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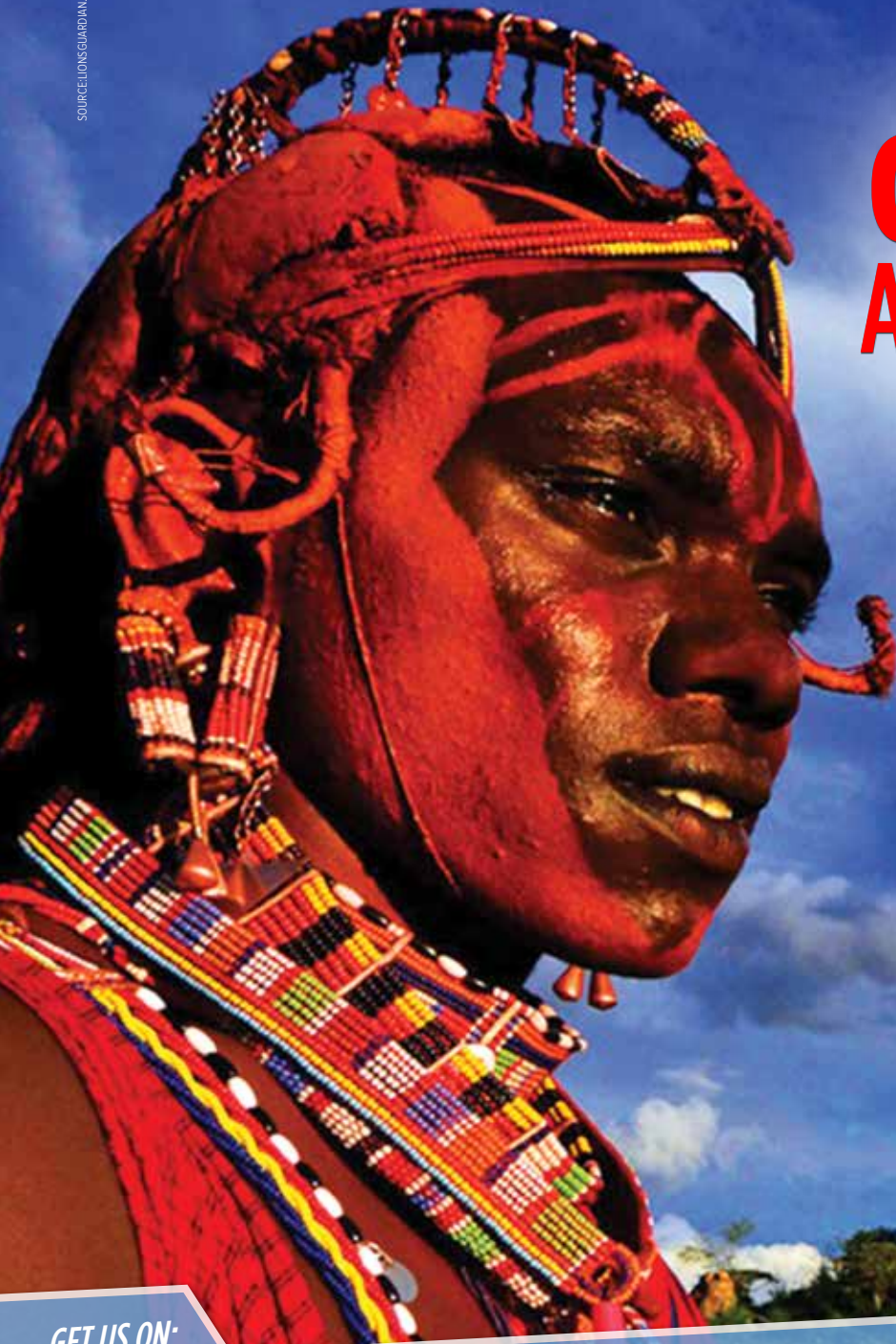
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Protecting Copyright in Arts and Cultural Festivals



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Honourable Attorney General, Mr. Paul Kihara Kariuki with World Intellectual Property Organisation (WIPO) Deputy Director General for Copyright Ms Sylvie Forbin during the regional meeting for African Heads of Copyright Offices at the Boma Hotel, Nairobi organised by WIPO and KECOBO.



Cabinet Secretary, Ministry of Arts, Sports and Culture Ambassador Amina Mohammed displays a portrait gifted to her by Kenya Copyright Board after attending the Regional Meeting on Exceptions and Limitations at the Boma Hotel, Nairobi.



Cabinet Secretary Ministry of Arts, Sports and Culture Ambassador Amina Mohammed chats with KECOBO Executive Director Mr. Edward Sigei during the Regional Meeting on Exceptions and Limitations at the Boma Hotel, Nairobi.

Promoting copyright interests in Arts and Cultural festivals



By. Paul Kaindo

An arts festival is a festival that exhibits any one or more intellectual or creative works such as music, dance, film, fine art, literature, poetry, comedy, theatre, drama etc. Fixed expressions in such festivals raise pertinent copyright and related rights concerns.

Copyright grants exclusive rights to creators of original works. Only those persons granted the exclusive rights can exercise such rights over the works or license others to exercise the rights. These rights include; the right to reproduce the original work or its translation or adaptation in any material form; the right to distribute the work to the public by way of sale, rental, lease, hire, loan, importation or similar arrangement; the right to publicly perform the work; the right to communicate the work to the public; right to broadcast the whole work or a substantial part thereof, either in its original form or in any form recognisably derived from the original; and, the right to make the work available to the public.

In order to protect and promote the rights of artists, performers and craft persons displaying their works in arts festivals, it is important for festival managers and organisers to strategically manage the copyright and

related rights in the works. These festival participants are a vital force of any arts festival. It is the quality of their intellectual and creative expressions that draw public attention and define the festival's eminence. Without an appropriate and effective copyright and related rights management, their rights can become vulnerable to illicit exploitation hence demotivating the creators.

