

**AN INVESTIGATION ON THE COPYRIGHTSTRUCTURE IN RELATION
TO THE KENYAN MUSIC INDUSTRY**

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K50/8360/03

**A Research Project Submitted in Partial Fulfillment of the Requirement for a
Degree of Masters of Arts, School of Journalism and Mass Communication,
University of Nairobi**

October 2014

DECLARATION

The work presented in this research project is my original work, having not been submitted for examination in any other academic institution

Signed **Date**

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This Research Project has been submitted for examination with my approval as a university supervisor.

Signed **Date**

Supervisor: Dr Julius Bosire

DEDICATION

A SPECIAL DEDICATION TO MY FATHER, THE LATE MR. GS KAGWI

I am who I am today because of your wisdom, your guidance and your belief in me. Thank you for always cheering me on. I love you always dad. May you continue to rest in peace, until we meet again.

This one's for you!

ABSTRACT

In the traditional African setting, music was viewed as a social tool through which important societal occasions were marked and valuable lessons passed from one generation to the next. With time and modernization, the value of music has expanded to include a strong economic value, with musicians engaging in the art with the hope of growing a successful business.

The Kenyan music industry has indeed grown in leaps and bounds over the last couple of years. However, in as much as this is so, many musicians have been unable to reap the financial benefits of the music industry and earn a meager fraction of what they are entitled to.

This study investigates the reasons as to why the economic value of the Kenyan music industry remains virtual, with little to no trickle down to its stakeholders.

It attributes the success or failure of any music industry to the infrastructural layout of the same, and as such aims to investigate the operations and organization of the pillars of the Kenyan music industry, and how they interrelate with one another.

Informed by the Game Theory and the Theory of Disruptive Innovation, the study investigates how decisions made on various levels of authority coupled with the evolution of technology have played major roles in bringing the Kenyan music industry to its current state. The study traces back decisions made from colonial times and a newly independent Kenya by political and industrial leaders, and how such decisions have subsequently impacted the development of the Kenyan music industry. It further investigates how technological and telecommunication advancements have impacted the economic status of the industry, and stakeholders of the same.

The methods employed were qualitative, owing to the exploratory nature of the study. The findings indicate that indeed, the current infrastructural organizational and operational layout is not efficient in its functions, much to the detriment of stakeholders. Relevant suggestions were consequently tabled in a bid to remedy the current status quo, with the objective of creating a stable environment in which musicians can conduct their business with a better chance of success.

ACKNOWLEDGMENTS

I'd like to show my utmost appreciation to my supervisor, Dr. Julius Bosire, whose patience, guidance and support was extremely invaluable to this study. Thank you for taking such keen interest in my research, and ensuring that it came to a successful end.

I would also like to thank my colleagues and peers in the music industry who willingly participated in this research. Thanks for taking the time off your hectic schedules to meet with me and discuss what truly ails this industry.

I thank my husband and fellow musician David K Mathenge, aka Nameless, for his tremendous support and encouragement. You have been a source of strength to me as I undertook this research, and I am truly indebted to you. Our wonderful angels, Tumiso and Nyakio Mathenge. I thank God for giving me the honor of being your mother. You are inspirations to me, despite your tender ages. May God continue to bless you.

My dad, the late GS Kagwi. Thanks for raising me to inspire positive change. I'm pretty sure if you were here, you'd utter your famous words "This is the stuff we're made of!" My wonderful mum, Mrs Nyakio Kagwi, you are such a treasure to me. Thank you for cheering me on throughout the span of this research. Your support has been absolutely invaluable.

Lastly, I would like to thank God Almighty for giving me the vision to embark on this study. It is my prayer that the contents herein act as guiding tool to better shape the Kenyan industry for our sake, and for the sake of generations to come.

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ACRONYMS AND ABBREVIATIONS:

CP	Content Provider
CMO	Collective Management Organization
IP	Intellectual Property
KAMP	Kenya Association of Music Producers and
KECOBO	Kenya Copyright Board
MCSK	Music Copyright Society of Kenya
MIAKE	Music Association of Kenya
PRISK	Performers Rights Society of Kenya
TRIPS	Trade Related Aspects of International Property Rights
UDCD	Universal Declaration on Cultural Diversity
UDHR	Universal Declaration of Human Rights
UNCTAD	United Nations Centre for Trade and Development
WIPO	World Intellectual Property Organization

CHAPTER ONE: INTRODUCTION

1.1 Context of the Study

Music is a basic mode of cognition (Reimer 1989) through which messages and emotions can be conveyed, and be elicited from its audience (Justin PN, 2001). In Africa, music is life that permeates all daily activities (Audonum 1980). The African is born, named, initiated, fortified, fed, nurtured and buried with music” (Audonum 1980). Indeed, it is the soul, which is ultimately concerned with various customs and religious practices.

Designed to fit particular ceremonial spaces, music at once defines and reinforces the disposition of power within those spaces and the authority represented by the same (Leyshon, 1995). In 2002, for example, the song “*Who Can Bwogo Me?*”(Who can defeat me) written and performed by the famed GidiGidiMajiMaji duo, moved to occupy the centre stage in the political arena of Kenya's general election, capturing and reiterating the socio-political ambience of the nation at the time (Ogude, 2005).

With time and modernization, the place of music in Africa has evolved to include economic viability. Erlman (1998) views this cultural shift not as an autonomous process, but as an aspect of the larger issues of industrialization. In many countries this transformation was informed by external factors in the form of influences from Asia, Europe and North America, initially through trade and later through colonization (Zambezia 1996).

In Kenya, as is the case with many third world countries, a very small percentage of musicians manage to make a living off their art, and those who do, do so primarily from stage performances in night clubs, public, private or corporate events. This is in contrast to more established markets in which royalty collection and

online sales of music are considered a major revenue earning avenues, without losing focus on other avenues such as record deals and touring. These traditional industries reap the lions' share of the global music industry, which, as of 2005, was valued at 50 billion USD (MEDS report, 2005). This is largely because the framework or soft infrastructure (Landry & Bianchini, 1995) upon which such industries are built are under constant evaluation, to ensure maximum output and maximum gains. Granted that the Kenyan music industry is relatively young and hence experiencing teething problems, there is an urgent need to assess and correct the music industry's infrastructure, if at all artists are to realize the financial rewards of their hard work, and if Kenya's music industry is to compete on a global scale.

1.2 Kenyan music industry infrastructure

The infrastructural layout of the Kenyan music industry comprises of various key components. These are, the legal framework, which revolves around the Copyright Act, and the Organizational framework, which includes the Kenya Copyright Board (KECOBO) Music Copyright Society of Kenya (MCSK), Kenya Association of Music Producers (KAMP) and Performers Rights Society of Kenya (PRISK). Below is an overview of their roles and functions.

1.2.1 Legal Framework

The importance of intellectual property was first recognized in the Paris Convention for the Protection of Industrial Property of 1883, and the Berne Convention for the Protection of Literary and Artistic Works 1886 (WIPO Publication 450). Both treaties are administered by the World Intellectual Property Organization (WIPO), which is a specialized agency of the UN, mandated to handling and regulating matters pertaining

to Intellectual Property in UN member states.

WIPO describes intellectual property as creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce (WIPO Publication 450). It further categorizes intellectual property into two; Industrial property (patents for inventions, trademarks, industrial designs and geographical indications) and copyright, which covers literary, works (such as novels, poems and plays) films, music, and artistic works.

Intellectual property rights are outlined in Article 27 of the Universal Declaration of Human Rights (UDHR), which is a declaration adopted by the United Nations general assembly, and is therefore applicable to all United Nations member states, Kenya included. The declaration provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions.

The Berne Convention as revised in Paris on July 24, 1971, and amended on September 28, 1979, entered into force with respect to Kenya on June 11th, 1993 (Berne Notification no. 145).

In addition to the Berne Convention, Kenya is also party to the Trade Related Aspects of International Property Rights (TRIPS) Agreement, WIPO Copyright Treaty, The WIPO Phonograms and Performances Treaty among others. As such, it has comprehensively reformed its Intellectual Property (IP) laws to bring them into compliance with internationally accepted standards of international Intellectual Property legal requirements.

Article 40 (5) of the Kenyan Constitution states that“ The State shall support, promote and protect the intellectual property rights of the people of Kenya”

The amended Copyright Act of 2001 was put in place to further comply with existing

international IP requirements, as well as to meet the needs of local IP based industries. One of the major results of this Act was the incorporation of the Kenya Copyright Board (KECOBO), which was put in place to deal with matters pertaining to IP based industries. Part Two of the Act widely elaborates on the administration, roles and functions of the Board as a state body. The functions of the body are indicated in section 5, as follows: The body the overseer the implementation of laws and international copyright treaties and conventions that Kenya is party to, to raise awareness on matters pertaining to copyright and administer all matters of copyright and related rights in Kenya, organize the legislation on copyright and related rights and ensure its constant improvement and continuing effectiveness of the same and to license and supervise the activities of Collective Management Societies (CMOs).

By nature of their mandate, the CMOs form the backbone of the Organizational Framework of the music industry.

1.2.2 Organizational Framework

Under KECOBO, three Collection Management Organizations have been registered, to act on behalf of local and international musicians. These companies are: The Music Copyright Society of Kenya (MCSK), Kenya Association of Music Producers (KAMP) and Performers Rights Society of Kenya (PRISK)

The rights of authors, composers and publishers of musical works are administered by Music Copyright Society of Kenya (MCSK). Formed in 1983, MCSK's mandate lies in collecting license fees on behalf of its national members within Kenya from broadcasters and the public performance in hotels, public transport and other venues where members' music is performed or utilized.

Kenya Association of Music Producers (KAMP) was licensed in 2008 by the Kenya Copyright Board to represent the rights and interests of producers of sound recordings, and to collect license fees and to distribute royalties in accordance with the Copyright Act.

Performers Rights Society of Kenya (PRISK) is the youngest of Kenya's collecting societies, having been established on 1 November 2009. PRSK represents performers in musical and dramatic works, and currently has about 70 members.

Implementation of the Copyright framework began over 30 years ago with the incorporation of MCSK in 1983. Even so, MCSK has little to show for its existence 30 years later, as the financial situation of its members remains dire, despite their popularity and public appreciation. Even so, MCSK has in the recent past made headway in license fees collections from media houses and other business ventures that incorporate music as a value add to their consumers. Such businesses include public service vehicles, hotels and restaurants. However, the organization has twice had its license revoked by KECOBO, owing to allegations of corruption and misappropriation of funds.

The incorporation of KAMP and PRSK came almost 25 years after MCSK was formed. This in itself is an indicator of a major flaw on a policy and implementation level. Both organizations are mandated to collect royalties and licensing fees from the very same music consumers targeted by the MCSK.

1.3 Evidence of Infrastructural Weakness

The Copyright Act (2001) further ensures protection of IP rights, and the facilitation of organizational structures to implement economic growth of the industry. But even with the introduction of new copyright laws, and the signing of international IP

treaties, piracy of music and motion picture recording has become increasingly common (Orawa 2011). As of 2011, the rate of piracy was estimated to be at 90%, and rising (Adhengo 2011). This is a direct result of a major flaw in the industry's infrastructure. Adhengo further finds weakness in the system on a policy level. The 2009 National Policy on culture and national heritage presented by the Office of the Vice President is wanting broadly in its implementation strategies and widely in its coherent definitions (Adhengo 2011). At a glance it touches on the basic components that are laudable at international level, though, on interpretation within the eyes of the cultural industry itself, there is no cohesion of the economic strata within which progress has to be measured. (Adhengo 2011)

(Otike 2005) draws attention to poor implementation of copyright infringement penalties, stating that persons found with such offenses pay a meager fraction of what is legally required, indicating a major failure in this mechanism. Further, it is estimated that rights holders in Kenya lose about 30 billion shillings (US\$ 420m) annually in counterfeit and piracy (Otike 2005) an indication of a major weakness in the efficiency of the soft infrastructure.

Adhengo however brings in a different perspective, suggesting weakness in the fact that copyright policies are primarily foreign, and may not necessarily be applicable within the African context.

In his book, *Creativity in Kenya*, Adhengo states:

“There is need for Africa to emancipate itself from studies done by the western nations on its own behalf, where their problems are branded and solutions are forthcoming from without. There is need for the African governments to do their own internal analysis, to promote innovation and creativity from within, most importantly, recognize those efforts that strive to create ideas and products that could add up to the

gross domestic product of the nation”. (Adhengo, 2,2011)

This paper seeks to investigate the enabling factors of weaknesses within the Kenyan music industry infrastructure, with the aim of increasing the efficiency of the industry and to ensure maximum economic benefit to stake holders.

1.4 Statement of the Problem

In the 1950’s, Nairobi was the hub of Eastern African music industry, with studios such as East African Sound Studios setting up as early as 1947 (Harrev,1991). Out of this era came the first home-grown regional super stars, with their popularity spreading beyond the Kenyan borders and into the entire East African region. Fadhili Williams became particularly popular for his rendition of *Malaika*, (Kubik 1981). Other internationally renowned musicians of this era were Daudi Kabaka, Fundi Konde and The Equator Sound Band. However despite their fame, these and many other popular stars from their time did not reap the economic benefits of their hard work. Many of them died in abject poverty, and those who are still alive, live in abject poverty.

Of particular note is the case of Fadhili Williams, who wrote the song Malaika in 1960. The song went on to become a global hit, with popular musicians such as Miriam Makeba, Boney M, and the King of Pop, Michael Jackson, releasing renditions of this song. In an ideal situation, Williams should have been able to earn copyright royalties from these renditions, as well as been recognized on their renditions of this song as the original author of the song. He should have been able to live a life that reflected his fame, and the fame of his outstanding artistry. Unfortunately, Williams never earned a single shilling in royalties from the renditions of these popular artists, and spent his lifetime in court trying to fight for his rights. His

efforts were to no avail. Sadly, Fadhili Williams, one of the most celebrated artists in Kenyan history, died a poor man, in February of 2001.

The issue of lack of financial remuneration has transcended throughout the history of the Kenyan music industry. To date, there is a large discretion between the popularity of Kenyan artists and the earnings that they receive from their art. This is despite numerous treaties that Kenya is party to and the constant amendments to the Copyright Act.

Indeed, the industry's growth has been so stagnated, with players not gaining the full economic benefits from their art. This study seeks to understand and analyze the factors that impede the music industry's growth, with the aim of making informed suggestions as to how the existing copyright framework can be adjusted so as to increase its efficiency, so as to maximize and actualize the economic potential borne by the Kenyan music industry.

1.5 Objectives of the study:

1.5.1 Main Objective

To investigate the factors that impedes the growth of the music industry in Kenya.

1.5.2 Specific Objectives:

- i) To analyze the copyright law in regard to the Kenyan music industry
- ii) To analyze the Kenyan music industry infrastructure.
- iii) To analyze the correlation between the infrastructure and the various income generating streams in existence.
- iv) To investigate the role of government in music industry development.

1.6 Research Questions

- i) How efficient is the Kenyan copyright law in regards to the Kenyan music industry?
- ii) How efficient is the Kenyan music industry infrastructure?
- iii) What challenges does the Kenyan music infrastructure face?
- iv) What is the role of the government as regards the growth of the Kenyan music industry?

1.7 Justification of the Study

The music industries of third world countries have long been valued for their contribution to cultural identity (Nettle 1997, Robinson et. al, 1991). However, according to Paul Collier, the director of the development research department of the World Bank, the African music industries has the potential to have a big impact on economic structures, precisely because these economies are so small.. The South African music industry for instance has a gross turn over of 900 million rand (approximately 9 billion ksh) and an employment opportunity for 15,000 people (Villiers 2006) According to a Nigerian Strategy Development Document of 2010, record sales are on the up and rising, averaging 10 million in 2005 and rising to an estimated 30 million in 2008. The same document reveals that great revenue is generated from musical shows and concerts held in Nigeria, with an estimated 1,200 concerts and shows taking place every year, accounting for a combined annual turnover of US\$105.5 million.

Even with such examples of revenue generation from other African countries, not even a single publication on the issues of creative economies exist in Kenya. (Adhengo 2011).

The findings of this study will contribute to this under researched section of our economy and hopefully open up avenues for discussion and further research geared towards the growth of the local music scene.

Moreover, the fact that Kenyan copyright structures have been in existence for close to 30 years, yet there is minimal economic impact of the economy goes to show that there is a major problem within this framework. It is therefore imperative to evaluate and re-adjust the current copyright framework, in order to encourage growth and sustenance of the music industry. This paper aims to advice this process.

The research paper shall be largely beneficial to persons and/or organizations with interests in the music industry both locally and internationally. It shall also contribute towards the Kenyan music industry literature resource base, both for archival and research purposes, especially because the literature resource on the same is very scarce. Research on this and related topics directs you to material written by foreign sources, and isn't extensive enough to satisfy a researcher looking for in-depth knowledge of the functioning of the Kenyan creative industries with an economic view.

1.8 Expected Benefits of the Study:

1.8.1 Economic Benefits:

A report made by the World Bank in 2008, which suggests states that 38% of Kenyan youth are neither in school, nor employed. Further, a study conducted by the Oxfam Great Britain (OGB) in 2009 indicated that 17 million Kenyans, almost half the entire national population, live below the poverty line. Mate Kovacs (2008) finds promise of poverty eradication within the development of creative economies, and as

such, the development of such industries should be considered as a high priority and urgent (Kovacs, 2008)

Seeking out the weakness within the music industry's mechanism will result its growth, a direct result of which would be the creation of much needed job opportunities for Kenyan youth.

In addition, artists will finally begin to reap the fruits of their labor, and not struggle through life with fame and no fortune.

