Managing Copyright in Museums, Libraries & Archives
Ms. Faith Amatika, KECOBO’s legal counsel, giving a talk on copyright on Mtaani Radio 99.9 Fm.

Mr. Patrick Ongusi (right) of KECOBO welcomes Mr. John Katana a former KECOBO Board member to the Board’s booth during the 4th Annual Ongea! East Africa Music Summit, held at Sarit Centre.

KECOBO Executive Director, Mr. Edward Sigei during training on corporate governance for Directors of CMOS at Simba Lodge, Naivasha.
Managing Copyright in Museums, Libraries and Archives

By. Paul Kaindo

Museums, libraries, archives and similar cultural institutions play an invaluable role in preserving and providing access to the rich cultural heritage of our planet. By recording and making available the music, the arts, the writings, the knowledge and the traditions of indigenous communities, such institutions help to spread a broader understanding and respect for different cultures. These activities can however raise a number of Intellectual Property issues, especially in a digital environment. Managing copyright in such institutions is one of the most daunting tasks such institutions face.

Most copyright laws in the world including Kenya have provisions for museums, libraries and archives. Countries around the world approach use of copyright-protected materials by libraries, archives and museums differently. A 2017 WIPO examination and analysis of copyright exceptions applicable to libraries and archives from the copyright laws of all 191 countries of the World Intellectual Property Organization (WIPO) showed that 161 of these countries have at least one provision in their copyright statutes that explicitly applies to libraries or archives. This demonstrates the strong relationship between the copyright laws and cultural institutions. Indeed, the growing prevalence of these copyright statutes in domestic legislation suggests strongly that exceptions for libraries and archives are fundamental to the structure of copyright law throughout the world.

Of the 191 member states in WIPO, 28 have no library exception in their domestic copyright statutes, and two countries have no copyright statutes at all. The most common subjects of the library exceptions are the making of copies of works (usually single copies, and often of short works) for readers, researchers, and other library users, and the making of copies for preservation of materials in the collections or copies for replacement of works that have suffered damage or loss.

Special provisions on such use are referred to as limitations or exceptions because they limit the exclusive rights of copyright owners and exempt museums, libraries and archives from the general requirement of obtaining permission from copyright owners and paying them royalties for using their copyright-protected works. Such provisions form an essential part of copyright law particularly for librarians.

Generally, these provisions differ from country to country. In Kenya, Section 26(1) of the copyright Act provides that copyright in literary, musical or artistic work does not include the right to control the reproduction of a work by or under the direction or control of public libraries where the reproduction is in the public interest and no revenue is derived therefrom. Note that this provision applies to prescribed public libraries, non-commercial documentation centres, and scientific institutions and not private libraries. The reproduction must be in the public interest with no commercial exploitation. There are no explicit exemptions for circumvention of technological protection measures by libraries.

According to Section 26(1)I copyright in literary, musical or artistic work does not include the right to control the reproduction of a work by a broadcasting authority for purposes of preservation in the archives of...
a broadcasting authority as long as the work is not rebroadcasted without the consent of the owner. This exception only applies to broadcasting and it is not clear whether it ought to apply to reproduction by other institutions for purposes of preservation in archives of copyright works.

There are no express limitations or exemptions for museums in the copyright Act. The only mention of museums in the Act is under Section 23(5) which provides that works eligible for copyright and vested in the National Museums Board of Directors or the National Museums is conferred in perpetuity on the National Museums.

Under Section 4 of the Kenya National Museum and Heritage Act, the functions of the national museum are to; serve as a national repositories for things of scientific, cultural, technological and human interest; serve as places where research and dissemination of knowledge in all fields of scientific, cultural, technological and human interest may be undertaken; identify, protect, conserve and transmit the cultural and natural heritage of Kenya; and to promote cultural resources in the context of social and economic development.

It is clear that for these functions to be effectively performed, it is necessary to incorporate express copyright limitations and exemptions for museums.

Other than the typical copyright works, collection and reproduction of traditional cultural expressions (TCEs) and traditional knowledge (TK) by cultural institutions raise a specific set of IP issues. Some indigenous peoples and local communities are concerned that sometimes documenting and displaying a traditional song or a tribal symbol, for example, make them vulnerable to misappropriation and misuse. The very process of preservation of TCEs can trigger concerns about their lack of legal protection.

The perception of IP in museums in developing countries has been varied, with some addressing the issue in the context of providing broad access to documented heritage. With the advent of new technologies, museums in developing countries are facing challenges in managing and distributing their cultural heritage content, while still maintaining provenance, attribution and authority.

The traditional point of view of museums, no matter where they are located, has been that IP, in particular copyright, has inhibited their ability to carry out their mission and mandate. It is cultural institutions’ general view that the IP interests of third parties and lack of limitations and exemptions in their favour have prevented them from carrying out reproduction for preservation purposes, reproduction and distribution for educational purposes and reproduction and distribution as a means of providing access to collections.

The following types of copyright-protected assets are either held by or owned by cultural institutions as part of their collections:

- Photographic images of artefacts and artworks in museum collections;
- Audio recordings and publications;
- Audio-visual works;
- Multimedia productions whether on CD or available on the Internet;
- Publications, and educational material, whether in print or electronic; and
- Databases of information about collections.