There are numerous types of festivals and different countries celebrate them with a variety of different events and activities such as music, drama and display of crafts. Such festivals play an important public good and have increasingly become arenas of discourse allowing people to express their freedom of expression on wider cultural, religious, social and political issues. They also play an immense role in bringing people together as they celebrate their diversity. In certain quarters, arts festivals have been used to promote peaceful coexistence among communities. Balancing between defending this public good and protecting individual property rights in arts festivals is not always easy.

In an effort to create a balance, copyright law provides for exemptions and limitation. These copyright exceptions and limitations are in the public interest. They allow members of the public to do any of the acts

exclusively reserved for the copyright owner without requiring authorisation by way of fair dealing. Fair dealing exception in Kenya Copyright laws allows the public to use the work for the purposes of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of the source.

Copyright law further acknowledges that while it confers the exclusive right to the author of the protected work, it is not intended to stop others from using or being inspired by the general idea behind the protected works. What copyright protects is the way the creator of the original work has expressed the idea and not the idea itself. It follows therefore, that the public is free to use or be inspired by the general idea in the exhibitions or performances in the arts festival to create their own independent works.

In addition, in Kenya, performers in arts festivals have related rights in their performances. They therefore have the right to control the recording and dissemination of their performances and their commercial exploitation. In particular they have the right to; broadcast the performance; communicate the performance to the public; make fixation of the performance and; rent for commercial purposes to the public, the original and copies

of their fixed performances.

To ensure that an arts festival's copyright policy is effective, organisers are highly encouraged to establish written contracts with all parties involved in the festival, including members of the public patronising the festival; persons who are likely to take photographs; audio recordings and videos in the festival such as journalists; and, festival performers and exhibitors. Licenses, accreditation agreements and performers' legal release agreements may be used for this purpose. Legal release agreements can be used to advise festival performers of the use of recordings, to seek written consent for use of recordings and to outline terms of use. Such agreements cover matters relating to both copyright and related rights. Effective contracts can also be a means to sealing commercial deals. They can, for example, provide for terms relating to the commercial use of photographs or recordings taken at the festival; donation of copies of recordings to the festival archive for preservation; among other terms. The upshot is that organising an arts festival is a multifaceted task that involves numerous copyright decision-making elements. An effective strategy calculated to efficiently support and promote the copyright interests of all parties involved in the festival is supreme.

Unlike arts festivals, cultural festivals may require a different Intellectual Property (IP) strategy because of their collective ownership nature and the unfixed nature of some cultural expressions. Cultural festivals are events that are representative of a culture and are related to display of cultural knowledge and expressions such as folklore, cultural music, cultural art, cultural heritage and other



SOURCE: MISSIONSINFERNO.WORDPRESS.COM

similar expressions of culture. Some of these expressions may be secret and/or sacred.

While it is true that conventional IP tools offer some amount of protection when Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) are displayed in arts festivals, complementary measures, such as cultural protocols, guidelines and notices may be necessary. An effective and comprehensive IP management strategy supports cultural respect and may help generate economic prospects for the festival while recognising and celebrating cultural diversity.

The Protection of TK and TCE Act, 2016 (TK and TCE Act) Laws of Kenya provides

a framework for protection of traditional cultural expressions in Kenya. Before the enactment of the Act, indigenous people could use copyright to protect cultural expressions. However, the unfixed nature of some cultural expressions such as folklore and folk songs made them ineligible for copyright. Furthermore, copyright grants exclusive rights to identifiable persons such as individuals or companies and not to amorphous groups such as indigenous people.

Festival organisers may need to take complementary steps, going beyond existing copyright law, to protect the cultural interests of participants whose cultural expressions do not qualify for copyright protection because of lack of fixation or the communal ownership character. Other than the regional Swakopmund Protocol on the Protection of TK and Expressions of Folklore, 2010 under the African Regional Intellectual Property Organisation (ARIPO), as of now, there is no international instrument protecting TK and TCEs, other than the protection of performances of expressions of folklore under the WIPO Performances and Phonograms Treaty, 1996.

That notwithstanding, festival organisers can take several measures similar to the ones used in arts festivals to prevent the unauthorised uses of TCEs in cultural festivals such as: Cautionary notices, guidelines and protocols advising visitors and members of the public and media about the need to respect the IP rights and TCEs of festival participants, accreditation system clearly defining the terms and conditions of the festival, setting up measures to monitor use of official broadcasts and public performances in an effort to prevent and stop any infringement.



SOURCE: EUROPEAN JOURNAL OF

Towards battling piracy of Traditional Knowledge

By: Caroline Waitera Thuo

Traditional knowledge (TK) has no agreed international definition. Simply defined, it is content or substance of knowledge resulting from intellectual activity in a traditional context. It is also knowledge that is passed on to generations that is not limited to any technical field. It could be agricultural, environmental, medicinal knowledge and knowledge associated with genetic resources among others. Traditional cultural expression (TCE) is basically any form, tangible or intangible in which TK or culture is expressed. This includes songs dances or art amongst other forms of expression.

Importance TK and TCEs

TK and TCEs provide a sense of identity. They differ in each community and that becomes the distinguishing factor. The constitution of Kenya under Article 11 recognises culture as the foundation of the nation and as the cumulative civilisation of Kenya as a nation. It mandates the state to promote and protect TK and TCEs including promoting intellectual property rights of the people and ensuring that communities receive royalties for usage of their culture and cultural heritage.

The Maasai and the Samburu tribes which are often misconstrued as one because of their many similarities can be differentiated by the manner of beading in their ornaments. The Samburu, a sub-tribe of the Maasai, can be distinguished because of the difference in their cultural expressions.