1.8.2 Cultural Benefits

The cultural imperialism hypothesis suggests that the one-way flow of cultural products from 'the West to the Rest' threatens to produce a cultural 'grey-out' (Tony Mitchell 1993). In the case of music, the hypothesis projects, a sort of 'Michael Jackson world takeover' of musical expectation and expression (Robinson et al. 1991:3), if national music markets are not protected and incubated. As suggested by Schrerer 2000a), music has the ability to influence preference, likes and dislikes. This view is further supported by Susan Halam, who states that "music is powerful at the level of the social group because it facilitates communication which goes beyond words, induces shared emotional reactions and supports the development of group identity". (Halam, 2008). This suggests that a high influx and preference of foreign music content with minimal circulation of local music, may negatively impact the audience sense of national pride.

The ripple effect of this is an unmotivated working force, which has little confidence in home grown industries, and have high opinion of foreign goods, services and cultures. The findings of this study and the implementation of the suggested changes thereafter, will therefore not only be relevant to the growth of the

music industry, but also be relevant to the development of other local industries, as well as generate a sense of national pride and confidence amongst Kenyans. Moreover, if this positive group identity were achieved on a national level, it would encourage the growth of a generation that looks within itself for encouragement and problem resolution, as compared to looking outwards to the Western World as trendsetters and problem solvers.

CHAPTER TWO: LITERATURE REVIEW

2.1 Introduction:

The Kenyan music industry has been in existence from long before Kenya received her independence from colonial powers. In spite of this, not much has been published on the industry from an economic angle although material that discusses the cultural and political aspects is sufficiently available. In his book *Creativity in Kenya*, Boaz Adhengo, points out that not even a single publication on the issue of creative economies exist in Kenya. All you get is departmental reviews by international agencies, which neither publish them for general access nor shares them with those from whom the information is gathered (Adhengo 2011). He goes on to point out that the stable documents about creative industries are and remain examples from Europe, America and now Asia (Adhengo 2011). Suggestions drawn from these reviews are therefore based on foreign understanding of our local needs, may not sufficiently fill the gap that they are intended to fill.

Adhengo further reiterates this in his book, stating the need for African governments to do their own internal analysis, to promote innovation and creativity from within, and most importantly, recognize those efforts that strive to create ideas and products that could positively impact the Gross Domestic Product of the nation. (Adhengo 2011).

2.2 History of the Kenyan Popular Music

One of the earliest forms of popular music in Kenyan is Beni Music, which was played by the Kenyan recruits into the British army. (Ranger 1975) Beni, (from the word band) was deemed revolutionary, as it comprised an interesting blend of

traditional and Western sounds and instruments, and had strong elements of social commentary and political criticism (Ranger,1975).

The first recording of African popular music is credited to the German, Carl Meinhof in 1902 (Harrev,1991). However, this recording was not done in Kenya, as the first Kenyan recording studio was established in 1947 by two British citizens, Guy Johnson and Eric Blackhart, and was called the East African Sound Studios (Harrev,1991). The late 40's and early 50's was an important phase in the history of popular music in East Africa. Import of records of the new guitar music of Mwenda Jean Bosco, Losta Abelo and other musicians from the former Belgian Congo (Zaire), (Kubik 1981) began to change the face of music within the region.

This new movement, dubbed the Congolese rumba, created something new out of a variety of local and global elements including local melodies, French cabaret music, vocal harmonies from church hymns, and brass-band fanfares (Ewens 1994). Artists such as Senoga-Zake, Fundi Konde, Daudi Kabaka Ally Sykes and Paul Mwachupa recorded several songs that had strong Congolese and Western influence, be it in the instrumentation, the language employed, or both.

By the 1950's, there had been a strong and continuing intra-African exchange of music; thus the new popular music of Kenya, had been permanently influenced by the new music of Zaire (formerly Congo). Out of this era of music came the first home-grown regional super stars, with their popularity spreading beyond the Kenyan borders and into the entire East African region. Fadhili Williams became particularly popular for his rendition of *Malaika*, which was originally done by Lucas Tututu in the late late 40's. (Kubik 1981).

In as much as the 50's and 60's are synonymous with drastic developments in the Kenyan music scene, these years were also politically tumultuous for the nation,

with the struggle for independence growing to a peak, and subsequent declaration of Kenya's independence in 1963. Being that in all East African countries, political music has its roots in a road to political independence (Kubik 1981) and "a need to prove their equality and ability to govern themselves along European lines" (Fair 1994:317), It was not unnatural for musicians of the time to compose music with strong political undertones.

Following independence, the ruling powers largely intervened in the production of music and by the mid 70's, a government censure on local music production was issued. Musicians who critiqued social or political stands taken by the government were detained or imprisoned (Kidula 2000). By 1980, there was no pervasive national music culture in Kenya (Ogot, 1995). Many Kenyan artists traveled to Tanzania in search of greener pastures because unlike Kenya, the Tanzanian government actively promoted and remunerated its musicians (Martin 1982). This, despite the fact that Nairobi had been set up as the recording capital for East and Central Africa (Stapleton and May, 1989).

Gospel music began to receive significant rotation in the early 90's, even though it had been recorded in Kenya since the 1950s. (Anderson 1994, Ward and Wesonga 1974). It soon became a market leader and became the savior of the local music industry (Kariuki 1990).

Gospel music was even being played during down time at local secular dance halls. Well-known secular musicians converted to Christianity and performed "gospel" (Muiruri 1993). While the genuineness of their faith was debatable, these former secular musicians were achieving chart status that had previously been elusive (Kidula 2000).

FM stations hit the Kenyan market in the mid 90's, and with them came a demand for local content. Musicians such as Hardstone, GidiGidiMajiMaji and Swahili Nation represented a new beginning for an ailing industry. The audiences loved the new sound they brought, and the FM stations competed to give the audiences what they wanted. By the turn of the century, the Kenyan music industry was more alive than it had ever been; new music genres such as Genge and Kapuka, replaced the demand for the Congolese sound. These new genres incorporate hip-hop, reggae, pop, dance music and typical African beats, and are sung in Sheng, a popular slang language which is a mixture of English, Swahili and other dialects.

Within no time entertainment columns, in the local dailies began to focus on the scene. The Nation Newspaper was the first to publish a purely entertainment based column, in the year 2000, with Dan Teng'o as its editor. Soon, other dailies followed suit. Kenyans were eager to learn about their own pop icons, be it gossip, album release, or anything in between. Kenya was bobbing its head to a new beat, a Kenyan beat, and Africa, and indeed the world, took recognition of this.

2.3 The Commodification of Music in Africa

Traditionally, music was not viewed as a money making matter within the African context (Askew 2003). Artists were valued more for their cultural impact on society, and were largely satisfied by the social status that came with this. Despite the fact that no study has considered political influences on music performance in Kenya (Mindoti & Agak 2004) there is evidence of such influences in the development of the music industry, both on a policy and social level.

The place of music within the traditional African context does not vary greatly from country to country. Among traditional East African communities for example,

music making is closely related with and recognized as a social activity that fosters and reinforces communal unity (Darba 2006).

Colonization played a significant role in transforming the context of music-making and performance by introducing the capitalist economic system and the notion of the market and money (Geschiere, 1992, 161). It began to become clear that there was a need to attach commercial viability specific to the art of music, especially in post colonial Africa, which also slowly embraced popular music as part of contemporary society (Pwono 1992).

Nigeria, the most populous country of the African continent, was always at the vanguard of world-music (Scaruffi 2002). And although Nigeria is a third world country with an emerging economy just like Kenya, it is home to the largest Music Industry in Africa, with speculators ranking Nigeria as the country with the largest number of musicians (Obidiedube 2012). According to Obidiedube the industry is currently valued at over \$3 billion dollars despite it being plagued with numerous obstacles in the fields of distribution, copyright, publishing, piracy and compliance the law (Obidiedube 2012).

There is little systemic academic investigation as to how African societies have produced full-time professional commercial cultural workers, especially entertainers, other than documentation of their activities (Zambezia, 1996). The question on how to capitalize on creative industries has been addressed severally, with bodies such as UNESCO and UNCTAD emphasizing on the relevance of such industries to economic development of third world countries.

Kenya is one of the 186 member states of WIPO (World Intellectual Property Organization) which was set up in 1967 to encourage creative activity, to promote the protection of intellectual property throughout the world. In order to maximize on the

music industry's potential, Adhenya (2011) suggests that it is very crucial for government and industry players to employ strategies that are relevant to the Kenyan music industry, as compared to borrowing entirely from western or foreign systems.

2.4. Music Copyright

2.4.1 Overview on Origins

In the ever developing international market place, the need to protect copyright cannot be overstated (Ouma & Sihanya 2009). The protection of these rights guarantees the maintenance and development of creativity and cultural diversity (The Commission of the European Communities 1991), as well as the development of any economy (Adelowo et al, 2012).

Copyright in the arts as we know it today is based on a narrowly defined, text-based concept of the "literary or artistic work" as it has developed since the enactment of the Statute of Anne in 1709 (Rose 1994). Music did not gain inclusion until 1842, when it was added to a definition of "books", and did not get treated as a separate art form until 1882 (Mills 1996). Hence the conceptual framework around which legal structures dealing with copyright in music have been built is a literary one.

At the centre of the copyright paradigm is the "author", the "creator", as a distinct and discrete entity. In earliest times "Creator" was a name of divine privilege, the human creative process finding its expression in ideas of craft and craftsmanship. The notion that the writer or composer is a special participant in the production process, indeed the only one worthy of attention, is a relatively recent one, a by-product of the Romantic notion that significant writers break altogether with tradition to create something utterly new, unique - in a word, 'original' (Woodmansee and Jaszi 1994).

As such, copyright can be viewed as an instrument of commodification within capitalist systems, as it excludes all kinds of knowledge, ideas, and innovations that take place in the 'intellectual commons' and are recognized only when knowledge and innovation generate profits, not when they meet social needs (Shiva 1993). This individualization and commodification of music may pose a threat to the transmission of culture and cultural values, as placing copyright ownership within the hands of an individual or individuals gives them the sole right to control its public usage. This opinion is further reiterated by Sherylle Mills (1996) who points out that "traditional music and Western law clash at the most fundamental level" (1996:57).

In this context, it is therefore of crucial relevance to consider the effect that such commodification can have on cultural transmission, specifically within the African context, where culture and tradition play a very central role in society.

2.4.2 Evolution of Kenyan Copyright Law

Kenyan and African copyright law is largely a product of three major legacies or factors:

British or French colonialism; American and transnational influence through postcolonial Western or transnational institutions and enterprises; and the internalization or retention of Western copyright norms in Kenya and in relevant African states. (Sihanya 2008)

On attaining independence in 1963, Kenya became bound by the Berne Convention through state succession (Sihanya 2008) as the UK's adherence to Berne extended to Kenya and other protectorates and colonies. Kenya acceded to the 1971 Paris Act of Berne on June 11, 1993.

Relatedly, some examples of the extent of WIPO's involvement in Kenya can

be seen in the fact that WIPO has worked with Kenya on drafting the copyright law. WIPO supplied extensive written comments and recommendations to the Government in the process of drafting the Copyright Bill 2000. WIPO's focus was on ensuring the implementation of Berne and the 1996 WIPO Internet Treaties, (Sihanya, 2008).

Further to Kenya's efforts in establishing and adhering to international intellectual property laws, Kenya is also signatory Trade Related Aspects of Intellectual Property Rights (TRIPS), WIPO Copyright Treaty, The WIPO Phonograms and Performances Treaty among others.

Generally, Kenyan Copyright law is largely a phenomenon of 19th and 20th century, beginning with the declaration of the country as a British protectorate in 1895 and a colony in 1920 (Ouma & Sihanya, 2009) Kenya's copyright law evolved from the 1842 United Kingdom (UK) Copyright Act, through to the 1911 and 1956 UK copyright Acts. These statutes were applied together with the English Common Law by virtue of the reception clause of the English East African order-in-council, 1897, and later, the Kenya Judicature Act of 1967. (Ouma & Sihanya, 2009)

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

Kenya enacted its first own Copyright Act in 1966, which consisted of only 20 sections. This was the declaration of Kenya's copyright independence. It repealed and replaced the UK Copyright Act, 1956. S.17. 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.

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

The Act consolidated national imperatives in an international context: aspects of traditional cultural expressions (TCE) (then called folklore) could be protected as a literary, artistic, or musical work. The intention was to conserve the national cultural heritage and economic welfare especially in the context of an international movement to protect natural and cultural heritage, as well as promote the then incipient interest in international trade in cultural products.

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

The 1989 amendment made numerous changes including the introduction of the term “audio-visual work” to replace “cinematographic films” and specifically mentioned the Kenya.

Broadcasting Corporation (KBC) as the broadcasting authority. Under s. 10B, it introduced the rights of performers, which are protected from unauthorized broadcasting and relevant forms of performance. S. 13A was amended to enhance the penalty for copyright infringement to a maximum Kshs. 200,000 or a jail term to up to five years or both.

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

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

2.4.7 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.”

2.4.8 The Copyright (Amendment) Regulations, 2000 LN 125/2000

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

2.4.9 The Copyright Act, Act No. 12 of 2001

The major changes in the 2001 Act include:

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

tangible forms of reproduction as well.

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

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

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

(e) The Act has clarified instances of fair dealing with respect to each subject matter. For instance, copyright does not control reproduction, translation, or adaptation, distribution, or communication to the public “by way of fair dealing for the purposes of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of

(f) Again, for the first time, the law prohibits and regulates anti-circumvention measures so that digital rights management systems (DRMs) or technological means employed to protect works are protected under copyright law.²⁹ The 2001 copyright

Act comprises of 52 sections, and the interpretation section of the Act states that the Act is an Act of Parliament, designed to make provision of copyright in literary, musical and artistic works, audi-visual works, sound recordings, broadcasts and for connected purposes.

2.5 Organizational Structures of the Kenyan Music Industry

At the core of the machinery that drives the Kenyan music industry are four main organizational structures. The Kenya Copyright Board,(KECOBO) the Music Society of Kenya (MCSK) The Kenya Association of Music Producers (KAMP) and Performers Rights Association of Kenya (PRISK)

2.5.1 The Kenya Copyright Board KECOBO

The Kenya Copyright Board (KECOBO) is a statutory body that was incorporated as the administration body of the Kenya Copyright Act, under Section 3. The mandate of the body is outlined in Section 5 as follows:

- (a) Direct, co-ordinate and oversee the implementation *of* laws and international treaties and conventions *to* which Kenya is a party and which relate *to* copyright and other rights recognised by this Act and ensure the observance thereof;
- (b) License and supervise the activities *of* collective management societies as provided for under this Act;
- (c) Devise promotion, introduction and training programs on copyright and related rights, to which end it may co-ordinate its work with national or international organizations concerned with the same subject matter;
- (d) Organize the legislation on copyright and related rights and propose other arrangements that will ensure its constant improvement and continuing effectiveness;

and

(e) Enlighten and inform the public on matters relating to copyright and related rights;

(f) Maintain an effective data bank on authors and their works; and

(g) Administer all matters of copyright and related rights in Kenya as provided for under this Act and to deal with ancillary matters connected with its functions under this Act.

Section 46 of the Copyright Act, 2001 gives the Board the exclusive mandate to register Collecting Societies. The Board is also given regulatory authority over the Collecting Society with the Act at Section 46 (9) providing that:

(9) The Board may by notice in the Gazette deregister a collecting society if it's satisfied that the collecting society –

(a) Is not functioning adequately as a collecting society;

(b) Is not acting in accordance with its Memorandum and Articles of Association or in the best interests of its members;

(c) Has altered its rules so that it no longer complies with subsection 4 of this section and;

(d) It has refused or failed to comply with any of the provisions of this Act.

2.5.2 Music Copyright Society of Kenya (MCSK)

Having being registered in 1983, MCSK was in existence long before Kenya Copyright Board. However, as part of KECOBO's mandate is to oversee the registration of collecting bodies and societies as a collecting body is to license and supervise the activities *of* collective management societies (Section 5.b) MCSK was automatically placed under the authority of KECOBO.

The Music Copyright Society of Kenya (MCSK), who represents the authors, composers and publishers. (Lureiro 2011). MCSK is mandated by law to collect public performance and mechanical rights royalties on behalf of its members, and works under the guardianship of the World Intellectual Property Organization (WIPO).

However, MCSK's past is riddled with corruption, with stories misappropriation of funds' reaching the public domain. This resulted in the revocation of the society's license. After a group of local artists started to blow the whistle on MCSK's management, it was found out in a financial report that the society was spending more than 50% of their earnings on administration, while the artists were not getting any income, (Lureiro 2011). MCSK regained its license and collecting rights in 2012, and is currently on a mission to reinstall trust amongst its members.

2.5.3 Kenya Association of Music Producers (KAMP)

This is a registered non-profit making private company, with no share capital limited by guarantee. KAMP was officially registered in the year 2003 under the Companies Act, Chapter 486 of the Laws of Kenya and licensed by the Kenya Copyright Board to operate as a collective management organisation in May 2008. KAMP was incorporated to represent the rights and interests of producers of sound recordings, and to collect license fees and to distribute royalties in accordance with the Copyright Act of 2001 of the Laws of Kenya. KAMP's mandate is to collect license fees and fairly distribute royalties to the makers and controllers of sound recordings, enabling them to fully benefit from their Intellectual Property Rights and make additional economic gain from their productions.

KAMP is charged with the responsibility of collecting license fees from the users of sound recordings such as broadcasting stations (radio and television) and public performance in places such as concert halls, restaurants, hotels, shopping malls, public transport vehicles, etc. KAMP is also mandated by the Copyright Act 2001 to collect blank media levy (private copy remuneration) and distributing the same to its members. In addition, KAMP seeks to have reciprocal agreements with other local and international bodies, which have similar objectives worldwide for purposes of collecting and distributing or channeling revenue to its registered members and its affiliates

2.5.4 Performers' Rights Society of Kenya (PRISK)

This is the youngest of the collective management organisations, having being licensed by KECOBO in November 2009. Its mandate is to represent performers in musical and dramatic works, as well as to collect remuneration from music users and distribute royalties to the rights holders. PRSK is a non-profit company limited by guarantee, and not having a share capital. The objectives of PRISK are, amongst others, to enhance performers lives by creating value for their work, to enhance the realization of performers rights and to act as a bridge between performers of music and artistic works and the users of those works.

