

**COPYRIGHT PROTECTION IN
THE CONTEXT OF THE MUSIC
INDUSTRY IN ZAMBIA**

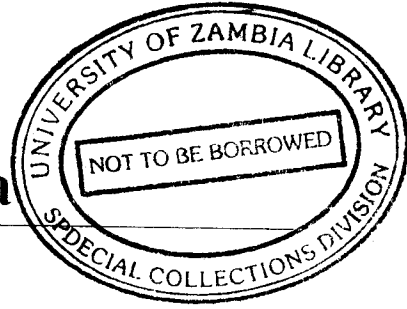
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Copyright protection in the Context of the
Music Industry in Zambia

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I recommend that the directed research paper under my supervision by Natasha
Nsanta entitled-

COPYRIGHT PROTECTION IN THE CONTEXT OF THE MUSIC INDUSTRY IN ZAMBIA

Be accepted for examination in partial fulfilment of the requirements for the award of the
Bachelor of Laws degree of the University of Zambia.



Mr. P. Matibini
(Supervisor)



Date

Dedication

To my beloved husband, Aka for all the support, encouragement and countless times spent on the computer typing. You are a real blessing!!!

To my son Thabo, for understanding that mummy had to study. I will definitely make up for the time lost.

To my wonderful Mother, Ms Enid Mantabe for having had such a profound impact on my life and being the mother that she is. I don't know what I would do without her.

To God, from whom all blessings flow. Everything that I am, I owe it to him.

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To my classmates, Mubanga, Monica, Christopher, Gina, Eta, Mercy, Yvonne, Muki, Mumbi, Ian, James, Clavel, Faith, Maggie, Chola and the rest of the class. I will definitely miss you all.

Declaration

I, Natasha Nsanta, do hereby declare that this dissertation presents my own work, and where other peoples work has been used, due acknowledgements have been made. This paper has not been previously submitted for any academic awards to the best of my knowledge.

Signed:.....*Nsanta*.....

Date:.....*20/12/05*.....

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CHAPTER ONE

1.0 INTRODUCTION

Intellectual Property rights also known as IPRS¹ give to a form of property that can be dealt with just like any other rights that can be assigned or licensed¹. From a legal point of view Intellectual Property is something that can be owned. Creations of the mind, such as an idea cannot be protected like physical objects against other people by having mere possession of that object². Once the intellectual creation is made available to the public, the owner or creator cannot exercise control over the use of that creation. The underlying principle, which is the inability to protect something by mere possession of an object, underlies the whole concept of Intellectual Property. Most forms of Intellectual Property are “chooses in action.” This means that they can only be enforced through legal action. Channel J. described a chose action by saying that:

*“Chose in action is a known legal expression used to describe all personal rights which can only be enforced by action and not by taking physical Possession.”*³

Intellectual Property denotes two branches of law, namely, industrial Property Law which deal with the protection of patent, trademarks, industrial designs, utility models and unfair competition and copyright and Neighboring Rights which deal with the protection of literary, artistic, musical works as well as phonograms and broadcast rights.

¹ Bainbridge D.I Intellectual Property, 4th Ed. (1998) P.10

² Cornish, W R Intellectual Property: Patents, Copyright, Trademarks and Allied Rights, 2nd ed. (1998) Sweet & Maxwell, London: P.333

³ This was discussed in the case of Torkington Vs Magee (1902)2 KBP. P 42

Intellectual Property Law which deals with legal rights associated with creative effort or commercial reputation and goodwill⁴. It protects applications of ideas and information that are of commercial value⁵. Thus, intellectual Property Rights means the legal rights that result from intellectual activity in industrial, scientific, literary and artistic fields⁶. Intellectual Property is aimed at safeguarding creators and other producers of intellectual goods and devices by granting them certain time limited rights to control the use made of those productions and innovations.