TK has provided the basis for problem-solving strategies for local communities. It represents an important component of global knowledge on development issues. TK is an underutilised resource in the development process. We can improve our understanding of local conditions provide a productive context for activities designed to help the communities through learning from TK and investigating what local communities know and have. A common example of such is the use of Neem Tree extracts for treatment of various ailments. The Neem Tree (*Azadirachta indica*) is found widely throughout parts of India forming a central part of Indian communities' culture and heritage. The extracts are used by these communities for a vast range of purposes including as medicines, insecticides and in fertilizers amongst other things. In India there are about **0.36 million Ayurveda** practitioners, **29.7 thousand Unani** doctors and **11.6 thousand Siddhaspecialists** in India. The three use diet, lifestyle, yoga and fasting for healing. Village



based health traditions are still carried on by housewives, birth attendants and *vaid-hakeems* (herbal healers), making a large percentage of healthcare in India dependent on traditional knowledge and practices.

Exploitation of TK and TCEs

Exploitation in simple terms is the use of something to gain an advantage from it. In this context, we focus on the use of TK and TCEs for commercial advantage to the detriment of the indigenous communities who should actually benefit from them. As established earlier, traditional knowledge and cultural expressions has proved vital and in need of protection.

There are various ways in which TK and TCEs have been misused over the years. The Maasai community is well known for its rich culture. They are especially known for their unique neck beading and the *shukas*. Well known Designer Brands such as *Louis Vuitton*, *Calvin Klein* and *Ralph Lauren* have infused Maasai designs into their clothing and jewelry without their consent. In 2018, Isaac Ole Tialolo; a Maasai elder and the chairman of the Maasai Intellectual Property Initiative Trust initiated legal action to persuade companies using Maasai products to pay for their usage.

These products have been used even on runways yet the Maasai community does not stand to gain anything from it. Another example of exploitation is through patenting of traditional

knowledge by individuals. The global attention to traditional methods of medicine has exposed traditional knowledge to bio-piracy. An example of this is a patent granted to W. R. Grace Company for the use of extracts from Neem Tree (*Azadirachta indica*) and Gale of the Wind (*Phyllanthus niruri*) for medicinal benefits, even though this practice has been ongoing for millennia and can be attributed to indigenous Indian communities.

Kenya has made steps in protecting TK and TCEs. In 2016, the Protection of Traditional Knowledge and Cultural Expressions' Act was enacted. This provided a framework for the protection and promotion of TK and TCEs giving effect to Article 11 of the Constitution of Kenya. Despite exploitation, TK and TCEs are also threatened by extinction as generations pass. Civilisation has made it harder to transfer such to generations. Younger generations can barely speak their mother tongues. Westernisation in particular has rendered such traditional norms as "uncool" and younger generations tend to distance themselves from such.

This calls for creation of awareness of TK and TCEs amongst communities and individuals because most are not aware of how such knowledge could benefit the community as a whole. Our culture is our identity. It deserves of protection and preservation.

Watch list to avoid copyright infringement for festival organisers

By. *Mideva Clarrise*

Cultural festivals in Kenya are held to showcase various communities' rich and diverse cultural expressions. They have also been used to promote peaceful coexistence within communities. Such festivals are celebrated through dance, music, stories, riddles, theatre, arts and crafts, foods, etc. Some well-known cultural festivals in Kenya include; the Lamu cultural festival where activities such as donkey races, dhow competitions, craft making, and henna paintings take place; Rusinga festival which features music, art, cultural sporting activities and cuisine from the Suba community among many others.

These festivals are platforms for nurturing talents and are also huge tourist attractions both at local and international level.

Intellectual property (IP) is at the heart of cultural festivals. Whilst protecting cultural expressions from misappropriation, misuse, and exploitation, festival organisers should also identify and protect the intellectual property-related aspects from any possible infringement. In principle, the use of works in which someone else owns the IP requires owners' prior consent if the planned exploitation falls out of the fair use ambit.

Copyright is the most relevant area of IP affecting cultural festivals. It protects literary and artistic creations of authors. In cultural festivals, copyright protects the program/posters/banners, music performed, choreography/dances, photography, costumes, stage set, audio-visual material and other materials on display.

Copyright also gives authors a bundle of exclusive rights to make copies of the work, distribute, display, publicly perform and make derivatives. These rights enable authors to control the use of their work and to receive remuneration. To be entitled to copyright protection, a work must be original.

The use of derivative works in festivals

There may be modifications of copyrighted works, especially from performers during festivals. This can threaten the owner's moral rights. A derivative work is a work based upon one or more pre-existing works such as a musical arrangement, motion picture, sound recording or any other form in which a work may be recast.

Music covers and movie sequels are common examples of derivative works. When one prepares a derivative work without permission, he/she exposes himself to various remedies for copyright infringement.



SOURCE: PERMANENT PRESIDENTIAL MUSIC COMMISSION - @PPMC_KENYA.

Derivative works can be copyrighted. Copyright to a derivative work will only extend to the material contributed to the original work and does not affect the scope of the original copyright. Therefore, when registering a derivative work, it will be necessary to disclaim the portions previously copyrighted.

Copyright ownership for festival staff & freelancers

Festival staff may be required to create works or content that can be used to invite people to the festival or rather used at/during the festival for instance videos, posters, banners, festival programs among others.

Where employees create work within the scope of their employment, the copyright will be owned by the employer unless there is a contract stipulating otherwise. This is because the employer has control over how the work is created. Due to this, work created by festival staff will be owned by the festival organiser.

Festival organisers may hire professional photographers, videographers, content creators or news reporters to make professional and commercial recordings and reports of the event.

For works that are commissioned or ordered from freelancers, the copyright remains with the freelancer. This is because the freelancer uses his/her tools, decides how the project will be conducted and bills the festival organiser. Control differentiates the freelancer from the festival staff and as such, the freelancer retains the copyright. However, if there is a written agreement signed by both parties, the festival organiser can claim copyright.

Fair use of copyrighted materials in festivals

Fair use provisions allow copyrighted works to be used without a license from the owners of the work. This use will not constitute copyright infringement. With these provisions, attendees can take pictures and film or record festival performances without express permission from the owners.

The Kenya Copyright Act, 2001 contains several general exceptions and limitations to the exclusive rights granted to authors. In an attempt to balance rights holders' rights with the interests of users, Section 26(1) of the Act provides exceptions and limitations for the following purposes: Research, private use, criticism or review and reporting of current events subject to acknowledgment of the source.

