COPYRIGHT LAW, TEACHING AND RESEARCH IN KENYA

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I. PROLEGOMENON

This article looks at the role of copyright in technological, economic and cultural innovation, creativity and development in Kenya.[1] My focus is on the development of copyright law and copyright teaching, training and research in Kenya. I consider these issues in the context of six interrelated themes:

1. Development of substantive copyright law in Kenya;
2. Copyright in the discourse on innovation, international trade, technology transfer and sustainable development in Kenya;
3. Methodological concerns on the role of copyright in economic and cultural development in Kenya;
4. Copyright in economic development in Kenya;
5. Copyright in cultural development and cultural politics, with specific reference to the cultural industries in Kenya;
6. Copyright teaching, training, and research in Kenya.

II. DEVELOPMENT OF SUBSTANTIVE COPYRIGHT IN KENYA

In this Part I evaluate the historical, cultural, political, economic and technological factors, which have influenced the development of Kenya's copyright principles, doctrine, policy, and practice. I have located Kenya's copyright law and doctrine in the (post)colonial context. I have also addressed the nature, subsistence and scope of copyright as well as copyright transactions and enforcement in Kenya.

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[1] This article is informed by my ongoing research: B Sihanya *Constructing Copyright and Creativity in Kenya: Cultural Politics and the Political Economy of Transnational Intellectual Property*, Doctoral Dissertation, Stanford Law School, 2003 [Hereinafter, *Constructing Copyright and Creativity in Kenya*] ; forthcoming as a book, *Intellectual Property and Innovation in Africa: Transferring Technology for Sustainable Development* (Innovative Lawyering & ©opyright Af®ica, Nairobi, 2006).

I argue that Kenya's Western-oriented copyright law has been sustained by three closely related factors:

i. Kenya's copyright law and practice have deep roots in the colonial and neo-colonial experience.

ii. Corporations based in the UK or US also influence copyright law and practice directly and indirectly through the governments of the countries they originate from or through copyright transactions and litigation. Indeed, they seek to have Kenya's copyright reflect Northern (and in particular Western) standards, which provide them with the desired protection and with the norms with which they are familiar.

Although the law originated from the UK, which still influences its development, relations with the UK and the US and, to a lesser extent, relations with Uganda, Tanzania, Ghana, Nigeria, and South Africa in the fields of bilateral and transnational trade, development, and cultural exchange, have contributed to the implementation of copyright law. This is the post-colonial phenomenon which includes the impact of technological development and relations between Kenya and international organizations as well as states other than the UK. To be sure, since the 1970s, information, high technology and cultural products have become critical factors in such transactions. In this context, the authors, creators, innovators, investors and traders have been keen to protect their proprietary and technological assets. Kenya, as a country, is also keen to attract foreign investment. Partly because of this Kenya has adopted foreign copyright principles that guarantee the investors copyright protection. The result is that Kenya is pressured by copyright owners in books, software and entertainment products to extend or strengthen protection of their works.

iii. Many economic and legal actors who have a role in shaping Kenya's copyright law have internalized the values and interests embodied in Western and international copyright. In this context, the imposition of copyright law is a nuanced phenomenon. Its sustenance is more closely related to the social, economic, political, and legal culture of the actors (many of them Kenyan). This reinforces the direct imposition from the Western capitals or headquarters of the trans-national corporations, the historical imposition by colonial officials, as well as by those interested in consolidating post-colonialism.

A. Historical Development of Copyright in Kenya

Copyright law is closely related to the invention of Caxton's printing press in England in the context of the Industrial Revolution. The benefits and challenges of the Industrial Revolution to culture and copyright initially occurred in the UK where it was realised that the printing press constituted a double-edged weapon. On the one hand, it facilitated the production and distribution of books and related materials. Yet it also facilitated copying and infringement of copyright.[2]

One of the most important developments in modern copyright law, the English Statute of Anne, would be enacted in 1710 and subsequently amended to address the concerns of authors, publishers and printers. In 1787 the US codified copyright law in its Constitution; with Art. 1 s. 8, giving the Congress the power "[t]o promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their ... Writings ...." Congress enacted the first copyright Act in 1790. Major overhauls came in 1909 and 1976. The US has influenced Kenya's copyright law mainly through American influence of the international copyright regime, especially the World Trade Organisation's (WTO's) Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, 1994 (TRIPs). Historically, British colonial influence has been more direct mainly because of (neo-) colonialism.

In Kenya, copyright law is largely a 20th century phenomenon, beginning with the declaration of Kenya as a British protectorate from June 15, 1895 and a colony in 1920.[3] Kenya's copyright law evolved from the 1842, through the 1911 and 1956 UK Copyright Acts. These statutes were applied together with the English common law by virtue of the reception clause under the East African-Order-in-Council 1897, which applied to Kenya the substance of the English common law, the doctrines of equity and statutes of general application in force in England as at that date,[4] and later the Kenya Judicature Act, 1967. That Order-in-Council was later revised to apply a number of UK copyright laws that were of general application. These included the Copyright Act 1842, the International Copyright Act, 1842 and 1844, the Fine Arts Copyright Act, 1862, and the Copyright (Musical Compositions) Act, 1888. The 1842 Act[5] "repealed

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[2] The United States' influence is mainly through developments in photocopying, broadcasting, and Internet technologies.

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

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

[5] 5 and 6 Vict., c. 45.

the Statute of Anne and other copyright laws to that date."[6] It also extended the definition of a "book" to mean and include "sheet, pamphlet, sheet of music, map, chart, plan, tragedy, farce, opera, comedy, [and] scenic or musical or dramatic entertainment."[7] This Act was amended by the 1956 UK Copyright Act, which was also applied to Kenya[8] and Anglophone Africa generally. At independence in 1963, the 1956 Act was still applied until Kenya enacted its own Copyright Act in 1966.[9] The 1956 Act and the Copyright (Kenya) Order, 1963 were repealed by s. 18 of the Copyright Act, 1966. This Act came into force on April 1, 1966.

Thus, like Uganda, Tanzania, Ghana, Nigeria, South Africa, and other African countries, Kenya has been engaged in the transnational copyright system through colonialism, neo-colonialism and post-colonialism. For instance, the Berne Convention on Literary and Artistic Works, 1886 and Universal Copyright Convention (UCC) 1952 were negotiated, signed and ratified on their behalf by colonial authorities. After independence they were tied to Berne by virtue of the "Berne safeguard clause" and similar manoeuvres contrived by the US, the UK, and other exporters of educational and entertainment materials.[10] A number of Agreements on Friendship, Commerce and Navigation (FCN) also cover(ed) or laid a framework for copyright policy and transactions.

In this context many copyright treaty provisions have been criticized for being inequitable and odious to Kenyan interests. Moreover, it is argued that since Kenya was not involved in the negotiation and conclusion it need not be bound.[11] Another argument is that at least objectionable provisions should not be binding on Kenya. According to many critics, the inequity visited by colonial imposition of treaty obligations has been perpetuated by TRIPs, which exhibits neo- and post-colonial characteristics.

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[6] J Chege, *Copyright Law and Publishing in Kenya*, (Nairobi: Kenya Literature Bureau, 1978), p. 97.

[7] Ibid at 97. Cf. D Bainbridge, *Intellectual Property*, (London: Pitman Publishing, 1999); W Cornish & D Llewellyn, *Intellectual Property* (2003); P Goldstein, *International Copyright: Principles, Law and Practice* (Oxford: Oxford University Press, 2001); M Rose, *Authors and Owners: The Invention of Copyright*, Harvard U. Press, (Cambridge, MA: Harvard University Press, 2002) at 93-142 (dealing with the construction of - and extension - of literary property); LR Patterson (1968), *Copyright in Historical Perspective*, (Nashville: Vanderbilt University Press, 1968), pp. 143-79.

[8] 4 and 5 Eliz. II, c. 74; Chege, supra note 6.

[9] *See* the Copyright (Kenya) Order, 1963 which extended the operation of the 1956 UK Act at independence, and the Copyright Act, 1966, Act No. 3 of 1966, L.N. No 85 of March 24, 1966. The 1966 Act is reproduced as Appendix VI in Chege, supra note 6, at 152-160.

[10] Under Art XVII and the Appendix (Declaration Relating to Art XVII) of UCC any Berne State which defected from Berne would lose protection from all Berne States; it would also lose protection in UCC States which belonged to Berne.

[11] In the case of TRIPs, a major argument has been that the Code was forced on Kenya and other developing countries.

B. Sources of Kenyan Copyright Law

In Kenya, Uganda, Tanzania, Ghana, Nigeria, South Africa and in Anglophone Africa generally, copyright law began with the application of the UK Copyright Acts of 1842, 1911 and 1956 and/or the (English) common law of copyright. This was largely courtesy of the reception clauses or practices in the respective countries.[12] Some countries tried to hold out, but only for a while. Like Kenya, Tanzania and Zimbabwe enacted their Copyright Acts in 1966.

