Copyright Law and Its Use as Property: Lessons for the Creative Arts Sector in Tanzania

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Abstract

Copyright is one class of Intellectual Property that is legally recognised and protected in Tanzania. This protection is anchored in both Tanzania's international commitments and the country's domestic laws, which, however, remain hardly known in the creative industry and innovative sector of the country. The international protection of copyrights is also enshrined in the WIPO Copyright Treaty (WCT), 1996, WIPO Performances and Phonograms Treaty (WPPT), 1996, the Berne Convention for the Protection of Artistic and Literary Works, 1886 and the Treaty Establishing the East African Community, 1999. At the domestic level, protection is guaranteed by the Constitution of the United Republic of Tanzania, 1977, the Cyber Crimes Act, 2015 and the Copyright and Neighbouring Rights Act, 1999 as well as the attendant regulations made under these laws. Lately in Tanzania, there have been growing concerns among authors, innovators and the general public about the real economic significance of these copyright laws and regulations to the authors' welfare and the national economy at large. This article argues that these concerns are a direct consequence of factors such as lack of requisite legal knowledge on the part of most artists on the economics inherent in dealing with copyright properties, lack of a litigation culture in cases of infringements and the complex nature of copyright infringements in the digital environment, including online piracy. Against this backdrop, this article serves as an "eye-opener" to those in the creative arts industry to enable them to understand the basics of copyright law so that they can benefit from their works. It also seeks to serve as "mind provoker" to other scholars interested in this subject matter and wish to further write on the subject matter or on other branches of Intellectual Property.

Introduction

The Cyber Crimes Act, 2015[1] provides for the meaning of the word "property" in the context in which it is used in this article. It defines property as "property of any kind, whether movable or immovable, tangible or intangible". The same Act defines intellectual property as the rights accrued or related to copyright, patent, trademark and any other related matters. These two definitions show that intellect creations fall within the definition of property. This issue will become more apparent in this article through our discussion on the qualifications of copyrightability of any work of art.

Intellectual Property Rights are customarily divided into two major groups. These comprise copyrights and rights related to copyrights and Industrial Property Rights[2]. Copyrights, upon which this article is entirely based, protect ideas expressed in a creative and tangible way, for instance literary, artistic and musical expressions[3]. Copyright is owned upon creation and the creation must be one that involves creativity by an author not merely efforts or sweat of brow[4].

1 Act No. 4 of 2015, section 3.

2 Mwaipopo, A.R., (2008) *Intellectual Property Rights and the Regulation of Access and Benefit Sharing of Genetic Resources in Mainland Tanzania*, University of Dar es Salaam (PhD Thesis), at p. 61.

3 Ibid.

4 Mwakaje, S.J. (2011) *Regulatory Framework of Intellectual Property Products: The Case of University Research and the Patents Law in Tanzania, University of Dar es Salaam* (PhD Thesis). He cites the famous US case of *Feist Publications v. Rural Telephone Service Co. 499 U.S. 340 (1991)* where the court held that information alone without a minimum of original creativity cannot be protected by Copyright. The court thereby overturned the doctrine of 'sweat of the brow' that provided that one would gain rights through simple diligence during the creation of the work such as data base or a directory.

Copyright as Property: Philosophical Perspectives

The rationale behind the Intellectual Property Law is the acknowledgement that scientific work, creations of mind and innovations must be encouraged, promoted and protected through an organised reward mechanism so as to achieve scientific and technological development. The overwhelming aim behind this regulation is to encourage creative expressions.[5] In this regard, Mwaipopo[6] notes that safeguarding Intellectual Property Rights or IPRs is justified by different kinds of theories of property. These range from utilitarianism and natural rights theories or justice theories that can be traced to as far back as the fourth century B.C. to Aristotle. From the natural right theories stemming from Locke the argument is that unpleasantness of labour should be rewarded with property. From the Hegelian perspective, the argument is that an idea belongs to the creator because it is the manifestation of his or her personality or self. According to Mwaipopo, the utilitarian approach to intellectual property rights protection hinges on instrumentalist view of IPRs. Under this theory, legal protection for products of human intellectual efforts and ingenuity is granted not because of a moral commitment to compensating creators or inventors but rather because the products they create enrich a society's culture and knowledge and, therefore, increases its welfare.