As the guardians of history and supporters of researchers/users, museums, libraries, archives and similar cultural institutions require reasonable limitations to copyright law in preservation, cross-border use, reproduction for research, orphan works, technological protection measures and contractual overriding exceptions. This will ensure that they fulfil their public and cross-border service mission in a globalised world.

There are current discussions around libraries and archives at the World Intellectual Property Organization’s (WIPO) Standing Committee on Copyright and Related Rights (SCCR) on exceptions and limitations to copyright for libraries and archives.

Kenya ought to keep up with technology. The law on these exceptions should change to make our copyright system better suited to the digital age. These changes should affect how museums, libraries, archives and other similar institutions can allow use of content like books, music, films and photographs in the interest of the public. The exception and limitation provisions play an important role in facilitating cultural institutions’ services and serving private and public interests in copyright law.
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libraries and archives play an important role in the dissemination of information and offer access to teaching and learning materials. Museums contain collections of photographs, sound-recordings, films and manuscripts that document indigenous people and traditional communities’ lives, cultural expressions and knowledge systems. Such records and works help in spreading a broader understanding and respect for different cultures.

Ownership of works in institutions such as public libraries can be attributed to specific authors. It is essential that libraries protect copyright to ensure that authors are able to gain maximum benefits for their work by shielding them against unfair exploitation and piracy. For works in the National Archives, ‘The Public Archives and Documentation Service Act’ provides that copyright subsists with the author even though the records are made accessible to the public for inspection. Under the Copyright Act, copyright of works eligible for copyright vested in the Museums or its board of directors is conferred to the National Museums of Kenya in perpetuity.

Museums and archives preserve works that are documentation of traditional cultural expressions (TCEs) amongst others. TCEs are capable of copyright protection as they can be attributed to certain communities who are considered their owners. This, however, raises concerns regarding the right to decide how such works can be disseminated. This has created challenges in protecting works in such public institution from infringement of copyright.

**Digitisation versus Preservation**

Digitisation is the conversion of text, pictures, or sound into a digital form that can be processed by a computer. Geographical limitations are no longer an obstacle to accessing such works. Digitisation of museum works can be argued on the point of preservation whereas that of works in archives and libraries can be argued on that of accessibility. So how does digitisation pose a challenge to protection of copyright?

A study on digitisation of libraries in Kenya concluded that consent should be obtained from authors and copyright holders of literary and artistic works before the same are added to digital libraries or databases. Digitisation of literary and artistic works may lead to violation or infringement of copyright. The ease of access makes them vulnerable to misappropriation by users of such databases.

Institutions like museums have struggled with whether it is permissible to digitise and index their collection for preservation purposes. The Government of Kenya through the National Museums of Kenya is in the process of digitising museum collections thereby creating a virtual museum thus availing this collection to the public domain.

Enigma; a German musical project in one of its world famous songs ‘Return to Innocence’ used a native Taiwanese chant by a Taiwanese tribesman Kuo Ying-nan and his wife KuoHsiu-chu, who had recorded the track in Paris in 1988 during a cultural exchange. The sampled chanting was the subject of a series of lawsuits and the case was finally settled out of court in 1999 and as a result the Taiwanese singers to this day receive 100% of the royalties for the song.

The recording of the chant in 1988 was meant for preservation but it was exposed to infringement by virtue of digitisation. Digitisation of works in these institutions is a double-edged sword. The ease of access though great would expose such works to copyright infringement and misappropriation. This will defeat the purpose of preservation of such works.

**Harmonisation of Digital Databases**

The Government recently initiated the process of digitisation of libraries and museums in the country. Having a robust digital database in these institutions would result in ease of data entry and storage of information and ensure ease of information retrieval and security. However, these institutions have their own databases with varying record collection, storage and management systems.

The county governments have a toolkit for collecting data on cultural and creative industry referred to as the County Cultural Tool. Additionally, the Kenya Copyright Board (KECOBO), which is the statutory body mandated to ensure protection of copyright and related rights, also maintains a databank of authors and their works which differs from that in libraries, archives and museums. This multiplicity of data management systems makes the data fragmented among the institutions. This fragmentation ultimately makes it difficult to ensure protection of infringement of works in libraries, archives and museums.

WIPO advises member states to adopt strict recordkeeping policies that guarantee information security, efficient and effective data collection and management mechanisms. The United Nations Educational Scientific and Cultural Organisation (UNESCO) through the Kenya National Commission for UNESCO (KNATCOM), has developed a toolkit to collects data on copyright of arts and cultural works in the country.

The KNATCOM toolkit utilises statistics from the County Cultural Tool and cultural indicators presented by UNESCO Institute of statistics (UIS) to develop a comprehensive mechanism of collecting data on artistic and cultural works. KNATCOM engaged relevant stakeholders, including KECOBO, in a two-day workshop in February 2019 to validate their toolkit which shall be used to conduct a national survey on the status of the cultural and creative industry in Kenya.