For a long time musical works enjoyed no legal protection. What was there was the archaic Copyright Act inherited from the colonial masters. It was not until 1994, when the Copyright and Performance Rights Act was passed that due regard was given to this form of Intellectual Property. By this time, prominent Zambian composers such as Paul Ngozi had already passed on and did not benefit fully from the enactment of this Act. Julius Caesar once remarked about Cassius "*He hears no music: seldom has he smiled.*"⁷ If Zambians though challenged as they are with economic, social, political and health problems, manage nevertheless to smile a little even amidst much adversity, some of the credit should be able to go to the capacity of Zambians to build some joy in peoples lives amidst many challenges. Music has quite a role in this remarkable achievement and certainly makes a major contribution to the quality of life⁸. In considering the role of the music industry it is important to note that development is all about enhancing the quality of life. In terms of cost benefit analysis, the music industry produces high returns thereby

⁴ Bainbridge D.J. Intellectual Property 4th Ed. (1998) p.3

⁵ Cornish W.R. Intellectual Property: Patents, Copyright, Trademarks & Allied Rights 2nd Ed. (1989) P.3

⁶ World Intellectual Property Organization Intellectual Property Reading material (WIPO) 1995, P.5

⁷ Ibid.

⁸ Paper Presented at workshop on the Development of the Music Industry in Africa, June 20-21 (2001) Washington DC

contributing to the quality of life. Creative arts contribute to the well being of human live as they are an important aspect of every society⁹. In enriching of human lives that development aims at, the argumentation of inexpensive but effective sources of joy and *fulfillment has a particular promising role. Music and the creative arts will never of* course replace the need for food and medicine but nor would food and medicine replace the need for the creative arts¹⁰. It is therefore imperative to mention that, the creative arts especially music should not be neglected.

Most of the times people see themselves beckoning to various s different groups related to their nationality, their community, their works, their profession, language, political affiliation and religions. Music not only helps to strength the solidarity that group identities can generate, but can also help to overcome narrowly divisive groupings that tend to split up a culture into battling groups along the lines of artificially sustained "separations."¹¹ Music is not only a great harmonious influence in general, is also assists in sustaining broad cultural solidarity. Music has played a uniting role in the lives of many. Music is not entertainment, but also dialogue. It is not surprising that music has often been at the vanguard of protest movements and in general has tended to give some voice to the voiceless. The destitute and the marginalized can use music as a vehicle of communication and expression, and a well developed music industry with firm channels of transmission, can give eloquence to voices that are otherwise muted and muffled. The development of the music industry can thus make many distinct, but interrelated contributions to economic and cultural progress.

⁹ Paper Presented at workshop on the Development of Music Industry in Africa (2001)

¹⁰ Ibid

¹¹ [Http://www.ifpi.org/site-content](http://www.ifpi.org/site-content) (accessed 13/07/2005)

The subject of Intellectual Property is growing in importance and more especially in the industrial countries. Therefore, copyright in the music industry as an Intellectual Property need to be protected against unauthorized use. In Zambia, copyright in musical works is protected by the Copyright and Performance Rights Acts 1994¹². *Section 8* of the Act provides that copyright shall subsist in any of the original generated works. When a person creates a literary, musical or artistic work, he or she is the owner of that work and is free to decide on its use. The person who is the “creator” or “author” can control the destiny of the works. Copyright can therefore be said to be the legal protection extended to the creator or author of the work. It comprises of two main sets of rights, the economic rights and the moral rights. The economic rights are the rights of reproduction, broadcasting, public performance, translation, public recitation, public display and distribution. The moral rights include the author’s right to object to any distribution, mutilation or other modifications of his work that might be prejudicial to his honor or reputation. Copyright however does not protect the idea itself; rather it protects the expression of the idea¹³. It protects the owner against those who copy. In other words, those people who take and use the form in which the original work was expressed by the author. It is only the owner of the copyright who may use the work as he or she wishes, but not without regard to the legally recognized rights and interests of others, and may also exclude others from using it without his authorization.

¹² Chapter 406 of the Laws of Zambia

¹³ Cornish, W.R. Intellectual Property: Copyright, Trademarks and Allied Rights (1994), P. 333

1.1 History of Copyright

The concept of exclusive rights was established in the early 18th Century when the printing press was invented¹⁴. In 1534 the stationers in England secured protection of the monarchy. The stationers were the principal risk-taker. They acquired the work from the author and organised its printing and sale. The stationers who are the fore fathers of the modern publishers were the chief proponents of exclusive rights against copiers¹⁵. In 1534 the stationers secured protection against importation of foreign books and in 1556 Queen Mary with her acute concern about religious opposition granted the stationers company a charter. This charter gave a power, in addition to supervisory authority over the trade, to search and destroy books printed in contravention of that statute. The company was thus enabled to organize what was in effect a licensing system by requiring lawfully printed books to be entered in its register. Until 1694, parliament refused to ratify the stationers company and it lost some form of protection. Notably, they lost the right to seize and could only claim damages¹⁶.