Such rationale of and the manner of copyright recognition and protection is nowhere better stated than in section 2 of Tanzania's Copyright and Neighbouring Rights Act, 1999[7]. This section provides as follows:

> This Act protects the moral and economic interests of authors relating to the works by recognising exclusive author's rights and providing for just and reasonable conditions of lawful use of author's work and regulated access to them.

The need for protecting copyrights is also reflected in Article 15 (1) (a) - (c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966. This article provides that "everyone has a right to take part in cultural life, enjoy the benefit of scientific progress and its application" in addition to "recognising the right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author"[8].

Works Protected by Copyright

It is to be noted that not all literary, artistic or musical works are copyrightable by virtue of the process of innovating or creating them. Copyright protects only those works that have creativity, as mere efforts or "sweat brow"[9] are not protected by copyrights. The hardships, costs and time involved in the creation of the work are irrelevant when it comes to the copyrightability of the work[10]. The work must involve creativity and, therefore, must be original. Indeed, the *sine qua non* of copyright is originality. To establish that a certain work qualifies for copyrighting, one needs to consider labour, judgement and skill that go into creating it[11]. Some measure of skill or judgement should have been expended in the production of the work for it to warrant copyright protection[12]. In the words of Peterson J. in the case of *University of London Press Ltd., v. University Tutorial Press Ltd*[13], the work must not be copied from another work. It must originate from the author seeking such copyright.

The notion of creativity was discussed and elaborated in the case of Feist[14]. The brief facts of the case are useful here. Feist had copied information from Rural's telephone listings. However, Rural refused to licence the information and sued for copyright infringement. The court partly ruled that information contained in Rural's phone directory was not copyrightable and, therefore, there was no infringement. The court further ruled that Rural's directory was nothing more than an alphabetic list of all subscribers to its service, which it compiled under the legal requirement without any creative expression being involved. The fact that Rural spent considerable time and money collecting the data was dismissed as irrelevant for purposes of the

5 Ngeri, T.O;(2015); Promotion and Protection of Intellectual Property Rights in Kenya; University of Dar es Salaam (LLM Dissertation) at pp.30-31.
6 Mwaipopo, op. cit, pp68-69.
7 Cap 218 (R.E 2002).
8 See also Article 103 (1) (i) of the Treaty Establishing the East African Community, 1999 and Article 24 of the Con-stitution of the United Republic of Tanzania, 1977 (as amend-ed).
9 Feist Case, op. cit.
10 Ibid.
11 Bainbridge, L.D., (7th Ed.) *Intellectual Property*, Ashford Colour Press, Gosport, 2009 at p.44.
12 British Leyland Motor Corp. Ltd v. Armstrong Patents Co. Ltd [1986]2 WLR 400.
13 [1916]2 Ch. 601.
14 See note 4.

claim under copyright law.

However, we should point out that the required standard to prove the existence of creativity is extremely low. After all, creativity does not involve the expression of idea being novel. Instead, it needs to possess a spark or minimal degree of creativity for copyright to be enforced. Justice O'Connor[15] had the following to say on the level of creativity needed to establish copyright protection:

> Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another publication to aid in preparing a competing work so long as the competing work does not feature the same selection and arrangement.

The ideas in the work do not necessarily need to be original but the form of expression must be the original expression of the author. This creativity can be in the choice of words, musical notes, colours and shapes. The creativity may, thus, differ from one work of art to another.

It is not stretching a point to argue that if there is more than one author claiming authorship on more than one substantially identical works, it is not necessary that there be automatic infringement. The immediate question to pose, in such circumstances, is whether either author copied from the other. If it is determined that each author applied his own skills and judgement in expressing his ideas without copying from the other, then the said similarity of the works will be coincidental and each author will continue to be the bearer of the copyright pertaining to his or her work. This is in line with copyright principle that copyright is all about creativity/originality and not uniqueness of the work. The question of creativity is proved primarily on the basis of the facts submitted rather than the law.