Festival Checklist

Festival organisers may come up with a checklist involving questions such as:

- Is the work protected by copyright?
- Who owns the copyright? Do they have any licenses (e.g. creative commons licenses) that would permit the use?
- Would the use violate any of the exclusive rights given to copyright owners?
- Do any of the exceptions to copyright apply?

With this kind of checklist, they will be able to determine the protected assets and ensure permissions & license agreements are granted or cautionary notices/oral warnings to copyrighted materials are given to all attendees at the festival to avoid copyright infringement.

Trademarks in Arts and Cultural Festivals

By *Rahma Ramadhan*

Trademarks include distinctive signs like symbols or words that identify particular goods or services as those provided or produced by a specific person or entity. These distinctive marks, words or symbols help consumers identify particular goods and services mostly due to their reputable nature and quality.

Festivals are a great avenue for entertainment providing people with unique experiences. As per the World Intellectual Property Organisation (WIPO), most cultural and arts festivals use different forms of marketing, merchandising and promotion of their registered trademarks to create and develop their brand leading to growth and development of their reputation over time.

Major festivals have become brands in their own right owning multiple trademark rights extending beyond entertainment services to clothing and apparels, food and a range of different merchandises.

WIPO states that there can thus be a number of trademarks arising from such festivals namely: Traditional involving name and image and non-traditional trademarks involving motion marks for video clips, 3D marks for festival memorabilia and souvenirs, slogans for promotional ads as well as television spots and advertising.

The strength of festivals' brand is not only determined by the films screened and musical performances but mainly from the unique experiences created by them.

WIPO records indicate that trademarks have previously been successfully registered by indigenous Australians in respect to cultural festivals. Proactive utilisation of trademarks and other intellectual property assets can greatly benefit festivals particularly by generating additional income hence contributing to long-term stability and financial viability of such fiestas. Commercialisation of trademarks is also a good income generating avenue for festivals. For example, licensing a trademark to a third party for use for a pre-determined duration and

fee. As owners of registered trademarks, festivals can market their souvenirs and merchandise on site at the festival.

Owing to emergence of new technology and the prevalence of e-commerce, festivals can also utilise different online platforms to promote the sale of their products.

Festival Trademark Infringement: The Case of "Coachella"

In order to fully enjoy and benefit from their intellectual property assets, festival organisers and management ought to be cautious of IP infringement by others especially around the festival period. The organisers of the renowned "Coachella" music festival in the United States of America (USA) filed a complaint in the Central District of California against a major clothing company, Urban Outfitters Inc and its subsidiaries, Free People of PA LLC, for infringement of IP rights. Coachella festival organisers, the Coachella Music Festival LLC and Golden Voice LLC stated that the use of the distinctive mark "Coachella" on clothing and apparels by the clothing company and its subsidiary was likely to falsely suggest a sponsorship, connection, license or some sort of association between Coachella, Urban Outfitters and Free People. Free People created a clothing line featuring bohemian free-spirited attire, which is the clothing of choice of most Coachella attendees, and used the word "Coachella" in marketing material and in the name and description of certain items of clothing. For instance, "Coachella Dress" and "Coachella Boot". The trademark rights to "Coachella" are owned by Coachella Music Festival LLC and Golden Voice LLC and they do provide licenses to clothing companies for the use of the mark "Coachella" in apparels.

In the suit, Coachella organisers sought damages for intentionally creating a false association as well as injunctive relief and cost of the suit. The organisers also stated that the unlawful use of the mark "Coachella" by the clothing company constituted tortious interference with Coachella's official licensees. Urban Outfitters, Free People and Coachella organisers did reach an out of court settlement and the matter was thus dismissed without prejudice. Considering the magnitude of Coachella festivals, this case clearly demonstrates that indeed festivals can own intellectual property rights in its own name and also demonstrates that serious legal action can be brought against infringers on different grounds.



PICTORIAL



Delegates from African countries pose for a photo with World Intellectual Property Organisation's (WIPO) Deputy Director General for Copyright Ms Sylvie Forbin (centre) during the regional conference on Copyright for Heads of Copyright Offices in Africa organised by WIPO and Kenya Copyright Board in June at Boma Hotel, Nairobi.



KECOBO staff mingle and have fun with children from Umbrella Children's Home during a corporate social responsibility (CSR) activity by the Board.



KECOBO staff issuing copies of the Copyright News magazine on IP and sports to Mr. Thomas Odundo of Rugby Union of Kenya to mark the World Intellectual Property Day celebrations.



Mr. Cyrus Knyungu, KECOBO Head of Communications explaining to a client at Impalla Sports Club about IP & Sports during the World Intellectual Property Day celebrations.



KECOBO staff delivering gifts to Umbrella Children's Home during a CSR activity.



KECOBO Staff overseeing destruction of copyright-infringing materials at December Waste.



Cabinet Secretary, Ministry of Arts, Sports and Culture Ambassador Amina Mohammed (centre) receives a gift from Kenya Copyright Board Executive Director Edward Sigei (right) after attending the Regional Meeting on Exceptions and Limitations organised by KECOBO at the Boma Hotel, Nairobi.

PICTORIAL



KECOBO staff having a good time with children and staff of Umbrella Children's Home during a CSR activity organised by the Kenya Copyright Board.



KECOBO staff distributed 200 copies of copyright News magazine on Intellectual Property & Sports to Athletics Kenya officials to mark the World Intellectual Property Day celebrations.



Cabinet Secretary, Ministry of Arts, Sports and Culture Ambassador Amina Mohammed (second right) and KECOBO Executive Director Edward Sigei (right) being interviewed by Media after attending the Regional Meeting on Exceptions and Limitations at the Boma Hotel, Nairobi organised by World Intellectual Property Organisation and KECOBO.



Honourable Attorney General Mr. Paul Kihara Kariuki, who was the chief guest, officially opens the Regional Conference for Heads of Copyright Offices in Africa at Boma Hotel, Nairobi.