In Kenya, Uganda, Tanzania, Ghana, Nigeria, S. Africa, and Africa generally, the applicable copyright laws are found in statutes, the English common law and international treaties.[13] The constitutions hardly deal with copyright matters directly, and statutes are the main body of copyright law in Africa[14]. Beginning in the late 1960s African states enacted or reformed copyright laws with increasing rapidity. This consolidation has received greater impetus from the late 1990s with many states being pressured or seeking to comply with TRIPs. These statutes provide for various matters including copyrightability, subject matter of copyright, qualification for copyright, copyright ownership by government and other bodies, rights of performers, first ownership of copyright, assignment and licenses, infringement, copyright administration, extension of the Act, and regulatory powers to extend the application of the Act. The statutes vary in length and detail. The 1966 Kenyan Act consisted of 20 sections, the last of which declared that the Act and "any other written law" is the sole copyright regime. The 2001 Act has 52 sections.

Kenyan copyright legislation is closely tied to the decolonization process. Four years after independence the Kenyan Parliament enacted a new generic rule of recognition (or the rule on the applicable laws) to replace the Kenya Colony Order-in-Council. Ss. 3 and 5 of the Judicature Act, 1967[15] spell out the broad sources of substantive, adjectival, evidentiary and remedial norms. S. 3(1) bears quoting in *extenso*:

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[12] *See* especially R Seidman, 'The Reception of English law in Colonial Anglophone Africa Revisited,' *East Africa Review* (1968), p. 1.

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

[14] Indeed, the development of the Kenyan Copyright Act, Chapter. 130 compares to other states: Tanzania Copyright and Neighboring Rights Act, 1999; Nigerian Copyright Act 1988 (as amended); Malawian Copyright Act, No. 9 of 1989; Zimbabwean Copyright Act, Chapter 26:01 and Ghanaian Copyright Act, 1985. *See* JO Asein *The Nigerian Copyright Act with Introduction and Notes* (Ibadan: Sam Bookman, 1994) P Kuruk, 'Protecting folklore under modern intellectual property regimes: A reappraisal of the tensions between individual and communal rights in Africa and the United States,' *American University Law Review* (1999), p. 769.

[15] Judicature Act, supra note 4.

> 3(1). The jurisdiction of the High Court, the Court of Appeal and all subordinate courts shall be exercised in conformity with
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> (a) the Constitution;
> (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act ...;[16]
> (c) subject thereto and so far as those writen (sic) laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date.

There is an important proviso to s. 3(1), probably intended to take into account Kenya's political economy and cultural politics:

> ... the common law, doctrines of equity and statutes of general application shall apply so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.[17]

My discussion of the sources of Kenya's copyright law is framed in the context of this provision (s. 3) of the Judicature Act. Let us consider five issues related to copyright in the list.

i. The Constitution,[18] which is the first in the list, does not make any specific provision on copyright. Some of its provisions may, however, be read as legislation by metaphor, largely providing a broad framework within which copyright is to be constructed. These include the protection of property (s. 75),[19] and freedom of expression and access to information (s. 79).

> The relationship between copyright and freedom of expression, including cultural expression, is beyond the scope of this article. Suffice it to say that the copyright-patent clause (Art. 1(8)(8)) of the US constitution is regarded by some as having a built-in mechanism to accommodate free speech interests. An example which is usually given is that copyright protects expressions, not ideas, hence people are generally free to discuss or use ideas. Others argue that the expansion

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[16] Part I to the Schedule referred to in para (b) contains laws which are not immediately relevant to copyright. These include laws on admiralty jurisdiction, evidence, ascertainment of British law, ascertainment of foreign law, and conveyancing.

[17] S. 3(1) of the Judicature Act, supra note 4.

[18] *See* Act No. 5 of 1969.

[19] This extensively protects private property. It provides for relief of, for instance, compensation in case of compulsory acquisition.

of copyright in terms of subject matter, scope and duration has the effect of enclosing or limiting the freedom of expression.[20]

The few contexts in which constitutional doctrines have been invoked in Kenya include Richard Kuloba's reading of the copyright law under the shadow of the Constitution's equal protection clause. It is very instructive here. He argues that although the Constitution does not specifically deal with copyright, its spirit can be taken to prohibit discrimination against illiterate innovators who may not be protected under the doctrine of materiality under the Copyright Act.[21]

ii. The second source of law in the Judicature Act is statute law. As I have indicated, Kenya has since 1966 had an Act on copyright. It is the only statute which specifically applies to copyright.

iii. A number of doctrines developed under UK copyright statutes continue to apply, especially those under the 1956 UK Copyright Act. In addition, the procedural and evidentiary rules regarding copyright administration and litigation (especially in collecting societies and courts), are drawn directly or indirectly from UK legislation or practice, pursuant to the Schedule referred to in s. 3(1)(b) of the Judicature Act.[22] Kenyan laws which further the application of English law and procedure include the Civil Procedure Act,[23] the Evidence Act,[24] the Appellate Jurisdiction Act,[25] rules of court, as well as judicial precedents.

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[20] Both sides agree that the anti-circumvention measures - that is measures which may circumvent the digital rights management systems (DRMs) - which are protected by the Digital Millennium Copyright Act (DMCA), 1998, limit the negotiated exploitation or fair use of works. *See* the Digital Millennium Copyright Act (DMCA), 1998 (USA) (Codified under Chapter 12 of the Copyright Act, 1976, as 17 USCA section. 1201-1205. The debate on the role of copyright in access to information is more complex than this. For extended reviews of the tension between freedom of expression (American "free speech") and copyright over the years, *See* P Goldstein, 'Copyright and the First Amendment' 70 *Columbia Law Review* 983; M Nimmer, 'Does copyright abridge the First Amendment guarantees of free speech and press?' 17 *UCLA Law Review* (1970), p. 1180; L Lessig, 'Copyright's First Amendment,' 48 *UCLA Law Review* (2001), p. 1057. For a recent long review of the issues, *See* NW Netanel, 'Locating copyright within the First Amendment skein,' 54 *Stanford Law Review* 1.

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

[22] *See* the explanation in B (v) in this article about the Judicature Act.

[23] Chapter 21, Laws of Kenya.

[24] Chapter 80, Laws of Kenya.

[25] Chapter 9, Laws of Kenya.

iv. The applicability of the common law, which is identified as a source of law in s. 3(1)(c), to copyright, is seriously contested.[26] Kenya and most African states liberally apply the common law of copyright, despite the provisions found in some copyright statutes that purport to abrogate the common law of copyright.[27] Such statutes seek to limit what laws apply to copyright. S. 51 of the Kenyan Copyright Act, 2001 states: "No copyright, or right in the nature of copyright, shall subsist otherwise than by virtue of this Act or of some enactment in that behalf." This was first enacted in Kenya as s. 17 of the Copyright Act, 1966, the clause having been copied from the 1911 UK Copyright Act.[28] The marginal note to the section reads, "Abrogation of common law rights."

In the context of Kenya's property jurisprudence, it is arguable whether the section only abolished non-statutory (common law) *right* in copyright, or the entire non-statutory (common) *law* of copyright. The latter would mean that non-statutory rights as well as remedies and procedures are also abrogated. Hence copyright would be the subject of strict (literal) interpretation. For instance, there would be no copyright in statutes or judicial decisions because s. 2(1) of the Act specifically excludes them in its definition of literary works. Moreover, unpublished works, such as diaries and manuscripts, would be uncopyrightable because they are not published. But such strictness does not always apply to Kenyan copyright. Kenya's experience with copyright indicates that s. 51 is a flawed attempt to make copyright an entirely statutory, and not a common law, matter in Kenya.

v. The Judicature Act does not specifically mention international law, including treaties and conventions, as a source of law and, therefore, copyright law. This has not arisen as an issue and it is arguable that there was no reason to specifically mention them: Kenya follows the British transformation doctrine whereby treaties must be ratified and enacted by Parliament to become law.[29] So treaties like Berne, UCC and the WTO Agreement would, through transformation, constitute part of the written

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

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

[28] Cf. Chege, supra note 6 at 98. The 1911 Act sought to abrogate common law copyright in the UK.

