

**COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS IN
KENYA: TOWARDS AN EFFECTIVE LEGAL FRAMEWORK FOR REGULATION
OF COLLECTING SOCIETIES**

VICTOR BUZIBA NZOMO
G62/68611/2011

A Research Project Submitted in Partial Fulfilment of the Requirements of
Master of Laws, School of Law, University of Nairobi.

Supervisor:

Leonard Obura Aloo
University of Nairobi Law School

DECLARATION

I, VICTOR BUZIBA NZOMO, declare that *Collective Management of Copyright and Related Rights in Kenya: Towards an Effective Legal Framework for Regulation of Collecting Societies* is my original work which has not been submitted for a degree in any other university and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

Signed at Nairobi on 19 November 2014,

.....

VICTOR BUZIBA NZOMO

This Research Project has been submitted for examination with my approval as University supervisor:

LEONARD OBURA ALOO

University of Nairobi School of Law

Signed:

Date:.....

TABLE OF CONTENTS

Acknowledgements

Abbreviations and Acronyms

List of Statutes

List of International Instruments

List of Cases

Abstract

1.1 Background.....	10
1.2 Statement of the Problem and Issue Arising.....	13
1.3 Research Questions.....	14
1.4 Research Objectives.....	14
1.5 Hypotheses, Assumptions and Arguments	15
1.6 Literature Review	15
1.7 Justification and Significance of the Study.....	23
1.8 Conceptual and Theoretical Framework of the Study.....	23
1.10 Originality, Contribution and Scope of the Study.....	27
1.11 Summary of Proposed Research Paper	27
CHAPTER 2: LEGAL FRAMEWORK FOR COLLECTIVE ADMINISTRATION OF COPYRIGHT IN KENYA	
2.0 Introduction	29
2.1. International Level.....	29
2.1.1 Berne Convention for the Protection of Literary and Artistic Works	29
2.1.2 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)	30
2.1.3 International Obligations for CMOs	31
2.2 National Level	32
2.2.1 The Constitution of the Republic of Kenya 2010	32
2.2.1 The Copyright (Amendment) Act, 1992.....	35
2.2.2 The Copyright Act No. 12 of 2001	36
2.3 Competition Act No. 12 of 2010	40
CHAPTER THREE: HISTORICAL DEVELOPMENT OF COLLECTIVE MANAGEMENT ORGANISATIONS IN KENYA	
3.0 Introduction	43
3.1 The Origin.....	43
3.2 Music Copyright Society of Kenya (MCSK).....	45
3.3 Kenya Association of Music Producers (KAMP).....	57
3.4 Reproduction Rights Society of Kenya (KOPIKEN)	59
3.5 Performers Rights Society of Kenya (PRSK/PRiSK).....	61
CHAPTER FOUR: EXPERIENCES FROM SOUTH AFRICA AND NIGERIA ON COLLECTIVE ADMINISTRATION OF COPYRIGHT	
4.0 Introduction	65
4.1 Legal and Institutional Frameworks for Licensing and Supervision of CMOs in Selected Common Law Jurisdictions	65
4.1.1 South Africa.....	65
4.1.2 Nigeria	68
4.2 Legislative Options for Kenya	72
4.2.1 Licensing Terms and Conditions for CMOs	73
4.2.2 Supervision of CMOs	76
4.3 Conclusion.....	77
CHAPTER 5: CONCLUSIONS	78

Acknowledgments

I wish to acknowledge the enormous intellectual debt owed to my Supervisor, Mr. Leonard Obura Aloo. I thank him for taking on the responsibility of supervising my work. Completion of this work would not have been possible without his invaluable feedback and comments.

I would also like to acknowledge Amb. Prof. Maria Nzomo who guided and supported me throughout this rigorous LL.M journey and reviewed every chapter of this study with me.

I owe much gratitude to Mr Maurice Okoth and Dr Marisella Ouma of Music Copyright Society of Kenya and Kenya Copyright Board respectively, who both gave me an opportunity to work at their respective institutions as in-house Legal Counsel.

I am indebted to Mr. Robert Hooijer, Mrs. Sharon Chahale Wata, Mrs. Angela Ndambuki and Ms. June Gachui, for the unique roles they each played in helping me understand the technical, business and legal aspects of copyright and related rights collective management.

I would like to thank Prof. Ben Sihanya, Dr Isaac Rutenberg and Ms Melissa Omino for their useful comments on earlier drafts of this project.

I dedicate this Research Project to Mum, Ced and Kareh for all their love, inspiration, encouragement and understanding.

Abbreviations and Acronyms

AG	Attorney General of the Republic of Kenya
CAK	Competition Authority of Kenya
CAP	Chapter (Laws of Kenya)
CEO	Chief Executive Officer
CISAC	International Confederation of Societies of Authors and Composers
CMO	Collective Management Organisations
COSON	Copyright Society of Nigeria
CRC	Copyright Review Commission
ED	Executive Director
GM	General Manager
IFRRO	International Federation of Reproduction Rights Organisations
KAMP	Kenya Association of Music Producers Limited
KECOBO	Kenya Copyright Board
MCSK	Music Copyright Society of Kenya Limited
MCSN	Music Copyright Society Nigeria Limited
No.	Number
NCC	Nigeria Copyright Commission
NORM	National Organisation for Reproduction Rights in Music (South Africa)
PRS	Performing Rights Society Limited (United Kingdom)
PERAK	Pubs, Entertainment and Restaurants Association of Kenya
PRiSK	Performers' Rights Society of Kenya Limited
SACEM	Société des Auteurs, Compositeurs et Editeurs de Musique (France)
SAMRO	Southern African Music Rights Organisation
SAMPRA	South African Music Performing Rights Association
SARRAL	South African Recording Association Limited
TRIPs	Trade Related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

List of Statutes

Companies Act Cap. 486 Laws of Kenya.

Competition Act No. 12 of 2010 (Kenya).

Constitution of the Republic of Kenya, 2010.

Copyright Act No. 12 of 2001 (as Amended) (Kenya).

Copyright Regulations, 2004 (Kenya).

Copyright Act of 1989 (as Amended) Nigeria.

Copyright Act No. 98 of 1978 (as Amended) (South Africa).

List of International Instruments

Berne Convention for the Protection of Literary and Artistic Works, 1883 (Paris Text, 1971).

Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement, 1994.

WIPO Copyright Treaty, 1996.

WIPO Performances and Phonograms Treaty, 1996.

IFRRO Code of Conduct - Reproduction Rights Organisation, 2007.

CISAC Binding Resolutions & Professional Rules for Musical Societies, 2013.

List of Cases

Anyasi Olusese & another v. Standard Limited & another [2008]eKLR. (Available at: www.kenyalaw.org)

Avenue Service Station (1997) Ltd & 9 others v. Music Copyright Society of Kenya & 2 others [2012] eKLR (Available at: www.kenyalaw.org)

Beatrice Wanjiku & another v. Attorney General & another [2012] eKLR (Available at: www.kenyalaw.org)

Cellulant Kenya Ltd v. Music Copyright Society of Kenya [2009] eKLR (Available at: www.kenyalaw.org)

John Boniface Maina v. Safaricom Limited [2013] eKLR (Available at: www.kenyalaw.org)

Music Copyright Society of Kenya v. Parklands Shade Hotel [2000] eKLR (Available at: www.kenyalaw.org)

Registrar of Companies v Music Copyright Society of Kenya [2004] eKLR (Available at: www.kenyalaw.org)

Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya, High Court Miscellaneous Judicial Review Application Number 133 of 2011 (unreported)

Republic v. Kenya Association of Music Producers & 3 others Ex-parte Pubs, Entertainment and Restaurants Association of Kenya [2014] eKLR (Available at: www.kenyalaw.org)

Trustees Kenya Budget Hotel Association & another v. Music Copyright Society of Kenya [2012] eKLR (Available at: www.kenyalaw.org)

Nairobi Pacific Hotel Ltd v. Kenya Association of Music Producers & another, Chief Magistrates' Court Civil Suit Number 7240 of 2013 (unreported)

Abstract

Collective Management Organisations (CMOs) are intended to be the bridge between rights holders and the individuals, businesses and organizations that want to exploit any exclusive rights in any copyright works publicly. In order to ensure that CMOs live up to their mandate, laws and regulations empower the State to license and supervise the activities of CMOs.

Since the establishment of Music Copyright Society of Kenya in 1983 to present day, rights holders and users alike have publicly voiced numerous concerns about corruption, mismanagement, aggressive licensing tactics, and lack of transparency on the part of CMOs. Arising from the concerns and allegations levelled against CMOs, this Research Project ventures into the often misunderstood world of collective copyright administration in Kenya.

This Project investigates whether or not the current legal and institutional framework for collective administration of copyright and related rights in Kenya provides adequate mechanisms and safeguards for regulation of CMOs. In so doing, the findings of this Project reveal that there is need to strengthen this framework so as to ensure that the interests of rights holders and users of copyright works are maximised through CMOs.

CHAPTER 1: INTRODUCTION

“One of the greatest challenges for the Kenya Copyright Board lies in the organisation of the music industry in Kenya, which is currently riddled with disagreements and controversies (....) Currently, there is one collecting society the Music Copyright Society of Kenya (MCSK) that has been collecting and distributing royalties on behalf of the Authors, Composers and Publishers in the music industry. Although MCSK has been in existence for the last twenty four years, it has been characterised by constant wrangles and the genuine members do not get their royalties. There have been several demonstrations by the various groups on the above issue (....) You, as a Board have the *function of licensing and supervising the activities of collective management societies. It is therefore your duty to intervene and put the music industry in order for the benefit of not only its members but also for the effectiveness of our activities as a Board.*”¹(Emphasis added)

1.1 Background

The above quote lies at the heart of this research project as it sets out the rationale behind the introduction of a legal and institutional framework for collective administration of copyright in Kenya. It is against this backdrop that this project seeks to critically examine Kenya’s legal and institutional framework for licensing and supervision of collective management organisations (CMOs).

Copyright and related rights² are bundles of different rights which can be exercised individually or, where it is impracticable to enter into individual arrangements³ can be managed by collecting societies⁴ also known as CMOs.⁵ The first known CMOs were established by the French in 1777⁶ and 1852⁷, followed by the British in 1914.⁸

¹ S.A.Wako (2003) Speech delivered by the Honourable Attorney-General, Republic of Kenya (As he then was) at the Official Launch of the Kenya Copyright Board at the State Law Office, Nairobi on July 21, 2003 (On file with the author).

² See W.A. Copinger and F.E. Skone James (1999) *Copinger & Skone James on Copyright* Vol. 1 14th Edition, Sweet & Maxwell, London; B. Sihanya (2009) *Copyright Law in Kenya* at 18-19. Available at: <http://innovativelawyering.com/attachments/article/26/Copyright%20Law%20in%20Kenya%20-%20Prof%20Ben%20Sihanya.pdf>. (last accessed on March 15, 2014); L. Bently, & B. Sherman, (Eds.) (2009) *Intellectual Property 3rd Edition*, Oxford University Press Inc. New York.

³ See M. Fisor (2002) “Collective Management of Copyright and Related Rights”, World Intellectual Property Organization, Geneva at 6. Prof. Fisor states that the reason why, in a number of cases, copyright and related rights cannot be exercised by individual owners of rights is that the works concerned are used by a great number of users. Individuals, in general, do not have the capacity to monitor all those uses, to negotiate with users and to collect remuneration.

⁴ P. Goldstein (2001) *International Copyright: Principles, Law and Practice*, Oxford University Press Inc, New York at 228.

To date, the system of collective administration remains an indispensable and effective means of bridging the gap between rights holders and users of copyright works.⁹

Collective administration of copyright effectively allows rights holders to grant exclusive mandates to a single entity namely the CMO, which acts on behalf of the rights holders to grant authorisations through licenses to users under certain conditions and on the basis of a tariff system; to collect the remuneration from the licenses; to distribute it among the rights holders; to monitor the uses of their works; to negotiate with prospective users;¹⁰ to prevent and detect infringement of rights; and to seek remedies for infringement.¹¹

Therefore, there is a need to have a legal and institutional framework for collective administration of copyright which strikes an appropriate balance between the interests of the rights holders and the users of copyright works.

From the perspective of the rights holder, a legal framework for collective administration of copyright establishes CMOs and allows them to do for rights holders what they cannot practically and economically do for themselves by providing a service to enable rights holders to enforce and administer certain of their rights effectively and cheaply.

From the perspective of the user, a legal framework for collective administration of copyright creates a system through which CMOs can provide a service to users by facilitating access to

⁵ See D.J. Gervais (2001) "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective", Department of Canadian Heritage, Canada at 82. Prof. Gervais states that collective management is a method, a tool that rights holders choose when the individual exercise of their right(s) to authorize is impracticable. Rights holders then choose to let users within a defined group or category use their works and all those within a repertory controlled by the respective collective management organisations. See also WIPO (1999) "Understanding Copyright and Related Rights", World Intellectual Property Organisation, Geneva. Available at: http://www.wipo.int/export/sites/www/freepublications/en/intproperty/909/wipo_pub_909.pdf (last accessed on April 1, 2014).

⁶ WIPO (2004) "WIPO Guide on the Licensing of Copyright and Related Rights", World Intellectual Property Organization, Geneva at 111.

⁷ *Ibid.*

⁸ W.R. Cornish & D. Llewelyn (2007) *Intellectual Property: Copyright, Trademarks and Allied Rights 6th Edition*, Sweet & Maxwell, London at 406.

⁹ P. Schepens (2000) "Guide to the Collective Administration of Authors' Rights", The Administration Society at the Service of Authors and Users, UNESCO at 15.

¹⁰ M. Fiscor (2003) *Collective Management of Copyright and Related Rights at A Triple Crossroads: Should It Remain Voluntary or May It Be "Extended" or Made Mandatory?* at 1.

¹¹ WIPO (1999) "Understanding Copyright and Related Rights", WIPO, Geneva at 14.

copyright works and making it possible for the latter to comply with their obligations under copyright law to obtain licenses for the use of works.

Therefore, the legal framework for collective administration of copyright ensures that the interests of rights holders are maximised at the least possible cost while creating a clearing-house or “one-stop shop” for users to obtain authorisations to use the works owned by the rights holders.¹² It follows that this legal framework guides the regulation of CMOs to ensure that the latter act in the public interest and do not abuse their dominant position¹³ to the detriment of rights holders and users of works.¹⁴

The legal and institutional framework for collective administration of copyright in Kenya is as provided for under the Kenya Copyright Act.¹⁵ Since the introduction of this framework in 2001,¹⁶ there have been two legislative interventions that have affected the collective administration of copyright namely the making of the Copyright Regulations of 2004¹⁷ and the Copyright Amendment Act of 2012.¹⁸

Despite Kenya having a legal and institutional framework for collective administration of copyright, the Kenya Copyright Board (KECOBO) continues to face challenges in the licensing and supervision of CMOs. These challenges have had an adverse impact on the interests of rights holders and users of copyright works. For instance in the year 2010, it is reported that right holders who were members of MCSK received forty eight million shillings (KES 48 million) in

¹² P. Schepens (2000) “Guide to the Collective Administration of Authors' Rights”, The Administration Society at the Service of Authors and Users, UNESCO at 22.

¹³ L. Bently & B. Sherman (Eds.) (2009) *Intellectual Property 3rd Edition* at 299. The authors note that any CMO, as a matter of fact or by operation of law, will be in a dominant position because it will represent the rights of a majority of a particular category of rights holders both national and foreign in any given territory.

¹⁴ *Ibid.* See also W.A Copinger & F.E Skone James (1999) *Copinger & Skone James on Copyright Vol. 1 14th Edition* at 1500.

¹⁵ Part VI of the Copyright Act, No. 12 of 2001.

¹⁶ S. M. Chahale (2011) “Cultural Barriers to the Introduction of Western Model Collective Management Systems in Developing Countries: Case Study, Comparison between Kenya and Haiti”, Unpublished LL.M Research Paper, University of Turin at 6; T. Ogada (2012) “Developing a National IP Policy and Strategy for Kenya: Draft Report. Desk Study of the IP System in Kenya and Its Links with National Development Priorities”, World Intellectual Property Organization, Geneva at 24.

¹⁷ Kenya Gazette Supplement No. 7, Legal Notice No. 9, February 18, 2005.

¹⁸ Statute Law (Miscellaneous Amendments) Act, 2012, Kenya Gazette Supplement No. 72 (Acts No. 12), July 12, 2012.

royalties out of a total revenue of one hundred and eighty five million shillings (KES 185 million) in revenue collections with one hundred and thirty seven million shillings (KES137 million) being consumed by MCSK as administration costs.¹⁹ As a reaction to this state of affairs, KECOBO decided to deregister MCSK as a collecting society for composers, authors and publishers of musical works in April 2011.²⁰

Since 2011, rights holders and users alike have continued to complain about CMOs in Kenya which brings into sharp focus the efficacy of the legal and institutional framework for regulation of CMOs.

1.2 Statement of the Problem and Issue Arising

This research project seeks to investigate whether or not the current legal framework for collective administration of copyright is sufficient to maximise the interests of both rights holders and users in Kenya.

The central issue which arises is whether Kenya's Copyright Act and Regulations provide an adequate legal and institutional framework for both licensing and supervision of CMOs in Kenya.

The problem and the issue arising are at the core of this research project, which will be guided by the research questions in the next section.

¹⁹ A. Gakuru (2011) "Copyright Board deregisters Music Copyright Society", *International Law Office Newsletter*. Available at: <http://www.internationallawoffice.com/newsletters/detail.aspx?g=1b71adf4-9a96-427a-97ed-b702eea7fd62> (Last accessed February 3, 2014). See also M. Okuttah (2010) "Regulator threatens to revoke MCSK's licence", *Business Daily*, December 31, 2010. Available at: <http://www.businessdailyafrica.com/Corporate+News/Regulator+threatens+to+revoke+MCSKs+licence/-/539550/1081144/-/12bak4h/-/index.html> (Last accessed on January 13, 2014); J. Muchiri (2011) "Music copyright body deregistered over 'misuse of funds'", *Daily Nation* May 14, 2011. Available at: <http://www.nation.co.ke/News/Music+copyright+body+deregistered+over+misuse+of+funds/-/1056/1162478/-/tif5bh/-/> (Last accessed on January 10, 2014).

²⁰ *Ibid.*

1.3 Research Questions

This research project seeks to investigate and address the following three questions:

1. Do national and international laws facilitate the collective administration of copyright in Kenya?
2. What are the origins of collective administration of copyright and how has it developed in Kenya?
3. What can Kenya learn from the experiences of leading African creative economies such as South Africa and Nigeria to strengthen its legal and institutional framework for collective administration of copyright?

1.4 Research Objectives

The core objective of this research project is to analyse the legal provisions relating to collective administration of copyright and determine the extent to which these provisions adequately regulate CMOs in Kenya for the benefit of rights holders and users.

In this regard, there are two specific research objectives in this project, namely:

1. To review and examine the legal and institutional framework for collective administration of copyright in Kenya with a view to identify key gaps in the statutory provisions for licensing and supervision of CMOs.
2. To identify and discuss key legal provisions from South Africa and Nigeria that may be employed to address the existing gaps in Kenya's Copyright Act and Regulations.

1.5 Hypotheses, Assumptions and Arguments

The main hypothesis of this research project is that the interests of rights holders and users in Kenya can only be maximised through a robust legal and institutional framework for collective administration of copyright which has adequate provisions for licensing and supervision of the activities of CMOs in Kenya.

This hypothesis is guided by three assumptions, as follows:

1. A key function of the legal and institutional framework for collective administration of copyright is to set out adequate provisions for the licensing and supervision of CMOs by the State.
2. The consistent public complaints by rights holders against CMOs and litigation instituted by users against CMOs provide an indication that there may be gaps in the legal and institutional framework for collective administration of copyright in Kenya.
3. The experiences of South Africa and Nigeria in the area of collective administration of copyright may provide useful lessons for Kenya on how to address shortcomings in the latter's legal and institutional framework.

An important argument underlying this research project is that the provisions relating to the licensing and supervision of CMOs must be continually and purposefully reviewed and/or amended in order to adequately address gaps in the legal and institutional framework for collective administration of copyright.

1.6 Literature Review

1.6.1. Role of National and International Laws in Collective Administration of Copyright in Kenya

The legal and institutional framework for collective administration of copyright exists at two levels, namely the national and international levels. On the national level, the laws that affect the

collective administration of copyright include copyright statutes,²¹ legislation regulating corporations and business associations²² and competition laws.²³ The Constitution has also been cited by several authors as an important source of law on copyright in general²⁴ and collective administration of copyright in particular.²⁵

On the international level, the Berne Convention along with other WIPO-administered Conventions and Treaties has been cited in addition to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) as being the key international instruments affecting copyright in general²⁶ and collective administration of copyright in particular.²⁷

In this connection, the role of international laws is to provide a set of minimum standards with regard to administration of copyright and related rights.²⁸ These minimum standards form part of Kenya's international law obligations.²⁹

²¹See M.N. Ouma (2006) "Public and Private Institutions in the Administration of Intellectual Property Rights in Kenya" at 6 & 10; J. Otike (2012) "Copyright: The Challenges Posed By Reproduction Rights Organizations (RROs) In The Provision Of Information To Users With Special Reference To Kenya" at 9; See also C. Seuna "Collective Management Bodies in Cameroon" at 3; DJ Gervais, "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective", Canadian Journal of Law and Technology at 31.

²²These laws relate to the formation of CMOs. However Ouma in her doctoral thesis notes that in most of the French speaking countries in Africa, the collective management of copyright and related rights is a function of the government. The CMOs in these countries are departments within the relevant Government Ministries. In the English speaking African countries, CMOs are mainly private organisations with the exception of Malawi and Tanzania. See also C. Seuna, "Collective Management Bodies in Cameroon" at 3; See also DJ Gervais, "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective" at 31

²³For a discussion of how competition laws affect the legal status of CMOs, see DJ Gervais "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective", Canadian Journal of Law and Technology at 26-27

²⁴Supra note 30.

²⁵ See generally, U. Uchtenhagen (2005) "The Setting-up of New Copyright Societies - Some Experiences and Reflexions", WIPO Publication at 5; O.O. Rotimi (2012) "Operation and Regulation of Copyright Collective Administration in Nigeria: Important Lessons for Africa", Published LL.M Research Project, University of South Africa, at 88; M.M. Frabboni (2009) "Collective management of music rights: a test of competition and Industrial Organisation theories Unpublished PhD Thesis, Queen Mary University of London, at 138-140

²⁶ For instance, see P. Kameri-Mbote (2005) "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) at 17; G.M. Sikoyo, E. Nyukuri & J.W. Wakhungu (2006) *Intellectual Property Protection In Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda*, African Centre for Technology Studies (ACTS) Ecopolicy Series no. 16 at 17; B. Sihanya (2009) "Copyright Law in Kenya", Innovative Lawyering & Copyright Africa, Nairobi, at 8-9

²⁷ For instance, see M. Fiscor "Collective Management of Copyright and Related Rights at A Triple Crossroads: Should It Remain Voluntary or May It Be "Extended" or Made Mandatory" at 8; DJ Gervais, "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective", Canadian Journal of Law and Technology at 30.