While digitising the databases of public libraries, museums and archives, Kenya should also adopt a unified data collection and record management system for all the three institutions similar to the one developed by KNATCOM to create a comprehensive harmonised database with a consolidated tracking system of copyright ownership of arts and cultural works thus making it easier to detect infringement.
Copyright and Creative Commons in Libraries

By. Elizabeth Oyange – Ngando

Libraries are custodians of knowledge, through their preservation of information in collections and archives. These constantly evolving spaces not only support content creators through buying volumes of their works, but also provide access to those who may not afford to buy such works. Upon consideration of authors’ rights, the public interest element drives libraries to set up budgets which support the buying of creative works; including the necessary subscriptions. Such access supports learning and knowledge sharing for the promotion of innovation. In the development of new knowledge, the issue of copyright is inseparable. In copyright law, a creator who records their original idea into some tangible form, is vested with a lifetime of copyright in that work. They and whomever they assign, have exclusive control of how that work will be used, distributed, reproduced, performed or sold.

In the context of libraries, collections will include copyright in literary, musical, artistic, audio-visual and films, photographic and dramatic works. Digital works may require licensing agreements. To ensure that certain digital subscriptions are used in a specified manner, a license might restrict the number or group of people who have access to those works and the manner or scenarios in which they can use or distribute such works. This is usually the case in academic and private libraries which have subscribed to databases and such tools are used to safeguard copyright works.

The rigidity of copyright requires permissions to be sought when using an author’s work. In practice, this would be unrealistic in libraries. It would mean that, without permissions, every time one watches a video or uses a book in certain ways, they would be infringing on the copyright of others. For this reason, limitations and exceptions exist which allow limited uses of copyright works without the need for any permissions. Such uses include fair use such as using copyrighted materials for one’s own private research or study, for teaching or instruction, to provide criticism or comment on the work, to report news and also to make parodies, satirical or pastiche based on the original work.

Creative Commons and Open Educational Resources

These and other safeguards exist to protect library users when they interact with copyright works. An excellent exception lies in the open access spectrum. Openly accessible materials (usually scholarly) are generally free to access and reuse without the need to ask for permissions from the creators or owners of the work. All one needs to do is check the terms attached to those works.

Creative Commons (CC), sits squarely within openly accessible works. The commons being a publicly shared space enabling access to knowledge for the enhancement of creativity. This free culture is of immense benefit to users as they are allowed to go as far as modifying copyright works; if any of the six Creative Commons licences allows them to. The six CC licences vary from the most flexible (allowing selling and changing the original work) to the most restrictive (not allowing any changes or sale of the copyright work).

The benefits of having CC licenced resources in libraries is that it lifts the element of copyright infringement, so that no wrong is done by the user until the point they do something which the licence does not permit. It also means that users are free to make unlimited photo copies and digital scans of CC licensed works without the usual fair use restrictions of copyright law. Quite simply, when users see any of the six CC licences (available at www.creativecommons.org) jubilation and glee should form, as they will be at liberty to copy, distribute, edit, remix and build upon the work without any copyright repercussions. CC licensed works also makes learning texts supremely affordable; outside the conventional expensive text books which are constantly updated by newer editions.

Libraries could benefit from drafting internal policies or guidelines that assist users in locating openly licenced works as well as provide resources which outline the benefits of creating works that allow others to freely build on, without the fear of copyright infringement.

It becomes increasingly difficult for libraries to preserve copyrighted works if technological protection measures have been incorporated. In cases where only one copy of a film exists for example, it would be much easier to preserve an openly licensed work such as those under creative commons than it would for a work that requires circumvention to bypass the digital security which would then allow reproduction for preservation.

The open movement curtails barriers to access to knowledge and libraries are well placed in their advocacy.

ELIZABETH OYANGE - NGANDO
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Limitations & exceptions to copyright for museums

By Rahma Ramadhan

Libraries play a crucial role in the society by providing access to a magnitude of invaluable information and knowledge essential in nurturing and fostering innovation and creativity. According to a presentation made at a World Intellectual Property Organisation (WIPO) meeting on Educational Content and Copyright in the Digital Age, over the last ten years, the two countries ranked position one in the United Nation Development Index were Canada and Norway which both have strong library infrastructure. It is essential that libraries protect copyright of authors to ensure creators are able to gain maximum benefits from their work by shielding right holders against unfair exploitation and piracy.

Emergence of copyright was necessitated by the need to create a balance between the protection of holder’s right vis-a-vis the user’s right to access information particularly for learning and teaching purposes. Like the Copyright Act of Kenya, international copyright agreements guarantee exclusive enjoyment of rights by authors. However, the agreements provide that exceptions and limitations to the exclusive enjoyment and control of copyright, although optional, are to be set by individual states through national legislation.

The preamble of the WIPO Copyright Treaty expressly recognises the need to strike a balance between rights of authors and the larger public interest, particularly with regard to education, research and access to information.

Authors of literary and artistic works enjoy exclusive rights over reproduction of their works; a copyright protection extended by Article 9 of the Berne Convention for the Protection of Literary and Artistic Works. Further, the convention allows signatory states to implement standardised exceptions that permit reproduction of artistic and literary works in a manner that does not prejudice the interests of the author.

The convention does not expressly mention libraries nor archives. However, this exception is implied by Article 9(2) which introduces the “Berne three-step test” which outlines the three principles that guide States in enacting limitations and exceptions to authors’ exclusive right of control and exploitation of copyright.

The principles firstly require that states shall grant exceptions only in certain special cases. Secondly, the exceptions must not conflict with normal exploitation of the work and lastly, the exception cannot unreasonably prejudice the interests of the author.