[29] DJ Harris, *Cases and Materials on International Law*, (London: Sweet & Maxwell, 1998) . *See also* the Vienna Convention on the Law of Treaties, 1969. It came into force, under Art 84, in 1980. Cf. Arts. 28, 29 and 29 *bis* of the Berne Convention, noting that being procedural and administrative provisions of Berne, they will not bind members of the World Trade Organization (WTO) under Art. 9 of the WTO TRIPs Agreement.

laws of the Kenya Parliament under s. 3(1)(2) of the Judicature Act. From the perspective of political legitimacy, however, it is arguable that Kenya's practice whereby all treaties and agreements are not controlled by a democratic constitutional process and are treated as quotidian executive functions, undermines the legislative process. Significantly, Parliament, which under ss. 30 and 47 of the Constitution has the power to debate policy besides legislating, is often presented with a *fait accompli*. Surprisingly, this has not been sufficiently questioned in constitutional scholarship, litigation, or activism.[30]

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

The development of Kenyan copyright law beginning with the Copyright Act, 1966 essentially illustrates the (post-) colonial impact on the construction of Kenya's copyright law. This process is discernible in the amendments of 1975, 1982, 1989, 1995, and 2000, and the super session in 2001. The provisions of the 1966 Act and most of the subsequent amendments are largely reproductions or adaptations of UK, US and transnational copyright law. The Copyright Act, 2001, which received presidential assent on December 31, 2001, and came into force on February 1, 2003 was drafted mainly to meet the standards established under the TRIPs Code of 1994 and the WIPO Internet Treaties, 1996.[31]

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

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

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[30] A few commentators have raised concerns regarding Kenya's signing or adoption of treaties and agreements, such as TRIPs, without sufficient study, analysis or debate. There are concerns that the new National Rainbow Coalition (NARC) government of President Mwai Kibaki should reform the policy and practice of the KANU government of President Daniel Arap Moi which it trounced on December 27, 2002. Cf. Ghai & McAuslan, supra note 3 at 334-58; Ojwang, supra note 3 at 119-143.

[31] "WIPO Internet Treaties" is the code expression for WIPO Copyright Treaty (WCT), 1996 and WIPO Performances and Phonogrammes Treaty (WPPT), 1996. The Bill went through various drafts in 1999, 2000 and 2001. The author participated in these processes. Even after passage, there were still difficulties regarding the institutional framework, especially the establishment, composition and structure of the competent authority. This amorphous body is a legacy of the Berne Convention which proposed its establishment and left specifics to individual states. It is also a legacy of the Act of 1966 which was not specific. Art II(9) of the Appendix to the Berne Convention (the Appendix is entitled Special Provisions Regarding Developing Countries), incorporated to Berne under Art. 21. *See* also Art 36 of the Berne Convention.

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

The Act consolidated national imperatives in an international context: folklore could be protected as a literary, artistic, or musical work. The intention was to preserve the national cultural heritage and economic welfare especially in the context of an international movement to protect natural and cultural heritage, as well as promote the then incipient interest in international trade in cultural products. It was probably a reactive, half-hearted and not-well-thought-through response to perceived Western domination of major economic sectors including cultural and literary industries like books, music and film. The hand of The United Nations Educational, Cultural and Scientific Organisation (UNESCO) could be seen in this process which appeared to depart from British copyright law and practice.[32]

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

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

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

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

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

The briefest amendment so far, the amendment of s. 17, only effected one change: it redefined the *ad hoc* institution called the competent authority. The Attorney General could establish it by appointing 3 to 5 persons to hear matters

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[32] "Appeared" because the provision on folklore has not been used much. On copyrighting folklore, *See* Sihanya, *Constructing Copyright and Creativity in Kenya* supra note 1 at chapter 10.

pertaining to compulsory copyright licensing where a copyright holder had unreasonably refused to license or had imposed unreasonable terms.

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

The 1980s and 1990s witnessed interest in the need to come to terms with technological change, especially the challenges they posed to copyright doctrine. This amendment redefined broadcasting to include wireless, wired, and satellite transmission and reception of images and sound (s. 2). It also redefined "copy" to mean "a reproduction of a work in any form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium by computer technology or other electronic means."[33]

Software and Internet technologies were knocking on the door, a fact recorded in s. 2's inclusion of charts, tables, and computer programmes in the list of literary works. The term "computer programmes" (sic) had been defined in 1989 under "author" but it had not been listed. S. 2(e) incorporated "mere data" as part of the definition of a work.[34]

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

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

viii. The Copyright Bill, 1999, 2000, and 2001

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

The Copyright Bill was essentially drafted to make Kenya TRIPs compliant. Indeed, the Kenya National Committee on the WTO had focused on this

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[33] Cf. definition of "copy" under s. 101 of the US Copyright Act, 1976. It excludes sound recordings, which are referred to as "phonorecords."

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

concern in its March 2001 report in which it set out the core provisions of Kenya's copyright law (under the 1966-2000 Act) vis-à-vis the standards under TRIPs.[35] Thus proposals to make Kenya compliant with TRIPs were eventually enacted in December 2001 and received presidential assent on December 31, 2001. The reforms were overdue by many years as far as Kenya's national interests are concerned.

The new Act makes fundamental changes. It supersedes and repeals the 1966 Act as amended over the years. A lot of the changes are influenced by the TRIPs Agreement and WIPO as well as local interests in the copyright and cultural industries.[36] The Government had sought WIPO's opinion so that Kenya would enact a copyright statute that complies with the TRIPs Agreement and the WIPO Copyright Treaty.

The 2001 Act includes the redefinition of "copy:"

> Copy means a reproduction of a work in any manner or form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium, by computer technology or any other electronic means. [37]

It is instructive that the definition covers "any...transient storage of a work in any medium." This is intended to cover the new reproduction and transmission technologies relating to the production and distribution of literary and other copyrightable works. The Act underscores non-material and non-tangible forms of reproduction as well. It emphasizes the difference between communication to the public and broadcasting.[38] The Act defines "broadcast" to mean:

> The transmission by wire or wireless means, of sounds or images or both or the representation thereof, in such manner as to cause such images or sound to be received by the public and include transmission by satellite.[39]

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[35] *See* Republic of Kenya, *Review of National Implementing Legislation on the Trade Related Aspects of Intellectual Property Rights Agreements (sic) (TRIPS Agreement): List of Questions Put to Members (sic) States Under Review: 1996-2000*, Ministry of Tourism, Trade and Industry, Nairobi (March) (edited by Lucas O. Sese, Dep. Director, KIPO; and Chair, TRIPs Agreement Sub-Committee, National Committee on WTO), 2001.

[36] *See* Republic of Kenya, *Review of National Implementing Legislation on the Trade Related Aspects of Intellectual Property Rights Agreements*, supra note 35; WIPO, *Comments on Kenya's Copyright Bill, 1999*, WIPO, Geneva, 1999.

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

[38] Ibid.

[39] *See* Goldstein, *International Copyright*, supra note 20 at 315-6.

On the other hand, communication to the public is defined in s. 2 as:

> (a) a live performance; or
> (b) transmission to the public, other than a broadcast, of the images or sound or both, of a work, performances or sound recording.

Thus the latter covers situations where the subject matter is transmitted by any other means except through broadcasting. These issues are critical given that many literary works are communicated to the public through radio programmes. Excluded from this category are the Kenya Broadcasting Corporation's (KBC's) Broadcast to Schools or Radio Teacher, and Books and Bookmen. The last reviews books and their authors and has for long been presented by Adalo Moga.[40] The doctrinal and practical distinction between broadcasting and communication to the public is, however, being eroded by Internet and related technologies such as web casting (or Internet radio).

WIPO's opinion also emphasized that pursuant to Art 9 of the WCT of 1996 the duration for photography should be 50 years just like other related subject matter of copyright. It emphasized that there should be no discrimination among the artistic works.

The Act also specifically referred to rights or activities that seem to have been ignored or excluded before: translation, adaptation, arrangement or other transformation of a work, and public performance of the work. WIPO argued that their exclusion is a limitation of exclusive rights contrary to Art 13 of TRIPs and Art 9(2) of the Berne Convention. Art 9(1) of Berne secures for authors of literary and artistic works the "exclusive right of authorizing the reproduction of these works in any manner or form."[41] Art 9(2) allows states some room for manoeuvre: they may, by law, "permit the reproduction of such works in certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[42] WIPO cited s. 62 of the UK Copyright, Patent and Design Act, 1988, and s. 65 of the Australian Copyright Act 1968 on how an acceptable exception may be formulated.[43]

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[40] Most other broadcasts, unless they are extempore, are based on scripts.

[41] My emphasis.

[42] My emphasis . The balance is often difficult to establish and the default is invariably extensive or expansive copyright protection. Art 13 of TRIPs re-enacts the point I have emphasized under Berne Art. 9(2). For an enlightening analysis of this difficult clause *See* Mihaly Fiscor *"Guide to the Copyright and related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms"*, 2004. Jane Ginsberg, 'Three-Step Test' For Copyright Exceptions" (2002) 187 R.I.D.A. cited in Daniel Gervais (2003) The TRIPS Agreement: Drafting History and Analysis, Sweet and Maxwell.

[43] S 62 of the UK Copyright, Patent, Design and Patent Act, 1988 is entitled "Representation of certain artistic works and pubic display." It provides:
"62.(1) This section applies to -

The Act has clarified instances of fair dealing with respect to each subject matter. For instance, copyright does not control reproduction, translation, or adaptation, distribution, or communication to the public "by way of fair dealing for the purposes of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of the source."[44] Fair dealing is further clarified under s. 26(1) (a), (d), (e), (f), (g), (h), (j), and (l). Some of these issues help construct the scope of literary copyright and were at the core of the North-South debate leading to the Stockholm Protocol or the Special Provisions Regarding Developing Countries. We discuss these below.