PRISK is mandated to exercise and enforce on behalf of members of the Society, being the performers of audio and audio-visual works, all the economic rights and remedies of the performer. Further, in respect to any exploitation of their works, PRSK administers all performers' rights relating to: public performance, broadcasting, communication to the public, mechanical reproduction, translation, adaptation and any other form of use of such works.

2.6 Income generation avenues

The Kenyan music industry has been in existence from long before Kenya received her independence from colonial powers. In spite of this, not much material has been published on the industry from an economic angle. Material that discusses the cultural and political aspects is sufficiently available from both local and foreign sources. However, sourcing published information that sheds light on the economic aspects as well as the organs that govern this particular industry has proved to be an enormous challenge.

All you get is departmental reviews by international agencies, who neither publish them for general access or share it with those from whom the information is gathered” (Adhengo 2011). The stable documents about creative industries are and remain examples from Europe, America and now Asia (Adhengo 2011). As such, the literature review herein is largely based on foreign yet relevant publications. There is need for the African governments to do their own internal analysis, to promote innovation and creativity from within, most importantly, recognize those efforts that strife to create ideas and products that could add up to the gross domestic product of the nation. (Adhengo 2011)

2.6.1 Stage Performances

Colonialism played a significant role in transforming the context of music-making and performance by introducing the capitalist economic system and the notion of the market and money (Geschiere, 1992, 161). This led to the commercialization of music that had been embedded within social relations and traditional ceremonies as Africans were adapting to urbanisation and industrialisation. (Zambezia 1996).

In Kenya, stage performance and album sales have for long been considered

the primary means through which musicians earn a living. Stage performances as an income generating activity, has been propelled largely by mass media (Zambezia 1996) as they act as a marketing tool for popular music within the context of music performance as a commodity (Qmpey, 1992).

Owing to poor structural and copyright enforcement, many musicians in Kenya and indeed in the developing world have long viewed stage performing as a primary source of income. Musicians develop their music commodity and use existing marketing tools such as audio visual, visual and print media to increase their popularity, with the aim of being invited to perform at social and corporate occasions and concerts. These range from small public appearances and local bars and restaurants, to large concerts organized either by themselves, or corporate brands.

The fees payable to artists for such appearances varies based on popularity, with less known artists even performing for no fee, in the hope of gaining an opportunity to showcase their art. There is no published research detailing the asking fees for Kenyan musicians. However, from my personal experience, having been a performing artist for the last fourteen years, well established artists will charge anywhere between 80,000 and 400,000 shillings for a public appearance at a concert in Kenya and within the East African region.

This is a marked improvement from the turn of the millennium, where established artists would be paid 30,000 at most, despite their popularity. Overseas performances too have become a common venture with artists traveling to the diaspora to perform for mainly for East African audiences living in these areas. For this, and again from my own experience, artists will ask for anywhere between 2000 us dollars to 5,000 us dollars, again depending on their popularity and public demand.

2.6.2 Album Sales

The global music business is a multi billion dollar segment of the media industries, and has been growing at a high rate, from US\$ 26 billion in 1991 to almost \$40 billion in 1996. Existing data indicates a 700 per cent increase in 12 years (from 1980-1992), in trade in sound recordings. (UNCTAD 1998). Most music exporting developing countries face severe barriers to entry into global markets in sound recordings, associated with high degrees of market concentration (Parisotto, 1997; UNCTAD, 1998). Particularly challenges arise in the area of traditional marketing and distribution, (WIPO 2007) with high sunk costs and capital requirements, music-exporting developing countries face considerable challenges (UNCTAD 1998) As a result, musicians in developing countries opt to pursue internal markets, and minimalizing the number of players involved in the production and distribution process owing to limited funding.

Record producers from developing countries normally do not participate in the manufacturing and distribution phases, which account for the greater portion of the value-added chain (ZeljkaKozul-Wright and Lloyd Stanbury 1998). Instead, record producers normally receive royalties from the sale of finished product, averaging between 10 and 15 percent of the retail price, depending on the provisions of the agreements entered into the distributors, or the record companies. Producers of music products in developing countries do not have adequate access to manufacturing facilities for the CD format (currently the dominant format accounting for approximately 70 per cent of global sales in 1998) (ZeljkaKozul-Wright and Lloyd Stanbury 1998). Album sales as an economic venture has largely been affected by piracy (Selgman 2001). By 1998 it was estimated that CD pirates hold up to a 20 per cent share of the global market, (ZeljkaKozul-Wright and Lloyd Stanbury 1998) .

The major loophole in the legal system is that “it may be able to stop factories from copying and selling CDs or books in volume, but it cannot stop individuals from replicating the materials for themselves or selling small numbers to their friends” (Thurow, 1997). The shift to the digital space has also largely affected album sales world wide. There are no existing reliable records that indicate album sale trends in Kenya. However, given that the current rate of piracy is at an all time high of 90% (Adhenya 2011) one can conclude that until the laws on copyright and piracy are properly implemented, the bulk of the revenue earned from sale of albums shall remain in the pockets of music pirates, denying both the government and musicians an opportunity to earn revenue.

There is a shift from revenues based on the physical distribution of tangible carriers, such as the sale of CDs and tapes, to income from licensing fees for the use of music in media channels. (Wallis 2001) A further problem for artists and composers is that they often sign away their rights to the music. They do this because there is not a good, strong system of collection societies which ensure that royalties are collected and paid. Thus, whereas in the West artists seek an both an initial advance and royalties on subsequent record sales, in Africa because artists have no expectation of receiving any royalties from record sales –because of piracy and the inadequate collections of royalties – they expect a bigger single up-front payment. (Selgman 2001)

2.6.3 The Digital Space

Over the last two decades, developments in ICT have introduced new potential markets for music industry players. Digital technologies have enabled the Internet to become an efficient medium for accessing music – be it by downloading ring back

tones, or by acquisition of singles and album from online retailers. The Internet, with its mix of computing, telecommunications and broadcasting, is revolutionizing the media and publishing business. New models of delivering content and entertainment to users through networks – such as Web casting of TV and radio – have also merged. (UNCAD 2002)

Such new developments in media and entertainment services pose a serious threat as well as opening up many new opportunities for artists, especially those in the developing world, who have limited finances to market or publish their music. The revenue potential of music online is incredibly significant, as more and more Internet users listen to and acquire music online.

In Kenya, music downloading has become a trend that transcends age and financial class, as more and more Kenyans are able to access music from their favorite local and international musicians from various music portals that exist on telecommunication platforms. Ideally, these portals come into a revenue share agreements with the copyright owner or their representative agent or body, and a telecommunications company to provide the downloadable music files to consumers at reasonable costs.

Music online offers multiple tangible benefits, such as reduced risk (it requires no immediate, upfront investment for the music companies), provision of additional distribution channels on the Worldwide Web, promotion of sales of music at low cost; and provision of an important additional marketing vehicle by promoting artists online, as well as other music-related merchandise, (UNCTAD 2002).

A report by the Communications Commission of Kenya (CCK) reported a total of 30.7 million telephone subscribers by the end of the 2012/2013 financial year (CCK Quarterly Sector Statistics Report, 2012-2013). Of these, 9.49 million were

internet subscribers up from 8.51 million recorded during the previous period, (CCK Quarterly Sector Statistics Report, 2012-2013).

These statistics not only indicate the fast rate at which the country is adapting to the digital space, but also present an enormous revenue generating opportunities for music industry stakeholders, as a large percentage of Kenyans are now able to access music and music related merchandise at a touch of a button. As such, policy makers in developing countries can no longer afford to remain uninterested in this important economic activity, which is a potential earner of foreign exchange and an untapped source of revenue, (UNCTAD 2002).

Unfortunately, these developments in ICT come with a number of new challenges. The fact that the Internet by its very nature is largely unregulated (Wallis 2001) has serious implications for trade expansion. Most significantly, piracy or illegal transmission of music without adequate copyright payments, or pricing policies, represent immediate challenges. New Internet based recording technologies, such as the MP3 (which enables free downloading of music) and the Napster website (which permits uncontrolled file swapping among fans for free), represent cases of evolving technologies, or alternative and additional modes of product delivery, (UNCTAD 2002).

Initially, because of these foreseen challenges to an otherwise structurally functional industry, major record companies were extremely hesitant in accepting the new technological challenges and only began to strategically reposition themselves to a greater degree in response to major and irrefutable pressures to change (Dollata 2011)

It therefore goes without saying that the diffusion of ICT has exerted a profound impact on the industry's development and continues to do so unabated (see

MBI, 1998; Krasilovsky and Shemel, 1995; UNCTAD, 1996b; EC,1997; Vogel, 1998). The World Intellectual Property Organization (WIPO) is currently working on the harmonization and development of new international treaties in the area of international licensing in a new digital environment, (UNCTAD 2002).

In Kenya, artists are increasingly registering their music with various music portals and are beginning to earn additional income through these channels. The agreements are made between copyright holders and the PRSPs, in which case CMOs do not have a role to play in this. Majority of Kenyan musicians remain ignorant as to the potential revenue that the digital space presents, much to the benefit of online music pirates. However, even in the case of legal acquisition of music, the revenue earned by the copyright holder is very meager, as the larger percentage of such revenue is divided between the PRSP and the telecommunications provider.

The move to the digital space is irreversible (UNCTAD 2002) and as such, there is need for both music industry stakeholders and the government to address the economic potential and loopholes of this space in order to maximize revenue earned by the country through online music portals.

Music publishing constitutes the core of the music industry in well-established markets. The role of a music publisher is to market music, license its usage and administer copyrights on behalf of the musician (Mathes & Michelman, 2003). In many emerging markets, Kenya included, the publishing role is taken on by the musician. According to Mathes and Michelman however, this situation should ideally work to the advantage of the musicians, as the artist owns a majority of the copyrights, and can therefore take home substantial earnings in royalties. This is only possible with the support of a structurally sound copyright framework. refer to this framework as a “soft infrastructure’ which informs the music industry value chain.

2.6.4 Performance royalties

The music sector represents a growing part of the audio visual service industry worldwide, which is characterized by a tremendous growth potential, (UNCTAD 1998). Accelerated growth of output of recorded music has been amply documented, and is tightly interwoven with the introduction and application of new technologies, which have vastly increased the size of markets through media such channels as radio, TV, films, etc. (Krasilovksy and Shemel, 1995).

These media channels not only work as marketing platforms for artists, but also act as a revenue resource on their own. The copyright owner of a song has the exclusive right to perform his song in public (Mathes & Michelman 2003). Therefore, no one can play your song in public (such as in clubs, at live concerts, on the radio, and on television) unless they have express permission to do so from copyright owners. Performing rights societies such as ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music Incorporated) and SESAC are responsible for issuing licenses to and collecting money from consumers.

Locally, collecting management organizations such as MCSK KAMP and PRISK are responsible for issuing such licenses, and distributing royalties to their members. The royalty trail begins when the song is registered with one of the three performing rights organizations mentioned above. Once a song is registered, it becomes part of that CMOs collection and is available to all of its users. Consumers pay a blanket license, which varies from the nature of consumption. The CMOs deduct money for their operating expenses and the rest goes to the songwriters and publishers.

CMO customers include just about anyone who plays music in a public place. This includes television networks, cable television stations, radio stations, background music services, colleges and universities, concert presenters, symphony orchestras, Web sites, bars, restaurants, hotels, and so on. Basically, any business that plays music in a public space is required by law to have a license to do so. The difficult thing to imagine in all of this is how these organizations track all of that music to get an accurate record of how much royalty money needs to be paid to which songwriters and publishers.

MCSK has recently adapted a scientific method of revenue remuneration, where artists are paid based on the rotation that they receive on television and radio. The more airplay an artist receives, the higher the royalties owed to him are. The challenge in the implementation of this system comes in as many media houses are not willing to co operate with the CMOs in remitting license fees.

Performance royalties collection is a very new phenomenon in the Kenya, and has been met with a lot of resistance from consumers, who previously used the music to benefit their various businesses for free. MCSK, PRISK and KAMP have however made tremendous progress in collection of performance licenses, much to the benefit of their members. With the assistance of law enforcement agencies and with compliance from consumers, performance royalties are in the near future going to be the key revenue earner for Kenyan musicians, as is the case with the developed world.

2.6.5 Challenges

The lack of a united sound also presents itself as a challenge to the industry, as indicated by the World Intellectual Property Organization (WIPO) which reported in 2007 that Kenya's 'linguist diversity' has 'fragmented the market and made it more

difficult for artists to develop a unique and internationally recognizable sound'. To this problem should be added the poor quality of recordings, which arises both from a lack of producing studios and the tendency for homemade and self-released recordings, (Loureiro 2011).

The legal system presents major loopholes in its administration of the law as regards the music industry. Most copyright infringement cases are pursued in Kenya by aggrieved parties as civil rather than criminal cases. The sanctions provided for copyright prosecutions are limited and some offenders may view the sanctions as negligible transaction costs rather than penalties (Sihanya 2008) Therefore, as stated, more needs to be done in training employees of prosecutorial agencies and the general public on the rights that accrue to copyright holders and on copyright management, prosecution and enforcement generally, (Sihanya 2008)

CMOs in Kenya are faced with a myriad of challenges. First, lack of a firm constitutional foundation in a normative and institutional sense (Sihanya 2008). Financial and technical capacity, coupled with inadequate copyright expertise amongst managers and members of CMO's also pose as major hurdles to the effectiveness of such bodies, (Sihanya 2008)

The current Copyright Act in itself does not sufficiently cater to curb factors impeding growth of copyright based industries. The Act for example, provides that any person found guilty of any offence specified in the Act will be liable to a fine not exceeding Kenya Shillings Four Hundred Thousand (Kshs400,000) (approximately US\$4,800) or imprisonment for a term not exceeding six (6) years for a first offender and in any other case to a fine not exceeding Kenya Shillings Eight Hundred

Thousand (Kshs. 800,000/=) (approximately US\$9,500) or imprisonment for not exceeding ten (10) years or both. The fines levied are to be shared equally by the

Kenya Copyright Board and the Kenya Revenue Authority. It can be assumed that this provision is meant to provide an incentive to both institutions to prosecute copyright infringers. The reality, however, indicates that this incentive scheme has not worked because, generally, the fines levied on offenders, and the number of prosecutions are too low. The average fine imposed is Kenya Shillings Five Hundred (Kshs. 500/=) (approximately US\$6).

KECOBO's establishment was a positive step towards countering piracy but research confirms that it is completely overwhelmed by the magnitude of the problem and there is no sense of achievement on its part. For instance, while the Board is mandated by the statute to prosecute infringers of copyright, it has to-date successfully prosecuted only very few cases over the last eight (8) years since it has been established. The Board is overwhelmed by the challenge ahead of it due to human resource incapacity.

2.7 Piracy:

The piracy of digital products is alarmingly common and piracy rates have begun to undermine the commercial foundations of some of the industries producing digital products, which have struggled to adapt to the digital age. Publishers of computer software and music claimed losses of over \$17.6 billion to piracy in 2002. (Ivan and Png, 2003). Global sales of recorded music fell by around 30% from 2004 to 2009 (IFPI 2010), a drop largely attributed to the impact of piracy. This is because consumers now have a broader variety of technologies that enable them to access and consume film and music

While many of these technologies have been utilized by firms to cater to the market, some have facilitated the illegal consumption of digital products, making

piracy almost as easy as legal access. The phenomenon of file sharing burst into the public consciousness in May of 1999, with the release of the software program Napster, which provided a simple to use interface with which consumers of music could share and download digital copies of songs (Blackburn 2004).

Although researchers have devoted considerable attention to illegal downloading over the Internet, the physical piracy of music is an equally compelling problem (Assenova 2007) Illegal sales of music on CDs and CD-Rs today account for a loss of over \$4.5 billion dollars annually according to a recent report released by the International Federation of the Phonographic Industry (IFPI), the leading world music trade researcher. China continues to make IFPI's list of the top ten pirate markets for music, with capacities for pirated CD production at about 19 times the legitimate domestic demand for CDs (Assenova 2007)

Recent evidence from Denmark indicates that more than three quarters of people between the ages of 18 and 29 have pirated films or music (Benner and Vuorela 2012). Previous studies seeking to explain and predict digital piracy have applied theories and models from social psychology (e.g., Taylor et al. 2009), criminology (e.g., Higgins 2007), and business ethics e.g., Peslak 2008), amongst others, converging around distinct research streams. But whatever the contributing factors may be, music piracy has been adopted by society, so much so that it has become a culture (Condry 2004).

The availability of songs on file sharing networks has two competing effects on sales that are likely to vary across artists. First, there is a direct substitution effect on sales as some consumers download rather than purchase music. Second, there is a penetration effect, which increases sales, as the spread of an artist's works helps to make the artist more well-known throughout the population. (Blackburn 2004)

Hui and Png (2003) term this second effect as “good piracy” which, according to Ivan and Png (2003) may raise legitimate demand for a musical product.

