Accessed 18 May 2018]

WIPO Performances and Phonograms Treaty (WPPT) (1996). Available at <http://www.wipo.int/treaties/en/ip/wppt/> [Accessed 18 May 2018]

Universal Copyright Convention (1952). Available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=172836 [Accessed 18 May 2018]

The Lusaka Agreement adopted on December 9, 1976' Available at http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=301377 [Accessed 18 May 2018]

Kenya Case Law

Kisumu Bar Owners Association & another v Music Copyright Society of Kenya & 2 others [2017] eKLR. Available at <http://kenyalaw.org/caselaw/cases/view/140559/> [Accessed 18 May 2018]

Laban Toto & David Amunga v Kenya Copyright Board (KECOBO) & 2 others Ex-Parte [2017] eKLR; Available at <http://kenyalaw.org/caselaw/cases/view/142712/> [Accessed 18 May 2018]

Mercy Muneo Kingoo & another v Safaricom Limited & another [2016] eKLR. Available at <http://kenyalaw.org/caselaw/cases/view/127554/> [Accessed 18 May 2018]

Republic v Kenya Association of Music Producers (KAMP) & 3 others Ex- Parte Pubs, Entertainment and Restaurants Association of Kenya (PERAK) [2014] eKLR. Available at <http://kenyalaw.org/caselaw/cases/view/96095/> [Accessed 18 May 2018]

Secondary Sources

Rahmatian A, *Copyright and creativity: The making of Property Rights in Creative Works* (Edward Elgar Publishing Limited 2011)

Seuna C, 'Collective Management Bodies in Cameroon', *e-copyright Bulletin*, (Geneva 2004)

<http://unesdoc.unesco.org/images/0013/001396/139648e.pdf> [Accessed 18 May 2018]

Communications Authority of Kenya, 'Fourth Quarter Sector Statistics Report for The Financial Year 2016/2017' (Nairobi 2017)

Communications Authority of Kenya, 'Quarterly Report' (Nairobi 2016)

Communications Authority of Kenya, 'The Programming Code for Free-to-Air Radio and Television Services in Kenya' (Nairobi 2010)

Gitonga G, 'An Overview of Contracts and The Law on The Audio-visual Industry in Kenya' Kenya Copyright Board Copyright News, (Nairobi 2012)

Burgess J, *Throwing the Switch: Challenges in the Conversion to Digital Broadcasting* (Centre for International Media Assistance 2009)

Miller J, *Nollywood Central*, Palgrave (Palgrave 2016)

Kenya Copyright Board, 'Copyright and the Audio-visual Industry in Kenya, a Practical Guide on Copyright for Film Makers', (Nairobi 2016)

Kenya Copyright Board, 'Film Industry in Kenya comes of Age,' (Nairobi 2014)

Kenya Copyright Board, 'Joint Collection Agreement for Collective Management Organisations' (Nairobi, 2011)

Desantis M, 'Understanding Voice over Internet Protocol', (US-Cert, 2006) [Online] Available at https://www.us-cert.gov/sites/default/files/publications/understanding_voip.pdf.

Monyatsi M, 'Survey on the status of Collective Management Organizations in ARIPO Member States,' (Harare 2014)

Arewa O, 'Nollywood Pirates and Nigerian Cinema,' In Kate Darling & Aaron Perzanowski, *Creativity without*

Law: Challenges and Assumptions of Intellectual Property, (New York University Press 2017) 242

Raquel Xalabarder, *International Legal Study on Implementing an Unwaivable Right of Audiovisual Authors to Obtain Equitable Remuneration for the Exploitation of Their Works*, (Barcelona: CISAC 2018) pp. 34

Republic of Kenya, *Vision 2030*, (Government Press 2003)

Republic of Kenya, *National (Draft) Film Policy*, (Government Press 2015)

Madhavi S, 'Cultural Dissent,' (2001) *Stanford Law Review*, Vol. 54, n 3, 501

Koskinen-Olsson T, *Study on Collective Negotiation of Rights and Collective Management of Rights in the Audiovisual Sector' in Kenya, Burkina Faso and Senegal shows that in Kenya* (WIPO 2014)

Nzomo V, 'WIPO releases study on copyright and the audiovisual sector in Africa recommendations for Kenya

<https://ipkenya.wordpress.com/2014/08/27/wipo-releases-study-on-copyright-and-the-audiovisual-sector-in-africa-recommendations-for-kenya/> [Accessed 18 May 2018]