The Copyright Act of Kenya under Section 26(1) recognises authors’ exclusive right of reproduction of artistic and literary works. The Act refers to reproduction as making one or more copies of artistic, musical or audio-visual work or a sound recording. As an exception to the general rule, reproduction of works by or under the direction or control of the Government or by public libraries, non-commercial documentation centres and scientific institutions is permitted provided it is done in the interest of the public and no revenue is derived from such reproduction. Reproduction can be in any material form including any sound or visual recording of a work as well as any permanent or transient storage of a work presented in any medium, either by computer technology or other electronic means.

In the case of works in national archives, the Public Archives and Documentation Service Act provides that copyright subsist with the author even though archives records are made accessible to the public for inspection. Reproduction of works is also permitted but can only be done under the authorisation of the director. Any act of copying or providing the public with access to archives records does not in any way infringe on the rights of the author.

**Museums**

Kenyan regulations are clear on who owns copyright of works under the custody of the National Museums of Kenya (NMK). As provided by Section 23(5) of the Copyright Act, copyright of works eligible for copyright and vested in the National Museums or the National Museums Board of Directors is conferred in perpetuity to the NMK. Being a body under the control of the Government, NMK, also falls within the category of institutions having the right to reproduce works without infringing on copyright pursuant to Section 26(1) of the Copyright Act.

**Comparative analysis**

Jurisdictions like Singapore extend the right of reproduction of literary, dramatic and musical works, along with any accompanying illustrations, to particular person as opposed to particular institutions. Authorised officers of libraries and archives are permitted to reproduce works but not-for-profit. Internationally, most countries have afforded public libraries operated by government authorities, national archives and scientific institutions the right to reproduce and make copies of artistic and literary works but at the same time, even while providing justifiable access to valuable information, they have put in place conditions to ensure that the rights of the authors are protected.
KECOBO Executive Director Edward Sigei (seated right) and KFCB CEO Dr Ezekiel Mutua sign as witnesses to a joint Communique issued by Collective Management Organizations at Simba Lodge, Naivasha.

Ms Sharon Chahale, KECOBO Deputy Chief Legal Counsel addressing participants during a btraining organised by Kenya Film Commission in Narok.

A representative from the business association gives his contribution during a public participation forum organised by KECOBO to discuss draft Collective Management Organisations (CMO) regulations held at NHIF Auditorium.

TOP: KECOBO legal team facilitating a training on copyright to a group of artists at Diani in Kwale County. ABOVE: Group Photo for the KECOBO committee members representing ADA, EAP, HIV/AIDS & OSH training at Machakos University.

Former KECOBO Board member, Mr. David Muriithi signing a visitors’ book after he visited the Board’s stand during the 4th Annual Ongea East African Music Summit, held at Sarit Centre.

KECOBO Executive Director Mr. Edward Sigei (right) with Kenya National Library Service (KNLS) CEO Mr. Richard Atuti after holding talks on possibilities of establishing a wall of fame for publishers at the ultra-modern National Library Services facility under construction in Nairobi.
PICTORIAL

KECOBO staff interacting with clients who visited the Board’s stand during the 4th Annual Ongea East Africa Music Summit, held at Sarit Centre.

A filmmaker asking a question during a public participation forum to discuss proposed tariffs presented by three collecting management organisations.

KECOBO Executive Director, Mr. Edward Sigei gestures during the training on corporate governance for Directors of CMOS at Simba Lodge, Naivasha.

Mr. Ephraim Ndiritu attending a client at Huduma Centre, Mombasa County during a copyright clinic.

KECOBO Executive Director, Mr Edward Sigei congratulates the chairmen of MCSK, KAMP and PRISK after they signed a joint Communique committing to abide by conditions given by KECOBO, collect royalties jointly and distribute 70 percent of royalties collected to members.

Mr. Howard Okior (holding a mic), KECOBO Legal Counsel, during a panel discussion at the Ongea Music Summit held at Sarit Centre.
Artists Converge to Celebrate Music

By. Lucian Mue

On February 14 – 17 2019, the Kenya Copyright Board joined local & international professionals in the music industry to create awareness on copyright and related rights at the Ongea Music Summit.

With an exhibition stand located strategically at the entrance, KECOBO staff attended to hundreds of clients mainly in the music industry. The forum was interactive and artists asked all copyright related questions.

Birthed 10 years ago, The Eastern Africa Music Summit is a platform for artists to showcase their music, technology and learn through various forums the opportunities, challenges and solutions for the creative industry. Held annually in February, ONGEA! seeks to enlist increased participation from the wider music industry in the region, to market Eastern Africa Music as a trading block.

The participants who visited KECOBO’s stand lauded the efforts the Board has put especially with the online registration system. The fact that authors can now apply online registered a major milestone. They found the interaction informative, educative as well as helpful for existing artists and upcoming artists.

Music is part of an extraordinary revolution that is taking place around us, a revolution that is fundamentally changing the way creative works are produced, distributed and consumed. We all enjoy music, whenever and wherever we want to listen to. We can listen freely on YouTube or for a small fee via streaming services. Thanks to digital technology and the Internet, we now have access to more music than ever before. The Internet has created a global marketplace and global stage for music. That is a wonderful thing for music lovers all over the world!

By. Cyrus Kinyungu

The Kenya Copyright Board’s legal team has commenced a countrywide outreach program to reach out to creatives and other Kenyans through free legal clinics.

The Board aims at educating Kenyans on copyright and related rights and also letting them know about KECOBO’s mandate.

