THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

A Mini-thesis Submitted in partial fulfilment of the requirements for the LLM degree in the Faculty of Law of the University of the Western Cape.

Student: Telesphory D.B Magogo

Student Number: 3282329

LLM Mode II Mini-thesis

TOPIC:

Harmonisation of Copyright within the East African Community: An Analysis of the Kenyan and Tanzanian Copyright Legislation

Supervisor: Professor. Bernard Martin

June 2013

Plagiarism Declaration

Dedication

This work is dedicated with immense love to my beloved parents: Mr. and Mrs. Daudi N. Busisi whose constant love and care has led me excel in this academic part of the legal profession. I know that your enthusiasm has always been to see me becoming a disciplined academic legal expert, something that I too always pray to become. May the good Lord grant you gracious long life and abundant blessings!

© Copyright

Acknowledgements

This work would not have become a reality without the strong support and cooperation from certain individuals. Their enthusiasm and insights in the study have inspired this work. But because it is not possible to mention all of them, hereunder are the only few mentioned names to represent all others. An expression of deep appreciation is a matter of duty and a source of pleasure!

I owe a very special word of gratitude to Prof. Bernard Martin, my supervisor and Dean of the faculty of law, University of the Western Cape, whose efforts, commitment, tireless guidance, critical assistance, constructive suggestions, and dedication, made it possible for me to prepare a mini-thesis on this form of intellectual property (IP)! His knowledge and accumulated experience in IP law, particularly on copyright has been of great help in this academic arena.

A full measure of gratitude is likewise due to Prof. Riekie Wandrag, programme coordinator and head of department of mercantile and labour law, University of the Western Cape, on behalf of all course initiators, who has so excellently and graciously devoted her time to making the University of the Western Cape become a home to the class, academically and socially throughout the programme. I am pleased to express my sincere gratitude to Prof. Patricia Lenaghan and Dr. Edward Kwakwa in their preliminary supervision to this study.

Special thanks to programme funders in their valuable efforts of capacity building in the areas of trade and investment in the growing African States. I wish to extend my acknowledgements to all who have contributed in any way to this study. Among many others may I mention my beloved lecturers: Prof. Kenneth K. Mwenda, Prof. Danny Bradlow, Ms. Elizabeth Tuerk, Dr. Edwini Kessie, Prof. Francois de Villiers, Mr. Darren Thorne, Mr. Peter Leon, Prof. Kitty Malherbe, Mr. Rian Geldenhuys, Mr. Niel Joubert, DLA PIPER, Prof. Loretta Feris, Mr. Jesse Kreier, Mr. Lambert Botha, Mr. Rolf Adlung, Mr. Hilton Zunckel, Ms. Oluethu, to Mr. Raphael Kamuli and to all my LL.M classmates 2012/2013. I wish to extend my sincere thanks to my beloved parents for their endless love, my beloved fiancée Ms. Veronica Ghati William, to Ms. Neema Ntakabanyula, to Mr. Godfrey, to Mr. Charles Mwabe, Mr. Ignatus Barongo and to the Saint Augustine University of Tanzania.

Abbreviations

All ER	All England Law Report
ARIPO	African Regional Intellectual Property Organisation
Cap	Chapter
CD	Compact Disc
Ch.D	Chancery Division of the High Court of England
COSOTA	Copyright Society of Tanzania
EAC	East African Community
EU	European Union
ICC	International Chamber of Commerce
IELRC	International Environmental Law Research Centre
IP	Intellectual Property
ISO	International Organisation for Standardisation
KECOBO	Kenya Copyright Board
OHADA	Organisation pour I' Harmonisation en Afrique du Droit des Affaires
R.E	Revised Edition
TLR	Tanzania Law Report
UNCITRAL	United Nations Commission on International Trade Laws
UNCTAD	United Nations Conference for Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
WIPO	World Intellectual Property Organisation
GATT	General Agreement on Tariffs and Trade, 1994

Key Words

Aspects of copyright;

Refer to the six selected aspects of copyright for the purpose of making an analysis of the East African Community (EAC) Partner States copyright statutes to identify the similarities and differences that exist in copyright rules so as to suggest harmonisation of copyright rules. The six selected copyright aspects are from the Kenyan and Tanzanian Copyright Acts. These are: the lists of works- subject matter of copyright, requirements for subsistence of copyright, ownership and administration of copyright, infringement and enforcement, including remedies.

Common market;

This means an integrated economic area characterised by fundamental freedoms of movement of persons, goods, labour, capital and services and the right of establishment of persons. A common market is a result of Partner States integrated markets to form a single market.

Copyright;

This is the exclusive right conferred on the copyright owner to control original works from being reproduced, distributed, translated, adopted; from sold, imported, communicated or made available to the public without the permission from the copyright owner.

Directive;

Means a legislative measure adopted by Partner States of resolving the differences that cause uncertainties in copyright rules (for the purposes of this study) by consolidating similarities to facilitate the implementation of the established common market.

East African Community (EAC);

It refers to the five Partner States of Burundi, Kenya, Rwanda, Tanzania and Uganda.

Harmonisation of copyright;

This is the process of co-ordinating different Partner States copyright legal provisions by eliminating major differences and uncertainties that exist in copyright rules and creating consistency and minimum standards of copyright protection to facilitate compliance and enforcement of copyright across borders.

Table of Contents

CHAPTER ONE

INTRODUCTION

This study on the need for harmonisation of copyright within the East African Community (EAC)-Burundi, Kenya, Rwanda, Tanzania and Uganda entails a discussion on the similarities and the significant differences that are found in the Kenyan Copyright Act (hereafter the Kenyan Act) and the Tanzanian Copyright and Neighbouring Rights Act (hereafter the Tanzanian Act).[1] These two statutes are among the statutes that provide for the domestic regulation of copyright within the EAC. They are therefore, representative of all EAC Partner States domestic copyright statutes. From these two copyright statutes, six selected aspects of copyright are analysed: the subject matter, the requirements for subsistence, ownership and administration, infringement and enforcement (all discussions of enforcement will include a consideration of remedies). The major reason as to why only the Kenyan and the Tanzanian Acts are analysed in their respective established aspects is that they seem to contain sufficient similar material yet to differ significantly enough. There are significant differences in their respective lists of works- subject matter- that qualify for protection, the requirements for the subsistence of copyright, ownership and the management of copyright. Other differences are found in the provisions of infringement acts as well as in the enforcement, including remedies which they provide. The selection done to the respective six aspects from these two copyright statutes is purposely intended to help to suggest for a harmonised regional copyright unit which is very important for achieving some of the goals of the established EAC Common Market.[2]

The six aspects embody the essential elements of copyright that are of great significant where harmonisation is proposed as a necessary means to creating certainty and clarity of rules. The study provides a suggestion for resolving the problem of uncertainties in copyright rules that has been caused by the significant differences which are found in the selected two EAC Partner States domestic copyright legislation.

---

1 The Kenyan Act refers to Cap 130 [R.E 2009] of the laws of Kenya and the Tanzanian Act refers to Cap218 [R. E 2002] of the laws of Tanzania. The Kenyan Act is an Act which makes provisions for copyright in literary, musical and artistic works, audio-visual works, sound recordings and broadcasts and the Tanzanian Act provides for protection of copyright and neighbouring rights in literary, artistic works and folklore.

2 A common market is an integrated economic area characterised by freedoms of movement of persons, labour, capital, goods and services and the right of establishment of persons in the territory of Partner States (see Key Words at page vi above). Also at http://www.moussis.eu (accessed 11 February 2014).

The study suggests the establishment of a harmonised and effective copyright system for the regional unit, the EAC. Harmonisation of the EAC Partner States domestic copyright laws is a step in the processes of developing a uniform system of copyright protection. Establishment of certain and clear rules is the goal of any economic cooperation like the EAC, especially when Partner States agree to cooperate by way of creating a common market like the EAC Common Market. This study also suggests the adoption of a Directive concerning some or all the relevant aspects of copyright aspects. The European Union (EU) copyright system has been compared as an example of those regional integrations that have taken effective measures in the protection of copyright. The chapter structure of the thesis is as follows.

The rest of chapter one explains the importance of copyright in the knowledge economy, the effects of creation of a common market within the EAC Partner States and the removal of barriers (quotas, tariff, non-tariff and uncertainty of laws) to trade in copyright works through harmonisation of copyright legislation. The discussions explain further the relationship between the EAC and the EU as well as examining the background of copyright law in Kenya and Tanzania.

Chapter two considers the similarities and differences between the Kenyan and the Tanzanian copyright statutes on four of the six aspects of copyright: the subject matter of copyright, the requirements for subsistence of copyright, issues of ownership and the administration of copyright. All the aspects can be described as dealing with the establishment and operation of copyright. This chapter ends up by revealing the need for harmonisation of these four aspects of copyright.

Chapter three continues the discussion commenced in chapter two further delineating the two aspects of copyright: infringement of copyright and enforcement, including remedies. The chapter also concludes with a call for harmonisation of copyright in respect of the two aspects.

A number of EU Parliament and Council's Directives on harmonisation of copyright are discussed in chapter four. Specific attention is paid to some of the six aspects of copyright discussed in chapters two and three. The reasons why other aspects of copyright have been left out of this study are stated in the introduction of chapter four.

Chapter five, the concluding chapter winds up the discussions and presents the prospects of an EAC Directive being successful. The conclusions are preceded by a summary of the similarities and differences that were found in the selected six aspects, and the arguments for adopting a harmonisation measure in a form of a Directive.

1.1 The Importance of Copyright in the Knowledge Economy and the Creation of a Common Market

Copyright is one of the main forms of intellectual property (IP). The other main forms are: patents, trademarks and trade names, industrial designs and geographical indications. Scholars have defined IP as the products of the creative endeavours of the human mind for which exclusive rights are conferred on their creators to protect access to and use by third parties.[3] IP rights are legally protected exclusive rights which entitle their holders to benefit from works that are the results of their intellect.[4] IP refers to those entities that are created by the human mind and that have trading impact. It covers ideas and information of commercial value,[5] whether disclosed or undisclosed. IP confers exclusive rights to IP rights holders at a certain prescribed period of time.[6] The exclusive rights so conferred prevent all other natural and legal persons from benefiting from IP rights without holder's consent.

Copyright is the legal protection that is given to authors for the expression of their ideas, as manifested in a fixed form such as a book, paper, musical composition, photograph, dance movement, motion picture, an audiovisual work, or computer software.[7] Cornish and Llewelyn have defined copyright to mean a right given against the copying of defined types of cultural, informational and entertainment productions.[8]

The justification for the protection of IP rights, in particular copyright is that they provide holders with both economic and moral incentives to produce socially desirable innovation and facilitate the growth of both domestic industry and international trade.[9] The protection of copyright allows creators to gain economic reward for their effort and so as to encourage future creativity and the development of new material which benefits everyone.[10] Protection of IP rights, in particular copyright is important especially in facilitating cross border trading cooperation.[11] This is because of the interconnection between IP and trade and the great value of IP, in particular copyright in the society. Sihanya[12] is of the view that copyright contribute

---

3 Boadi, Kameri-Mbote, Mugaguri, Opati, Sikinyi, Wekesa & Sihanya *Intellectual Property in Kenya* (2009) 14.

4 Dawson 'The brave new world of intellectual property' available at http://rossdawsonblog.com (accessed 7 September 2012); Hart, Fazzani & Clark *Intellectual Property Law* 4ed (2006) 1.

5 Cornish & Llewelyn *Intellectual Property: Patents, Copyright, Trade Marks & Allied Rights* 7-ed (2010) 7.

6 Boadi *et al* (note 3 above) 19.

7 Spinello & Tavani *Intellectual Property Rights in a Networked World: Theory and Practice* (2005) 21-22.

8 Cornish & Llewelyn (note 5 above) 8.

9 Boadi '*et al'* (note 3 above)19.

10 EU Copyright office at http://www.eucopyright.com (accessed 20 May 2013).

11 Lester, Macurio and Davies *World Trade law Text, Materials and Commentaries* (2008) 60.

12 Sihanya 'Copyright law in Kenya' at http://www.innovativelawyering.com (accessed 10 May 2013).

to socio-economic development in at least two ways; (a) copyright and IP are the source of royalty and related payments to creators, publishers and distributors and (b) copyright and IP are the source of regular national income or revenue stream, especially in the form of taxes. Copyrighted products are subject to taxation and other related fees such as registration fees. Employment is created in the production and distribution of copyrighted products.

The government of India argues that economic and social development of a society is dependent on creativity, and that the protection provided by copyright to the efforts of writers, artists, designers, dramatists, musicians, architects and producers of sound recordings, cinematograph films and computer software, creates an atmosphere conducive to creativity, which induces them to more and motivates others to create.[13] Discussing the reasons to the protection of copyright, it is of the view that copyright ensures certain minimum safeguards of the rights of authors over their creations, thereby protecting and rewarding creativity.

The establishment of the East African Community (EAC) regional integration in terms of the 1999 EAC Treaty; the conclusion of the 2005 EAC Customs Union Protocol and the 2010 EAC Common Market Protocol have led to the need for harmonised protection of IP rights within the East African region. Copyright cannot remain a self-contained regime outside the established trade arena of the EAC, the Common Market. Partner States domestic copyright statutes provide some different standards of protection of copyright within the same regional trading bloc.[14] Harmonised protection of copyright is required to resolve such differences and to ensure and facilitate fair and competitive trade within the region.

Kenya, Tanzania and Uganda concluded the 1999 Treaty to form the East African Community (EAC) following the collapse of the 1967 East African Cooperation in 1977.[15] In 2000 the East African Community (EAC) was re-established. Burundi and Rwanda joined the EAC in 2010.The EAC Partner States have agreed to cooperate in political, economic, social and

---

13 The government of India: Ministry of Human Resource Development A hand Book of Copyright Law at *http://www.copyright.gov.in/Documents/handbook.htm* (accessed 10 May 2013).

14 See footnotes 32, 33 & 34 bellow; also sections 7 & 12 (8) of the Tanzanian Act and sections 23 (3)(a) & (b) & 26 (1) of the Kenyan Act.

15 Preamble of the 1999 EAC Treaty. This provision has to be read together with the 1967 East African Cooperation for further information concerning the East African Cooperation.

cultural fields.[16] In the economic field, Partner States have concluded two Protocols; one on a Customs Union and the other on a Common Market.[17]

Economic cooperation which comes with the establishment of a common market has a significant impact on trade. Some aspects of its impact are free movement of goods, persons, labour, services, capital and sometimes the rights of establishment and residence.[18] Article 2 (4) *(a)* of the EAC Common Market Protocol provides for the free movement of goods within the EAC Common Market.[19] Copyright being one of the main forms of IP is covered by the EAC Common Market Protocol.[20]

1.2 Removal of Barriers to Trade

Economic integration concluded by the EAC requires certain and clear rules that facilitate fair competition in trade, business and investment. These certain and clear rules should cover investment in copyright works and enable a fair competition within the established EAC Common Market. Schiff, Agusti and Earle argue about the achieving of the goals of economic integration, especially establishment of a common market within the region unit that this is enabled by removing barriers to trade such as quotas, tariff and non-tariff and also that a common market seeks to further facilitate free competition within Partner States.[21] Economic integration can affect not only the economies, but also foreign policies, domestic politics and other national interests of the countries involved.[22] Copyright works are among those products that are likely to be affected by the restrictive rules in a non-harmonised copyright system within the trading region like the EAC. Partner States want to achieve free economic competition in the EAC Common Market; therefore, they must establish common rules that regulate each type of business. International trade, business and investment are discouraged by restrictions such as uncertainty of rules, quotas, tariff and non-tariff; generally referred to as barriers to trade. These have always been eliminated through Partner States concluding agreements on technical regulations and standards. A good example of such an agreement is the1994 World Trade Organisation-Agreement on Technical Barriers to Trade. Partner States

16 Article 5 (1) of the 1999 EAC Treaty.

17 Article 2 of the EAC Customs Union Protocol and Article 2 of the EAC Common Market protocol; also articles 75 and 76 of the 1999 EAC Treaty provide further concerning the establishment of a custom union and a common market respectively.

18 Article 2 (4) *(a)* to *(g)* of the 2010 EAC Common Market Protocol; also article 104 of the1999 EAC Treaty.

19 Article 6 of the EAC Common Market on the free movement of goods within the EAC Common Market.

20 Article 43 (2) *(a).*

21 Schaffer, Agusti & Earle *International Business Law & its Environment* 7-ed (2009) 501.

22 Clarkson, Miller, Jentz & Cross *West's Business Law: Text and Cases; Legal, Ethical, International and E-Commerce Environment* 9-ed (2004) 1051-1052.

may also agree to adapt uniform rules or standards that have been established by institutions like: the International Chamber of Commerce (1CC)[23]. United Nations Commission on International Trade Laws (UNCITRAL),[24] International Organisation for Standardisation (ISO),[25] International Institute for the Unification of Private Law (UNIDROIT)[26] and *Organisation pour I' Harmonisation en Afrique du Droit des Affaires* (OHADA).[27] Standardised rules make for a less-trade restrictive common market unit.

There are also a number of established international trade principles which Partner States must recognise in establishing a common market. Such principles include: the most- favoured-nation principle and the national treatment principle. The most favoured nation principle requires that any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country must be accorded immediately and

---

23 ICC is an orgnisation that was founded in 1919 to facilitate international business transactions through policy making. ICC is dedicated to business self-regulation and has unrivalled authority in making rules, guidelines, and codes that govern the conduct of business across borders including rules on IP. ICC issued products includes the Uniform Customs and Practice for Documentary Credit- a set of rules mostly used in international trade and finance. ICC has also been publishing a set of international rules for interpretation of trade terms, called Incoterms. Adaptation of such rules will help to facilitate the daily flow of global cross border trade and investment, particularly in copyright. ICC rules promote efficient IP system that supports international trade; encourage investment in creation and innovation for sustainable development and for the development of knowledge-based industries. ICC has formed a commission on IP that promote the use of IP as a business tool. The headquarters of ICC is Paris, France; at http://www.iccwbo.org (accessed 10 August 2013).