²⁸ See JJ Baloyi (2014) "Demystifying the Role of Copyright as a Tool for Economic Development in Africa: Tackling the Harsh Effects of the Transferability Principle in Copyright Law", Potchefstroom Electronic Law Journal at 118; M.W. Carroll (2009) "One Size Does Not Fit All: A Framework for Tailoring Intellectual Property

Given the generality of international law provisions relating to collective management of copyright and related rights, one Ghanaian commentator Kumi-Atiemo³⁰ recommends the adoption of a specialised international treaty under the auspices of WIPO, which could be called “WIPO Collective Management Organisation Treaty (WCMOT)” to be spearheaded by WIPO and CISAC for CMO-related matters.³¹ Kumi-Atiemo elaborates that such a treaty could be seen as a special treaty of the Berne Convention³² like the WIPO Copyright Treaty (WCT) to govern the activities of CMOs.³³

Aside from the general safeguards offered in the Berne Convention and TRIPS Agreement,³⁴ several countries opt to legislate specifically on collective administration of copyright.³⁵ Therefore the role of national laws is to facilitate the establishment, operation and supervision of CMOs.³⁶ In this context, national laws provide a framework that affects various areas of collective management of copyright including, the legal status of CMOs, acquisition of rights, system of dispute settlement and measures of controlling anti-competitive activities.³⁷

In Kenya, the legal and institutional framework for collective administration of copyright is affected both directly and indirectly by several national laws including the Constitution of

Rights.” Ohio State Law Journal, 70, no. 6 at 1366. Available at:

http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1044&context=facsch_lawrev

²⁹ Kenya ratified the Berne Convention on June 11, 1993 and the TRIPS Agreement on January 1, 1995. Information on Kenya’s intellectual property-related treaty memberships is available at:

<http://www.wipo.int/wipolex/en/profile.jsp?code=KE>

³⁰ Alfred Kumi-Atiemo is currently Assistant Director at the Ghana Copyright Office. Information available at:

<http://www.copyright.gov.gh/contact-us>

³¹ A. Kumi-Atiemo (2009) “Collective Management of Copyright and Related Right in Music: A Case Study of the United Kingdom and Ghanaian System”, Unpublished LL.M Research Paper, University of Turin at 39.

³² Article 20 of the Berne Convention (1971) provides “... countries reserve the right to enter into special agreements...” Also article 1(1) of the WCT states, “This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention.....”

³³ A. Kumi-Atiemo (2009) *op cit.* at 39.

³⁴ See 2.5 and 2.6 *infra*.

³⁵ M. Fiscor (2002) *op cit.* at 142.

³⁶ See A. Dietz (2001) “Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe Part I”, Journal of the Copyright Society of the United States of America at 910 – 911; E. Meyer (1998) “Operation and Supervision of Collecting Societies in the European Context”, Paper presented at WIPO National Seminar on Collective Management of Copyright and Neighbouring Rights and the WIPO “Internet” Treaties (WCT and WPPT) at 2-7; L. Guibault & S. van Gompel (2006) Collective Management in the European Union, The Hague, Kluwer Law International at 10; S. M. Chahale (2011) “Cultural Barriers to the Introduction of Western Model Collective Management Systems in Developing Countries: Case Study, Comparison between Kenya and Haiti”, Unpublished LL.M Research Paper, University of Turin at 324;

³⁷ See W. Liu (2012) Models for Collective Management of Copyright from an International Perspective: Potential Changes for Enhancing Performance”, Journal of Intellectual Property Rights Vol. 17 at 46.

Kenya, Copyright Act and the Competition Act.³⁸ In numerous law suits filed against CMOs in Kenya, users of copyright works have invoked Articles in the Constitution to challenge the manner in which the CMO in question carries out its licensing activities. This fact alone illustrates the effect that national laws have on the collective administration of copyright. Further there are several reported cases relating the CMOs' relationship with users, members and other CMOs that fall within the scope of Kenya's competition laws.

1.6.2 Origins of Collective Administration of Copyright and Its Development in Kenya

The 1709 Statute of Anne, which was passed into law by the British Parliament on April 10, 1710, is traditionally claimed to be the world's first copyright statute and has thus become viewed as the origin of a system of national laws that today exist in most countries of the world.³⁹ This act vested exclusive rights to authors or purchasers in the copies of printed books.⁴⁰ The preamble of this Act emphasises the need to strike a balance between rights holders and users as it states that it is "an act for encouragement of learning" and "for the encouragement of learned men to compose and write useful books".⁴¹ The passing of the Statute was intended to address a growing practice among users of exploiting printed and written works without the license of the authors.⁴²

Despite the enactment of the Statute of Anne and subsequent legislation in the UK, collective enforcement of rights began to take shape in the 1900s when composers of most music and their publishers found it impossible to enforce their performing rights, work by work, against users such as concert promoters and theatre proprietors.⁴³ Therefore both composers and publishers found it necessary to rally for a proper performing right regulation and a collecting agency to implement it.⁴⁴ As a result, the definition and scope of performing rights in the previous Acts of

³⁸ See Chapter 2 of this Project.

³⁹ L. Bently, U. Suthersanen & P. Torremans (eds) (2010) *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*, Edward Edgar Publishing, United Kingdom at 7.

⁴⁰ *Ibid*

⁴¹ *Ibid* at 25.

⁴² *Ibid*.

⁴³ Cornish, W.R. and Llewelyn, D. (2007). *Intellectual Property: Copyright, Trademarks and Allied Rights* 6th Edition, Sweet & Maxwell, London, pg. 406.

⁴⁴ S. Albinsson (2012) "The Advent of Performing Rights in Europe", *Music & Politics* Issue No. 2 Vol. 6 Summer 2012, University of Michigan Publishing, United States at 14.

1833 and 1842 were extended and modernized in the new Copyright Act of 1911. Thereafter the Performing Rights Society (PRS) was created in March 1914 to administer performing rights on behalf of composers and publishers.⁴⁵

Although public performance and broadcasting of works were the first uses to give rise to collective licensing, the emergence of secondary mass by new means of exploitation of works⁴⁶ has made the need for collective administration of rights even more acute.⁴⁷ Increasingly, therefore, collective administration is becoming the most realistic way for copyright owners to exercise many of their rights.⁴⁸ Collective administration of copyright allows authors and other rights owners to grant exclusive licenses to a single entity namely the CMO, which acts on their behalf to grant authorizations through licenses under certain conditions and on the basis of a tariff system, to collect the remuneration, and to distribute it among the owners of rights, to monitor the use of their works, to negotiate with prospective users, to prevent and detect infringement of rights, and to seek remedies for infringement.⁴⁹

A legal and institutional framework for collective administration of copyright is necessitated by the fact that CMOs occupy a monopoly position in relation to both rights holders and users.⁵⁰ Such a position is, in practical terms, a necessary condition for the appropriate operation of collective management of copyright.⁵¹ Therefore, without appropriate guarantees, such a monopoly position might be abused by CMOs.⁵² These safeguards are needed both in the CMOs' relationship with rights holders as well as in its relationship with users.⁵³

⁴⁵ *Ibid.*

⁴⁶ These include photocopying, commercial rental, satellite broadcasting, cable distribution of television programmes and films, and the use of computer technology to digitise and store protected works in databases and to transmit them in non-material digital form throughout the world, by means of a combination of computer, telephone and satellite and cable technologies on the global information infrastructure (internet).

⁴⁷ W.A. Copinger and F.E. Skone James (1999) *op cit.* at 1490.

⁴⁸ *Ibid.*

⁴⁹ Fiscor, M. (2003) Collective Management of Copyright and Related Rights at A Triple Crossroads: Should It Remain Voluntary or May It Be "Extended" or Made Mandatory at 1.

⁵⁰ M. Fiscor (2002) *op cit.* at 141.

⁵¹ *Ibid.*

⁵² M. Fiscor (2002) *op cit.* at 141.

⁵³ W.A. Copinger and F.E. Skone James (1999) *Copinger & Skone James on Copyright* at 1500.

In addition to the abuse of monopoly power, adequate provisions for licensing and supervision of CMOs are necessary to ensure that the collective administration of copyright is carried out in public interest.⁵⁴ However it has been noted that a check before approving the establishment of a CMO is not a sufficient guarantee in itself of the proper operation of the collective management system.⁵⁵ Therefore Fiscor and others have argued that competent public authorities should regularly supervise certain key elements of the collective management system, such as whether the actual activities correspond to the approved statutes whether the rules of collecting and distributing fees are correct; whether the costs of management administration are reasonable; and whether the distribution and transfer of remuneration in fact take place as prescribed.⁵⁶

In Kenya, prior to the year 2000, there was no legal and institutional framework for collective administration of copyright. The Copyright (Amendment) Act of 1992 defined a “licensing body” as “an organisation which has as its main object, or one of its main objects, the negotiation or granting of licenses in respect of copyright works”. Under this Act, such a licensing body was regulated by an ad hoc institution called the competent authority.⁵⁷ During this period, one such licensing body, Music Copyright Society of Kenya (MCSK) Limited, was the subject of numerous complaints by rights holders and users of musical works.⁵⁸ Among the complaints documented, it is reported that MCSK would pay royalties to unqualified people and fictitious members while the genuine members got very little.⁵⁹ It is also reported that the then MCSK administrator and some MCSK Board Members would solicit money from users in lieu of royalties.⁶⁰ Furthermore MCSK is reported to have been working contrary to the interests of its members by collaborating with pirates as well as the police and as a result infringing copies would go missing from police custody.⁶¹

The first comprehensive legal and institutional framework for collective administration was introduced in the Copyright Act No. 12 of 2001. The drafting and enactment of the revised Act

⁵⁴ D.J Gervais (2001) *op cit.* at 49.

⁵⁵ M. Fiscor (2002) *op cit.* at 143.

⁵⁶ *Ibid.*

⁵⁷ B. Sihanya (2003) *op cit.* at 5.

⁵⁸ M. Ouma (2009) *op cit.* at 91.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ M. Ouma (2009) *op cit.* at 91.

in 2001 was mainly intended to comply with the standards set under the WTO TRIPs Agreement of 1994 and the WIPO Internet Treaties of 1996.⁶² Section 3 of the Act establishes the Kenya Copyright Board (KECOBO), a state corporation whose mandate is the overall administration and enforcement of copyright and related rights in Kenya.⁶³ KECOBO is specifically mandated under Section 5(b) of the Act to license and supervise the activities of CMOs as provided for under the Act.⁶⁴ Part V of the Act specifically addresses collective administration of copyright. For a body to be licensed as a CMO by KECOBO it must meet the requirements set out in section 46(4) of the Act.

Since the enactment of this Act, four (4) distinct CMOs have been registered and are currently licensed to operate in Kenya, namely MCSK, KAMP, KOPIKEN and PRiSK.⁶⁵ There appears to be no local studies or research publications on the history and developments of these CMOs and how their activities are licensed and supervised by the State within the existing legal and institutional framework for collective administration of copyright.

1.6.3. Experiences from Nigeria and South Africa on Collective Administration of Copyright

According to the World Bank, Nigeria⁶⁶ and South Africa⁶⁷ are the leading economies in Africa with gross domestic products of \$522.6 billion and \$350.6 billion respectively against populations of 173.6 million and 52.98 million respectively whereas Kenya's GDP⁶⁸ stands at \$44.10 billion against a population of 44.35 million.⁶⁹ In the context of collective administration, the legal and institutional frameworks in Nigeria⁷⁰ and South Africa⁷¹ have undergone more developments than Kenya's framework.⁷²

⁶² B. Sihanya & M. Ouma (2010) *op cit.* at 10.

⁶³ S. 5 of the Copyright Act 2001. See also KECOBO (2007) "Guide to Copyright in Kenya", Kenya Copyright Board, Nairobi at 3; KECOBO (2008) "Copyright and the Music Industry in Kenya", Kenya Copyright Board, Nairobi at 8.

⁶⁴ This is the specific mandate referred to in the excerpt from the Former AG's speech quoted at the beginning of this Chapter.

⁶⁵ See Chapter 3 of this Project.

⁶⁶ World Bank (2013) Country Profile: Nigeria. Available at: <http://www.worldbank.org/en/country/nigeria>

⁶⁷ World Bank (2013) Country Profile: South Africa. Available at: <http://www.worldbank.org/en/country/southafrica>

⁶⁸ World Bank (2013) Country Profile: Kenya. Available at: <http://www.worldbank.org/en/country/kenya>

⁶⁹ *Ibid.*

⁷⁰ Blackfriars LLP (2008) Anarchy in the World of Collecting Societies in Nigeria: Implications for Copyright Protection of Foreign and Local Musical Works (part 1), January 2009 Volume 22 Issue 1 and Blackfriars LLP

In the Nigerian context, researchers such as Rotimi⁷³ sheds light on the legal and regulatory framework of collective management of rights in Nigeria. Rotimi's work is significant as it traces the evolution of CMOs in Nigeria, maps out the legal framework for collective management in Nigeria and then problematises and contextualises the regulatory challenges of collective management in Nigeria in the hope of providing lessons for the rest of Africa. A more detailed study of the copyright collective administration experience in Nigeria is offered in Chapter 4.

In the South African context, the Minister of Trade and Industry established the Copyright Review Commission (CRC) on 18 November 2010 to assess concerns and allegations about the CMOs model that is in place for the distribution of royalties to musicians and composers of music.⁷⁴ The CRC Report was completed in mid- 2012 and presented to the Trade and Industry Minister. As we shall see in this Chapter 4, the CRC Report is significant because of its analyses, findings and recommendations on the following issues: the need for regulation of all CMOs by the Registrar of Copyright in South Africa in light of the collapse of the South African Recording Rights Association Ltd (SARRAL);⁷⁵ the failure of all CMOs in South Africa to comply with the Collecting Society Regulations as well as applicable principles of sound corporate governance;⁷⁶ the thorny issue of the costs-to-royalty income ratio (i.e. administration costs as a percentage of total collections) of CMOs with a focus on the performance of the largest CMO, the Southern

(2009) Anarchy in the World of Collecting Societies in Nigeria: Implications for Copyright Protection of Foreign and Local Musical Works (part 2), February 2009 Vol. 22 Issue 2. Following the introduction of a legal framework for collective administration in 1992, there have been three legislative changes to the framework namely the Copyright (Collecting Societies) Regulations, 1993, the Copyright Amendment Act, 1999 and the Copyright (Collective Management Organisations) Regulation, 2007.

⁷¹ The South African Parliament enacted its first Copyright Act in 1916. South Africa's performing rights CMO, the Southern African Rights Management Organisation (SAMRO) was established in 1951, over thirty years prior to the establishment of MCSK in Kenya.

⁷² See chapter 4 of this project.

⁷³ O.O. Rotimi (2012) "Operation and Regulation of Copyright Collective Administration in Nigeria: Important Lessons for Africa", Published LL.M Research Project, University of South Africa.

⁷⁴ An important aspect of the CRC's terms of reference was to assess the effectiveness of the structure of collecting societies in South Africa, including those that belong to authors, composers, recording companies, musicians/artists and others. The CRC was required to make recommendations to improve the collective management of copyright. See Chapter 1.3 of the CRC Report on the Commission's Terms of Reference.

⁷⁵ *Ibid.*, at Chapter 7.

⁷⁶ *Ibid.*, at Chapter 6.

Africa Music Rights Organisation (SAMRO);⁷⁷ a comparative study conducted by the CRC in Brazil, France, India, Norway, Senegal, Switzerland and the United Kingdom (UK) on best practices in collective administration.⁷⁸

1.7 Justification and Significance of the Study

The main justification for this Study is that there is a scarcity of literature analysing the legal framework for collective management organisations in Kenya. In particular, no local study has to date been conducted with a view to identify gaps and suggest possible legislative and policy interventions in Kenya. It is hoped that the findings of this Project will contribute to legal knowledge in the area of collective management of copyright and would be usefully employed by legal practitioners, policy makers and key stakeholders keen on ensuring that the licensing and supervision of CMOs is both effective and efficient.

The study is significant in that it identifies and addresses several important shortcomings in the legal framework for licensing and supervision of CMOs with reference to neighbouring common law jurisdictions in Africa. This study will open a pathway into further scholarly investigations into other legal provisions relating to the collective administration of copyright that may have shortcomings.

1.8 Conceptual and Theoretical Framework of the Study

Two of the leading theoretical approaches to the study of intellectual property are the labour theory of property, springing from the writings of John Locke and the utilitarian theory originating from the ideas of Jeremy Bentham.⁷⁹ Locke's labour theory of property asserts that a person enjoys a natural right in the fruits of his labour in transforming raw materials (viewed as including facts and concepts) that are "held in common" into a finished product of enhanced

⁷⁷*Ibid.*, at Chapter 10.

⁷⁸*Ibid.*, at Chapter 14.

⁷⁹ William Fisher (2001) "Theories of International Property" in S. Munzer (ed) (2001) *New Essays in Legal and Political Theory of Property*. William M. Landes and Richard A. Posner, (1989) "An Economic Analysis of Copyright Law", Cambridge University Press at 2. Available at: <http://cyber.law.harvard.edu/people/tfisher/iptheory.pdf>

value, and the state has a duty to enforce the natural right that derives from the labour.⁸⁰ However, the principal problem with applying this Lockean labour theory to the field of intellectual property is that it does not self-explain why labour added to a resource “held in common” should entitle one to a property right in such resource; if “yes”, what is meant by “intellectual labour” and “held in common”; and how far should one's rights go in the fruits of his labour. To illustrate this so-called ‘problem of proportionality’ in the application of Lockean theory to the field of copyright law, Fisher writes:

“If I write a novel about a war between two space empires, may I legitimately demand compensation from people who wish to prepare motion-picture adaptations, write sequels, manufacture dolls based on my characters, or produce T-shirts emblazoned with bits of my dialogue? How far, in short, do my rights go? Locke gives us little guidance.⁸¹”

In light of the above, it is clear that the Lockean approach of property would not be a suitable analytical tool in the specific area of intellectual property under examination, namely collective management of copyright and related rights. Therefore this research project adopts the utilitarian approach to intellectual property.

The utilitarian theory posits that maximum benefit of the maximum members of the society should be guaranteed by the law in force and in the regulation there-under.⁸² Bentham stated that “utility” is the greatest happiness to the greatest number” therefore all laws had to be measured against this criterion of utility.⁸³ Utilitarians were passionate law reformers who wanted to change the outdated English legal system; therefore utility was the scientific basis for measuring the success of their legal reforms.⁸⁴

In the context of intellectual property law, society aims to maximise utility in the form of scientific and cultural progress by granting exclusive rights to authors and inventors as an incentive toward such progress, subject to the caveat that such rights are limited in duration so as

⁸⁰ William Fisher (2001) “Theories of International Property”, *op cit.* at 4.

⁸¹ *Ibid* at 28.

⁸² N.S Sreenivasulu (2013) *Law Relating to Intellectual Property*, Partridge, India at 15

⁸³ I.J Kroeze (2007) *Legal Philosophy*, University of South Africa Press, Pretoria at 61

⁸⁴ *Ibid.*

to balance the social welfare loss of monopoly exploitation.⁸⁵ It follows that copyright and related rights are devices created by statute to prevent the diffusion of information before the author has recovered profit to incentivise investing in creation or innovation.⁸⁶ According to utilitarian theory, copyright law provides the incentive of exclusive rights for limited duration to authors to motivate them to create socially and culturally viable works, thereby maximising social welfare.⁸⁷ Without this incentive, the theory states that authors might not invest the time, energy and resources need to create copyright works because these works might be used cheaply and easily by the public, eliminating authors' ability to profit from their works.⁸⁸

According to utilitarianism, the exclusive rights of authors and by extension CMOs restrict competition in protected works which allows the latter to charge a premium for commercial use of the works for a fixed period of time.⁸⁹ Once the term of protection expires, the rights holders and CMOs can no longer license for the use of the protected works. As a result, the society benefits since subsequent creators are not prevented from building on previously protected creations to generate new works.⁹⁰ With regard to collective administration of copyright, utilitarianism demands that an optimal balance is struck between, on one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and, on the other, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations.⁹¹ It follows that utilitarian law-making in the area of collective administration should be aimed at the maximisation of net social welfare.⁹²

⁸⁵ P.S. Menell (1998) "Intellectual Property: General Theories" in: Bouckaert, Boudewijn, De Geest, Gerrit (eds.) (2000) *Encyclopedia of Law and Economics*, Vol. 1, The History and Methodology of Law and Economics, Cheltenham, Edward Edgar, United Kingdom.

⁸⁶ A.D. Moor (2003) *Intellectual Property, Innovation and Social Progress: The Case Against Incentive Based Arguments* The Hamline Law Review, Vol. 26 at 602-630. Available at: SSRN.

⁸⁷ J.C. Fromer (2012) "Expressive Incentives in Intellectual Property", *Virginia Law Review* Vol. 98, No. 8, December 2012 at 4.

⁸⁸ *Ibid.*

⁸⁹ M.A. Lemley (1997) "The Economics of Improvement in Intellectual Property Law" *Texas Law Review*, Vol. 75 at 989.

⁹⁰ *Ibid.*

⁹¹ William Fisher (2001). *Theories of International Property*, in Munzer S. (ed). *New Essays in Legal and Political Theory of Property*. William M. Landes and Richard A. Posner, (1989) "An Economic Analysis of Copyright Law", 18 *J. Legal. Stud.* 325 Available at: <http://www.law.harvard.edu/faculty/tfisher/iptheory.html>.

⁹² *Ibid.*

Therefore the adequacy of the legal framework for collective administration will be measured against the following utilitarian cost-benefit analysis: the benefit to society of rights holders crafting valuable works offsets the costs to society of the incentives the law offers to these rights holders.⁹³

Using this utilitarian framework, this project shall examine whether the legal and institutional framework for collective administration facilitates not only the balanced and efficient exercise of exclusive rights by rights holders⁹⁴ but also offers advantages to users by enabling access to works in an organised manner and at reasonable rates.⁹⁵ Therefore this theoretical framework will greatly facilitate the analysis of the data gathered in this project.

1.9 Research Methodology

This research project relies on data collected from desk research.

In respect to the research questions of this project, the data collected includes published and unpublished records and materials including primary and subsidiary legislations, textbooks, judicial decisions, journal articles, periodicals, speeches, magazine articles, among other materials. This data was collected from various physical locations including the University of Nairobi Law Library, Kenya Copyright Board offices and MCSK Head Office. All electronic data was sourced from various online sites accessed through the University of Nairobi Online Library Portal, the National Council for Law Reporting website among other online sources. Copies of all the court documents filed in the MCSK deregistration case were obtained from the Registry at the High Court of Kenya in Nairobi. Finally, several informal interviews were conducted with the General Managers and Chief Executive Officers of the various CMOs as well as members of the CMOs and other relevant stakeholders.

⁹³ M.A. Lemley (1997) *op cit* at 996-997.

⁹⁴ T. Koskinen-Olson & N. Lowe (2012) *op cit* at 18.

⁹⁵ S. Alikhan & R.A. Mashelkar (2009) "Intellectual Property and Competitive Strategies in the 21st Century", Kluwer Law International, The Netherlands at 98.

1.10 Originality, Contribution and Scope of the Study

The current literature on copyright and related rights in Kenya has given little focus to the specific aspect of collective administration of copyright. In particular, no local studies have focussed on CMOs within the framework of collective administration and the importance of the role played by the State in licensing and supervision of CMOs. Therefore the originality in this study lies primarily in the selection of the area of law and the findings as presented and analysed.

This study is intended to contribute to the body of knowledge on collective administration of copyright. The unique contribution of this study lies in its critical analysis of the evolving legal and institutional framework for licensing and supervision of CMOs in Kenya.

The scope of this study is limited to examining three main gaps in the legal framework for collective administration of copyright which have arisen out of reported case law and media reports. It therefore follows that one limitation of this study is that no official data has been recorded and analysed from industry players and stakeholders on any other perceived gaps, problems and challenges in the legal framework that may be hindering the effective collective management of copyright and related right in Kenya.

1.11 Summary of the Research Project

The project is divided into five chapters.

Chapter 1 is an introduction to the topic of collective administration of copyright with a focus on the legal framework for licensing and supervision of CMOs. The problem surrounding the legislative and regulatory framework governing CMOs has informed the study's research questions, research objectives, hypotheses, assumptions and arguments. This chapter reviews literature from different jurisdictional contexts with a view to explore various legislative and regulatory frameworks for licensing and supervision of CMOs. This literature review forms the basis of the conceptual and theoretical framework of the study and the various jurisdictions considered will be analysed in greater detail in Chapter 4 of the study.