WIPO Deputy Director General Ms. Sylvie Forbin giving her opening remarks during the Regional conference for Heads of Copyright Offices in Africa at the Boma Hotel.



December Waste staff dismantling cables, decoders, dishes and other assorted materials delivered by KECOBO during the destruction of copyright infringing materials.

KECOBO & WIPO hosts regional copyright conference in Nairobi



Participants from across the world who attended the conference organised by KECOBO and WIPO pose for a group photo at the Boma Hotel.

By. *Cyrus Kinyungu*

The Kenya Copyright Board in partnership with the World Intellectual Property Organisation (WIPO) in June hosted a series of three conferences on copyright attended by over 300 delegates from across the world.

The first of the three back to back meetings held at Boma Hotel in Nairobi was a two day regional seminar on Heads of Copyright offices in Africa which was followed by a meeting on Standing committee on Copyright and Related rights (SCCR).

The Nairobi gathering also saw the two organisations hold an International Conference for Least Developed and Developing Countries on Copyright and Management of Public Sector Information.

The meeting, which was officially opened by Attorney General Paul Kihara Kariuki, was attended by heads of copyright offices in Africa, delegates from African Regional Intellectual Property Organisation (ARIPO) and Organisation Africaine de la Propriété Intellectuelle or OAPI (English: African Intellectual Property Organization) and other international Non-Governmental Organisations representatives mainly from Geneva. The World Intellectual Property Organisation's Deputy Director General, Copyright and Creative Industries sector Ms Sylvie Forbin assisted by KECOBO executive Director Edward Sigei was steering the conference. This was a major milestone for Kenya as it was the first time WIPO was holding such an international conference on Copyright in Kenya.

While officially opening the conference, the Attorney General Paul Kihara Kariuki noted: "Copyright and creative expressions represent

a new frontier for Africa's development and already contribute significantly to the Gross Domestic Product of many countries as evidenced by the studies undertaken in Tanzania, Malawi, South Africa and Kenya."

He noted that the studies conducted with the support of WIPO further establish that Africa is a significant importer of many cultural products especially movies, music and books.

"This represents both an opportunity and a threat to the culture and languages in this region and Africa must guard against misappropriation of its cultural property," he warned.

Cabinet Secretary, Ministry of Sports, Culture and Heritage Ms Amina Mohamed while opening the regional meeting on exceptions and limitations, said the new phase of Intellectual Property governance will not be characterised by reduction or expansion of IP rights.

"Rather," she noted, "it will be defined by contextual calibration based on the recognition of the positive and negative implications of intellectual property on public policy priorities. The idea is to strike the right *balance between promoting the public interest in the dissemination of works of the intellect while guaranteeing a just reward for copyright holders.*"

Ms Amina said the new phase of Intellectual Property governance should be defined by contextual calibration based on the recognition of the positive and negative implications of intellectual property on public policy priorities. The idea is to strike the right *balance between promoting the public interest in the dissemination of works of the intellect while guaranteeing a just reward for copyright holders.*

The seminars registered a major success following the adoption of the Nairobi Strategic Plan for the Development of Copyright and Re-

lated Rights in Africa.

"The global objective is the formulation of a strategy for African countries, taking into consideration copyright and related rights issues in digital environment in order to maximise the potential of creative industries for development," the member states noted of the plan.

The plan seeks to strengthen national and regional institutions within the continent, promote social, economic and cultural development and update and facilitate the implementation of copyright laws.

Members agreed to undertake studies on the economic contribution of creative industries to promote evidence based information for policy decision making.

They also committed to take appropriate measures to facilitate the implementation and enforcement of the legislative provisions including mechanism/ strategies to combat piracy and other forms of copyright infringement.

To secure the value chain, members agreed to facilitate identification of works in order to enhance traceability, creation of common databases and interoperability of management systems.

The Nairobi Strategic Plan also acknowledged the need to enhance capacity and awareness creation by encouraging the professionalization of stakeholders through training and creation of trade associations and guilds.

Speaking during the conference for the least developed and developing countries on copyright and management of public sector information, Ms Forbin said: "It is clear that from a copyright perspective, in principle many forms of public sector information may well be protected and therefore conditions for access and reuse should be further assessed."

How new copyright law will safeguard against online infringement

By Paul Kaindo

The Copyright (Amendment) Act, 2019 which was signed into law by the president on September 18 addresses challenges brought about by technological changes. It is particularly intended to address online copyright infringement which the Copyright Act, 2001 did not address sufficiently. The new law introduces a takedown procedure for copyright owners to address infringement over the Internet. It also avails Internet Service Providers (ISPs) certain defences usually referred to as 'safe harbours'. These are defences allow ISPs to avoid liability for copyright infringement provided they comply with certain statutory conditions.

The amendment Act defines Internet Service Providers as persons providing information services, systems, or access software providers providing or enabling computer access by multiple users to a computer server including connections for transmission or routing of data. Information systems under the Act means systems for generating, sending, receiving, storing, displaying or processing data and include internet. ISPs may therefore potentially include persons who own or operate websites, blogs, social media platforms, telecommunication companies and other internet suppliers.

The new law provides that a person whose copyright has been infringed may issue a takedown notice requesting the ISP to remove the infringing content. The takedown notice must be in writing addressed to the ISP or their designated agent and must contain the full names, telephone, physical and email addresses and

signature of the complainant or his authorised agent. It must sufficiently describe and identify the allegedly infringing content(s) and right(s).

The notice must be accompanied by an affidavit or a declaration attesting to claim of ownership, validity of the rights, good faith and effort taken to have the infringer remove the content. It must be copied to Kenya Copyright Board (KECOBO), Communications Authority of Kenya (CA) and the recognised Internet Service Providers' umbrella association. A takedown notice is deemed delivered on the next business day following physical delivery at the ISP's registered physical address or two days after it is sent by registered post or immediately it is sent by electronic communication to the ISP's or its agent's designated address. The law obligates ISPs to designate an agent or an address for receiving takedown notices.