Easley, Michel & Devaraj (2003) present evidence supporting the notion that exposure to music piracy actually played a role in pushing record labels: to adopt internet technologies (those exposed to piracy were more likely to be early adopters of internet technology), to create richer and more fully-featured web sites, and to experiment with electronic forms of distribution that are either proprietary or in other ways nonthreatening (e.g., short clips of songs). Because of these deliberate efforts to either counter piracy, or take advantage of its existence, Assenova (2007) suggests that piracy has had no significant effect on developed markets. Studies by Oberholzer and Strumpf (2004) also found that the effect on record sales by piracy was 'indistinguishable from zero' (Oberholzer and Strumpf, 2004: 3) and using their most pessimistic estimates, they conclude that it would take 5000 downloads to displace one sale. Hui and Png (2003)

At the individual consumer level virtually all published studies provide evidence that consumers use of file sharing platforms stimulates more cd sales than it might displace Hui and Png further support this argument, stating that at the individual consumer level virtually all published studies provide evidence that consumers use of file sharing platforms stimulates more cd sales than it might displace (Hui and Png 2003). In response to the decreased album sales in the US, Lessig (2004: 70-71) suggests there are other possible causes for the drop in US sales besides piracy.

However, the same zero effect does not apply to developing countries (Assenova 2007). Where industries continue to struggle to counter the effects of piracy. In 2009, The United Nations Educational, Scientific and Cultural Organization

(UNESCO) valued the Kenyan music industry at Ksh 10billion. Unfortunately, piracy of music and motion picture recording in Kenya has become increasingly common (Orawa 2011), with piracy levels being recorded at an all time high of 90% in 2007 (WIPO, 2007) .It is estimated that rights holders in Kenya lose about 30 billion shillings (US\$ 420m) annually in counterfeit and piracy (Otike, 2005) implying that pirates are currently the largest beneficiaries of the local music industry. This is largely due to poor structural organization, a lack of government support and corruption, (loureiro 2011).

Heightened poverty levels also play a major role in encouraging negative piracy, as consumers may not afford to purchase original product. Some portion of these “pirates” may be willing to pay for legal downloads at a reasonable price. (Ivan and Png, 2003). As controversial as it may be, working hand in hand with pirates is a possible way forward in growing the Kenyan music industry. The Nigerian music industry is an example of an industry that is capitalizing on existing pirate networks as a distribution and marketing tool. In Kano, the economic center of northern Nigeria, media piracy is part of the “organizational architecture” of globalization (Sassen 2002), providing the infrastructure that allows media goods to circulate. As controversial as this may sound, this is the industry’s attempt to turn structural flaws into a structural or organizational tool that potentially adds economic value to industry.

According to a Nigerian Strategy Development Document (2010) record sales more than tripled between 2005-2010 averaging 10 million in 2005 and rising to an estimated 30 million in 2008 The industry is currently valued at over \$3 billion dollars despite it being plagued with numerous obstacles in the fields of distribution, copyright, publishing, piracy and compliance the law (Obidiedube 2012)..

Similar situations can be spotted on the Kenyan scene, where artists come into written distribution agreements with pirates, allowing them to publish their works at negotiated fees.

The same collaborative symbiosis can be spotted in Uganda and Tanzania, where artists come into agreements with music pirates and use them as distribution channels. The end result of this becomes a wider audience reach that potentially leads to an increase in revenue in the form of stage performances. The challenge in this is a lack of collaborative and consorted effort; hence the positive impact of this is felt on a very minimal segment of the industry.

2.8 Theoretical framework

This research was guided by two theories – the Theory of Disruptive Technology and The Game Theory.

2.8.1 Clayton Cristensen’s Theory of Disruptive Innovation.

This theory highlights the failure of companies or institutions to stay atop their industries when confronted by certain types of market and technological changes (Christensen et al, 2000). Indeed, organization may fail for a myriad of reasons including bureaucracy, arrogance, tired executive blood, poor planning, short-term investment horizons, as well as inadequate skills and resources (Christensen et al, 2000). The theory of disruption however holds these contributors to failure constant, and considers external contributors, specifically the evolution of technology.

The theory suggests that innovations that simplify the accessibility of a commodity to the masses are also responsible for reduced production and retail price of the same. This ultimately upsets an existing market balance, and companies or

organizations that do not have the technological knowhow to adapt to this stand a chance to fail. Researchers in this area have shown that incumbents are often toppled by entrants when disruptive innovations are introduced since these technologies are not initially demanded by the established firms' customers.

A number of books have been co-written by Christensen applying the disruptive innovation theory to many different issues e.g., healthcare and education (Standstrom 2010). Scholars have used this notion in fields such as psychotherapy (Simon and Ludman 2009), orthopedics (Hansen and Bozix, 2009) and political science (Mukunda 2010)

The theory has also had profound impact on management. Christensen (2006) describes how several large companies such as Kodak and Intel have used his model to develop and launch disruptive innovations successfully. New-market disruptive innovations prosper among customers that have not been addressed previously. The personal computer and the first portable transistor radios can serve as illustrative examples of new market disruptive innovations (Sandstrom 2010).

Govindarajan and Kopalle (2006) however sought to improve existing classifications, claiming that Christensen's original definition was too narrow since it only took cheaper, simpler and initially lower performance products into consideration. They instead proposed that a disruptive innovation can be defined as: "an innovation which introduces a different set of features, performance, and price attributes relative to the existing product, (Govindarajan and Kopalle, 2006).

In the case of the music industry and more specifically, the Kenyan situation, such markets include customers with limited financial ability to purchase entire music albums, and those who are unable to access their preferred music owing to inadequate distribution channels. As such, the disruption innovation, which in this particular

instance which is primarily digital music content outfits, allows the customer to access their song of choice at the touch of a button on their mobile phone. The option of purchasing preferred compositions off an album not only introduces the element of choice to the customer, but is also more pocket friendly as compared to the traditional set up where the customer had to purchase an entire album to listen to their favorite song. It also bridges the distribution gap, by bringing the commodity to the customer.

However, in as much as such digital outfits are solving the customer's dilemma, they have also created a new one in that the copyright holder suffers great loss of revenue, for various reasons. Firstly, creation of these digital platforms have provided an environment in which online music piracy thrives. Secondly, even in situations where copyright owners are compensated for online sales, content, telecom and internet providers end up sharing the larger portion of digital sale profits, much to the economic disadvantage of the musician.

The loopholes following the introduction of disruptive technology lies in the failure of the industry's infrastructure to accommodate the digital dimension, and bring the market into a state of equilibrium, where all stakeholders play fair and gain fairly. This failure is visible throughout the infrastructure, from the law, to policy, to operational structures within the various CMOs. The inability of the Kenyan copyright law to adapt to the entrants employing new technologies has proved to be a great disadvantage to Kenyan musicians. Music content providers as well as telecom companies have taken advantage of the ambiguity of the Kenyan copyright law, as well as the complacency of matters pertaining to intellectual property, much to the detriment of the Kenyan musicians. Similarly, the inability of Kenyan CMO's to collectively and effectively address this issue and adapt to the same has placed their members and major economic disadvantage.

The managerial recommendations related to disruptive innovation have also been improved over time. For example, the resource allocation process can be managed by creating a separate organization. Another way of managing it is to make use of strategic buckets, i.e. specifying which resources should be used for disruptive and sustaining initiatives (Chao and Kavadias, 2007; Hogan, 2005).

The applicability of the disruptive innovation theory is therefore clear, in that the music industry infrastructure has been unable to accommodate or keep up with the rate at which internet technology is evolving, and hence, causing a major economic upset in the music industry.

2.8.2 The Game Theory

A game is any decision problem where the outcome depends on the actions of more than one agent, as well as perhaps on other facts about the world. Game Theory is therefore the study of what rational agents do in such situations (Weathorson 2011). Turocy et al (2001) describe the theory as “the formal study of decision-making where several players must make choices that potentially affect the interests of the other players”

Game theory was pioneered by Princeton mathematicians Oskar Morgenstern (1902-77) and John von Neumann (1903-57) and is well documented in their 1944 book 'Theory of Games and Economic Behavior. A strategic game represents a situation where two or more participants are faced with choice of action, by which each may gain or lose, depending on what others choose to do or not to do. The final outcome of a game, therefore, is determined jointly by the strategies chosen by all participants. Two-person zero-sum games (where one's gain must mean the other's

loss) are used by military-strategists. Many-person (non-zero-sum games where it pays to cooperate).

The game theory is closely associated with the Decision Theory and may be used to study situations where management-psychology can play an important part in the overall success of an organization.

In the early years the emphasis was on games of pure conflict (zero-sum games). Other games were considered in a cooperative form. That is, the participants were supposed to choose and implement their actions jointly. Recent research has focused on games that are neither zero sum nor purely cooperative. In these games the players choose their actions separately, but their links to others involve elements of both competition and cooperation.

The direct applicability of the Game Theory to my study of the Kenyan music industry infrastructure lies in the fact that none of industry infrastructural components exist independently of each other. As such, strategic decisions employed within one component not only affects its individual output, but also affects the output or efficiency of the entire system.

The theory can be viewed as a science of strategy, as it attempts to determine the actions that “players” should take to secure the best outcomes for themselves in a wide array of “games.” But the games all share the common feature of interdependence. That is, the outcome for each participant depends on the choices (strategies) of all. In so-called zero-sum games the interests of the players conflict totally, so that one person’s gain always is another’s loss. More typical are games with the potential for either mutual gain (positive sum) or mutual harm (negative sum), as well as some conflict.

As a mathematical tool for the decision maker, the strength of game theory is the methodology it provides for structuring and analyzing problems of strategic choice. The process of formally modeling a situation as a game requires the decision maker to enumerate explicitly the players and their strategic options, and to consider their preferences and reactions. The discipline involved in constructing such a model already has the potential of providing the decision makers with a clearer and broader view of the situation. This is a “prescriptive” application of game theory, with the goal of improved strategic decision making (Turocy et al, 2001)

The relevance of the game theory in relation to my study of the Kenyan music industry infrastructure came in the fact that none of the structural components exist in isolation; the complex nature of music copyright products and the interdependent nature of its supporting infrastructure dictates the employment of cooperative game strategies amongst all players.

A central assumption in many variants of game theory is that the players are *rational*. (Turocy et al, 2001) A rational player is one who always chooses an action that gives the outcome he most prefers, given what he expects his opponents to do. (Turocy et al, 2001). Looking at the current infrastructural state, one can immediately see that this rational decision making has not only been difficult to achieve, but has ultimately contributed to the economic failure of the music industry. It is therefore empirical to ensure that implementation of strategy is cooperative in nature, and in line with the zero sum methodology for the overall economic gain of industry stakeholders.

2.9 Summary

Even with the visible evolution of copyright law as well as the participation in international IP related treaties, there is an eminent issue regarding the governments position on local music production and dissemination. (Kidula 2000). Adhenyo (2011) supports this opinion, stating that the National policy on culture and national heritage document wanting broadly in its implementation strategies and widely in its coherent definitions. Sihanya (2009) also finds the government's cavalier attitude to copyright, general ignorance about copyright, limited resources, and limited legal literacy on copyright a major impediment in the development of copyright industries. Copyright law is constantly evolving to meet the demands of the industry. However, that the spirit behind copyright law appears half hearted on a policy level, results in poor implementation of the same.

The development of a credible copyright infrastructure is critical for low-income countries like Kenya. The chaotic state of its music sector is a serious matter of concern, not only because it undermines the growth potential of this creative industry, driving-off national and international funding and investment, but also, and more importantly, because it has a very immediate and direct impact on local artists, who struggle to make a living in a particularly difficult economic environment. The United Nations Education Scientific and Cultural Organization, UNESO argue that the promotion of a 'creative economy' in developing countries as Kenya is a feasible development strategy and a better alternative to other economic models based on 'short term profitability' and 'technical rationality' (Kovacs 2008),

In a newsletter in June 2011, KEBOCO identifies the main challenges that the industry is currently facing, which are essentially the same as the World Intellectual Property Organization (WIPO) and local musicians and producers have been pointing

out over the years: lack or limited capital, copyright piracy, lack of appreciation or recognition by the policy makers and users, ignorance on copyright matters and lack of other relevant resources.

In a study on carried out by the Kenya Copyright Board (KECOBO) in 2011, it was reported that music piracy in Kenya was at a staggering 95%. This is because the enforcement and the understanding of the importance of Intellectual Property (IP) are lacking (Orowa 2011)

Piracy is seen by artists, producers and observers as one of the main impediments of growth of the Kenyan music industry, and all seem to point the finger to the government's lack of interest in issues related to music and the cultural sector in general. (loureiro 2011) Whether the government is to blame or not, the alarming rate of piracy is an indication of the existence of major loopholes in the entire machinery of the music industry.

Wallis (2001) sums up the main current trends in the music industry as follows; widespread diffusion of new digital technologies for recording and distribution, providing wider access to technology with satisfactory quality at an affordable price. The deregulation of existing analogue channels and the growth of the Internet and new digital channels as global means for conveying music to businesses and consumers; The removal of national boundaries in distribution (through satellite and Internet distribution), leading to globalization of media products; Increased opportunities for revenue flows from IPR-related intangible as opposed to tangible sources. At the same time, many observers have clearly exaggerated the demise of physical carriers such as the CD and the pre-recorded cassette and an increased integration of rights ownership and rights exploitation (production, distribution) amongst the global media conglomerates.

The existence of three Collective Management Organizations (CMO's) also presents itself as a challenge as the public and business owners do not see the reasoning behind paying for music use to different organizations. An important contribution to the growth of Kenyan music was the announcement in 2009 that Nairobi would host the MTV Africa Music Awards ceremony. Two years later, the capital of Kenya was chosen again to organize this event that has a massive international audience. While there's still work to be done and things to be changed, with political willingness, social awareness and a development strategy that understands the importance of supporting the country's cultural and creative economy, the Kenyan music industry will hopefully realize its potential

CHAPTER THREE: METHODOLOGY

3.0 Introduction

The researcher's task was two-fold; to understand and analyze the factors that hinder the effectiveness of the machinery that drives the Kenyan music industry, and secondly to provide informed suggestions as to how this machinery can be improved to maximize the industry's productivity.

The purpose of this chapter is to discuss in depth the research methodology used for the study of the Kenya music industry infrastructure, in relation to the objectives of the research.

3.1 Research Design

The researcher designed this study around qualitative methods of research. This is because the research cannot be expressed in quantities, and revolves around a phenomena relating to or involving a quality or kind (Kothari 2014, Hankok 2002) The researcher used qualitative method because the study's concern was to find the answers to questions which begin with open-ended questions, which yield qualitative data (Hancock, 2002) and generate words, not numbers as date for analysis (Cochran et al, 2002), as is the case the researchers scope of study. Following insight from Kothari (2014), the following qualitative research methods were used.

3.2 Analysis of Secondary Documents

The researcher found that the review of published literature relating to music as a commercial business crucial to her study. Such literature was key in various ways, including understanding the history of the Kenyan music industry and the challenges it has faced, as well as shedding light on the infrastructural and operational

layouts of other music industries, specifically those which have proven to be successful.

A literature review is an evaluative report of studies found in the literature related to your selected area (Biele et al, 2005) A literature review goes beyond the search for information and includes the identification and articulation of relationships between the literature and your field of research. (Biele et al, 2005) involves the systematic identification, location, and analysis of documents containing information related to the research problem. The term is also used to describe the written component of a research plan or report that discusses the reviewed documents. (Shi, 2006)

In line with Kothari (2014), the researcher built upon such previous works to investigate the uniqueness of the Kenyan situation, and hence generate solutions tailored for the Kenyan music industry.

3.2.1 Experience Survey

The researcher engaged people who had practical experience on the subject of study. This is in line with Kothari (2014) who defines experience survey as as the survey of people who have had practical experience with the problem to be studied (Kothari 2014). The object of such a survey is to obtain insight into the relationships between variables and new ideas relating to the research problem (Kothari 2014). The experience survey was extremely relevant to this research especially because not much had been documented and published in from a local perspective regards to the area of study. Secondly, the Kenyan music industry scene is not only at an infantile stage, but is currently in the need of the contribution of experienced critical thinkers

who can analyze it and suggest amendments that are tailor made for the Kenyan situation.

Participants of the Experience Survey were selected and prequalified based on the following guidelines; the experience within their various professions, their knowledge of the Kenyan music industry's current infrastructural layout as well as their ability to objectively analyze it. The knowledge of the workings of other existing infrastructural designs was also relevant, but participants were not disqualified for the lack of such information. This survey was conducted in two main ways, the Key Informant interviews, and the Focus Group Discussions.

3.2.3 Key Informant Interviews

The researcher interviewed personnel within the various Copyright organizations, that is, personnel within KECOBO, MCSK, PRISK and CAMP. These personnel included the General Managers, Chief Executive Officers, chiefs of strategy, marketing and public relations managers, IT specialists, as well as legal officers working within the organizations.

The interviews sought to gain deeper insight into the functioning of the various copyright structural components, the hurdles they have faced over the years, their current operational strategies as well as their future plans as regards the growth and development of the local music industry.

The researcher also interviewed policy makers involved in the enactment of Copyright. These included personnel working within the Attorney General's office, UNESCO and WIPO, as well as independent lawyers with experience in intellectual property law. These interviews sought to investigate the history of Kenyan copyright law, as well as the impact of the various amendments on the music industry.

Other stakeholders and contributors to the music industry value chain were also interviewed. These persons included music copyright holders, radio presenters and dj's. Such contributors were primarily prequalified based on the number of years they have been associated with the Kenyan music industry as well as the success that they have had in the same regard.

A point of additional value came in the fact that majority of the interviewees by default have been engaged in impacting change within the music industry infrastructure in one way or the other. This is because of the fact that the industry is currently at a turning point, and their experience and success has by default qualified them to sit at round table meetings with key decision makers at different levels. As such, majority of the interviewees not only had experience in terms of success, but also had hands on experience in enacting positive change within the music industry layout. Additionally, all of the office bearers interviewed came from a legal background, and had in depth knowledge of copyright law.