24 UNCITRAL was established by the General Assembly in 1966 (resolution 2205(XXI) of 17, December 1966. UNICITRAL is the United Nations body specialising in commercial law reform worldwide. UNCITRAL's business is the modernisation and harmonisation of rules on international business. In order to increase trade opportunities worldwide, UNCITRAL is formulating modern, fair and harmonised rules on commercial transactions including regional economic cooperation to ensure uniform commercial laws. On IP, UNCITRAL deals with elimination of discrimination in laws affecting international trade; at http://www.uncitral.org (accessed 10 August 2013). UNCITRAL's current Headquarters is in Vienna, Austria

25 ISO is the world's largest developer of voluntary international standards founded in 1947 and since then ISO has published more than 19500 international standards covering almost all aspects of technology and business. ISO ensure that products and services are safe, reliable and of good quality for business. ISO facilitate free and fair global trade by maintaining required standards. On IP, ISO ensures that IP products and services especially copyright works are safe, reliable and of good quality for cross border trade. Its headquarters is in Geneva Switzerland; at http://www.iso.org (accessed 11 August 2013).

26 UNIDROIT is the independent intergovernmental organization with its seat in the villa-aldobrandini in Rome. UNIDROIT was set up in 1926 as an auxiliary organ of the League of Nations. Following the demise of the league of Nations the institute was re-established in 1940. Its purpose is to study needs and methods of modernising, harmonising and coordinating private and in particular commercial laws between States and to formulate uniform law instruments, principles and rules. On IP, such activities encourage fair and competitive trade in IP rights. UNIDROIT uniform law instruments facilitate cross border trading in IP rights, including copyright; at http://www.unidroit.org (accessed 11 August 2013).

27 OHADA- the organization for the harmonisation of business law in Africa was created on October 17, 1993 in Port-Louis, Mauritius. OHADA deals with setting up of a harmonised, simple, modern and adapted business law to enable an easier access to economic activities for the economic integration of States. OHADA's harmonised laws guarantee a safe legal environment and enhance investment, including investment in copyright. Its Headquarters is Yaoundé, Cameroon; at http://www.ohada.org (accessed 11 August 2013).

unconditionally to the like product originating in or destined for the territory of all other Partner States.[28] The national treatment principle requires that nationals of other Partner States must not be discriminated on grounds of nationality.[29] This principle is also referred to as the non-discrimination principle. The other principles to be observed by Partner States on the establishment of a common market include the principle of transparency and sharing of information.[30]

The EAC Common Market Protocol empowers the EAC Council to issue Directives for cooperation in the administration, management and enforcement of IP rights, including copyright.[31] There is, however, to date, no a harmonised rule or standard that regulates IP within the EAC Common Market. IP rights, including copyright have remained governed by EAC Partner States domestic legal frameworks which differ significantly in some aspects.

The six aspects of copyright under consideration which show significant differences include: the lists of works-subject matter- that qualify for protection,[32] the requirements for subsistence of copyright,[33] ownership and management of copyright; infringement[34] and the enforcement, including remedies provided in the Kenyan Act and the Tanzanian Act. The detailed discussions to these six aspects are presented in chapters two and three below.

Uncertainties found in the EAC Partner States domestic copyright make it difficult to achieve the goal that led to the conclusion of the 2010 Protocol which is to facilitate trade and to

---

28 Article 3 (2) *(b)* of 2010 EAC Common Market Protocol; see also Article I of GATT (1994).

29 Article 3 (2) *(a)* of 2010 EAC Common Market Protocol; see also Article III of GATT (1994).

30 Article 3 (2) (c) and (d) of 2010 EAC Common Market Protocol.

31 Article 43 (5) *(a)* of the 2010 EAC Common Market Protocol provides that the Community Council shall issue directives for the cooperation in the administration, management and enforcement of intellectual property rights.

32 Section 7 of the Tanzanian Act provides for a total exclusion of laws, and decisions of courts and administrative bodies as well as official translation thereof, news of the day published, broadcast or publicly communicated by any other means, from being protected under copyright law whereas according to section 26 (1) *(a)* and *(g)* of the Kenyan Act provides to the effect that any fair use of such works must be accompanied by sufficient acknowledgement of the sources otherwise it would amount to infringement.

33 Section 23 (3) *(a)* and *(b)* of the Kenyan Act provide to the effect that for a literary, musical or artistic work to qualify for copyright protection there must be sufficient effort that has been expended on its making and that gives it the character of being original. And according to section 23 (3) *(b)* of the Kenyan Act, for the work to qualify for copyright protection it has to be written down, recorded or otherwise reduced to material form. These requirements are not provided for in the Tanzanian Act.

34 According to section 12 (8) of the Tanzanian Act, reproduction in the press or communication to the public any political speech or any speech delivered during legal proceedings, any lecture, address, sermon, for current information without author's consent is permissible and does not amount to infringement. This is not the position in the Kenyan Act. Any such uses of the work unless accompanied by sufficient acknowledgement of the sources it shall amount to infringement as provided for under section 26 (1) *(a)* and *(g)* of the Kenyan Act.

promote and protect IP rights within the regional context.[35] Infringement of IP rights, especially infringement of copyrights is still one of the main problems within the EAC Common Market, as well as in Partner States domestic markets.[36]

1.3 The Relationship between EAC and EU

The relationship between the EAC and the EU subsists in the similar objectives for the establishment of common market, power to issue Directives, the need for removal of differences that cause uncertainties and unclear trading rules by way of consolidating similarities, and in similar need of applicability of Directives in each of these two regional trading groups.

The European Parliament and Council have the power to adopt Directives on harmonisation of copyright has been enabled by the provisions of the Treaty establishing the European Community; also referred to as the Treaty of Rome. Articles 47, 95, 155, 249 and 308 of the Treaty of Rome provide for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted.[37] Article 249 of the Treaty of Rome empowers the European Council, together with the European Parliament to issue Directives to Member States. Cornish and Llewelyn[38] argue that article 308 is the residual provision which empowers the European Council to make appropriate measures, over and above those provided for in the Treaty of Rome, which are necessary to attain, in the course of the operation of the common market, one of the objectives of the Community. A Directive issued by the EU Council and Parliament gives Member States a choice as to implementation and sometimes as to the extent of the implementation.[39] Article 95 of the Treaty of Rome empowers the European Council and the Parliament to issue Directives for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market[40] in the same way that the 2010 EAC Common Market Protocol empowers the EAC Council to issue Directives for effective implementation of the provisions of the EAC Common Market Protocol.[41]

Under article 95 of the Treaty of Rome, IP Directives have been adopted including a number of copyright directives for harmonisation of the divergences in the national copyright legislation

35 Article 43 of the 2010 EAC Common Market Protocol.
36 Sihanya 'Copyright law in Kenya' at *http://www.innovativelawyering.com* (accessed 10 May 2013).
37 Cornish & Llewelyn (note 5 above) 23.
38 Cornish & Llewelyn (note 5 above) 23.
39 Sources of European Union law at *http://www.europa.eu* (accessed 14 February 2013).
40 Cornish & Llewelyn (note 5 above) 23.
41 Article 51 of the 2010 EAC Common Market Protocol.

of European Member States. Cornish and Llewelyn[42] are of the view that harmonisation of copyright within the European Community, which is proceeding stepwise, has now been the subject of successive Directives of very considerable importance, the most recent being one dealing with the internet.[43]

The aim of the EU Directives is to resolve the legal differences that cause uncertainties in protection of copyright, and to ensure that these differences do not hinder economies of scale for new products and services containing copyright. These measures must, however, comply with the provisions of the Berne Convention to which all EU Member States are signatories.[44] Some other reasons for the EU's adaptation of Directives on harmonisation of EU Member States' copyright laws include: the need for a general and flexible legal framework at community level in order to foster the development of the information society in Europe, to facilitate the implementation of the freedoms of the internal market, namely; movement of goods and services, persons, capital and labour and in addition to that, is the need to foster substantial investment in creativity and ensure increased competitiveness and to safeguard employment and encourage job creation within the European Community.[45] Similar objectives to those mentioned above led to the establishment of the EAC Common Market as provided for by articles 76 and 104 of the 1999 EAC Treaty and articles 4 and 5 of the 2010 EAC Common Market Protocol.

A Directive issued by the EU Parliament and the Council has direct applicability and it binds all EU Member States[46] in the same way that a Directive issued by the EAC Council has direct applicability and it binds all EAC Partner States.[47] Essentially, both the EU and the EAC have

---

42 Cornish & Llewelyn (note 5 above) 23.

43 Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society; also intellectual property at *http://www.europa.eu* (accessed 14 February 2013).

44 Intellectual Property at *http://www.europa.eu* (accessed 14 February 2013).

45 Preamble to Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society. Also intellectual property at *http://www.europa.eu* (accessed 14 February 2013).

46 Article 249 of the Treaty establishing the European Community (Nice consolidated version) provides that unlike a regulation which binds in its entirely, a directive however binds, it leaves to the national authorities the choice of form and method of implementing it.

47 Article 16 of the 1999 EAC Treaty provides that Regulations, Directives and Decisions of the Council taken or given in pursuance of the provision the EAC Treaty shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly within their jurisdictions and on those to whom they may under the EAC Treaty be addressed. It is only when they are taken or given in pursuance of the provisions of the 1999 EAC Treaty that Regulations, Directives and Decisions of the EAC Council become binding to Partner States. Regulations, Directives and Decisions of the Council which are taken or given but not in pursuance of the provisions of the 1999 EAC Treaty do not have binding effect to Partner States. Article 16 of the 1999 EAC Treaty does not provide further about how the binding effect should operate in Partner States as it does not also

similar need to remove the differences in legal rules that cause uncertainties by consolidating similarities in form of a Directive to facilitate the implementation of the established common market in their trading regions.

1.4 Background to copyright in Kenya and Tanzania

1.4.1Kenya

Kenya inherited its copyright regime from the English copyright regime during the period of colonialism. Kenya was declared a British colony in 1897. Some of the English copyright laws which became those of Kenya are: the 1842 English Copyright Act, the 1844 International Copyright Act, the 1862 Fine Arts Copyright Act and the 1888 Copyright (Musical Compositions) Act.[48] Kimeri-Mbote[49] has argued that copyright law in Kenya during colonialism was designed by the British to protect the monopoly rights of the British publishers while restricting the growth of the domestic publishing industry. Sihanya also argues that the reception clause[50] applied to Kenya the substance of the English common law, the doctrine of equity and the statute of general application.[51] The statute of general application which provided for the application in British colonies, of English laws in force in England from the date of British rule in colonies, included the application of English copyright laws in Kenya from 1897 when Kenya was declared a British colony. The statute of general application was repealed and replaced by the 1967 Kenya Judicature Act.[52] The 1967 Judicature Act also maintained the application of English copyright law in Kenya but with the limitation of being applied only where it appeared necessary to cover some gaps in the domestic copyright law.

---

provide what Partner States should do or not do. Generally article 16 of the EAC Treaty does not provide for procedures nor does it provide for operations of the Regulation, Directive or Decision issued by the EAC Council in pursuance of the provisions of the 1999 EAC Treaty. It does provide for the status of the Regulation, Directive or Decision taken or given by the EAC Council in pursuance of the provisions of the 1999 EAC Treaty to Partner States.

48 Kimeri-Mbote 'Intellectual property Protection in Africa: An Assessment of the status of Laws, Research and Policy Analysis on intellectual Property Rights in Kenya' International Environmental Law Research Centre (IELRC) *WORKING PAPER* 2005-2, p 5.

49 Kimeri-Mbote (note 48 above) 5.

50 The reception clause was a provision in the East African-Order-in-Council of 12th August 1897 which was promulgated by the British Government requiring all courts in Kenya to apply received laws in the territory of Kenya but with some modifications such as; received laws should be in conformity with the substance of common law, the doctrine of equity and statutes of general application in force in England at the date of this order; and that received laws should apply so far the circumstances of the territory and its inhabitants permit. The reception clause started operating in Tanganyika as one of the provisions in the Tanganyika Order-in-Council on 22nd July 1920 when the British colonised Tanganyika.

51 Sihanya 'Copyright law in Kenya' at *http://www.innovativelawyering.com* (accessed 10 May 2013).

52 Sihanya 'Copyright law in Kenya' at *http://www.innovativelawyering.com* (accessed 10 May 2013). Section 9 of the 1967 Kenya Judicature Act provided for application of Acts of United Kingdom.

The 1956 Copyright Act continued to operate after Kenya became independent in 1963, and in 1966 a new Copyright Act was passed.[53] The 1966 Copyright Act was repealed and replaced by the 2001 Kenya Copyright Act (hereafter the Kenyan Act).[54] The Kenyan Act provides for the protection of copyright in literary works, audio-visual works, sound recordings and broadcasts. It was enacted to reflect the development of the copyright industry in Kenya as well as the need to comply with the international copyright treaties to which Kenya is a State party.[55] This Kenyan Act establishes the Kenya Copyright Board (KECOBO) as an independent corporate body mandated to discharge such functions as to direct, coordinate and oversee the implementation of laws and international treaties and conventions to which Kenya is a party, to supervise the activities of collective management societies in Kenya, to conduct training programs on copyright and to administer all matters of copyright and related rights in Kenya.[56]

Kenya is a State party to various international copyright agreements such as the Berne Convention for Protection of Literary and Artistic Works of 1886, International Convention for the Protection of Performers, Producer of Phonograms and Broadcasting Organisations (The Rome Convention) of 1961, Agreement on Trade Related Aspects of Intellectual Property Rights of 1994 (TRIPS Agreement), World Intellectual Property Organisation Copyright Treaty of 1996, World Intellectual Property Organisation Performers and Phonograms Treaty of 1996, Universal Copyright Convention; Kenya is also a Member to the Marrakesh Agreement Establishing the World Trade Organization (WTO) of 1994, a Member State to the World Intellectual property Organisation (WIPO) and a State party to the African Regional Intellectual Property Organisation (ARIPO).[57]

1.4.2Tanzania

Tanzania inherited its copyright regime from England on 22 July 1920, the reception date, when Tanganyika was declared a British colony. As it is to Kenya, from the date when Tanganyika was declared a British colony (22 July 1920), the statute of general application which provided for the application in British colonies, of English laws in force in England from the date of British rule in colonies, included the application of English copyright laws in

53 Cap 130 of the laws of Kenya.
54 Cap 130 (note 53 above).
55 These treaties are discussed below.
56 Section 3 of the Kenyan Act establishes the Kenya Copyright Board (KECOBO). KECOBO is mandated to discharge administrative and adjudicative functions. It is headed by the executive Director who is appointed by the Minister responsible for Copyright matters on the recommendation of the Board. According to section 11(2) of the Kenyan Act, a person to be appointed who to perform the functions of directorship of KECOBO must be the one who has acquired the following qualifications: qualified as an advocate of the High Court of Kenya for a period not less than five years' standing or has held judicial office in Kenya ,or has five years of experience in matters relating to copyright and other related rights, or has three years of experience due to his position of service as a senior officer in copyright office.
57 Intellectual Property Protection in Africa at *http://www.ielr.org* (accessed 25 February 2013)

Tanganyika. Tanganyika before its union with the Revolutionary Republic of Zanzibar (which consists of the two islands of Pemba and Unguja) of 1964 to form Tanzania was known as the Republic of Tanganyika. The copyright law which Tanganyika inherited from England was an instrument of monopoly. Copyright law aimed to protect foreigners' copyrights within the colony.[58] Copyright law had little to do with the protection of indigenous Tanzanians copyright works. It inhibited indigenous innovative activities. Protection was mostly conferred to copyright works that were the products of foreigners in Tanganyika. After independence,[59] the Copyright Ordinance[60] of 1921 was repealed and replaced by the Copyright Act No.61 of 1966. The 1966 Copyright Act recognised and protected both, foreigner's and indigenous' copyright works. The 1966 Copyright Act was repealed and replaced by the 1999 new copyright legislation which was enacted purposely to conform to the economic and technological advancement in the country and to align with the international IP agreements to which Tanzania is a State party. This new copyright legislation is the Copyright and Neighbouring Rights Act (hereafter the Tanzanian Act),[61] which is currently in force.

The Tanzanian Act establishes the Copyright Society of Tanzania (COSOTA) as a body corporate.[62] COSOTA performs such functions as: to promote and protect the interests of authors, performers, translators, producers of sound recordings, broadcasters, publishers, and to collect and distribute royalties accorded to them in the Act; COSOTA also maintains register of copyright works, identifies the rights of owners and give evidence of the ownership of copyright works where disputes arises; and it advises the Minister responsible for the protection and promotion of IP rights on all copyright matters,[63] who is also the minister for trade and industry.

It should be noted that the term 'Tanzania' as used in the 1999 Tanzanian Act does not refer to the political union of Tanganyika and Zanzibar because IP is not one of the matters that fall within the ambit of the political union of Tanganyika and Zanzibar of 1964.[64] Union matters

---

58 WIPO/SMES/DAR/05/; also available *at* *http://www.WIPO-ip-dar-05-www.78437.pdf* (accessed on 26 February 2013).

59 Tanganyika became independent on 9 December 1961.

60 Cap 218 of the Tanganyika Ordinances. All laws which operated in Tanganyika before its independence were referred to as Ordinances. After Tanganyika became independent all its laws are now referred to as Acts.

61 Cap 218 [R. E 2002] of the laws of Tanzania. This is an Act which provides for the legal protection in literary, artistic work and folklore and for related matters.

62 The Copyright Society of Tanzania (COSOTA) is established by section 46 of the Tanzanian Act.

63 Section 47 of the Tanzanian Act.

64 With reference to the provision of Article 4 of the 1977 Constitution of the United Republic of Tanzania as amended in 2005, Cap 2 of the laws of Tanzania (hereafter the Constitution of Tanzania), Union Matters are those identified matters in the first schedule of the Constitution of Tanzania, for which the

are listed in the first schedule of the 1977 Constitution of Tanzania[65] as amended in 2005 and the non-union Matters which are all matters that are not listed in the first schedule of the 1977 Constitution of Tanzania.[66] The general sources of copyright law in Kenya and Tanzania are: common laws,[67] doctrine of equity,[68] customary laws,[69] case law, national legislation and international copyright agreements.

government of the United Republic of Tanzania and the Revolutionary Government of Zanzibar have to undertake common responsibilities in their administration, management and protection. Such matters include inter alia, The Constitution of the United Republic of Tanzania, foreign affairs, defence and security, police, citizenship, mineral oil resources, including crude oil and natural gas, research, higher education, external borrowing and trade.

