

# LEGAL CHALLENGES TO THE PROTECTION OF COPYRIGHTED CREATIVE WORKS AGAINST INFRINGEMENT UNDER CYBERSPACE IN TANZANIA

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## ABSTRACT

Science and technology are taking the lead in many aspects of human life. Now it is fashionable to conduct most activities online as opposed to the past time when paper-based transactions were common. The online transaction simplifies the way intellectuals, among other dealers, market their copyrighted works. For example, authors sell books online; designers advertise their designs and musicians sell their musical works through various intermediaries such as websites. Ensuring the smooth conducting of these, internet is an important tool. However, irrespective of its importance in electronic transactions, the internet has been an engine through which pirates infringe upon copyrighted works. Through this infringement, knowledge of intellectuals worth payment is lost with neither payment nor acknowledgement. This article focuses on musical works and films by looking at how copyright law in Tanzania protects them against infringement in cyberspace. The article shares knowledge with the stakeholders such as musicians, actors, authors and their regulatory bodies on how they can fight against online piracy of copyrighted works. It argues that the Tanzania copyright legal framework does not adequately address the infringement of copyrighted works in cyberspace. Consequently, the owners of copyrighted materials and the government lose income from the owners' creativity. The article recommends that the law needs amendment in response to developments in science and technology. The law should not only address the sale of copyrighted musical works and films online but also the offline dealings resulting from online infringements.

## INTRODUCTION

The world is experiencing developments in technology facilitating the use of the internet in many transactions and communications. However, the internet is two sided: It has positively affected human life in areas of communication and trade, on the one hand, and has negatively affected human activity in terms of cyber security<sup>1</sup> and infringement of intellectual property on the other

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<sup>1</sup> Xinmin, M., (2015), "What Kind of Cyberspace Do We Need?" *AALCO Journal of International Law*, 4(1), 1-6, p.1. of  
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hand.<sup>2</sup> Intellectual property rights, which refer to creative rights, now include intellectual property created electronically.<sup>3</sup> As technology has heightened the vulnerability of intellectual property rights (IPRs), hence increasing the need for intellectual property protection in cyberspace. In fact, trading in cyberspace has necessitated the reform of intellectual property laws to suit the technological developments that have come with the use of internet. People express their ideas through writings such as books, literary and artistic works, for example, music and films. The focus in this paper is on artistic works, particularly music songs and films. The internet has become an important element that affects how people produce, trade and communicate electronically.<sup>4</sup> Internet computer programmes and databases facilitate the creation as well as the marketing of musical works and films. However, the same internet has come with challenges worth noting: it does not know boundaries while the protection of IPRs is territorial.<sup>5</sup>

Through this internet, various illegal cyber activities including a blatant breach of IPRs seriously threaten to undermine individual interests and rights.<sup>6</sup> It allows anyone to trace anything online. To protect the owners of ideas, legal and regulatory protection becomes imperative. In addition to legal framework, creating awareness and confidence on the part of owners of musical works and films is also important. Such heightened awareness can make the fight against digital infringement of copyrighted works successful. The intellectual property rights, of which copyright forms a part, provide remedies to owners whose ideas expressed in the form of music and films get manipulated—they are copied as originals and sold either online or offline through hard discs (CDs).<sup>7</sup>

## CONCEPTUALISING INTELLECTUAL PROPERTY RIGHTS

Intellectual property refers to creations that involve the mind; inventions, literary and artistic works; symbols, names and images used in commerce.<sup>8</sup> In short, the term refers to the property that comes out of someone's brain. As such, anything that involves the use of the intellect is an intellectual property.<sup>9</sup> These intellectual creations or inventions attract certain legal protected rights.

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<sup>2</sup> Kibadu, P. I., (2016), "Digital Trademarks: The Global Legal Regime and Tanzania Legislation", *LST Law Review*, 1(1), 91-109, p. 91.

<sup>3</sup> Mambi, J. M., (2010), *A Source Book for Information and Communication Technologies and Cyber Law*, Dar es Salaam: Mkuki na Nyota Publisher Ltd., p. 198.

<sup>4</sup> Xinmin, *op cit.*, p.1.

<sup>5</sup> Mambi, *op cit.*, p. 198.

<sup>6</sup> Xinmin, *op cit.*, p.2.

<sup>7</sup> Mambi, *op cit.*, p. 197

<sup>8</sup> WIPO, "What is Intellectual Property?" Publication No. 150. Available at [http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf), (Accessed on 16 August 2017).

<sup>9</sup> Mwaipopo, A.R., (2008), "Intellectual Property Rights and the Regulation of Access to and Benefit Sharing of Genetic Resources in Mainland Tanzania", Dar es Salaam, PhD Thesis: University of Dar es Salaam, p. 61. 2

The rights are statutory to safeguard individuals' creativity. What is protected is an idea already transformed into a work or creation, which is original to the owner and, at least, contains some creativity.<sup>10</sup> Others can freely create similar works or even identical, provided they do so independently using their own efforts.<sup>11</sup> This approach helps to avoid monopoly in a particular work and encourage inventions using the intellect.<sup>12</sup> After all, ideas remain free for the entire public use unless creators express them in a certain form.<sup>13</sup> For example, nothing exists such as a movie or song until artists or characters practically present their ideas that anyone can see or and hear. Generally, IPRs are in two categories: industrial property rights and copyright.<sup>14</sup>