Moreover, the work must be affixed in some material form so as to attain a certain level of permanence in a bid to qualify for copyrightability, [16]. For instance, the work must be written or printed, in Compact Disc, DVD, VHS, and VCD form[17]. The requirement of affixation as the prerequisite for the copyright protection hinges on the very rationale of copyright protection. The rationale requires that that, although creators should be rewarded for their work done, their creations must also be readily available for public consumption. The works must benefit society. Therefore, unexpressed ideas, those which remain in the minds of authors, irrespective of their creativeness and importance, do not fall in the purview of copyright law. Once the work meets these two qualifications of originality and affixation, then the work can be protected under copyright regardless of its form of expression, the quality and purpose for which it was created[18].

15 Ibid.
16 Article 1(2) of the Berne Convention.
17 www.cosota-tz.org/ (Retrieved on 27th/07/2017).

Registration of Copyright

As a general rule, the protection of copyright does not need any sort of formality including the requirement of registration. This is the phraseology that dominates international instruments and local enactments. According to the Berne Convention[19] the enjoyment and exercise of copyrights is not subject to any formality. The Copyright and Neighbouring Rights Act, 1999[20] also reiterates that copyright subsists by the sole fact of creation of the work.

Also, according to the World Intellectual Property Organisation (WIPO)[21], in the majority of countries copyright protection is obtained automatically without the need for registration or other formalities. Nevertheless, many countries have systems in place to allow for voluntary registration of works. Such voluntary registration systems can help resolve disputes over ownership or creation, as well as facilitate financial transactions, sales and the assignment and/or transfer of rights.

Hence, the registration of copyright is optional or voluntary and the purposes of copyright registration are as laid out in the preceding paragraph. In Tanzania, there is also in place the mechanism of copyright registration. This registration exercise is monitored by the Copyright Society of Tanzania (COSOTA)[22] and there is no fee for registration[23]. Apart from the purposes of registration laid down by the WIPO[24],

18 Section 5(3) of Cap 218 (R.E 2002).
19 Article 5 (2) the Berne Convention,
20 Section 5(2) Neighbour Rights Act, 1999.
21 www.wipo/portal/en/index.html (Retrieved on 19th July, 2016).
22 COSOTA is established under section 46 Cap. 218 (R.E 2002), its mandates are provided for by section 47. It is responsible for the protection and promotion of interests of authors, producers and translators, and maintenance of registers of registers of works, productions and associations as well as giving evidence of ownership in disputes or infringements.
23 Regulation 6 of the Copyright and Neighbouring Rights (Registration of Members and their Works), Regulations, 2005.
24 See note 21.

the registration of copyrights with COSOTA serves another pivotal purpose of ensuring collective and comprehensive copyright protection[25]. Although the work COSOTA has been undertaking since its inception may not be that of a magnitude to makes headlines, its efforts cannot be equated to the last kicks of a dying donkey. The Society has been firm in fighting for its members' rights, especially artists. In particular, it has been fighting against copyright piracy of artistic works. The cry of the Society has been that all works be distributed and sold in a traceable manner and royalties be paid to the artists. But its efforts face challenges as copyright piracy is escalating to alarming levels especially in cities and large towns such as Dar es Salaam. The escalation of piracy is happening at the economic detriment of the creators of the works and tax collection on the part of the government.

Exemption of Works from Copyright Protection

Under copyright law, there are some works which do not attract copyright protection. The entry point in this regard is Article 2 of the WIPO Treaty[26] which provides that copyright protection extends to the expression of ideas and not to ideas, procedures and methods of operation or mathematical concepts. The general principle in copyright law is that copyright protects the expression of ideas and not just mere ideas going to it or with functionally or end product that results[27]. The exemption of such works from copyright protection is that the protection of IPRs has always been a tag-of-war between economic benefits of the creators and public interests to use such works.