65 Cap 2 of the laws of Tanzania. All international agreements fall within Union Matters. Those aspects of IP which are of international character are discharged as Union Matters. Internally each party to the Union of Tanzania has its own domestic IP legal frameworks. The Copyright regime addressed in this study falls within the ambit of those matters that are non-Union Matters, but rather they are matters of Mainland Tanzania.

66 Article 4 (3) of the Constitution of the United Republic of Tanzania of 1977 as amended 2005, Cap 2 of the laws of Tanzania.

67 Common law is used in Kenya and Tanzania as one of the primary sources of law. The phrase 'common law' originally meant the law that was common in the whole of England, but apart from this original meaning the phrase has been used at different times with different significations like; the law that is not emanating from legislation, the law that is not equity or the law that is developed by the old courts of common law as contrasted with the law developed by the old Court of Chancery. See Williams *Learning the Law* 11 -ed (1982) 9.

68 The doctrine of equity refers to the idea of resolving the dispute in a manner that seems to be fair and just to the parties than considering the substantive part of the written laws. It is generally a departure from or relaxation of a fixed norm for the purpose of reaching a fair and satisfactory decision in the case. One of the principles of equity is that any party seeking to rely to this equity must have clean hands. Equity means fairness or justice. See Williams *Learning the Law* 11ed (1982) 9 for the distinction of common law from equity; Bodenheimer *Jurisprudence: The Philosophy and Method of the Law; Revised Edition* (2006) 363.

69 Customary law refers to rules of practice and usage of the local people in doing a certain thing in a certain way for a long period of time that has been accepted and that binds but not written. It can be rules relating to matters of succession, marriage, inheritance. A person to apply customary law must be a member of the community which follows that customary law. Customary laws are established from community members' long usage of their actions to the extent that they create to their conscious the recognition and belief that such actions have binding force; also Bodenheimer (note 66 above) 376-378.

CHAPTER TWO

SUBJECT MATTER, REQUIREMENTS FOR SUBSISTENCE, OWNERSHIP AND ADMINISTRATION OF COPYRIGHT IN THE KENYAN AND TANZANIAN LAW

2.1 Introduction

The discussion in this chapter centres on the similarities and significant differences found in four of the six aspects of copyright which are being explained: the subject matter, requirements for subsistence of copyright, ownership and administration of copyright in the Kenyan Copyright Act (hereafter the Kenyan Act)[70] and the Tanzanian Copyright and Neighbouring Rights Act (hereafter the Tanzanian Act).[71] The other two aspects which are: infringement of copyright and the enforcement (including remedies) are discussed in chapter three below. This chapter concludes with a summary of the similarities and significant differences that are found in the two copyright statutes to show the necessity of having a harmonised copyright system within the EAC in the respective analysed four aspects.

2.2 Subject Matter of Copyright in the Kenyan and Tanzanian Law

Ideas, concept, facts, processes and methods are not in themselves protected by copyright. Copyright protects the particular way the idea is expressed in the fixed form or artistic creation.[72] This simply means that the idea in the author's mind must be reduced into physical form.[73] Copyright, therefore, protect authors' ideas that are represented in fixed forms from infringement. Ideas which are protected are those found in fixed forms, whether literary, musical or artistic work, audio visual, sound recordings or broadcasts. Cornish and Llewelyn[74] are of the view that copyright is the particular expression making up a work which is protected, rather than the idea behind it. The basis of copyright lies in the personal character of the subject matter in issue; literary or artistic.

Spinello and Tavani argue that there are three conditions that any literary or artistic work must satisfy for its protection under copyright law.[75] These conditions are; (a) the work must be original, meaning that the work must owe its source from the author, (b) the work must be non-

70 Cap 130 of the laws of Kenya.
71 Cap 218 [R.E 2002] of the laws of Tanzania.
72 Greenhalgh & Rogers *Innovation, Intellectual Property and Economic Growth* (2010) 48.
73 Wherry *Intellectual Property: Everything the Digital-Age Librarian Need to Know* (2008) 3.
74 Cornish & Llewelyn *Intellectual Property: Patents, Copyright, Trade Marks& Allied Rights* 5-ed (2003) 9.
75 Spinello &Tavani *Intellectual Property Rights in a Networked World: Theory and Practice* (2005) 21-22.

functional or non-utilitarian in nature and (c) the work must be fixed or expressed concretely in the form of some tangible medium such as a book, poem or musical score**.**

The material form in terms of the Kenyan Act includes such works that have been reduced into material form, that is, they have been written down and recorded.[76] Recording of the work in material form means that the copyrightable work must be fixed in a permanent or durable material. This requirement carries with it many benefits; but the most obvious is the evidential benefit. Law prefers fixed evidence such as written, filmed, and taped than oral evidence in copyright matters. Another benefit is that reducing ideas into a material form increases the possibility of the public to continue accessing the work even after the death of the author of the copyrighted work or after the expiry of the copyright in the work as the case may be.

Spinello and Tavani[77] also argue that copyright covers expressions that are in tangible medium such as a book or a sheet of paper containing a musical score. As it is argued by Boadi, Kameri-Mbote, Mugaguri,[78] and as it is to other forms of IP, the purpose of copyright law is to enhance creativity and provide incentives to persons who are interested to invest in copyright works. It is also aiming to the achieving of a balance for creativity and rewards on the one hand, and for the securing freedom of expression and public interest on the other hand.

Copyright is the exclusive right conferred on the copyright owner, to control original works from being reproduced, distributed , translated , adapted; from sold, made available for rental lease, hire, loan; imported, communicated to the public, and broadcasted without the permission from the copyright owner.[79] Wherry[80] is of the view that copyright normally grants five primary rights to the copyright holder. Such rights include: the right to make copies, the right to prepare derivative works, the right to distribute copies of the copyrighted work to the public, the right to perform the copyrighted work publicly and the right to display the copyrighted work to the public.

Neither the Kenyan nor the Tanzanian copyright legislation provides a comprehensive definition of copyright as to include all aspects that are protected under the copyright statute.

---

76 Section 22 (3) of the Kenyan Act. This section provides that a literary, musical or artistic work shall not be eligible for copyright unless (a) sufficient effort has been expended on making the work to give it an original character ; and (b) the work has been written down, recorded or otherwise reduced to material form.

77 Spinello & Tavani (note 75 above) 5.

78 Boadi, Kameri-Mbote, Mugaguri, Opati, Sikinyi, Wekesa, Sihanya & Oira *Intellectual Property in Kenya* (2009) 150.

79 Section 22 of the Kenyan Act.

80 Wherry (note 73 above) 3.

The interpretation section of the Tanzanian Act defines copyright to mean the sole legal right to print, publish, perform, film or record a literary or artistic or musical work.[81] This definition does not cover all the works that are protected under the Tanzanian Act. Other categories of works protected under the Tanzanian Act include: dramatic works, books, pamphlets, computer programs, lectures, addresses, sermons choreographic works and pantomimes; cinematographic works and audio visual works; drawings, paintings, works of architecture, sculpture, engraving, lithography, tapestry: photographic works including works expressed by process analogous to photography, illustrations, maps, plans, sketches and three dimensional works relative to geography, topography, architecture or science; handicraft works and works resulting from expressions of folklore such as folk tales, folk poetry, riddles, folk songs and instrumental folk music, folk dances, play and artistic form of rituals, production of folk art in particular, drawings, painting, carving, sculpture, pottery, baskets woodwork, and terracotta, mosaic and costumes.[82] The definition of copyright as provided under the Tanzanian Act is of the effect that copyright is an exclusive right only given to a person to protect his work that qualifies for protection by meeting the requirements.[83]

Copyright is also defined by the Kenyan Act in relation to the subject matter to be protected by copyright. The Kenyan copyright legislation confers exclusive rights on original literary, musical, artistic and audio visual works, sound recordings and broadcast works.[84]

Literary works are defined by the Kenyan Act to mean any works that are or are similar to novels, stories and poetic works; plays, stage directions, film sceneries and broadcasting scripts; textbooks, treatises, histories, biographies, essays and articles; encyclopaedias, and dictionaries; letters, reports and memoranda; lectures, reports and sermons; charts and table; computer programs and tables and compilations of data including tables and compilations of data store and embodied in computer or a medium used in conjunction with a computer.[85] Both, the Kenyan and Tanzanian copyright statutes deny written laws and judicial decisions protection.[86]

---

81 Section 4 of the Tanzanian Act.

82 Sections 5 and 24 of the Tanzanian Act.

83 Section 3 of the Tanzanian Act provides for protection of only works whose authors are nationals or residents of Tanzania.

84 Section 22 of the Kenyan Act.

85 Section 2(1) of the Kenyan Act.

86 Section 7 of the Tanzanian Act provides that laws and decisions of courts are not protected. This provision is related to section 2 of the Kenyan Act which generally excludes written laws and decisions of courts from literary works, meaning that they are not covered as protected works.

Though the Tanzanian Act protects literary works, artistic works and folklore, the meaning of literary works and artistic works is not provided in the Act. The Tanzanian Act only provides lists of works to be protected as literary and artistic[87] which include all the works protected as literary and artistic works in the Kenyan Act. Such lists of works are also protected under the Tanzanian Act irrespective of their form of expression, their quality and the purpose for which they were created.[88]

Artistic works as provided by section 2 (1) of the Kenyan Act means, irrespective of artistic quality, any of the following or works similar thereto: paintings, drawings, etchings, lithographs, woodcuts, engravings and prints; maps, plans and diagram; works of sculpture; photographs not comprised in audio visual works; works of architecture in the form of building or models and works of artistic craftsmanship, pictorial woven tissue and articles of applies handcraft and industrial art. Musical works are all works that are composed for musical accompaniments.[89]

Audiovisual work means a fixation in any physical medium of image, either synchronised with or without sound, from which a moving picture may be reproduced and include videotapes but not a broadcast.[90] It also means a work that consist of series of related images which impart the impression of motion, with or without accompanying sounds, susceptible of being made visible and where accompanied by sounds susceptible of being made audible.[91]

Sound recording means any exclusively aural fixation of the sounds of a performance or other sounds, or a representation of sounds, regardless of the method by which the sounds are fixed or the medium in which the sounds are embodied but does not include a fixation of the sounds and images, such as the sound track of an audiovisual work.[92]

Broadcast is defined in the Kenyan Act[93] to mean the transmission, by wire or wireless means, of sounds or images or both or the representations thereof, in such a manner as to cause such image or sounds to be received by the public and includes transmission by satellite. The

87 Section 5 (2) of the Tanzanian Act.
88 Section 5 (3) of the Tanzanian Act.
89 Section 2 of the Kenyan Act.
90 Section 2 of the Kenyan Act.
91 Section 4 of the Tanzanian Act.
92 Section 2 of the Kenyan Act.
93 Section 2 of the Kenyan Act.

Tanzanian Act define broadcasting to mean the communication of a work, a performance or a sound recording to the public by wireless transmission, including transmission by satellite.[94]

The Kenyan Act provides for the nature of copyright protection in a literary, music work or audio visual work to mean the right to control the doing of any of the following acts: the reproduction in any material form of the original work or its translation or adaptation, distribution to the public of the work by way of sale, rental, lease, loan, importation or similar arrangement and the communication to the public and the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original.[95]

The nature of copyright protection in sound recordings is the exclusive right to control the doing of any of the following acts in respect of the sound recordings: reproduction of the work in any manner or form or distribution to the public of copies by way of sale, rental, lease, hire, or any similar arrangements, or the importation of the work, communication to the public or the broadcasting of the sound recording in whole or in part either in its original form or in any form recognisably derived from the original.[96]

In broadcasts the nature of copyright protection is the exclusive right to control the doing of any of the following acts: the fixation and broadcasting of the whole or a part of the broadcast and communication to the public of the whole or a substantial part of a television broadcast either in its original form or in any form recognisably derived from the original work, and to control the taking of still photographs.[97]

In audio visual works, a person who broadcasts audio visual works in which a musical work is incorporated is the owner of the right to broadcast and such a person is the one who is entitled to receive fair compensation.[98] Unlike the Kenyan Act which provides for the nature of copyright protection in the subject matter of copyright as it is discussed above, the Tanzanian Act does not provide for the nature of copyright protection in its subject matter.

There are significant differences in their respective lists of works- subject matter that qualify for protection. Section 7 of the Tanzanian Act provides for a total exclusion of laws, and decisions of courts and administrative bodies as well as official translation thereof, news of the

94 Section 4 of the Tanzanian Act.
95 Section 26 (1) of the Kenyan Act.
96 Section 28 (1) of the Kenyan Act.
97 Section 29 of the Kenyan Act.
98 Section 27 of the Kenyan Act.

day published, broadcast or publicly communicated by any other means, from being protected. According to section 26(1) *(a)* and *(g)* of the Kenyan Act, any use of the lists of works excluded from protection by the Tanzanian Act as discussed above, must be accompanied by sufficient acknowledgement of the sources otherwise it would amount to infringement.

Another difference is found in the protection of derivative works.[99] Unlike the Kenyan Act which does not provide the same protection for both derivative works and original works, the Tanzanian Act provides for the protection of the derivative works as original works. According to the Tanzanian Act, derivative works are all works falling within the following lists: translation, adaptation, arrangements and other transformation of literary and artistic; collections of literary and artistic works, such as encyclopaedias and anthologies; collection of expressions of folklore and compilation of data bases which by reason of selection and arrangement of their contents constitute intellectual creations and works inspired by expression of folklore such as folk tales, folk poetry, riddles, folk songs, folk dances.[100]

The term 'fixation' is defined by the Kenyan and Tanzanian copyright statutes to mean the embodiment of sounds or images, or both or the representation thereof from which they can be perceived, reproduced or communicated through a device,[101] but the term 'device' is not defined by both, the Kenyan and the Tanzanian Acts. Fixation has the same meaning in both the Tanzanian and Kenyan Acts.[102]

According to the Tanzanian Act, expression of folklore means production consisting of characteristic elements of the traditional artistic heritage developed and maintained over generations by a community or by individuals reflecting the traditional artistic expectations of their community.[103] In the Kenyan Act folklore is defined to mean a literary, music and artistic work presumed to have been created within Kenya by an unidentified author which has been passed from one generation to another and constitutes a basic element of the traditional cultural heritage of Kenya and includes: (a) folktales, folk poetry and folk riddles; (b) folk songs and instrumental folk music; (c) folk dances and folk play and (d) the production of folk art, in particular drawings, paintings, sculptures, pottery, woodwork, metal wire, jewellery, handcrafts, costumes and indigenous textiles.[104]

---

99 A derivative work is the work that is developed from pre-existed work.
100 Section 6 (1) of the Tanzanian Act.
101 Section 2 of the Kenyan Act and Section 4 of the Tanzanian Act.
102 Section 4 of the Tanzanian Act.
103 Section 4 of the Tanzanian Act.
104 Section 2 of the Kenyan Act.

Copyright protection is granted on a certain limited period of time. The concept of limitation of the period of protection is what is known in IP as the term of protection. It is not only applies to copyright but also to other forms of IP rights such as patents and trademarks. The term of copyright protection conferred by the Kenyan Act is as follows: literary, musical or artistic work other than photographs- the term of protection is fifty years after the end of the year in which the author dies; audio visual works and photographs- the term of protection is fifty years from the end of the year in which the work was either made, first made available to the public or first published, whichever date is the latest; sound recordings the term of protection is fifty years after the end of the year in which the recording was made; in broadcasts- the term of protection is fifty years after the end of the year in which the broadcast took place.[105] The Kenyan Act also provides the term of protection in anonymous or pseudonymous literary, musical or artistic works that in such works copyright subsists until the expiration of fifty years from the end of the year in which the particular work was first published provided that in the event of the identity of the author becoming known the term of protection of a copyright is also calculated.[106] In the case of a work of joint authorship, the death of the author is taken to refer to the author who dies last.[107]

In the Tanzania Act, the term of protection conferred to copyright subject matter in literary and artistic works is from the period when the work was first published and for fifty years after the death of the author.[108] In the case of the work of joint authorship, the term of protection is from the time when the work was published and the fifty years after the death of the last author.[109] Whereby in case of works published anonymously or under a pseudonym the term of protection is fifty years from the date on which the work was either made, first published whichever date is the latest, provided that where the authors identify is revealed or is no longer in doubt before the expiration of the provided period, the term of protection is that which is provided under section 14 subsection (1) and (2).[110]

2.3 Requirements for subsistence of Copyright in the Kenyan and Tanzanian Laws

According to the Kenya Act, the first requirement for the work to enjoy copyright protection is that there must be sufficient effort that has been expended on its making that gives it the

105 Section 23 (2) of the Kenyan Act.
106 Footnote 105 above.
107 Section 23 (4) of the Kenyan Act.
108 Section 14 (1) of the Tanzanian Act.
109 Section 14 (2) of the Tanzanian Act.
110 See footnote 108 above.

character of being original.[111] So originality of the work is tested considering the expended sufficient effort on the making of the work. The other requirement as to the Kenyan Act is that it must be represented in a fixed form, that is, written down, recorded or reduced to material form for it to enjoy copyright.[112]

The Tanzanian Act provides that authors of original literary and artistic works are entitled to copyright protection for their works by the sole fact of the creation of such works.[113] This means that the Tanzanian Act only provides for the protection of original works. It does not provide for the requirement that a work in order for it to qualify for enjoying copyright protection it must be in a fixed form such as being recorded in material form. This is one of the significant differences found between the Kenyan Act and the Tanzanian Act in the requirements for enjoying copyright protection. Although the Tanzanian copyright statute does not expressly provide for the requirement that the work must be reduced in material form for it to qualify for enjoying protection, impliedly, it does provide for the requirement that the work should be reduced in a material form to qualify for protection, because copyright subsists only in original works that are manifested in material form.[114] The Tanzanian Act only requires that in order for the work to enjoy the protection it must be original, be it literary, artistic or musical work.[115]

Another difference in the requirements for enjoying copyright protection in the two Acts is the test for originality of the work. The test for originality of the work is not provided by the Tanzanian Act. We have seen in the Kenyan Act that there must be sufficient effort expended on making the work and that gives it the character of being original.[116] The Tanzanian Act only requires that in order for the work to enjoy protection it must be original, be it literary artistic or musical work.[117] It does not provided for the test of originality of the work to qualify for copyright protection. The difficulty of establishing when a work is original is overcome by referring to case law of countries which follow the common law system which have binding force in Tanzania.