	Copyright Management representatives			
	KECOBO	MSCK	PRISK	KAMP
No. interviewed	1	2	1	1
	Musicians/copyright holders			
	Secular musicians	Gospel musicians	River road musicians	
No. interviewed	2	2	2	
	Media house representatives			
	Kiss 100	One Fm	Nation media group	Clouds FM (TZ)
No. Interviewed	1	1	1	1
	Music distributors			
	Legal (hard copy)	Illegal (pirates)	Digital content providers	
No. Interviewed	1	2	1	
	Total number of interviewees – 19			

Table 1 List of engaged interviewees

3.3 Focus Group Discussions (FGD’S)

When well executed, a focus group creates an accepting environment that puts participants at ease allowing them to thoughtfully answer questions in their own words and add meaning to their answers. (Elliot Et al, 2005) Surveys are good for collecting information about people’s attributes and attitudes in the event that deeper understanding of issues is required, then the Focus Group Discussion is well suited for this purpose (Elliot Et al, 2005).

Discussions amongst representatives of the various components of the music industry value chain were held with the aim of highlighting the strengths and weaknesses of the framework as well as determining workable solutions and ways forward. Four Such FGD’s were conducted, each of which comprised of different stakeholders. The objective of this was in line with insights from Elliot et al (2005) who indicate that one of the keys to holding a successful focus group discussion is to ensure that various views and opinions on the area of research are represented. It takes more than one focus group on any one topic to produce valid results – usually three or four (Elliot Et al, 2005). Eliot further states that one knows that enough groups have been conducted (with the same set of questions) when you’re not hearing anything new anymore, i.e. you’ve reached a point of saturation (Elliot Et al, 2005).

	No. of representatives per stakeholder category			
	FGD 1	FGD 2	FGD3	FGD 4
Legal advisors	1	-	2	1
Gospel artists	2	1	1	1
Secular artists	2	3	1	1
CMO reps	1	2	1	1
Digital Content Providers	1	-	2	2
Music distributors	-	2	3	1

Table 2 Focus group participants

3.4 Data collection procedure:

The researcher intensively and expansively reviewed concerning literature (3.2.1) while simultenuously laying the ground for her Experience Survey. The ground laying process included formulating applicable questionnaires for the various aspects of her qualitative research. She then made introductory phone calls and emails to the potential participants, which briefly described the nature of her research, and requested the participants' consent in assisting her on the same. Following their approval, she proceeded to book interview and focus group dates. Each aspect of her research was conducted with the guidance and advice of her supervisor.

3.5 Data Presentation and Analysis

Having conducted her Key informant interviews and Focus group discussions, the researcher coded and thematically classified her findings. These findings, coupled with the research on concerning literature, enabled the researcher to derive the key issues facing the Kenyan music industry as well as objectively deduce workable solutions tailor made for the Kenyan situation. These findings were thematically clustered and presented for easy perusal and understandability.

3.6 Limitations of the Study:

While conducting her study, the research encountered a number of notable limitations. Owing to the fact that majority of the participants are incredibly busy, scheduling dates especially for the focus group discussions presented itself as a challenge. On three occasions, the researcher had to reschedule such group discussions, owing to the unavailability of majority of the participants, despite having discussed and booked them on the particular dates. Similarly, the top CMO office

bearers were not easily accessible, and had extremely hectic schedules. On two occasions, the researcher had to postpone the scheduled interviews by over three weeks, owing to sudden job related travels and engagements. Their participation was however crucial to her study owing to the wealth of knowledge both on copyright law and the mechanics of the music industry. As such, she opted to reschedule such interviews, as compared to opting to engage replacement participants. The fact that the researcher is herself a major stakeholder in the Kenyan music industry was in itself a challenge. Having been a musician for the last 12 years, she indeed has strong opinions regarding the same. She was tasked with presenting every aspect of the research objectively and without bias, allowing participants to air their opinions freely, without presenting her own personal views. Indeed, this was not easy, but she was however successful in delivering an objective, well researched final document.

3.7 Conclusion:

This chapter has presented the methodology used for the study on the efficiency of the Kenyan music industry infrastructure. It has outlined the specific data collection and analysis methods and techniques employed. It has also highlighted the limitations of the challenges faced, as well as the manner in which such challenges were handled.

The research was successful and it is the researcher's hope that the research findings shall contribute positively towards establishing a more efficient music industry infrastructure.

CHAPTER FOUR: DATA PRESENTATION AND ANALYSIS

4.0 Introduction

The overall objective of the research was to investigate ways in which the infrastructural layout of the Kenyan music industry can be optimized in order to facilitate maximum economic output. The presentations in this chapter focus on the various infrastructural and legislative setbacks faced by the music industry. The findings are based on the qualitative research methods employed, together with the review of concerned literature

4.1 Poor Legislative Framework

On attaining independence in 1963, Kenya became bound by the Berne Convention through state succession (Sihanya 2008) and acceded to the Paris Act of Berne in 1993. Kenya is also a member state of the World Intellectual Property Organization (WIPO) as well as Trade Related Aspects of Intellectual Property Rights (TRIPS). WIPO particularly played a large role in the drafting of the 2000 bill, which was assented into law in 2001. One of the more significant amendments of this Act was the incorporation of Kenya Copyright Board, KECOBO, which is mandated to oversee all Collective Management Organizations as well as to co-ordinate the implementation of laws and international treaties and conventions to which Kenya is a party, amongst other roles. In 2012, the Act underwent further amendment to recognize the rights of music performers and producers to equitable remuneration. This gave power to Performers Rights Society of Kenya (PRISK) and Kenya Association of Music Producers KAMP to collect licensing fees on behalf of their members.

The Copyright system is not, and can probably never be perfect (Walis et al, 2001). There have been several progressive amendments made to the Copyright Act, also known as Copyright Act cap 130, but even so, there remains major gaps within the legal system in relation to the music industry, both in the law itself, and in the administration of the law, as highlighted below.

4.1.1 Inadequacies in the Copyright Act.

Whereas majority of the stakeholders are considered within the Copyright Act, there are some members of the industry that remain unconsidered. The rights of Authors, composers, publishers, performers and producers are recognized, but videographers or audio-visual producers have not been catered for (KII-10). There are countries, such as Ghana which have a dedicated CMO to consider the plight of videographers (KII-11) In as much as this discussion has not been had within the Kenyan setup, it is challenging at this point to consider incorporating a fourth CMO to handle the rights of these stakeholders, as the industry has reached the statutory limit of collecting bodies under section 26, 28 and 30 of the Copyright Act (FGD3, KII-10).

Additionally, definitions of some significant terms are vague and at times not relevant to the market in question. The term “Piracy” for instance is not defined under the Penal Code, but in its place the terms “infringement of rights” and “illegal reproduction” are used (KII-10). That said, “Piracy” is however deductible from the law. (KII-10) but the fact that it has not been defined in black and white leaves room for legal debate on what really amounts to piracy (KII-11).

Some of the laws copyright laws in the Kenyan constitution do not apply directly to the Kenyan music industry (FGD3). For instance, according to the

according law, the term “composer” is meant to refer to the person who creates a music score. The term “music score” implies the placement of a musical progression onto solfa notation. This form of composition is minimally relevant within the Kenyan context, as majority of composers do not employ the usage of notation while composing music (FGD 2). Kenyan musicians write music in two primary ways:

Firstly, with the guidance of a pre-recorded instrumental and secondly, by putting together lyrics which later guide a music producer to lay a suitable instrumental track (KII-17). As such, the relevance of the term “composer” as defined by the law is irrelevant, and is the source of many disputes between contributors of finished musical work. (KII-17). Fines for infringement of copyright are also very low, to the point that pirates can factor in such fines as operational costs (KII-10)

4.1.2 Inadequacies of the Copyright Act in the Internet era

The digital space has become a key revenue-generating avenue for the global music industry, with major record labels worldwide shifting their attention to such avenues (KII-12) This space however has brought with it major threats to the same industry, as online music piracy has become increasingly prevalent. A study by the Institute of Policy Innovation pegs the damage brought about by online piracy on the US economy at 12.5 billion us dollars in total output, over 400 million dollars in revenue, over 70,000 lost jobs and 2 billion US dollars in lost wages (Siwek 2007).

As such, efforts are continuously been made to curb this phenomenon. The Stop Online Piracy Act (SOPA) and Protect Intellectual Property Act (PIPA) are legal efforts by the US to combat online copyright infringement. The Acts are fully dedicated to the enforcement and protection of intellectual property from online piracy.

A report by the Communications Commission of Kenya (CCK) reported a total of 30.7 million telephone subscribers by the end of the 2012/2013 financial year (CCK Quarterly Sector Statistics Report, 2012-2013). Of these, 9.49 million were Internet subscribers up from 8.51 million recorded during the previous period. (CCK Quarterly Sector Statistics Report, 2012-2013). This increases the risk of online piracy within Kenya, especially because this kind of piracy has not been accorded sufficient attention by the relevant authorities. Different groups of stakeholders have written to KECOBO in this regard, without much success (KII-19) which poses a major threat to all stakeholders including copyright owners, communication and registered content providing companies.

Even so, the issue of online music piracy has not been catered for specifically within the constitution, and remains largely defined under infringement of copyright (KII5-17/05/14).

4.2 Poor execution and enforcement of the law by KECOBO

The Law in itself though not perfect, is one of the best in the World, and is sufficient to sustain a well functioning music industry (KII-11). According to Muriithi (2007) the issue does not lie within the law, but the execution of it.

Under the constitution, KECOBO is mandated to direct, co-ordinate and oversee the implementation of laws and international treaties and conventions to which Kenya is a party. Therefore failure to execute intellectual property law in its entirety can be, to large extent blamed on KECOBO (KII-18). In order to understand the failures of KECOBO, it is relevant to outline the Boards mandate, as outlined by the law.

4.2.1 KECOBO'S constitutional mandate.

The mandate of the Board is outlined in Section 5 of the Copyright Act as follows:

- (a) Direct, co-ordinate and oversee the implementation *of* laws and international treaties and conventions *to* which Kenya is a party and which relate *to* copyright and other rights recognized by this Act and ensure the observance thereof;
- (b) License and supervise the activities *of* collective management societies as provided for under this Act;
- (c) Devise promotion, introduction and training programs on copyright and related rights, to which end it may co-ordinate its work with national or international organizations concerned with the same subject matter;
- (d) Organize the legislation on copyright and related rights and propose other arrangements that will ensure its constant improvement and continuing effectiveness;
- (e) Enlighten and inform the public on matters relating to copyright and related rights;
- (f) Maintain an effective data bank on authors and their works; and
- (g) Administer all matters of copyright and related rights in Kenya as provided for under this Act and to deal with ancillary matters connected with its functions under this Act.

Section 46 of the Copyright Act, 2001 gives the Board the exclusive mandate to register Collecting Societies.

4.2.2 KECOBO's limitations

Although KECOBO has managed to achieve a considerable number of positive developmental milestones since its inception, there are a number of challenges and limitations that have impeded its activities.

4.2.3 Insufficient staffing

The Board is a not a profitable organization, hence its funding is ideally supposed to come from the government, as well as prosecution of copyright related cases, where they receive a percentage of copyright related court fines (KII-4). As a result, they are unable to employ a sufficient workforce. Currently, there are only 8 copyright inspectors at KECOBO, expected to handle enforcement of intellectual property rights throughout the country, which are not exclusively music industry related.

According to the Copyright Act, the duties of copyright inspectors include receiving and investigation of copyright infringement, arresting and charging infringers, giving reports of copyright infringement to the Commissioner of Police and the Executive Director of Kenya Copyright Board, collecting intelligence on copyright infringement, education of the public /police on copyright and related, coordination with police stations/formations on matters of copyright Infringement of copyright occurs where a third party does any of the acts that are exclusively reserved for the rights holder without their authority, (Kenya Copyright Act section 41 and 42).

Eight officers, however qualified, cannot adequately and efficiently handle all copyright matters across the country (KII-17). They are unfortunately overwhelmed to the point of being unable to specifically handle matters pertaining to CMOs (KII-11).

4.2.4 Lack of judicial support

The Judicial system does not have enough magistrates who are well acquainted with copyright law (KII-1). Majority of the judges do not understand the gravity of copyright infringement and as such do not administer adequate fines to persons or companies who break copyright related laws (KII-13). Fines administered

to perpetrators range between 20,000-50,000 (KII-13). Because the monthly income potential generated from piracy runs into the millions, majority of the companies involved in piracy are in a financial position to factor in piracy related fines into their operational costs (KII-13).

However, it can be argued that it is the responsibility of the prosecuting party to educate the sitting judges on matters pertaining to copyright, and ensuring that they fully appreciate such issues on the table (KII5-17). This is because the law is very broad, and it is impractical to expect judges to thoroughly know all aspects of the law. (KII-17).

4.3 Non-compliance with the law

The success of a CMO relies heavily on compliance with existing laws and regulations by music consumers (Lowe 2012). The issue of lack of compliance is not unique to Kenya. Since they often function as de facto monopolies, CMOs have received an increasing level of scrutiny from official bodies such as international and national regulators, as well as end users of the music commodity (Wallis et al 2001).

Users have frequently complained that the societies have used their monopoly status to extract rates that are unfairly high. This has caused a lot of friction between CMOs and users in the recent past. A CMOs function is to act as an ostensibly independent intermediary between rights holders and users exploiters of music (Wallis et al 2001).

The lack of compliance with the systems in place in part because of the novelty of the enforcement of licensing regulations, as well as a poor understanding of the same. As such, there have been extensive workshops and initiatives to educate such users on licensing structures and need to comply with the licensing regulations.

But even so, co-operation has not been without hesitation (KII-13).

The issue of compliance however is one that cuts across the board, with musicians also failing to do their due diligence as far as the law is concerned (KII-18). For instance, there exists a legal requirement for all physical CDs to bear an authenticity proving device, or hologram. This is an affordable device that ideally enables all buyers and law enforcers to identify what is original and what is not, in which case attention would then be shifted to public awareness on purchase of unoriginal CDs. However a negligible number of music copyright owners have complied with this requirement, yet are very quick to cry foul when their music is pirated (KII-4)

4.4 Foul play by telecom companies and digital content providers

Technological and communications developments have indeed changed and amplified the musical environment and its scope not only nationally, but on a worldwide scale (Orawa 2011). Digital music can be downloaded in two main formats; Ring back tones and ringtones. A ring back tone is designed to provide entertainment while making an outgoing phone call while a ring tone is content designed to alert a subscriber on incoming calls.

The culture of downloading ring tones and ringback tones has become globally popular, with many content providers and telecommunication companies earning substantial amounts from the trade of digital music. The constant growth of mobile phone technology coupled with the drop in the retailing costs of mobile phones have facilitated this new phenomenon. In 2004, The Economist valued the annual sales of mobile ringtones at \$3.5 billion, in the US alone. This shows that the revenue earned by portals providing such services is indeed very significant.

However, in the absence of proper structure, the biggest loser winds up being the most critical component of this kind of business – the musician.

Skiza, is a platform on the Safaricom portal used to download digital content by Safaricom service subscribers. With over 6 million subscribers, Skiza is the largest such platform in Kenya (KII-11). Being that digital content provision is not Safaricom's core business, Skiza subcontracts companies to provide digital and downloadable content, which they then avail to their subscribers.

In the absence of fair play and proper structural organization, the financial trickle down to the Kenyan musician has been meager, to say the least. In as much as there are other similar portals provided by competing telecommunication providers, the researcher chose to focus on Safaricom's Skiza Tunes, because it is the largest and most popular local digital content platform in Kenya, and as such remedial measures to improving its infrastructure will set a precedence for others to follow, for the benefit of the music industry in its entirety.

4.4.1 How Skiza Tunes works

As mentioned earlier, Skiza Tunes is the largest platform for digital music provision in Kenya. Skiza Tunes exists as a value add to Safaricom customers, as Safaricom's core business is telephony. Skiza Tunes subcontracts Content Providers (CPs) or aggregators to provide content for the portal. These companies include Bernsoft Interactive Limited Interactive Media Services, Liberty Afrika, MTech Communications and Cellulant. The content uploaded onto the portal is the responsibility of the aggregator/hosted company, which must ensure that it receives all licenses and clearances, including clearance from the CCK and the copyright owners or representatives to use music on the digital realm. The CPs are therefore

responsible for sourcing, formatting and uploading digital content, which includes music, screen-savers, short video clips.

Ideally, and as stated above, the CPs are supposed to seek permission for copyright usage, as well as handle payment of royalties either to the copyright owners, or to the bodies representing them. This arises as the first critical point of foul play, as many CPs sell copyrighted works without the owners' knowledge. In 2011, MCSK filed a case against Cellulant for copyright infringement, as they did not have signed contracts with some of the musicians or record labels whose music they provided as downloadable content. The case was won by MCSK, resulting in hefty payments by the defendant to the aggrieved parties represented by MCSK. Even so, many CPs continue to illegally provide content to Skiza subscribers, and other similar portals.

4.4.2 Skiza Tunes payment structure

The second point of foul play within the digital content platform comes in the revenue share between artists, content providers and telecommunications companies. To download a song on Skiza Tunes, one has to pay a weekly subscription of 5ksh, which automatically rolls over to the following week if one does not terminate usage of the tone. This ultimately implies that one will pay ksh20 per month to use one ringback tone. Consumption habits of subscribers indicate that one is likely to download anywhere between 1-5 such tones (KII-7). Bearing in mind the over 6 million Skiza Tunes subscribers, portal has the potential of generating approximately 600,000,000,000 ksh on a monthly basis.

Of the revenue earned by the Skiza platform, 26% goes to taxation; (10% excise duty, 16% VAT). Assuming a monthly income of 100,000,000 that would

imply 74,000,000 would be the sharable amount after taxation. Of this figure, Safaricom retains a whopping 85%, leaving 15%, (or 11.1 million) to be shared by musicians and content providers. Content providers then enter individual agreements with copyright owners or their representatives. Such agreements are unfortunately never in favor of the musician, who in only very rare occasions is accorded a 50/50 revenue share.