Chapter 2 addresses the first research question of this Project namely, the national and international legal and institutional framework for collective administration of copyright applicable to Kenya. On the national front, this Project analyses the effect of the Constitution, the Copyright Act and the Competition Act on collective administration generally and the regulation of CMOs in particular. At the international level, the Berne Convention, the TRIPs Agreement and other international instruments are analysed from a collective administration perspective.

Chapter 3 focuses on the second research question of this Study namely the development of collective management organisations throughout history, with a special focus on the evolution of Kenya's four CMOs, namely MCSK, KAMP, KOPIKEN and PRiSK. Through this chapter's analyses, several legislative gaps and institutional challenges are revealed that hamper the proper licensing and supervision of the activities of CMOs in Kenya.

Chapter 4 critically examines the experiences of Nigeria and South Africa in the area of collective administration. Thus this chapter deals with the third and final research question of this Project and explores useful legislative provisions in these two countries which may offer possible solutions to address the existing gaps in Kenya's legal framework.

The fifth and final chapter of this study gives a summary of the findings and recommendations of this study. From the findings of this study, the three research questions set out in chapter one are answered and the study seeks to either to confirm or disprove the research hypothesis. Finally this chapter recommends that the Copyright Act be reviewed for purposes of making useful amendments and that Regulations be made specifically on the licensing and supervision of CMOs.

CHAPTER 2: LEGAL FRAMEWORK FOR COLLECTIVE ADMINISTRATION OF COPYRIGHT IN KENYA

2.0 Introduction

This chapter seeks to contextualise the various national and international legal instruments that affect the collective administration of copyright in Kenya. On an international level, this project examines the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and other relevant international instruments. On a national level, this paper examines relevant provisions in the Constitution of the Republic of Kenya 2010 and the Copyright Act⁹⁶ and Copyright Regulations⁹⁷ and the Competition Act.⁹⁸

2.1. International Level

2.1.1 Berne Convention for the Protection of Literary and Artistic Works

The Berne Convention is an international agreement which sets out to harmonise the way that copyright and related rights are regulated at an international level.⁹⁹ The Convention is administered by the World Intellectual Property Organisation (WIPO) and was first adopted in 1886 as an agreement to honour the rights of all authors who are nationals of countries that are party to the Convention.¹⁰⁰

The UK became a party to the Berne Convention on December 5, 1887¹⁰¹ and as was the practice, it's adherence to Berne extended to Kenya and other British protectorates and colonies such as Nigeria, among others.¹⁰² Since its adoption in 1886, Berne has been updated seven

⁹⁶ No. 12 of 2001 (as amended)

⁹⁷ Copyright Regulations, 2004

⁹⁸ No. 12 of 2010

⁹⁹ See for instance, J.W. Chege (1978) *Copyright Law and Publishing in Kenya*, Kenya Literature Bureau at 98; M. Wekesa & B. Sihanya (2009) "Intellectual Property Rights in Kenya", *op. cit.* at 4, 8, 76 and 152.

¹⁰⁰ The UK Copyright Service (2004) "International copyright law - The Berne Convention", Available at: http://www.copyrightservice.co.uk/copyright/p08_berne_convention

¹⁰¹ See WIPO Official Website on WIPO-Administered Treaties, Contracting Parties - Berne Convention. Available at http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15

¹⁰² B. Sihanya (2009) *op cit* at 13.

times, most recently in 1979.¹⁰³ As of January 2014, one hundred and sixty seven (167) countries had signed the Berne Convention.¹⁰⁴ The Convention provides briefly for the collective management of copyright and related rights.¹⁰⁵

Article 5 of the Convention contains the principle of national treatment for authors. According to this principle, foreign rights holders ought to receive the same treatment as national rights holders.¹⁰⁶ In the context of licensing and supervision of CMOs, the relevant legal framework must ensure that CMOs collect and distribute all royalties equally on behalf of both their Kenyan members and their foreign affiliates.

Article 11*bis* and Article 13 of the Convention provide that it is a matter of national law-makers in the Berne member countries to determine and/or impose conditions under which exclusive rights under copyright and related rights may be exercised. In the Kenyan context, Chapter 2.2 explains how these provisions of Berne have given rise to a voluntary licensing system for collective management of copyright and related right through private non-profit companies called CMOs.

2.1.2 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)

The TRIPs Agreement is an international agreement administered by the World Trade Organization (WTO). It sets out minimum standards for intellectual property regulation as may be applied by nationals of WTO Members.¹⁰⁷ It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994 and came into effect on January 1, 1995.¹⁰⁸

¹⁰³ WIPO (2013) Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886), Available at: http://www.wipo.int/treaties/en/ip/berne/summary_berne.html

¹⁰⁴ The Republic of Kenya later acceded to the Berne Convention on June 11, 1993. See WIPO Official Website on WIPO-Administered Treaties, Contracting Parties - Berne Convention. Available at http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15

¹⁰⁵ See M. Fisor, Collective Management of Copyright and Related Rights at A Triple Crossroads: Should It Remain Voluntary or May It Be "Extended" or Made Mandatory, at 3-5

¹⁰⁶ See for instance, M.M. Frabboni, "Collective management of music rights: a test of competition and Industrial Organisation theories, Published PhD Thesis, Queen Mary University of London, 2009 at 109-110.

¹⁰⁷ WTO (2013) "Overview: the TRIPs Agreement" Available at: http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.

¹⁰⁸ *Ibid.*

It is important to note that TRIPS includes nearly all the conditions of the Berne Convention as is contained in Articles 9 through 14 of TRIPS.¹⁰⁹ Therefore, TRIPS effectively brought the laws of those WTO member states that had not signed the Berne Convention into harmony with the laws of those countries that are signatories to Berne.¹¹⁰ In the Kenyan context, the ratification of TRIPS required that Kenya's copyright laws be updated in order to be TRIPS-compliant.¹¹¹ This led to the enactment of Copyright Act of 2001, discussed in detail at Chapter 2.2.2 below.

2.1.3 International Obligations for CMOs

Currently, there exists a well-established global network of collective management organizations, and they are strongly represented by non-governmental organizations such as the International Confederation of Societies of Authors and Composers (CISAC)¹¹², the International Federation of Reprographic Reproduction Organisations (IFRRO), among others.¹¹³

MCSK is a member of CISAC, a non-governmental, non-profit organisation founded in 1926¹¹⁴ with its headquarters in Paris, France.¹¹⁵ By becoming a CISAC member, MCSK joined an international community of CMOs and is expected to comply with the CISAC Professional Rules

¹⁰⁹ J. Watal, *Intellectual Property Rights in the WTO and Developing Countries*, Kluwer Law International, 2001 at 210.

¹¹⁰ M. N. Ouma, "Enforcement of Copyright in the Music Industry: A Critical Analysis of the Legal and Institutional Framework on Enforcement in Sub Saharan Africa", Unpublished PhD Thesis, Queen Mary University of London, 2009 at 171 and 172

¹¹¹ A. Perullo & A.J. Eisenberg (2014) "Musical Property Rights Regimes in Kenya and Tanzania after TRIPS", Forthcoming in *SAGE Handbook of Intellectual Property* (Matthew David & Debora Halbert, eds.) (On file with author).

¹¹² M. Fiscor (2003) "Collective Management of Copyright and Related Rights at A Triple Crossroads: Should It Remain Voluntary or May It Be "Extended" or Made Mandatory?", *op. cit.* at. 8; See also Department of Trade and Industry (2011), "Copyright Review Commission Report", Republic of South Africa.at 40.

¹¹³ WIPO (1999) "Understanding Copyright and Related Rights", *op. cit.* at 4.

¹¹⁴ CISAC is the world's leading network of authors societies. As of CISAC's latest General Assembly, in June 2013, the organisation united 227 authors' societies and guilds in 120 countries, representing more than 3 million creators and publishers from all creative genres including music, audiovisual, film, drama, literature, and visual arts. See CISAC official website: www.cisac.org/

¹¹⁵ Currently CISAC's operations are spearheaded from its Regional Office in Burkina Faso. Mr. Balamine Ouattara was appointed as CISAC Africa Region Director with effect from March 1, 2013. See: <http://ipkenya.wordpress.com/2013/03/27/balamine-ouattara-new-regional-director-for-african-copyright-societies/>

for Musical Societies¹¹⁶ and CISAC Binding Resolutions¹¹⁷ which set out specific obligations with which all member CMOs of CISAC must comply.¹¹⁸

KOPIKEN is a member of IFRRO, an independent organisation established in 1988¹¹⁹ with its headquarters in Brussels, Belgium.¹²⁰ IFRRO's mandate is to facilitate, on an international basis, the collective management of reproduction and other rights relevant to copyrighted works through the co-operation of national Reproduction Rights Organisations (RROs). Unlike CISAC, IFRRO's Code of Conduct is voluntary in nature and it embodies the principles and values which IFRRO believes all RROs should achieve and uphold, including KOPIKEN.¹²¹

2.2 National Level

2.2.1 The Constitution of the Republic of Kenya 2010

According to Article 2 of the Constitution, the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. Clause 6 of this Article provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya¹²² which includes Berne and TRIPs as discussed in Chapter 2.1 above.¹²³

Article 10 of the Constitution states that the national values and principles of governance binds all State organs, State officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements public policy decisions. Clause 2 of this Article provides non-exhaustive list of national values and principles of governance including good governance, integrity, transparency and accountability. Within the context of licensing and supervision of CMOs, KECOBO as an organ or office of state is bound by Article 10 of the

¹¹⁶ Last amended on 5th June 2012. Available online here:
<http://www.cisac.org/CisacPortal/initConsultDoc.do?idDoc=23722>

¹¹⁷ *Ibid.*

¹¹⁸ See U. Uchtenhagen (2005) "The Setting-up of New Copyright Societies - Some Experiences and Reflexions", World Intellectual Property Organization, Geneva at 19.

¹¹⁹ See IFRRO official website: www.ifrro.org/

¹²⁰ Currently IFRRO African Development Committee sits in Zimbabwe. Mr. Greenfield K. Chilongo from the Harare-based national RRO, ZIMCOPY, serves at the Chairperson. See: <http://www.ifrro.org/node/1145>

¹²¹ See IFRRO official website: <http://www.ifrro.org/node/25>

¹²² See for instance *Beatrice Wanjiku & another v Attorney General & another* [2012] eKLR, at 6.

¹²³ According to WIPO, Kenya ratified the Berne Convention on June 11, 1993. Thereafter, Kenya ratified the TRIPs Agreement on January, 1 1995. Available online here: <http://www.wipo.int/wipolex/en/profile.jsp?code=KE>

Constitution; therefore this Article ought to guide how KECOBO carries out its statutory function of licensing and supervision of CMOs in Kenya.

Article 11(2)(c) of the Constitution states that the State shall promote the intellectual property rights of the people of Kenya. This article covers works of copyright as forms of national and cultural expression terming them as “the foundation of the nation” and “the cumulative civilization of the Kenyan people and nation”.

Article 40 of the Constitution provides for protection of the right to property. It provides that every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. Clause 5 of this Article states that the State shall support, promote and protect the intellectual property rights of the people of Kenya¹²⁴. Out of an abundance of precaution, Article 260 of the Constitution defines “property” as contained in Article 40 to include any vested or contingent right to, or interest in or arising from intellectual property. Therefore just like any other tangible property, copyright and related rights are construed as property and as such copyright owners, copyright assignees, copyright licensees are recognised as holders of rights.

It may be argued that in licensing and supervising CMOs, KECOBO is giving effect to Article 11(2)(c) and Article 40 of the Constitution by supporting, promoting and protecting the rights under copyright assigned to CMOs. This “constitutionalisation” of intellectual property law in Kenya is unprecedented and significant¹²⁵ as it empowers CMOs and their respective members i.e. the rights holders to demand that KECOBO acts positively to protect their rights under copyright. However the intellectual property rights controlled by CMOs as guaranteed by the Constitution are not absolute and must be balanced against other competing rights in the Bill of Rights.¹²⁶

¹²⁴ In contrast to the Pre-2010 Constitution, Sihanya opines that there is a paradigm shift in the Constitution of Kenya 2010 which extends protection beyond real property to intellectual property, innovation and technology transfer. See B. Sihanya (2011) "Intellectual Property Enforcement in Kenya: Challenges and Prospects", *op.cit.* at 4.

¹²⁵ *Ibid.*

¹²⁶ See for instance, *Patricia Asero & 2 others v Attorney General* [2012] eKLR, at para 87.

Article 36 of the Constitution deals with freedom of association. It provides that every person has the right to form, join or participate in the activities of an association of any kind.¹²⁷ In the context of copyright collective administration, this Article may be construed to allow the formation of CMOs of any kind for purposes of managing rights. This Article further provides that a person shall not be compelled to join an association of any kind.¹²⁸ Finally, this Article provides that registration of an association may not be withheld or withdrawn unreasonably; and that there shall be a right to have a fair hearing before a registration is cancelled.¹²⁹

In the context of licensing and supervision of CMOs, it may be argued that the rights holders of Kenya are free to come together and form as many CMOs as they wish and that the registration or non-registration of these CMOs must be done in a manner that is consistent with the Constitution, in particular Article 36 as above.

Article 47 of the Constitution provides for fair administrative action. It states that every person has the right to administrative action that is expeditious,¹³⁰ efficient,¹³¹ lawful, reasonable and procedurally fair. The decision to grant, refuse, renew or withdraw the registration of CMOs is clearly an administrative action¹³² and therefore it must conform to the requirements of this Article.

In the context of licensing and supervision of CMOs, it has been argued that the several common law doctrines and principles of administrative law are applicable, including ultra vires, abuse of discretion, mala fides, natural justice, error of law on the face of the records, jurisdictional error as well as reasonableness, proportionality and the principle of legitimate expectation.¹³³

¹²⁷ Art.36(1) of the Constitution.

¹²⁸ *Ibid*, at Art. 36(2).

¹²⁹ *Ibid*, at Art. 36(3).

¹³⁰ Within the context of licensing and supervision of CMOs, it is submitted that the Act ought to be amended to include clear time frames for KECOBO to carry out its licensing function i.e. including granting of certificates of registration and renewal of certificates of registration.

¹³¹ *Ibid*.

¹³² Defined generally as the exercise of any power or performance of any function provided by law. See P.L.O. Lumumba (2006) *Judicial Review in Kenya 2nd Edition*, Law Africa Publishers, at 17- 19.

¹³³ These arguments arose prominently in the MCSK deregistration case where KECOBO's decision to revoke MCSK's license to operate as a CMO was called into question as a violation of the MCSK's constitutional rights inter alia, the right to fair administrative action.

Furthermore, clause 2 of Article 47 provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. However, the Act does not make any provision for KECOBO to give written reasons to CMOs when it carries out any actions in connection to its licensing and supervision function of CMOs.

2.2 Copyright Law and Regulations

Kenya enacted its first domestic Copyright Act in 1966.¹³⁴ Since 1966, there have been several legislative changes in the copyright law framework in 1975,¹³⁵ 1982,¹³⁶ 1989,¹³⁷ 1992,¹³⁸ 1995,¹³⁹ 2000,¹⁴⁰ 2001,¹⁴¹ 2004,¹⁴² 2011¹⁴³ and 2012.¹⁴⁴ For purposes of this Research Project, we will focus on the legislative changes recorded in 1992, 2001, 2004 and 2012 as they have a direct impact on the topic of collective administration of copyright in Kenya.

2.2.1 The Copyright (Amendment) Act, 1992

The 1992 Act is significant in the context of collective administration of copyright as it defines the Competent Authority and sets out its functions. This amorphous body is a legacy of the Berne Convention which proposed its establishment and left the specifics to individual member states.¹⁴⁵ Therefore Kenya sought to domesticate Article 11*bis* and Article 13 of Berne in this respect however the Copyright Act of 1966 did not provide specifics¹⁴⁶ on the matter of the competent authority.

¹³⁴ Chapter 130 of the Laws of Kenya.

¹³⁵ The Copyright Act, 1975, Act No. 3 of 1975.

¹³⁶ The Copyright (Amendment) Act, 1982, Act No. 5 of 1982.

¹³⁷ The Copyright (Amendment) Act, 1989, Act No. 14 of 1989.

¹³⁸ The Copyright (Amendment) Act, 1992, No. 11 of 1992.

¹³⁹ The Copyright (Amendment) Act, Act No. 9 of 1995.

¹⁴⁰ The Copyright (Amendment) Regulations, 2000 LN 125/2000.

¹⁴¹ The Copyright Act, No.11 of 2001.

¹⁴² The Copyright Regulations, 2004.

¹⁴³ The Copyright (Amendment) Regulations, 2011.

¹⁴⁴ The Copyright (Amendment) Act, 2012.

¹⁴⁵ B. Sihanya (2009) *op cit* at 4.

¹⁴⁶ *Ibid*

Section 17 of the 1992 Act defines the competent authority to mean an authority of not more than three persons appointed by the Attorney-General for the purpose of exercising jurisdiction under this Act whenever any matter requires to be determined by it.¹⁴⁷ The Section also defines a “licensing body” to mean an organisation which has as its main object, or one of its main objects, the negotiation or granting of licenses in respect of copyright work.¹⁴⁸

In the context of collective administration, section 17 empowers the competent authority to determine the reasonableness of licensing practices of a licensing body, including the mode of collection of license fees from members of the public, tariffs established for various categories of users, among others.¹⁴⁹

2.2.2 The Copyright Act No. 12 of 2001

The Copyright Act¹⁵⁰ establishes KECOBO, whose mandate is the overall administration of copyright and related rights in Kenya. KECOBO was previously a section within the office of the Department of the Registrar General, Office of the Attorney General.¹⁵¹ The Board was officially launched on July 23, 2003¹⁵² but started its full operations in August 2006.¹⁵³ However, according to KECOBO, it was only from the year 2007 that it assumed its statutory roles of licensing and supervision of CMOs.¹⁵⁴

¹⁴⁷ **Appointment of Competent Authority and Duties of such Authority**

17. (1) In any case where it appears to the competent authority that a licensing body –

(a) is unreasonably refusing to grant licenses in respect of copyright; or

(b) is imposing unreasonable terms or conditions on the granting of such licenses

the competent authority may direct that, as respect the doing of any act relating to a work with which the licensing body is concerned, a license shall be deemed to have been granted by the licensing body at the time the act is done provided the appropriate fees fixed by the competent authority are paid or tendered before the expiration of such period or periods as the competent authority may determine.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ The Act was passed by Parliament in December 2001 and came into force on 1st February 2003. For a detailed account of the history of copyright legislation in Kenya, see J.W. Chege (1978) *Copyright Law and Publishing in Kenya*, Kenya Literature Bureau at 97-123.

¹⁵¹ M. Ouma (2006) “Public and Private Institutions in the Administration of Intellectual Property Rights in Kenya”, *op cit.* at 5-6.

¹⁵² An excerpt from the Attorney General’s speech at KECOBO’s launch can be found in chapter 1 of this research project.

¹⁵³ See Replying Affidavit sworn by KECOBO Chief Legal Counsel in *Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya*, *op. cit.*

¹⁵⁴ *Ibid.*

As mentioned above, Section 5(b) of the Act provides that KECOBO shall license and supervise the activities of collective management organisations as provided for under Part VI of the Act, which deals with collective administration of copyright.

Section 46(1) of the Act makes it mandatory for any person or association of persons seeking to commence or carry on the business of a copyright collecting society to obtain a certificate of registration granted under the Act. It is submitted that this section is now subject to Article 36 of the Constitution on freedom of association. Clause 3 of this Article provides that registration may not be withheld or withdrawn unreasonably; and that there shall be a right to have a fair hearing before a registration is cancelled.

Section 46(2) provides that the applications for CMO registration must be accompanied with the prescribed fees and that once the application is approved, KECOBO shall declare the applicant as a CMO for all relevant copyright owners or for such classes of relevant copyright owners. Section 46(3) makes it clear that every certificate of registration for CMOs shall be valid for a period of twelve months from the date of issue unless cancelled. Section 46(4) provides the criteria under which KECOBO may approve any body's application for registration as a CMO. The requirements include: 1) registration as a company limited by guarantee; 2) non-profit making motive; 3) rules and regulations that are in the best interests of the members; 4) collection and distribution of royalties as principal objectives and regularly audited accounts. Section 46(5) of the Act is clear that that approval of a CMO shall not be given to another society in respect of any class of copyright owners if the existing approved CMO functions to the satisfaction of its members. Section 46(6) of the Act provides that KECOBO may, where it finds it expedient, assist in establishing a CMO for any class of copyright owners.

Section 46(9) of the Act states that KECOBO may by notice in the Gazette deregister a CMO if four conditions are found to exist within the latter's operation and management structures¹⁵⁵. These four conditions for deregistration are as follows: a) the CMO is not functioning adequately

¹⁵⁵ S. 46(9) of the Act was applied for the first time by KECOBO to deregister the Music Copyright Society of Kenya (MCSK) as a collecting society for composers, authors and publishers of music with effect from April 1, 2011 through Kenya Gazette Notice 5093 of May 6 2011. In doing so, KECOBO stated that MCSK had not complied with paragraphs (a) and (c) of this section. However, the Gazette Notice erroneously refers to paragraphs (b) and (c) of the section.

as a collecting society; b) the CMO is not acting in accordance with its Memorandum and Articles of Association or in the best interests of its members; c) the CMO has altered its rules so that it no longer complies with subsection 4 of this section and; d) the CMO has refused or failed to comply with any of the provisions of this Act.

From the outset, the proper interpretation of this section has proven to be problematic. It may be argued that this section provides a CMO may only be deregistered where KECOBO is satisfied that that all four conditions are present. However in the MCSK deregistration case, KECOBO took the position that the presence of any two of the four conditions is sufficient to deregister a CMO.¹⁵⁶

2.2.3 The Copyright Regulations, 2004

Under section 49 of the Copyright Act 2001, the Attorney General (AG) has the powers to make regulations for the better carrying out of the provisions of the Act. In exercise of these powers, the AG made the Copyright Regulations 2004. In the context of collective administration, sections 15, 16, 17 and 18 of the Regulations are of great importance.

Section 15 of the Regulations clarifies the procedures and forms to be used when a company limited by guarantee seeks to apply to KECOBO for registration as a CMO under the Copyright Act. In addition, this section provides a list of documents to accompany the statutory application. These accompanying documents are produced so that KECOBO can examine whether the applicant is in compliance with the statutory requirements for registration as a CMO. This section also provide for several key statutory forms such as the certificate for registration of collecting society,¹⁵⁷ application for renewal of registration of a collecting society¹⁵⁸ and the certificate of renewal of registration of a collecting society.¹⁵⁹

¹⁵⁶ *Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya, op. cit.* No written reasons were given by KECOBO to MCSK or to the public explaining why the Board relied on only two of the four grounds to deregister MCSK.

¹⁵⁷ Form No. CR13

¹⁵⁸ Form No. CR14

¹⁵⁹ Form No. CR15

Section 16 of the Regulations provides the form and accompanying documents to be submitted by each registered CMO within three months after the end of each financial year. These Annual Reports and Audited Accounts are used by KECOBO to determine the overall performance of the CMO during the year. Key performance indicators may include the total amount of royalties collected and distributed to the CMO's members vis-à-vis the total amount of money spent the CMO on administration and for all its operations.¹⁶⁰ Other factors may include the growth of the CMO's membership and the nature of its activities through the year. Sections 17 and 18 of the Regulations set out the forms and procedures to be used when making applications to the competent authority.

2.2.4 The Copyright (Amendment) Act, 2012

With the enactment of the Statute Law (Miscellaneous Amendments) Bill 2012, four sections of the Copyright Act 2001 were amended, namely sections 15, 30, 36 and 42. For the purposes of this project, the amendments to section 30 are crucial as they directly impact the collective administration of copyright particularly related rights.