---

111 Section 22 (3) *(a)* of the Kenyan Act, provides that literary, musical or artistic work shall not be eligible for copyright unless (a) sufficient effort has been expended on the making the work to give it an original character.

112 Section 22(3) *(b)* of the Kenyan Act.

113 Section 5 of the Tanzanian Act.

114 Spinello & Tavani (note 75 above) 5.

115 Section 5 (1) of the Tanzanian Act provides that authors of original literary and artistic works shall be entitled to copyright protection for their works under the Act by the sole fact of the creation of such works.

116 Footnote 111 above.

117 Footnote 115 above.

The issue of originality in copyright works possesses some difficulties in relation to its precise meaning. In copyright law, originality of the work does not mean that the work must be unique or novel, but rather it means that the author must have exercised certain amount of skill, labour and judgement.[118] It is the established legal requirement from case law that originality of the work should be tested from the point of view of authors' skill, labour and judgment spent in preparing that work.[119] So what is material for the work to qualify for copyright protection are the skill, labour and judgement involved in the work and not the novelty of the work. This legal requirement has been adopted by courts in various copyright decisions where the need for testing originality of the work arises. In the case of *University of London Press v University of Tutorial Press Ltd*,[120] originality of the work was considered not in terms of novelty of the work but rather in terms of the source of that work. This decision has also effect in Kenya and Tanzania because the two countries follow the common law system of administration of justice and cases decided in other common law jurisdictions have binding effect in the legal system of these countries.

The Tanzanian copyright legislation provides for the protection of secondary works or sometimes also referred to as derivative works, as original works.[121] Secondary or derivative works are those copyrightable works derived from pre-existing works. The test for originality in derivative works may be difficult as compared to the test for originality in new copyrightable works. For the derivative work to qualify for copyright protection, the skill, labour and judgement involved in the work must be that which impart to such work some quality or character that is not possessed by the principal work from which it is derived. This was also the reasoning of the court in the case of *MacMillan v Cooper*.[122] If the author of the derivative work does add the skill, labour and judgement to the existing work which impart to such work some quality or character of being original, the derivative work cannot be protected.

Mechanical or automatic change of form does not result in protection of derivative works. Mechanical or automatic change is a change in the resulting works that is brought about without any involvement of human input as skill, labour and judgement. In *Football League v*

118 *Ladbroke v William Hill* [1964]1 ALL ER 469. In this case, the court noted that originality in the works is dependent upon the degree of skill, labour and judgement involved in preparing the compilation to art works.

119 *Ladbroke v William Hill* [1964]1 ALL ER 469 (note 116 above).

120 [1916] 2 Ch. D 601.

121 Section 6 of the Tanzanian Act provides for derivative works to include translation, adaptations, arrangements, collections of literary and artistic works such as encyclopaedias and anthologies; or collections of expressions of folklore and compilation of data or data base.

122 [1924] 40 TLR 186, 188.

Littlewoods [123] it was held that the making of chronological list which is automatic and only requires pains-taking accuracy would not itself render to the originality of the work. This is because it requires no element of test or selection, judgement or originality though there might be the application of labour by the maker but it does not require special knowledge. In the case of *Rejet Shop v Robber Manners*[124] the court held that photocopying an image and enlarging it by ten per cent is only a mechanical and lacks originality. By being Member States to the Berne Convention for the Protection of Literary and Artistic Works, both, the Kenyan and the Tanzanian copyright legislation recognise the automatic subsistence of copyright in the copyrightable works from the sole fact of the creation of such works whether such works have been published or not.[125]

It is noteworthy that the copyright conferred by both, the Kenyan and the Tanzanian copyright legislation is of territorial by nature.[126] Section 23 of the Kenyan Act provides that the work to be eligible for copyright the author ,or, in case of a work of joint authorship, any of authors is, at the time when the work is made, a citizen of, or is domiciled or ordinarily resident in, Kenya or is a body corporate which is incorporated under or in accordance with the laws of Kenya; whereas section 3 of the Tanzania n Act provides for the protection of works of authors who are nationals of or have their habitual residence in the United Republic of Tanzania, works first published in the United Republic of Tanzania irrespective of nationality or residence of their authors or whose producers, as for the case of audio-visual works, have headquarters or habitual residence in the united Republic of Tanzania or authors' company is incorporated under the laws of the United Republic of Tanzania. But unlike the Kenyan Act which is so strict to the territorial principle, the Tanzanian Act has extended its application to the protection even unpublished works and works first published in a foreign country of the authors of foreign nationality and having their residence in a foreign country, provided that the country where the author has his habitual residence or in the case of published works, the country of their first publication, grants similar protection to nationals or residents of the United Republic of Tanzania and by virtue of international requirements. In both, the Kenyan and Tanzanian Acts

123 [1959] Ch. D 637.

124 [1995] FSR 870, 876.

125 Article 3(1) *(a)* of the Berne Convention for the Protection of Literary and Artistic Works of 1886 provides that the protection applies to authors who are nationals of one of the countries of the union, for their works, whether published or not . Article 5 of the Berne Convention for the Protection of Literary and Artistic Works of 1886 provides for the guaranteed rights; outside the country of union and in the country of union.

126 A brief discussion on the territorial principle is given in page 24 bellow; also in Section 23 of the Kenyan Act and Section 3 of the Tanzanian Act.

the territoriality principle of IP is that which apply to copyright matters.[127] In order for copyright to subsist in the work the author, or one of the authors for the case of joint authorship of the copyrightable work, must either be the citizen of, or domiciled or ordinarily residing in the country or if the author is a corporate body, it must have been incorporated according to the laws of the relevant country.[128] It seems worthy to explain the territorial principle of IP at this juncture, even though in brief.

The territorial principle of IP restricts the rights granted in forms of IP such as copyright, trade mark, and patents, to be administered, managed and enforced only within the territory of the relevant state. The territorial scope of national IP statutes and the rights granted under these statutes are restricted to the territory of the state.[129] This principle however has been subject to counter arguments: scholars like Hart, Fazzani and Clark[130] have argued that by its nature IP requires protection on an international level.

In my own view, the argument that IP requires protection at the international level holds. This is due to the main reason that IP rights should not themselves become barriers to legitimate trade. IP rights are trade related aspects, as such, common efforts which are taken by states to facilitate cross- border trade should also be taken to ensure that IP rights are effectively protected and appropriately enforced taking into account the differences found in national legal systems.

Not all literary, musical and artistic works are protected. There are some literary, musical and artistic works which are not protected; hence, they may be used without causing any infringement to such works. Literary, musical and artistic works which are not protected are referred to in copyright as works in the public domain. The Kenyan Act provides the list of works that belong to public domain to include: works whose terms of protection have expired; works in respect of which authors have renounced their rights and foreign works which do not enjoy protection in Kenya.[131] Sub section (3) of section 45 of the Kenyan Act also provides to the effect that works in public domain may be used without any restrictions upon fulfilling the condition which is to pay such fees as may be determined by the Minister in relation thereto.

---

127 In both, the Kenyan and the Tanzanian copyright legislation, a work is eligible for copyright where it is published within the country by an author or for the case of joint authorship, by one of the authors who is a national or resident of that country. Or if it is a corporate body, it must be that which is incorporated according to the laws of the country as per sections 23 (1) and 24 of the Kenyan Act and section 3 of the Tanzanian Act.

128 Section 23 (1) of the Kenyan Act and section 3 of the Tanzanian Act.

129 Fawcett & Torremans *Intellectual Property & Private international Law* (1980) 478.

130 Hart, Fazzani and Clark *Intellectual Property Law* 4-ed (2006) 3.

131 Section 45(1) of the Kenyan Act.

2.4 Ownership of Copyright in Kenyan and Tanzanian Law

Though there is a relationship between authorship and ownership of copyright, this study is not giving a detailed discussion concerning that relationship. This study explains the concept of ownership as one of the six selected aspects of copyright. But since these two copyright concepts; authorship and ownership are related to such extent that sometimes they cannot be distinguished, authorship has also been explained in this part of chapter two of the study but with a limited scope. The Tanzania Act defines an author to mean the natural person who creates the work.[132] The Kenyan Act defines an author in relation to the nature of the copyright work that a person has contributed to the production of that copyright work. For example in relation to literary, musical or artistic work; an author is the person who first makes or creates the work; in relation to sound recordings, an author is a person by whom the arrangements for making of the sound recording of the film were made.[133] An author can be defined to mean a person who has undertaken the production of a substantial part of the work to give it an original character.

Unlike the Tanzanian Act, the Kenyan Act draws a distinction between the form and idea for a person to qualify to be an author of the copyrightable work. Section 22(3) *(b)* of the Kenyan Act provides that for the work to be protected it must be reduced to material form. Thus an author is the person who has undertaken the labour required to reduce the work to material form. The author of the copyright work can be an organisation or a corporation or an individual person.

The Kenyan Act provides that the author is the person who initially owns copyright.[134] This principle is also found in the 1999 Tanzanian Act.[135] Section 15 (1) of the Tanzanian Act provides that the authors of a work of joint authorship shall be co-owners of the rights in that copyrightable work. In respect of audio visual works, the original owner of the economic right is the co-author of the audio visual work, but in the absence of proof of the contrary, the authors of audio visual works are presumed to be: the author of the scenario, the author of the

---

132 Section 4 of the Tanzanian Act.

133 Section 2 of the Kenyan Act.

134 Section 31 (1) of the Kenyan Act. This section provides that the copyright shall be vested initially in the author provided that where a work (a) is commissioned by a person who is not the author's employer under a contract of service, or(b) not having been so commissioned, is made in the course of the author's employment under a contract of service, the copyright shall be deemed to be transferred to the person who commissioned the work or the author's employer, subject to any agreement between the parties excluding or limiting the transfer.

135 Section15 of the Tanzanian Act provides that the right in a work protected under the Tanzanian Act shall be owned in the first instance by the author or authors who created the work. In audio-visual works, the original owner of the economic right is recognised by the Tanzanian Act to be the co-author of the audio-visual work.

dialogue, the composer of the music specifically created for the audio visual work, and the director provided that the director has exercised actual supervision and has made an actual intellectual contribution to the creation of the work.[136] The person who commissions the work or the employer may not be the first owners of copyright in the work unless there is a prior agreement for them to be regarded as first owners of copyright.[137]

A point on which the 1999 Tanzanian Act and the 2001 Kenyan Act differ in respect of issues of ownership of copyright is that, the Kenyan Act confers copyright on works that are eligible for copyright protection which have been created pursuant to commission from the government or international body or a non-governmental body.[138] Conferring copyright to works that have been created pursuant to commission from the government or international body or from a non-governmental body, conflicts with the provisions of sections 23(1) and 24(1) of the Kenyan Act. Sections 23(1) and 24(1) of the Kenyan Act require that for the work to enjoy copyright its author or authors in case of joint authorship, at the time of making the work, must be either citizen of Kenya, or domiciled in Kenya or ordinarily residing in Kenya or being a body corporate which is incorporated in Kenya under Kenyan laws, or that the work must be first published in Kenya, or if so requires, the work be transmitted from the transmitters situated in Kenya. Thus government commissioned works, even if prepared outside Kenya by foreigners, or first published outside Kenya, will still enjoy copyright protection in Kenya. This is not the position in the 1999 Tanzanian Act.

The Kenyan Act provides that if the work is made within the scope and in the course of employment, the ownership vests in the employer whereas works made in the course of government employment belong to Government.[139] Works made in the context of employment in international bodies such as World Trade Organisation (WTO) and World Intellectual Property Organisation (WIPO) belongs to those bodies.[140] Ownership of the copyright in joint works belongs to co-owners of a single copyright in the work. A joint work or work of joint authorship is a work that has been prepared and produced by the collaboration of two or more authors in which the contribution of each is not separable from the contribution of the other author or authors and that there was an intention that their contributions be merged into inseparable or independent parts of a unitary whole.[141] The owner of copyright is any person

136 Section 15 (2) of the Tanzanian Act.
137 Section31(1) of the Kenyan Act and s15 of the Tanzanian Act.
138 Section 25 of the Kenyan Act.
139 Section 31(1) of the Kenyan Act.
140 Section 31 (2) of the Kenyan Act.
141 Section 2 (1) of the Kenyan Act.

whom the economic rights either vested originally or to whom they are transferred.[142] So in both, the Kenyan and the Tanzanian Acts, the copyright owner can be the first author, any other natural person or even any legal entity like the government or a company. The economic rights seek to secure the owner's material or financial benefits from or of his or her innovation or creativity. The economic rights include: the right to reproduce the work in any available means like scanning, downloading, photocopying, or printing the copyrighted work; the right to distribute the work by way of sale, gift, offer for sale; the right to communicate the work to the public, the right to perform the work for commercial purposes, broadcasting right, and the right to developing a derivative or adapted work from an original work.[143] Copyright also confers authors' moral rights. The authors' moral rights include: the right to paternity, that is the right to be named as the author of a literary, artistic or musical work or as the director of a film or an audio visual work; the right to the integrity of the work, this is the right to protect the work from being misquoted, mutilated, disparaged, and baselessly attacked among others in a manner that compromises the reputation of the author; the right to have the work not falsely attributed to the author, this is generally the right that requires not to attribute the work to a person who is not the author of the work; and the right to privacy.[144] The author has the right to privacy. Good example is when a photographic film is being made for private, and domestic purposes must be kept in private. Moral rights are not transferable. In both, the Kenyan and the Tanzanian copyright legislation the author has the right to claim for the authorship of the work and the object to any distortion, mutilation or other modification of or other derogatory action in relation to the work which would be prejudicial to his honour or reputation under what are called the moral rights of the author.[145] These rights are not transmissible during the life of the author but the right to exercise any of such right is transmissible by way of testamentary disposition or by operation of the law following the demise of the author.[146]

Unlike moral rights, the economic aspects of copyrights are exclusive rights that are transferable. They are vested in the copyright owner. Both, the Kenyan and Tanzanian copyright statutes provide for the manner in which the owners' economic copyrights may be

142 Section 31 (3) of the Kenyan Act and section15 of the Tanzanian Act.

143 Section 9 of the Tanzanian Act.

144 The authors' right to privacy refers to the right to object and to seek relief in connection with, any distribution, mutilation or other modification to his or her work, where such action would be or is prejudicial to his or her honour or reputation as it is provided for under section 11 of the Tanzanian Act.

145 Section 32 (1) of the Kenyan Act provides that independently of the author's economic rights and even after the transfer of the said rights, the author shall have the right to (a) claim the authorship of the work and (b) object to any distortion, mutilation or other modification of or other modification of or other derogatory action in relation to, the said work which would be prejudicial to his honour or reputation. Section11 of the Tanzanian Act also provides the same author's rights in the copyright work.

146 Section 32 (2) of the Kenyan Act.

transferred as any other movable properties upon owners consent.[147] The following are the ways through which an owner can deal with his copyright: (a) enjoy the copyright personally or directly by publishing or performing the work, and (b) transferring the rights to any other person. The transfer of the economic copyright may be done in different forms such as: by assignment, by licence, testamentary disposition or by operation of law. Like the Kenyan Act, the Tanzanian Act provides that an assignment of copyright should be made in writing and signed by the parties.[148] Unlike the Tanzanian copyright legislation, the Kenyan copyright legislation validates the signing of the written assignment of copyright by another person on behalf of the assignor.[149] The Kenyan copyright legislation places the necessary condition that the written assignment of copyright must be accompanied by a letter of verification from the Kenya Copyright Board (KECOBO) in the event of an assignment of copyright works by a person from outside Kenya.[150] This is not the position under the Tanzanian copyright legislation. Both, the Tanzanian copyright legislation and the Kenyan copyright legislation provide that the assignment of copyright may be made in whole or in part.[151]

Unlike the Kenyan Act, the Tanzania Act does not legalise assignment of copyright in future works; any such assignment is void.[152] Whereas the Kenyan Act provides for the limiting of the assignment of copyright in the work as to apply only to some of the acts which the owner of the copyright has exclusive right to control, or to a part only of the period of the copyright, or to a specified country or other geographical area,[153] the Tanzanian Act is silent about the limitation of the assignment of interests in copyrightable works.

In terms of owners' licensing copyright works, both the Kenyan and Tanzanian Acts provide that the copyright owner may issue two types of licences; an exclusive licence and a non-exclusive licence.[154] The Kenyan Act provides that the licence granted in respect of any

147 Section 33 of the Kenyan Act and section 18 of the Tanzanian Act.
148 Section 33 (3) of the Kenyan Act and Section 16 (2) of the Tanzanian Act.
149 Section 33 (3) of the Kenyan Act. This provision requires the assignment to have no effect unless it is in writing signed by or on behalf of the assignor.
150 Section 33 (3) of the Kenyan Act.
151 Section16 (1) of the Tanzanian Act and Section 33 (2) of the Kenya Act.
152 Section 16 (4) of the Tanzanian Act. Section 33 (5) provides to the effect that future assignment, licence or testamentary disposition of interests so done in copyrightable work is valid and the prospective copyright in any such work is transmissible by operation of law as movable property.
153 Section 33(2) of the Kenyan Act.
154 Section 33 of the Kenyan Act and section17 of the Tanzanian Act. An exclusive licence is the kind of licence that entitle the licensee to carry out the act concerned to the exclusion of all others including the author or other owner of copyright whereas a non- exclusive licence is that kind of licence which entitles the licensee to carry out the act concerned concurrently with the author or other owner of the copyright and concurrently with any other possible non-exclusive licensees. This definition is as provide by Section 33(3) and (4) of the Kenyan Act.

copyright by the person who, in relation to the matters to which the licence relates is the owner of the copyright, is binding upon every successor in title to the interest in the copyright work.[155] There is provision for exceptions for a purchaser in good faith and without notice, actual or constructive of the licence, or a person deriving title from such purchaser to the doing of anything in relation to any copyright, with or without the licence of the owner of the copyright.[156] The Tanzanian copyright legislation provides to the effect that the maximum period for the validity of the licensing contact is fifteen years.[157] Any grant of exclusive licence is valid only if it is in writing and signed by the contracting parties.[158]

Unlike the Kenyan copyright legislation which provides that implied licensing terms are binding, the Tanzanian copyright legislation does not provide for implied licensing contract.[159] Implied licensing terms includes the authorisation of the doing of anything by the person deriving title from the guarantee of the licence though not expressly stated. It is within such terms that the contract is deemed to be done with the licence and of every person, if any, upon whom the licence is binding. In both, the Kenyan and Tanzanian copyright statutes, exclusive licensee and exclusive sub-licensee have the same right of action and are entitled to the same remedies as if the licence were an assignment.[160] The Kenyan copyright legislation requires an exclusive licensee or sub- exclusive licensee to give notice of his or her intention to the owner of the copyright concerned, in writing, before instituting proceedings in a competent institution.[161] The owner has the legal right to intervene in such proceedings and recover any damages he may have suffered.[162]

2.5 The Administration of Copyright in Kenyan and in Tanzanian Law

In both Kenya and Tanzania, copyright is administered by the established independent legal entities; the Kenya Copyright Board (KECOBO)[163] for Kenya and the Copyright Society of

155 Section 33 (9) of the Kenyan Act.

156 The effect of the exceptions is that the intention of the purchaser in good faith and without notice, actual or constructive, of the licence, or a person deriving title from such purchaser to the doing of the business without the licence of the owner should be construed accordingly to avoid the legal duties resulting from concluding binding contracts.