## INDUSTRIAL PROPERTY RIGHTS

These include patents for inventions, trademarks, industrial designs and geographical indications.<sup>15</sup> They concern different types of protection for inventions.<sup>16</sup> Patents for inventions are exclusive rights granted for innovations.<sup>17</sup> For a patent to get protection there must be a new, non-obvious invention and not a discovery.<sup>18</sup> Something must be noble—that it has never existed. Industrial designs are rights granted to owners of designs of various materials such as laptops. Designs may consist of different dimensional features such as the shape or surface of an article or two-dimensional features, such as patterns, lines or colour.<sup>19</sup> These can be aesthetical or functional.<sup>20</sup>

Industrial designs protected by law must be new and original.<sup>21</sup> Trademarks include signs, symbols or names that distinguish goods or services of one company from those of another, for example, Coca-Cola, Samsung, and techno. The application of these marks to services transforms

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<sup>10</sup> See Article 2 of World Intellectual Property Organization (WIPO) Treaty, 1996. Also, see Bainbridge, D., (2010), *Intellectual Property*, 8<sup>th</sup> ed., Pearson Education Ltd, Harlow, UK, p. 5.

<sup>11</sup> *Ibid*, Bainbridge, p 6.

<sup>12</sup> *Ibid*. However, independently creating a similar or identical work can be limited where the creator of the work is the only person with access to contents or other material from which the work was created

<sup>13</sup> Marjorie Hodges Shaw, H. M., and Brian B. Shaw, B. B., (2003), "Copyright in the Age of Photocopiers Word Processors, and the Internet", *Taylor & Francis, Ltd.*, 35(6), 20-27, p. 23.

<sup>14</sup> Mwaipopo, *op cit.*, p. 62

<sup>15</sup> WIPO, *op cit.*, p. 15.

<sup>16</sup> Mwaipopo, *op cit.*, p. 62.

<sup>17</sup> See article 27 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, (TRIPS), April 15 1994, Annex 1C of the Marrakesh Agreement Establishing the WTO.

<sup>18</sup> Bainbridge, *op cit.*, p. 7.

<sup>19</sup> WIPO, *op cit.*, p. 12.

<sup>20</sup> Jayashree Watal, J., (1998), "Intellectual Property Rights in Indian Agriculture", *Occasional Paper*, p. 3.

<sup>21</sup> See Article 25 (1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, (TRIPS), April 15 1994, Annex 1C of the Marrakesh Agreement Establishing the WTO.

them into service marks.<sup>22</sup> The aim of protecting these trademarks is to protect the consumer and the owner of the trademarks.

On the other hand, geographical indications refer to signs used for goods from a specific geographical origin and such goods possess a reputation due to that place of origin.<sup>23</sup> Usually, a geographical indication consists of the name of the place of origin of goods. Therefore, geographical indication is an intellectual property that protects the source and origin of the product. Agricultural products typically have qualities that derive from their place of production because of specific local geographical factors such as climate and soil. For example, “Tanzanite”, “Dodoma Wine” and “Champagne”- wine produced from grapes grown in the Champagne region of France. However, protecting geographical indications differs from one jurisdiction to another. Whereas in some jurisdictions, geographical indications constitute IPRs, in other jurisdictions, they are simply generic indications for certain products.<sup>24</sup>

## COPYRIGHT

This covers creative literary works such as novels, poems and plays, films, and music, as well as architectural designs and artistic works such as drawings, paintings, photographs and sculptures. These are protected as an incentive for the creation and dissemination of original expression.<sup>25</sup> Copyright extends to the performing artists in their performances, films or music producers in their recordings, and broadcasters in their radio and television programmes.<sup>26</sup> The owners of copyrighted works get protection for their output because they apply creativity in expressing their ideas into a work with ownership. Through this creativity in the expression of ideas, copyright serves as an engine of free expression.<sup>27</sup> However, ownership of a copyright is alienable, for the owner can transfer it to another person; or through licensing, the owner may permit that other person to do one or more specified acts with the copyrighted work.<sup>28</sup> The use of the copyrighted work without consent of the owner such as through licence or transfer of ownership, on the other hand, may subject the user to legal action against such unauthorised use, as it constitutes an infringement of the copyrighted work.<sup>29</sup>

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<sup>22</sup> Mwaipopo, *op cit.*, p. 63.

<sup>23</sup> See Article 22.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), April 15 1994, Annex 1C of the Marrakesh Agreement Establishing the WTO.

<sup>24</sup> Geuze, M., (2016), “Geographical Indications under WIPO-Administered Treaties”, In Dev. S Gangjee, ed., *Research Handbook on Intellectual Property and Geographical Indications*, Edward Elgar Publishing Ltd., p. 95.

<sup>25</sup> Neil W. Netanel, W. N., (2008), *Copyright's Paradox*, Oxford University Press, p. 81.

<sup>26</sup> WIPO, *op cit.*, p. 2.