The insertion of a new section 30A has introduced the right to equitable remuneration for performers and producers of sound recordings to acknowledge the essential contribution of performers and producers of sound recordings in the creation of recorded music.¹⁶¹ The rights to equitable remuneration are the rights of performers and producers of sound recordings to be paid fairly for the broadcast and communication to the public of their works.¹⁶²

It is important to note that as a result of the enactment of section 30A, KAMP and PRISK claim to have the legal authority to issue a joint compulsory license to users to pay KAMP and PRISK

¹⁶⁰ S. 16(3) of the Regulations

¹⁶¹ KAMP (2014) "What is equitable remuneration?", Frequently Asked Questions (FAQ's), Kenya Association of Music Producers Official Website. Available at: <http://www.kamp.or.ke/?portfolio=faqs>. See also PRISK official website available at: <http://prisk.or.ke/faqs.html>

¹⁶² *Ibid.*

as long as any of the related rights in the works they control are exploited within the territory of Kenya.¹⁶³

2.3 Competition Act No. 12 of 2010

The Competition Act was assented to by the President of the Republic on December 30, 2010 and came into force on August 1, 2011. Its purpose is to promote and safeguard competition in the national economy, it also provides for the establishment, powers and functions of the Competition Authority of Kenya (CAK) and the Competition Tribunal.¹⁶⁴

The object of this Act is therefore to enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya in order to increase efficiency, promote innovation, protect consumers and create an environment conducive for investment, both foreign and local among other goals.¹⁶⁵

In the context of licensing and supervision of CMOs, section 46(5) of the Copyright Act states that there can be only one CMO in respect of any class of rights and category of works thereby allowing existing CMOs to flourish as de jure monopolies. Therefore, from a competition law perspective, CMOs occupy a dominant market position¹⁶⁶ in at least two respects: (1) towards the users of protected works who may have just one legitimate supplier of licences, and (2) towards the individual owners of protected works who may have no alternative provider of a collective management infrastructure.¹⁶⁷

In the context of the CMO-user relationship, Kenya's competition law can play an important role in controlling the discretion of CMOs in granting licenses as well as imposing certain terms and

¹⁶³ *Ibid.* See also Oraro & Company Advocates (2014) "Recent Developments in Copyright and Related Rights in Kenya", Oraro Blog. Available at: <http://blog.oraro.co.ke/2014/02/recent-developments-in-copyright-and-related-rights-in-kenya/>

¹⁶⁴ See short title of the Act

¹⁶⁵ See S.3 of the Act

¹⁶⁶ See S. 2 read with S.4 of the Act.

¹⁶⁷ M. Kretschmer (2002), "The failure of property rules in collective administration: rethinking copyright societies as regulatory instruments", at 1. Available online at: http://www.cippm.org.uk/pdfs/kretschmer_eipr_032002.pdf

conditions on licenses granted, including the setting of tariffs.¹⁶⁸ In the event of a conflict between the provisions of the Competition Act and the provisions of the Copyright Act with regard to matters concerning competition and consumer welfare, the provisions of the Competition Act shall prevail.¹⁶⁹ Furthermore, the Competition Act requires KECOBO and CAK to cooperate, share information and jointly address all matters concerning competition in accordance with the principles of the Competition Act.¹⁷⁰

2.4 Conclusion

Following the promulgation of the 2010 Constitution, there is a positive obligation on KECOBO, as the state regulator of CMOs, to carry out its functions in a manner that supports, promotes, and protects the copyright and related rights of the Kenyan people. In this regard, KECOBO is required to work closely with other state organs including the Registrar of Companies under the State Law Office and the Competition Authority of Kenya in order to adequately supervise the activities of CMOs. Apart from the Copyright Act which establishes KECOBO and empowers it to regulate CMOs, there are several other national laws that play an important role in the licensing and supervision of CMOs in Kenya. In this regard, competition law protects users as consumers and ensures that the activities of CMOs are in the best interests of rights holders.

From an international perspective, the activities of CMOs must be guided by the Berne Convention as well as the TRIPS Agreement. However, given the generality of international law provisions relating to collective management of copyright and related rights, it would be beneficial for national governments to consider the adoption of a specialised international treaty to set minimum standards on CMO-related matters under the auspices of WIPO.¹⁷¹

¹⁶⁸ For a European perspective, see M. Frabboni (2009) "Collective Management of Music Rights: A Test of Competition and Industrial Organisation Theories", *op. cit.* at 118.

¹⁶⁹ See S. 5(2) of the Act.

¹⁷⁰ *Ibid.*, at S. 5(3).

¹⁷¹ See A. Kumi-Atiemo (2009) "Collective Management of Copyright and Related Right in Music: A Case Study of the United Kingdom and Ghanaian System" *op cit.* at 39 where the author proposes the adoption of a "WIPO Collective Management Organisation Treaty (WCMOT)" to be spearheaded by WIPO and CISAC for CMO operations.

In the specific case of MCSK and KOPIKEN, CISAC and IFRRO have set out international standards, requirements and best practices for collective management of copyright. However, it would be advisable for the State to consider MCSK and KOPIKEN's international obligations as a source of information on these CMOs' performance and state of operations. This information could also prove useful to KECOBO when setting terms and conditions for the CMO license, which will be discussed in the next chapter.

CHAPTER THREE: HISTORICAL DEVELOPMENT OF COLLECTIVE MANAGEMENT ORGANISATIONS IN KENYA

3.0 Introduction

This chapter seeks to contextualise and problematize the collective administration of copyright from its origins in France to its development in Kenya. Presently the collective management of copyright and related rights has become highly important for linking rights holders and users of their works. In the Kenyan context, there are currently four registered and licensed CMOs whose historical backgrounds and present operations shall be reviewed in order of the date of incorporation at the Registrar of Companies.

3.1 The Origin

In the year 1777, it is said that an influential French playwright named Pierre-Augustin Caron de Beaumarchais assembled twenty two of the most creative writers of his time to discuss the collective protection of their works which were being exploited by theatres without the authors receiving any remuneration.¹⁷² This meeting led to the formation of a collective known as the French Society of Dramatic Authors or *Societe des auteurs dramatiques (SACD)*.¹⁷³ However, the establishment of the first fully fledged CMO was as a result of a legal battle in 1847 between a Parisian “cafe-concert” called “Ambassadeurs” and two composers Paul Henrion and Victor Parizot and a writer, Ernest Bourget.¹⁷⁴ This successful case by the Bourget and the two composers led to the formation of the *Societe des auteur, compositeurs et editeurs de musique (SACEM)* in 1850, the world’s first and oldest CMO to-date.¹⁷⁵

¹⁷² M. Fiscor (2002) “Collective Management of Copyright and Related Rights”, World Intellectual Property Organization, Geneva at 18.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid* at 19. Fiscor explains that the Henrion, Parizot and Bourget saw a flagrant contradiction in the fact that the latter had to pay for their seats and meals in the "Ambassadeurs" yet they were not paid for the public performance of their works by the orchestra at the venue in question. Therefore Bourget and the two composers took the brave and logical decision that they would pay as long as they were not paid as well. It is reported the court ruled in favour of Bourget and the two composers and ordered "Ambassadeurs" to pay a substantial amount of fees.

¹⁷⁵ *Ibid.*

Therefore the establishment of the first CMO predates the adoption of the Berne Convention for the Protection of Literary and Artistic Works of 1886.¹⁷⁶ Following the adoption of the Berne Convention, which recognises the public performance as a principal feature of the protection to be afforded to all authors from the Berne Union countries, it became apparent to authors in many other countries that in practice it was impossible to safeguard such a right on an individual basis.¹⁷⁷

For purposes of this research project, it is important to note that the Performing Right Society (PRS) based in the United Kingdom (UK) was formed in 1914.¹⁷⁸ At the time of the formation of PRS, Kenya was a British Protectorate and thereafter became a British Colony in 1920.¹⁷⁹ The UK Copyright Acts of 1911 and 1956 were applied in Kenya by virtue of the reception clause under the English East African Order in Council of 1897.¹⁸⁰ Therefore PRS was responsible for the collective management of copyright throughout the British Empire, including Kenya.¹⁸¹ Between 1911 and 1983, performing rights CMOs began to sprout from all over the world. These included ASCAP (1914) in the United States,¹⁸² SUIA (1923) in Switzerland,¹⁸³ APRA (1926) in Australia,¹⁸⁴ TONO (1928) in Norway,¹⁸⁵ SESAC (1930)¹⁸⁶ and BMI (1939)¹⁸⁷ in the United States, JASRAC (1939) in Japan,¹⁸⁸ among others. In Africa, the first CMOs were SAMRO (1961) in South Africa,¹⁸⁹ MCSK (1983) in Kenya and MCSN (1984) in Nigeria.¹⁹⁰

¹⁷⁶ Hereafter referred to as the Berne Convention. This convention is the bedrock of the international copyright law system.

¹⁷⁷ *Ibid.*

¹⁷⁸ The history of the PRS actually dates back to 1910 with the formation of the Mechanical Copyright Licences Company (Mecolico) which is later merged with the Copyright Protection Society (CPS) merge to form the Mechanical-Copyright Protection Society (MCPS). In 1998, MCPS and PRS completed their operational alliance agreement under one management team - The MCPS-PRS Alliance, which is later branded as PRS for Music. Full history of PRS is available at: <http://www.prsformusic.com/aboutus/ourorganisation/ourhistory/Pages/default.aspx>

¹⁷⁹ N. Swainson (1980) *The Development of Corporate Capitalism in Kenya, 1918-77*, University of California Press, United States of America at 22.

¹⁸⁰ B. Sihanya & M. Ouma (2010) "Access to Knowledge in Africa: The Role of Copyright": "Kenya", African Copyright and Access to Knowledge (ACA2K) project at 86.

¹⁸¹ *Ibid.*

¹⁸² See the Official Website of ASCAP. Available at : <http://www.ascap.com/about/>

¹⁸³ See the Official Website of SUIA. Available at: <http://www.suisa.ch/en/suisa/the-society/brief.html>

¹⁸⁴ See the Official Website of APRA. Available at : <http://www.apraamcos.com.au/about-us/what-we-do/>

¹⁸⁵ See the Official Website of TONO. Available at: <http://www.tono.no/english/>

¹⁸⁶ See the Official Website of SESAC. Available at: <http://www.sesac.com/About/About.aspx>

¹⁸⁷ See the Official Website of BMI. Available at: <http://www.bmi.com/about>

¹⁸⁸ See the Official Website of JASRAC. Available at: <http://www.jasrac.or.jp/ejhp/about/history.html>

¹⁸⁹ See the Official Website of SAMRO. Available at: <http://samro.org.za/about-SAMRO>

¹⁹⁰ See the Official Website of MCSN. Available at: <http://mcsnigeria.com/mcsn/about-mcsn.html>

3.2 Music Copyright Society of Kenya (MCSK)

It is said that the 1980s in Kenya witnessed the formation of several new music-based organisations, which were to function as vehicles for putting forward the demands of interest groups on the Kenyan popular music scene.¹⁹¹

On March 4, 1983, MCSK was established to take over the rights to collect and distribute copyright royalties, a monopoly previously enjoyed by PRS.¹⁹² MCSK was intended to be a national society of composers, authors and publishers of musical works as opposed to the existing Musicians Performing Rights Society of Kenya (MPRSK).¹⁹³ Therefore once MCSK was established, it took over the functions that were previously handled by the PRS and the MPRSK under a PRS-MPRS Collaboration Agreement signed on January 1, 1981.¹⁹⁴

MCSK was incorporated under the Companies Act¹⁹⁵ as a Company Limited by Guarantee under incorporation number C.5/83.¹⁹⁶ It is a non-profit making CMO whose main mandate is to collect royalties in public performance,¹⁹⁷ reproduction¹⁹⁸ and broadcasting, on behalf of its members¹⁹⁹ and to distribute the same to its members based on certain agreed rules.²⁰⁰ MCSK also represents in Kenya the interests of other similar performing and mechanical rights societies worldwide through reciprocal agreements.²⁰¹

Between 1984 and 2001, all amendments to the Copyright Act did not provide an adequate framework for regulation of CMOs other than the provisions relating to licensing bodies and the competent authority under the Copyright (Amendment) Act, 1992.²⁰² As a result, Kenyan rights holders frequently complained through the media about non-payment of royalties. The earliest

¹⁹¹ K. Malm and R. Wallis (1992) *Media Policy and Music Activity*, Routledge, London at p. 86.

¹⁹² *Ibid.*

¹⁹³ S.N. Ndemange (1984) "Royalty Payment", A letter written to Mr. Habel Mwalumba Kifoto on March 1st 1984 by S.N. Ndemange the then MCSK General Manager. Available on file with the author.

¹⁹⁴ *Ibid.*

¹⁹⁵ Chapter 486 of the Laws of Kenya.

¹⁹⁶ See Certificate of Incorporation of MCSK dated March 4, 1983.

¹⁹⁷ See *Avenue Service Station (1997) Ltd & 9 others v. Music Copyright Society of Kenya & 2 others* [2012] eKLR

¹⁹⁸ See *John Boniface Maina v. Safaricom Limited* [2013] eKLR

¹⁹⁹ See *Music Copyright Society of Kenya v. Safaricom Limited & another* [2010] eKLR

²⁰⁰ See the Official Website of MCSK. Available at: www.mcsk.or.ke/

²⁰¹ See Clause 3(b) of MCSK Memorandum of Association.

²⁰² See Chapter 2.2.1 of this project.

such complaint was on February 20, 1984 in an article titled "Musicians Complain of Royalties" published in the Standard newspaper.²⁰³ In this article, musicians who were members of MPRSK were complaining that the license fees collected on their behalf under the collaboration agreement with PRS were not being paid out by MCSK.²⁰⁴

Between 2001 and 2008, rights holders continued to complain about the distribution of royalties by MCSK.²⁰⁵ In addition, there were several court cases involving MCSK and various categories of copyright users, where the latter accused MCSK of harassment, intimidation and coercion. The earliest such case is the Klub House case²⁰⁶ where MCSK sought orders from the court to restrain Klub House, a bar and restaurant, from playing music at two of its premises without a prior license from MCSK. Klub House contended that MCSK was not the sole copyright licensing body for musical works in Kenya.

In dismissing MCSK's case against Klub House, the court ruled that MCSK cannot 'claim to be the sole licensed authority which enforces copyrights of all musical works.'²⁰⁷ The learned judge Jeanne Gacheche²⁰⁸ found that MCSK had not furnished the court with executed assignments to support its claim. Sihanya and Ouma appear to suggest that the court in this ruling failed to properly address the legal issues at hand and that such decision, unless overruled by the highest court, would affect subsequent cases.²⁰⁹ However from a jurisprudential perspective, the ruling in the Klub House appears to have been overruled and overtaken by legislative developments in

²⁰³ S.N. Ndemange (1984) "Royalty Payment" *op cit*

²⁰⁴ *Ibid.*

²⁰⁵ Daily Nation (2001) "Artistes Dismiss Society Directors", January 31, 2001. Available at: <http://allafrica.com/stories/200101310247.html>, O. Ogodo (2002) "Ignore Dismissal Order, MCSK Tells Musicians" The Standard March 25, 2002. Available at: <http://allafrica.com/stories/200203250098.html>, Daily Nation (2001) "Music Society Back To Work", February 6, 2001. Available at: <http://allafrica.com/stories/200102060180.html>, P. Mwaniki (2004) "Pay Us for Our Songs, Say Artistes", Daily Nation August 03, 2004. Available at: <http://allafrica.com/stories/200408030084.html>, T. Kamuzu Banda (2007) "Musicians Strive to Earn a Fair Share of What They Produce", Daily Nation April 07, 2007. Available at: <http://allafrica.com/stories/200704060797.html>, J. Kariuki (2007) "Time for some order ... and more income" Nation Weekend November 11, 2007. Available at: <http://www.nation.co.ke/lifestyle/weekend/-/1220/219068/-/csm4h6/-/index.html>

²⁰⁶ *Music Copyright Society of Kenya v. Parklands Shade Hotel T/a Klub House* [2000] eKLR

²⁰⁷ *Ibid.*

²⁰⁸ It is interesting to note that the Honourable Lady Justice Gacheche will later preside over the MCSK deregistration case in 2011 where she makes crucial orders in favour of MCSK against KECOBO. For more details, see 3.2.4 below.

²⁰⁹ B. Sihanya & M. Ouma (2010) "Access to Knowledge in Africa: The Role of Copyright": "Kenya" *op cit.* at 104.

Kenya's copyright law under which MCSK is registered and licensed as the sole CMO representing authors, composers and publishers of musical works.²¹⁰

In the 2004 Registrar of Companies case,²¹¹ two individuals, including one member of MCSK had sworn affidavits in an application by the Registrar seeking court orders under section 166(b) of the Companies Act. Therefore the application was for the appointment of inspectors to investigate the affairs of MCSK and to report back to the court in such a manner as the court may direct. In reply, MCSK raised a preliminary objection claiming that the evidence placed before the court was superfluous, misplaced and did not disclose the sources of the information. The court agreed with the Registrar that an application brought by the Registrar of Companies under section 166 of the Companies Act may be further supported by an affidavit of a member of a company, particularly for purposes of adducing evidence as to the matters envisaged under section 166 subsection (b)(i)(ii)(iii) perpetrated by the principal officers of a company.²¹² However, the court ultimately ruled in favour of MCSK and held that that the affidavits were defective as the deponents failed to disclose those matters within the latter's own knowledge as opposed to matters of information and matter of belief and the grounds of such beliefs.²¹³ In this regard, the court found that it was not conceivable that all the matters deposed by the MCSK member were within his own personal knowledge.²¹⁴

On October 3 2008, KECOBO declared MCSK a CMO licensed to collect royalties on behalf of authors, composers and publishers in the category of musical works.²¹⁵ Following the registration and licensing of MCSK, it appears that users, KECOBO and MCSK found themselves at logger-heads over the criminal enforcement of copyright at the instance of MCSK. On one hand, users maintain that raids and seizures by MCSK accompanied by police officers are unlawful and contrary to the Constitution and the laws of Kenya, including the Copyright Act. On the other hand, MCSK submits that it is merely a complainant in such criminal matters

²¹⁰ See Kenya Gazette Notice 5093 of May 6, 2011.

²¹¹ *Registrar of Companies v Music Copyright Society of Kenya* [2004] eKLR

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ Kenya Gazette Notice 9602 of October 9, 2011. It is important to note that this Gazette Notice first appeared a year prior in May 2007. At the time of the 2007 Notice, KECOBO had not been fully constituted as the Notice was signed by Ms. Marisella Ouma, in her capacity as Acting KECOBO Executive Director and Mr. Jimmi Makotsi, as Acting KECOBO Chairman. See Kenya Subsidiary Legislation 2007, Legal Notice 71 of May 16, 2007 at 1178.

and that all police officers within the Republic are empowered to perform the functions of a copyright inspector as spelled out in the Act. Two arms of government appear to take divergent views on the matter of criminal enforcement of collectively administered rights under copyright, with KECOBO being pro-user²¹⁶ while the Judiciary has made two divergent rulings; one ruling takes a pro-MCSK stance²¹⁷ while an earlier ruling by the same court took a pro-user position.²¹⁸

In 2011, KECOBO deregistered MCSK as a collecting society for composers, authors and publishers of music with effect from April 1, 2011.²¹⁹ KECOBO invoked section 46(9) of the Copyright Act as the basis for its decision, stating that MCSK had not complied with paragraphs (a) and (c) of this section.²²⁰

KECOBO later publicly confirmed that the twin reasons why it deregistered MCSK was the latter's non-remittance of royalties to its members and that MCSK spent most of its revenue from royalty payments on administration.²²¹ It had been widely reported that MCSK's expenses stood at one hundred and thirty seven million shillings (KES 137 million) for the year ending June 2010, against revenues of one hundred and eighty five million shillings (KES 185 million), leaving it with a surplus of forty eight million shillings (KES 48 million) – therefore only approximately twenty five per cent (25%) of its collected fees were paid out as royalties.²²² In

²¹⁶ KECOBO (2013) "Collective Management of Copyright and Related Rights" *Copyright Newsletter Issue no. 8*, Kenya Copyright Board, Nairobi.

²¹⁷ *Trustees Kenya Budget Hotel Association & another v. Music Copyright Society of Kenya* [2012] eKLR

²¹⁸ *Cellulant Kenya Ltd v. Music Copyright Society of Kenya* [2009] eKLR

²¹⁹ Kenya Gazette Notice 5093 of May 6, 2011.

²²⁰ Section 46 (9) of the Copyright Act.

²²¹ A. Gakuru (2011) "Copyright Board deregisters Music Copyright Society", *International Law Office Newsletter*. Available at: <http://www.internationallawoffice.com/newsletters/detail.aspx?g=1b71adf4-9a96-427a-97ed-b702eea7fd62>. See also M. Okuttah (2010) "Regulator threatens to revoke MCSK's licence", *Business Daily*, December 31, 2013. Available at:

<http://www.businessdailyafrica.com/Corporate+News/Regulator+threatens+to+revoke+MCSKs+licence/-/539550/1081144/-/12bak4h/-/index.html> (Last accessed on January 13, 2012); J. Muchiri (2011) "Music copyright body deregistered over 'misuse of funds'", *Daily Nation* May 14, 2011. Available at: <http://www.nation.co.ke/News/Music+copyright+body+deregistered+over+misuse+of+funds/-/1056/1162478/-/tif5bh/-/> (Last accessed on January 10, 2014).

²²² *Ibid.* See also J. Muchiri (2011) "Copyright Board Vs MCSK: Who's Fooling Whom?", *Daily Nation* May 28, 2011. Available at: <http://www.nation.co.ke/lifestyle/buzz/Copyright-Board-Vs-MCSK-Whos--Fooling-Whom/-/441236/1171016/-/wjgn51/-/index.html>; J. Muchangi (2012) "All Matters Music, Royalties and Copyright", *The Star* April 30, 2012. Available at: <http://starreport.co.ke/news/article-20451/all-matters-music-royalties-and-copyright>

addition to the distribution questions, users of copyright works have also raised numerous concerns about the licensing activities carried out by MCSK on behalf of rights holders.²²³

On May 30, 2011, MCSK moved to the High Court in the case of *Republic v. Kenya Copyright Board*²²⁴ seeking leave to apply for judicial review orders to quash KECOBO's decision to deregister it as a CMO. The MCSK deregistration case is significant as it exposes three main gaps in the legal and institutional framework for licensing and supervision of CMOs namely the lack of terms and conditions of licenses issued to CMOs by KECOBO, the lack of clarity on the “supervision” function of CMOs by KECOBO and the lack of procedures for deregistration of a CMO. Each of these gaps will be discussed in turn as they arose in the MCSK deregistration case.

3.2.1 Terms and conditions of MCSK license to operate as CMO

The Act and Regulations do not provide any guidelines, standards, limits or restrictions on how MCSK Board of Directors and Management Team should run the CMO in carrying out the functions of royalty collection and distribution on behalf of local and foreign rights holders. As a result of this lacuna, KECOBO contended in the MCSK deregistration case that MCSK was not functioning adequately as a CMO and contrary to the best interests of its members.

In support of this contention, KECOBO submitted into evidence a compliance report dated March 14, 2011²²⁵ showing numerous areas of non-compliance, system failure, weak internal controls and risks.

²²³ Daily Nation (2011) "The Cutting Edge by The Watchman", March 1, 2011. Available at <http://www.nation.co.ke/oped/Cutting-Edge/The-cutting-edge/-/440802/1117048/-/12fr50q/-/index.html>; Daily Nation (2010) "Investigate these 'copyright officers'", July 7, 2010. Available at: <http://www.nation.co.ke/oped/Letters/Investigate-these-copyright-officers/-/440806/953874/-/nuhq61z/-/index.html>; E. Wamari (2008) "Protecting their creativity at all costs", Daily Nation September 11, 2008. Available at: <http://www.nation.co.ke/lifestyle/weekend/-/1220/469188/-/dyub9g/-/index.html>; J. Muchangi (2012) "All Matters Music, Royalties and Copyright", The Star April 30, 2012. Available at: <http://starreport.co.ke/news/article-20451/all-matters-music-royalties-and-copyright>; F. Orido (2005) "Major Threat From TV And Radio Stations", Daily Nation August 01, 2005. Available at: <http://allafrica.com/stories/200508011323.html>

²²⁴ *Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya*, High Court Miscellaneous Judicial Review Application Number 133 of 2011 (MCSK deregistration case).