For the first time the copyright law contains the content of and specific limitations to a new form of literary copyright, namely, software copyright, mainly courtesy of WIPO's and the Business Software Alliance's (BSA's) proposals. BSA represents software TNCs. The law allows adaptation and creation of backup copies of computer programs under certain conditions. These conditions include where copies of a computer program is necessary with the program's intended purpose:

i. to make copies of the program to the extent necessary to correct errors; or
ii. to make a back-up copy; or
iii. for the purpose of testing a program to determine its suitability for the person's use; or
iv. for any purpose that is not prohibited under any license or agreement whereby the person is permitted to use the program.[45]

The Act also recognizes that a person may decompile a computer program, cover the program into a version in order to allow the interoperability of the

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(a) buildings, and
(b) sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public.
(2) The copyright in such a work is not infringed by -
(a) making a graphic work representing it,
(b) making a photograph or film of it, or
(c) Broadcasting or including in a cable programme service a visual image of it.
(3) Nor is the copyright infringed by the issue to the public of copies, or the broadcasting or inclusion in a cable programme service, of anything whose making was, by virtue of this section, not an infringement of the copyright."

[44] S 26(1) of the 2001 Copyright Act. Berne refers to the concept as "fair practice;" the US as "fair use;" and the UK and Kenya as "fair dealing;" The three are not coterminous. I discuss fair dealing systematically and in detail in Chapter 8 of my doctoral dissertation;: Ben Sihanya, *Constructing Copyright and Creativity n Kenya*, supra note 13. Berne refers to the concept as "fair practice;" the US as "fair use;" and the UK and Kenya as "fair dealing;" The three are not coterminous.

[45] *See* S 26(4) of the 2001 Copyright Act. These exceptions would obviously not apply to other literary works, such as novels, plays, lectures, or summons.

program with another program in a different programming language, code or notation.[46]

S. 26(6) of the 2001 Act provides that copies made pursuant to the fair dealing provisions (s. 26) must be destroyed when the person's possession of the computer program ceases to be lawful.[47]

Again, for the first time, the law prohibits and regulates anti-circumvention measures so that digital rights management systems (DRMs) or technological means employed to protect works are protected under copyright law.[48] Circumvention of such systems is criminal under s. 36. This provision has been enacted pursuant to Art 11 of the WCT 1996. Art. 11 is entitled "Obligations concerning technological measures." It provides that:

> Contracting Parties shall provide *adequate legal protection and effective remedies* against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law."[49]

Jessica Litman has done a comprehensive study indicating that Art. 11 was breached by the US content industry. After failing to secure legal protection of DRMs in Congress (Washington, DC), they turned to WIPO (Geneva) so that Congress would have to enact it as a treaty obligation.[50]

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[46] S 26(5) of the 2001 Act does not clearly differentiate between decompilation and conversion of a computer program into a version expressed in a different programming language.

[47] *See* s 24(a), (5) and (6) of the Copyright Act 2001. This is discussed in Chapter 10.3 of my doctoral dissertation, supra note 1.

[48] *See* ss 2 and 35(3)(c) of the Copyright Act 2001.

[49] My emphasis. This was the only UCC standard. It was later interpreted in the North/South conflict in Berne and UCC of the late 1960s to mean that authors would have exclusive rights to control reproduction and translation; and that such exclusive rights would only be limited in special circumstances. *See* RD Hadl 'Toward International Copyright Revision: Report on the Meetings in Paris and Geneva, September 1970,' 18 *Bulletin of the Copyright Society of the USA* 183-228 (1970) ; CF Johnson, "The origins of the Stockholm Protocol" 18 *Bulletin of the Copyright Society of the USA* (1970), p. 91; IA Olian, 'International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris,' 7(2) *Cornell International Law Journal* (1974), p. 81; NM Tocups, 'The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries,' 29 *Journal of the Copyright Society of the USA* (1982), p. 402.

[50] *See* J Litman, *Digital Copyright*, (Amherst: Prometheus Books, Amherst, 2001), pp. 122-150; *See also* MJ Radin, JA Rothchild & GM Silverman, *Internet Commerce: The Emerging Legal Framework*, (New York: Foundation Press, 2002), pp. 799-876; P Samuelson, 'Technological Protection for Copyrighted Works,' 45 *Emory Law Journal* (1997); P Samuelson, 'Intellectual Property and the Digital Economy: Why the Anti-circumvention Regulations Need to be Revised,' 14 *Berkeley Technology Law Journal* (1999), p. 519; M Lemley, et al, *Software and Internet Law* (New York: Aspen Law & Business, 2000) , pp. 891-902. This has been implemented under the US Digital Millennium Copyright Act, 1998 (the DMCA), and Art. 6 of the EU Copyright Directive, 2001. The Directive is reproduced in H Norman,

D. Implementing the Copyright Act, 2001

The Kenya Government has set the machinery in motion to implement the new Act. The Attorney-General appointed members of the Board on May 16, 2003. There have been mixed feelings towards copyright implementation, management, administration. Some of the views were specifically on the role of the Board while others regard strict copyright enforcement as having the actual or potential effect of reducing employment opportunities or blocking revenue streams, particularly among the infringers and pirates.

E. Copyright Treaties In Kenya

Treaty law has influenced Kenya's copyright law and practice since protectorate and colonial days. This influence has been direct, as where WIPO advised Kenya to enact WIPO Internet Treaties. Another context is where a number of copyright transactions are concluded under the shadow of treaty rather than statute law, and especially where the statute is deficient. Moreover, treaties are generally referred to, to make political and moral arguments, and especially to pressure Kenya to enact norms embodied in international (or even a Western state's) instruments. The role of Berne is a classic case.

The UK became a party to the Berne Convention on December 5, 1887, 8 years before Kenya became a British protectorate. As was British practice, its adherence to Berne extended to Kenya and other protectorates and colonies such as Ghana, Nigeria, and India.[51] On attaining independence in 1963, Kenya became bound by the Berne Convention through state succession. And after 1971 it could not renounce Berne partly because Art XVII of the Universal Copyright Convention (UCC) (the "Berne safeguard clause") forbade it.[52] Kenya acceded to the 1971 Paris Act of Berne on June 11, 1993.[53]

The UK and the US became parties to the 1952 original text of UCC on September 27, 1957 and September 16, 1955, respectively. They both became parties to the 1971 Paris text of UCC on July 10, 1974. Kenya "adopted the principles of [UCC] as contained in the British Copyright Act, 1956[54] which was

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Intellectual Property Law Statutes 2004/2005 (London: Sweet and Maxwell, London, 2004) pp. 555-570; P Goldstein, *International Legal Materials on Intellectual Property* (New York: Foundation Press, 2002).

[51] The same applied to other colonies such as Belgian Congo and French Senegal.

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

[53] *See* Goldstein, *International Legal Materials on Intellectual Property* supra note 50 at 149; Sihanya, *Constructing Copyright and Creativity in Kenya*, supra note 1 at chapters 1 and 5.4.3; Copyright (Amendment) Regulations, 2000, Kenya Gazette Supplement No. 47 (Legislative Supplement No. 47 of 13 October, 2000).

[54] 4 & 5 Eliz, c. 74.

a statute of general application.[55] [Independent] Kenya's membership to UCC was later formalised by Act No.3 of 1966..."[56] John Chege casts the development of the UCC vis-à-vis developing countries in the context of the international political economy of copyright. In characteristic neo-Marxist language, he states:

> The Geneva [UCC] Convention was significant in copyright law because it marked the end of a prolonged rivalry between Western Europe as represented in the Berne Convention and the Americans with their Pan-American Copyright as represented by the USA. These were capitalist giants in the world copyrights (sic) and were uneasy partners in the sense that no bilateral agreement existed between them in the exploitation of the third world. The Berne Convention was used by the colonial countries of Western Europe such as France, Germany ... Britain ... as the blanket gentleman's agreement in the export of publications to the colonial countries in Africa ...[57]

Stanford University Copyright Professor Paul Goldstein convincingly argues that UCC was essentially an intra-Western compromise at inception.[58] Chege's perspective on UCC as an anti-"Third World" Western conspiracy, at inception, is not very accurate. The "conspiracy" may have been only remotely incidental at best. UCC would, however, in the late 1960s and early 1970s play a major role in securing Anglo-American interests and hegemony in copyrighted educational and entertainment products. UCC did this by requiring Kenya and other African countries to implement higher standards under Berne (and UCC).[59]

Although UCC's standard only required "adequate protection," this would be interpreted to include securing the copyright owner's right to reproduction and translation. Yet access to the materials through reproduction, translation and related activities was critical to Kenyan and African education and entertainment. Without excessive protection and promotion of (transnational) copyright, translation and reproduction through publishing, the materials could be affordable – because they would attract limited or no royalty. The efficiency also depended on whether the country had developed the appropriate infrastructure, and/or in case copyright owners did not assert their rights, or in case equitable compulsory licenses were available and workable. But the

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

[56] *See* Legal Notice No 85 of March 24, 1966, published in Kenya Gazette Notice No. 25 of 1966; Chege supra note 6 at 93, 123 n. 5.