<sup>27</sup> Netanel, *op cit.*, p. 81,

<sup>28</sup> Bainbridge, *op cit.*, p. 5

<sup>29</sup> *Ibid*

## INTERNATIONAL COPYRIGHT LEGAL FRAMEWORK

The free access given to everyone to access whatever is uploaded on the internet has and continues to threaten the protection of copyrighted works against digital infringement. This has exposed the inadequacy of copyright legal regimes at the national and international levels. Thus, it has become necessary to have international law and mechanisms responsive to the cyberspace development speed.<sup>30</sup> IPRs, to which copyright form a part, are like other property rights whose owners, invest time and money to create.<sup>31</sup> They are protected to enable the owners enjoy the fruits of their investment. This protection is recognised by the Universal Declaration of Human Rights, 1948 that states:

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.<sup>32</sup>

Following the challenges to the protection of copyrighted works in cyberspace, the World Intellectual Property Organisation (WIPO) came up with two treaties commonly known as WIPO internet treaties, specifically aimed to address the protection of copyrighted works against digital infringement. These treaties supplement the Berne and Rome Conventions<sup>33</sup> that did not envision the rapid development of science and technology and its impact on the copyright field. The WIPO internet treaties<sup>34</sup> address new dimensions pertaining to copyright protection in cyberspace.

On the one hand, the WIPO Copyright Treaty, 1996 is a special agreement under Berne Convention specifically dealing with the protection of intellectual creations under cyberspace.<sup>35</sup> It mainly covers copyrighted matters. The Treaty protects computer programmes as literary works in whatever form of their expression<sup>36</sup> and protects the compilation of data or other materials, which constitute intellectual creations.<sup>37</sup> The owners of copyrighted works have exclusive rights of either distributing or authorising the

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<sup>30</sup> Xinmin, *op cit.*, p.3.

<sup>31</sup> WIPO, *op cit.*, p. 3.

<sup>32</sup> See Article 27 of the Declaration.

<sup>33</sup> Both Paris Convention for the Protection of Industrial Property, 1883 and the Berne Convention for the Protection of Literary and Artistic Works, 1886 were the first international instruments administered by WIPO to recognise the importance of IPRs.

<sup>34</sup> The Treaties are WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, both of 1996.

<sup>35</sup> Article 1(1) of WIPO Copyright Treaty, 1996.

<sup>36</sup> *Ibid*, Article 4.

<sup>37</sup> *Ibid*, Article 5.

distribution of originals or copies of their works to the public through sale or other means of ownership transfer.<sup>38</sup>

Moreover, owners are free to determine the terms and conditions that should govern such contractual arrangement involving the sale or ownership transfer of their copyrighted works.<sup>39</sup> Furthermore, the Treaty recognises the exclusive rights of the owners of copyrighted works to authorise any communication to the public of their works either by wire or by wireless means.<sup>40</sup> This implies that, if the work is to be uploaded onto the internet for public use by wireless means, the owner should sanction such upload or use.

On the other hand, the WIPO Performances and Phonograms Treaty, 1996 addresses the rights of performers who include actors, singers, musicians and producers of programmes.<sup>41</sup> These have economic rights in authorising the broadcasting and communication of their unfixed performances<sup>42</sup> to the public save for cases where the performance is already a broadcast performance<sup>43</sup> and the fixation of their unfixed performances.<sup>44</sup> Furthermore, the performers have the right to authorise the reproduction of their fixed performances in either phonograms<sup>45</sup> or any other form.<sup>46</sup> In addition, the performers enjoy the exclusive right of authorising the making available to the public of the original and copies of their performances fixed in phonograms through either the sale or other means of ownership transfer.<sup>47</sup> The performers may grant access to the public of their performances fixed in phonograms by wire or wireless means.<sup>48</sup> It is through this way, the public should access the performances at their chosen places and time.

## DIGITAL INFRINGEMENT OF COPYRIGHTED WORK

Despite the international legal framework on the protection of copyrighted works, digital infringement of copyrighted musical works and films, among other works, continues to pose a grave threat to the owners. In responding to this infringement of their copyrighted works, copyright owners such as

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<sup>38</sup> *Ibid*, Article 7(1).

<sup>39</sup> *Ibid*, Article 7(2).

<sup>40</sup> *Ibid*, Article 8.

<sup>41</sup> See Article 2 of WIPO Performances and Phonograms Treaty, 1996 on the definition of a performer.

<sup>42</sup> According to Article 2 of the Treaty, fixation of performances involves the embodiment of sounds, or of the representations thereof, from which they can be perceived reproduced or communicated through a device. Therefore, unfixed performances are performances just taken in action without any modification.

<sup>43</sup> Article 6(i) of WIPO Performances and Phonograms Treaty, 1996.

<sup>44</sup> *Ibid*, Article 6(ii).

<sup>45</sup> *Ibid*, Article 2 of the Treaty defines a "phonogram" as the fixation of the sounds of a performance or of other sounds, or of a representation of sounds.

<sup>46</sup> *Ibid*, Article 7.

<sup>47</sup> *Ibid*, Article 8(1).

<sup>48</sup> *Ibid*, Article 10.

musicians, actors and producers form associations aimed to fight against this infringement.

Through these associations, owners of copyrighted works adopt preventive and enforcement measures such as pressuring governments to enact or amend copyright laws to address the problem of digital infringement of their works. These measures include filing cases in courts of law seeking remedies against such infringement. For example, in 2003 the Recording Industry of America Association filed a lawsuit for \$98 billion.<sup>49</sup> In addition to these measures, security firms, night-vision goggles and mental detectors, commonly used in movie previews, are adopted to fight digital infringement.<sup>50</sup> Such measures seek to restrict people from creeping electronic-artistic works and filming copies later uploaded onto the internet through various channels such as websites. As already noted, it is through the internet, infringers copy and reproduce songs, films and distribute them for sale either online or offline without the owners' consent through various computer programmes and software.