The team, led by the Chief Legal counsel Mr George Nyakwemba, in March toured the coast region where they pitched tent at Kwale and Mombasa Huduma centres.

Dozens of Kenyans from the region were advised on matters to do with copyright and related rights as they visited the Board’s desk at the Huduma centres.

The team also detoured to Ukunda where they met a group of musicians on their invitation seeking for a training.

Dozens of IEC materials that included a Guide to Copyright in Kenya, Copyright and the Audio-visual Industry in Kenya and KECOBO’s service charter were distributed to those who attended. These books can also be downloaded free of charge from the Board’s website www.copyright.go.ke.

Creatives who met the KECOBO team were interested in knowing how to protect their work from infringement. Some took advantage of the team’s presence in the region to commence the process of registration of copyright for their works.

Earlier in the month, KECOBO offices had hosted a copyright legal clinic that was attended by disabled creatives.

In April and May, the Board has planned to extend the free copyright clinics to Kiambu, Kajiado, Machakos, Murangâ, Kirinyaga and Embu counties.

KECOBO also plans to meet city dwellers in Kibera, City Square and Makadara. All these outreach programmes will be held at the Huduma centres.
Copyright News

Online Copyright Registration Offers Convenience to Right Holders

By. George Njoroge

The Kenya Copyright Board rolled out an online Copyright registration system on July 2018 for use by Copyright owners. Accessible via www.copyright.go.ke website, the online system takes copyright registration services at the convenience of Copyright owners.

By the end of March, the portal had managed to register over 100 successful Copyright registrations.

Some of the key benefits offered by the online Copyright registration system are:-

1. Copyright holders can now access registration services from any place at any time. They are no longer compelled to physically visit KECOBO offices during registration processing. The applicants also do not have to come to the offices to collect registration certificate. The System is able to generate a certificate which an applicant can download and print.

2. The automatic ‘Save for later functionality’ enables Copyright applicant to complete the application at a later time in case the applicants are unable to complete the process at the first login.

3. In addition, a step by step manual which is available from the registration portal, a hotline number; 0791399159, has been dedicated for enquiries during Copyright registration via the portal.

KECOBO is currently conducting a customer feedback survey in order to understand areas that need improvement on the online portal. Copyright applicants are therefore advised to complete the feedback forms available on the online portal.

REGISTER YOUR WORK TODAY!

Why Kenyan Visual Artists Need a CMO

By. Faith Amatika

Section 22 of the Copyright Act provides for works eligible for copyright. Among them are artistic works/visual arts. Visual Arts take various forms, for instance, paintings, sculptures, graphic designs, illustrations, works of architecture and photographs.

In most cases, the creators of such works simply sell them through individual contracts to art collectors or book publishers. However, it must be noted that once an artist sells his painting or photograph to the dealer or book publisher, the painting or photograph may be resold many other times without the creator benefitting at all from the sales.

Article 14 of the Berne Convention provides for what is known as the Artists’ Re-sale Right (droit de suite). It provides that an author (creator) shall “…enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.”

This means that once a painter sells his/her painting to an art dealer, he/she still has interests in any subsequent sale of the painting in that he/she ought to get a certain percentage of the selling price or profit. The Berne Convention further provides that an artist can only enjoy the resale right if it is provided for in his/her country’s legislation as well as in the country the work is resold.

The Copyright Act does not provide for this right. However, it is provided for in the pending Copyright Amendment Bill 2017. Assuming it is passed without any amendment of that section, then Kenyan Visual Artists will be smiling all the way to the bank.

It will, however, not be automatic. Visual Artists will have to organise themselves and form a Collective Management Organisation to administer this right.

It will not be possible to monitor all auction sales of visual artwork or any sales in galleries, and other public places. It is for this reason that the relevant section in the bill provides as follows: “Visual artists may form a collective management organization to manage the right under this section and in the absence of a registered collective management organization, the Attorney-General shall designate any registered collective management organization.”

The Artists’ Resale Right was first introduced in 1920 in France to help support widows and orphans of deceased visual artists. It has now spread to a number of countries. In Africa only Senegal and Burkina Faso have working legal provisions for it.
By Cyrus Kinyungu

Directors and top managers of the three Collective Management organisations (CMOs) licensed by KECOBO benefited from a two-day training on corporate governance organised by the regulator.

Directors of Kenya Association of Music Producers (KAMP), Performers Rights Society of Kenya (PRISK) and Music copyright Society of Kenya (MCSK) and their managers went through an intense training programme that was organised by KECOBO and sponsored by Kenya Film Classification Board (KFCB).

They were trained on corporate governance and legal policy matters, accountability and internal controls in governance, principles of corporate governance best practices and explored on opportunities in the creative economy.

Kenya Copyright Board Executive Director Mr Edward Sigei impressed on the directors the need to prudently manage the CMOs resources for the benefits of members.

“KECOBO made the decision to license the three CMOs for them to work jointly and in harmony. We shall not hesitate to take action if we note there is loss of members’ money,” said Sigei.

He warned them that the renewal of their licenses next year is not guaranteed adding it will be based on how well they manage and distribute the royalties to their members. He reminded them that the Copyright Amendment Bill 2017, if passed by Parliament gives KECOBO a bigger role in supervising the CMOs.

The directors came up with a joint communiqué which was read to the public during a press conference held at the Simba Lodge in Naivasha.