²²⁵ For the full report, see Replying Affidavit sworn by KECOBO Chief Legal Counsel in *Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya*, *op. cit.*, at Annexure ES-3.

From a human resource perspective, the KECOBO report stated that the total workforce of MCSK increased by sixty three point seven per cent (63.7%) from sixty five (65) to one hundred and two (102) employees at one go with no satisfactory explanation given to KECOBO. According to the report, forty (40) employees who had been engaged on contract basis as marketing assistants were absorbed as licensing assistants; a position which the report maintained did not exist in the CMO's organogram nor were any specific qualifications required. Based on the payment of salaries in January 2011, the report confirmed that MCSK's salary expenditures increased from three point four million shillings (Kshs 3,400,000) to six million shillings (Kshs 6,000,000) with unexplained allowances paid to some four (4) staff members. The report also noted that the GM's salary had doubled in the last three months based on a new contract which gave him an increment of seventy thousand shillings (Kshs 70,000).

From a finance and ICT perspective, KECOBO in its report expresses concern that the Budget presented by MCSK when the latter lodged its application for renewal of registration was different from the one that was currently in use. The report also noted inconsistencies in the dates of approval of the CMO's audited accounts. In addition, the report noted with concern that the CMO did not keep a physical cash book and instead used a computer-generated spreadsheet where figures could easily be altered. The report further noted that the CMO failed to adhere to certain statutory payments such as income tax for both the Board Directors and the Staff members, with the purported calculations on PAYE by the CMO found to be inaccurate.

From a licensing and distribution perspective, the KECOBO report noted that MCSK had not adhered to the 30:70 cost-royalty ratio as required administratively by KECOBO and that it was not clear what distribution criteria had been used by the CMO. The report also noted that despite having adopted the documentation rules and principles and training of staff members on documentation and distribution by WIPO, MCSK continued to have general distributions even where log sheets could be obtained. In sum, the report questioned the lack of transparency in the distribution of royalties as contained in the CMO's accounts.

From a governance perspective, the report revealed that the CMO's Board of Directors had reverted to signing cheques paying themselves hefty allowances including an allowance for

signing the cheques. It was noted that there was no system to monitor the payments made to the Directors and that they are free to advance cash to themselves which was not reflected in the books of accounts that were presented to KECOBO for audit. The report found that MCSK had not observed the principles of corporate governance or the Companies Act including the separation of the roles of the Board and Management.²²⁶

3.2.2 Supervision of MCSK's activities under the Act and Regulations

The Act and Regulations do not set out what powers and obligations apply to KECOBO and MCSK respectively in the context of supervision of CMOs under section 5(b) of the Act. The only obligation imposed on CMOs is to submit a report of its operations and a copy of its audited accounts for the year of operation.²²⁷ With regard to the annual reports and audited accounts, the Regulations further provide certain specific documents and information that must be included in the annual report.²²⁸

This requirement of annual reporting appears to be problematic because KECOBO may not be able to adequately supervise the operations of a CMO if it only receives a single report to cover the entire licensing period of a CMO. In this regard, the Act and Regulations ought to consider a quarterly reporting system to aid in proper supervision of a CMO by KECOBO enabling the latter to get a clearer picture of the CMO's operational and financial position throughout the licensing period. Furthermore, there are several key areas of concern that have been left out in Regulation 16 (3) that ought to be disclosed by a CMO. These areas of concern include proof that the CMO operate separate accounts for administration and distribution, a summary of income held in the CMO's administrative and distribution accounts, proof of strict adherence to the CMO's Financial Budget, evidence that the CMO's expenditure is within a pre-determined

²²⁶ For example, KECOBO found that MCSK Board Directors drew various allowances from unnecessary Board Meetings and Committee Meetings held to discuss and resolve matters that could have been dealt with by the Management. MCSK Board of Directors were found to be engaged in the day to day running of the activities of MCSK in effect working as an executive board which is not provided in the MCSK Memorandum and Articles of Association.

²²⁷ See S. 47(1) of the Act.

²²⁸ See Regulation 16 (3).

cost-royalty ratio, a distribution list showing amounts received and total distributions for the preceding quarter, details of cost-saving measures²²⁹ employed by the CMO.

Coupled with the obligation on a CMO to submit reports to KECOBO, the Act and Regulations ought to require a CMO to publicise certain information about its operations to the public or specific sections of the public such as members or licensees.²³⁰ In addition, there ought to be an obligation on the CMO to notify KECOBO of certain events, decisions, developments and news relating to the CMO's licensing and distribution activities.²³¹

Aside from the obligations on CMOs, the MCSK deregistration case also revealed the need to for the Act and Regulations to explicitly provide certain powers and rights to KECOBO within the context of its supervision function. These powers and rights include inspection of CMOs, audit of CMOs, summoning of CMO officials, sanctioning of CMOs and CMO officials, rewarding of CMOs and CMO officials and provisions for KECOBO to attend Board Meetings and Annual General Meetings of CMOs.²³²

3.2.3 Procedures followed to deregister MCSK

The Act and Regulations do not set out what rules and procedures apply in the deregistration of a CMO under section 46(9) of the Act. In the MCSK deregistration case, KECOBO wrote to MCSK requiring the latter to show cause why the Board should not revoke the license granted to MCSK.²³³

On March 23, 2011, the compliance report (as discussed in 3.2.1 above), show cause letter and MCSK's reply letter were tabled and discussed at a KECOBO Board Meeting.²³⁴ The Board

²²⁹ These include requirements to establish a secure mode of royalty payments and to furnish proof of staff deployment to minimise revenue leakage.

²³⁰ These additional requirements are provided in the legislative frameworks of several countries including South Africa and Nigeria, which will be discussed in Chapter 4 of this Project.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ For the full letter, see Replying Affidavit sworn by KECOBO Chief Legal Counsel in *Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya*, *op. cit.*, at Annexure ES-4.

²³⁴ For the full copy of the Minutes, see Replying Affidavit sworn by KECOBO Chief Legal Counsel in *Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya*, *op. cit.*, at Annexure ES-6.

found that MCSK’s response to the show cause letter was “dismissive and defensive” and it “failed to satisfactorily address the issues raised”.²³⁵ Furthermore, in light of the compliance report, KECOBO expressed concern about MCSK’s level of impunity and lack of professionalism in running its affairs.²³⁶ KECOBO therefore concluded that the MCSK Board and Management had failed to effectively fulfil the CMO’s mandate by collecting royalty payments and using most of the money on expenses with very little going to the members of MCSK.²³⁷ KECOBO also noted with concern that MCSK had consistently failed to fulfil the conditions for the licenses every year.²³⁸

In light of the above, the Board of KECOBO resolved that MCSK’s license should be revoked immediately and a public notice of the same be issued to the users of music.²³⁹ KECOBO recommended that this public notice would further inform the users of music that they were still required to keep the money aside for license fees for public performance and broadcasting of authors’, publishers’ and composers’ rights.²⁴⁰ It was further recommended that the renewal of MCSK’s license would only be reconsidered if it fulfils all the conditions set out in the Copyright Act and Regulations.²⁴¹

On April 1, 2011, the then Chairman of the Board, KECOBO, Dr. Henry Chakava wrote a letter²⁴² to the then Chairman of the Board, MCSK, Mr. Habel Kifoto informing the latter that KECOBO had resolved at its meeting on March 30, 2011 to revoke the license issued to MCSK on October 30, 2010 in accordance with the provisions of section 46(9) (a) and (c) of the Act.

This notice of revocation letter stated that the KECOBO Board of Directors were dissatisfied with MCSK’s response letter to KECOBO’s show cause letter as discussed in chapter 3.2.3 above. Therefore KECOBO wrote to inform MCSK of its decision to revoke the latter’s license

²³⁵ For the full copy of the Minutes, see Replying Affidavit sworn by KECOBO Chief Legal Counsel in *Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya*, *op. cit.*, at Annexure ES-6.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² For the full copy of the letter, see Verifying Affidavit by MCSK CEO in *Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya*, *op. cit.*, at Annexure MMO-6.

with effect from April 1, 2011 and as such, MCSK was required to cease collection of royalties forthwith.

It is important to note that the revocation of MCSK's license was with immediate effect.²⁴³ Therefore this effectively denied MCSK the opportunity to make any further representations to KECOBO with respect to the revocation of its license.

On May 6, 2011, KECOBO published Gazette Notice No. 5093 captioned "Notice of De-Registration of a Collecting Society" stating that in exercise of the powers conferred by section 46(9)(b) and (c) of the Act, it has deregistered MCSK as a CMO for music composers, authors and publishers with effect from April 1, 2011.²⁴⁴ Furthermore the Gazette Notice stated that a previous Gazette Notice No. 9602 of 2008 was revoked. This previous Notice was made pursuant to section 46(2) of the Act and declared MCSK as a CMO for music composers, authors and publishers with effect from May 23, 2008. This Gazette Notice is significant because it is the first time that KECOBO officially informed the general public that it had de-registered MCSK as a CMO.²⁴⁵

3.2.4 Effect of MCSK deregistration on rights holders and users

The Act and Regulations do not contain any transitional provisions to protect the rights of CMO members and the interests of users once a licensed CMO is deregistered by KECOBO. This creates a state of limbo which is not in the best interests of copyright owners and users.

In the MCSK deregistration case, it was argued that KECOBO had waived its revocation of MCSK's license by inviting MCSK to participate in a Joint CMO Symposium to discuss a joint structure for CMO royalty collection²⁴⁶ and playing the role of midwife in the signing of a Joint

²⁴³ For the full copy of the letter, see Verifying Affidavit by MCSK CEO in *Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya*, *op. cit.*, at Annexure MMO-6.

²⁴⁴ It is curious to note that the notice of revocation letter refers to section 46(9)(a) and (c) whereas the Gazette Notice refers to section 46(9)(b) and (c).

²⁴⁵ For reference to power of gazettelement, see section 46(2) of the Act.

²⁴⁶ For the full copy of the Resolutions dated April 13, 2001 of the CMO Symposium held April 11, 2001, see Verifying Affidavit by MCSK CEO in *Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya*, *op. cit.*, at Annexure MMO-17.

Agreement on Licensing between MCSK, Kenya Association of Music Producers (KAMP) and the Performers Rights Society of Kenya (PRSK).²⁴⁷ It is interesting to note that on the same day of the Joint Agreement signing on May 6, 2001, Gazette Notice No. 5093 deregistering MCSK as a CMO was published.

On May 19, 2011, KECOBO issued a public notice in the Nation and Standard Newspapers referring to the above Gazette Notice on the deregistration of MCSK as a CMO. The public notice reads in part, as follows:

“Consequently, the Music Copyright Society of Kenya has no mandate currently to collect royalties and license fees. Music users are therefore advised not to make any payments to Music Copyright Society of Kenya until advised to the contrary by the Board.”

On the same day, May 19, 2011, MCSK published a public notice of its own where it appeared to challenge KECOBO’s public notice by stating that it derives its mandate directly from the local and foreign rights holders it represents in Kenya. More importantly, MCSK’s public notice made reference to the Joint Agreement on Licensing signed by MCSK, KAMP and PRSK and that pursuant to the Agreement, MCSK was the collecting party for royalties and license fees on behalf of all three CMOs.²⁴⁸

Therefore KECOBO’s various actions as highlighted above and MCSK’s public notice created a lot of confusion among members of the public, particularly among rights holders and users.²⁴⁹ As a result, members of MCSK met on May 17, 2011 and resolved to stage demonstrations to the Offices of the Prime Minister and the President unless KECOBO reinstated MCSK’s license

²⁴⁷ For the full copy of the Joint Agreement on Licensing signed on May 6, 2011 between MCSK, KAMP and PRSK, see Verifying Affidavit by MCSK CEO in *Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya*, *op. cit.*, at Annexure MMO-18. For media coverage of this historic signing, see S. Muendo (2011) "Breakthrough as music societies merge", Standard Newspaper May 9, 2011. Available at:

http://www.standardmedia.co.ke/?articleID=2000034751&story_title=Breakthrough-as-music-societies-merge

²⁴⁸ See clauses 2.6, 3.7 and 4.4 of the Joint Agreement on Licensing signed on May 6, 2011 between MCSK, KAMP and PRSK. Available on file with the author.

²⁴⁹ W. Kagwe (2011) "Music management in crisis as bodies fight", The Star May 21, 2011. Available at: <http://www.the-star.co.ke/news/article-62879/music-management-crisis-bodies-fight>; J. Muchiri (2011) "Copyright Board Vs MCSK: Who’s Fooling Whom?", Daily Nation May 28, 2011. Available at: <http://www.nation.co.ke/lifestyle/buzz/Copyright-Board-Vs-MCSK-Whos--Fooling-Whom--/441236/1171016/-/wjgn51/-/index.html>

within seven days.²⁵⁰ Members of MCSK expressed anger at KECOBO's seemingly confusing and controversial stance towards MCSK, stating in part as follows:

“As far as we are concerned MCSK is doing a great job as far as collection and distribution of royalties is concerned. They may not have met the expectations of many, but we artistes get paid every three months”²⁵¹

Users were equally confused by the deregistration of MCSK. The Pubs, Entertainment and Restaurants Association of Kenya (PERAK) in a public statement claimed that KECOBO needed to explain to the entertainment industry players who should collect royalties for music following the deregistration of MCSK. In PERAK's statement, MCSK was accused of harassing business owners and its mode of licensing was termed as unorthodox and unprofessional.²⁵²

On May 31, 2011, Honourable Lady Justice Gacheche granted MCSK leave to apply for judicial review orders to quash KECOBO's decision to deregister it as a CMO. In granting MCSK's leave to apply for judicial review, the High Court ordered that the granted leave operate as a stay to suspend the implementation/enforcement of the decision by KECOBO to revoke the licence of MCSK and deregister it as a collecting society for music composers, authors and publishers.²⁵³

There was a mixed reaction to the order by the High Court with some MCSK members standing in support of KECOBO and expressing their dissatisfaction with the sums paid out by MCSK and the frequency with which they received the royalties from MCSK.²⁵⁴

After almost one year in court,²⁵⁵ a Press Release was issued by the CEO of MCSK on April 23, 2012 confirming that KECOBO and MCSK had agreed to settle the deregistration matter out of court. The Press release stated, in part, as follows:

²⁵⁰ Daily Nation (2011) “Musicians to Demonstrate”, The Nation May 20, 2001. Available on file with the author.

²⁵¹ The Standard (2011) “Artistes plan demo over royalties standoff”, The Standard May 23, 2001. Available on file with the author.

²⁵² B. Otieno (2011) "Pubs body seeks direction from copyright board", The Star May 17, 2011. Available at: <http://www.the-star.co.ke/news/article-63366/pubs-body-seeks-direction-copyright-board>

²⁵³ See Order issued on June 2, 2011 in *Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya*, High Court Miscellaneous Judicial Review Application Number 133 of 2011. For media coverage of this court order, see L. Okulo (2011) "MSCK to continue collecting fees for musicians - Court", The Star June 6, 2011. Available at: <http://www.the-star.co.ke/news/article-61333/msck-continue-collecting-fees-musicians-court>; M. Okuttah (2011) "Reprieve for artistes as court reinstates MCSK", Business Daily, June 6, 2011. Available at: <http://www.businessdailyafrica.com/Corporate-News/-/539550/1175452/-/vuxi8j/-/index.html>

²⁵⁴ C. Mukei (2011) "Musicians say no to MCSK", The Star June 6, 2011. Available at: <http://www.the-star.co.ke/news/article-61361/musicians-say-no-mcsk>

“Music Copyright Society of Kenya (MCSK) is pleased to inform its members and the general public that MCSK has reached an agreement with the Kenya Copyright Board (KECOBO) for the licensing and issuance of MCSK with a current certificate as a collective management organization. The agreement was reached following intervention by the Honourable Attorney General who advised the parties to negotiate the terms of licensing of MCSK for the benefit of the music industry in Kenya. The agreement provides for MCSK license to be effective 1/04/2012 and the license period to be for one (1) year renewable as provided for under the Laws of Kenya.”²⁵⁶

On June 5, 2012, the MCSK deregistration case was mentioned before Lady Justice Githua where MCSK and KECOBO confirmed in open court that they had arrived at a settlement and therefore applied to the court for a mention date to record the final settlement.²⁵⁷

3.3 Kenya Association of Music Producers (KAMP)

KAMP was incorporated in 2003 as a Company Limited by Guarantee.²⁵⁸ On October 3, 2008, KECOBO declared KAMP a CMO for producers of sound recordings.²⁵⁹

The origins of KAMP appear to date back to the 1980s. It is said that in the early years of the 1980s, the phonogram industry was polarised into two: the Kenyan Branch of the International Federation of the Phonographic Industry (IFPI) and the Kenya Association of Phonogram Industries (KRPA).²⁶⁰ The Kenyan IFPI was mainly composed of the subsidiaries of international record companies whereas KRPA represented a multitude of small, local operators and phonogram producers.²⁶¹ This split was resolved in 1983 with the signing of the Kenya National Music Organizations' Treaty aimed at regulating studio fees, copyright and royalty fees

²⁵⁵ J. Muchiri (2011) "Musicians finally get the better of MCSK", Daily Nation July 23, 2011. Available at: <http://www.nation.co.ke/lifestyle/buzz/Musicians-finally-get-the-better-of-MCSK--/441236/1206456/-/3wbihhz/-/index.html> ; M. Mutegi & M. Okuttah (2012) "Music society hits another sour note with watchdog over royalty payments", Business Daily, February 27, 2012. Available at: <http://www.businessdailyafrica.com/Corporate-News/Music-society-in-wrangles-with-watchdog-over-royalty-payments-/539550/1355000/-/v78qxwz/-/index.html>; J. Muchangi (2012) "All Matters Music, Royalties and Copyright", The Star April 30, 2012. Available at: <http://starreport.co.ke/news/article-20451/all-matters-music-royalties-and-copyright>

²⁵⁶ Press Statement (For Newsroom Release) signed by Maurice Okoth, CEO MCSK http://www.mcsk.or.ke/News_Room_Release%5B1%5D.pdf (accessed on April 30, 2012). See also J. Muchangi (2012) "All Matters Music, Royalties and Copyright", The Star April 30, 2012. Available at: <http://starreport.co.ke/news/article-20451/all-matters-music-royalties-and-copyright>

²⁵⁷ See Order issued on June 4, 2012 in *Republic v. Kenya Copyright Board ex parte Music Copyright Society of Kenya*, High Court Miscellaneous Judicial Review Application Number 133 of 2011. Available on file with the author.

of phonogram producers as well as authors and composers of music.²⁶² Shortly after the 1983 Treaty, it is reported that some local phonogram producers joined the Kenyan IFPI and formed the Kenya Association of Record Producers (KAPI).²⁶³

From 2008 to 2010, KAMP and MCSK had entered into a partnership whereby MCSK would collect license fees for exploitation of both musical works and sound recordings and then share the joint collections.²⁶⁴ It was agreed that MCSK would retain a commission of 20% of the joint collections.²⁶⁵ Over time, it is said that the partnership disintegrated into acrimony for various reasons including weak internal controls within MCSK, insufficient capability of KAMP to monitor MCSK's collections, differences of opinion on cost-sharing, break-down of communication at the Board level and overall broken trust between the two erstwhile partners.²⁶⁶

As at January 1, 2013, KAMP's members were 118 in number.²⁶⁷ Its membership includes record companies, music producers, and other individual producers of sound recordings registered or incorporated in Kenya.²⁶⁸ Out of this total membership, nine (9) representatives sit on KAMP's Board of Directors for term of 3 years.²⁶⁹ KAMP has four full-time staff and three part-time personnel.²⁷⁰ The monthly operations budget for KAMP is about Seven Hundred Thousand Kenya Shillings (KES 700,000).²⁷¹ In Chapter 3.6 below, KAMP's operations shall be discussed in greater detail within the framework of the "PayForPlay" Joint Collection Partnership with the Performers' Rights Society of Kenya (PRiSK).

²⁵⁸ KECOBO (2013) "Collective Management of Copyright and Related Rights" *Copyright Newsletter Issue no. 8*, Kenya Copyright Board, Nairobi.

²⁵⁹ Kenya Gazette Notice 9601 of October 9, 2008.

²⁶⁰ K. Malm and R. Wallis(1992) *Media Policy and Music Activity*, Routledge, London at p. 86.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ J. Gachui (2012) "Management of Performers' and Phonogram Producers' Rights – the Case Study of Kenya", A Presentation made at the New Perspectives in Collective Management Sub-Regional Copyright Workshop held on November 8th 2012, Harare, Zimbabwe. Available here: <http://ipkenya.wordpress.com/2012/11/23/new-perspectives-in-collective-management-of-copyright-and-related-rights-in-africa/>

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.* Gachui explains that KAMP terminated the Partnership and claimed that MCSK had failed to remit KAMP's share of the joint collections. After mediation and negotiation efforts, it was finally agreed that MCSK would pay KAMP a total of USD 134,000 to cover all outstanding dues from Partnership.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.* See also the Official Website of KAMP. Available at: www.kamp.or.ke/

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

3.4 Reproduction Rights Society of Kenya (KOPIKEN)

The idea of forming a Reprographic Rights Organisation (RRO) in Kenya was championed in the early 1990s to protect and promote authors and publishers of literary works.²⁷² The name “Kopiken” was adopted for the RRO that was intended to fight infringement and piracy, and to ensure authors and publishers secure maximum benefits from their printed works.²⁷³

Kopiken was first registered in 1994 as a Society under the Societies Act.²⁷⁴ Between 1997 and 1998, Kopiken was inactive and Kenya Publishers Association (KPA) took over the organization in a caretaker capacity.²⁷⁵ KPA started the process of reviving Kopiken in 2004.²⁷⁶

In December 2005, Kopiken was registered as the Reproduction Rights Society of Kenya and incorporated as a Company Limited by Guarantee.²⁷⁷ In 2006, Kopiken began setting up its operations and made its first collection in 2007.²⁷⁸

Currently, Kopiken has a total of seven (7) members.²⁷⁹ It is important to note that, unlike any other CMO, Kopiken's members are associations and not individuals. Its membership includes member associations like MCSK along with long-time partner, KPA.²⁸⁰ Kopiken's licenses cover all types of published material.²⁸¹ At present, Kopiken has two types of licensees namely copy shops and educational institutions.²⁸² As at January 1, 2013, Kopiken's total collections from all

²⁷² B. Sihanya (2009) *Copyright Law in Kenya* at 18.

²⁷³ *Ibid.*

²⁷⁴ See Kopiken's official website: <http://www.kopiken.org/about/history.html>

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ KECOBO (2013) “Collective Management of Copyright and Related Rights” *Copyright Newsletter Issue no. 8*, Kenya Copyright Board, Nairobi.