[57] Ibid, at 95. My emphasis.

[58] P Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (New York: Hill and Wang, 1994), pp. 185, 187-9, 191, 193, 201, 233.

[59] This was mainly after the "Berne Safeguard Clause" linked the two agreements to forestall developing countries' threatened defection from the higher and more protective Berne standards. *See* Hadl, supra note 49; Johnson, supra note 49; Olian, supra note 49; Tocups, supra note 49.

copyright owners, who were invariably British or American content corporations, were keen on using national and transnational copyright to optimize revenue.

The criticism of treaty copyright law and structure has thus been part of the larger criticism of (post)colonialism, and the legacy of cultural, literary and techno-economic domination. For instance, beginning the late 1950s, newly independent developing states in Africa and elsewhere questioned the treaty standards to which colonial powers had committed them. According to Paul Goldstein:

> They eventually threatened to defect from both Berne and the [UCC]. The preamble to recommendations adopted at a 1963 African Study meeting on Copyright in Brazzaville, Congo, declared that international copyright conventions are designed, in their present form, to meet the needs of countries which are exporters of intellectual works. These conventions, if they are to be generally and universally applied, require review and re-examination in the light of the specific needs of the African context.[60]

Robert D. Hadl, Charles F. Johnson, Irwin A. Olian, Jr. and Nora Maija Tocups have each written a well-sourced article about this "crisis in international copyright."[61] They adopt a Western (US) perspective, and underscore how US leadership later saved the day by restoring the integrity of the copyright system. The subtext suggests that the copyright regime is better after the 1969 Washington Recommendations. They also indicate that the West reclaimed the initiative partly because of limited financial, technical, institutional capacity in Southern copyright, educational, and entertainment industries, coupled by diffuse interests in the South. My perspective throughout is that this Western perspective of the copyright system is essentially a zero-sum (win-lose) game and is inefficient and inequitable in national and transnational terms.[62]

Thus, in the context of this "crisis," an international, preferably UN, agency was necessary to secure the confidence of developing countries while sustaining the essence of the copyright system. WIPO became that institution, partly because the UN was highly regarded as a democratic institution. WIPO's role has been crucial in other ways. Kenya has been influenced by WIPO in reforming its

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[60] Goldstein, *Copyright's Highway*, supra note 58 at 187-8. Prof Goldstein adds: "The insurgents shrewdly focused their demands on the most compelling social claim: unfettered use of copyrighted works for educational and scholarly purposes. And the evident strategy was to threaten turmoil in international copyright - the operative, feared word in the West was 'destabilization,'" Ibid at 188. The case for review to protect Kenyan interests informs the current TRIPs discourse.

[61] *See* Hadl, supra note 49.; Johnson, supra note 49.; Olian, supra note 49; Tocups, supra note 49.

[62] I have pursued these issues more systematically in *Constructing Copyright and Creativity in Kenya*, supra note 1.

copyright law, including in redefining literary copyright.[63] It has also relied on WIPO's resources in administering various forms of IP. Moreover, many national and foreign creators or innovators, traders and consumers have tended to rely on transnational IP regimes mainly because they argue that the Kenyan IP regime is weak.[64]

Some examples of the extent of WIPO's involvement in Kenya can be seen in the fact that WIPO has worked with Kenya on drafting the copyright law. WIPO supplied extensive written comments and recommendations to the Government in the process of drafting the Copyright Bill 2000.[65] WIPO's focus was on ensuring the implementation of Berne and the new WIPO Internet Treaties.

Moreover, WIPO has also exercised its mandate on enforcement.[66] WIPO conducts many of its activities through regional and national workshops. The former are meant for a much wider audience and have included conferences. Both have had some impact on copyright in Kenya. Some commentators complain that copyright and other IP matters have geographical and cultural (con)texts and subtexts. They argue that increased use of experts on Kenyan or African IP and trade law, including technology transfer, especially from Africa, may enhance capacity building and the development of local materials. It is remarkable that examples of equitable, efficient and sustainable partnerships are emerging between Northern and Southern governments, experts, civil society players, *et cetera*. These are examples of appropriate collaborative strategies.

This observation is partly based on the fact that while many WIPO experts used to rely on Western, especially Anglo-American, laws and practices in advising African countries, many African copyright offices now have a say on the experts they can invite with WIPO's support.[67] Moreover, many Western IP experts now have a genuine interest in working with African countries and experts to build capacity in copyright and IP generally, as well as in drafting appropriate legislation. The development of international and developing country copyright programmes in such schools as Stanford and Warwick (UK), as well as the writing and publication of materials in the recent past are instructive and instrumental.

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[63] On some occasions or issues, Kenya has voluntarily sought WIPO's counsel.

[64] On US reliance on the international regime for this reason, to protect its IP in developing states, in the TRIPs dispensation, *See* MA Leaffer, 'Protecting United States Intellectual Property Abroad: Toward a New Multilateralism,' 76 *Iowa Law Review* (1991), p. 273.

[65] *See* Part 6.3.3.8 below.

[66] Personal communications on diverse dates in 2000, 2002-03 with Ms Marisella Ouma, State Counsel, Copyright Section, Attorney-General's office, Nairobi; and with WIPO officials, Geneva, diverse dates, 2005.

[67] Ibid.

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

The dynamics are changing somewhat partly because local Kenyan enterprises and individuals are creating copyrightable literary, musical, and other works. Their interest in expansive or absolute copyright protection converges with those of the erstwhile colonial power or foreign publishing or recording and other TNCs. So far, however, the treaty regime is generally stronger on patent and trade mark law. The discourse on Kenya's patent commitments under patent law is also pursued with greater fervour.[68] For instance, Kenya has implemented aspects of TRIPs by superseding the Industrial Property Act (IPA), 1989 and the Trade Marks Act.[69]

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

TRIPs seek to consolidate gains made by copyright interests in the regimes I have already discussed. In Kenya, the impact and significance of TRIPs, which is now regarded as the dominant copyright regime internationally, is still dubious. There is intense debate opposing it or supporting some of its provisions. Yet there is no scientific study on its impact.[70] Art. 9 of TRIPs reinforces the substantive provisions of Berne.[71] And Art 10 of TRIPs protects computer software as a literary work within the Berne regime. The same Article also protects the compilations of data or other materials, which by reason of the selection or arrangement of their contents constitute intellectual creation. The

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[68] *See* B Sihanya, 'Negotiating intellectual property in Seattle and beyond: strategies for protecting Southern trade and development interests,' Working paper presented at the Southern Seminar for the WTO Millennium Round, October 18-22, 1999, at MS Training Centre for Development Co-operation (MS-TCDC), Arusha, Tanzania, (published in ECONEWS AFRICA October 1999); B Sihanya, 'TRIPs and access to drugs, food and the relevant technologies: Reforming Intellectual Property and Trade Laws for Sustainable Development,' Published Research Report for ECONEWS AFRICA, Nairobi, 2003 (underscoring the difficulties Kenya faces in implementing TRIPs generally, and proposing legal, institutional, and administrative reforms that focus on the national interest and that debunk uncritical TRIPs implementation or compliance).

[69] Chapter 506, Laws of Kenya.

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

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

protection does not extend to the material itself.[72] This strengthens the basic doctrines of Berne, such as *originality, automatic protection, national treatment,* and *duration.*

An example of a trend towards strong protection is that by a 1995 amendment Kenya sought to protect "mere data" where it was part of a database. This was a violation of Berne. This was expunged by the 2001 Act's definition of "work" that does not include "mere data." The European Database Directive[73] would protect mere data. It has raised concerns in international copyright.[74] This is partly because it would limit access to scientific and related databases that are so crucial to research and development (R&D). It would also represent doctrinal deviance and throw into confusion the concept of originality, which is at the core of copyright.

The term of protection for primary works (also called works of original authorship) under Berne is the life of the author plus 50 years.[75] Derivative works, such as films (referred to as audio-visual works in Kenya), are protected for 50 years from the date they were made available, first made available to the public to the public, or first published.[76]

II. COPYRIGHT IN THE DISCOURSE ON INNOVATION, INTERNATIONAL TRADE, TECHNOLOGY TRANSFER AND SUSTAINABLE DEVELOPMENT IN KENYA

This sub theme is closely related to the methodological concerns on the role of copyright in economic and cultural development in Kenya. What conceptual, methodological and related tools are necessary to mainstream IP in discourses, programmes and strategies on innovation, creativity, as well as technological, economic, and cultural development in Kenya?[77]

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[72] Thus "Selected Poems of Jared Angira" or a similar poetry anthology may be protected as a compilation even though - and mainly because - the individual poems are protected in the first place.

[73] Directive 96/9/EC of the European Parliament and the Council of March 11, 1996 on the Legal Protection of Databases, at <http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html> (last visited April 22, 2003). In P Goldstein, *International Legal Materials on Intellectual Property Materials* (New York: Foundation Press, New York, 2000), pp 617-623.

[74] *See* CIPR, *Integrating Intellectual Property Rights into Development Policy,* Commission on Intellectual Property Rights, London (2002).