### DIGITAL INFRINGEMENT THROUGH MP3

MP3 is an abbreviation of MPEG-3; a software computer users deploy to copy an audio compact disc directly onto their hard drive for the later use.<sup>51</sup> This is done by compressing the information on the disc, which is in the form of songs into the MP3 format. The use of such copyrighted work may be either private or commercial in nature. This software allow members of the public to access musical works by downloading and storing them in their hard drives. This act also facilitates the reproduction of copyrighted musical works in CD or DVD formats for commercial distribution. The use of MP3 to infringe upon the copyrighted musical works in cyberspace is common in Tanzania. These works are sold at a cheaper price almost in all streets in Tanzania. The music and film industry in Tanzania that comprises two groups famously known as "Bongo flava" and "Bongo movie" has been hit hard by this problem, forcing the artistes to complain to the authorities such as the Copyright Society of Tanzania (COSOTA) to protect their works against such infringement.<sup>52</sup> This infringement originates from online before the works are sold offline. They raise their complaints based on the money, time and creativity they invest in their copyrighted works.

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<sup>49</sup> *Ibid*

<sup>50</sup> Shaw and Shaw, *op cit.*, p. 22.

<sup>51</sup> Zapeda, M. L., (2002), "A & M Records, Inc. v. Napster, Inc.", *Berkeley Technology Law Journal*, 17(1), p. 72.

<sup>52</sup> Mohammed, A., "How Artists, Government Continue to Lose Billions from Piracy Every Year", *The Citizen*, 26th February 2017. Available at <http://www.thecitizen.co.tz/News/Business/How-artistes--govt-continue-to-lose-1840414-828244-format-xhtml-wclofn/index.html>, (Accessed on 21<sup>st</sup> August 2017). 7

On the one hand, it is a requirement of the law that a person who makes a reproduction of musical works and films relating to a copyright and neighbouring rights must apply for a licence to COSOTA.<sup>53</sup> An applicant is required to pay the initial licence fee to COSOTA.<sup>54</sup> On the other hand, the infringers of these copyrighted musical works and films sell them without such a licence either from the owner or COSOTA under which they could pay compensation for such reproduction and distribution. This illegal action amounts to exploitation in the copyright world.<sup>55</sup>

## CONTRIBUTORY COPYRIGHT INFRINGEMENT AND VICARIOUS COPYRIGHT LIABILITY CONTRIBUTORY COPYRIGHT INFRINGEMENT

As already indicated in this work, the internet facilitates digital infringement of intellectual property rights abetted by agents such as computer or internet service users, online libraries that digitise books and internet service providers. Some agents are direct infringers such as computer and internet service users whereas others are indirect infringers such as internet service providers (ISPs). These agents have been held liable for facilitating the digital infringement of copyrighted works. The reason is that, although ISPs do not upload their content online for their customers to use, they provide the internet service through which infringement is done.<sup>56</sup> This has brought about the concept of contributory and vicarious infringement that involves the primary and secondary liability of the infringer and facilitator of infringement, respectively. The secondary infringer facilitates the infringement by providing services to the primary or direct infringer.<sup>57</sup> However, contributory infringement requires knowledge of the infringement and inaction against it.<sup>58</sup> This has been upheld by the courts of law in various cases in the US. For example, in *Religious Tech. Ctr. v. Netcom On-Line Communication Services Inc.*,<sup>59</sup> the court held that contributory infringement exists where the secondary infringer “knows or has reason to know” of direct infringement.

This was also the same with *A & M Records, Inc. V. Napster, Inc.*,<sup>60</sup> where the court developed some principles regarding contributory infringement of copyrighted works under cyberspace. Napster was an internet service provider that operated a system, which allowed the transmission and

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<sup>53</sup> See Regulation 5(1) of the Copyright and Neighboring Rights (Copyrighted Works-Communication to the Public) Regulations, 2015.

<sup>54</sup> *Ibid*, Regulation 7(1).

<sup>55</sup> Thomas, Copyright Law and Digital Exploitation of Works: The Current Copyright Landscape in the Age of the Internet and Multimedia, Available at [http://www.zar.kit.edu/DATA/veroeffentlichungen/\\_dreier\\_Copyright\\_Law\\_and\\_Digital\\_Exploitation\\_of\\_Works\\_1a8525c.pdf](http://www.zar.kit.edu/DATA/veroeffentlichungen/_dreier_Copyright_Law_and_Digital_Exploitation_of_Works_1a8525c.pdf), (Accessed on 21<sup>st</sup> August 2017).

<sup>56</sup> Mambi, *op cit.*, p. 203.

<sup>57</sup> *Ibid*.

<sup>58</sup> Bainbridge, *op cit.*, p. 174.

<sup>59</sup> 907 F. Supp. 1361, 1373-74 (N.D. Cal. 1995).