²⁷⁸ See Kopiken's Profile on IFRRO's official website: <http://www.ifrro.org/members/reproduction-rights-society-kenya>

²⁷⁹ See Kopiken's membership here on its official website: <http://www.kopiken.org/about/organization.html>

²⁸⁰ The remaining members are: Kenya Oral Literature Association (KOLA), Kenya Non-Fiction Authors Association (KENFAA), Kenya Union of Journalists (KUJ), Kenya Association of Photographers, Illustrators and Designers (KAPIDE)

²⁸¹ See Kopiken's Profile on IFRRO's official website: <http://www.ifrro.org/members/reproduction-rights-society-kenya>

²⁸² *Ibid.* These institutions are classified as follows: 1. Universities 2. Technical Training Institutes 3. Colleges 4. Professional schools of training e.g. Law school

licensing operations stands at One Million Four Hundred and Seventy Eight Thousand Two Hundred and Fifty (KES 1,478,250.00).²⁸³

However, users and librarians have made several complaints against KOPIKEN.²⁸⁴ The Kenyan RRO is criticised for operating in the blind pursuit of royalty maximisation and using threats of arrest and prosecution to obtain reproduction license fees from users.²⁸⁵ KOPIKEN is accused of taking advantage of the low level of awareness on copyright law to demand license fees from users and librarians.²⁸⁶ In this regard, it is clear that KOPIKEN's licensing mandate is limited by the "fair dealing" provisions in the Copyright Act that provide exemptions and limitations to copyright protection.²⁸⁷ In addition, KOPIKEN is accused of failing to inform users that there are materials which can be freely reproduced as they have entered the public domain.²⁸⁸

With regard to KOPIKEN's license fees, it is argued that KOPIKEN's fees are unreasonable since the owners of photocopiers are charged for each machine in their business premises regardless of the amount of copyrighted work that is reproduced by the machine.²⁸⁹ In this connection, a key area of concern for users is how KOPIKEN distributes license fees it collects.²⁹⁰ This is because KOPIKEN is reported to collect fees from users in Kenya without stating whose works have been reproduced and whether they authorised to represent the owners of those works in Kenya.²⁹¹ Therefore users fault KOPIKEN for not clarifying what do they do with the money collected from works whose owner has not authorized them to collect licence fee and how does such an owner know that his/her work has attracted payment.²⁹²

²⁸³ See Kopiken's Profile on IFRRO's official website: <http://www.ifrro.org/members/reproduction-rights-society-kenya>

²⁸⁴ The most prominent critic of KOPIKEN is Prof. Japhet Otike of Moi University, Eldoret, Kenya. See J. Otike (2012) "Copyright: The Challenges Posed By Reproduction Rights Organizations (RROs) In The Provision Of Information To Users With Special Reference To Kenya", Paper presented at SCECSAL XXth Conference on 4th-8th June 2012 http://scecsal.viel.co.ke/images/7/7f/Copyright-_The_Challenges_Posed_By_Reproduction_Rights_Organizations_%28RROs%29_In_The_Provision_Of_Information_To_Users_With_Special_Reference_To_Kenya.pdf

²⁸⁵ J. Otike (2012) "Copyright: The Challenges Posed By Reproduction Rights Organizations (RROs) In The Provision Of Information To Users With Special Reference To Kenya" *op cit* at 7.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid* at 8.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Ibid.*

3.5 Performers Rights Society of Kenya (PRSK/PRiSK)

In October 2009, the Performers Rights Society of Kenya (PRSK) was incorporated as a Company Limited by Guarantee.²⁹³ PRSK successfully applied to KECOBO for registration as a CMO and was gazetted in November 2009.²⁹⁴ In 2012, PRSK²⁹⁵ changed its acronym to PRiSK so as to distinguish itself from the Public Relations Society of Kenya.²⁹⁶

PRiSK collects license fees from users of sound recordings and audiovisual works and distributes royalties to performers of those works.²⁹⁷ As at January 1, 2013, PRiSK had a total of eighty (80) members, including both musicians and actors.²⁹⁸ Six (6) members serve on the PRiSK Board which has a secretariat of two (2) full time staff and two (2) consultants.²⁹⁹ PRiSK's monthly operating budget is estimated at Five Hundred Thousand Kenya Shillings (KES 500,000).³⁰⁰

3.6 The KAMP-PRiSK "PayForPlay" Joint Licensing Partnership

This KAMP-PRiSK Partnership was born in July 2011³⁰¹ following a failed attempt at a Joint Agreement on Licensing between MCSK, KAMP and PRiSK in May 2011 brokered by KECOBO with the support of the Norwegian Copyright Development Agency (NORCODE).³⁰²

²⁹³ KECOBO (2013) "Collective Management of Copyright and Related Rights" *Copyright Newsletter Issue no. 8*, Kenya Copyright Board, Nairobi.

²⁹⁴ Kenya Gazette Notice 12322 of November 5, 2009.

²⁹⁵ S. Muendo (2011) "Another body to collect artistes' money", Standard Newspaper January 18, 2010. Available at: http://www.standardmedia.co.ke/?articleID=2000001192&story_title=Another-body-to-collect-artistes%E2%80%99-money

²⁹⁶ V. Nzomo (2012) "From PRSK to PRiSK: A Tale of Two Societies", IP Kenya Blog June 8, 2012. Available at: <http://ipkenya.wordpress.com/2012/06/08/from-prsk-to-prisk-a-tale-of-two-societies/>

²⁹⁷ See the Official Website of PRiSK. Available at: www.prisk.or.ke/

²⁹⁸ J. Gachui (2012) "Management of Performers' and Phonogram Producers' Rights – the Case Study of Kenya", A Presentation made at the New Perspectives in Collective Management Sub-Regional Copyright Workshop held on November 8th 2012, Harare, Zimbabwe. Available here: <http://ipkenya.wordpress.com/2012/11/23/new-perspectives-in-collective-management-of-copyright-and-related-rights-in-africa/>

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ J. Gachui (2012) "Management of Performers' and Phonogram Producers' Rights – the Case Study of Kenya" *op cit.*

³⁰² See our discussion at 3.2.4. See also V. Nzomo (2013) "Amalgamation of Collecting Societies, Compulsory Licensing and the Role of the Copyright Tribunal", IPKenya Blog, September 11, 2013. Available at: <http://ipkenya.wordpress.com/2013/09/11/amalgamation-of-collecting-societies-compulsory-licensing-and-the-role-of-the-copyright-tribunal/>

From the outset, both CMOs acknowledged their shared challenges in the area of collective management of related rights, most notably the lack of awareness among users as well as the co-existence of MCSK, a more established CMO operating within the music industry. In addition, the related rights CMOs needed to be unified in their lobbying and negotiation efforts for amendments and revisions to the Copyright Act. The fruits of these efforts by KAMP and PRiSK will be examined in Chapter 3 within the context of the 2012 Copyright Amendment Act.

Initially, the Board Directors and CEOs of both KAMP and PRiSK agreed that the PayForPlay Partnership would run on a trial basis for collections from Communication to the Public Stream of Revenue based on commission.³⁰³ Between 2011 and 2012, joint collections rose from Forty Three Thousand US Dollars (USD 43,000) to over One Hundred and Twenty Thousand US Dollars (USD 120,000).³⁰⁴ In addition, KAMP and PRiSK enjoy other advantages from joint collection and shared secretariat, such as a significant reduction in operational costs as well as increased pool of resources both at secretariat level as well as membership level.³⁰⁵

At present, the PayforPlay Partnership has its own fully functional stand-alone website³⁰⁶ where users of rights administered by KAMP and/or PRiSK can access information relating to the license tariffs, terms and conditions, payment options for license fees and much more.

However, users have made several complaints against KAMP-PRiSK Joint Licensing Partnership. In the case of PERAK case,³⁰⁷ the Pubs, Entertainment and Restaurants Association of Kenya (PERAK) applied to the High Court for judicial review orders of prohibition and mandamus against KAMP-PRiSK.³⁰⁸ PERAK accused the two related rights CMOs of arbitrarily imposing and collecting high tariffs and license fees and other levies from the PERAK's

³⁰³ J. Gachui (2012) "Management of Performers' and Phonogram Producers' Rights – the Case Study of Kenya" *op cit.*

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ See the Official Website. Available at: www.payforplay.or.ke/

³⁰⁷ *Republic v Kenya Association of Music Producers (KAMP) & 3 others Ex- Parte Pubs, Entertainment and Restaurants Association of Kenya (PERAK)* [2014] eKLR.

³⁰⁸ It is reported that a similar suit has been filed against KAMP-PRiSK by the Nakuru Municipality Pubs, Bars, Restaurants and Hotel Owners Association. See I. Wairimu (2014) "Bar owners fight fees", The Star Newspaper September 19, 2014. Available at: <http://www.the-star.co.ke/news/article-190406/bar-owners-fight-fees>

members' business premises, using a wrong tariff structure³⁰⁹ and generally harassing, intimidating businesses and confiscating business equipment owned by PERAK members throughout Kenya.³¹⁰ PERAK also accuses KAMP-PRiSK of discrimination since only those businesses deemed to be popular are targeted for heavy licensing and harassment.³¹¹

PERAK claims that it has tried to engage KAMP-PRiSK in negotiations on the latter's licensing conditions and tariffs throughout a three year period but KAMP-PRiSK have failed to incorporate PERAK's proposals in the tariff structure. Instead, KAMP-PRiSK's license terms and conditions have remained the same and that the latter continued to issue invoices to the PERAK's members in total disregard of the on-going negotiations.³¹²

Additionally, PERAK accused the State of failing to hear and determine its dispute with KAMP-PRiSK on an acceptable tariff structure despite PERAK having referred the matter to the Competent Authority in 2012.³¹³ The court in the PERAK case granted the order of mandamus sought by PERAK compelling and directing KECOBO and the Competent Authority to hear and determine the dispute between the PERAK and KAMP-PRiSK in relation to the high license fees charged and /or tariffs charged/levied using a wrong tariff structure by KAMP-PRiSK.³¹⁴

³⁰⁹ At para 7, PERAK argues that KAMP-PRiSK ought to use the parameter of measuring the size in square feet of each establishment for purposes of imposing license fees; that the use of size in establishments as parameter vis-à-vis the consumer price index resulted in huge amounts as license fees being levied or charged on major Pubs and Restaurants yet most of the space is either for parking vehicles, children play grounds or for aeration purposes. In a nut shell, a bigger size did not and does not constitute more sales to PERAK members.

³¹⁰ *Ibid* at para 1-3.

³¹¹ *Ibid* at para 8. PERAK contends that, if the KAMP-PRiSK tariff structure was to be harmonized, negotiated and agreed upon by all stakeholders into a fairly reasonable license fee applicable or payable by all gazetted Pubs, Entertainment joints and Restaurants, there is no doubt that the license fees payable would be lower and thus KAMP-PRiSK would collect more license fees across the country without targeting only a few large businesses.

³¹² *Ibid* at para 10.

³¹³ *Ibid* at para 11-12. See N.R. Ombija (2011) "Case Study Of Kenya's Specialized Intellectual Property Rights Court Regime". Available on the Kenya Law Website at: <http://kenyalaw.org/kl/index.php?id=1899> Ombija notes that despite the setting up of the Competent Authority in 2008, the Authority is yet to commence its sittings. Ombija reports that, according to an official from the Kenya Copyright Board, the Authority has never adjudicated on a dispute and has to date only received 5 cases which are pending for its decision. Ombija argues that it is very likely that rights holders have no information of the Authority's existence.

³¹⁴ *Ibid* at para 60-62. The court stated that it is upon the State to facilitate the Competent Authority so that the latter can undertake its statutory duties. To fail to do so amounts to abdication of the Constitutional duties imposed upon the State. This Court further stated that it was not satisfied that the reason advanced by KECOBO i.e. budgetary and administrative challenges, warrants the State being absolved from the performance of its statutory duties taking into account the fact that the Competent Authority is already in the office.

3.7 Conclusion

From SACEM to PRiSK, it is clear that the evolution of collective management organisations has been a process led by rights holders who, at various points in history, come together to seek a cost-effective way of benefiting from the commercial exploitation of their works. This phenomenon and the laws that have developed around it find their rationale and justification in the utilitarian mantra of “the greatest good for the greatest number”. In the Kenyan context, it is clear that the existing CMOs have brought some level of returns to rights holders and facilitated the interaction between rights holders and users, both of which would otherwise not be there.

However, this chapter reveals that there are several gaps in the legal and institutional framework to license and supervise CMOs in Kenya. These gaps have been manifested through complaints and litigation by rights holders and users respectively against CMOs. From a utilitarian perspective, this lack of an adequate legal and institutional framework to license and supervise CMOs does not maximise social welfare since rights holders lose out on royalties and end up lacking sufficient incentive to create culturally and socially valuable works.

All in all, these complaints by rights holders and numerous court cases by users against CMOs are evidence that the legal and institutional framework for collective administration must be reviewed and amended to strengthen KECOBO and the Competent Authority in their respective roles of regulating CMOs in Kenya.

CHAPTER 4: EXPERIENCES FROM SOUTH AFRICA AND NIGERIA ON COLLECTIVE ADMINISTRATION OF COPYRIGHT

4.0 Introduction

This chapter seeks to address the gaps identified in the copyright law framework for regulating CMOs by examining the experiences in collective administration of copyright in two advanced African economies, namely South Africa and Nigeria. These two jurisdictions have developed in the area of licensing and supervision of CMOs. Through an examination of the experiences of South Africa and Nigeria, this chapter aims to identify some useful legal provisions that could be introduced into Kenya's Copyright Act and Regulations.

4.1 Experiences from South Africa and Nigeria on Collective Administration of Copyright

4.1.1 South Africa

The primary source of law for collective administration of copyright is the Copyright Act No. 98 of 1978. Section 9A(1)(c) of the Act is significant as it provides that where a dispute arises between a rights holder and user, either party may refer the matter to the Copyright Tribunal referred to in section 29(1) of the Act. Section 29(1) states that the judge or acting judge who is from time to time designated as Commissioner of Patents in terms of section 8 of the Patents Act, 1978,³¹⁵ shall also be the Copyright Tribunal for the purposes of the Act.³¹⁶

Therefore in South Africa, members of the Judiciary are designated to preside over disputes as the Copyright Tribunal. In this regard, section 31(5) of Act stipulates that the Tribunal shall on

³¹⁵ Section 8 of the Patents Act provides that '[the] Judge President of the Transvaal Provincial Division [Gauteng High Court] of the Supreme [High] Court of South Africa shall from time to time designate one or more judges or acting judges of that Division as commissioner or commissioners of patents to exercise the powers and perform the duties conferred or imposed upon the commissioner by this Act.'

³¹⁶ The two cases of *Foschini Retail Group (Pty) (Ltd) and 9(Nine) Others v South African Music Performance Rights Association (0003/2009) [2013] ZAGPPHC 304* and *National Association of Broadcasters v South African Music Performance Rights Association and Another (119/2013) [2014] ZASCA 10; [2014] 2 All SA 263 (SCA); 2014 (3) SA 525 (SCA)* are recent examples of how the Copyright Tribunal has played an important role in supervising the licensing activities of CMOs in South Africa. In both these cases, the Tribunal determined that the tariffs for broadcast and public performance applied by SAMPRO were not reasonable.

any reference of a matter in dispute and after giving the parties to the dispute an opportunity of presenting their respective cases, the Tribunal make such order as the Tribunal may determine to be reasonable in the circumstances.

In June 1, 2006, the Minister responsible for the Act exercised his powers under section 39(cA)³¹⁷ of the Act and promulgated the “Regulations on the Establishment of Collecting Societies in the Music Industry Collecting Society”.³¹⁸ Section 3(1) of these Regulations requires that new applicants for accreditation as CMOs must have at least fifty (50) members. An important feature of the Regulations is that the time-lines³¹⁹ are clearly spelled out within which the Registrar of Copyright must act on an accreditation application and there is an in-built duty imposed on the Registrar to give written reasons³²⁰ for any decisions relating to accreditation of a CMO. Finally, the South African Regulations provide, under section 3(5) that the accreditation of a CMO granted by the Registrar shall be valid for a term of five (5) years and renewable for 5 years.

In South Africa, the grant, renewal, refusal or non-renewal, and the withdrawal of an accreditation must be communicated to the CMO in writing together with reasons for the action.³²¹ This action must also be published in the South African Government Gazette by General Notice.³²² Once there has been publication in the Gazette of the Registrar’s decision to grant, renewal, refusal or non-renewal, and the withdrawal of an accreditation, section 3(8) of the South African Regulations expressly provides that this decision shall be subject to judicial review on application to the High Court of South Africa, Transvaal Provincial Division (TPD), brought within three months after this publication.

Regarding the supervision of the activities of CMOs, section 4(1) of the South African Regulations vests this power on the Registrar of Copyright who is required to keep a register of

³¹⁷S. 39(cA) of the South African Act provides that the Minister may make regulations in consultation with the Minister of Finance, providing for the establishment, composition, funding and functions of collecting societies contemplated in section 9A, and any other matter that it may be necessary or expedient to regulate for the proper functioning of such societies.

³¹⁸Department of Trade and Industry (2011), Copyright Review Commission Report, *op. cit.* at 24.

³¹⁹ See S. 3(4) of the South African Regulations.

³²⁰*Ibid*, at S. 3(4)(c) and 3(6).

³²¹*Ibid*, at S. 3(6).

³²²*Ibid*, at S. 3(7).

all accredited collecting societies and ensure that these CMOs discharge their obligations under the law.³²³ Under section 4(2) of the Regulations, CMOs are required to invite the Registrar to their Annual and Special General Meetings of its membership in addition to submitting an Annual Activity Report, including financial records and any other documents that may be necessary to assess the degree of compliance of the collecting society with the Regulations, and the Copyright Act. Furthermore CMOs in South Africa have a duty under the Regulations to keep the Registrar of Copyright informed at all times of any and all occurrences or changes affecting its organisational and operational features within 30 days of the occurrence or change.³²⁴

If an accredited CMO in South Africa does not comply with its obligations under the Regulations, the Registrar may provide a period of between thirty (30) and ninety (90) days for the CMO to remedy the situation.³²⁵ Where the CMO fails to comply, the Registrar is empowered under section 4(4) to withdraw the accreditation³²⁶ and/or apply to court for relief including placing the CMO under judicial management or winding up or dissolution.³²⁷

Finally, within the context of licensing and supervision of CMOs, sections 6(1) and (2) of the Regulations expressly provide that all CMOs must distribute at least eighty percent (80%) of their incomes and not more than twenty per cent (20%) should be retained by the CMO after distribution to defray its administrative costs or apply otherwise.

In practice, South Africa's legal framework is narrow in scope as compared with Kenya's framework since the former only applies to the administration of needle-time rights while excluding all other rights under collective management of copyright and related rights.³²⁸ In this

³²³See S.4(2) of the South African Regulations.

³²⁴*Ibid*, at S. 4(3).

³²⁵*Ibid*, at S.4(4).

³²⁶*Ibid*, at S.4(4)(a). The Copyright Review Commission recommended in 2012 that the Copyright Act be amended to allow the Registrar to take over the administration (as opposed to the withdrawal of accreditation) of any relevant collecting society (SAMPRA, NORM or SAMRO) if the Registrar has reason to believe that there has been a material breach of the Copyright Act or Regulations. See Paragraph 6.3.1 in Department of Trade and Industry (2011), Copyright Review Commission Report, *op. cit.* at 40.

³²⁷S.4(4)(b) of the South African Regulations.

³²⁸ See Paragraph 6.3.4 in Department of Trade and Industry (2011), Copyright Review Commission Report, *op. cit.* at 46.

connection, Kenya may wish to take lessons from the liquidation of South African Recording Rights Association Limited (SARRAL). SARRAL had been operating as an accredited CMO despite the fact that it had received a qualified audit report for three consecutive years, had failed to comply with the South African Companies Act with regard to the issuance of the audited financial statements, and had a pending case about its financial status.³²⁹ Therefore, the SARRAL case shows that the legal framework must have provisions in place for carrying out comprehensive investigation before any CMO license to operate is granted and/or renewed.

With regard to dispute resolution, the Kenyan and South African legal frameworks provide for the Competent Authority and Copyright Tribunal to act as arbiters in disputes arising between the various actors within the collective management system. However, there is need to strengthen the legal provisions relating to these bodies so as to enhance their efficiency and effectiveness.³³⁰

With regard to the Kenyan requirement of one society per class of rights and category of works, there is need to review the Act along the lines proposed by the Copyright Review Commission.³³¹ In the South African context, the Commission suggested that all collecting societies be mixed (e.g. a collecting society for needletime should cater for both performers and record companies) and existing societies should be given a period of two years to merge, failing which an appropriate process should be used to appoint the mixed collection societies.³³²

³²⁹ See Department of Trade and Industry (2011), Copyright Review Commission Report, *op. cit.* at Paragraph 6.1.4.

³³⁰ *Ibid* at Paragraph 6.3.4. The South African Copyright Review Commission recommended that the Copyright Tribunal should consist of 5 members namely a President and a Deputy President (both of whom should be High Court judges appointed by the President of the Republic on the recommendation of the Judicial Service Commission (JSC)) and three other members appointed by the President of the Republic on the recommendation of the JSC, each of whom have at least five years' experience at a high level in industry, commerce, business, public administration education or the practice of a profession. The CRC further recommends that the sittings of the Tribunal should be held at such places and times as the President of the Tribunal determines. A quorum of the Tribunal should be constituted by one member, unless a party to a matter before the Tribunal requests that it be constituted by more than one member, in which event it should be constituted by not less than two members, one of whom should be the President or the Deputy President.

³³¹ *Ibid* at Paragraph 6.3.4.

³³² *Ibid.* The implementation of this recommendation commenced in 2014 with the establishment of the Composers Authors and Publishers Association (CAPASSO). CAPASSO is a result of the merger of NORM's and SAMRO's mechanical rights units to form one collecting society for mechanical rights. More information on CAPASSO is available at: <http://www.capasso.co.za/index.php/about-us/our-history#>

Therefore, in the case of Kenya's three CMOs in music industry, KAMP, PRiSK and MCSK, the interests of rights holders and users would be maximised through a merger of these CMOs for joint administration of royalties from blank tape levies, public performance/communication to the public, broadcasting, reproduction of musical works and sound recordings, as is already the case in Nigeria with the Copyright Society of Nigeria (COSON).³³³

4.1.2 Nigeria

The primary source of law for licensing and supervision of CMOs is the Copyright Act Cap C28, Laws of the Federation of Nigeria 2004 and the Copyright (Collective Management Organisations) Regulations 2007.³³⁴ Section 39(8) of the Nigerian Act aptly defines a CMO as “an association of copyright owners which has as its principal objectives the negotiating and granting of license, collecting and distributing of royalties in respect of copyright works.” The Nigerian Copyright Commission (NCC), established under section 34 of the Nigerian Act, is the statutory organ responsible for all matters affecting copyright in Nigeria as provided for in the Copyright Act. Under section 39(2) of the Nigerian Act, the NCC has the powers to give approval for any entity seeking to operate as a CMO for the purposes of the Act.³³⁵ Like the Kenyan Act, the Nigerian Act criminalises the act of performing the duties of a CMO without the approval of the NCC but it goes a step further to impose a graduated scale of fines and an imprisonment term.³³⁶

³³³ COSON is the sole CMO approved by the Nigerian Copyright Commission (NCC) to act on behalf of authors, composers, performers, publishers of Musical works and owners of sound recordings in Nigeria. More information about COSON is available at: <http://www.cosonng.com/the-copyright-society-of-nigeria/>

³³⁴The NCC has discretionary powers under section 39(7) to make regulations which would specify certain conditions required for effective copyright collective administration of rights in Nigeria. Pursuant to these powers, the NCC issued the Copyright (Collective Management Organisations) Regulations 2007.

³³⁵ In this connection, see the case of *Musical Copyright Society Nigeria Ltd v Details Nigeria Limited* discussed by O. O. Rotimi (2012) *op cit.* at 60. In this case, an ex-parte order had been obtained by the plaintiff against the defendants to which the defendant raised a locus standi objection. The defendant argued that since the plaintiff had claimed to represent more than two million artistes, and was essentially carrying out the activities of negotiating and granting of licenses, collection and distribution of royalties on copyright works, the plaintiff was functioning as a collecting society and required the approval of the Nigerian Copyright Commission to operate as a collecting society in order to be entitled to institute copyright infringement proceedings. The plaintiff on the other-hand denied commencing the action as a collecting society but rather as an owner, assignee and exclusive licensee as contemplated under Section 15 of the Act. The court ruled that the plaintiff is a collecting society. Therefore the fact that MCSN has not been registered pursuant to Section 32B(4) of the Act, it cannot be permitted to operate as such a CMO.

³³⁶ S. 39(5) of the Nigerian Act.

Within the context of supervision of the activities of CMOs, section 2(3)(vi) of the Nigerian CMO Regulations states that the Articles of Association of the CMO must make provision for the attendance of a representative of NCC as an observer at the Governing Board and General Meetings of the CMO. Section 2(4) of the Regulations provides that NCC may require any new applicant to advertise, at its own cost, its application for grant of licence to operate as a CMO in designated national newspaper(s). Finally, section 2(9) of the Regulations provides that the license granted by NCC is valid for three (3) years and may be renewed every two (2) years for a successive 2 year period.