Here is another way of looking at the payment structure. Of the monthly retainer fee of 20 the shillings, 74% is considered income (after taxation), which comes to 14.8ksh. Of this, safaricom retains 85%, or 12.58ksh, bringing the revenue shared by the CP and artist to ksh 2.22 only. Assuming a 50/50 revenue share, that will mean that 1.1ksh will be shared amongst all the rights holders of the ringback tone in question, that is, author, composer, performer, publisher and producer. Assuming an equal revenue share amongst all rights holders, it would imply that each would take home a meager 0.22 ksh (22 cents) for each ringback tone, a highly unfair take-home, given that such rights holders are at the core of this particular revenue generating avenue.

The figure below is a graphical representation of the revenue share of digital content within the Skiza Tunes set up.

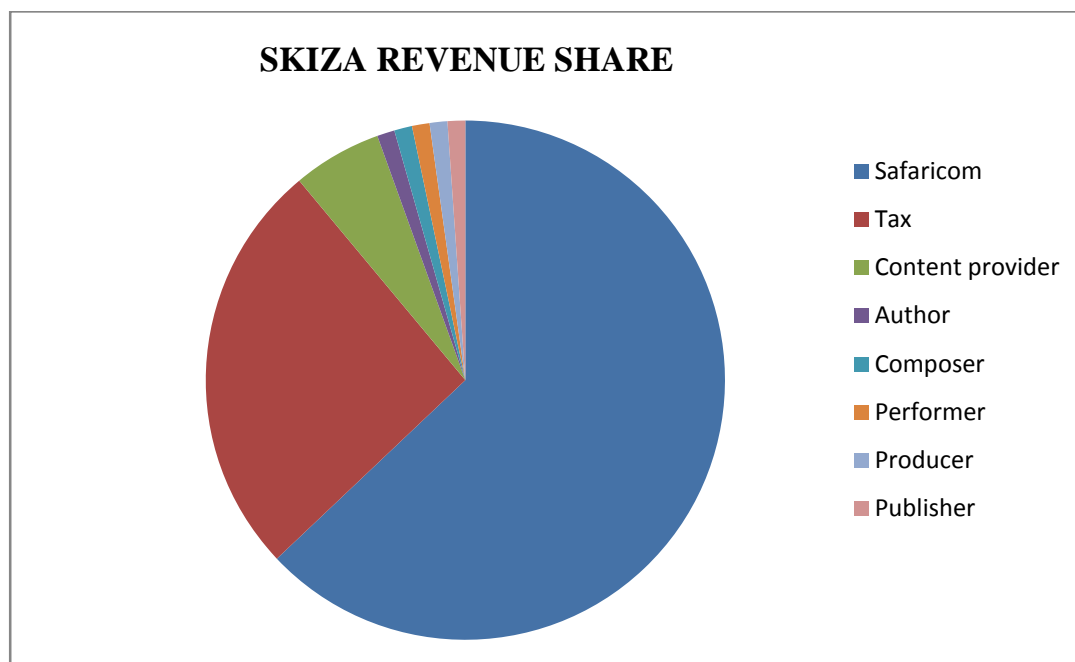


Figure 1: Revenue distribution chart

The figure assumes the following: 50/50 revenue share between Content providers and Copyright holders; equal revenue share amongst all copyright holders

Stakeholder	Percentage	Amount per download (ksh)
Government taxes	26%	5.2 ksh
Safaricom	62.9%	12.58ksh
Content provider	5.55%	1.11
Author	1.1%	0.22
Composer	1.1%	0.22
Performer	1.1%	0.22
Producer	1.1%	0.22
Publisher	1.1%	0.22

Table 3: Reflection of revenue share per download (ksh 20)

This is an obvious display of mal practice, where the portal has taken advantage of its popularity amongst the Kenyan masses (KII-9). Additionally, owing to the fact that this is not a core business of Safaricom (KII-19), and in fact, not one of

their major revenue earners (KII-13), Safaricom have previously approached this issue with a nonchalant attitude, even in the existence of IP laws that do not advocate for this kind of unfair revenue share. (KII-11).

4.4.3 Ringtones

Whereas the digital format of ring back tones calls for central storage on portals such as Skiza Tunes, ring tones are decentralized, directing subscribers to the various sites of the numerous content providers. As such, content providers that trade in ring tones use telecommunication companies merely as one of the tools through which they can access potential customers. Such companies have well structured online sites where ringtones can also be accessed using any other internet survey gadget such as computers, ipads, smart TVs etc. Just like in the case of ring back tones, revenue share between copyright owners and content providers varies from one content provider to another. The same is true about the retailing cost of the ring tone.

The act of downloading a song automatically subscribes one to the content provider's site. Such subscription allows the content provider to broadcast new music to the subscriber in the form of an SMS, and at an additional fee. The regularity or intervals of such broadcasts and the set fees for the same are at the discretion of the content provider. Sakata Media, a well-known Kenyan content provider, offers subscription at 30shillings. Sakata Media broadcasts music content to their subscribers three times a week, at the rate of 20ksh per broadcast (KII-19) This broadcast fee is regardless of whether the subscriber opts to download the broadcast music or not. Sakata media remits 60% of its income to Safaricom, and the remaining 40% is shared between themselves, the system provider and the artist. At the end of the day, the copyright owner within the Sakata framework is entitled to 1shilling per

download. So in the event that 10,000 people download one particular song at 20 shillings, Sakata media will generate 200,000 shillings from this one particular song, who is then consequently entitled to a meager 10,000 shillings. Similar revenue arrangements exist between content providers and copyright holders and more often than not, the revenue entitlement to the copyright holder is far from attractive. Owing to the flexibility of such arrangements there are instances where a content provider will opt to pay an artist a lump sum of money in exchange of the rights to sell their content. These rare instances occur when an artist and/or his content is highly popular. The artist or his representative can bargain figures ranging from a couple of hundreds of thousands into the millions, depending on his popularity, and the revenue potential of his music. Such instances are however few and far between. Arguably, content providers spend a pretty penny on media advertising, system providers and telecommunication companies so as to provide this service. Even so, there is a very apparent revenue share imbalance that needs to be addressed and resolved for the sustainability of the Kenyan music industry.

4.5 Lack of goodwill from media houses & the hotel industry

In 2010, MCSK embarked on a licensing operation targeted at the PSV industry. This nationwide operation was implemented under the supervision of the incumbent C.E.O, Mr Maurice Okoth. Initially, the exercise was taxing and did not bear much fruit (KII-5). However, with consistency and persistence, the PSV community is now almost 100% compliant with the current licensing MCSK requirements (KII-5).

The same success cannot be seen with other major consumers of music, such as the Media and Hotel industries. The battle of coming to licensing terms is however

not uncommon. It took the Music Copyright Service of China (MCSC) over ten years to come into agreement with certain broadcasters on licensing terms (Lowe 2012).

The Kenyan law is clear regarding payment of licensing fees by broadcast companies, but there is still hesitation in complying with the same (KII-5). This translates to unsatisfactory collections in licensing fees, which results in poor distributions to members. Despite a song being played on high rotation in Kenya, the copyright owner will not enjoy the financial fruit fall of his work as much as his counterpart in Nigeria will (KII-2).

This is largely because media houses in Nigeria accord the musicians the goodwill to pay licensing fees a lot more than those in Kenya (KII-2). The issue of lack of goodwill is also rooted in the recent history where musicians were satisfied with having an opportunity to have their music broadcast to the public (KII-7). In some instances, music owners had to offer bribes to have their music played (KII-7). Because of a lack of compliancy, or impunity for that matter, while the Kenyan radio and television industry earns more than \$170 million a year, very little trickles down to MCSK (Poynder 2004) and the musicians they represent, who should in fact be viewed as partners or stakeholders of sorts in radio or TV stations (KII-7). This is because, stations, especially radio stations rely heavily on music content for their sustenance. However, media owners do not view the issue as one of lack of compliance, but one of corruption and lack of transparency on the part of the CMOs, which come across as a government racket, as there is little evidence of rights holders receiving sufficient remuneration, if any. (KII-3).

The hotel industry is a major user of music as well. Restaurants, pubs, clubs and hotels all employ the use of music in one way or another within their businesses.

In 2011, PERAK, (Pubs, Entertainment, Restaurants Association of Kenya) was approached and educated about the need to pay for the use of music content. Over and above that they were offered major discounts and incentives to pay such license fees. These included: 10% discount to the association, 10% discount on individual users, and a 10% contribution of collected funds to the PERAK SACCO. Even so, out of the 260,000,000 collected by MCSK that particular year, only 1,000,000 came from PERAK and its members, a clear show of lack of goodwill and compliance with the law (KII-5)

4:6 Lack of Sufficient government support

The economics of copyright can be summarized as a particular case of private provision of a public good (Demsetz 1970). Today, creative industries are among the most dynamic sectors in world trade (UNCTAD/DITC/2008/2) and by description, the copyright industries fall under this section of the economy.

In the absence of accurate data the World Bank reported the value of the Kenyan music industry at 5.4 billion in CD sales alone, without discussing digital downloads, revenue earned from broadcasting stations, as well as other revenue streams (World Bank Report, 2011). The copyright industries contribute 5.3% of the GDP of the country in 2007 (KII-4). But even in light of this, there has been minimal government initiative to improve and invest in the economic development of this industry (KII-16). Perhaps the lightness with which the industry's economic viability is carried by the governing forces has been inherited from previous regimes, which focused primarily on the cultural aspect of Kenyan music with the aim of improving national cohesion (KII-1)). In developing countries, the music industry has long been valued for its contribution to cultural identity (Nettl, 1997; Robinson et. al., 1991) and

the adoption of an economic angle by the government has not been easy.

Additionally, the government decision to make music a non-examinable subject in the Kenya Certificate of Primary Education (KCPE) has produced a rippling effect that has affected all levels of the education system in our country, and contributed to the deterioration of standards of music products (Draft National Music Industry Policy 2012).

The lack of Kenyan government enthusiasm as regards the economic viability of the music industry is ironically in sharp contrast with some African countries such as South Africa. A research carried out by the South African government under its cultural arm, Cultural Industries Growth Strategy (CIGS) in 2005 cited the South African industry as the “economic miracle industry of South Africa

In Jamaica, a third world country, just like Kenya, there is increasing recognition of the economic potential of the music industry and the entertainment sector as a whole on the part of the government (Nurse, 2001). It can be argued that the government’s apparent disinterest in the past is also triggered by the lack of organization and unity within the sector (KII-8). It can further be argued that this apparent lack of support by the government is also as a result of prioritization due to limited resources. The government therefore invests more effort into development of other industries such as agriculture & tourism (KII-19).

4.7 Lack of a music industry Union.

Associations and unions show a great range in capacity, from government lobbying to assisting members develop new products, processes, skills, and technology (McCormick, 2000). In Kenya, the power of industry associations and unions such as Kenya National Union of Teachers (KNUT) and Kenya Medical

Practitioners, Pharmacist and Dentist Union (KMPDU) have helped a great deal in lobbying for the rights of their members with much success.

One of the largest challenges that the industry has faced in that past has been the absence of an organized artist association, to voice the plight of Kenya musicians (FGD 4). Attempts have previously been made by factions of the industry especially CMOs to engage major contributors and stakeholders in discussions regarding the financial welfare of Kenyan artists, with little success (KII-11). This is partly because musicians do not appear to back such efforts by these entities, which attempt to negotiate better terms with the government, telecommunication companies, and media houses (KII2)

The Recording Industry Association of Kenya (RIAK) is an organization of copyright owners in the entertainment industry engaged in the distribution business. It was formed in the year 2010 for the purpose of protecting its members from exploitation, professionalizing the industry, designing a code of conduct for the industry and bringing together all stakeholders to speak in one voice. However, RIAK membership is limited to copyright owners engaged in distribution, and does not fully represent the industry as a whole.

The Music Association of Kenya (MIAKE) was registered by the government on January 17th 2014 to foster, promote and serve the best interests of Kenya's music industry. Its Board of Governors and committee members comprise of leading musicians and producers, who have in-depth knowledge of matters relating to music copyright. Previous attempts to register an artist-driven association have been made to no avail, owing to fundamental differences amongst Kenyan musicians (KII-1).

MIAKE, being less than one year old, is faced with a multitude of challenges. Poor communication or interpretation of MIAKE's agenda has hindered support from

MCSK board members (KII-11). Additionally, factions of artists who have not fully understood MIAKE's objectives have slowed down the membership process, sighting corruption and poor industrial representation (KII-9). Parties or companies that stand to lose revenue by the successful engagement of this organization also attempt to discredit the association, with the hope of slowing down, if not completely halting its growth (FGD 4). The association also faces financial challenges, with majority of its current funding coming from the intermediary board members, (FGD 1)

4.8 Challenges faced by Collective Management Organizations (CMOs)

The concept of paying for music consumption in Kenya is relatively new. (KII-1) Indeed, MCSK has been in existence since 1983, but it was not until 2010 that it began to exert its force and become visible to the public in its capacity as a licensing and collecting body. Being that media and other public consumers of the music commodity were not accustomed to paying for broadcasting the music to their audience, the presence of MCSK, and indeed PRISK and KAMP was met with a lot of hostility (KII-12). The logic employed by potential licensees was that when one merely tunes into a radio broadcast at home, common sense supports the belief that licenses are unnecessary (Luh 1996). The problem is further compounded when such potential licensees are required to pay three licenses to the three CMOs as media owners find it taxing and unnecessary, especially when the commodity being licensed is generalized as "music" by the consumer by no fault of their own. Further, there is no guarantee that monies paid will be delivered to the rights holders (KII-3).

In addition to these external challenges, Kenyan CMOs have severally come under public scrutiny, owing to allegations of corruption, misappropriation of funds and poor internal organization (FGD 2). Indeed, Copyright holders too have addressed

such allegations on public platforms against the CMOs, especially MCSK, stating that these bodies have not properly representing their members' best interests. Below is a critical review of the flaws within the CMOs operational layout as was indicated by participants of this research.

4.8.1 Poor strategy and organization

CMOs play a fundamental role in the copyright system (Patel, 2012). And poor strategic planning can lead to major industrial losses. In order for intermediaries such as CMOs to operate efficiently, they must have correct, up-to-date and efficient data bases covering authors and works, an efficient transaction processing systems, efficient, comprehensive negotiation and collection routines in their own geographic area of operations, efficient local distribution routines as well as fair and functioning reciprocal agreements with sister societies in other countries (Wallis, 2001). Following Dr. Wallis' definition of an efficient CMO, operational structural and strategic flaws are immediately identifiable on multiple levels of Kenyan CMOs.

The initial licensing strategy employed by MCSK was to engage the private business users that utilized music in their day-to-day activities (KII-11). These included players in the transport sector (public service vehicle owners), the hotel industry (bars, restaurants, resorts etc), and other similar businesses in which the broadcasting or rebroadcasting of music played a key role. MCSK endeavored to engage such businesses nationwide, a process that required a high capital and human resource investment (KII11-22/06/14).

There were many loopholes in this approach. Firstly, the fact that field officers in charge of licensing dealt directly with physical cash gave leeway for corruption (FGD 2). Secondly, the strategy required a heavy investment in physical assets on the

part of MCSK, which implied that a larger percentage of collected revenue was being re-invested into the organization, than was being distributed to members. (KII-11). To their operational costs, MCSK has to include an extra 16 million a year to hire police for their collection activities (KII-11). Because of the high investment in labor and human assets, MCSK initially distributed 30% of annual collections to members, while 70% of this revenue was absorbed into operational costs. This distribution did not agree well with members, especially those whose music was on high rotation and expecting better pay (FGD1).

KECOBO too raised concerns regarding the funds distribution, to the extent of recalling MCSK's operational license in 2012. The distribution of funds has improved over the last five years, with the organization distributing 45% and absorbing 55% of the 300,000,000 ksh collected in 2013.

Admittedly, the CEO of MCSK, Mr. Maurice Okoth states that it would have been a less expensive venture if MCSK first approached larger stakeholders such as media houses, telecommunications companies and supermarket chains for license fee collection, as this would require minimal effort, with a lot more output in terms of revenue collected. The only issue with this approach would have been that at the time that MCSK began actively collecting, the organization had only 600 members in 2007 (KII-11). As such it would have been difficult to convince these potentially high payers that they indeed were collecting on behalf of the Kenyan musicians. Today, the MCSK membership stands at 8,000.

The communication and distribution systems at MCSK though functional, are not efficient. Currently members are informed via text message of royalty payments deposited in their respective accounts. One of the existing issues is that currently

royalty payments breakdown statements are not concurrently available to the rights holders, leaving room for suspicions on book-fixing (FGD1)

Currently, MCSK employs the use of a computerized system known as World Intellectual Property Copyright System (WIPOCOS). This is a multi-purpose, multi-user client-server application developed by WIPO for collective management organizations or societies that enables them to perform, with full accountability, the main operations involved in collective management of copyright and related rights. WIPOCOS was designed to help stakeholders in developing countries to overcome the expense and complexity of IT systems (KII-2). The current shortfall in this is that meta data entry is imputed manually, which leaves room for error. Additionally, rights holders' statements are entered and emailed manually, a system that is not only taxing, but also leaves room for further error (FGD1).

4.8.2 Allegations of misappropriation of funds

The history of Kenyan CMOs is riddled with allegations of misappropriation of funds throughout their organizational strata. Starting from the very bottom, field officers have been alleged to engage in corrupt deals with potential licensees, (KII-7). There have also been allegations of ground officers from different CMOs engaging in unhealthy competition. For example, some officers from MCSK have in the past been known to dissuade business owners from paying KAMP/PRISK licenses (FGD3).