[75] *See* Art. 7 of the Berne Convention.

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

[77] *See* P Goldstein, 'Is Culture Property?,' in *International Intellectual Property: Cases and Materials,* New York: Foundation Press (2000) ; FS Kieff, "Property Rights and Property Rules for Commercializing Inventions" 85 *Minnesota Law Review* (2001), p. 697 (on economics of patent); K Maskus, *Intellectual Property Rights in the Global Economy* (Washington, DC: Institute for International Economics, 2000); K Maskus & C Fink, eds., *Intellectual Property and Development: Lessons from Recent*

Sustainable development implies development that meets the needs of the present generations without compromising the ability of future generations to meet their own needs. This is normally achieved by balancing the need for present development and growth against the need to protect future prospects.

In the economic sense IP protection and promotion is meant to ensure economic development. Encouraging innovation by granting innovators protection is critical in ensuring economic progress. On the other hand, technology transfer will ensure developing countries as well as members of the public can access such technology and such access will lead to their economic development.

An efficient and equitable IP regime is one that guarantees sustainable development. It should strike the balance between protecting innovators and providing for access or technology transfer.

Kenya, as a developing country is dependent on technology transfer in order to progress economically. Technology transfer in copyright can greatly assist especially in the publishing industry and in education, for instance, through open and online learning or training.

It is argued that copyright laws and TRIPs are keener on protecting innovators and provides very little on technology transfer. As a result, developed countries benefit more while developing countries like Kenya continue to lag behind. It is my argument that TRIPs embodies important flexibilities in copyright which Kenya can benefit from.

Significantly, inadequate protection of folklore undermines sustainable development of the Kenyan culture as there are no guaranteed incentives to communities as innovators.

It is remarkable that comparatively limited work has been done on cultural dimensions of sustainable development. WIPO has initiated an important body of studies on cultural expression and cultural industries.

A. Intellectual Property, Related Rewards and Incentives to Creators and Innovators

IP owners derive benefits in the form of incentives and rewards. Copyright law provides such owners with exclusive rights. Such rights include the right to use, reproduce, develop derivative works, distribute and dispose of their copyrighted products as they please. They also derive economic benefits in the form of royalties, license fees and other contractual fees and benefits arising out

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Economic Research (2005); K Maskus & J Reichmann, eds., (2005) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (2005).

of assignment of their rights. The law also protects IP owners against infringement. This protection is Copyright, Trade Mark and other statutes and can be enforced by either criminal or civil suits. In such cases remedies include damages and injunctions, or penalties such as fines or jail terms.

Optimal benefit accrues to creators and users or consumers where there is a good account and record of IP innovations and products. Kenya lacks such a system. In Kenya, one does not need to register copyright for it to be protected, a rule derived from Art 5 of Berne. This is advantageous in the sense that securing copyright is not restrictive. However, its disadvantage is that transactions involving such copyrights are not recorded in any system. This is a messy situation and the Kenya Copyright Board has formulated the Copyright Regulations 2004 to facilitate voluntary copyright registration.[78]

This situation can be contrasted with that in the US where copyrightable works and publications are invariably registered, deposited and stored in a Library of Congress in a manner generally accessible to the public.

III. COPYRIGHT IN ECONOMIC DEVELOPMENT IN KENYA

Are the tool-kits available in Kenya to mainstream copyright in the development process? How have relevant strategies been deployed in other economies?[79]

A. Conceptual and Strategic Considerations

Copyright contributes to socio-economic development in at least two ways:
(i) Copyright and IP is a source of royalty and related payments to creators;

(ii) Copyright and IP is a source of regular national income or revenue stream

The economic benefits accruing to copyright and other IP owners as stated above sometimes trickles down to Kenyans in the form of Government revenue. The copyrighted products are subject to taxation and other related fees such as registration fees. In addition, employment is created in the production and distribution of copyrighted products. Similarly copyright and trade mark are crucial in the advertising industry, a major income earner in Kenya. These IP

[78] The Copyright Regulations, 2004, Legal Notice No. 9, Kenya Gazette Supplement No. 7 (Special Issue), Feb. 18, 2005.

[79] WIPO has published an excellent guide on methodological issues. *See* WIPO, *Guide on Surveying the Economic Contribution of the Copyright-based Industries*, WIPO, Geneva (2003). *See* also WIPO, *Performance of Copyright Industries in Selected Arab Countries: Egypt, Jordan, Lebanon, Morocco, and Tunisia*, WIPO, Geneva.

doctrines and the related processes help quality and consumer confidence, which results in increased sales and translate to development.[80]

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

i. Kenya does not have a way of monitoring copyright transactions. The role of looking out for infringers is left to the copyright owners who have neither the capacity nor the mechanism to monitor each part of the country and look out for copyright infringers.
ii. Ignorance on the part of the IP owners. Many artists are not aware that they possess valuable IP rights. They therefore go about their lives believing that copyright infringement is either permissible or has no remedy
iii. The penalties provided for copyright infringement are not sufficient to control infringement. The Copyright Act provides a maximum penalty of Kshs. 800,000 or 10 years imprisonment.[81] The Kenyan practice has been that courts impose (lower) fines rather than the jail term. For a copyright infringer who expects to earn Kshs. 4 million from a school book, a fine of Kshs. 800,000 is like loose change, petty cash or operational expenses and would not deter him from infringing the copyright.
iv. Kenya loses a great amount of revenue due to activities such as infringement or piracy. This has led to some arguing that it is better to permit some acts of IP infringement and tax them in order to get revenue, or better, persuade the infringers to engage in appropriate legitimate business.

B. Collective Management Organizations In Kenya's Development

Copyright Collective Management Organizations (CMOs) play a major role in collecting royalties on behalf of their creative members, and distributing it to them

Lately collective management organizations have been proposed by copyright owners to try and secure their interests in the context of increasing infringement. These include Kenya Reprographic Rights Organization (KOPIKEN), which seeks to protect and promote authors and publishers of literary works; Music Copyright Society of Kenya (MCSK), for musicians; and

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

[81] Section 38 of the Copyright Act.

Society of Performing Artists of Kenya (SPAK), which would secure performers' interests. To qualify as a CMO under s. 46 of the Copyright Act, the agency must first be incorporated as a company limited by guarantee; they also require to be registered by the Kenya Copyright Board so as to have the authority of collecting and distribution royalties. None has so far been registered.

Once they qualify for registration and are sufficiently enabled, such organizations can perform certain functions such as:

i. Monitoring copyright transactions and act as watchdogs on copyright use and infringement or piracy
ii. Training their members on their copyright and remedies for infringement
iii. Collecting and storing copyright products
iv. . Collecting and distributing royalties on behalf of copyright owners.

These organizations, however, are faced with the following challenges:

i. Lack of a firm constitutional foundation in a normative and institutional sense.
ii. Most of them are established under government ministries thus they lack autonomy and independence.[82]
iii. Limited financial and technical capacity.
iv. Inadequate copyright expertise among the managers and members of the organizations.

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

John Chege, writing with the Kenyan context as his declared territorial and conceptual focus argued that copyright performs two tasks. First, it regulates and controls intellectual property (IP). Second, it propagates education, ideology and propaganda. He sees copyright performing the task of "a revenue earning enterprise and ... an important media (sic) of mass communication."[83] His conclusion is particularly significant here: "Copyright law has been linked with the changes in the economic infrastructure and it has been shown that the law has always been amended to accommodate the technological and class changes in the political set-up."[84]

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[82] Sihanya, *How Can We Constitutionalise Innovation, Technology and Intellectual Property in Kenya,* supra note 80 at p. 6.

[83] Chege, supra note 6 at 24. Cf. Wu, supra note 20.

[84] Chege, supra note 6. Significantly, Chege's analysis focuses on doctrinaire or hardcore (para Marxist) political economy of copyright and pays no attention to the discourse on the role of copyright in cultural and educational industries. Henry Chakava's work complements Chege's by dealing with the educational industry. *See* Sihanya, *Constructing Copyright and Creativity in Kenya,* supra note 1 at chapters 1, 4 and 9.

That perspective links the two roles copyright plays in Chege's typology. Granted that there is a convergence of certain values based on common humanity, Kenya's copyright law has disproportionately remained essentially Western in substance, form and practice in spite of the divergent economic condition and perceived social, political and cultural interests. The reason begs the following closely related questions.

i where did Kenya's copyright law come from? And what is its structure or cultural content?

ii what factors have animated recent developments in that law? What socio-cultural factors sustain the essential characteristic of Kenya's copyright regime?

iii why can't Kenya drop out of this regime altogether or design a more socially, economically, and culturally appropriate one that meets core international obligations while seeking their reform, and at the same time serving the national interest? After all, developed countries applied strategies that focused on the interests of their nationals (the publishers) at Berne and UCC in the 1960s as well as in the formulation of TRIPs.

This study has considered the challenges and opportunities in proposing a cost-benefit framework for pursuing this multifaceted strategy.