During the registration of a CMO, the Regulations impose certain positive obligations on CMO to furnish certain information both to the NCC as well as the general public. Section 8(1) provides that NCC must be notified by the CMO on the following issues: 1) any alterations to its Memorandum or Articles of Association or any internal rules; 2) any adoption of Tariffs and alteration thereof; 3) any Reciprocal Representation Agreements entered into with foreign collecting societies; 4) any alteration to the standard membership agreement; and 5) any decisions in judicial or official proceedings to which the CMO is a party, where the Commission so requires. Furthermore, under section 8(4), the CMO must publicise any change in the tariff rates for any category of users through a medium that is accessed publicly by them. In the event of breach of the above conditions, the CMO and/or its officers may be liable to a written caution and be required to rectify the breach within a specified time. Failure to rectify the breach within the specified period, the CMO shall be liable to a fine of fifty thousand Naira (N50, 000).

The Nigerian Regulations also provide for the appointment of an auditor at any time to audit the accounts of a CMO and the cost of such auditing shall be borne by the CMO. However, the Nigerian Regulations empower NCC to initiate criminal proceedings against the CMO where it appears that an offence has been committed by the CMO or by any of its officers.

An important feature of the Nigerian Regulations is section 11 which imposes a maximum limit of 30% out of the total royalties and fees collected that may be deducted by a CMO for administrative expenses during a year. However under section 11(2), the CMO may make a prior written application to NCC seeking the latter's approval to deduct more than 30% of its total

revenue to cover administrative expenditures. In the event of breach, the CMO may be liable to a caution and/or written admonition from NCC and be required to rectify the breach within a specified time. Where there is a dispute arising from any matter that falls within the purview of the Regulations, section 15 states that such disputes are to be referred to NCC which may set up a Dispute Resolution Panel.

Within the context of supervision of CMOs, section 18 is significant as it sets out certain conduct and practices deemed to be unethical including the following: 1) granting licenses, collecting and/or distributing royalties in respect of works for which the CMO is not authorized to administer; 2) making false representation in respect of any matter to which it is required to provide information knowing such representation to be false; 3) discriminating in the provision of licence to members of the same user class; inducing a user who is in the process of negotiating for a licence with another society or right owner to refrain from completing the licensing process; and 4) failing to make available to any other CMO information which is reasonably required by such other CMO to enable it effectively administer the rights held by it, doing anything or acting in a manner that has the effect of preventing any other CMO from carrying its functions as approved under the Regulations; among others.

With regard to deregistration of a CMO, the Regulations provides for revocation of a CMO's license. Section 3(1) states that NCC may on its own motion or on application by any interested person revoke the license of a CMO. Section 20 of the Regulations addresses how NCC deals with CMOs found to be in breach of the Regulations. In the first instance, the CMO may be liable to a written caution where it fails to act to address a breach of any of the sections in the Regulations. If the CMO fails to comply with a directive of NCC, then its license may be suspended pending the CMO's compliance. Where the CMO fails to comply with three months of the suspension, then the CMO's license may be revoked. Any officer of a CMO who has been cautioned for two times may be disqualified by NCC from holding any management position in any CMO unless he/she satisfies NCC on why he/she shall not be disqualified or why such disqualification should be lifted.

While it appears that Nigeria's legal provisions for regulation of CMOs are more stringent than those in South Africa and Kenya, one must bear in mind that the Nigerian provisions have been the subject of many litigation battles pitting CMOs against both users and the regulator, NCC. For instance, several cases arose from the requirement under Nigerian Copyright Act that prohibited a CMO from instituting actions for infringement of copyright unless such CMO had been approved by the NCC.

In the case of *Music Copyright Society of Nigeria Ltd v Details Nigeria Ltd*,³³⁷ the court upheld the defendant's locus standi objection by ruling that the plaintiff was functioning as a collecting society and not as an owner, assignee and exclusive licensee.³³⁸ This reasoning was reaffirmed by the Federal High Court in the case of *Music Copyright Society of Nigeria Ltd v Adeokin*.³³⁹ However the Court of Appeal in the *Adeokin* case reversed the lower court's decision by dismissing the locus standi objection and ruling that MCSN had the requisite locus standi as an owner, assignee and exclusive licensee to bring an action for copyright infringement.³⁴⁰ This appellate court reasoning was affirmed in subsequent cases such as *Music Copyright Society of Nigeria Ltd v Guinness Nigeria Plc*,³⁴¹ *Music Copyright Society of Nigeria Ltd v Nigerian Copyright Commission*³⁴² and *Compact Disc Technologies Ltd. v Music Copyright Society of Nigeria Ltd*.³⁴³

4.2 Legislative Options for Kenya

It is submitted that a common denominator of the legal frameworks in South Africa and Nigeria is two-fold: firstly the powers and functions of the South African and Nigerian regulators have been significantly enhanced and secondly, the obligations and duties imposed on registered CMOs in South Africa and Nigeria are greater than in the Kenyan context. Both South Africa and Nigeria have enacted special regulations dealing exclusively with the establishment, control

³³⁷ (1996) F.H.C.L.R 473. A commentary of this case is available in O.O Rotimi (2012) *op cit.* at 50.

³³⁸ See O.O Rotimi (2012) *op cit.* at 50.

³³⁹ CA/L/498/1997. A commentary of this case is available in O.O Rotimi (2012) *op cit.* at 125.

³⁴⁰ See O.O Rotimi (2012) *op cit.* at 125.

³⁴¹ FHC/L/CS/904/2005. A commentary of this case is available in O.O Rotimi (2012) *op cit.* at 124.

³⁴² FHC/L/CS/35/2008. A commentary of this case is available in O.O Rotimi (2012) *op cit.* at 125.

³⁴³ CA/L/787/2008. A commentary of this case is available in O.O Rotimi (2012) *op cit.* at 124.

and supervision of CMOs. In light of the existing gaps in its copyright law framework discussed in 3.2 above, this Study proposes that the following minimum legislative measures could be considered as contained in the legislative frameworks of Nigeria and South Africa.

4.2.1 Licensing Terms and Conditions for CMOs

All the requirements set out in sections 46 (a) and 46 (9) of the Act along with any other terms and conditions of the CMO license must be contained in a set of Regulations which is systematic and clear. The duration of the CMO license as set out in section 46(3) of the Act must be reconsidered. Among the jurisdictions analysed, South Africa’s license is the longest at 5 years, followed by Nigeria at 3 years. Revising the duration of the CMO license upwards will serve to bring this provision in line with section 47(1) which deals with Annual Reports and Audited Accounts.³⁴⁴

On the question of the CMOs’ obligations, the terms and conditions of the license must clearly spell out cost-to-income ratio that will be applicable. It is generally accepted that if the cost remains within some 30% of income from the management of performance and broadcasting rights or within 25% of the income from the management of reproduction rights then the CMO can be deemed economically sufficient and viable.³⁴⁵ Among the countries considered, South Africa has a cost-to-income ratio at twenty percent (20%), followed by Nigeria at thirty per cent (30%). In this regard, it is important to note that the Nigerian Regulations provide that a CMO may make a prior written application to the regulator seeking the latter’s approval to deduct more than 30% of its total revenue to cover administrative costs.

An important obligation on the CMO is to keep the government informed throughout its license period. In the both the Nigerian and South African Regulations, all registered CMOs are required to keep the regulator informed at all times, in addition to providing certain information to the

³⁴⁴ The Act appears to frustrate KECOBO’s supervisory mandate by prescribing that a CMO license shall be valid for one year yet it provides that CMOs shall only report to KECOBO once a year through their Annual Reports and Audited Accounts. This provision restricts KECOBO’s ability to examine and evaluate the operations and performance of CMOs prior to the period of application for renewal of registration.

³⁴⁵ U. Uchtenhagen (2005) “The Setting-up of New Copyright Societies - Some Experiences and Reflexions”, *op.cit.* at 7.

users of their copyright works. The CMO must inform the regulator within a 30 day period in the event of any changes to the Constitution or rules of the CMO, Tariffs, Reciprocal Representation Schedule, Standard Membership Agreements, and any decisions of judicial or official proceedings involving the CMO. The CMO would also be under a duty to notify the public, in particular, its licensees, about changes in its tariffs, licenses and other related information through public advertisements at the CMO's own cost.

In addition to the list of laws governing the activities of a CMO, the license must also require strict adherence to principles of good governance. Out of the two countries under review, South Africa presents the best argument for requiring CMO compliance with corporate governance principles. The collapse of SARRAL is noteworthy as it is attributed in part to corporate governance failure.³⁴⁶ For the remaining accredited CMOs, the South African Copyright Review Commission identified several key areas of non-compliance with the principles of good corporate governance namely, lack of internal controls and audit functions overseen by an effective audit committee, lack of independent directors³⁴⁷ on the boards of the CMOs and non-disclosure of directors' remunerations.³⁴⁸

The terms and conditions of the CMO license must prohibit CMOs from engaging in certain conduct and practices deemed to be anti-competitive and /or monopolistic vis-à-vis both users, members and other registered CMOs. This includes making any representations made to the users and the citizenry at large that any CMO is the sole CMO in the country without recognising the other CMOs that may exist within the particular industry. In line with the Nigerian regulations, CMOs must also be prohibited from engaging in certain conduct and practices deemed to be unethical within the scope of collection and distribution of royalties.

³⁴⁶See Department of Trade and Industry (2011), Copyright Review Commission Report, *op. cit.* at 52. Among some of the areas of non-compliance include: the breakdown or significant weaknesses in internal controls (the auditors issued qualified audit reports for 2003, 2004 and 2005 for failing to verify receipts from the South African Broadcasting Corporation and distribution of royalties to members); the internal rules of the CMO were in conflict with the constitutive documents of the CMO; The Managing Director was also the Chairperson of the CMO; The outdated constitutive documents were also in conflict with the South African Companies Act of 1973; The CMO made changes in its accounting policies, which resulted in breaching of the members' contracts.

³⁴⁷ These directors are qualified but do not form part of the CMO's membership. The SA CRC Report recommends at least one-third of the Board should be comprised of independent directors.

³⁴⁸*Ibid*, at 53.

Within the terms and conditions of the CMO license, specific timelines must be set for the CMOs to make all applications to the regulator including those for renewals, extensions, exceptions. Time limits must also be set for submission of all reports, and other information as required by the regulator.

Equally, the terms and conditions of the CMO license must impose certain obligations on the regulator to ensure that the latter exercises its functions within the confines of its enabling statutes and all other applicable laws of the land. First and foremost, any decision to be made by the regulator regarding the grant, renewal, non-renewal, rejection or withdrawal of a CMO's registration must be time-bound. Such time allocations must be calculated from the date of receipt of the application by the regulator.

In this connection, the license terms and conditions must expressly provide that the regulator must furnish the concerned CMO with written reasons for any decision made in the scope of its licensing and supervision mandate. With regard to the appeals provision in section 21(1) of the Copyright Act, it is submitted that a further amendment may be included to provide that on written request, an additional thirty (30) days may be allowed for a party to appeal before the Competent Authority. The appeals provision should also include interim or interlocutory applications pending final hearing and determination of the appeal.

It is submitted that the ouster clause in section 21(3) of the Act is unconstitutional as it limits the rights and fundamental freedoms of CMOs who may be aggrieved by the decisions of both KECOBO and the Competent Authority. In this regard, the Constitution clearly states that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.³⁴⁹

Finally, the terms and conditions of the CMO license must spell out clearly the consequences of breach. In the case of breach by the regulator, the CMO should be entitled to reliefs, both pecuniary and non-pecuniary. In the case of breach by the CMO, the regulator must have several

³⁴⁹See generally Art. 22(1) of the Constitution of Kenya, 2010.

options ranging from written cautions, warning letters, show cause letters and culminating in revocation of the license to operate and withdrawal of registration as a CMO.

4.2.2 Supervision of CMOs

As discussed above, the ideal situation is that there are clear terms and conditions for a CMOs license including the consequences of breach. However in order to ensure that CMOs comply with the license, the regulator must be empowered by law to carry out a wide range of supervisory functions with respect to the CMOs' activities.

The current situation in Kenya is that the Act does not provide any mechanisms or measures for KECOBO to effectively supervise the activities of CMOs. However there are useful provisions on government supervision of CMOs from Nigeria and South Africa that may be worth considering. In Nigeria, the audit of a CMO's activities by the regulator is clearly spelled out in law. Such an auditor is vested with statutory powers relating to the supervision of a CMO's activities and appears to have a great deal of independence and autonomy from both the CMO and the Commission. Therefore it is submitted that Kenya's legal framework must clearly articulate the audit function within the licensing and supervision of CMOs.

Quite separately from audit, the inspection of a CMO by the regulator is an important aspect of the regulator's supervisory role. Unlike audits, inspections ought to be continuous in nature and are intended to assess the degree with which the CMO's day to day activities are in compliance with the terms and conditions of its license. Therefore, Kenya ought to have the function of CMO inspectorate alongside that of CMO audit within its legal framework for licensing and supervision of CMOs.

With regard to non-compliant CMOs, KECOBO's only course of statutory course of action is to deregister the latter as provided under section 46(9) of the Act. However, in the two African jurisdictions under review, deregistration is seen as a measure of last resort and therefore the law prescribes other less drastic measures and actions to deal with non-compliant CMOs.

In South Africa, the CMO is given a notice of non-compliance and a period of between thirty (30) and ninety (90) days is provided to remedy the situation. Where the CMO fails to comply, the Registrar is empowered under section 4(4) to withdraw the accreditation and/or apply to court for relief including placing the CMO under judicial management or winding up or dissolution

Nigeria arguably has the most systematic framework for dealing with non-compliant CMOs. This framework is a combination of fines, penalties, cautionary letters, suspensions and disqualifications. As seen in the Nigerian context, the NCC is vested with a wide array of powers aimed at deterring non-compliance on the part of registered CMOs in Nigeria.

4.3 Conclusion

The experiences of South Africa and Nigeria in the area of collective administration of copyright provide important lessons for possible legislative developments in Kenya's copyright law framework.

Based on the legal provisions in South Africa and Nigeria, the Board of Directors and Management Team running CMOs are required to observe certain laid-out guidelines with regard to collection and distribution of royalties, administration, reporting and accounting in all aspects of their operations. In addition to the CMOs' obligations, the laws in South Africa and Nigeria provide additional powers to the State in regulation of CMOs such as inspection, audit, sanctions including fines and other punishment and the legal authority to be present in the CMOs' Annual General Meetings and Board Meetings.

In sum, this Project notes that while the legislative and regulatory provisions from South Africa and Nigeria may appear cogent and robust on paper, there is need to conduct further scholarly investigation and research on the practical effects of these provisions on the collective administration of copyright within the respective jurisdictions.

CHAPTER 5: CONCLUSIONS

In Chapter 1, this Project set out to investigate whether or not the existing legal and institutional framework for collective copyright administration is sufficient to maximise the interests of rights holders and users in Kenya. In order to carry out this investigation, this Project asks three questions relating to the evolution of collective administration of copyright and its development in Kenya with reference to relevant international and national laws. This Project assumes that the core function of a legal and institutional framework for collective copyright administration is to set out adequate provisions for the licensing and supervision of CMOs which will be enforced by the State for the benefit of rights holders and users. Additionally, it is assumed that a collective copyright administration framework may be deemed inadequate if there are persisting public complaints by rights holders against CMOs and litigation instituted by users against CMOs.

In the specific case of collective administration of copyright in Kenya, Chapter 1 explains that a key assumption in this Project is that an examination of the legislative frameworks in two leading creative economies in Africa, namely South Africa and Nigeria, may be useful to inform Kenya's approach in the area of State regulation of CMOs. In carrying out this investigation, Chapter 1 states that utilitarianism is the theoretical framework that will be used to facilitate the analysis of data gathered from the author's desk research. In utilitarian terms, an adequate legal framework for collective administration of copyright is one where the benefit to society derived from rights holders crafting valuable works offsets the costs to society of the incentives the law offers to the rights holders.

In Chapter 2, this Project examines the various national and international legal instruments that affect the collective administration of copyright in Kenya. This examination is critical as it sets out the various roles, rights and obligations of the four key actors in the collective copyright administration framework, namely: rights holders, users, CMOs and the State. In the case of the Kenyan State, this Project focuses on the Executive function to implement all the laws of Kenya, including those international instruments that have been ratified by Kenya. In particular, the Executive is responsible for the implementation of all national laws affecting the collective copyright administration namely, the Constitution, the Copyright Act and the Competition Act.

In terms of the copyright law framework, the Executive through KECOBO is responsible for the registration and licensing of CMOs. Once the CMO is registered and licensed by KECOBO, the State is responsible for the supervision of the CMO's activities. The exercise of these licensing and supervision functions must be fully consistent with the Constitution and must also comply with other written national laws including the Competition Act.

From the data presented in Chapter 2, there has been a gradual increase in the legislative provisions governing collective administration of copyright in Kenya. From a utilitarian perspective, this increase is aimed at maximising the interests of rights holders and users of copyright works. However the sluggish pace of implementation by the Executive has been a major stumbling block in the collective administration of copyright. For instance, despite the enactment of the 2001 Act which established KECOBO, it took KECOBO a period of seven years until 2007 to begin licensing and supervision of CMOs. In this connection, major concerns have been raised about the Executive's continuing failure to operationalize the Competent Authority under the Act despite the existence of an enabling legislative framework since 1992! As Chapter 2 shows, the Competent Authority plays an important role in regulating how CMOs relate with both rights holders and users in Kenya. Additionally, the Competent Authority would have been a formidable arbiter in disputes arising between CMOs and KECOBO on terms and conditions of CMO licenses, including compliance with requirements for renewal of CMO licenses.

In Chapter 3, this Project contextualises and problematises the collective administration of copyright from the establishment of the first CMO in 1850 to the most recently established Kenyan CMO in 2009. From the findings of this Chapter, it is clear that the evolution of CMOs throughout history has been a process led by rights holders who come together to seek a cost-effective way of benefiting from the commercial exploitation of their works. This phenomenon and the laws that have developed around it find their rationale and justification in the utilitarian mantra of "the greatest good for the greatest number".

In the specific case of Kenya, the phenomenon of collective administration of copyright has spawned four CMOs namely, in order of year of incorporation: MCSK, KAMP, KOPIKEN and

PRiSK. The data presented in Chapter 3 strongly suggests that each of the four CMOs ought to be closely regulated by the State to ensure that the welfare of rights holders and user is fully maximised. In this regard, social welfare maximisation appears to be limited by the absence of a robust legal and institutional framework for licensing and supervision of the four CMOs. In the case of MCSK, both rights holders and users continue to complain about the royalty collection and distribution methods of MCSK from as early as 1984 to date. In the cases of KOPIKEN, KAMP and PRiSK, the complaints are more prominent among the users of the copyright works controlled by these CMOs.

All in all, the numerous complaints and court cases against CMOs discussed in Chapter 3 are evidence that CMOs are not functioning efficiently and/or effectively in the collection and distribution of royalties. In this connection, the maximisation of welfare of rights holders and users is dependent on the efficiency and effectiveness of CMOs, which in turn requires a robust legal and institutional framework for collective administration. Therefore it is imperative that this framework is reviewed and amended to strengthen the powers of KECOBO in its role of regulating CMOs in Kenya. Within KECOBO's empowering statute the Copyright Act, this Project focuses on three key gaps which must urgently be addressed namely, the lack of exact terms and conditions of a CMO license, the lack of adequate provisions for supervision of CMOs and the lack of adequate provisions to sanction non-compliant CMOs, including deregistration of a CMO solely as last resort.

With regard to possible review and amendment of the Kenya's copyright law framework, Chapter 4 of this Project considers the experiences of two leading African economies namely Nigeria and South Africa in the area of collective administration. From this analysis, the study discovers that there are several important legal provisions that may be borrowed and used by Kenya to adequately address the shortcomings in her copyright law framework for licensing and supervision of CMOs. In this regard, the data collected in this chapter shows that Nigeria's legislative and regulatory framework is significantly more robust on the licensing and supervision of CMOs than the South African framework. However it is important to note that both Nigeria and South Africa have enacted special regulations dealing exclusively with the establishment, supervision and control of CMOs by the State. This Project proposes that such a

move should also be taken by Kenya so as to consolidate and enhance existing legislative and regulatory provisions on licensing and supervision of CMOs by KECOBO.

From the data presented in Chapter 4, it is clear that the Nigerian and the South African experiences are particularly instructive for Kenya. From the CMO licensing perspective, rights holders and users have clearly defined mechanisms to challenge the State's decision to accept, reject or renew a CMO's license through administrative and judicial means. Once licensed to operate, CMOs in South Africa and Nigeria are under the watchful eye of the respective State regulators and the CMOs are obliged to keep the regulators informed of their activities as well as invite the regulators to the CMOs' Meetings. CMOs in South Africa and Nigeria are also required to abide by a pre-determined cost-royalty ratio spelled out in the law.

An important finding from the data collected in Chapter 4 is that South Africa and Nigeria have a graduated system of sanctions and punishments for CMOs that do not comply with the law. In both cases, the revocation of a CMO's license to operate is a measure of last resort. In the first instance, the CMO is cautioned in writing and given time to remedy the breach, failure to which the CMO will be liable to fines and other administrative sanctions include suspensions. It is only where the CMO completely fails or refuses to comply that the State is empowered to revoke its license to operate. In light of MCSK deregistration saga, the provisions in South Africa and Nigeria may be of use to Kenya so as to ensure that CMOs do not exploit the gaps in the legal framework to evade liability and punishment.

In sum, this Project concludes that an adequate legal and institutional framework for collective administration is the key to ensure the maximisation of the interests of rights holders and users. The adequacy of this framework depends entirely on the provisions for licensing and supervision of CMOs. These provisions ought to balance the rights and obligations of CMOs vis-à-vis its relations with its members, users and the State. The institutions established and empowered by the legal framework must be well-funded and well-staffed in order to ensure that CMOs remain compliant and responsive. It follows that any proposals for review and amendment of Kenya's legal and institutional framework must involve these four key players, namely: CMOs, rights holders, users and the State.

BIBLIOGRAPHY

ARTICLES

A. Dietz (2002) “Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe”, *Journal of the Copyright Society of the United States of America*.

A. Perullo & A.J. Eisenberg (2014) "Musical Property Rights Regimes in Kenya and Tanzania after TRIPs", Forthcoming in *SAGE Handbook of Intellectual Property* (Matthew David & Debora Halbert, eds.) (On file with author)

A.D. Moor (2003) “Intellectual Property, Innovation and Social Progress: The Case Against Incentive Based Arguments” *The Hamline Law Review*, Vol. 26.

JJ Baloyi (2014) “Demystifying the Role of Copyright as a Tool for Economic Development in Africa: Tackling the Harsh Effects of the Transferability Principle in Copyright Law”, Potchefstroom Electronic Law Journal.

J. Band & B. Butler (2013) "Some Cautionary Tales About Collective Licensing". *Michigan State International Law Review*, Vol. 21:3, 2013.

J.C. Fromer (2012) “Expressive Incentives in Intellectual Property”, *Virginia Law Review* Vol. 98, No. 8, December 2012

M.A. Lemley (1997) “The Economics of Improvement in Intellectual Property Law” *Texas Law Review*, Vol. 75

M.F. Schultz & A. van Gelder (2008) "Creative Development: Helping Poor Countries by Building Creative Industries". *Kentucky Law Journal*, Vol. 97, No. 1, 2008.

S.P. Croley (1998) “Theories of Regulation: Incorporating the Administrative Process”, *Columbia Law Review*.

M. Hantke-Domas (2003), "The Public Interest Theory of Regulation: Non-Existence or Misinterpretation", *European Journal of Law and Economics*.

BOOKS

D. Nyariki (2009) *The Economic Contribution of Copyright-Based Industries in Kenya*, World Intellectual Property Organization, Geneva.