<sup>60</sup> 239 F.3d 1004 (9th Cir. 2001).

retention of digital audio files among its users through a process called peer-to-peer file sharing. Through this system, Napster users made MP3 files stored and shared on the computer hard drive ready for use by other users and search for MP3 music files stored on other users' computers. The Napster system allowed its users to connect directly to one another through internet.<sup>61</sup> The copied MP3 files from one computer to another did not pass through Napster's software.<sup>62</sup>

Although the evidence showed that the Napster's system contained the majority of copyrighted MP3 files, Napster was not licensed to download, distribute or authorise others to download and distribute the copyrighted music in MP3 files. In fact, the owners of these copyrighted musical works did not receive any royalty in respect to their works downloaded by Napster users. Following this operation of Napster's software system, the plaintiffs who were engaged in recording, distributing and selling music songs, among others, filed a suit against Napster alleging that Napster was a contributory infringer in the District Court for the Northern District of California. The District Court decided in favour of the plaintiffs on the ground that Napster had both actual and constructive knowledge of the direct infringement by its users. Napster appealed against this decision to the Court of Appeal for the Ninth Circuit. While deciding against Napster Inc., the court developed various principles regarding the protection of copyrighted musical works against digital infringement. The principles developed by the court relate to two main aspects, that is, fair use and infringement.

The court held that contributory infringement requires actual or constructive knowledge of infringement. It reasoned that if the operator or service provider learns of the infringement and fails to stop it, he/she knows and contributes to direct infringement. Quoting the decision in *Sony Corporation of America v. Universal City Studios, Inc.*,<sup>63</sup> the court held, "conversely, absent specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material." This implies that the owners of copyrighted works have a duty to inform the service provider of the infringement. This finding notwithstanding, the court found Napster secondarily liable for direct infringement. This is because, first, Napster as the operator of software system possessed actual and constructive knowledge of the materials available on its system that were used for infringement. Second, it failed to block the connection that its service users used to download the MP3 files of musical works. Furthermore, it was upheld that contributory infringement requires material contribution. The evidence showed that Napster provided

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<sup>61</sup> Zapeda, *op cit.*, p. 72.

<sup>62</sup> *Ibid.*

<sup>63</sup> 464 U.S. 417 [1984], p. 450.

services to its customers, which they used to download the music files. Through sites and facilities supplied by Napster, the infringement occurred.

### VICARIOUS COPYRIGHT LIABILITY

The court in the *Napster case* addressed the issue of whether Napster was secondarily liable for direct infringement. It held that vicarious copyright or secondary liability popularly known as *respondent superior* extends beyond an employer and employee relationship. Under the copyright law, the principle covers those with ability and right to supervise the infringing activities and with financial interest in such activities. Napster, as the owner of the software system, was vicariously or secondarily liable as it had the control over the direct infringers, Napster internet users. It was further held that Napster had a direct financial interest in the infringing activity. The court reasoned that the more the infringing of materials in the Napster system, the more the financial benefits accruing for the company because of the increase of customers.

### FAIR USE OF THE COPYRIGHTED WORK

In determining the fair use of the copyrighted work, various factors are considered. These include the purpose and character of the use, portion used and effect of the use on the market. Purpose and character of the use focuses on whether the new work merely replaces the object of the original creation or instead adds a further purpose or different character. This implies that the new work created should be transformative. In the *Campbell vs. Acuff-Rose Music*<sup>64</sup> case, where among others, the US Supreme Court noted:

...the enquiry focuses on whether the new work merely supersedes the objects of the original creation or whether and to what extent it is transformative altering the original with new expression, meaning or message. The more transformative the new work, the less will be the significance of other factors like commercialism that may weigh against a finding of a fair use.

In the Napster case, the Court of Appeal supported the finding of the District Court that downloading MP3 files does not transform the copyrighted work. Furthermore, the purpose and character of the use focuses on the commercial or non-commercial nature of the use. Ordinarily, Napster users would be required to buy the downloaded MP3 files but because of the Napster software system, they obtained them for free and thereby infringing upon the copyrighted musical works. The court further held that direct economic benefit is not required to demonstrate a commercial use. Instead, it was the frequent exploitative copying of copyrighted works, irrespective of whether the copies are offered for sale or not, which may constitute commercial use.

On the portion used, the court found that copying the entire work goes against the ground of fair use. However, under certain circumstances copying the entire work may still constitute fair use, for example, if the copied work does not conflict with the owner's exclusive rights protected by law and no effect of the use on the value of the copyrighted work.<sup>65</sup> In fact, whether the use is fair or not depends on the circumstances of each case. Moreover, the court held that the impact of the use on the marketability of the original work also determines the fair use.

## PROTECTION OF CREATIVITY VIS-AVIS PUBLIC INTEREST

There is a debate on the protection of owners of copyrighted works and fair users. On the one hand, literature indicates that most people believe copyright law is unjust, for it restricts the public from accessing knowledge and that the costs and royalties charged for using these works are too high. To them, copyright law is against the public interests.<sup>66</sup> Therefore, as Marjorie and Brian argue, the infringers break the copyright law hoping that massive infringement will move the authorities to amend the law to suit their needs. However, this article contends that infringement of copyrighted work through the internet is a thievery like any other theft. The perpetrators do that knowing what they are doing is wrong or because of easy accessibility of the said works through the internet or lack of strict rules against this infringement. Thus, believing that massive infringement can easily force the authorities to amend the copyright laws to suit their needs may hardly be defended. They feel more pleasure than pain like any other criminal. This defence on the part of infringers shows how critical the fight against digital infringement of copyrighted works is.