This study argues that Kenya's copyright law has been grappling with several and difficult concerns and challenges. Four of these are most critical. First, there have been tensions between national and foreign interests, as illustrated by the Kenyan debate on books, folklore and software. Second, there have been controversies regarding the interests of authors, creators or innovators, on the one hand, and publishers and other cultural entrepreneurs, on the other, with readers or consumers getting caught in the crossfire.

Third, technological change has complicated the picture or matrix. It has ushered in new industries such as numerous printers and publishers, video libraries, photocopying shops or centres, software development and distribution corporations, and Internet Service Providers (ISPs). Fourth, the increasing role of information, high technology and cultural products in the context of the liberalization of international trade and investment has introduced new challenges to Kenya's copyright law. These relate to Internet based publishing and distribution of literary materials, including the prospect of e-learning at levels lower than the university.[85]

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[85] In April 2003 the Ministry of Transport and Communications announced that it was consulting the Ministries of Education, Science and Technology, and of Roads, Public Works and Housing, with a view to establishing e-learning. The African Virtual University (AVU), on the other hand, was established with assistance from the World Bank and located at Kenyatta University in the 1990s. AVU has since relocated. Egerton University also has the AVU facility. *See* A Ouma, 'Government to Sell 70 PC Stake in Telkom,' *East African Standard*, April 9, 2003 (Kenya).

A. What are Cultural Industries?[86]

Cultural industries are based on creativity and accumulation of copyrighted and cultural products. They may create wealth and employment.[87] This definition is founded on Britain's and the UN's definition of cultural and creative industries. Britain defines creative industries as those originated from personal creativity, skills, and talents that have potential to create wealth and employment opportunities often produced and developed through intellectual property rights." And UNESCO defines them as "industries combined with innovation, production, and commercial contents and at the same time the nature of the contents have the qualities as intangible assets and cultural concepts that are protected under intellectual property rights and presented in forms of products or services."

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

i. Book publishing - there are famous writers such as Ngugi wa Thiong'o, Francis Imbuga, Marjorie Oludhe Macgoye, and Margaret Ogola.

ii. Cinema - a Kenyan cinema or film industry is developing. Some important films have been shot in Kenya. In some of them Kenyans are major actors or actresses, directors, or producers. These include: *Out of Africa* (Meryl Streep); *Nowhere in Africa*

iii. Some of the famous actors and actresses, as well as movies, include - Joseph Olita (in *The Rise and Fall of Idi Amin*); Sidede Onyulo (in the German Academy (Oscar) winning *Nowhere in Africa; Dangerous Affairs;* and *Project Daddy*

iv. Music - composition, performance, recording and publishing, for instance, Fadhili Williams in *Malaika*

v. Cultural handicrafts - Akamba carvings, Gusii soapstone, Ciondo (hand-woven basket), Kikoy, Lesso, Maasai artifacts.[88]

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

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[86] *See* the UN and European classification codes relevant to copyright-based industries in WIPO, supra note 79 at 73-82.

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[88] I Ndegwa, 'Character Merchandising in Kenya: The Case of the Maasai,' LL.B. Dissertation, University of Nairobi, 2000 (Unpublished).

In an optimal context cultural industries add lots of value. And because they are knowledge and labour-intensive, they create employment and wealth, nurture creativity and foster innovation in production and commercialization processes. At the same time, cultural industries are central in promoting and maintaining cultural diversity and in ensuring democratic access to culture and information. This twofold character - both cultural and economic - builds up a distinctive profile for cultural industries. During the 1990s they grew exponentially, both in terms of employment creation and contribution to GNP. Today, globalization offers new challenges and opportunities for their development.[89]

Kenya needs to define cultural industries and cultural creativity within the context of IP. Thus, such industries and the innovators would receive the protection and promotion granted to other IP owners. The industries protected in Kenya are those protected under TRIPs with a meager attempt at protection of folklore by the Copyright Act. Maasai artifacts, ciondos and Akamba handicrafts are not sufficiently protected.

There is also need to review TRIPs to include these industries as well as folklore more specifically.

The Kenyan Government has a role to play in this. It should develop a policy on cultural industries that define them and their scope. This should be followed by laws that recognize such creativity as IP thereby granting the innovators IP protection and promotion. Kenya can only successfully push for recognition of it cultural industries under TRIPs when it has in place a comprehensive policy and legal framework on the same. The same applies to geographical indications.

Taiwan is a good example. In March and July 2003, resolutions were passed in the 2nd and 3rd meetings dubbed "Cultural and Creative Industries Promotion Team" formed jointly by the Ministry of Economic Affairs, Ministry of Education, Government Information Office, and the Council for Cultural Affairs. These established the definition and scope of the cultural and creative industries in Taiwan.[90] The effect of this is that Taiwan now benefits substantially from these industries.

WIPO's work can provide a guide. The WIPO *Guide on Surveying the Economic Contribution of the Copyright-based Industries* which has defined the copyright and cultural industries[91]. This should be compared to the numerous related studies

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

[90] *See* Council of Cultural Affairs, Taiwan, *Cultural Policy White Paper* (2002) available at <http://english.cca.gov.tw/public/Attachment/411317355771.pdf> (last accessed on May 8, 2003).

[91] *See* World Intellectual Property Organization (WIPO) *Guide on Surveying the Economic Contribution of the Copyright-based Industries.* Word Intellectual Property Organization (WIPO), Geneva (2003).

by UNESCO and UNCTAD. WIPO defines these industries thus: core copyright, interdependent industries, partial copyright industries, and non-dedicated support industries. The core industries include the following, which incorporate my interpolation of the Kenyan scenario, in a context where (post-) colonialism has promoted Western creativity:

Press and literature: for example books - Ngugi wa Thiong'o v. Shakespeare, Charles Dickens v. John Grisham

Music, theatrical productions, operas: for example music - Fadhili William v. The Beatles v. 50 Cent/Eminem

Motion picture and video: audio-visual works (documentaries, docu-dramas, movies or films, etc.) - Nyambane (Mong'are) v. Jay Leno, Charlie Chaplin (comedian?) v. Julia Roberts, Tom Hanks, Tom Cruise

Radio and television - Kenya Broadcasting Corporation (KBC), the public radio and TV; and numerous private radio (esp. FM) and TV stations. There is also a community broadcaster in Kenya that can help bolster cultural industries.

Photography: this is big business and photographers are abundant in parks, studios, etc. Most of these require copyright and business education. For instance, there is a general false assumption that paying a photographer guarantees ownership of copyright.

Software and databases - these are developing very fast, especially on legal databases, including law reports, statutes; software development is getting a foothold on proprietary as well as free or open source software platforms.

Visual and graphic arts: e.g., visual arts, crafts, textile and related designs - the kitenge, leso, ciondo....

Advertising services: many international brands and service providers are represented in Kenya.

Copyright collecting societies (or CMOs) are evolving as discussed above,

V. IMITATIVE INNOVATION IN CULTURAL INDUSTRIES?[92]

[92] *See* B Sihanya, 'Imitative innovation in Kenya's literary and musical contexts: the case of hip hop,' ©opyright Africa & Innovative Lawyering Working Paper (2006); an early draft is available at <www.innovativelawyering.com>

There is debate on the preservation, protection, use or exploitation of folklore or traditional cultural expressions. A major concern is that foreigners and locals (and particularly young) artistes and cultural entrepreneurs are inappropriately exploiting traditional cultural expressions (TCEs) or folklore by ripping, mixing and burning TCEs. This is especially used in Kenyan hip hop (aka Kapuka).

There are debates between those who see this as part of freedom of expression, artistic freedom, or artistic creativity, vis-à-vis those who regard this as misappropriation of Kenyan cultural heritage or others' creativity.

Folklore or TCE have been added by statute since an amendment in 1975, under the Copyright Act (s. 18 of the repealed Copyright Act, Cap. 130). This is now regulated under s. 2 and s. 49(d) of the Copyright Act, 2001 and Regulation 20 of the Copyright Regulations, 2004.[93] The Copyright Act and Regulation 20 provide a basis for compensation for folklore, and TCE, especially for commercial purposes.

The Kenya Copyright Board, launched in July 2003, passed the Regulations partly to provide for payment for the use of folklore or TCE.[94]

The Board is not yet independent as anticipated under the Act. It is still dependent on the Attorney General's office for funding, office space and the implementation of (major) decisions. The law's and the Board's efficacy in securing enforcement and compensation in copyright and related cultural industries is thus still limited.

VI. COPYRIGHT TEACHING, RESEARCH AND TRAINING IN KENYA

A. Teaching[95]

There are about 6 public (Government sponsored)[96] universities and about 10 private ones. The public ones are University of Nairobi, Kenyatta University, Moi, Egerton, Jomo Kenyatta and Maseno. The Western College of Science and Technology (WUCST)) is in the process of becoming fully-fledged, as it has been

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[93] These were enacted and applied to make Kenya TRIPs compliant. The Act and Regulations also implement certain provisions of the WCT and WPPT, such as Digital Rights Management Systems (DRMS) or technological measures of protecting copyright.