Once the ISP receives the takedown, it is required to disable access to infringing content within 48 hours unless it receives a counter notice contesting the takedown notice and which fulfils the requirements set out in a takedown notice.

Failure to take down or disable access after receiving a takedown notice without justification makes the ISP liable for damages resulting from the non-compliance. The ISP also commits an offence punishable, upon conviction, by a fine not exceeding Sh500, 000 or imprisonment of five years, or both.

Lodging a false or malicious takedown or counter notice is an offence attracting a fine of up to Sh500, 000 or imprisonment for five years or both. Any person convicted for the offence is also liable for any consequential damages.

Under the safe harbour provisions, an ISP must demonstrate that it merely provided access or transmitted, routed, or stored the content and did not initiate transmission or select addressees. The safe harbour requires that the ISP is not involved in content selection, modification or promotion. This defence applies where transmission or routing and provision of access is automatic, transient and intermediate.

This applies in case of automatic, intermediate and temporary storage of infringing content brings ISPs under the safe harbour. The Internet Service Provider must however not have modified the content and must have complied with conditions on access and with rules regarding updating of cache in conformity with generally accepted standards within the service sector. The ISP to benefit from safe harbour, must have not interfered with any technological protection measures while using the content.

In addition, the ISP is not liable if it removes or disables access to the content upon receipt of a takedown notice or deletes or disables access to the content following a court order or upon acquiring knowledge that the content is infringing. The law therefore exempts ISPs from liability for damages arising from infringing content stored at the request of recipients of its services provided it did not have knowledge that the content or activity relating to the content was infringing.

The ISP will not be liable for damages where it refers or links users to a webpage containing infringing content or unintentionally facilitates infringing activity through information location tools. This applies where the infringing nature of the content is not obvious and the ISP removes or disables access to the reference or link upon being informed that it is infringing.

There is no general obligation on ISPs under the amendment Act to monitor material on its services or to seek facts or circumstances of infringing activity without being prompted. This is justified because ISPs transmit huge quantities of content instantaneously making it impractical to expect them to monitor all content.

The ISP will however be liable where the recipient was acting under its authority. An ISP will not be liable for wrongful takedown in response to a valid takedown notice. It will be considered wrongful takedown if the takedown is based on an invalid notice.

If the ISP may be liable to injunction from copyright owner(s) for failure to takedown. The ISP may be ordered to require to disclose to investigative agencies of the identity of subscribers suspected of infringing his/her content.

The law brings Kenyan law in line with international standards.



Challenges protecting copyright infringement in the digital age

By: Alex Ombaga

Copyright is defined as the exclusive and assignable legal right, given to an author for a fixed number of years to print, publish, perform, film or record literary, artistic or musical material. This right is only assignable in the economic sense. The original author retains moral rights to the work which prevent others from using the works in a manner that would be injurious to his/her reputation. A work eligible for copyright protection must be of original authorship and fixed in a tangible form from which they can be perceived, reproduced or communicated either directly or through other devices. This could also be in digital form.

To use a copyrighted work, one must seek the permission of the author lest that use amounts to an infringement which is a criminal offence.

Museums and Archives are institutions which contain collections of works such as manuscripts, photographs, art and films amongst other artistic works. The only difference between the two is that Archives are usually maintained solely for academic study whereas even where museums may contain academic materials it must also have displays and be open to the public. Works in museums and archives can be attributed to specific authors and where

it is traditional knowledge or cultural expressions, specific communities.

These institutions house a vast knowledge and culture and hold a nation's heritage. These institutions in the fulfilment of their mandate to disseminate information to the public and promotion of education may be required to reproduce such works in their collection to communicate to the public. This poses a copyright issue.

The advent of information technologies with digitisation and dissemination of works over the internet has revolutionised the way human knowledge is distributed. Institutions such as museums and archives have been forced to adapt in an effort to achieve their mandate. Kenya is in the process of creating a virtual museum through digitisation of works in their collection. This has been argued on a point of preservation of the same. Digitisation would certainly make dissemination of the works and access to the public easier. Works in these institutions as mentioned have been created by individuals or groups who are the actual copyright holders. Their use, therefore, must be accompanied by the owner's consent.

Limitations and Exceptions

Under the Berne convention and The Copyright Act of Kenya, copyright protection lasts for the lifetime of an author plus an

additional 50 years after their death. Not all works enjoy copyright protection in museums or archives. When the period of copyright protection lapses, the work falls into the public domain and can be used by anyone. The primary mandate of museums is gathering, organisation and preservation of elements of cultural heritage. Acquisition of such works may be through donations or loans which may be tied with conditions imposed by the owner.

After acquisition, the works must put in an inventory and categorised. The recording must verify rights and restrictions conveyed with the artwork because of the legal implications. The work may be digitised for permitted purposes and archived.

Cultural heritage which manifests as traditional knowledge (TK) or cultural expressions (TCEs) may be fixed in a tangible form or digitised for preservation purposes. This poses IP related issues as there is derivative works which is basically "new works" based upon existing works. For instance, a recording of a traditional dance and original works like the traditional dance itself. TK and TCEs are protected under both international and national laws. The holders of the rights of TK and TCEs are the indigenous communities to whom they can be attributed to. Permission to use such works must be obtained from the community or its representatives.

Where the works have been copyrighted, the author must consent to their digitisation reproduction, exhibition and communication. This could be through an assignment or licenses from the author or their representative i.e. relatives or a collective management organisation. Some works however may be unclaimed. These are referred to as orphan works. In such instances, there are limitations and exceptions to their use. There are specific exceptions which allow usage of non-attributed works only for example with the intent to preserve such works or maybe exhibition in the museums catalogue and general exceptions which entail usage for education or reprographic purposes.

The three-step-test under TRIPs agreement confines limitations and exceptions to exclusive rights to *certain special cases* which don't conflict with normal exploitation of the work and don't unreasonably prejudice the legitimate interests of the right-holder.