On the other hand, the opponents of this infringement rightly argue that the copyright law aims at protecting the creativity of owners of these products so that they can see the paybacks from their labour. The main reason of this protection being that the copyright law creates an incentive to the owners of copyrighted products for their creativity and improves competitiveness.<sup>67</sup> It would be unfair to allow the commercial use of these products without the consent of the owners on the grounds of public interests. Any tolerance may not go beyond the non-commercial use of the copyrighted products, for example, for education purposes in universities and other institutions. However, even non-commercial users of copyrighted works are not without limits. This limitation should stave off unfair exploitation of one's creativity as was upheld in *Sony Corporation of America v. Universal City Studios, Inc.* (supra). In this case, the issue was whether unauthorised home videotaping of television broadcasts for non-commercial "time-shifting" purposes amounted to fair use. On this issue, the court ruled:

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<sup>65</sup> *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 [1984], p. 450.

<sup>66</sup> Shaw and Shaw, *op cit.*, pp. 21-22.

<sup>67</sup> Bainbridge, *op cit.*, p. 16.

The purpose of copyright is to create incentives for creative effort. Even copying for non-commercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. However, a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such non-commercial uses would merely inhibit access to ideas without any countervailing benefit. Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, non-commercial uses are a different matter.

The court further ruled:

A challenge to a non-commercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defence against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a non-commercial purpose, the likelihood must be demonstrated.

The argument here is that the law should strike a balance between these two sides. The fact that the costs and royalties charged are too exorbitant cannot justify infringement, for nothing goes for nothing. However, to avoid monopoly of this industry, the protection should not be unlimited. For example, the law should clearly state the criteria that show fair use of the original copyrighted work in a transformative way. This leeway intends to encourage the creation of other copyrighted works out of creativity.

Therefore, determining the fair use of the original work requires considering factors such as whether the purpose and character of the use is of commercial value or not and whether it creates potentially harm the market for the original work.

## PROTECTION OF COPYRIGHTED WORKS IN TANZANIA

In Tanzania, the protection of IPRs stems from the Constitution of the United Republic of Tanzania, 1977.<sup>68</sup> Under the Constitution, it is the right of every person to own property and have his/her property held in accordance with the

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<sup>68</sup> Cap. 2 of Laws of Tanzania.

law protected.<sup>69</sup> The laws regulating the protection of copyrighted works in Tanzania are the Copyright and Neighbouring Act,<sup>70</sup> the Cyber Crimes Act<sup>71</sup> and the Media Services Act.<sup>72</sup>

The Copyright and Neighbouring Act, as the main copyright law in Tanzania, protects economic and moral rights of the owner of copyrighted musical works and films, among others.<sup>73</sup> The copyrighted works covered by the Act include books, pamphlets and other writings such as computer programmes.<sup>74</sup> More relevant to this article, the Act recognises the protection of musical works such as vocal and instrumental music, whether they include the accompanying lyrics or not<sup>75</sup> and other audio-visual works.<sup>76</sup> The artists have exclusive rights to carry out or to authorize the reproduction, distribution or rental of the original or copy of an audio-visual work, a work embodied in a sound recording, a computer programme, a database, or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned.

Similarly, the owners enjoy the right to carry out or authorise public exhibition, translation, adaptation, public performance, broadcasting, communication to the public and importation of copies of the work.<sup>77</sup> As in the case of other properties, the author or co-author of audio-visual works owns the rights protected in their works.<sup>78</sup> As already noted in this article, copyright protects only the expression of an idea,<sup>79</sup> as such, owners of copyrighted works do exercise the freedom of expression guaranteed by the constitution.<sup>80</sup>

Moreover, the law allows the author or other owner of the copyrighted work to grant non-exclusive or exclusive licences to others to carry out, or authorise the carrying out of certain specified acts covered by his/her or its economic rights.<sup>81</sup> Whereas a non-exclusive license entitles the licensee to carry out the act concerned concurrently with the author or other owner of copyright and concurrently with any other possible non-exclusive licensees, an exclusive license entitles the licensee to carry out the act concerned to the exclusion of all others, including the author or the other owner of the

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<sup>69</sup> *Ibid*, Article 24(1).

<sup>70</sup> Cap. 218. R.E. 2002.

<sup>71</sup> The Cyber Crimes Act, 2015.

<sup>72</sup> The Media Services Act, 2016.

<sup>73</sup> Section 8 of the Copyright and Neighboring Act, Cap. 218. R.E. 2002.

<sup>74</sup> *Ibid*, section 5(2) (a).

<sup>75</sup> *Ibid*, section 5(2)(d)

<sup>76</sup> *Ibid*, section 5(2) (e).

<sup>77</sup> *Ibid*, section 9.

<sup>78</sup> *Ibid*, section 15.

<sup>79</sup> See footnote No. 10 of this Article.

<sup>80</sup> Article 18 of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 of Laws of Tanzania.