Therefore, works excluded from protection under this category, say formulas, procedures and methods, are considered to be so pivotal in public interests and for development that their strict protection from free public access and use may jeopardise the general public at the benefit of a single or few creators, whose consequence is undesirable.

Rights Protected Under Copyright Law

The principle of any kind of property is that the owner may use it as he wishes, and that nobody else can lawfully use it without his authorisation. This general rule is, however, subject to the legally-recognised rights and interests of other members of the society. Copyright, therefore, being a property also operates around this long established property principle.

Copyright law is designed for the purpose of providing incentives for the creation of new works for public use. In exchange with the creation of new works, the government gives the author a limited monopoly over that work/creation for a finite period, after which it can be used and enjoyed freely by the general public[28]. During the period of protection, the author gets a number of rights which will be detailed shortly.

Copyright law protects two kinds of rights, namely, pecuniary and non-pecuniary rights. Pecuniary rights are those of the owner/author that allow him or her to get financial returns from his or her works. These rights are statutorily known as exclusive economic rights[29]. As for the latter, they are rights of attribute and integrity that keep the work from the public domain. These non-pecuniary rights are statutorily known as moral rights[30]. Due to the focus of this article, these rights (moral rights) shall not be detailed save for occasional references and comparisons.

The list of economic rights granted to the author is not such short. It includes carrying out or authorising reproduction of the work, distribution of the work, renting out the work, public exhibition, translation, public performance, broadcasting, and importation of copies of the work[31]. Moreover, such exclusive economic rights are independent as the exercise or authorisation of one right does not in any way include the other right[32]. Therefore, one artistic or literary work attracts a series of economic arrangements, whose the legal framework intends to and must protect.

25 Section 46 of Cap 218 (R.E 2002) and Regulation 5 of the Copyright and Neighbouring Rights (Production and Dis-tribution of Sound and Audiovisual Recordings) Regulations, 2006.

26 WIPO Copyright Treaty, 1996, popularly known as the WCT.

27 *Cyprotex Discovery v. University of Sheffield [2004] RPC 68*, see also section 7(1) of Cap 218 (R.E 2002) which excludes laws, decisions of courts, news of the day published, concepts, principles, discoveries or mere data.

28 Under Article 7(1) of the Berne Convention and section 14 of Cap 218 (R.E 2002), copyright is protected during the life of the author and for fifty years after his death. After the fifty years have elapsed, the work falls within the public domain for free use.

29 Article 8 of the Berne Convention and section 8 of Cap 218 (R.E 2002).

30 Section 11 of Cap 218 (R.E 2002).

31 Section 9(1) Cap 218 (R.E 2002).

32 Ibid, section 16 (3).

It is also worth noting that from a copyright the author may decide to manoeuvre such a copyright and obtain other copyrights from that original work. These subsequent works will also attract protection as the originals without prejudicing the copyright in the original work[33]. These are statutorily known as derivative works. They include translations, adaptations and arrangement. For example, the author of the book may opt to make a film in respect of that book. In this case, both the book and the film will be equally protected and economic rights therein may be exploited independently in respect of each work. Another relevant example is the current mushrooming tendency in the world and Tanzania in particular, where out of their "hit songs" musicians due to popular demand, business target or any other good cause create a "Remix"[34]. The economic rights accruing from such a "Remix" will be independently exploited and equally protected just like the original "hit song".

Economic arrangements for copyrighted works

Economic exploitation of the copyrights largely entails the author authorising third parties, who are otherwise excluded, to intermingle with his copyrighted work. Such authorisation may take a number of forms. The common ones include licensing, assignment and newly-introduced renting. Under the licensing arrangement, the author has grants to other people with the licence to carry out specific acts in respect of the work for a specific time.[35] There are two types of licences namely, exclusive licences and non-exclusive licences. The exclusive licence is the one granted to a licensee that allows him or her to perform the act subject of the licence freely without the interference of any other person including the author himself. In this situation, the licensee has full powers in respect of the work as if he or she is the owner. The licensee also has the right of standing in the dispute relating to the work.[36] For a non-exclusive right, the author is not excluded from control of the work. The licensee will carry out the act concurrently with the author and other non-exclusive licensees, if any.[37]