Where there is no exception whether general or specific under national or international laws regarding use of works in a museum or archives, permission must be sought from the creator of the works to prevent claims on copyright infringement.



Why royalties for artists are bound to improve in future

By Edward Sigei

In the last few weeks there has been a raging debate about the entire system of royalty management since the music Collecting Societies'; Kenya Association of Music Producers (KAMP), Performers Rights Society Kenya (PRISK) and Music Copyright Society of Kenya (MCSK), distributed their royalties.

Some artists have accused the Collecting Societies, also referred to as Collective Management Organisations (CMOs), of inefficiency and failing in their mandate. Others have accused them of corruption. Some members of the public have even wondered if these societies should exist, questioning whether they are legally recognised.

Some users of musical works have accused the organisations of harassment and application of outdated methods of collection of royalties. Others had doubted if they paid their members or rendered accounts.

This is, therefore, an attempt to answer some of these questions so as to assist Kenyans understand why the societies exist and why users of copyright works should comply by paying the set royalties.

Whereas majority of the rights available under copyright are managed by individual or corporate rights holders, there are some rights that cannot be managed individually for practical reasons. Those rights must, therefore, be managed jointly or collectively, hence the name Collecting Societies.

These organisations are owned and managed by members who authorise them to manage their works in return for a share of the payment of royalties collected. To enable efficient management of rights and offer easy access to artists' work, the copyright laws provide for their establishment. Collecting Societies exist globally, having first been founded in late 1800s in Europe. In those countries, royalty payment compliance is very high and artists can enjoy decent life on royalties alone.

In Kenya, we have Collecting Societies for music authors (MCSK), producers (KAMP) and performers (PRISK). Actors are also represented by PRISK while publishing or reprography is represented by Reproduction Rights Society of Kenya (KOPIKEN). And soon there might be a society to represent visual arts and producers of audio-visual works.

The Collecting Societies are private entities registered as companies limited by guarantee. They are licenced annually and regulated by Kenya Copyright Board (KECOBO). Their tariffs are published after a fairly rigorous process with public participation.



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 at least 70 percent of royalties collected to members.

KECOBO, as the oversight regulatory agency, is well-placed to address the question of whether Collecting Societies are failing in their mandates or are corrupt.

As far as the recent distribution is concerned, the societies collected Sh118 million and distributed Sh80 million, representing 68 per cent of the collections. As such, they performed extremely well with the distribution nearly matching the obligatory 70 per cent compared to 54 per cent; 24 per cent; 13 per cent for PRISK, KAMP and MCSK respectively for last year.

This performance follows measures put in place by the regulator to ensure transparency in collection including the joint invoicing and deposit in a common supervised account. The measures have partially sealed some loopholes that led to revenue leakages and cutting of unnecessary costs.

The anticipated passage of Copyright Amendment Bill 2017 will assist KECOBO to further stamp its authority in the management of Collecting Societies.

The collection methodologies are similar to those of other collecting societies globally. Tariffs are set and collected by among others, taking measurement of business premises.

Users have complained about the tariffs, stating they are quite high and proposing their own procedures for determination of tariffs. The suggestions have not received traction with collecting societies as they are afraid of losing royalty income. The impasse often leads to unnecessary litigation.

The historically poor compliance places a heavy burden on the few that the collecting societies can reach to make up for the rest who fall through the net, usually by design.

Sadly, those who have not complied were

the loudest critics about the poor pay to artists.

The poor compliance represents a big threat to artists' rights as it puts into question the future of these organisations. The collecting societies must adapt to local and technological realities. The payment of copyright dues is clearly a new concept to many business owners who use copyright works. It is hard for them to understand and comply especially in a difficult economic environment.

Technology has the potential of providing the collecting societies with new tools and approaches to collection of royalties. The Kenya Copyright Board has been toying with methods of collection that do not involve direct contact with the users and the use of police in enforcement.

These include imposing a music levy on food and hotel establishments to be collected in the same manner as catering levy, music levy on alcoholic beverages, a subscription model for media houses that pays for every song played and a flat royalty at NTSA licence desk. Universities can collect a nominal fee for the photocopies done in the campuses in favour of book authors' royalty. Any shortfall can be made up from flat rate collections.

Subject to an impact study and the setting of appropriate fees on those platforms, this can be implemented as soon as next year. Of course this will depend on whether other government agencies and ministries, especially the Treasury, approve the decision. If this is implemented, the amount of royalties payable to artists might increase while businesses would run smoothly. This system will finally deliver for artists an important campaign promise.

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Can music royalties be collected by subscription?

By Edward Sigei

Copyright at its core is a business framework. As a creation of the commercial framework, collective management was established for easy monetisation of narrow category rights placed under single corporate structure controlled by authors and owners. This is akin to farmers submitting produce to the cooperative for marketing.

The use of music to enhance business is one of the sources of royalty to musicians. The use of music requires payment as it supports the core business being undertaken in that public space.

However, there is no system that has been found yet in Kenya that is flexible and simple to execute. One suggestion is remodelling the collection into a subscription system similar to the Safaricom Skiza. That model attributes monetary value to each song and payment is made for the number of uses.

If the model is applied to a broadcasting station, every song played attracts a payment of a fee. The more the songs is used, the bigger the



payment to the owner. Revenues received here could be paid as per the log sheets.

In the case of Hotels, Bars and Public vehicles, the number of hours each user consumes the music could be converted to give the number of tracks played and the fee can be paid for each track. However, unlike the broadcaster, the relative monetary value of a song for matatus and hotels would be lower while that of bars can be slightly higher.

For example, if the notional value of broadcasted music is Sh5 per song; the bar could attract a fee of Sh3 per song while the matatu and hotels could pay Sh1.50 per song.

Alternatively, the CMOs can create their audio channel that users can subscribe to get content. The system will automatically create a log to enable distribution to respective owners of music used.

A similar audio-visual channel could be the answer for those who wish to get that type of content. The subscription could be on a need basis, thereby resolving one of the biggest issues between owners and users of music; the cost of idle space and equipment currently paid for by bars, hotels and restaurants.