157 Section 17 (7) of the Tanzanian Act.

158 Section 17 (8) of the Tanzanian Act.

159 Section 33 (10) of the Kenyan Act provides to the effect that implied terms of the licence is binding.

160 Section 34 (1) of the Kenyan Act.

161 Section 34(1) of the Kenyan Act.

162 Section 34 (2) of the Kenyan Act provides that before an exclusive licensee or sub- institutes proceedings he shall give notice in writing to the owner of the copyright concerned, of his intention to do so, and the owner of the copyright may intervene in such proceedings and recover any damages he may have suffered as a result of the infringement concerned or a reasonable royalty to which he may be entitled.

163 Section 3 of the Kenyan Act.

Tanzania (COSOTA)[164] for Tanzania. These legal entities are established as corporate bodies, each having perpetual succession and a common seal, capable of suing and be sued, purchasing or otherwise acquiring, holding and alienating movable and immovable properties. KECOBO and COSOTA are corporate bodies capable of performing all acts that are allowed by law to be done or performed in their specific jurisdictions.[165]

The two corporate bodies; COSOTA and KECOBO perform some functions of the similar nature, *inter alia*: to maintain the register of works, give evidence of the ownership of copyrightable works where needed; advise the Minister on all matters of copyright; direct, co-ordinate and oversee the implementation of laws and international treaties and conventions which relate to copyright and ensures observance thereof; license and supervise the activities of collective management societies; conduct training programs on copyright and related rights and to enlighten and inform the public on matters relating to copyright and related rights.[166]

The Kenyan Act provides for the establishment of a Competent Authority.[167] Among other functions, the Competent Authority is mandated to grant a certificate of registration in respect of a collecting society as unreasonably refused to grant by KECOBO, or unreasonably imposing terms and condition on the grant of such a certificate; a collecting society unreasonably refusing to grant a licence in respect of a copyright work or a collecting society is imposing unreasonable terms or conditions on the granting of such a licence.[168] The Tanzania copyright legislation also establishes The National Arts Council of Tanzania as Competent

---

164 Section 46 of the Tanzanian Act.

165 COSOTA commenced its activities on July 2001 after its budget was approved by the Parliament of the United Republic of Tanzania whereas KECOBO commenced its activities on first of February 2003 when the Kenya copyright Act came into operation.

166 Section 5 of the Kenyan Act and section 47of the Tanzanian Act.

167 Section 48 of the Kenyan Act establishes the Kenya competent authority, its members to be appointed by the Minister for trade and industries who is also responsible for copyright issues; to administer copyright matters where so required to be determined by such authority. Matters to be determined by the competent authority include: the KECOBO unreasonable refusal to the grating of a certificate of registration in respect of a collecting society, the KECOBO imposition of unreasonable terms or conditions on the grating of a certificate, unreasonable refusal of granting licence by a collecting society in respect of a copyright work, imposition of unreasonable terms or conditions on granting of a licence by a collecting society. The Kenya Competent Authority is vested with jurisdiction to settle copyright dispute brought by parties. It gives non-binding opinions to parties. The maximum number of members who form the competent authority is five persons. The qualification to be appointed as a chairman of the competent authority is that a person should be one whom is qualified as an advocate of the High Court of Kenya of not less than seven years' standing or person who holds or has held judicial office in Kenya. On 26th June 2009 the Attorney General of Kenya appointed Prof. Sihanya as the Chairman of the Kenya Competent Authority through G. N. No. 6385; and Mr Maema and Mr Obura as Members of the Tribunal.

168 Section 48 (2) of the Kenyan Act.

Authority to deal with copyright matters including the giving of opinion on copyright issues, but without the ability to perform tribunal functions as that of Kenya.[169]

The Kenyan copyright legislation provides for the establishment of collecting societies to discharge the functions of negotiating for collection and distribution of royalties and granting licenses to copyrightable works.[170] The Tanzania copyright legislation does not provide for the establishment of collecting societies. The functions of collecting societies are conducted by COSOTA.

The National Arts Council of Tanzania so referred to by the Tanzania copyright legislation as the Competent Authority by section 29,[171] is established by section 3 of the National Arts Council of Tanzania Act[172] to discharge such functions among others as: (a) to assume the responsibility for the revival and to promote the development and production of artistic works. (b) to carry out research and development and production of artistic works and marketing of such works including the standard and quantity of artistic works produced in Tanzania (c) to provide advisory services and technical assistance necessary for or incidental to the proper development of enterprises for the production of the artistic works, to parastatal organisations and other persons engaged in such enterprises (d) to plan and co-ordinate the activities of persons engaged in the production of the artistic works in Tanzania. Section 4(2) of the National Arts Council of Tanzania Act[173] provides that the National Arts Council has the power as a body corporate for the purpose of carrying out its functions to do all such acts as appear to be requisite, advantageous or convenient for or in connection with the carrying out its functions or incidental or conducive to their discharge and may carry on any activities in that behalf either alone or in association with any other person or body (including the government)whether within or outside the united republic. The National Arts Council of Tanzania is therefore an independent body corporate, having its perpetual succession and common seal, capable of suing and of being sued and having all the rights envisaged in any other corporate body as those of the COSOTA and the KECOBO.[174]

The Tanzanian Act provides for the existence of two independent corporate bodies, COSOTA and the National Arts Council to deal with copyright matters in Tanzania. The operation of

---

169 Section 29 of the Tanzanian Act.
170 Sections 46 (4) *(d)* and 48(4) of the Kenyan Act.
171 Cap 204 [R.E 2002] of the laws of Tanzania.
172 Cap 204 (note169 above).
173 Cap 204 (note171 above).
174 Section 3 of the National Arts Council of Tanzania Act, Cap 204[R. E 2002] provides for the establishment of the National Arts Council as a body corporate to discharge artistic works matters.

these two corporate bodies may not be convenient to the assurance of copyright promotion and protection. The National Arts Council for example is vested with powers to discharge copyrights falling under the subject matter of artistic works only. It does neither cover literary works nor software products. The National Arts Council's competence in other areas of copyright is limited so far.

Section 4(3) of the National Arts Council of Tanzania Act[175] allows the Minister responsible for Artistic works (the Minister for trade and industries) to issue general and specific directions to the National Arts Council and section 5 of the same Act provides for the appointment of the secretary of the National Arts Council to be done by the president. The secretary of the National Arts Council performs the chief executive officers' functions. The schedule to the National Arts Council of Tanzania Act provides the constitutions and proceedings of the council whereby the chairman is to be appointed by the president to serve for a term of 3 to 6 years. Other members of the council who may not exceed 29 persons are to be appointed by the Minister responsible for Artistic works only according to the National Arts Council of Tanzania schedule. Unlike the 2001 Kenyan copyright Act, and with the exception of the chairman of the Competent Authority[176] who is required to have knowledge and provable experience in copyright, the 1999 Tanzania Act does not provide qualifications which other persons to be appointed members of the Competent Authority should have.[177] This means that other members may not suppose to have knowledge for them to qualify for the appointment. In this case with the exception of the chairman, other members of the competent authority may be appointed without considering their knowledge in copyright matters. Appointing members of the Competent Authority without taking into consideration their knowledge in copyright matters hinders the efforts in protecting copyright. This is a weakness on part of the law in regulating copyright matters and copyright issues generally. The named Competent Authority may be incompetent in handling copyright complains of piracy and other forms of infringement which require copyright knowledge. The Competent Authority in this respect is seen as a toothless organ in the protection of copyright matters in the country. Unlike KECOBO,

175 Cap 204 (note 171 above).

176 Section 5 of the schedule to the Tanzanian Act provides that the chairman of COSOTA should be a person with knowledge and provable experience of copyright and neighbouring rights.

177 Qualifications to be appointed a member of the Kenya Competent Authority are provided in under section 48 (4) of the Kenyan Act; that an authority need to be a body of not less than three and not more than five persons, one of whom need to be a person qualified as an advocate of the High Court of Kenya of not less than seven years' standing or a person who holds or has held judicial office in Kenya who shall be the chairman. A person is also disqualified for the appointment as a member of the Competent Authority if he or she is a partner or employer or has a pecuniary interest in any matter for which the Competent Authority is formed for determination. This is provided by Section 48(5) of the Kenyan Act.

COSOTA does not perform adjudicative functions;[178] it performs only advisory functions. Again unlike in the Kenyan copyright legislation where all copyright matters are governed by the Copyright Act, the Tanzanian copyright legislation does not provide for all copyright matters to be governed by a single piece of legislation. The Tanzania Copyright and Neighbouring Rights Act referrers copyright matters to be dealt with other laws of Tanzania such as the Tanzanian Civil Procedure Code,[179] The Criminal Procedure Act,[180] The Law of Contract Act,[181] The Judicature and Application of Laws Act,[182] The Tanzania Revenue Authority Act,[183] The Succession (non- Christian Asiatics) Act,[184] The Probate and Administration of Estates Act,[185] The Law of Marriage Act,[186] The Islamic Law (Restatement) Act,[187] and the Evidence Act.[188]

These references result in it not being sufficient for a person who seeks to know the Tanzania copyright law to have knowledge to the Act. A person should still need to have knowledge of the other laws governing copyright matters to be able to file the suit against infringers. Such technicalities cause difficulties in the enforcement of copyright claims in Tanzania. Legal technicalities as making reference to other laws of the country lead to unnecessary delay in the administration of justice for the promotion and protection copyright.

Though the Kenyan and the Tanzanian copyright statutes have created KECOBO and COSOTA as bodies responsible for administration of copyright, authors and performers in Kenya and in Tanzania have made numerous complaints on the royalties and protection of their interests. Such complaints are that: authors and performers do not receive royalties from publishers, producers and collective management organisations that reflect the market value of their respective works, that some authors' works are translated or inaccurately translated without their authority, and that most publishers and producers do not protect authors' interests sufficiently in case of infringement.[189] There is a need therefore to make legal and regulatory reform in the domestic copyright system to ensure that copyright holders are sufficiently protected and that they benefit from their copyrights.

---

178 Adjudicative functions are explained in footnote 167 above.
179 Cap 33 [R.E 2002] of the laws of Tanzania.
180 Cap 20 [R.E 2002] of the laws of Tanzania.
181 Cap 345 [R.E 2002] of the laws of Tanzania.
182 Cap 358 [R.E 2002] of the laws of Tanzania.
183 Cap 399 [R.E 2002] of the laws of Tanzania.
184 Cap 28 [R.E 2002] of the laws of Tanzania.
185 Cap 352 [R.E 2002] of the laws of Tanzania.
186 Cap 29 [R.E 2002] of the laws of Tanzania.
187 Cap 375 [R.E 2002] of the laws of Tanzania.
188 Cap 6 [R.E 2002] of the laws of Tanzania.
189 Sihanya 'Copyright Law in Kenya' at *http://www.innovativelawyering.com* (accessed 10 May 2013).

2.6 Conclusions

The discussions in this chapter have revealed that to the great extent to which the Kenyan and Tanzanian Acts provide for similar copyright protection. Similarities have been found in defining the term 'copyright.' In both statutes the meaning given to the term 'copyright' in their interpretation sections do not give a substantive meaning as to suffice to cover that which are provided in the Acts for protection. In the subject matter for example, the two copyright statutes provide some similar list of works that are protected; books, pamphlets, computer programs, musical works and dramatic works, lectures, addresses, sermons, maps plans and sketches.[190] They also provide similar meaning to the term fixation.[191]

The two copyright statutes provide similar requirements for subsistence of copyright.[192] They both contain similar provisions regarding ownership: the owner as a person who initially creates the work.[193] They both provide for the right to claim for the ownership of the work in case of infringement and the manner in which the economic rights can be transferred.[194] Both statutes invest the copyright holder with freedom to assign the work in part or in whole.[195] They provide the same kinds of licenses; exclusive and non-exclusive licenses.[196] With regard to the administration of copyright, both copyright statutes have established independent legal entities that perform some similar functions in the administration of copyright, KECOBO for Kenya and COSOTA for Tanzania.[197]

There are, however, some fundamental differences in the four aspects that have been discussed in this chapter. In the subject matter, the Kenyan Act provides for the nature of protection in every subject matter:[198] This is not found in the Tanzanian Act. There are also found significant differences in provisions on the list of works-subject matter that qualify for protection. Section 7 of the Tanzanian Act provides a total exclusion of laws, decisions of courts and administrative bodies from copyright, whereas the Kenyan Act requires that any use of such literary works must be accompanied by sufficient acknowledgement of their sources, otherwise it would amount to infringement.[199] Unlike the Kenyan Act, which does not provide for the protection of derivative works, the Tanzanian Act provides for protection of derivative

190 Footnotes 83, 84 and 85 above.
191 Footnote 101 above.
192 Footnotes 111 and 113 above.
193 Footnotes134 and 135 above.
194 Footnote 145 above.
195 Footnote 146 above.
196 Footnote 154 above.
197 Footnotes 163& 164 above.
198 Footnotes 95, 96, 97 and 98 above.
199 Section 26(1) *(a)* and *(g)* of the Kenyan Act.

works as original works.[200] In respect of the requirements for the subsistence of copyright, significant differences are found in the requirement that the work must be in a fixed form to qualify for protection as it is provided in the Kenyan Act.[201] The Tanzanian Act only provides that the work to qualify for protection need be original.[202] The test for originality of the work is provided in the Kenyan Act but not provided in the Tanzanian Act.[203] Unlike the Tanzania Act, the Kenyan Act draws a distinction between the form and the idea for a person's copyright work to qualify for protection that the work must have reduced into material form.[204] The Kenyan Act also provides for protection of copyright works commissioned by the government even though performed outside the territory of Kenya.[205] This is not provided in the Tanzanian Act. Unlike the Tanzanian Act which provides that assigning of copyright in future works in void, the Kenyan Act validates assignment of copyright in future works.[206]

In respect of administration of copyright, there are significant differences between the Competent Authorities; the Copyright Society of Tanzania (COSOTA) and the Kenya Copyright Board (KECOBO). Whereas KECOBO does perform adjudicative function in case of copyright disputes,[207] COSOTA does not. The Kenyan Act provides for establishment of collecting societies, but the Tanzanian Act does not.[208] Unlike the Kenyan Act which is the only legal instrument that regulates copyright in Kenya, the Tanzanian Act provides for the multiple of legal and regulatory frameworks in the administration of copyright.[209] But again unlike the Tanzanian Act which is silent about qualifications to be appointed as administrator of copyright matters, the Kenyan Act provides for qualifications to be appointed as an administrator of the Competent Authority in copyright matters.

Such significant differences have caused uncertainties in copyright rules that require EAC Partner States to adopt harmonisation as a measure to resolve such uncertainties. Harmonisation of copyright as a measure will help to facilitate the establishment of an effective copyright system in the regional unit; that will provide for clear and certain rules to promote fair competition in copyright works. Harmonisation of EAC Partner States copyright law will also facilitate the achieving of the goals of the established EAC Common Market; to ensure

200 Footnote 121 above.
201 Footnote 112 above.
202 Footnote 113 above.
203 Footnotes 111 and 116 above.
204 Section 22 (3) *(b)* of the Kenyan Act.
205 Footnote 138 above.
206 Footnote 152 above.
207 Footnote 167 above.
208 Footnote 170 above.
209 Footnotes 179-189 above.

free and fair trade within the regional unit in promoting employment and improving standards of living and working conditions within the Community.[210]

[210] Preamble of the 2010 EAC Common Market Protocol; also Article 2 of the 2010 EAC Common Market Protocol.

CHAPTER THREE

INFRINGEMENT AND ENFORCEMENT (INCLUDING REMEDIES) IN THE KENYAN AND TANZANIAN COPYRIGHT LAW

3.1 Introduction

This chapter is a continuation of the discussions on the six aspects of copyright that have been identified as the base for the discussions on the similarities and significant differences that are found in the Kenyan Copyright Act (hereafter the Kenyan Act)[211] and the Tanzanian Copyright and Neighbouring Rights Act (hereafter the Tanzanian Act).[212] Four aspects have been discussed in chapter two and this chapter elucidates the remaining two aspects; infringement of copyright and enforcement (including remedies). Infringement of copyright and enforcement are two aspects of great importance not only in copyright but also in other forms of IP: they really define the effect of IP.

3.2 Infringement and Enforcement of Copyright in Kenyan and Tanzanian Law

Infringement is defined by the Kenyan Act to mean any act that violates a right protected under the Act.[213] Infringement also refers to the dealing with copyrighted material in a manner that is inconsistent with the copyright owner's proprietary interest. It occurs where the defendant does any of the activities protected or restricted by copyright without the right holder's licence. Infringing acts are unauthorised acts done by the person who is not the owner of copyright and who neither holds the license from the copyright owner. Some of the actions that amount to infringement are: copying of the work and making adaptation of the work; circumventing the effect of any technical measure designed to protect the work; manufacturing or distributing devices which are primarily designed or produced for the purposes of circumventing technical measures designed to protect works protected under the copyright law; removing or altering any electronic rights management information, distributing, importing, broadcasting or making available to the public protected works, records or copies from which electronic rights management information has been altered without the authority of the right holder; the manufacture or importation for sale or rental of any device or means specifically designed or adapted to circumvent any device or means intended to prevent or restrict reproduction of a work, a sound recording or a broadcast, or to impair the quality of copies made; the manufacture or importation for sale or rental of any device or means that is susceptible to

211 Cap 130 [R.E 2009] of the laws of Kenya.
212 Cap 218 [R.E 2002] of the laws of Tanzania.
213 Section 2 of the Kenyan Act.

enable or assist the reception of an encrypted program, which is broadcast or otherwise communicated to the public, including by satellite, by those who are not entitled to receive the program; the removal or alteration of any electronic rights management information without authority.[214]

Other acts, which may amount to infringement of copyright when not fairly done,[215] include: the inclusion of the copyright work in another work without acknowledging the source and the name of the author or quoting the work without acknowledging the source and author of the quotation; utilisation of the work by way of illustration in publications, broadcasts, programs distributed by cable, or sound or visual recording for communication purpose without acknowledging the source and author; and utilisation of the work for teaching purposes provided that such use is incompatible with fair practice and that the source and the name of the author are not mentioned. In these activities to amount to copyright infringement the defendant's conduct must be seen to be inconsistent with or contravening the reserved right.