It is important to point out that for the contract of the licence to be valid, it must be written and duly signed by the parties and the right granted under the licence must be expressly stated[38]. Only economic rights explicitly mentioned in the contract shall be considered part of the licence[39]. These provisions are designed to protect the economic interests of the author in the sense that they ensure that the licence agreement gives with certainty room to the author in the event of subsequent dealings. The requirement of specification of the licensed right is equally vital as it is in line with the argument that each right exists independent of the other and its exploitation calls for an independent arrangement. For instance, artists may grant independent licences for the performance and public exhibition of their works.

Under assignment the owner transfers the right to authorise or prohibit certain acts covered by one, several or all rights under copyright. An assignment is a transfer of a property right. So if all rights are assigned, the person to whom the rights are assigned becomes the new owner of the copyright. The authorship will be assigned together with the work, in other words.

Renting[40] is another form of economic dealing with copyrighted works has increasingly attained wide recognition since its inception in the WCT. This basically entails the right by the author to authorise the rental of originals or copies of certain categories of works as musical works in sound recordings, audio-visual works and computer programmes. The rental right became necessary to prevent the abuse of the copyright owner's right to production because technological advancements have made it easy for rental shop customers to copy such work at the exclusion of the authors.

Copyright Infringement and the Concept of 'Free Use'

Copyright infringement is a primary result of the use or authorisation of the use of the copyrighted work without the consent of the author. Any exclusive economic right done in respect to the work by another person other than the author and without the latter's consent, generally constitutes copyright infringement and attracts legal action, as the consequence[41].

33 Article 2 (3) of the Berne Convention and section 6 (1) of Cap 218 (R.E 2002).

34 In this context 'Remix' refers to the second version of the original song.

35 Under section 17 (7) of Cap. 218 (R.E 2002), the li-cense expires 15 years after the contract was concluded.

36 Ibid, section 17 (4).

37 Ibid, section 17 (2).

38 Ibid, section 17 (8).

39 Ibid, section 17(6).

40 Article 7 of the WCT.

41 Sections 36 and 42 of Cap 218 (R.E 2002).

Copyright properties, apart from economically and morally benefiting the creators or authors, must also benefit the general public. It is in this context that the law permits certain activities pertaining to the copyrighted works to be carried out without the consent of the author or obligation to pay remuneration for the use of the work. In such cases, the concept of copyright infringement is muted. Therefore, the use of copyrighted work without the author's consent does not necessarily constitute copyright infringement because the copyright work falls within the public domain[42] which justifies the free use of the copyrighted work.[43] The activities classified as free use or fair use that attract no copyright infringement include the production, translation, adaptation, arrangement or other transformation of the work exclusively for the user's own personal private use, use of the work for teaching purposes (education), quotations and broadcasting[44]. For example, using parts of a song of an artist or photocopying a few pages in a book for teaching purposes is not a copyright infringement so long as it is done for the public good as opposed to personal commercial gain.

Despite allowing free use of the copyright properties in certain circumstances, the law restricts that liberty as such free use must meet certain qualifications. The Berne Convention[45] mandates that such use must be compatible with the fair practice and the extent of use should not exceed that justified by the purpose. Likewise, the Copyright and Neighbouring Rights Act, 1999[46] provides that such use must not unnecessarily prejudice the legitimate interests of the author and must be justified by the purpose. Therefore, it is clear that not every activity under the pretext of "free use", indeed, constitutes free use as there are limitations.

Despite the restrictions imposed on the free use of copyrighted works, neither the Berne Convention nor the Copyright and Neighbouring Rights Act offers a clear demarcation between free use and unfair or unjustified use. This missing link in both legal documents is pivotal and calls for clear definitions because the obvious defence of every copyright infringer, in case of legal action, will be the free use avenue. Thus, without any meaningful demarcation, it will result into jurisprudential confusion and the economic interests of authors and the nation will be hanging precariously at the crossroads. This challenge has been noted in the WIPO Copyright Treaty, 1996, which urges the Contracting Parties to address this matter as follows:

> Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author[47].