The high running costs incurred by MCSK has led to major corruption allegations, and the subsequent withdrawal of their collection license, following an outcry from members and other stake holders (KII-4).

There have been allegations of Board members at MCSK offering bribes to members so as to keep them in office come election season. Majority of the members

will settle for a “token of appreciation” owing to their prevailing financial constraints (FGD 3). This leads to the perpetuation of poor leadership, which in turn contributes towards the current unenviable status quo of the music industry.

Because of these allegations, there is a sizeable percentage of artists who have opted not to join any CMO, as they feel that these bodies are unable to handle their mandate efficiently (FGD3) and are more interested in pursuing their individual and personal agendas (KII-13)

4.8.3 Musicians’ lack of knowledge of their rights

Despite the numerous on-the-ground awareness activations carried out by MCSK and KECOBO, it arose in this research that majority of musicians are still not fully aware of how to strategize their individual businesses, what they are entitled to and how to overcome the hurdles that they face. Many artists still feel that the primary issue facing the Kenyan music industry is piracy of hard copy albums (KII-1) and lack of sufficient airplay of Kenyan music (KII-10). As much as these may be challenges faced by the industry, they do not compare in magnitude to the flaws within the field of digital music content (KII-5). Today, the global music industry is turning its attention to the Internet and the opportunities it offers (KII-4). Many Kenyan artists are still placing their primary emphasis on traditional forms of earnings such as sales of physical CDs and stage performances (KII-4).

Many musicians undervalue the role played by CMOs, and how their successful running can ultimately impact their revenue earnings. As such, there is a percentage of artists who choose not to associate with these bodies, and majority of those who do join, are not fully aware of their entitlements, up to and including their right to elect and dismiss board members depending on their ability to deliver (FGD4)

There is a general lack of enthusiasm amongst industry stakeholders when it comes to knowledge acquisition on the music business (FGD 2). This results in poor attendance to workshops facilitated by CMOs and KECOBO, unless there is a promise of monetary remuneration at the end of the session (FGD 2).

However, it is possible that this lack of enthusiasm could be as a result of poor strategy to impart knowledge to industry players (KII-9).

4.8.4 Poor inter-organizational coordination

There exists a strong disconnect within the entire CMO layout. PRISK and KAMP have forged a collaborative effort to collect equity on behalf of their members. The MCSK board has however been adamant about being part of this alliance, following previous operational misunderstandings and mistrust, much to the detriment of the rights holders (KII-7). KAMP and PRISK are however willing to enter into an agreement with MCSK. However, their remuneration expectations are high, with the two organizations demanding immediate access to the value of their members' equitable rights as opposed to a gradual access of the same as proposed by MCSK (KII-5).

In addition to this, the MCSK board members are not sufficiently knowledgeable about matters pertaining to copyright, or how to maximize earnings for themselves and their members from royalty payments (KII-5). As pointed out earlier in this chapter, their coming into power is largely through corrupt means, and is not based on their ability to deliver. The inability of the three CMOs to come to a workable consensus has stagnated economic growth of the music industry as a whole (FGD 1)

Despite the numerous internal and external challenges that CMOs face, they have indeed exhibited a level of growth in the collection and disbursement of royalties. The Scientific Collection has had a good level of success. Based on airplay, there are MCSK members who have received royalty payments that range into the millions. In as much as the allegations of corruption and foul play continue to plague MCSK, the constant increase of collected revenue and monies disbursed to members displays significant growth. Below is a table that indicates the income collected by MCSK between June 2008 and June 2014

	June - 08	June -09	June-10	June -11	June -12	June -13	June -14
Inco me	42,720,1 21	118,125,7 64	185,551,5 21	216,970,9 83	261,422,3 78	273,650,9 30	330,823,9 80
Surpl us	8,214,53 1	25,409,59 4	47,911,69 1	64,496,66 0	107,238,8 97	98,483,50 3	141,486,0 53

Table 4: Income and surplus of MCSK from June 1008-June 2014

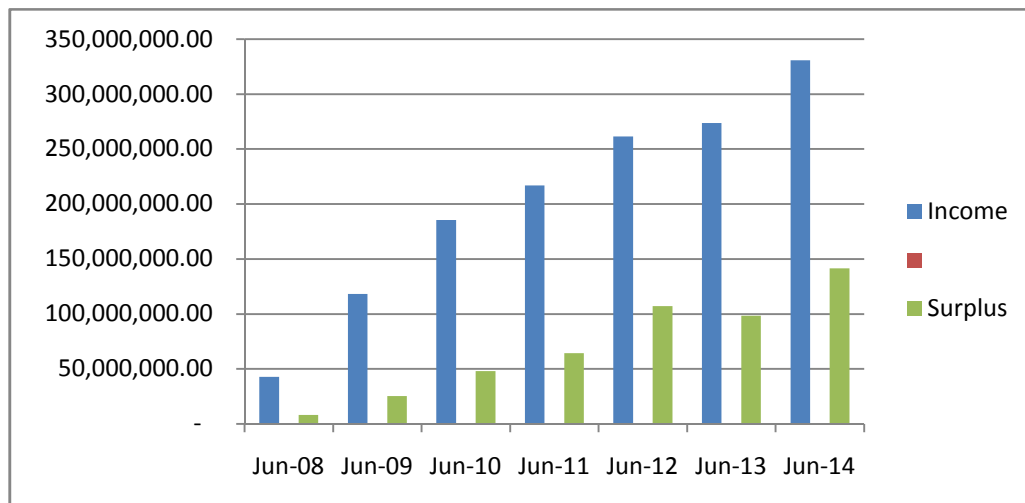


Figure 2: Graphical representation of MCSK Income and Surplus between June 2008-June 2014

4.9 Chapter summary

The data collected in this study clearly shows that the Kenyan music industry has indeed exhibited growth within the last decade or so. There has been increased audience appreciation of Kenyan music, with more and more artists being able to earn a decent living off their art. Digital platforms have also opened new revenue earning avenues for copyright holders. However due to inadequate copyright education, lack of compliance with the law and insufficient government support poor organizational structures, a sizeable amount of revenue that remains in the pockets of a few stakeholders. From the findings of this study, it emerged that the economic potential borne within the digital world is explosive. However, there exists a great imbalance when it comes to revenue share of digital content owing to impunity, poor legislative implementation as well as lack of a united front to negotiate on behalf of the entire music industry. Telecommunication companies, media houses, hotels, restaurants and other end users have found an opportunity, either to abscond from due diligence, or take advantage of the current state of disarray.

The role of MIAKE is central to the development of the industry. Despite the fact that it is the youngest core element of the music industry, MIAKE is faced with the immense task of ensuring that the various, infrastructural elements are functioning efficiently. However, MIAKE has still not been fully accepted as part of the infrastructure. Some industry players too have received the association negatively, while others are indifferent.

Although MIAKE is faced with a huge task is key, ultimately, all individual elements and players are equally responsible for the overall success or failure of the Kenyan music industry.

The hand of the government is eminent in countries exhibiting music industry growth and stability. The government support comes in on almost every aspect of growth, but particularly on the implementation and endorsement on development policies. In the absence of government support, efforts to grow the industry will remain futile.

CHAPTER FIVE: FINDINGS AND RECOMMENDATIONS

5.1 Introduction

Third world countries, Kenya included, are a basin of creativity, which has influenced international commercial activities for decades (Wallis et al, 2001). With new communication technologies, both physical and virtual, allowing for cultures and cultural expressions to interact (Wallis & Malm 1984), it is likely that this creative and commercial potential will grow even stronger (Walis et al 2001).

WIPO estimated the value of the Kenyan music industry at 10 Billion Kenya Shillings, as of 2010. Unfortunately, due to inefficiencies within the music industry structure, the growing economic value of the Kenyan music industry largely remains virtual. The implementation of the well thought out strategies will result in increasing the efficiency of the music industry infrastructure, which ultimately translates into better compensations for music industry stakeholders.

Based on my extensive qualitative research, the following are suggestions drawn from experts within the Kenyan music industry on ways in which the infrastructure of the same can be improved. These suggestions do however put into great consideration insights from concerning literature review, from industries whose infrastructure is worth emulating.

5.2 Improving the efficiency of individual CMOs

In any music industry, the Collective Management Organizations form a critical part of the entire music industry infrastructure. Additionally, the nature of music as a copyrightable product also implies that such CMO's must exist harmoniously within one the same space, and work collaboratively towards win-win

objectives, following the rules of Non-Zero games (See Chapter two). Chapter four brings out CMO flaws that have ultimately contributed greatly towards the current state of music industry affairs. The following are remedial measures of such flaws, as suggested by participants of this research.

5.2.1 Unison amongst Kenyan CMOs

Chapter four identifies lack of unity, mistrust, and unhealthy competition amongst CMOs as major reasons as to why the three Kenyan CMOs have failed to form a successful working relationship. Looking at the issues raised in this regard (see chapter four) it is extremely crucial for MCSK, PRISK and KAMP to work in concert to improve efficiency and increase royalty payments to members. (KII-5).

The ideal situation would in fact be to have the three CMOs unite under one umbrella body or united front in conducting their business. The importance of such an alliance would have multiple positive repercussions. Firstly, it would ease licensing logistics especially if users were presented with one licensing requirement as compared to the three that they are currently required to pay. Over and above easing the licensing procedures, round table discussions and negotiations would also be more effective, as various users would rather hold such discussions with one body as compared to three (see chapter four). Such concerted efforts would also help remedy the current negative public perception of a fragmented and disorganized music industry, and win good will both with stakeholders, and potential partners and investors (FGD 4). Additionally, if the three CMOs were to merge or work together, shared resources would ultimately result in reduced operational costs, hence increased royalty disbursement to members

5.2.2 Amendment of the Copyright Act

Both Article 12 of the Rome Convention and Article 15 of the WIPO Performances and Phonograms Treaty (WPPT) give performers and producers of sound recordings a right to a single equitable remuneration for broadcasting and communication to the public. The same is articulated in the Copyright Act section 30(a). The interpretation of this entitlement remains vague in regards to the collection process, but directly implies that PRISK and KAMP should concert their collection efforts. In spite of this lack of clarity, the Board of Governors of both CMO's opted to merge their collection efforts so as to increase efficiency.

Owing to previous and existing misunderstandings (see chapter 4) MCSK has been left out of this collective process. However, an amendment to the Copyright Act mandating concerted efforts by all three CMOs would have a huge impact on the entire music industry, as previously indicated in section 5.2.1 above. KECOBO would be best placed to propose such an amendment to the Copyright Act, being that it is the body charged with overseeing the operations and functions of all Kenyan CMOs.

5.2.3 Compliance with the Law

A lack of compliance with the law is eminent throughout various structural components of the Kenyan music industry infrastructure. Corruption by its very nature amounts to a lack of legal compliance; a vice that has mired the names of Kenyan Collective Management Organizations, with MCSK being focal as far as this is concerned. Ensuring that corruption is curbed would ultimately result in revenue increment for copyright holders. One of the methods currently been implemented to ensure this is the introduction of Cashless Licensing. In this, end users are issued with pay-bill numbers through which to subscribe for their licenses, reducing the

temptation that comes with handling of actual cash, and improving license payment tracking systems in all the CMO's.

Enforcement of heavy penalty or equivalent jail time for CMO officials found guilty of corruption would also discourage the perpetuation of corruption.

Similarly, enforcement of the law would come in handy in ensuring end users such as media owners, hotels, restaurants, public transport companies etc, pay the required licensing fees.

On the other hand, copyright owners too are required to comply with the law, before pointing blaming fingers at other stake-holders (KII4). In a document by KECOBO outlining the Requirements for Registration of Copyright Work, it is stated that "Upon issuance of the Certificate of Registration, owners of Musical and Audiovisual works shall proceed to apply for Authentication Devices, also known as Hologram Stickers and Bar Code stickers. If copyright holders complied with this law, it would go a long way in curbing hard copy piracy, as the pirates themselves would be afraid of legal repercussions of piracy (KII-1).

It was recommended that CMOs introduce fully-fledged legal departments into their organizational structure, so as to reduce legal outsourcing. Such legal departments will be in a position to enforce the law up to and including filing lawsuits against persons found to be involved in copyright infringement. This will reduce the legal burden borne by KECOBO, which is currently mandated to handle such cases, but is unable to fulfill it efficiently for a myriad of reasons. (See chapter four)

5.2.4 Technological improvement of the CMOs Operational Systems

MCSK currently employs the use of a scientific monitoring system, to monitor the usage of music by radio and TV stations. Each song is encoded with a digital

stamp, which is immediately recognizable when the song is played on any media. The system helps monitor how many times a song is played on radio and TV stations, and hence how much in royalties is owed to the copyright holders of the same.

When disseminating the funds, MSCK employs the World Intellectual Property Organization Computerized System (WIPOCOS), which immediately allocates royalties to the copyright holders of a musical work. (See chapter four).

The issue arises in that data is manually imputed into the WIPOCOS system, leaving room for error. There is need for the transfer of information from the Scientific Monitoring System to the WIPOCOS system to be fully automated (KII4). This will not only reduce the cost of labor, but will also increase the speed in which data is transferred and the risk of data entry errors (FGD 1). Additionally, rights holders represented by PRISK and KAMP should be included within this system, or the system introduced within the PRISK and KAMP data entry process. Currently, only copyright holders registered with MCSK benefit from WIPOCOS.

5.2.5 Transparency and Accountability

The issue of transparency and accountability arose repeatedly from various players of the music industry during this research (See Chapter Four). It is therefore a key area that needs to be addressed, and various suggestions towards handling this issue were raised.

Firstly, it was suggested that CMOs need to have a seamless communication mechanism, where members can readily access information related to their music if and when they chose to. This would imply setting up of personal accounts for members, where they can access statements, account activity, media usage of their

products etc, so as to account for payments, or lack thereof. Currently, such statements and information is availed to MCSK members on request.

Secondly and in relation to digital content usage by telecommunication companies and CPs, there should be clear communication of statements relating to usage of digital content and revenue due to rights holders. Currently, such information is obtainable from content providers on request by artists, or their representative CMO or management body. A major challenge in this lies in the fact that such records are easily manipulated in favor of the CP, as has been the case in the past (KII4). In order to deal with the issue of data manipulation, it was suggested that such records should also be available from the telecommunication company that hosts the CPs. These records are bound to reflect more truthful data, as the telecommunication company simply does not have the time to manipulate such data, nor does it stand to gain or lose much by alterations of the same (FGD3).

5.2.6 Addressing the issue of the MCSK Board of Governors

Most organizational theorists agree that effective leadership is one of the most important contributors to overall organizational success (Chemerz, 1997). Leaders must establish and encourage norms, roles, and rules for efficient application to known tasks, but must also be sensitive and responsive to change by employing sensitivity, problem solving, and decision making strategies that allow for adaptation (Chemerz 1997). In essence, poor leadership is reflected in the effectiveness, efficiency and profitability of any organization.

As such, the competence of the Board of Governors in all three CMO's is critical to their success. Policies and decisions passed at board level are extremely crucial to the overall output of CMOs. The MCSK B.O.G requires a lot of convincing

in order to merge forces with the two other CMO's for a myriad of reasons, with mistrust, lack of understanding of the music business and personal interest being mentioned at the top (FGD 4).

One of the ways to deal with this would be to release the Board from their responsibilities (FGD 4). This however would not be an easy task, owing to the clout that they have developed in their respective regions, from ill-educated MCSK members. (KII-14).

The other way to address this issue would be to show by example, how such a union would result in tripling the revenue earned by the B.O.G, who are also musicians by their own right. (KII-15). Following a series of round table negotiations, Safaricom, one of the primary end users and beneficiaries of digital music, has indicated a willingness to improve the revenue structure for the benefit of the music industry. Musicians would stand to increase revenue earned from digital downloads by up to three times, once this deal is sealed (KII-18). However, Safaricom also insists on dealing with one representative body as compared to individual CMOs (KII-17). This situation presents the perfect opportunity to show the MCSK B.O.G how they personally stand to gain by working in collaboration with PRISK and KAMP, with the hope of encouraging future CMO partnerships.

5.3 Proper Licensing of Broadcasting Stations

Kenya is the only country in the entire world that charges a flat rate for media licensing (KII-4). This licensing method, which is based on the size and reach of the station, was introduced as a palatable option of engaging media owners in Kenya, who were not used to the concept of paying for play (KII-4). This template of licensing is impractical and contributes to the minimal revenue earned by industry

players. Ideally, licensing should be based on the annual revenue earned by a media house, (KII-4). The law of partnerships will dictate that once a station opens, musicians automatically become partners, and they are entitled to profits, subject to a minimum (KII-4).

The change in licensing procedures has been received with a lot of resistance from media owners, as it stands to affect their annual income much more than the previous licensing technique. As such, participants of my research suggested the following mechanism, which would ideally have a zero effect on the stations' income.

It was proposed that the stations should implemented a 1% music levy on advertising, such that advertisers pay an extra minimal percentage that shall be due to MCSK. In that way the station incurs no direct cost, and instead, transfers this cost to the advertiser. However, for all copyright holders to benefit from this fee, it is suggested that the three representative CMO's approach this issue on a united front, as compared to individually. This lends the proposition more power, and increases the chances of compliance.

5.4 Public appreciation of users

In 2012, MCSK introduced the MCSK Music Awards. During this annual ceremony, end users who have complied with the licensing regulations are publicly acknowledged and awarded, with the aim of encouraging their counterparts to follow suit. Similarly, law enforcement agencies and their achievements towards ensuring legal compliancy are recognized for their efforts. Musicians who have earned significant amounts of revenue from royalties are also recognized. The objective of this ceremony is to publicly appreciate companies, organizations and persons who have positively influenced the Kenyan music industry, as well as to prove that indeed,

royalty payments are a crucial source of revenue for copyright owners.