<sup>81</sup> *Ibid*, section 17(1).

copyright.<sup>82</sup> The exclusive nature of a license may be determined either by the actual words of a licence or prevailing circumstances.<sup>83</sup>

This protection notwithstanding, the law stipulates circumstances under which using a protected work, either in the original or in translation, is permissible without the author's consent and the obligation to pay remuneration for the use of the work.<sup>84</sup> In this regard, the works must be used in ways compatible with fair practices. For example, the published works except computer programmes may be produced, adapted, transformed without the consent of the author. However, the use should not unreasonably prejudice the legitimate interest of the author.<sup>85</sup> It is also allowable to reproduce a work of art in an audio-visual or video recording and communicate the same to the public if the said works are permanently located in a place where the public can view them.<sup>86</sup>

Similarly, the Tanzania Cyber Crimes Act contains some provisions that address the issue of the violation of IPRs. For example, it prohibits the use of a computer system with intent to violate IPRs protected under any written law.<sup>87</sup> Therefore, it prohibits the violation of the rights protected under the Copyright and Neighbouring Act, among other written laws. Moreover, it categorises the infringement into two categories, that is, infringement on commercial and non-commercial basis.<sup>88</sup> Both categories of infringements are punishable under this law.

The Media Services Act, on the other hand, governs some issues pertaining to IPRs protection under cyberspace. Under the Act, a media includes online platforms.<sup>89</sup> The Act provides for ownership, rights and obligations of the media houses and journalists. The rights and freedoms provided include freedom to collect, process and edit information in accordance with professional ethics governing journalists as well as freedom to publish or broadcast news.<sup>90</sup> In executing their duties, all media houses are obliged to ensure that the information issued does not infringe upon lawful commercial interests, including IPRs of the information holder or a third party from whom information was obtained.<sup>91</sup>

This analysis of the copyright legal framework in Tanzania indicates that the copyright legal framework falls short of copyright protection under

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<sup>82</sup> *Ibid*, section 17(2).

<sup>83</sup> *Ibid*, section 17(4).

<sup>84</sup> *Ibid* 12(1).

<sup>85</sup> *Ibid*, section 12(2) (a).

<sup>86</sup> *Ibid*, section 12(6).

<sup>87</sup> *Ibid*, section 24(1).

<sup>88</sup> *Ibid*, section 24(2).

<sup>89</sup> Section 3 of the Media Services Act, 2016.

<sup>90</sup> *Ibid*, section 7(1).

<sup>91</sup> *Ibid*, section 7(3) (g).

cyberspace. On the one hand, the Copyright and Neighbouring Act focuses on the offline infringement of copyrighted works including films and musical works. Although the law was enacted after the conclusion of the WIPO internet Treaties, it contains no provision addressing the digital infringement of copyrighted works along the lines of the WIPO internet treaties. In fact, the Act only protects computer programmes and databases<sup>92</sup> and not the artistic works, which are infringed using the computer programmes or software such as MP3.

On the surface, the Cyber Crimes Act may seem to fill the legal gap in the Tanzania's copyright legal framework when it comes to copyright infringements associated with cyberspace; however, the gap remains uncovered. To begin with, the law does not define the digital infringement. Instead, it only addresses the use of computer system to cause infringement. Second, it does not contemplate the fair use of a copyrighted work in a transformative way. For example, it does not recognise the use of a copyrighted work for educational purposes or using the work when permanently placed in a certain site for the public to access. What it does is spell out punishment for every use of a copyrighted work in cyberspace. Yet, punishing the use of the copyrighted work on the non-commercial basis sounds absurd and unfair to the public, for it merely inhibits access to ideas without any countervailing benefit.<sup>93</sup>

As indicated earlier, the copyright law creates a balance between the protection of creativity by providing incentives to the owners and avoiding monopoly of the work.<sup>94</sup> The WIPO internet treaties also maintain a balance between the rights of intellectual property owners and the public interest in using others people's creativity.<sup>95</sup> As such, the Tanzania law should strive to avoid the infringement of economic rights of the owner of copyrighted work by prohibiting commercial use of the work. As was held in *Sony Corporation of America v. Universal City Studios, (supra) Inc.*, a challenge to a non-commercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. The Tanzanian Cyber Crimes Act does not address this issue.

Similarly, the Media Services Act fails to address this challenge. Although the Act requires the media house to issue information that does not infringe upon the IPRs, it does not address the circumstances where the

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<sup>92</sup> *Ibid*, section 5.

<sup>93</sup> *Sony Corporation of America v. Universal City Studios, Inc.* 464 U.S. 417 [1984].

<sup>94</sup> See footnote 12 of this Article.

<sup>95</sup> See Jerome H. Reichman, et al., "A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works", *Berkeley Technology Law Journal* 22(3), 981-1060, p. 982.

media house and journalists do not issue IPRs infringing information but rather facilitate the infringement of copyrighted works by providing services online through which the infringement occurs, as was the case with *Napster* (supra).

This situation requires a legal framework that adequately covers copyright protection under digital environment, because the works uploaded onto the internet become easily accessible to everyone who can ably use the internet. Fighting the digital infringement of copyrighted musical works and films requires affirmative measures that can determine which works are in the public domain whose use does not amount to infringement.

Besides the infringement by the online service providers, telecommunication companies are also implicated in the infringement. Telecommunication companies, particularly in Tanzania use musical works as caller tones in their customers' phones. The practice is that, a song is used to entertain the dialler but the recipient of the call covers all the charges for such a service. Moreover, telecommunication companies use the same arrangement to infringe upon the copyrighted musical works without a license or any authorisation from the owners of the works. This has raised the copyright issues in the music industry in Tanzania.