The three CMOs committed to strictly adhere to all conditions prescribed by KECOBO on their licenses, distribute at least 70 percent of all royalties collected to their members and only use 30 percent of the collection as administration cost. They also undertook to collect copyright license fee jointly and issue a single license to the business community to avoid parallel collection.

The CMOs also committed to develop a digital system that will aid in joint collection and distribution of royalties, develop and implement corporate governance structures that enhance efficiency and effectiveness in service delivery.

Kenya Film Classification Board CEO Dr Ezekiel Mutua challenged the heads of the CMOs to nurture young talent among the youth to not only create employment but also to inspire hope in them. He encouraged creatives to come up with clean content that upholds the Kenyans’ moral standing and protect children from exposure to harmful content.

KECOBO, KFCB Partner to Train CMOs Directors on Good Governance

KECOBO Executive Directors addressing participants during the CMOs directors training.

KECOBO Inspectors Register 20 Cases in Court

By Mutegi Kathenya

During the month of December the department registered 20 cases. Nine of these cases were registered in Kericho. Due to digital migration, the operation on authentication has a lot of challenges especially within Nairobi County, hence the department expects to deal with this type of operation outside the city when funds are available.

Multichoice Operations

On illegal distribution of infringing DSTV signal which is an offence under section 38 of Copyright Act, the department registered three cases in Mombasa which are currently pending before court. One case is also registered at Milimani Law Courts where a suspect was found in a possession of streaming Boxes which were confirmed by the Communications Authority of Kenya to be illegally exported to the country and were used to distribute illegal signals of premier league.

Books Piracy

On books piracy, the department received two complaints from Kenya Literature Bureau and the author by the name Mr. Philip Ndeda. All the cases were investigated and the infringers arrested. The two matters are currently before court.

Training

During the months in review, the department visited 11 Police Stations which included two in Embu County, four in Kiambu and Nyeri counties, One in Kilifi County and two in Machakos County.

During these visits, a total of 618 police officers were trained on Copyright and related rights and 1,094 copies of enforcement bulletin and Copyright guides were distributed.
Mediation is a key form of Alternative Dispute Resolution (ADR). Alternative for this purpose means a substitute to having a decision imposed by a judge in a judicial process. It is a consensual alternative justice system based on self-determination and involves parties in dispute meeting with a neutral third person with a mutual aim of finding an agreeable solution to the dispute.

As copyright holders increasingly appreciate the value of copyright, the creative industry has witnessed a steady surge in copyright disputes in the recent past. Given the seemingly jaded nature of the Kenyan judiciary and the technical nature of copyright, Judges, more often than not, struggle to resolve copyright disputes.

In an attempt to save the situation, the Kenya Copyright Board (KECOBO) offers mediation services to copyright holders and users who opt not to go to court and are seeking an expeditious process to determine disputes. Most mediation cases KECOBO has handled involve different rights holders in the music and book publishing sectors. KECOBO has also mediated cases involving infringement of copyright in visual works. In 2017 the WIPO Arbitration and Mediation Centre signed a collaboration agreement with KECOBO for purposes of promoting use of ADR for copyright disputes in Kenya.

Mediation sharply differs from both arbitration and judicial determination in that no decision can be imposed by the mediator. The decision is purely by the parties. The process is confidential and without prejudice. It allows the disputants to explore the full range of potential solutions in a relaxed environment. The mediator may encourage the use of principled negotiation, based upon reason and objective criteria.

According to Mediation Training Institute (MTI), 85% of mediations result in resolution within a day or shortly thereafter. Where mediation fails and the disputants decide to go ahead with litigation, the matter takes a relatively shorter time to resolve because the parties already know each other’s primary interests which may not have been disclosed in a litigious process. Litigation looks at the facts and the law while mediation allows the parties to penetrate further and see what the other party’s interests are.

As opposed to judges, mediators do not suggest or impose any solution. It is the disputants themselves who find and agree to a solution that meets their needs, concerns and interests with the mediator’s assistance.

In a mediation process, the disputants voluntarily agree to be guided by the mediator. This is a neutral person who the parties come to respect and trust. The mediator, having the benefit of knowing each party’s private and real business interests, eventually enjoys a unique position that permits him or her to identify shared interests to which each party may initially be blind to. Possessed with a uniquely complete understanding of the context of the dispute, the mediator can then, without violating confidence, steer the parties to a resolution that each party recognises as addressing its own interests.

Mediation can be instituted at any point in a dispute, from when the dispute first arises to when it is in the middle of litigation or arbitration. The earlier a dispute is referred to mediation the better the chances of early success. This is so because at such early stage, positions have not been hardened by legal posturing.

The flexibility in mediation helps save time and cost. Before litigation begins, parties are free to use mediation and to select structures that suit particular needs without having to comply with imposed court-related mediation rules.

In mediation, the mediator’s duty is to help the parties communicate without reflecting his/her thoughts unless requested by the parties. The mediator builds a trusting relationship with both parties, explains the mediation process, goals and procedures and creates a positive tone early in the process.

The mediator is often well trained on how to break impasse and deal with disputants’ emotional outbursts which are quite common. His reaction to outbursts can be highly productive if well-orchestrated.