Copyright in a work is considered as infringed only if a person makes use of a substantial part without authority. What is substantial varies from case to case; more often it is a matter of quality rather than quantity.[216]

Narayanan, when discussing issues of infringement of copyright, has raised five important points which must be considered in the suit for infringement of copyright.[217] These are: (1) whether the plaintiff is entitled to file the suit? (2) Whether copyright subsists in the work alleged to have been infringed? (3) Whether what the defendant has done or proposed to do constitute infringement of copyright in the work? (4) Whether the defendants' act comes within the scope of any of the exemptions to the infringement? and (5) Whether there are remedies to which that the plaintiff is entitled?

The Kenyan Act[218] define copy to mean a reproduction of work in any manner or form and includes any sound or visual recordings of a work and any permanent or transient storage of a work in any medium, by computer technology or any other electronic means. In the Tanzanian

214 Section 35 (3) of the Kenyan Act and Section 44 of the Tanzanian Act.

215 Fairly done acts under copyright are acts which their commissions have been accompanied by due acknowledgement of their sources. Also Johnston's four points on fair dealing activities (note 224 bellow).

216 If the contribution made to the pre-existing work is adding value in the quality of the work that makes it appear to have acquired new form, then that is enough to protect the work by copyright than considering its quantity.

217 Narayanan *Intellectual Property Law* 3-ed (2001) 349-350.

218 Section 2 of the Kenyan Act.

Act[219] reproduction means the making of one or more copies of a work or of a phonogram in any manner or form, including sound or visual recording or any permanent or temporary storage of the work or phonogram in electronic form. An infringing copy is defined by the Kenyan Copyright Act to mean: (a) a copy, the manufacture of which constitutes an infringement of any right protected by the Act; or (b) where imported, a copy the manufacture of which would have constituted an infringement of such rights if manufactured in Kenya by the importer.[220]

Unless the person is able to prove that the act that he or she has committed was done in good faith and that he or she had no reasonable grounds for supposing that copyright or the right of a performer would or might be infringed, the following acts are infringing acts: making for sale or hiring any infringing copy; selling or letting for hiring or by way of trade exposing or offering for sale any infringing copy; distributing infringing copies; possessing otherwise than for private and domestic use any infringing copy; importing any infringing copy and making or possessing any contrivance used or intended to be used for the purpose of making infringing copies.[221] Other infringing acts include: manufacturing or importing for sale or rental of any device or means specifically designed or adapted to circumvent any device or means intended to prevent or restrict reproduction of a work, a sound recording or a broadcast, or to impair the quality of copies made; the manufacture or importation for sale or rental any device or means that is susceptible to enable or assist the reception of an encrypted program, which is broadcast or otherwise communicated to the public, including by satellite, by those who are not entitled to receive the program and removal or alteration of any electronic rights management information without authority.[222]

There are differences between the Tanzanian and the Kenyan Acts on what constitutes an act of infringement. According to section 12 (8) of the Tanzanian Act,[223] reproduction in the press or communication to the public any political speech or any speech delivered during legal proceedings, any lecture, address, sermon, for current information without author's consent is permissible and does not amount to infringement. The Kenyan Act is to the effect that when

219 Section 3 of the Tanzanian Act.
220 Section 2 of the Kenyan Act.
221 Section 38 (1) of the Kenyan Act.
222 Section 44 of the Tanzanian Act.
223 Cap 218 [R.E 2002] of the Tanzanian Act.

any of such acts are done to the work without being accompanied by sufficient acknowledgement of the sources it shall amount to infringement.[224]

Apart from such differences, both the Kenyan and the Tanzanian copyright legislation provide for defences when dealing with copyright works. One of the main defences is fair dealing or fair use of the copyrighted works. As it is also argued by Narayanan,[225] how much of the reproduction may be considered as fair depend upon the circumstances of the case. Fair dealing is the question of fact and impression. It is argued by Spinello and Tavani[226] that the principle of fair dealing have been developed to balance the exclusive control given to copyright holders against the broader interest of society. Under fair dealing every author or publisher is allowed to make limited use of another person's copyrighted work.

Fair dealing activities are such activities involving scientific research, private use, criticism or review or reporting of events but subject to acknowledgement; reproduction, translation and distribution of copies for personal use provided that the legitimate interest of the author is not prejudiced; the inclusion in a film or broadcast or of an artistic work situated in a place where it can be viewed by the public; academic usage of the work in registered schools and universities but with acknowledgement; broadcasting of a work for systematic instructional activities; reproduction of the work as instructed by the government, public libraries and other non-commercial documentation centre; and the use of the work in any activities related to judicial proceedings.[227]

Johnston[228] argues that four main factors help the court to determine whether or not an act falls within the ambit of fair dealing: (1) the purpose and character of the use - Commercial use for example weighs against the claim of fair dealing, (2) the nature of the copyrighted work - creative works receive more protection than factual works because creative works add value in quality and their protection encourage more creations, (3) the amount and substantiality of the portion used in relation to the work as a whole and (4) the effects of the dealing on the market for the work. These four factors are not the only ones that can properly be taken into account in deciding whether or not a use is a fair use, but Johnston[229]argues that they are ordinary serve as big enough umbrellas to cover everything that is relevant to be considered by the court when determining fair dealing acts.

---

224 Section 26 (1) (a) and (g) of the Kenyan Act.
225 Narayanan (note 217 above) 333.
226 Spinello & Tavani *Intellectual Property Rights in a Networked World: Theory and Practice* (2005) 23.
227 Section 26 of the Kenyan Act and Section12 of the Tanzanian Act.
228 Johnston *Copyright Handbook* 2-ed (1983) 132.
229 Johnston (note 228 above) 132.

Other defences to copyright infringement in the two Acts include: the absence of legal ownership of the alleged infringed work, absence of originality in the alleged work, statutory exemption of the act from being infringing act, copyright time limit, and lack of proof that the defendant had reasonable ground for believing that copyright subsisted in the alleged work.[230]

Tanzania faces personnel challenges with regard to enforcing IP right, particularly copyright. Tanzanian universities offer IP law as one of the elective courses, therefore, only few students who have opted for IP course have any qualification in this field of study. There are consequently only few Tanzanians who have graduated with knowledge of IP. The Tanzanian Magistrates Courts' Act[231] provides that holders of the diploma in law are the competent to be appointed as judicial personnel to adjudicate in the District Court. Diploma holders generally have not been exposed to IP law. This means that adjudication of copyright in the District Courts is done by persons without any formal knowledge in the field of IP.

The Tanzanian copyright legislation still refers copyright matters for adjudication in the District Courts.[232] That means copyright matters in Tanzania are adjudicated by District Courts Magistrates who are not likely to have expertise in that area of law. Administering justice in copyright matters without having basic knowledge in copyright law endangers copyright development and might even be regarded as a disregard of public interest which demands disputes to be settled by competent judicial officials. This has undermined not only the development in copyright as a form of IP law but also the whole field of IP in Tanzania.

The Competent Authority to discharge copyright matters in Tanzania also suffers from lacking competent personnel to discharge copyright matters.[233] The Tanzania National Arts Council, the appointed Competent Authority is specialised in artistic works alone and not in any other forms of copyright works such literary and musical works. The COSOTA which is the only organ that is established to deal with protection of copyright is also weak and unevenly distributed in different regions of Tanzania, thus difficult in dealing with conspiracy against copyrighted works. COSOTA only operates in the major urban centres in Tanzania, therefore, difficulty to monitor infringement acts in other parts of the country.

The 1999 Tanzanian Act does not provide for example compulsory registration of musical works. Without this, it is difficult to know who the rightful owner of the copyrightable work is

230 Sections 38 (9) and 41 of the Kenyan and Tanzanian Acts respectively.
231 Cap 18 [R. E 2002] of the laws of Tanzania.
232 Section 4 of the Tanzanian Act.
233 In the Tanzanian Act, there are no established criteria that a person must meet to qualify for the appointment as a member of the Competent Authority.

in case of any infringement. The 1999 Tanzanian Act is also silent on compulsory licence on part of broadcasting corporations. The new technology which has made it possible to transmit, reproduce and obtain copyrighted materials wherever in the global renders a big challenge to the 1999 Tanzanian Act in terms of enforcing the violated copyrights. The Tanzanian legislation does not directly address infringement resulting from internet and digital technology which allow users from different parts of the world to share and obtain copyrightable works like music by simple means like downloading. In *R v Khalifan Abdallah*[234] the prosecution lacked enough evidence from the Tanzanian Act on whether pirated CD copies falls within those acts that are infringing acts. The prosecution failed to establish the offence of producing the pirated CD copies and lost the case. Not only that but in *Samuel Paul v Johnson Chikawe*[235] the plaintiff withdrew his case due to lack of a legal proof that pirated CD copies amount to infringement of copyright in Tanzania. The law does not provide to cover internet infringing acts like downloading copyrighted works. This however turns to the argument of lack of competent personnel in copyright; who would have applied case law in such circumstances from other common law jurisdiction. The plaintiff, due to lack of enough knowledge in copyright law decided to withdraw the case. This remains a big challenge to copyright enforcement in Tanzania, especially in facilitating investing in copyright in this digital environment.

Kenya has established two mechanisms for resolving copyright disputes, namely; The Kenya Competent Authority which is composed of experts, distinguished academics and persons with practical credentials when acting in its capacity as a tribunal[236] and the judiciary. Decisions of the Kenya Competent Authority are binding on the parties and persuasive in the court in case of appeals. The Kenya Competent Authority deals among other copyright issues, with disputes arising out of infringement of copyrights and collective management societies.[237] This is not the position in the Tanzanian copyright legislation. Copyright disputes in Tanzania are resolved only by Courts, exercising either criminal or civil jurisdiction.

There are also well particular challenges in establishing infringement acts in electronic versions of copyrightable materials in the Kenyan copyright legislation as with the Tanzania copyright

---

234 Unreported criminal case no 550 (2004). Khalifan was arrested in the area of the Kisutu Resident Magistrates Court in Tanzania with duplicating machine and pirated CD copies.

235 Unreported civil case no 1888/08 (2008).The defendant was reported to have sold downloaded CD in the District Court of Shinyanga in Tanzania. The plaintiff failed to establish his case something which later caused him to withdraw the case.

236 Section 48 (3) of the Kenyan Act and Section 21 of the Tanzanian Act.

237 Ombija 'Kenya law Report: Case study of Kenya's Specialised Intellectual Property Rights Court Regime' available at http://www.kenyalaw.org (accessed on 6 February 2013).

legislation. In the case of *R v Boaz Waswa*[238] the Kiambu Resident Magistrates Court issued an-acquittal order after the prosecution failed to establish that copyright subsist in the music that was downloaded from the Internet and copied into the compact disc (CD).

The Tanzanian copyright legislation does not provide for inspection, arrest and prosecution in criminal offences of infringement of copyright. The Kenyan copyright legislation by contrast, provides for persons responsible to inspect as well as the mode of conducting the inspection, power of arrest and the conduct of prosecutions. Inspection may be conducted by appointed persons as inspectors by KECOBO, members of KECOBO, and policy officers of any rank.[239] The Kenyan copyright legislation confers power of arrest on any police officer without a warrant of arrest and to any officer of KECOBO upon wearing a visible badge of office and upon delivery of a certified written document from KECOBO.[240] Prosecution is to be done by any appointed public prosecutor from the Attorney Generals' Chamber.[241] In this respect, the Kenyan copyright legislation seems to provide strong institutions to fight against infringement of copyrights.

3.2 Penalties for Infringement of Copyright in Kenyan and Tanzanian Law

Sihanya is of the view that despite of the introduction of heavy penalties and civil remedies for infringement in the 2001 Kenyan Copyright Act, Kenya still faces obstacles in the enforcement of copyright.[242] The main agency charged with the prosecution of copyright infringement in Kenya, the police regard copyright infringement less serious than other crimes such as murder, theft, battery, as nobody has lost anything.[243] Many copyright enforcers are ignorance about copyright protection, and the meaning of infringement; insufficient human, technical and financial resources limit the Kenya Copyright Board and other agencies' capacity to enforce copyright in Kenya.[244] KECOBO suffers from being understaffed making the management of copyright difficult. The magistrates and judges charged with the responsibilities of deciding on

238 Unreported criminal case no 148 (2005). Boaz Waswa was arrested in the area of Kiambu Resident Magistrates Court in Kenya with downloaded copies of music into the CD.

239 Section 39 of the Kenyan Act.

240 Section 42 of the Kenyan Act.

241 Section 43 of the Kenyan Act.

242 Sihanya 'Copyright law in Kenya' at *http://www.innovativelawyering.com* (accessed 10 May 2013)

243 Boadi, Kameri-Mbote, Mugaguri, Opati, Sikinyi, Wekesa & Sihanya *Intellectual Property in Kenya* (2009) 163.

244 Section 16 of the Copyright Act, Cap 130 [R.E 2009] of the laws of Kenya. Section 16 (1) of this Act provides for the fund of the KECOBO which comprises of the sums as may be granted to the Board by the Minister, monies or assets as may be accrue to or vest in the Board in the course of the exercise of its powers or the performance of its functions under the Act or any other written law and monies from any other source provided for or donated or lent to the Board. Sub section (2) of section 16 provide that there shall be made to the Board, out of monies provided for by Parliament for that purpose, grant towards the expenditure incurred by the Board in the exercise of its powers or the performance of its functions under the Act.

copyright disputes exhibit limited competence including skills, knowledge and values on copyright.[245]

Boadi, Kimeri-Mbote, Mugaguri,[246] are, however, of the view that the 2001 Kenyan Act seems to make adequate provision for the protection and promotion of copyright in the protected works, enforcement of copyright is still a great challenge due to the weaknesses found in the institutions that are mandated to enforce copyright law; and that it is necessary for the government of Kenya, the Kenya Copyright Board (KECOBO) and the collecting societies of Kenya and all other stakeholders in copyright to undertake practical measures to tackle these challenges in order to protect and promote copyright in Kenya. Copyright law without effective enforcement is of little use to those it seeks to protect. A law is only effective where there are corresponding institutional structures. The main problem for copyright holders in Kenya is not so much in the written law but in the enforcement or lack thereof. That is the major challenge especially in the digital era.

A person whose copyright has been violated may seek relief from the established institutions. A copyright owner is entitled to various remedies in terms of the Kenyan and in the Tanzania copyright legislation. There are generally three main categories of remedies provided by both, the Kenyan and the Tanzanian Acts: administrative measures, civil and criminal remedies.

Civil remedies include damages for conversion, injunction, accounts of profits, delivery- up of infringing copies; and criminal remedies provide imprisonment of the accused or imposition of fine or both, seizure of infringing copies and delivery-up of infringing copies to the owner of the copyright, forfeiture and non-custodial sentences.[247] Administrative remedies consist of resolving the matter through competent authorities who may order to ban the import of infringing copies in respective states or the delivery of the infringing copies confiscated to the owner of the copyright. In both, the Kenyan and Tanzanian copyright legislation, unless the owner of copyright complains of acts of copyright infringement no suit for enforcement is instituted. In other words, there is no 'copyright police'.

There are differences between the Kenyan and the Tanzania copyright legislation with regard to criminal remedies. In the Tanzanian copyright legislation for example, The Tanzanian Act provides that infringement done for the first time attracts a lesser sentence than when it is done

245 Boadi '*et al'* (note 243 above) 163.
246 Boadi '*et al'* (note 243above) 172.
247 Sections 35 and 38 of Kenyan Act and Sections 36, 37, 38, 39, 41 and 42 of the Tanzanian Act.

the second or third time;[248] this is not the position in the Kenyan Act. The Kenyan copyright legislation provide for a maximum penal sanction of ten years for specified offences, like making for sale or letting any infringed copy.[249] The Tanzanian copyright legislation has a maximum penal sanction of five years for the same offence.[250] The penal sanction of ten years is given to offences of importing or distributing copies of expressions of folklore without the authorisation of the Competent Authority in Tanzanian law.[251] There are also significant differences between the fines payable upon infringement in the Kenyan and the Tanzanian copyright laws.

Generally damages are in monetary form and are intended to restore the plaintiff to the position in which he or she would have been had infringement not occurred. Additional or punitive damages may be awarded where the defendant had benefited from the infringement. This can for example occur in copying owner's work by the defendant or the defendant publishing the authors' work or where the licensee abuses the copyright licence for commercial basis to the extent of benefiting from such infringing acts.[252] In such circumstances remedial actions must be taken to restore the owner in the position he would have been had the infringement not occurred. So damages are intended to restore the economic loss that the plaintiff has suffered due to the defendant's infringing acts.

An interlocutory injunction normally prohibits the committing or continuation of infringement. This is the most popular remedy in the law of copyright. In order to secure immediate protection from a threatened infringement or from the continuance of an infringement, a plaintiff may apply for an interlocutory injunction pending the trial of the action or further orders from the court or any institution empowered to settle copyright disputes. As it has been also argued by Narayanan[253] for obtaining an interlocutory injunction the plaintiff has to

---

248 Section 42 (1) of the Tanzanian Act provides that without prejudice to the remedies available, any person who knowingly violates, or cause to be violated, the rights protected under this Act shall be liable to (a) a fine of not exceeding five million shillings or imprisonment for a term not exceeding three years or to both, for the first offence if the infringement was on a commercial basis; and a fine of not exceeding ten million shillings or to imprisonment for a term not exceeding five years or both, for each subsequent offence if the infringement was on a commercial basis. Sub section (9) of section 42 provides that for any other criminal offences under copyright infringement the penalty shall be (a) a fine of not more than four million shillings or to imprisonment of up to three years for the first offence; or (b) a fine not more than eight million shillings or to imprisonment of up to two years for each subsequent offence.