Some musical artists in Tanzania have opposed this practice by filling cases in the courts of law on the infringement of their copyrighted musical works. In a recent case of *MIC (T) Ltd. v. Hamisi Mwinyijuma, Ambwene Yesaya and Cellulant Tanzania Ltd.*,<sup>96</sup> the respondents are musical artists in Tanzania popularly known as Mwana FA and AY, respectively, and the appellants are telecommunication companies doing business in the country.

In the court of the first instance, the plaintiffs claimed that on different occasions, the defendant used their songs namely *Usije mjini* and *Dakika moja* as caller tones to its subscribers without the plaintiffs' consent, thereby infringing upon their rights. The plaintiffs further claimed that since the release of their songs, they had never agreed with any person over the use of their copyrighted works as caller tones.

Apart from the specific, general damages and other reliefs, the plaintiff artists had the following pleas. First, the declaration that the defendant's act over the plaintiffs' registered joint authorship musical work is illegal and infringes their copyright and neighbouring rights to which civil remedies are applicable. Second, an injunction restraining the defendant, its agents and workmen from further infringements save for times only when permitted by the plaintiffs. During the hearing of the case, the main issue was whether the defendant infringed upon the plaintiffs' rights over their joint musical work.

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<sup>96</sup> Civil Appeal No. 64 of 2016, High Court of Tanzania at Dar es Salaam (unreported). 16

The defendant applied for third party notice against Cellulant Tanzania Ltd from whom the defendant had the right of indemnity. After issuing such third party notice, the third party disputed the defendant's right of indemnity against it. The third party, Cellulant Tanzania Ltd., claimed to have procured the songs from another party, Sony Music Entertainment Africans (Ptn) Ltd. Therefore, in case the defendant is found liable, the indemnity right claimed should be borne by Sony Music Entertainment Africans (Ptn) Ltd. The court ruled in favour of and granted damages to the plaintiffs in view of section 36 (1), (5) (b) of the Copyright and Neighbouring Act, 1999.

After the decision of the District court, the defendant appealed against the verdict in the High Court of Tanzania alleging, among others, that the court had no jurisdiction, no infringement had been proven to occur and that the court decided the matter without making any findings on the third party proceedings before it. Notwithstanding these grounds of appeal, the High Court dismissed the appeal, for it was preferred contrary to mandatory provisions of law.

Irrespective of a ruling from the court, this case exposes the real situation pertaining to infringement of copyrighted musical works in Tanzania. It reveals some awareness of the owners of musical works and films regarding the protection of their works against infringement. The case further serves as a wakeup call to other artists that they can approach the courts of law and enforce their rights.

## CONCLUSION AND RECOMMENDATIONS

The article focused on the protection of copyrighted works, particularly musical works and films against digital infringement. It has specifically looked at the legal challenges in addressing infringement of copyrighted works in cyberspace. It has noted that although the use of the internet simplifies the way people conduct business including marketing of the goods and services online, the technological advancement has created conditions that pose challenges that underscore the increased value of copyright law effectively covering cyberspace as well. Under cyberspace, members of the public can access materials posted online regardless of whether the posted or uploaded materials onto the internet are copyrighted or not.

The challenge brought about by technology with regard to copyright protection is the digital infringement of the copyrighted materials. These technological challenges require the legal framework as a necessary tool. At the international level, the international community, through WIPO, came up with WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, 1996. These two treaties address the issue of copyright protection in cyberspace. They provide for moral and economic rights of the owners of copyrighted musical and films, among others. These treaties also vest owners

with the rights to reproduce, distribute or authorise the reproduction and distribution of their works. Furthermore, the treaties require the contracting states to provide legal protection and effective legal remedies against the infringers of the copyrighted works through internet.

At the domestic level, the Tanzania legal framework addresses the protection of copyrighted works. However, the framework does not adequately address the infringement of copyrighted works particularly films and musical works committed in cyberspace. In fact, the Copyright and Neighbouring Act, 1999 only addresses the offline infringement of copyrighted works. As supplements, the Cyber Crimes Act, 2015 and Media Services Act, 2016 were enacted. Nevertheless, the new laws fail to address adequately the digital infringement of copyrighted works.

Based on the discussion and conclusion made in this work, the following recommendations are worth making. The government, as a state organ, and COSOTA in its capacity as a government agency overseeing the operation of the music and film industries in Tanzania should work towards ensuring that the copyright law serves the interest of the society. Thus, it is imperative to change or amend the law to cope with the changes in ways of life due to technological developments that come with not only benefits but also challenges. The law in Tanzania should be amended to address adequately ways through which copyright materials are infringed upon in cyberspace. The law should address the issue of the connection between internet service providers and copyright infringers. As such, the law must show the criteria of contributory copyright infringement and vicarious copyright liability. This should go together with effective and adequate legal remedies to those whose works are infringed upon online.

In addition, the government should consider signing and ratifying the WIPO internet treaties for the protection of copyrighted works against digital infringement. After all, signing and ratifying a treaty relate with sovereignty. As cyberspace does not know boundaries, keeping the digital infringement of copyrighted works abreast may not work in favour of the owners and the government itself, for substantial revenue is lost. Furthermore, the government through COSOTA should provide training programmes aimed at educating the members of the creative industry such as singers and actors on the protection of their works. The training should raise awareness among the owners of the musical works and films on the importance of their creations as an investment for both individual and collective good.

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