At the end of the mediation, the mediator ensures that the parties execute a memorandum of agreement before leaving the session. This avoids uncertainty. Even when all the details have not been worked out, it is important for the mediator to reduce what has been agreed into a memorandum for concurrence.

In the worst case scenario, the mediator will terminate the process when it becomes clear that no agreement is possible or when the parties are unwilling to continue with the mediation. The mediation process being voluntary can be terminated at any time by the parties without consequence.

By. Paul Kaindo

Mr. Paul Kaindo is an advocate of the High Court of Kenya, MTI trained professional mediator and a legal counsel at Kenya Copyright Board; kiariekaindo@gmail.com
Why Relationship Between Museums and Copyright is a Delicate Balance

By. Sharon Chahale

The term public domain has been used to describe creative works that are not protected by intellectual property laws, in this case copyright. The public, therefore, owns these works and not an individual author/artists. This means that anyone can use a work within the public domain without permission but no one can own the work.

A museum on the other hand is a building in which objects of historical, scientific, artistic or cultural interest are stored and exhibited. The purpose of the museum is to collect the materials, preserve them, research into them and present them to the public for the purpose of education and enjoyment.

The collections are stored either physically or electronically. Museums also provide public access through exhibitions. It is also to stimulate learning, discovery, discussion and debate.

Works that are not within the public domain, however, are covered under copyright laws.

The rights granted by copyright include the right of reproduction, translation or adaptation, distribution to the public through way of sale, rent, hire, loan, importation, broadcasting and communication to the public.

These rights, however, are usually accompanied by some exceptions and limitations in special cases. Under the right to reproduction no one other than the owner can make reproductions or copies of the work.

What is needed here is that the copying is substantial and material. Under the exceptions and limitations rule, however, such reproduction may be done by anyone who is not the owner/right holder without necessarily paying for it or seeking permission. Research, also done by museums is also an acceptable exception to copyright.

The relationship between copyright and Museums can be complicated and it needs a high level of knowledge and understanding. This is because mostly the objects and artworks that museums deal with will most likely still be enjoying copyright protection. Few, however, may be within the public domain.

Museums may sometimes also deal with content that has been created by other people other than their staff e.g. volunteers, contractors etc in whom copyright will be vested.

There are numerous ways in which museums need to reproduce works. This happens through reproducing works within exhibitions spaces, online, on billboards, posters for promotion purposes, when creating postcards for sale in their shops and so on.

These activities warrant copyright consideration and seeking the relevant permissions. Digital photography, scanning and the internet have also made it possible for museums to make their works accessible to a global audience. However, there has not been sufficient legal backing for this activity until recently when many jurisdictions are beginning to include this in their legislations.

In the UK, for example, the law has recently been changed to make it easier for cultural institutions like libraries, archives and museums to use, share and preserve their collections.

First these institutions are now allowed to preserve any type of copyright work that is held in their permanent collection and cannot be readily replaced. This will ensure preservation of cultural heritage.

One can copy works for archiving and preservation reasons if they are part of a permanent collection and it is not reasonably practicable to purchase a replacement. The works can also be copied as many times as necessary for the work to be preserved. It is necessary to allow multiple copies here since there is a risk that both an original and copy of a work may degenerate or corrupt over time.

The Berne Convention for the protection of Literary and Artistic Works in Article 9(2) provides ‘It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author.’

The TRIPS (Trade Related Aspects of Intellectual Property Rights) Agreement also provides under Article 13 that ‘Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder’.

Member countries are encouraged to enact laws that do not prejudice the rights of a copyright holder while taking care of the needs of the user also.

According to a study done by the World Intellectual Property Organisation (WIPO) presented at the 31st Session of the WIPO Standing Committee on Copyright and Related Rights, there are more than 55,000 museums worldwide which are as diverse as possible. Most are conscious of IP and public domain issues. It found that only 45 countries worldwide expressly mention museums in their exceptions to copyright laws.

It is, therefore, clear that the relationship between museums and copyright is a delicate balance where the needs of the players must be taken into serious consideration while encouraging and promoting creativity.

Dilemma on Copyright Protection in the Digital Age

By Rahma Ramadhan

Technology has transformed how literary and artistic works are used, managed, consumed, accessed, administered and even disseminated. Use of technology by libraries and museums can greatly propel the dissemination of information that would otherwise be difficult to access. Technology also initiates and facilitates interactions with authors across different disciplines and creates a platform for conversation among readers and potential consumers of information of traditional and cultural knowledge as well as other literary works available in libraries. With the revolution of technology, digitisation is an important aspect to institutions that have previously been particularly traditional like museums and libraries especially in broadening access to and use of the institution’s collections and resources beyond geographical limitations.

Libraries

Past studies have indicated that part of the problem facing digitisation of libraries is copyright. Resources in digital libraries cannot be shared for extended periods as opposed to traditional libraries. Prior to the commencement of the actual digitisation process, officials must consider if the very act of digitising the literary or artistic works will result in violation or infringement of copyright. Other institutions like museums have struggled with whether it is permissible to digitise and index their collection for preservation purposes only. According to a study on Digitisation of Libraries in Kenya, in order to deal with copyright issues, consent should be obtained from authors and copyright holders of literary and artistic works before the same are added to digital libraries or databases.