The gap in the law can be filled by the courts in Tanzania with the assistance of practices from other jurisdictions. For example, in the case of *A & M Records Inc. v. Napster Inc*[48] members of the music industry brought a law suit against Napster alleging copyright infringement. The alleged infringement was that the defendant (Napster) allowed multiple users who loaded their files onto their computers to connect to Napster (also known as peer-to-peer file sharing). Thereafter, people from any location accessed Napster on demand and uploaded and/or downloaded copyright protected sound recordings. Napster Inc. did not maintain a central computer system that stores and delivers content files. Instead, individual users employed Napster's software to find and locate files that were stored on the computers owned by other individuals who connect voluntarily to the Napster system. The defence of "free use" was invoked by the defendant. The court was called upon to determine one legal question of "Whether the actions of Napster and its users fit into any of the exceptions in the law from copyright liability".

In its detailed judgement, the court held that the "sharing" of copyrighted files did not amount to fair use and was not within the exceptions from and limitations on copyright infringement created by the Audio Home Recordings Act of 1992[49] or the Digital Millennium Copyright Act, 1998[50]. The court was also specific in concluding that the users of Napster violated the distribution right when they uploaded music files and violated the reproduction right when they downloaded the files as copies in their own computer systems.

42 Article 10 of the Berne Convention. In other jurisdictions, for example, in the US it is known as "fair use'.

43 Section 12 of Cap 218 (R.E 2002), the work will also fall under the purview of free use after its protection period has expired.

44 Ibid.

45 Article 10.

46 Section 12.

47 Article 10(1).

48 239.3d 1004 (9th Cir 2001).

49 Pub. L. No. 102, 106 Stat 4232.

50 Pub. L. No. 105-304, 112 Stat 2860.

Determining whether an activity is within fair use depends on an application and balancing of four factors as outlined in US laws: i) the purpose of the use; ii) The nature of the work being used; iii).The amount of the work used; iv) The effect of the use on the market or the value of the original work. The court analysed each factor as follows:

The Purpose of the Use

In relation to the purpose of the use, the court found that this factor does not favour fair use as the users of Napster stood to gain a "commercial" benefit. It was stated further that there was commercial use in the "repeated and exploitative copying" of the works, even if they were not offered for sale. In particular, the court found a commercial purpose in the repeated copying made to save the expense of purchasing authorised copies. Therefore, in determining whether the alleged infringement falls under the limits of free use, it is important for the analysis to determine whether the use is commercial or educational /non-profit. In all cases, the finding of a commercial purpose does outshine a finding of free use. The court also adopted a progressive and wide meaning of the term "economic purpose" to mean not only infringing upon copyrights for selling but also using unauthorised copyrights with the view to evading costs of obtaining the authorised copyrights.

The court also stated that to warrant the defence of fair use, the use of the work must be used "transformatively" and that in this case the uploading and downloading of music is not transformative. It cemented its point in that courts have been reluctant to find a fair use when an original work is merely retransmitted in a different medium, for example, from analogue to digital recordings or from a CD-ROM to an Mp3 file. The concept of "transformative use" in this context inquires whether the activities in some respect change the original work into a new work of new utility. For example, commenting on or excerpting from an existing text can create a new work that serves a new need and attract a new audience of users.

The nature of the Work

On the nature of the work, the court noted that because the more creative works receive greater protection than fact-based works and that, because musical compositions and recordings are "creative" in nature, this factor weighs against the fair use concept. The court gave no meaningful detail on how this factor operates and, probably, the finding on this ground was influenced by the conclusion of the first factor.

The Amount of work used

On the factor relating to the amount of the work used, the court stated that, the amount of the work used in the infringement allegation is also a determinative factor regarding whether the use falls within the ambits of fair use. It noted that there is no hard and fast rule for this factor; sometimes even copying the entire work may still satisfy the test of fair use.[51] In the Napster case the court found that Napster users engaged in "wholesale copying" of entire works, which weighed against fair use. It is unfortunate that the court never troubled to elaborate on what it meant by "wholesale copying". Nevertheless, logic dictates that it has something to do with commercial use/purpose as explained in the case of the first factor. Therefore, the two factors must be considered conjunctively.