Recommendations in this regard were to include PRISK and KAMP in future award ceremonies, so as to improve the public image of the CMO structure, as well as public validation of the two younger CMOs.

5.5 Formation and support of Artist Unions.

As Khan (2010) submits, trade/labor unions have always been attributed with securing financial and non-financial benefits for their members through collective bargaining. Flanders (1970) further adds that trade unions have helped deliver significant outcomes in terms of improved living standards, equity and justice to workers all over the world. These organizations have always had two faces, sword of justice and vested interest” (Flanders, 1970). Buchmueller et al (1999) expressed that the role of US trade unions in obtaining health and welfare benefits for their members, dates to the 18th century and according to Munts (1967) earlier union organizations were established for the provision of health and welfare benefits and later on they became engaged in bargaining with employers over wages.

It therefore becomes eminent that the role and relevance of trade unions within any economic industry is geared towards the improvement of the working terms and conditions of the laborers within that industry.

The need to form a music industry association has for long been eminent. Indeed, steps to formulate such an organization have previously been taken, but minimal industrial endorsement coupled with poor strategic planning and lack of financial backing, such efforts have been in vain. The incorporation of the Music Industry Association of Kenya, (MIAKE), in January 2014 has been received with mixed reactions by industry players (KII-2) (see chapter four).

The Kenyan music industry is on the verge of a major breakthrough in regards to revenue generation, and lack of unity in regards to mapping the way forward can have major negative repercussions. Being that a section of industry leaders have taken a proactive step in forming a music association, it would do the industry good to support this initiative, more so because the agendas of the association as outlined in its constitution, all aim at improving the economic welfare of its members. According to its constitution, MIAKE is to act as the industry watchdog and whistle blower, ensuring that all structural components are fulfilling their mandate to the best of their ability; it will also negotiate with industry stakeholders such as the national government and music end users for and on behalf of its members, make viable recommendations for the betterment of the music industry, as well as ensure that the welfare of its members is well taken care of (KII-2). The relevance of a music association has been documented in the successful implementation and operation of such associations in other markets.

More than 17 years ago, France, as was most of Europe, was flooded with Western music. However, through its Musicians Union, they were able to lobby for a 70:30 ratio airplay with 70% of the content being generated from France.

The Musicians' Union (MU) is an organization, which represents over 30,000 musicians working in all sectors of the UK music business. This union has a sub-committee that closely liaises with the parliamentary committee in charge of Arts and Culture in the UK. Because of this relationship, there is little need for them to lobby, as they have an excellent working relationship (K11-9)

The Nigerian Music Coalition declared September 1st 2011, a “No Music Day”. The coalition consequently requested all broadcasting stations in the country to devote significant periods of their broadcast schedules today to interviews, debates,

comments, discussions, and other programs related to the rights of artistes and creative people, as a mark of solidarity with the Nigerian creative community. The statement also urged all national newspapers and magazines to do special features and editorials on the subject. (KII-9)

Currently, board members of MIAKE foot majority of its current costs, as the association itself has no finances to handle such expenses (KII2). There is commitment to financially support awareness campaigns from both PRISK and KAMP, with negotiations with MCSK still ongoing. It is of key importance that artists not only individually support the association, but also put pressure on their respective CMOs to do the same (KII7). This support bears most results if presented in public spaces such as social media platforms, TV and Radio interviews as well as the print press. This is because visible support lends credibility to the association and diminishes skepticism. Following the successful roll out of the association's activities, there shall be a need to introduce sub committees that handle specific aspects relating to certain sections of the industry. In the US for example, there is Screen Actors guild, Writers guild, all of which fall under one umbrella association (FGD3)

In the absence of a music Union however, a strong well structured CMO mechanism is extremely relevant. This is because theoretically the mandate of any CMO is to act as a strong, fair buffer between the interests of rights holds and exploiters, setting tariffs via reasonable negotiations with users on behalf of all authors (thereby being able to offer a universal repertoire), balancing the reasonable demands of both rights holders and users (Wallis et al, 2001). Seeing that the CMO structure is more than wanting, the fact remains that a well-functioning association is crucial to the proper development of the music industry infrastructure.

5.6 “Legalisation” of Hard Copy Pirates

In a study spearheaded by the Kenya Copyright Board (KECOBO) in 2011, it was reported that music piracy in Kenya was at a staggering 95%. Piracy is seen by artists, producers and observers a major impediment to the growth of the Kenyan music industry, and all seem to point the finger to the government’s lack of interest in issues related to music and the cultural sector in general, (Loureiro 2011).

The issue of piracy is tricky, as it is an interesting play between impunity, lack of awareness (KII-15) high cost of original CDs (KII-2), poor distribution (KII-8) and undersupply or poor distribution of hard copy music (KII-3).

Developments in telecommunication and Internet services have delivered music as a consumable product out of the physical store, and into the hands of its intended market (KII-6). That said, a large percentage of local and international musicians and music companies trade in physical sales of the product, implying an existing, albeit diminishing demand of the hard product

The success of hard copy music piracy in Kenya can be largely accredited to the pirates’ ability to bridge music distribution and cost gaps (KII-7), amongst other reasons (see chapter four). Persons and companies involved in this illegal trade have not only established efficient distribution channels, but have also invested in music reproduction plants which despite producing lesser quality products, manage to satisfy their consumers’ needs (KII-8). Additionally, they are in a position to provide unoriginal hard copy albums at extremely affordable prices, owing to the fact that they do not incur high production costs (KII-19). Unavailability of original music to consumers and shortcomings in the legal system further perpetuate the existence of such illegal companies (KII-19). As stated in Chapter four, the rate of music piracy in Kenya has been placed at 95%, meaning artists only take home 5% of the actual value

of their music commodity. It would do the industry much good to discuss ways in which both the pirate and the musician can co-exist as profitable entrepreneurs. One of the ways of such a co-existence would be to legalize music pirating companies, making them taxable, legal entities able to carry out their business without fear of the law (FGD3).

In such an arrangement, artists would be required to come into legal agreement with the music pirate, granting reproduction and/or distribution and rights to the latter. This is a simple and easily implementable solution that is currently being employed in countries such as Uganda, and Tanzania, where musicians either allow pirates to reproduce their master album, or provide them with copies of their music at an affordable rate for distribution purposes. Either way, the artist stands to make money that would otherwise have been lost to illegal reproduction and sale of their commodity.

5.7 Formation of Industry-driven music content provider

In the advent of the implication of properly functioning primary structures, the revenue potential in ringtones and ringback tones is exponential, to say the least. In the ideal scenario, telecommunication companies, content providers and copyright holders would exist harmoniously with each stakeholder taking home a fair share of revenue. What would be more ideal would be if the Kenyan music industry registered a profitable content providing company with the full endorsement of Kenyan musicians. For such a CP to receive industry support, it would have to offer much more favorable revenue share opportunities to copyright holders. This would ultimately force the competition to restructure their revenue share percentages in favor of musicians, increasing overall industry profitability (K11-9).

One of the reasons as to why Skiza (Safaricom's digital music platform) retains the lion's share in terms of percentages is that the company outsources the online platform that hosts this platform from an overseas company, which leases the platform at a very expensive rate. It would do the industry much good to investigate the possibility of sourcing another more affordable company, if not consider setting up one themselves. Safaricom would then source the service internally reducing operational costs, and increasing revenue share with other stake holders. The possibility of investing in an online hosting company locally would save the Kenyan music industry billions of shillings in the long run (KII-5).

5.8 Conclusion

This research presents critical analysis of the flaws within the Kenyan music industry infrastructure, as presented by experts within the industry. It further presents simple and applicable remedial measures, which if implemented can have a great impact on the efficiency of the system. A lot of effort was also put into the research of concerning material, for purposes of borrowing valuable infrastructural lessons that can be implemented on a local level.

The research brought out many relevant issues affecting the industry, but the need for industrial unity and government support and endorsement rise to the top of the priority list. Indeed, if only these two aspects were considered for implementation, the results would by default affect the other areas of the infrastructure hence increasing the music industry efficiency.

The economic potential borne within the music industry is exponential and indeed musicians, the Kenyan public as well as the Kenyan government all stand to gain if the suggested remedial measures are acted upon.

5.9 Recommendations for Future Research.

The current research was based on improving the overall efficiency of the music industry infrastructure. The idea of this research was inspired by the need to see stakeholders beginning to earn a proper living from their hard work, as currently, Kenyan artists do not receive proper compensation for their efforts. This study also brought to light the growing revenue opportunity within the digital space. In line with this, it would be extremely important to study this particular section of the music industry, understand the current status quo and make relevant suggestions as to how Kenyan musicians can fully benefit from the existence and growth of the digital world.

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APPENDICES

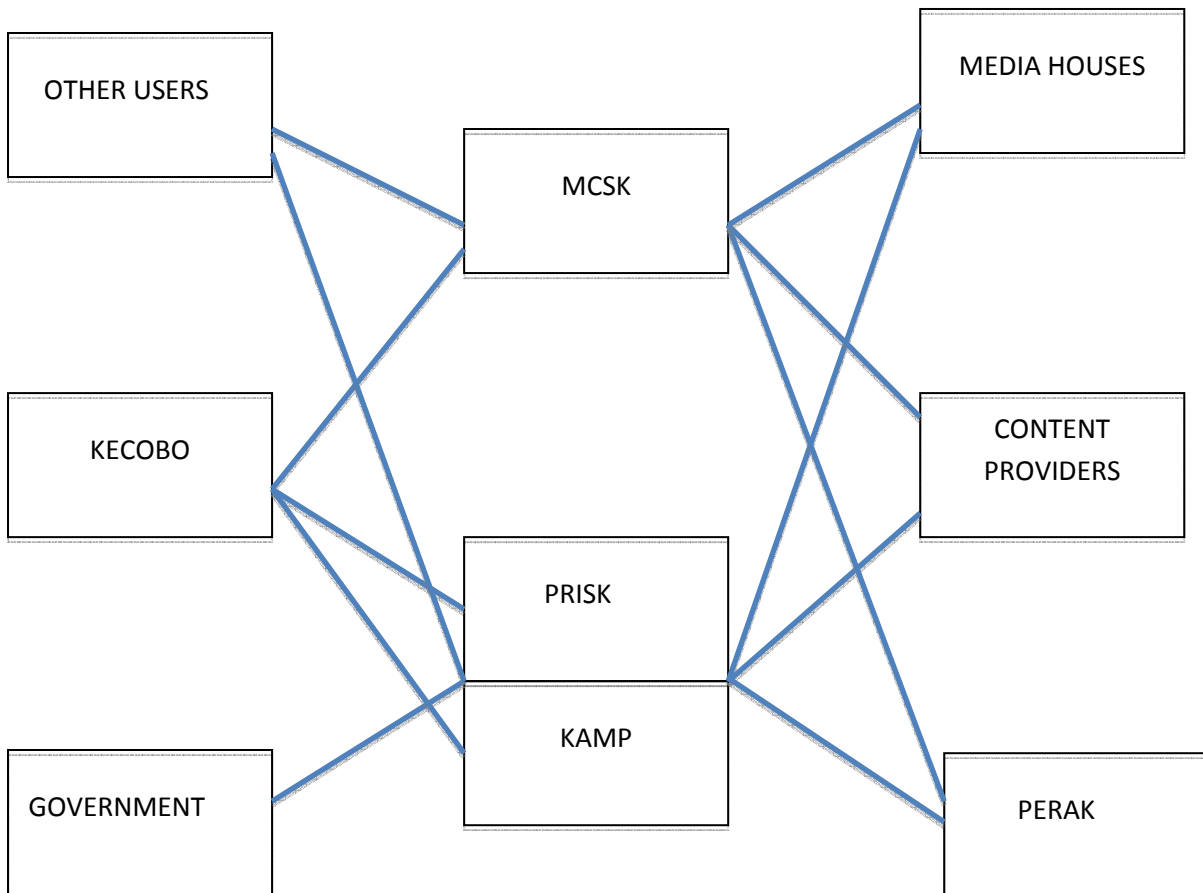
APPENDIX 1:

QUESTIONNAIRE FOR KEY INFORMANT INTERVIEWS AND FOCUS GROUP DISCUSSIONS.

- 1) What is your take on the Kenyan music industry?
- 2) What are the factors that you feel impede its growth?
- 3) How effective is the law in regards to the Kenyan music industry?
- 4) How effective are the current CMO's?
- 5) How effective is KECOBO?
- 6) What changes would you like to see effected in and by:
 - a. The Kenyan Copyright law
 - b. CMO's
 - c. KECOBO
 - d. Musicians
 - e. Music consumers such as TV and Radio stations, telecommunications companies, restaurants, pubs and discotheques?
- 7) How has technology affected the Kenyan music industry?
- 8) What changes should be made so that the music industry can fully enjoy the benefits of music technology?
- 9) How has piracy affected the Kenyan music industry?
- 10) What can be done to reduce music piracy?
- 11) How can the industry turn around the prevalent piracy situation to work in its favor?
- 12) What can be made to increase music sales, locally and internationally,
- 13) What can be done to increase musicians' income from music downloads

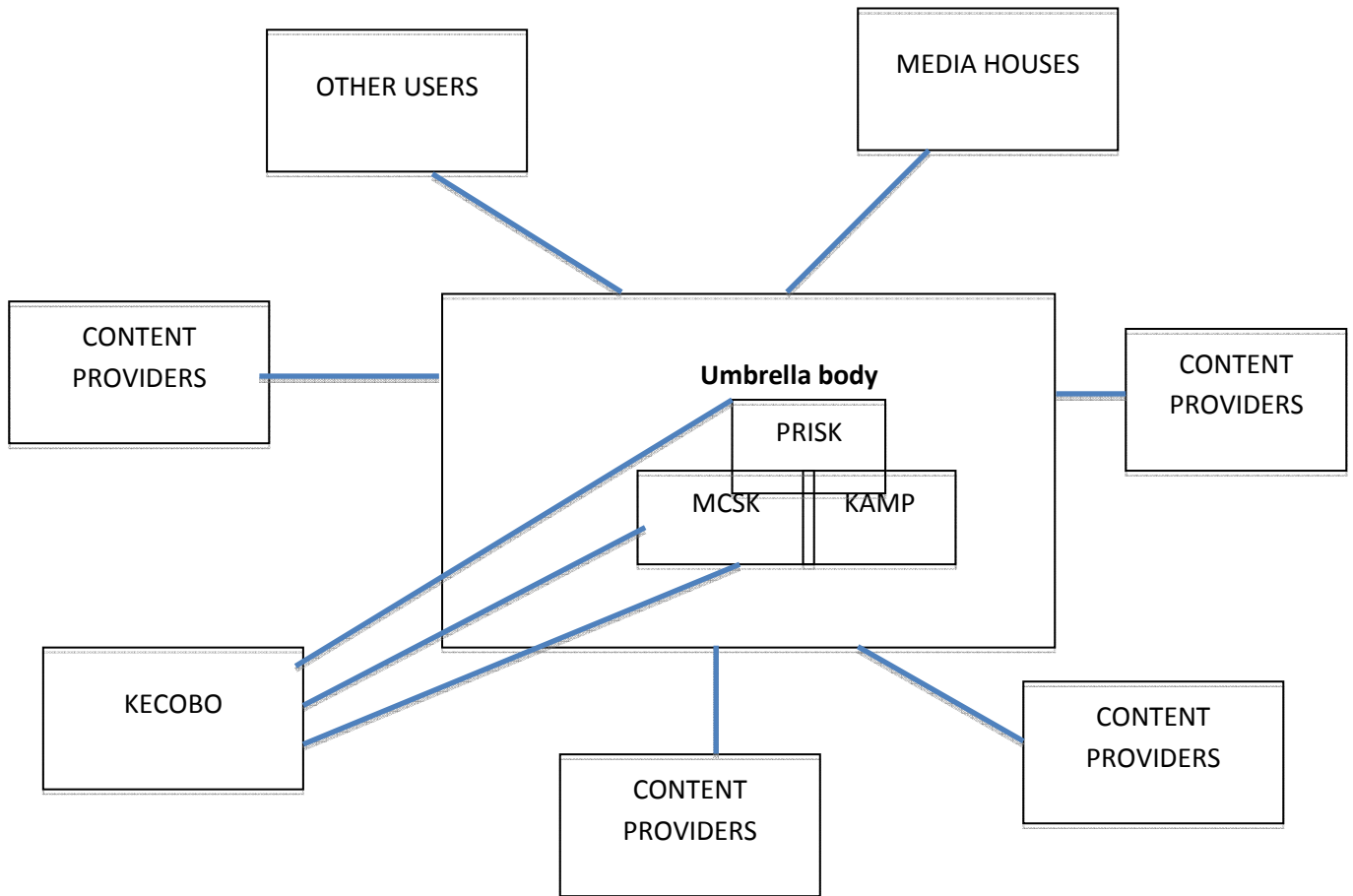
APPENDIX 2:

**CURRENT LANDSCAPE OF THE KENYAN MUSIC INDUSTRY
INFRASTRUCTURE**



Currently, PRISK and KAMP have concerted efforts in relating to end consumers. KECOBO being a regulatory body, individually assesses the functions of all the CMOs. MCSK exists and functions almost independently of its fellow CMOs.

**APPENDIX 3:
SUGGESTED LANDSCAPE OF THE KENYAN MUSIC INDUSTRY**



Recommendations on a suitable landscape suggested that CMOs should have concerted efforts in conducting their businesses, and/or approach music copyright consumers in a concerted effort. The more preferred approach to this was the implementation of an umbrella body through which the CMOs can relate with consumers. However in the absence of such a body, the CMOs should endeavor to work in unison to reduce costs & increase efficiency. KECOBO would however maintain individual contact with the CMOs, as it is a regulatory body