Museums

Museums play a critical role in the preservation and dissemination of important information, rich cultural heritage and traditional knowledge through provision of access to their collections. At the same time, handling collections of aspects related to cultural heritage and traditional cultural expression (TCE) raises certain intellectual property (IP) issues. World Intellectual Property Organisation (WIPO) has previously expressed concerns raised by indigenous people and traditional communities regarding the preservation of TCEs stating that the very process of documenting TCEs may create an avenue for misuse by making them vulnerable to misappropriation.

As other countries are debating on whether to have a public database of cultural exhibits, the Government of Kenya, through the National Museums of Kenya, is in the process of digitising what was described as one of the largest collections in the world. The digitisation project also includes setting up a virtual museum that will give people access to the collection beyond the confines of museum walls. Reports in local dailies indicate that custodians and caretakers of cultural institutions are part of the team working on the digitisation project. In the efforts of creating a new and dynamic museum experience that opens up a people’s history and culture to the world, is it possible to ensure preservation at the same time guaranteeing protection from misuse and exploitation as a result of cultural documentation? How then can museums strike a balance between the two without restricting public access to the rich cultural heritage and other invaluable, unique information?

The Maasai of Kenya and Tanzania are well-known for their unique culture and tribal dress and have been said to embody one of the most powerful representation of tribal Africa. Their culture and distinctive style has made the Maasai people a popular tourist attraction in East Africa resulting in numerous pictures exhibiting their rich culture made easily accessible online. The Maasai’s cultural heritage has been commercially used by many high-end designers including Louis Vuitton (LV) and Calvin Klein without authorisation from the community nor acknowledgment. In 2011, LV presented different ensembles, made out of the Maasai shuka that copied the community’s well-known distinctive prints, colours and patterns as part of their “African Inspired” collection in a fashion show in Paris. As custodians of copyright of their signature prints and patterns, the Maasai are entitled to protect their traditional design under copyright law. Parties that borrow distinctive designs and patterns of cloth are required to remunerate the holders of copyright for such.

Culture is a vital part of the Maasai identity. The essence of copyright and intellectual property rights is that the right holders or authors of literary and artistic work have exclusive rights of reproduction. Making use of new technology broadens access and does make it easier for audiences around the world to interact and appreciate the country’s art, heritage and cultural collection. However, by having cultural collections easily available to everyone via online platforms, there is limited control on access or use which may contribute to increased misuse, misrepresentation and appropriation particularly in this age of rapid replication.
Group Training for KECOBO Committees Champions

By Ketty Arucy

The cross-cutting group training for the committees entrusted with administrative responsibility on implementation and reporting of respective regulatory compliance commitments was held at Machakos University from 25th to 29th March 2019.

The five-day training which targeted Employee Assistance Programme (EAP) champions, HIV/AIDS, Alcohol and Drug Abuse (ADA) and Occupational Safety and Health (OSH) committee members was facilitated by the Board’s management.

The objective of the training was to equip the participants with required skills and competence necessary for effective interpretation of strategic plan objectives and performance contract commitments, work-plan preparation; implementation; monitoring and self-evaluation to ensure achievement of the Board’s strategic goals and negotiated performance contract targets.

COMPLAINTS PROCEDURE

The Kenya Copyright Board (KECOBO) views complaints as being key to the continuous improvement of its services. If you have a complaint about KECOBO, its staff or the standard of our services please submit it via either of the listed complaints channels;

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<th>COMPLAINT CHANNEL:</th>
<th>CONTACTS:</th>
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</thead>
<tbody>
<tr>
<td>1.</td>
<td>KECOBO Postal Address:</td>
<td>The Executive Director, Kenya Copyright Board, P. O. Box 34670 – 00100, Nairobi.</td>
</tr>
<tr>
<td>2.</td>
<td>KECOBO Emails:</td>
<td><a href="mailto:complaints@copyright.go.ke">complaints@copyright.go.ke</a>, <a href="mailto:corruption@copyright.go.ke">corruption@copyright.go.ke</a>, <a href="mailto:info@copyright.go.ke">info@copyright.go.ke</a></td>
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<tr>
<td>3.</td>
<td>KECOBO Hotline:</td>
<td>+254 703885033</td>
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<tr>
<td>4.</td>
<td>KECOBO Office Telephone Lines:</td>
<td>+254 20 253 3859/69, +254 713 761 758/739 062 643</td>
</tr>
<tr>
<td>5.</td>
<td>Website:</td>
<td><a href="http://www.copyright.go.ke">www.copyright.go.ke</a></td>
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<tr>
<td>6.</td>
<td>Twitter:</td>
<td>@KenyaCopyright</td>
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<tr>
<td>7.</td>
<td>Facebook:</td>
<td>Kenya Copyright Board</td>
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<tr>
<td>8.</td>
<td>CAJ’s Postal Address:</td>
<td>The Chairperson, Commission on Administrative Justice (CAJ) P. O. Box 20444 – 00200, Nairobi</td>
</tr>
<tr>
<td>9.</td>
<td>CAJ’s Email:</td>
<td><a href="mailto:complain@ombudsman.go.ke">complain@ombudsman.go.ke</a></td>
</tr>
<tr>
<td>10.</td>
<td>CAJ’s Office Telephone Lines:</td>
<td>+254 20 227 0000</td>
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The management promises to respond promptly and appropriately.

The Kenya Copyright Board also guarantees confidentiality and privacy of all communications.

“Protecting Copyright, Encouraging Creativity” ● ISO: 9001:2015