I.J Kroeze (2007) *Legal Philosophy*, University of South Africa Press, Pretoria.

J.W. Chege (1978) *Copyright Law and Publishing in Kenya*, Kenya Literature Bureau.

J. Watal (2001) *Intellectual Property Rights in the WTO and Developing Countries*, The Hague, Kluwer Law International.

K. Malm and R. Wallis(1992) *Media Policy and Music Activity*, Routledge, London.

L. Bently & B. Sherman (Eds.) (2009) *Intellectual Property 3rd Edition*, Oxford University Press Inc. New York.

L. Bently, U. Suthersanen & P. Torremans (eds) (2010) *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*, Edward Edgar Publishing, United Kingdom.

M. Fiscor (2002) *Collective Management of Copyright and Related Rights*, World Intellectual Property Organization, Geneva.

N.S Sreenivasulu (2013) *Law Relating to Intellectual Property*, Partridge, India.

N. Swainson (1980) *The Development of Corporate Capitalism in Kenya, 1918-77*, University of California Press, United States of America.

P. Goldstein (2001) *International Copyright: Principles, Law and Practice* Oxford University Press Inc, New York.

P.L.O. Lumumba (2006) *Judicial Review in Kenya*, 2nd Edition, Law Africa Publishers.

P.S. Menell (1998) "Intellectual Property: General Theories" in: Bouckaert, Boudewijn, De Geest, Gerrit (eds.) (2000) *Encyclopedia of Law and Economics, Vol. 1, The History and Methodology of Law and Economics*, Cheltenham, Edward Edgar, United Kingdom.

S. Alikhan & R.A. Mashelkar (2009) *Intellectual Property and Competitive Strategies in the 21st Century*, Kluwer Law International, Netherlands.

T. Jackson (1988) *The Law of Kenya*, Kenya Literature Bureau.

U. Uchtenhagen (2005) *The Setting-up of New Copyright Societies - Some Experiences and Reflexions*, World Intellectual Property Organization, Geneva.

W.A. Copinger & F.E. Skone James (1999) *Copinger & Skone James on Copyright*, Vol. 1 14th Edition, Sweet & Maxwell, London.

W.R. Cornish & D. Llewelyn (2007) *Intellectual Property: Copyright, Trademarks and Allied Rights* 6th Edition, Sweet & Maxwell, London.

CHAPTERS AND PAPERS

A. Gakuru (2011) "Copyright Board deregisters Music Copyright Society", *International Law Office Newsletter*. Available at: <http://www.internationallawoffice.com/newsletters/detail.aspx?g=1b71adf4-9a96-427a-97ed-b702eea7fd62> (Last accessed February 3, 2012).

B. Sihanya (2009) "Copyright Law in Kenya", *Innovative Lawyering & Copyright Africa*, Nairobi. Available at: <http://innovativelawyering.com/attachments/article/26/Copyright%20Law%20in%20Kenya%20-%20Prof%20Ben%20Sihanya.pdf>. (Last accessed on August 22, 2014)

B. Sihanya & M. Ouma (2010) "Access to Knowledge in Africa: The Role of Copyright": "Kenya", *African Copyright and Access to Knowledge (ACA2K) project*, International Development Research Centre (IDRC), Shuttleworth Foundation, Cape Town, South Africa.

B. Sihanya (2012) "Transnational Copyright and Related Law: Kenyan and African Perspectives", *Lecture Notes to LLM International IP Class 2011/12*, April 12, 2012. (On file with the author).

Blackfriars LLP (2008) Anarchy in the World of Collecting Societies in Nigeria: Implications for Copyright Protection of Foreign and Local Musical Works (part 1), January 2009 Volume 22 Issue 1. Available at: http://www.blackfriars-law.com/index.php/en/docs/doc_view/64-ip-newsletter-jan09?tmpl=component&format=raw. (Last accessed on August 22, 2014).

Blackfriars LLP (2009) Anarchy in the World of Collecting Societies in Nigeria: Implications for Copyright Protection of Foreign and Local Musical Works (part 2), February 2009 Vol. 22 Issue 2. Available at: http://www.blackfriars-law.com/index.php/en/docs/doc_view/64-ip-newsletter-jan09?tmpl=component&format=raw. (Last accessed on August 22, 2014).

C.B. Graber, M. Burri & M. Girsberger (2004) "Collecting Societies - Not Yet 'Six Feet Under'" *INDICARE Monitor*, Vol. 1, No 4, September 2004. Available at: <http://ssrn.com/abstract=1345093>. (Last accessed on August 22, 2014).

C. Seuna (2004) "Collective Management Bodies in Cameroon", UNESCO. Available at: http://portal.unesco.org/culture/en/files/23814/11515030291Seuna_e.pdf/Seuna_e.pdf (Last accessed on August 22, 2014).

Department of Trade and Industry (2011), Copyright Review Commission Report, Republic of South Africa, Pretoria. Available at: <http://www.info.gov.za/view/DownloadFileAction?id=173384> (Last accessed on August 22, 2014).

D.J. Gervais (2001) "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective", Department of Canadian Heritage, Canada. Available on file with the author.

E. Meyer (1998) "Operation and Supervision of Collecting Societies in the European Context", Paper presented at WIPO National Seminar on Collective Management of Copyright and Neighbouring Rights and the WIPO "Internet" Treaties (WCT and WPPT). Available at: http://www.wipo.int/mdocsarchives/WIPO_CNR_MNL_98/WIPO_CNR_MNL_98_8_E.pdf (Last accessed on August 22, 2014).

G.M. Sikoyo, E. Nyukuri & J. Wakhungu (Eds.) (2006) "Intellectual Property Protection In Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda", African Centre for Technology Studies (ACTS), Ecopolicy Series no. 16 of 2006. Available at: <http://www.acts.or.ke/dmdocuments/ecopolicy16.pdf> (Last accessed on August 22, 2014).

J. Drexl (2007) "Collecting Societies and Competition Law". Available at: <http://ip.mpg.de/shared/data/pdf/drexl - crmos and competition.pdf> (Last accessed on August 22, 2014).

J. Gachui (2012) "Management of Performers' and Phonogram Producers' Rights – the Case Study of Kenya", A Presentation made at the New Perspectives in Collective Management Sub-Regional Copyright Workshop held on November 8th 2012, Harare, Zimbabwe. Available here: <http://ipkenya.wordpress.com/2012/11/23/new-perspectives-in-collective-management-of-copyright-and-related-rights-in-africa/> (Last accessed on August 22, 2014).

J. Otike (2012) "Copyright: The Challenges Posed By Reproduction Rights Organizations (RROs) In The Provision Of Information To Users With Special Reference To Kenya", Paper presented at SCECSAL XXth Conference on 4th-8th June 2012 http://scecsal.viel.co.ke/images/7/7f/Copyright-The_Challenges_Posed_By_Reproduction_Rights_Organizations_%28RROs%29_In_The_Provision_Of_Information_To_Users_With_Special_Reference_To_Kenya.pdf (Last accessed on August 22, 2014).

KECOBO (2007) "Guide to Copyright in Kenya", Kenya Copyright Board, Nairobi. Available on file with author.

KECOBO (2008) "Copyright and the Music Industry in Kenya", Kenya Copyright Board, Nairobi. Available on file with author.

KECOBO (2011) "Collective Management of Copyright and Related Rights", *Copyright Newsletter Issue no 2*, Kenya Copyright Board, Nairobi. Available on file with author.

KAMP (2014) "What is equitable remuneration?", Frequently Asked Questions (FAQ's), Kenya Association of Music Producers Official Website. Available at: <http://www.kamp.or.ke/?portfolio=faqs> (Last accessed on August 22, 2014).

L. Guibault & S. van Gompel (2006) *Collective Management in the European Union*, The Hague, Kluwer Law International. Available at: http://www.ivir.nl/publications/guibault/collective_management_in_the_european_union.pdf. (Last accessed on August 22, 2014)

M. Fiscor (2002) "Collective Management of Copyright and Related Rights", World Intellectual Property Organization, Geneva. Available on file with the author.

M. Fiscor (2003) Collective Management of Copyright and Related Rights at A Triple Crossroads: Should It Remain Voluntary or May It Be "Extended" or Made Mandatory? Available at: http://portal.unesco.org/culture/en/files/14935/10657988721Fiscor_Eng.pdf/Fiscor%2BEng.pdf. (Last accessed on August 22, 2014)

M. Kretschmer (2002), "The failure of property rules in collective administration: rethinking copyright societies as regulatory instruments". Available online at: http://www.cippm.org.uk/pdfs/kretschmer_eipr_032002.pdf. (Last accessed on August 22, 2014)

M. Kretschmer (2004), "The Future of Collecting Societies", Paper presented at Foundation for Information Policy Research (fipr) Conference, October 9, 2010. Available online at http://ibal.bmth.ac.uk/pdf_docs/434.pdf (Last accessed on August 22, 2014)

M. Kretschmer (2005), "Access and Reward in the Information Society: Regulating the Collective Management of Copyright". Available online at: <http://eprints.bournemouth.ac.uk/3695/1/CollSoc07.pdf>. (Last accessed on August 22, 2014)

M. Ouma (2006) "Public and Private Institutions in the Administration of Intellectual Property Rights in Kenya" Available at: <http://www.dime-eu.org/files/active/0/Ouma.pdf> (Last accessed on August 22, 2014).

M. Pallante (2013) "The Next Great Copyright Act", 26th Horace S. Manges Lecture delivered on March 4, 2013, Columbia University.

M. Wekesa & B. Sihanya (2009) "Intellectual Property Rights in Kenya", Konrad Adenauer Stiftung. Available at: http://www.kas.de/wf/doc/kas_18323-1522-2-30.pdf?110214131726. (Last accessed on August 22, 2014)

N. R. Ombija (2011) "Case Study Of Kenya's Specialized Intellectual Property Rights Court Regime". Available on the Kenya Law Website at: <http://kenyalaw.org/kl/index.php?id=1899> (Last accessed on August 22, 2014)

Oraro & Company Advocates (2014) "Recent Developments in Copyright and Related Rights in Kenya", Oraro Blog. Available at: <http://blog.oraro.co.ke/2014/02/recent-developments-in-copyright-and-related-rights-in-kenya/>. (Last accessed on August 22, 2014).

P. Kameri-Mbote (2005) "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). Available at: <http://www.ielrc.org/content/w0502.pdf> (Last accessed on August 22, 2014)

PricewaterhouseCoopers LLP (2005) "Music collecting societies: Evolution or regulation?", United Kingdom. Available at: [http://pwcplus.pwc.de/fileserver/EmbeddedItem?docId=e5021b4f91a7ed8&componentName=pubDownload_hd&title=PDF:+Verwertungsgesellschaften:+Evolution+oder+Regulierung?+\(Music+Collecting+Societies.pdf](http://pwcplus.pwc.de/fileserver/EmbeddedItem?docId=e5021b4f91a7ed8&componentName=pubDownload_hd&title=PDF:+Verwertungsgesellschaften:+Evolution+oder+Regulierung?+(Music+Collecting+Societies.pdf). (Last accessed on August 22, 2014)

P. Schepens (2000) "Guide to the Collective Administration of Authors' Rights", The Administration Society at the Service of Authors and Users, UNESCO. Available at: <http://unesdoc.unesco.org/images/0012/001206/120677e.pdf>. (Last accessed on August 22, 2014)

R. Posner (1974) "Theories of Economic Regulation", United States National Bureau of Economic Research (NBER) Working Paper No. 41. Available at: <http://ssrn.com/abstract=259352> (Last accessed on August 22, 2014)

S. Albinsson (2012) "The Advent of Performing Rights in Europe", Music & Politics Issue No. 2 Vol. 6 Summer 2012, University of Michigan Publishing, United States. Available on file with the author.

S. A. Wako (2003) Speech delivered by the Honourable Attorney-General, Republic of Kenya (As he then was) at the Official Launch of the Kenya Copyright Board at the State Law Office, Nairobi on July 21, 2003. Available on file with the author.

S.N. Ndemange (1984) "Royalty Payment", A letter written to Mr. Habel Mwalumba Kifoto on March 1st 1984 by S.N. Ndemange the then MCSK General Manager. Available on file with the author.

T. Koskinen-Olson & N. Lowe (2012) "Educational Material on Collective Management of Copyright and Related Rights" Module 2 Final Draft Publication, World Intellectual Property Organization, Geneva. Available on file with the author.

T. Ogada (2012) "Developing a National IP Policy and Strategy for Kenya: Draft Report. Desk Study of the IP System in Kenya and Its Links with National Development Priorities", World Intellectual Property Organization, Geneva. Available on file with the author.

UK Copyright Service (2004) "International copyright law - The Berne Convention", Available at: http://www.copyrightservice.co.uk/copyright/p08_berne_convention (Last accessed on August 22, 2014).

U. Suthersanen (2005), "The Future of Copyright Reform in Developing Countries: Technological Interpretation, Localised Globalism and the "Pubic Interest" Rule", http://www.iprsonline.org/unctadictsd/bellagio/Bellagio2005/Suthersanen_final.pdf. (Last accessed on August 22, 2014).

V. Nzomo (2012) "From PRSK to PRISK: A Tale of Two Societies", IP Kenya Blog June 8, 2012. Available at: <http://ipkenya.wordpress.com/2012/06/08/from-prsk-to-prisk-a-tale-of-two-societies/> (Last accessed on August 22, 2014).

V. Nzomo (2013) "Amalgamation of Collecting Societies, Compulsory Licensing and the Role of the Copyright Tribunal", IPKenya Blog, September 11, 2013. Available at: <http://ipkenya.wordpress.com/2013/09/11/amalgamation-of-collecting-societies-compulsory-licensing-and-the-role-of-the-copyright-tribunal/> (Last accessed on August 22, 2014).

V. Nzomo (2014) "Lessons for Kenya: South African Copyright Tribunal Sets Aside License Tariff for Use of Sound Recordings", IPKenya Blog, March 13, 2014. Available at: <http://ipkenya.wordpress.com/2014/03/13/lessons-for-kenya-south-african-copyright-tribunal-sets-aside-license-tariff-for-use-of-sound-recordings/> (Last accessed on August 22, 2014).

William Fisher (2001). Theories of International Property, in Munzer S. (ed). New Essays in Legal and Political Theory of Property. William M. Landes and Richard A. Posner, (1989) "An Economic Analysis of Copyright Law", 18 J. Legal. Stud. 325. Available at: <http://www.law.harvard.edu/faculty/tfisher/iptheory.html>. (Last accessed on August 22, 2014)

WIPO (1999) "Understanding Copyright and Related Rights", WIPO, Geneva. Available at: http://www.wipo.int/export/sites/www/freepublications/en/intproperty/909/wipo_pub_909.pdf. (Last accessed on August 22, 2014)

WIPO (2004) "WIPO Guide on the Licensing of Copyright and Related Rights", World Intellectual Property Organization, Geneva. Available on file with the author.

WIPO (2014) Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886), Available at: http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (Last accessed on August 22, 2014)

WTO (2014) "Overview: the TRIPS Agreement" Available at: http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm. (Last accessed on August 22, 2014).

NEWSPAPER ARTICLES

East African Standard (2012) "Royal fight for royalties", August 19, 2012. Available at: http://www.standardmedia.co.ke/?articleID=2000064330&story_title=Royal-fight-for-royalties (Last accessed on August 22, 2014)

J. Muchiri (2011) "Music copyright body deregistered over 'misuse of funds'". Daily Nation May 14, 2011. Available at: <http://www.nation.co.ke/News/Music+copyright+body+deregistered+over+misuse+of+funds/-/1056/1162478/-/tif5bh/-/> (Last accessed on August 22, 2014)

L. Okulo (2011) "MCSK to continue collecting fees for musicians - Court.". The Star, June 6, 2011. Available at: <http://www.the-star.co.ke/business/local/27009-msck-to-continue-collecting-fees-for-musicians-court> (Last accessed on August 22, 2014)

M. Okuttah (2010) "Regulator threatens to revoke MCSK's licence", Business Daily, 31 December 2010. Available at: <http://www.businessdailyafrica.com/Corporate+News/Regulator+threatens+to+revoke+MCSKs+licence/-/539550/1081144/-/12bak4h/-/index.html> (Last accessed on August 22, 2014)

M. Okuttah (2011) "Music society to track broadcasters via new software", Business Daily, October 10, 2011. Available at: <http://www.businessdailyafrica.com/Corporate+News/Music+society+to+track+broadcasters+via+new+software+/-/539550/1253280/-/hqjyvkz/-/index.html> (Last accessed on August 22, 2014)

The Standard (2003) "Group Blames State Over Piracy", November 6, 2003. Available at: <http://allafrica.com/stories/200311060013.html>. (Last accessed on August 22, 2014)

Daily Nation (2003) "Music Piracy Blamed On Laxity By the Government", November 7, 2003. Available at: <http://allafrica.com/stories/200311070164.html>. (Last accessed on August 22, 2014)

E. Mwendwa (2007) "Chasing the Lost Millions in Music", The Standard July 07, 2007. Available at: <http://allafrica.com/stories/200707060899.html> (Last accessed on August 22, 2014)

I. Wairimu (2014) "Bar owners fight fees", The Star Newspaper September 19, 2014. Available at: <http://www.the-star.co.ke/news/article-190406/bar-owners-fight-fees> (Last accessed on September 22, 2014)

M. Ongwae (2007) "Act Tough On Music Pirates, Urges Lobby", Daily Nation July 28, 2007. Available at: <http://allafrica.com/stories/200707270954.html> (Last accessed on August 22, 2014)

Ochieng' Ogodo (2002) "Ignore Dismissal Order, MCSK Tells Musicians" The Standard March 25, 2002. Available at: <http://allafrica.com/stories/200203250098.html> (Last accessed on August 22, 2014)

T. Kamuzu Banda (2007) "A Major Breakthrough for Kenyan Musicians", Daily Nation June 09, 2007. Available at: <http://allafrica.com/stories/200706090082.html> (Last accessed on August 22, 2014).

M. Wa Micheni (2008) "'Toothless' Music Society Out to Regain Former Glory", Business Daily February 03, 2008. Available at: <http://allafrica.com/stories/200802040706.html> (Last accessed on August 22, 2014).

J. Muchiri (2011) "Copyright Board Vs MCSK: Who's Fooling Whom?", Daily Nation May 28, 2011. Available at: <http://www.nation.co.ke/lifestyle/buzz/Copyright-Board-Vs-MCSK-Whos--Fooling-Whom--/441236/1171016/-/wign51/-/index.html> (Last accessed on August 22, 2014)

J. Muchangi (2012) "All Matters Music, Royalties and Copyright", The Star April 30, 2012. Available at: <http://starreport.co.ke/news/article-20451/all-matters-music-royalties-and-copyright> (Last accessed on August 22, 2014)

Daily Nation (2001) "Artistes Dismiss Society Directors", January 31, 2001. Available at: <http://allafrica.com/stories/200101310247.html> (Last accessed on August 22, 2014)

Daily Nation (2001) "Music Society Back To Work", February 6, 2001. Available at: <http://allafrica.com/stories/200102060180.html> (Last accessed on August 22, 2014)

P. Mwaniki (2004) "Pay Us for Our Songs, Say Artistes", Daily Nation August 03, 2004. Available at: <http://allafrica.com/stories/200408030084.html> (Last accessed on August 22, 2014)

T. Kamuzu Banda (2007) "Musicians Strive to Earn a Fair Share of What They Produce", Daily Nation April 07, 2007. Available at: <http://allafrica.com/stories/200704060797.html> (Last accessed on August 22, 2014)

J. Muchiri (2011) "Musicians finally get the better of MCSK", Daily Nation July 23, 2011. Available at: <http://www.nation.co.ke/lifestyle/buzz/Musicians-finally-get-the-better-of-MCSK--/-/441236/1206456/-/3wbihhz/-/index.html> (Last accessed on August 22, 2014)

Daily Nation (2011) "I'm still waiting for my dues from music copyright body ", May 28, 2011. Available at: <http://www.nation.co.ke/oped/Letters/-/440806/1171088/-/9v4h2e/-/index.html> (Last accessed on August 22, 2014)

J. Muchiri (2011) "Roba: We want our money, MCSK!", Daily Nation March 12, 2011. Available at: <http://www.nation.co.ke/lifestyle/buzz/Roba-We-want-our-money-MCSK/-/441236/1123512/-/bt8uvyz/-/index.html> (Last accessed on August 22, 2014)

J. Muchangi (2012) "All Matters Music, Royalties and Copyright", The Star April 30, 2012. Available at: <http://starreport.co.ke/news/article-20451/all-matters-music-royalties-and-copyright> (Last accessed on August 22, 2014)

Daily Nation (2011) "The Cutting Edge by The Watchman", March 1, 2011. Available at <http://www.nation.co.ke/oped/Cutting-Edge/The-cutting-edge/-/440802/1117048/-/12fr50q/-/index.html> (Last accessed on August 22, 2014).

Daily Nation (2010) "Investigate these 'copyright officers'", July 7, 2010. Available at: <http://www.nation.co.ke/oped/Letters/Investigate-these-copyright-officers/-/440806/953874/-/nuhq61z/-/index.html> (Last accessed on August 22, 2014).

E. Wamari (2008) "Protecting their creativity at all costs", Daily Nation September 11, 2008. Available at: <http://www.nation.co.ke/lifestyle/weekend/-/1220/469188/-/dyub9g/-/index.html> (Last accessed on August 22, 2014).

J. Muchangi (2012) "All Matters Music, Royalties and Copyright", The Star April 30, 2012. Available at: <http://starreport.co.ke/news/article-20451/all-matters-music-royalties-and-copyright> (Last accessed on August 22, 2014).

F. Orido (2005) "Major Threat From TV And Radio Stations", Daily Nation August 01, 2005. Available at: <http://allafrica.com/stories/200508011323.html> (Last accessed on August 22, 2014).

T. Kamuzu Banda (2010) "Brighter days for artistes ", Daily Nation November 27, 2010. Available at: <http://www.nation.co.ke/lifestyle/buzz/Brighter-days-for-artistes-/-/441236/1061348/-/78tjc1/-/index.html> (Last accessed on August 22, 2014).

T. Kamuzu Banda (2008) "Royalties: Who should pay up and are the artistes benefiting?", Daily Nation August 09, 2008. Available at: <http://www.nation.co.ke/lifestyle/buzz/-/441236/454540/-/c3vf7y/-/index.html> (Last accessed on August 22, 2014).

THESES AND DISSERTATIONS

A. Kumi-Atiemo (2009) "Collective Management of Copyright and Related Right in Music: A Case Study of the United Kingdom and Ghanaian System", Unpublished LL.M Research Paper, University of Turin. Available on file with the author.

A. S. Masake (2013) "Copyright Enforcement in the Music Industry in Kenya: Challenges Posed by the Internet", Unpublished MIP Research Paper, Africa University Zimbabwe. Available on file with the author.

M. Frabboni (2009) "Collective management of music rights: a test of competition and Industrial Organisation theories, Published Ph.D Thesis, Queen Mary University of London. Available on file with the author.

M. Ouma (2009) "Enforcement of Copyright in the Music Industry: A Critical Analysis of the Legal and Institutional Framework on Enforcement in Sub Saharan Africa", Unpublished Ph.D Thesis, Queen Mary University of London. Available on file with the author.

O.O. Rotimi (2012) "Operation and Regulation of Copyright Collective Administration in Nigeria: Important Lessons for Africa", Published LL.M Research Project, University of South Africa. Available on file with the author.

S. M. Chahale (2011) "Cultural Barriers to the Introduction of Western Model Collective Management Systems in Developing Countries: Case Study, Comparison between Kenya and Haiti", Unpublished LL.M Research Paper, University of Turin. Available on file with the author.

K. Gebremedhn (2013) "The Emerging Ethiopian Copyright and Related Rights Collecting Society: Assessment of Challenges and Prospects", Unpublished LL.M Research Project, Addis Ababa University. Available on file with the author.