The benefits of the scheme are the payment of music used per day, week, monthly or as regularly as the user wishes (flexibility). The payment for use especially monthly could enable CMOs to pay royalties to artists monthly and issue statements (regularity and accountability). Another benefit is the reduction of visits to business premises to measure and evaluate for invoicing.

What is your view about this model? Share with us on info@copyright.go.ke

KECOBO Honours Sportsmen During World Intellectual Property Day

BY Lucian Mue

Every year on April 26, we celebrate World Intellectual Property Day to learn about the role that Intellectual Property (IP) rights play in encouraging innovation and creativity. This year's World Intellectual Property Day campaign – Reach for Gold – focus was in the world of sports.

The aim was to explore how innovation, creativity and the IP rights support the development of sports and its enjoyment around the world.

World Intellectual Property Day is a great opportunity to get people interested in issues relating to intellectual property (IP). While WIPO promotes a gen-



eral theme each year, it is up to organisations to decide how best to use the event to meet their own public awareness raising goals.

Unlike previous years where the Board has earmarked WIP Day by conducting trainings, organising exhibitions, hosting stakeholder forums, this year the



Board published a special Edition of the Copyright News under

the title “Intellectual Property and Sports” and distributed it to sportsmen.

The focus of the magazine was on intellectual property and sports in Kenya, how sportsmen earn from intellectual property, drafting of good contracts for sportsmen, managing image rights and the lucrative game of image rights in sports.

(The Special Edition, available on <http://www.copyright.go.ke/media-gallery/newsletters.html>)

More than 600 copies of this edition were printed and distributed to Athletics Kenya, Olympics Kenya, Motorsports Kenya, Federations of Kenya, Rugby Union and Impala club.

President Kenyatta unveils measures to fix the music industry



By PSCU

The Government will move the Kenya Copyright Board from the Office of the Attorney General to the Ministry of ICT as part of measures to protect musicians from exploitation.

The announcement was made by President Uhuru Kenyatta when he led thousands of mourners in sending off Benga music icon, John Mwangi Ng'ang'a well-known as John De'Mathew in Gatanga, Murang'a County today.

The announcement on copyright board is part of several measures the President revealed that are aimed at protecting the rights of artistes.

The President said the right home ministry for the copyright board is ICT because that is where it can have the ability to monitor broadcasters, telecoms and other entities that use productions by artistes.

He said the Ministry of ICT is under firm instructions to ensure that artistes get their dues such as royalties.

"I have instructed the ICT Ministry to ensure that before renewal of licenses for broadcasters and telecoms they must pay what they owe artistes," said the President when he spoke at the funeral service of the late musician

held at Githambia Primary School grounds in Murang'a County.

He said broadcasters and telecoms should pay for music they play because they are using it to make money.

The President who was accompanied by Deputy President Dr William Ruto said he has also instructed the Directorate of Criminal Investigations to probe organisations that collect money on behalf of musicians to see if they are embezzling what they collect.

"The music industry has a problem that needs to be fixed. Recently we were told that an organisation collected around Shs 200 million on behalf of musicians and then claimed that they spent 60 percent of that money as expenses for the collection," said the President.

He also encouraged Members of Parliament to push through an amendment to the copyright laws that is pending in parliament and which is aimed at protecting the interests of artistes.

President Kenyatta said De'Mathew was his personal friend who loved peace and who liked to unite people and not to divide them.

In the late musician's honour and to support upcoming talented artistes, the President announced that the government will set up a Shs 10 million studio at Kirwara within Gatanga

Constituency.

DP Ruto said De'Mathew has been a prominent champion of the interests of musicians especially through Tamko Sacco where he was chairman. The Sacco was established so as to support local musicians to save and access loans for their collective and individual prosperity.

Dr Ruto assured Tamko Sacco members of government's support in completing a commercial building the group plans to construct at their parcel of land in Kenol town off Thika-Nyeri highway.

The funeral was attended by several Cabinet Secretaries including James Macharia (Transport), Amina Mohamed (Sports), Mwangi Kiunjuri (Agriculture) and Joe Mucheru (ICT).

Local leaders led by Governor Mwangi wa Iria, Senator Irungu Kangata and County Woman MP Sabina Chege said De'Mathew was more than just a prominent musician to the people of Murang'a.

Governor wa Iria said De'Mathew was considered to be a seer or prophet by locals and many things he predicted came to pass.

Kirinyaga Governor Anne Waiguru and her Nakuru counterpart Lee Kinyanjui were among those who attended the funeral service.



Enforcement Activities Undertaken Between July – September 2019

1. Raids

AREA	CATEGORY	NUMBER
Narok	Broadcast	1
Nairobi	Broadcast	1
Litein	Music	2

2. Copyright Court Cases Summary

NUMBER OF CASES	TOTAL NUMBER
Number of cases reported	4
Cases Investigated	4
Cases pending before court	4
Cases pending under investigation	Nil
Cases withdrawn	2
Finalized cases	Nil
Cases Referred to arbitration	Nil

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;

#	COMPLAINT CHANNEL:	CONTACTS:
1.	KECOBO Postal Address:	The Executive Director, Kenya Copyright Board, P. O. Box 34670 – 00100, Nairobi.
2.	KECOBO Emails:	complaints@copyright.go.ke, corruption@copyright.go.ke, info@copyright.go.ke
3.	KECOBO Hotline:	+254 703885033
4.	KECOBO Office Telephone Lines:	+254 20 253 3859/69, +254 713 761 758/739 062 643
5.	Website:	www.copyright.go.ke
6.	Twitter:	@KenyaCopyright
7.	Facebook:	Kenya Copyright Board
8.	CAJ's Postal Address:	The Chairperson, Commission on Administrative Justice (CAJ) P. O. Box 20414 – 00200, Nairobi
9.	CAJ's Email:	complain@ombudsman.go.ke
10.	CAJ's Office Telephone Lines:	+254 20 227 0000

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