[94] The Board has representation from the Government, the various copyright industries, and three experts. I am a member of the Kenya Copyright Board in the category of "expert in copyright and related matters."

[95] *See also* B Sihanya, 'Teaching and researching intellectual properly and technology transfer in Kenya: a personal testament,' paper circulated at the WIPO IP teachers workshop, Abuja, Nigeria, September 1999.

a college of Moi University. Private universities include Catholic University of East Africa (CUEA), Baraton University of East Africa, Nazarene University, Daystar University, Kabarak, Kiriri Women's University, United States International University (USIU) and Strathmore University. Many Kenyans also study in Makerere or at the Kampala International University, both of which are in Uganda.

Most of these universities and schools do not offer intellectual property; only the University of Nairobi and Moi offer Intellectual Property, and even then, it is still essentially a Law school affair and is essentially optional. Kenya has three Law schools - Nairobi, Moi, and Catholic. Catholic has only recently commenced admission of first year Law students. Kenyatta University have advanced plans to teach law.

Some schools mentioned teach intellectual property under commercial law. Some schools teach only patent law and a little trademark - for long, this was the case in Nairobi.

Moi University provides courses in IP at LL.B. level only. At the University of Nairobi, on the other hand, we are teaching balanced Intellectual Property and Transfer of Technology. I teach the Intellectual Property unit to regular students and evening students (currently two streams) in the fourth (final) year of LL.B.[97]

The University of Nairobi also provides courses on IP at the LL.M level. We have just finished teaching the second class in LL.M. I teach copyright and trade mark, which are offered as separate units for an LL.M. in IP. In 2004-05 Marisella Ouma diligently and intelligently worked with me on co-teaching the LL.B. and LL.M. IP classes.[98]

In addition, currently two to three students have requested if I can supervise their doctoral (Ph.D.) research in IP (especially copyright, trade mark, and in the copyright-patent-trade mark interface). One has submitted a good proposal on content regulation in the copyright industries.

B. Training

i. Innovative Lawyering and ©opyright Africa[99]

[97] These are approximately 250 students taking this option.

[98] Marisella Ouma is a doctoral associate at Queen Mary Intellectual Property Research Institute in London. She is a Co-Director with me of ©opyright Af®ica, an agency that focuses on copyright and trade mark research, training, and information dissemination from Nairobi, Kenya.

[99] *See* < www.innovativelawyering.com.>

I co-founded Innovative Lawyering and ©opyright Af®ica with the objectives in part to research, train, publish, and engage in information dissemination, as well as consult in IP and innovation.

The organisation involves both interns and externs from the University of Nairobi. A majority are made up of current or former undergraduates and graduates of the University, especially from the Law school. They are trained in copyright, trade mark, patent and general IP law. We also have external affiliations or associations with other experts in the field, most of whom are also litigating or pursuing IP outside Kenya, especially in the US, England, Germany, Italy, South Africa and Uganda.

With the Masters and Doctoral fellowships already in place, students are encouraged to pursue their theses and dissertations under my formal and informal supervision. I supervise most IP researches at the Law School, partly because of a policy that lecturers should specialize. In some cases, IP is important or even peripheral to some of the researches. Hence some students need not be my direct supervisees. Nevertheless, we encourage consultation and I provide materials, in particular, through Innovative Lawyering and ©opyright Af®ica.

In March 2006, these institutions conducted a training workshop for industry on the closely related theme: trade mark, branding and franchising in Kenya.

Innovative Lawyering has recently offered expert opinion in a criminal case where the accused digitized news and related materials from the *Nation*, the leading media group in East and Central Africa. The issue is whether this was a breach of copyright.

ii. Law Society of Kenya

The Law Society of Kenya (LSK) is currently running workshops under the Continuing Legal Education (CLE) programme. IP law courses were offered in the major towns of Nairobi,[100] Mombasa, and Eldoret in 2005. Similar workshops are planned to include Kisumu city.

This will hopefully be offered annually - if not more regularly. This object is to aid lawyers who did not study IP Law School as well as inform those who want to keep abreast of the issues.

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[100] *See* B Sihanya, 'Patent law and practice in Kenya,' Presentation to the Law society of Kenya (LSK), Continuing Legal Education Programme, March 2005, on file with the author and at Innovative Lawyering and ©opyright Afr®ica, Nairobi.

iii. International Development Law Organization (IDLO)

IDLO has been providing professional development and continuing legal education courses in Kenya. I facilitated their video-conference training on IP with the Ministry of Justice and Constitutional Affairs, in September 2004. It was co-ordinated from Rome-Nairobi-Kampala. Unfortunately, the video link from Dar Es Salaam failed.

iv. Training for Law Enforcement Officials under A-G's Office

The Attorney General's (A-G's) office and the Kenya Copyright Board, have on occasions organized training workshops for law enforcement officials in IP. The two I facilitated were both on copyright and targeted police officers, prosecutors, and officers from the Weights and Measures Department.

C. Research

A body of IP research is emerging in Kenya. Some of these are in the footnotes, in the Bibliography, and Innovative Lawyering's and ©opyright Af®ica's brochure (both originally appended to this study). My own copyright and trade mark studies, Marisella Ouma's studies, relevant copyright dissertations at the University of Nairobi, and others are described or listed in Innovative Lawyering's and ©opyright Af®ica's office and website: <www.innovativelawyering.com.>

D. Copyright Law Reform

Kenya's copyright, trade mark, patent, trade secret, and industrial property law generally have been reformed in the past two to five years. However, it appears the focus was on uncritical TRIPs compliance in certain cases. The opportunity was largely lost to address sustainable development issues, particularly the normative and institutional issues in integrating IP in economic, cultural, and technological development.

In this context, the Kenya Copyright Board, ©opyright Af®ica, and Innovative Lawyering are exploring options for legislative reform to secure the public interest while taking advantage of flexibilities under TRIPs and related IP regimes.

E. WIPO

WIPO has conducted training and workshops in Kenya especially in industrial property, in collaboration with the Kenya Industrial Property Institute (KIPI), for the (prospective) collective management organizations in the music industry, and for the Kenya Franchising Association (February 2006).

WIPO has also sponsored a study on documenting IP as an asset.

F. WTO

The World Trade Organization (WTO) is running a programme, the Regional Trade Policy Course. This includes TRIPs, taught in terms of doctrine, rules, the regional perspectives or concerns of various African countries, and the state of play in the negotiations at WTO.

In the past it has been conducted at the University of Nairobi for English speaking African countries. Countries send government representatives to be trained on WTO issues so that they can negotiate the issues. The training in 2005 was (and in 2006 will be) conducted at the University of Namibia. In 2004 Mr Hannu Wager of WTO and I taught TRIPs. In 2005, Dr Wolf Meir-Ewert represented WTO and partnered with me.

This collaborative work has led to the development of a study co-edited by WTO's Dr Patrick Low on how States participate in and perceive the WTO. My chapter is entitled "Patent law, compulsory licensing, and parallel importation of HIV/AIDS drugs in Kenya."[101] My findings are, partly, that patent law is not the (main) cause of limited access to such pharmaceutical products; a Government's health and drugs policy, the health infrastructure, public and private sector corruption and lethargy, among others, are some of the core factors.

G. Way Forward: Research, Scholarship, Intervention and IP Activism

IP, and especially copyright and trademark, play a major role in Kenya's social, economic, cultural and technological development. However, the national, corporate and individual accounting and budgeting processes have not captured this contribution. Moreover, there is no empirical study on this phenomenon.

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[101] B Sihanya (2005) 'Patents, Parallel Importation and Compulsory Licensing of HIV/AIDS Drugs in Kenya,' in P Gallagher, P Low & AL Stoler, eds., *Managing the Challenges of WTO Participation*, London: Cambridge University Press, 2005), pp. 264 - 283.

We are raising issues of copyright and access to educational materials, software, creative and relevant entertainment and infotainment products (cf. the emergence of Nigerian and Mexican soaps in Kenya).[102]

There are broader questions regarding the role of IP (esp. copyright and trade mark) in sustainable development. The next phase must focus on sector specific concerns, on methodology and generate as well as utilize empirical evidence.

Kenyan authorities as well as African delegates and Governments need to be persuaded to pursue copyright and trade mark issues with vigour similar to that regarding IP and access to public health.

Some of the immediate challenges include conducting empirical studies on the matter. There is also need to strengthen IP teaching, research, training, publishing and information dissemination. The University of Nairobi and Moi University have taken up some of these challenges, by offering LL.B., LL.M., and opportunities for doctoral research. Innovative and ©opyright Af®ica are complementing these efforts by conducting more focused and long-term studies and training on the issues. The various programmes are in the institutional website.

The various programmes conducted by WIPO and WTO, including the WIPO and WTO colloquium for IP teachers, have strengthened our resolve at the University of Nairobi and at ©opyright Af®ica and Innovative Lawyering.

[102] Some of these issues have been raised with respect to developing countries generally in CIPR, supra note 74.