The effect on the Market

On the issue of effect on the market,[52] the court held that the use of Napster results into at least two forms of harm to the music industry, the loss of sales of CDs and served as a heightened barrier to entry by the music industry into the market for electronic delivery of music. This factor is worth considering particularly with regard to copyright violation in the digital environment where unauthorised copies of a copyrighted work may be retrieved from the internet by millions of people in a relatively short time and, therefore, adversely foreclose potential markets of the work. Therefore, the wider the work spreads the more the concept of free use separates itself.

Apparent, the purpose of the use test—economic versus education/non-economic use— appears to be the most clear and applicable test. In the Napster case, the other three factors were not clearly favoured as the court heavily invoked the purpose of use test to determine whether the defence of free use was properly established for it to be permissible. This reveals that it is difficult to discuss the rest of the factors, that is, *effect on the market, amount of the work used* and *nature of the work,* independent

51 Sony Corp. of America v. Universal City Studios, Inc., 46 U.S 417 (1984), in which the US Supreme Court permitted individuals to record television programmes for viewing at their homes later.

52 Ibid, it was also held that the plaintiffs failed to demon-strate any likelihood of more than minimal harm to the poten-tial market for, or the value of their copyrighted work.

of the purpose of use test.

The Napster case is quite persuasive in Tanzania's legal Jurisprudence. Courts in Tanzania need to consider this decision when faced with options in adopting these tests. It is important that the law be amended to accommodate these tests.

Copyright Protection, Enforcement and the Digital Environment

Like the rest of the world, Tanzania is undergoing a wave of progress in digital development and application. This development has posed a big threat to the protection and enforcement of copyrights. The threat here is that authors' exclusive economic rights, in particular the right to reproduction and distribution, are running out of authors' control in favour of unauthorised third parties. This problem is complicated further by major loopholes in the relevant laws for copyright protection[53].

Also, information and communication technologies have radically changed the way works and services circulate. Consequently, there have been changes in the way people access and use protected works. They have made it possible for information to be communicated at high speed over wired or wireless networks practically everywhere and have allowed for the opportunity of simultaneous access by an unlimited number of individuals[54].

Digitisation and circulation of works over networks such as the internet means that low-cost, high-quality copies can be made quickly. These copies can also be sent to many other people around the world, irrespective of borders. Moreover, digital works are easily altered, or even falsified, which means that there are many potential threats to the moral rights of authors. Furthermore, the relationship between creators, society and the users of protected works has also changed considerably.

In direct reaction to these challenges, as early as 1996 two new International Treaties were signed under the aegis of WIPO. These are the WIPO Copyright Treaty (WCT), 1996[55] and the WIPO Performances and Phonograms Treaty (WPPT), 1996[56] which sought to deal with primary concerns of authors now operating in the digital environment. The treaties contain vital provisions protecting author's rights. For instance, they introduced the right for authors and the owners of related rights to authorise the making of their works available to the public by networks such as the internet[57]. The treaties also provide for the protection of technological measures used by copyright owners to prevent unauthorised access to their works or rights for the purposes of management systems.

There have been also regional and national efforts to address the authors' concerns in the digital environment with Tanzania following the queue. This is acknowledged by COSOTA's Chief Executive Officer (CEO) who is on record to have stated the following:

> Our key role is to identify those deficiencies and advocate to have them corrected. Some of its provisions must be amended in order to bring Tanzania in the line with its international treaty obligations as well
>
> as evolving international norms. As it is, it simply does not go far enough to protect creators and producers in the digital environment.[58]

The Copyright and Neighbouring Rights Act, 1999 has no direct provisions for management and control of online piracy of copyrights and other related illegal activities. However, the Cyber Crimes Act, 2015[59] in a way makes an attempt to fill this gap. For instance, section 24 of the Act provides, *inter alia*, thusly:

24 (1) A person shall not use a computer system to violate intellectual property rights protected under any written law.