249 Section 38 (4) of the Kenyan Act.

250 Section 42(1) of the Tanzanian Act.

251 Section 42(2) of the Tanzanian Act.

252 Section 36 (1) *(b)* of the Tanzanian Act.

253 Narayanan (note 217 above) 350.

establish a prima facie case and that the balance of convenience is in his favour and that if the interim order is not granted it will cause irreparable injury to the plaintiff.

Narayanan argues that an interlocutory injunction will not be granted where the defendant might suffer irreparable injury from an injunction pending trial and the plaintiff can be protected by the defendant being ordered to keep an account, nor will it normally be granted where a *bona fide* defence of fair dealing has been pleaded, or if the plaintiff has been guilty of undue delay in coming to the court or his conduct amounted to acquiescence in the infringement or if there is substantial doubt as to the plaintiff's right to succeed.[254] In *American Cyanamid v Ethicon*[255] it was held that in considering whether to grant interlocutory injunction the court must look at the whole case, it must have regard not only to the strength of the claim, but also to the strength of the defendant and then decide what is best. This case constitutes a binding precedent in both the Kenyan and Tanzanian courts.

Accounting of profits stops unjust enrichment or situations where it would be more lucrative to infringe copyright and pay damages later.[256] The plaintiff may claim for accounting of profit as an alternative to damages to benefit from the defendants' wrongly appropriated profits by way of sale of infringing copies in the market. Delivery of such an order normally takes place where infringing copies are likely to cause material injury to copyrighted works in the market.

An order permitting search and seizure may be granted where the plaintiff fears that the defendant may abscond, or that the defendant may destroy or dispose of the evidence so as to defeat the course of justice.[257] The Kenyan Act empowers a police officer of the rank of an inspector to seize and detain any substance or article which he has reasonable cause to believe to be an infringing copy of any work or in relation to which or by means of which he has reasonable cause to believe that an offence has been or is being committed.[258] An inspector may also seize any document which he has reasonable cause to believe to be a document which may be required in proceedings.

Sihanya is of the view that IP regime in Kenya, particularly copyright is still lacking in many aspects as to realise the full economic benefits[259] of copyright.[260] He argues further that

---

254 Narayanan (note 217 above) 350.

255 [1975] RPC 513

256 Section 37(1) of the Tanzanian Act provides in part that the injured party may recover the profits derived by the infringer from the acts of infringement together with a detailed accounting reflecting such profits.

257 Sections 41(2), 41(3) and 43(2) of the Kenyan Act and Tanzanian Acts, respectively.

258 Section 41(2) of the Kenyan Act.

259 Economic benefits of copyright include *inter alia*; profits resulting from the reproduction of the

copyright owners are losing millions of shillings due to infringement, piracy and counterfeiting. These are attributed by a number of factors such as; absence of the institution responsible for monitoring copyright transaction, leaving the role of looking out for infringers to the copyright owners who have neither the capacity nor the mechanism to monitor each part of the country, lack of awareness to creators of copyright works that they poses valuable intellectual property rights. Authors of copyrighted works due to lack of copyright knowledge they believe that copyright infringement is either permissible or has no remedy. The penalties provided for copyright infringement are not sufficient to control infringement. The 2001 Kenyan Act provides for a maximum penalty of Kenyan shillings 800000 or 10 years imprisonment.[261]

3.4 Conclusions

This chapter and chapter two above reveal that there are great similarities between the protection the Kenyan and Tanzanian Acts provide through infringement and enforcement of copyright (including remedies). In infringement, similarities are found in some of the infringing acts such as copying of the work and making adaptation of the work; circumventing the effect of any technical measure designed to protect the work; manufacturing or distributing devices which are primarily designed or produced for the purposes of circumventing technical measures designed to protect works protected under the copyright law; removing or altering any electronic rights management information, distributing, importing, broadcasting or making available to the public protected works, records or copies from which electronic rights management information has been altered without the authority of the right holder; the manufacture or importation for sale or rental of any device or means specifically designed or adapted to circumvent any device or means intended to prevent or restrict reproduction of a work, a sound recording or a broadcast, or to impair the quality of copies made; the manufacture or importation for sale or rental of any device or means that is susceptible to enable or assist the reception of an encrypted program, which is broadcast or otherwise communicated to the public, including by satellite, by those who are not entitled to receive the program; the removal or alteration of any electronic rights management information without authority.[262] The two Acts provide similar defences to acts of infringement. Some of these are

---

original work or its translation or adaptation, the distribution to the public copies by way of sale, rental, lease, hire, or loan; refer Section 9 of the Tanzanian Act and Sections 26, 27 and 28 of the Kenyan Act.

260 Sihanya 'Copyright law in Kenya' at *http://www.innovativelawyering.com* (accessed 10 May 2013).

261 Section 38 of the Kenyan Act. Kenyan practices have been that courts impose lower fines rather than the jail term. For a copyright infringer who expects to earn 4 million from a school book, a fine of 800000 Kenyan shillings is like petty cash; Sihanya 'Copyright law in Kenya' at *http://www.innovativelawyering.com* (accessed 10 May 2013).

262 Footnote 214 above.

fair dealing, absence of proof of originality, time limits, absence of legal bases of the alleged infringed work and statutory exemption of the act.[263] The two Acts provide similar kinds of enforcement mechanisms and similar remedies are available in cases of infringement. Such remedies are: administrative measures, civil and criminal remedies.

There are significant difference in the list of infringing acts and enforcement mechanisms.[264] Unlike the Tanzanian Act, the Kenyan Act invests the Kenya Competent Authority which is headed by competent persons in copyright law, power to adjudicate copyright matters, sitting as a tribunal.[265] Unlike the Tanzanian Act, the Kenyan copyright legislation also provides for persons responsible for inspection, arrest and prosecution in copyright matters.[266] There are significant differences in criminal remedies too, particularly in the magnitude of the criminal remedies, between the Tanzanian and Kenyan copyright legislation. We have seen that in the Tanzanian copyright legislation infringement acts committed at the first time attracts lesser penal sanction than when the act is done at the second or third time.[267] This is not the position in the Kenyan Act. Differences are also found in the duration of imprisonment and in fines payable to the same offences in the two copyright legislations.[268] The Tanzanian Act, unlike the Kenyan Act allows for copyright matters to be administered by personnel of uncertain competence.

Resolving the significant differences discussed, as in Sihanya's view, with which I concur, it is important to have certain and clear provisions on the two aspects; infringement and enforcement of copyright, including remedies. Sihanya argues that while definitions, procedure of registrations and duration of copyright protection are important, these can only be said to be useful when and if they are built upon a foundation of enforcement.[269] In line with this view, these two aspects of law require certain and clear rules to ensure protection not only in copyright matters being discussed in this study, but also in every matter which deals with the provision of justice. These two aspects of law become of most important where there is an agreement on economic corporation like the EAC Common Market. Harmonisation of copyright which aims to establish certain and clear rules will help to resolve the differences that have been observed in this chapter to the two aspects of law; infringement and enforcement.

---

263 Footnotes 227 and 230 above.
264 Footnotes 223 and 237 above.
265 Footnote 236 above.
266 Footnotes 239-241 above.
267 Footnote 248 above.
268 Footnotes 249- 250 above.
269 Sihanya 'Copyright Law in Kenya' at *http://www.innovativelawyering.com* (accessed 10 May 2013)

CHAPTER FOUR

HARMONISATION OF COPYRIGHT: THE EU EXAMPLE

4.1 Introduction

The discussions in chapters two and three above show how highly desirable it is to resolve the differences between the six aspects of copyright in the Kenyan Copyright Act (hereafter the Kenyan Act)[270] and the Tanzanian Copyright and Neighbouring Rights Act (hereafter the Tanzanian Act)[271] discussed by means of harmonisation of rules. The six aspects of copyright which call for harmonisation of rules are: the subject matter of copyright, the requirements for subsistence of copyright, authorship and administration of copyright; infringement and enforcement, including remedies. This chapter discusses how harmonisation of the differing aspects may be done. The study draws examples from the EU regional system because of its effectiveness in harmonisation of copyright in its Member States. In the course of this study, however, it was found that the three aspects of authorship, requirements for subsistence of copyright and the administration of copyright have not been a problem in the EU, therefore, they are not discussed in this chapter. The three aspects discussed are: the subject matter of copyright, infringement and enforcement including remedies as they are found in EU Parliament and the Council's Directives on harmonisation of copyright. These discussed three aspects of copyright by the EU have got similar effect with the three aspects of copyright discussed in chapters two and three above which call for harmonisation of rules. Harmonisation of rules in form of a Directive, a measure adopted by the EU on the three similar aspects of copyright have become very important even within the EAC as a regional trading unit in resolving the differing aspects and in establishing certainties in rules for effective copyright protection. This means of harmonisation of rules adopted by the EU on the three discussed aspects of copyright has brought effective copyright protection within its Member States.

4.2 EU Directive on the resale right for the benefit of the author of the original work of art

Directive 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of the original work of art provides for the subject matter in artistic works that require protection by EU Member States.[272]

---

270 Cap 130 [R.E 2009] of the laws of Kenya.

271 Cap 218 [R.E 2002] of the laws of Tanzania.

272 Directive 2001/84/EC-EUR-Lex at *http://www.eur-lex-europa.eu* (accessed 29 April 2013).

4.2.1 The Subject Matter in Artistic Works

Directive 2001/84/EC provides a list of artistic works which includes: pictures, collages, painting, drawings, engravings, prints, lithographs, sculpture and photographs.[273] Article 1 of this Directive obliges EU Member States to include in their domestic copyright legal frameworks a provision for authors of the original works of art to benefit from a resale right which must be defined as an inalienable right. The same article requires Member States to ensure that their copyright laws enable authors of work of art to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.

This Directive applies to all acts of resale involving as sellers, buyers, intermediaries art market professionals, such as salerooms, art galleries and any dealers in work of art.[274] It obliges EU Member States to include a provision in their domestic laws which makes the law applicable to works of art sold at a minimum price of €3000.[275]

The issue of the subject matter in the Kenyan and Tanzanian Acts is discussed in chapter two. In the discussion of this issue we found that there are significant differences in the lists of things that are protected by the two copyright Acts. In the Tanzanian Act for example, there is no clear distinction on literary and artistic works.[276] Directive 2001/84/EC has effectively protected authors of original artistic works in the European Community. Such effective protection of authors of original works is also needed in the EAC to resolve the differences in copyright subject matter. A kind of such a Directive should be adopted by the EAC Partner States to provide a list of works which will form the subject matter in all Partner States for effective protection.

4.3 EU Directive on the harmonisation of certain aspects of copyright and related rights in the information society

Directive 2001/29/EC of 22 May 2001 provides for the harmonisation of certain aspects of copyright and related rights in the information society.[277] It deals with the protection of the rights of authors of original works (without specification) from infringing acts in the three main areas of reproduction, communication, and distribution.

---

273 Article 3 of Directive 2001/84/EC.
274 Article 2 of Directive 2001/84/EC.
275 Article 3 of Directive 2001/84/EC.
276 Section 5 (2) of the Tanzanian Act. This section provides only a list of literary and artistic works. It does not make a clear distinction on literary and artistic works. In its interpretation section, the Tanzanian Act does not provide a definition on literary and artistic works.
277 Directive 2001/29/EC available at *http://www.eur-lex.europa.eu* (accessed 29 April 2013).

4.3.1 Authors' Reproduction Rights

Article 2 of this Directive obliges EU Member States to make provision for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: for authors, of their work; for performers, of fixations of their performances; for phonogram producers, of their phonograms; for the producers of the first fixation of films, in respect of the original and copies of their films and for broadcasting organizations, of their broadcasts are transmitted by ire or over the air, including by cable or satellite.[278]

Article 5 of Directive 2001/29/EC requires EU Member States to enact provisions for the exceptions and limitation on the utilisation of the right provided in the Directive for the lawful use of the work without economic gain and reproduction in a manner that the right owner gets fair compensation. Article 5(1) provides that temporary acts of the production referred to in Article 2, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (i) a transmission in a network between third parties by an intermediary or (b) a lawful use of a work or other subject-matter to be made and which have no independent economic significance shall be exempted from the reproduction right provided for in Article 2.

4.3.2 Authors' Rights of Communication

EU Member States are required by Article 3 to protect author's rights of communication by providing in their domestic laws the exclusive right as to authorise or prohibit any communication to the public authors' works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. Article 7 provides further that the obligation concerning right-management information such as electronic right-management information, the distribution, and importation for distribution, broadcasting, and communication or making available to the public of the work or other subject matter protected.

4.3.3 Authors' Distribution Rights

Article 4 of this Directive requires EU Member States to include in their domestic copyright law provisions that enable authors of original works to enjoy their exclusive right of authorising or prohibiting the distribution to the public original or copies of their works. Article 6 of the Directive requires EU Member States to provide adequate legal protection against the

[278] Article 2 of Directive 2001/29/EC available at *http://www.eur-lex.europa.eu* (accessed 29 April 2013).

manufacture, import, distribution, sale, and rental, advertisement for sale or rental or possession for commercial purposes of devices, products or the provision of services.

4.4 EU Directive on enforcement of intellectual property (IP) rights

Directive 2004/48/EC of 29 April 2004 deals with the enforcement of IP rights, which includes copyright.[279] The Directive requires all EU Member States to enact in their domestic IP legal frameworks, laws that provide measures for effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy of IP. The measures, procedures and remedies should be fair and equitable and should not be unnecessarily complicated or costly or entail unreasonable time-limits or unwarranted delays and not act as barriers to trade.

Article 5 requires Member States to enact a law that recognises the author of literary or artistic work in the absence of proof to the contrary, for purposes of applying the measures, procedures and remedies as provided, to be entitled to institute infringement proceedings, only by reason of the appearance of the name on the work. [280] This also applies to holders of rights related to copyright with regard to their protection.

Article 6 (2) of the Directive requires EU Member States to take steps to ensure that for cases of infringement which involve commercial institutions or commercial documents or financial institutions confidential information is protected.

Article 9 (1) requires EU Member States to ensure that the judicial authorities may at the request of an applicant (a) issue an interlocutory injunction against the alleged infringe an interlocutory injunction intended to prevent any imminent infringement of an IP right or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder; an interlocutory injunction may also be issues under the same condition against an intermediary whose services are being used by a third party to infringe an intellectual property right; (b) order the seizure or delivery up of the goods suspected of infringing an IP right so as to prevent their entry into or movement within the channels of commerce within the EU regional unit.

[279] Directive 2004/48/EC available at *http://www.eur-lex.europa.eu* (accessed 7 may 2013).
[280] Article 5 of Directive 2004/48/EC.

Sub article 2 of article 9 requires Member States to provide measures in case of an infringement on a commercial scale, that allow judicial authorities may order a precautionary seizure of movable or immovable property which includes freezing the bank accounts and other assets. Article 11 of the Directive requires EU Member States to provide rules on injunctions, whereas article 12 requires EU Member States to provide for alternative measures in form of pecuniary compensation to be paid to the injured party instead of applying other measures. Article 13 (1) of Directive 2004/48/EU requires Member States to ensure that competent judicial authorities, on application by an injured party, may order the infringer who knowing or who on reasonable grounds ought to know that he or she is engaged in an infringing activity; pay the right holder damages appropriate to the actual prejudiced suffered by him or her as a result of infringement. It requires judicial authorities when setting the damages to take into account all appropriate aspects, such as the negative economic consequences, including loss of profits made by the alleged infringer and in appropriate cases elements other than economic factors, such as: (a) the moral prejudice caused to the right holder by the infringement or (b) set damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorization to use the IP rights in question. Article 13 (2) requires Member States to set measures that will enable authors of original works to recover profits or damages suffered in consequence of the infringement of their works. Article 14 requires Member States to provide reasonable and proportionate legal costs and other expenses incurred by the successful party to be born as a general rule, by the unsuccessful party, unless equity does not allow this.

Generally, Directive 2004/48/EC places an obligation to EU Member States to enact in their national IP laws, including copyright, enforcement measures including remedies in cases of infringement. As we have observed in our discussion on the aspects of infringement and enforcement, including remedies in chapter three, the EAC does not have a Directive for harmonisation on this aspect. There are significant differences in the EAC Partner States national copyright laws on issues of infringement and enforcement (including remedies). The EAC, therefore, needs a Directive of this kind to resolve the differences found in the aspects of infringement and enforcement of copyright as part of establishing an effective copyright system in the EAC.

4.5 Conclusion

The three aspects of EU copyright discussed above indicate the kind of effective measures required to harmonise the differing copyright laws of the Member States.[281] The harmonisation of the substantive copyright laws of EU Member States significantly reduced barriers to trade and adjusted the framework of copyright in EU Member States domestic laws.[282] The EU as a regional trading unit has taken measures to review the copyright framework based on market studies and impact assessment and undertaken some legal drafting work.[283] Among the elements that it has been suggested be reformed to allow for the better legal functioning of the EU internal market is the territoriality nature of copyright and IP in general, limitations and exceptions to copyright in the digital age, fragmentation of the EU copyright market; and how to improve the effectiveness of enforcement of copyright.[284] This review in copyright seeks to resolve the remaining differences among the EU Member States; to have a modern copyright framework that is fit for the purpose and that seeks to foster innovative market practices in order to guarantee the more effective and appropriate remuneration of right holders; to provide sustainable incentives for creativity, cultural diversity and innovative; to allow new models to emerge; and to more effectively contribute to combating offers and piracy.[285]

The EU Member States are obliged to domesticate Directives on harmonisation of copyright and the national courts must incorporate the judgements of the European Court of Justice into their copyright regimes to ensure that copyright and related rights contributes to the achievements of the objectives of the single internal market.[286] The EAC requires similar measures for its effective protection of IP, particularly copyright. The EAC must adopt similar Directives on harmonisation of its Partner States domestic copyrights to ensure fair competition and to facilitate investment in copyright in the concluded EAC Common Market. Harmonisation is suggested to be in a form of a Directive because unlike regulations which normally are self-executing and do not require any implementing measures, a Directive normally leaves Member States with a certain amount of leeway as to the exact rule to be

---

281 Cornish & Llewellyn *Intellectual Property: Patents, Copyright, Trade Marks & Allied Rights* 5-ed (2003) 20.

282 http://www.ec.europa.eu/internal_market/copyright/index_en.htm (accessed 20 May 2013).