(2) Any person who contravenes subsection (1) commits an offence and in case the infringement is on:

(a) Non-commercial basis, is liable to a fine of not less than five million shillings or to imprisonment for a term of not less than three years or both; or

(b) Commercial basis, is liable to a fine of not less than twenty million shillings or to imprisonment for a term of not less than five years or to both.

The Act, in many respects, is too general and does not adequately reflect the WCT and the WPPT standards. Although the Act also penalises non-commercial copyright infringement, it does not

53 See note 58, the Copyright and Neighbouring Rights Act has no direct provisions for the management and control of online piracy of copyrights and other related illegal activities.

54 http://www.accu.or.jp/appreb/10copyr/pdf_ws0605/c2_1pt.pdf (Retrieved on 3rd/August/2016).

55 It entered into force on March 6, 2002.

56 It entered into force on May 20, 2002.

57 Article 8 of the WCT and Articles 10& 14 of the WPPT.

58 Stated by Doreen Anthony, Copyright Society of Tanzania lawyer (now the C.E.O), at the sidelines of a workshop on 'The Solution to Intellectual Property Rights in Tanzania', in July, 2010 at Dar es Salaam.

59 Act No. 4 of 2015.

define what this kind of infringement entails. This concern needs to be addressed because most of the non-commercial use of copyright falls under the veil of the free use concept which does not attract penalty for infringement[60]. Unless it is clearly defined, two conclusions may be drawn. First, the provision intends to abolish the concept of free use, which would be retrogressive and unreasonable. Second, the phraseology of the provision was used out of context.

Copyrightinfringementinthedigitalenvironmentdoes not only threaten protection but also enforcement. It is a common ground that the infringement can be done simultaneously by an unlimited number of people from any location. The practical dilemma which arises is who is to be held accountable for the alleged infringement. This is because litigation against a vast number of individuals from unknown places is problematic and costly. Due to this practical challenge, the doctrine of "vicarious or contributory infringement" has been applied by courts to hold responsible software owners who allow or condone copyright infringement on their systems.

Vicarious or contributory infringement entails that the company or software owner is held liable for acts of its users. In the Napster case[61] discussed above, the court held Napster Inc. responsible for misdeeds of its users who uploaded and downloaded files without authorisation on the Napster software. This doctrine, therefore, assists authors and responsible organs to trace a single company which (or a person) who facilitates the infringement process.

Conclusions and Recommendations

This article has pointed out that copyright is a property and is available for disposal. From a copyright other series of copyrights can be generated. And each copyright attracts multiple economic rights which can be dealt with independently in accordance with each copyright. All of this takes place during the life time of the authors and then fifty years after his or her death. If properly administered, copyright is a form of wealth to the authors themselves and the nation in general. However, the proper administration and enforcement of copyright is not an overnight process; there a lot that needs to be done. Continuous mass education, more so in the artistic and literary industries, is a necessity. The job being done by COSOTA in this regard must be rejuvenated and multiplied and, of course, this is one of its statutory duties.[62] Education will also serve another purpose of reminding authors that the law confers upon them rights and that those rights are there to be enforced in any event of breach.

Also, the gaps in the law identified must be addressed to ensure an effective enabling legal environment is in place. The Copyright and Neighbouring Rights Act, 1999 certainly needs to be amended to address issues that have emerged in the digitalisation era and the challenges it engenders as directed by the WCT and WPPT to which Tanzania remains committed.

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60 See for example Sony Corp. of America v. Universal City Studios, Inc. 464 U.S417 (1984).

61 Napster case op. cit. See also the case of Sony Corp. of America v. Universal City Studios, Inc.464 U.S417 (1984) famously known as the 'Betamax case'.

62 See Section 47 of Cap 218 (R.E 2002) that obliges COSOTA to print, publish or circulate any information, report, periodical, books, pamphlet or any other material relating to copyright and rights of performers, producers of sound recordings and broadcasters.

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