283 http://www.ec.europa.eu/internal_market/copyright/index_en.htm (accessed 20 May 2013).

284 http://www.ec.europa.eu/internal_market/copyright/docs/copyright_infso/121218_communication-content_en (accessed 20 May 2013).

285 http://www.ec.europa.eu/internal_market/copyright/docs/copyright_infso/121218_communication-content_en (accessed 20 May 2013).

286 Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society.

adopted.[287] A Directive is binding as to the result to be achieved upon each Member States to which it is addressed, but it normally leaves to the national authorities the choice of form and methods.[288] Directives do not dictate the means of achieving particular results. The advantage of having a Directive for harmonisation of copyright is that it is not intending to create a new copyright regime as to replace the existing Partner States copyright regime, rather it is intended to resolve the differences by providing certain, stable and clear rules that ensure effective legal regime in the regional trading unit. The legal basis for harmonisation of copyright in form of a Directive is provided by Articles 16 and 5 of the 1999 EAC Treaty and 2010 EAC Common Market Protocol respectively.[289]

[287] http://www.ec.europa.eu (accessed 18 October 2013).
[288] Footnote 287 above.
[289] Article 5 of the 2010 Treaty provides for the need of harmonised legislations in the EAC and Article 16 of the 1999 EAC Treaty provides for the adoption of Directives by EAC Partner States.

CHAPTER FIVE

CONCLUSIONS

Commencing from chapter one to chapter four the discussions have explained the need for harmonisation of intellectual property (IP) legal regimes, specifically copyright regime in the EAC Partner States as represented by the Kenyan and Tanzania copyright legislation. All the chapters suggest harmonisation of copyright to be adopted in form of a Directive. The discussions on the reasons for the choice of harmonisation to be adopted but in a form of a Directive and not a regulation are given in chapter four above. The Directive should be issued by the EAC Council and adopted and implemented by all EAC Partner States in respective of the subject matter of copyright, the requirements for subsistence of copyright, ownership and administration of copyright; infringement and enforcement of copyright, including remedies. These aspects are the essential elements in the process of creating a harmonised copyright law in the regional context to facilitate fair and competitive trade and investment in copyright works. A Directive on the six aspects of copyright is intended to resolve uncertainties which are found in rules and which have caused significant differences in the protection of copyright within the same regional trading area.

Chapter one explains the importance of copyright protection in the knowledge economy and the effect of creating a common market in the trading region; removal of barriers to trade, one of which being uncertainty of copyright laws which can be eliminated by adopting harmonised standards or rules established by international institutions such as International Chamber of Commerce (ICC), United Nations Commission on International Trade Laws (UNCITRAL), International Organisation for Standardisation (ISO), International Institute for the Unification of Private Law (UNIDROIT), and *Organisation pour I' Harmonisation en Afrique du Droit des Affaires* (OHADA).[290] The chapter also discusses the relationship between EAC and EU based on their shared objectives for the establishment of the common market in the two regional trading groups and the background to copyright in Kenya and Tanzania. The respective six aspects of copyright have become the bases for discussions. The main reasons to the choice of the Kenyan Copyright Act (hereafter the Kenyan Act)[291] and the Tanzanian Copyright and

[290] Footnotes 23-27 above.
[291] Cap 130 [R.E 2009] of the laws of Kenya.

Neighbouring Rights Act (hereafter the Tanzanian Act)[292] are provided in chapter one, one being that the two Acts seem to contain similar material yet to differ significantly enough as to cause uncertainties which can skew trading patterns.

Chapter one also demonstrates that when effectively protected copyright contributes to the economy of both, the State and individuals. The chapter establishes that where States agree to economic integration by establishing a common market, they must adapt rules that facilitate fair competition and remove barriers to trade, particularly trade in copyright. Kenya and Tanzania are Partner States to the EAC which have agreed to establish a common market, therefore, they must adapt rules that facilitate fair competition and remove barriers to trade, particularly trade in copyright to contribute to the growing economies of both, EAC Partner States and individuals.

Chapter two sets out the principal similarities and differences that are found in four aspects of copyright in Kenya and in Tanzania: the subject matter of copyright; the requirements for subsistence of copyright; ownership and administration of copyright.

Similarities in respect of the subject matter are found in the list of works protected by the two Acts which includes: books, pamphlets, computer programs, lectures, addresses, sermons choreographic works and pantomimes; cinematographic works and audio visual works; works of drawings, painting, architecture, sculpture, engraving, lithography, tapestry, photographic works including works expressed by process analogous to photography, illustrations, maps, plans, sketches and three dimensional works relative to geography, topography and architecture; shortly referred to as literary works and artistic works.[293] Such list of works represents 95 per cent of the similar works protected under the Kenyan and Tanzanian Acts.

The main similarity in respect of the requirements for subsistence of copyright is that a work must `be original. The ownership similarities are found in the copyright holder's right to claim ownership and freedom to assign copyright work in whole or in part. There are also similarities in the kinds of licenses that are provided by the two copyright statutes.[294] Similarities with respect to administration of copyright are found in the establishment of independent legal entities to deal with copyright matters and in the establishment of Competent Authorities.[295]

292 Cap 218[R.E 2002] of the laws of Tanzania.
293 Section 5 of the Tanzanian Act and sections 22 and 2 of the Kenyan Act.
294 Footnote 154 above.
295 Footnotes 163 and 164 above.

The main differences in regard to the aspects of copyright discussed in chapter two are now discussed. The differences in the subject matter are found in the nature of protection in each statute; in the list of works-subject matter that qualify for protection such as; laws, and decisions of courts and administrative bodies as well as official translation thereof, news of the day published, broadcast or publicly communicated by any other means. Such list of works represents 5 per cent of the list of works-subject matter that provides differences in the two copyright statutes; and in the protection of derivative works as original works. Some key differences in the requirements for subsistence of copyright are found in the requirement that a work must be in a fixed form to qualify for copyright protection and in matters of assigning copyright in future works.[296] Differences in administration of copyright are found in the qualifications for membership of the Competent Authorities; the competence of members of Kenya's Competent Authority is open to question, while those of the Tanzania Competent Authority is not. The authorities also fulfil different functions: unlike the Tanzanian Act, the Kenyan Act provides for the establishment of collecting societies.[297] While the Tanzanian Act makes reference to kinds of legislation which also regulate copyright, the Kenyan Act is the only Act which regulates copyright in Kenya.

The two statutes demonstrate the necessity of harmonisation of copyright law in the EAC Partner States in the four aspects analysed in order to create certain and clear rules to enhance a fair and competitive trade in copyright.

Chapter three continues the detailed examination of the similarities and differences between the copyright statutes of Kenya and Tanzania begun in chapter two. The aspects of infringement of copyright and enforcement, including remedies are considered. The principle similarities are found in some of the infringing acts and enforcement mechanisms, the defences and in the kinds of administrative remedies, civil and criminal remedies provided. The discussions reveal differences in the list of infringing acts and enforcement mechanisms,[298] in adjudicative bodies,[299] in criminal remedies,[300] such as the duration of imprisonment and fines payable to the same offences.

Chapter three indicates that to ensure security for those who want to invest in copyright there must be stable and effective rules to determine what acts constitute infringement and effective

296 Footnote 112 above.
297 Footnote 170 above.
298 Footnotes 223 and 224 above.
299 Footnote 232 above.
300 Footnote 248 above.

enforcement rules, including remedies. Harmonisation of rules is, therefore, a necessary measure in providing the security desired by investors who want to trade in copyright to the EAC Common Market.

The EU example of how harmonisation of various aspects of copyright may be effected is examined in chapter four. Three of the six aspects discussed in chapters two and three have presented no difficulties within the EU regional trading system and are consequently not discussed; authorship, requirements for subsistence of copyright and administration of copyright. The three aspects of EU law which could hold lessons for the Kenya and Tanzania are discussed; the subject matter of copyright, infringement of copyright and enforcement. The EU Member States have adopted Directives for harmonisation of copyright which have led to effective copyright protection within the regional trading area. The Kenyan and Tanzanian copyright statutes present good examples of the differences that are found in the EAC Partner States domestic copyright laws. Harmonisation of the EAC Partner States' domestic copyright laws is very necessary in resolving the differences in the aspects examined. The aspects of EU copyright system discussed in chapter four above demonstrate that harmonisation can, indeed ensure clarity and consistency, both in the extent of the rights and their enforceability within the regional unit; similar considerations apply in the case is of the EAC.

Articles 76 and 104 of the 1999 EAC Treaty provide for the establishment of the EAC Common Market which is intended to facilitate the EAC internal trade.[301] Most important, the EAC Common Market has enhanced cross-border trading activities by implementing the agreed freedoms of movement of labour, goods and services, capital, freedom of movement of persons and the right of residence.[302] Copyright as do other forms of IP, has a direct trading impact on the EAC Common Market. The differences in their six aspects presented have caused uncertainties in protection for copyright owners within the EAC unit. Entrepreneurs who are interested in investing in the copyright industry do not consider it a safe market. Insecurity of the copyright market has resulted in ineffective deterrence of copyright

[301] Establishment of the Common Market within the trading region facilitates cross-border business. That is why Members who form the regional economic block should agree on the opening of their borders to facilitate the four freedoms, namely; movement of persons, labour, goods and services and capita. Common regulations must be adopted to make sure that the initiative of having a Common Market within the trading region is achieved. Trade policies for example must aim at regulating public interests while protecting individual benefits to facilitate economic growth within the trading region. In this case, harmonisation of trade laws among Members is inevitable for competitive business. IP is a field which is so connected with trade. It is a trade related aspect which has great impact to economic development within the regional trading: that is why where Members agree on cooperation in Common Market, IP rights issues must be clarified.

[302] Article 5 of the EAC Common Market Protocol, 2010 provides for the provisions to apply to activities that are aiming at achieving the free movement of goods, persons, labour, services and capital.

infringement which hinders economies of scale for new products and services containing copyright. The need arises to harmonise copyright laws to ensure security to copyright owners within the EAC.

We have seen from the EU example in chapter four above, that harmonisation is an effective measure for resolving the existing differences in EAC Partner States copyright legislation. Copyright owners are interested in investing in places where there are effective and stable rules that protect their rights against infringers. Harmonisation of copyright legislation in EAC Partner States will accelerate economic growth and competitiveness in the materials and contribute to implementing the objectives of the EAC Common Market.[303] Harmonisation of copyright laws should be used as a step in the process of getting to a uniform EAC copyright.

We have seen in chapter one that, the 2010 EAC Common Market Protocol confers power to the EAC Council to issue Directives for cooperation in administration, management and enforcement of IP rights, and that a Directive issued by the EAC Council binds in the Partner States.[304] The EAC Partner States should, therefore, adopt a Directive as measure to harmonise copyright legislation. Although all the six respective aspects established in this study suggest for harmonisation to establish certain and clear rules that will resolve differences that have been identified in the two Partner States copyright statutes: The Kenyan and Tanzanian Acts, a Directive on harmonisation should be adopted on the two last aspects; infringement and enforcement of copyright, including remedies to start with. Certain and clear rules on infringing acts and enforcement, including remedies are important is the establishment of effective and stable copyright regime. The two elements are important for ensuring consistency, both in the extent of rights and their enforceability. Harmonisation in a form of a Directive of these two elements of copyright will therefore become a good foundation for effective and stable copyright legal regime in the EAC Partner States. It will also serve in creating confidence among copyright holders who trade on the EAC Common Market. This will facilitate investment in copyright because certain and clear rules on infringing acts and on enforcement mechanisms, including remedies are reliable factors for investing in copyright. These can only be attained through harmonisation of copyright in a form of a Directive in the differing two aspects of law; infringement and enforcement, including remedies. The Directive on infringement and enforcement of copyright should aim to combat illegal activities, to ensure

303 Article 4 of the EAC Common Market Protocol, 2010 provides for the Common Market to accelerating economic growth and development of Partner States through the attainment of free movement of goods, persons, labour, services and capital with the right of residence.

304 Footnote 47 above.

economic benefits and to foster legitimate trade in copyright works while protecting the interests of individuals and corporate bodies investing in copyright works.

Generally a Directive on harmonisation will help Partner States domestic copyright legal frameworks to adopt changes that reflect the economic reality faced by persons who are investing in copyright. It will encourage their persistence in innovation for the development of the copyright and IP in general. Harmonisation of copyright in EAC Partner States will foster investment in creative and innovation including increasing competition in the EAC Common Market. It will safeguard employment and encourage job creation, which is a critical element in the success of the EAC.

BIBLIOGRAPHY

Books

Anderman S.D (ed) *The Interface between Intellectual Property Rights & Competition Policy* (2007) US, Cambridge University Press

Boadi R, Kameri-Mbote P, Mugaguri L, Opati L. M, Sikinyi E, Wekesa M & Sihanya B *Intellectual Property in Kenya* (2009) Nairobi, Konrad Adenaure Stiftung

Bodenheimer E *Jurisprudence: The philosophy and Method of the Law; Revised Edition* (2006) Delhi, Universal Law Publishing co pvt Ltd

Clarkson K.W, Miller R.L, Jentz G.A & Cross F.B *West's Business Law: Text and Cases; Legal, Ethical, International and E-Commerce Environment* 9ed (2004) USA, Thomson South-Western

Cornish W & Llewelyn D *Intellectual Property: Patents, Copyright, Trade Marks & Allied Rights* 5ed (2003) London, Sweet & Maxwell Limited

Dimatteo L& Dhooge L *International Business Law: A Transactional Approach* 2ed (2005) US, South-Western College

Fawcett J & Torremans P *Intellectual Property & Private international Law* (1980) Oxford University Press

Greenhalgh C & Rogers M *Innovation, Intellectual Property and Economic Growth* (2010) Princeton, Princeton University Press

Hart T, Fazzani L & Clark S *Intellectual Property Law* 4ed (2006) New York, Palgrave Macmillan

Johnston D.F *Copyright Handbook* 2ed (1982) New York, R.R. Bowker Company

Lowenfeld A.F *International Economic Law* 2ed (2008) USA, Oxford University Press

Mann R.A, Roberts B.S & Smith Y. L *Smith & Roberson's Business Law* 10ed (1996) USA, West Publishing Co.

Narayanan P *Intellectual Property Law* 3ed (2007) Kolkata, Eastern Law House Private Ltd

Schaffer R, Agusti F & Earle B *International Business Law & its Environment* 7ed (2009) USA, South-Western

Spinello R.A and Tavani H.T *Intellectual Property Rights in a Networked World: Theory and Practice* (2005) USA, Information Science Publishing

Wherry T.L *Intellectual Property: Everything the Digital-Age Librarian Need to Know* (2008) Chicago, American Library Association

Williams G. *Learning the Law*, 11ed (1982) New Delhi, Universal Law Publishing Co. Ltd

World Intellectual Property Organisation *WIPO Intellectual Property Handbook: Policy, Law& Use* (2001) Geneva WIPO Publisher

Articles

Kimeri-Mbote P 'Intellectual property Protection in Africa: An Assessment of the status of Laws, Research and Policy Analysis on intellectual Property Rights in Kenya' International Environmental Law Research Centre (IELRC) Working Paper 2005-2

Ombija N R, 'Kenya law Report: Case study of Kenya's Specialised Intellectual Property Rights Court Regime' Policies and Reports The East African Community Council Draft East Africa Community Regional Intellectual Property Rights Policy on the Utilisation of Public Health (2011) Arusha East African Community

EAC-UNCTAD Framework for cyberlaw: Phase II on Intellectual Property Rights (2011) Arusha East African Community

WIPO/SMES/DAR/05

List of Statutes

Kenyan Legislation

The Copyright Act, Cap 130 [R. E 2009]

Tanzanian Legislation

The Constitution of the United Republic of Tanzania of 1977, amended 2005, Cap 2

The Copyright and Neighbouring Rights Act, Cap 218 [R. E 2002]

The National Arts Council Act, Cap 204 [R. E 2002]

List of Cases

English Cases

Football League v. Littlewoods [1959] Ch. D 637

Ladbroke v William Hill [1964] 1 All ER 469

University of London Press v University of Tutorial Press Ltd [1916] Ch. D 601

Kenyan Case

R v Boaz Waswa unreported criminal case no 148 (2005), Kiambu Resident Magistrates Court, Kenya

Tanzanian Cases

Macmillan v Cooper [1924] 40TLR 186

R v Khalifan Abdallah unreported criminal case no 550 (2004), Kisutu Resident Magistrates Court, Tanzania

Samuel Paul v Johnson Chikawe unreported civil case no 188 (2008), District Court of Shinyanga, Tanzania

Conventions, Agreements, Treaties and Protocols

The Berne Convention for Protection of Literary and Artistic Works, 1886

International Convention for the Protection of Performers, Producers of Phonograms and Broadcastings Organisations, 1961

World Trade Organisation- Agreement on Technical Barriers to Trade, 1994

World Trade Organisation- Agreement on Trade Related Aspects of Intellectual Property Rights, 1994

World Trade Organisation- General Agreement on Tariffs and Trade (GATT), 1994

Treaty for the Establishment of the East African Community, 1999

East African Community Common Market Protocol, 2010

East African Community Customs Union Protocol, 2005

Internet Resources

http://www.ielr.org

http://www.eur-lex.europa.eu

http://ec.europa.eu/internal market/copyright-infso/index_en.htm

http://www.kenyalaw.org

http://rossdawsonblog.com

http://www.WIPO-ip-dar-05-www.78437.pdf

http://www.intellectual-property.gov.Uk

http://www.wipo.org

http://www.copyright.gov.in/Documents/handbook.htm

http://www.innovativelawyering/com

http://www.ec.europa.eu/internal_market/copyright/index_en.htm

http://www.ec.europa.eu/internal_market/copyright/docs/copyright_infso/121218_communication-content_en

http://www.europa.eu/legislation_summaries/internal_market_for_good/technical_harmonisation/12100

http://www.europedia.moussis.eu/books/Book_2/2/3/3/index.tkl

http://www.iccwbo.org

http://www.uncitral.org

http://www.iso.org

http://www.unidroit.org

http://www.ohada.org

http://www.moussis.eu