During the reign of Queen Anne, the Copyright Act was enacted and was referred to as the Statute of Anne. The statute gave the sole right to print books to authors and assign enforcement rights which depended on whether you were registered. Before the invention of the printing press many original technology resulted in the production of multiple copies and it was naturally felt that the author should be paid for each copy that was made¹⁷.

¹⁴ Holy Oak, J. Jorremans, P. Intellectual Property Law (1995) P. 147

¹⁵ Ibid

¹⁶ Cornish, W.R. Intellectual Property: Copyright, Trademark and Allied Rights, 2nd Ed. (1998) Sweet and Maxwell, London. P.

¹⁷ Holy oak, J. Jorremans, P. Intellectual Property Law(1995) P. 147

In Zambia, the Copperbelt and Performance Rights Act was the archaic copyright laws that were enacted by the colonists. The Copyright and Performance in public of his or her music whether such performance is performed live by orchestra, pianist, disc player, jukebox, tape machine, radio or television. A performance in public broadly speaking is said to be any performance which is outside the domestic circle. For instance, the courts have held that this includes performance in hotels, restaurants, circuses and even performances given to audiences restricted to the members of a club or local institute. When it is realized that the performing rights royalties form the major part of a composers or artists livelihood, all reasonable people will ensure that he or she is entitled both morally and legally to some payment for the use of his or her intellectual property. Taking a person intellectual property and using it without permission or payment is equivalent to taking his/her material property unlawfully and that is nothing less than theft.

1.2 Justification for Protecting Copyright in Music

Copy protects “works of the spirit.” By works of the spirit we mean creations of creative genius which include literary, dramatic, musical and artistic works. The creators of such works depend on the use and exploitation of these rights. It is often said that “like the laborer is worthy of her hire”, so is the creator entitled to an equitable remuneration for the use of his or her work by others. In order for a musical work to enjoy protection, it must satisfy certain minimum standards. Firstly, there should be sufficient skill, judgment and labor or selection, judgment and experience expended by the author in creating the work, but the input must satisfy a certain criterion. Secondly, it must be original.

However, this does not concerned with originality of ideas but independence in the expression of thought¹⁸.

The exercise of rights means that he or she can use the work himself or herself, and can give permission to someone else to use the work or can prohibit someone else from using the work. The general principle is that copyright protected works cannot be used without the authorization of the owner of the rights. Thus, copyright protects the independent skill, labor and effort which has been expended in producing the work and prevents others from helping themselves to too large a portion of that skill, labor and effort. In the case of *Macmillan V Cooper*¹⁹ Lord Alan said that “there must be sufficient labour and capital expended by the owner in order to qualify for copyright.” The purpose of copyright is to ensure that artists and their recording companies are economically rewarded for their works which it is hoped in the long run enables public to have access to quality musical works and sound recordings. Copyright is the essential building block of the music business. In order for song writers, record companies to invest their revenues and their livelihoods they need to be secure in the knowledge that they, and no one else will own the result and incentive to be creative. It protects artists from piracy of their works.

Protecting copyright, fighting piracy and promoting the values to modern economic legitimate music industry. Copyright provides that the right holders determine whether and how copying, broadcasting and other uses of their work place. This enables talented

¹⁸ Cornish, W.R. Intellectual: Property: Copyright, Trademarks and Allied Rights, 2nd Ed. (1998) Sweet and Maxwell, London P. 268.

¹⁹ (1923)93 L.J.P.C,113

people to create great works and entrepreneurs, the economic reasons to invest in their works. Copyright protects everyone involved in the music industry from the aspiring artist, to the successful best seller and from the local independent record company to the large multi-national producer. It ensures that all the parties that have had art in creating the music are, represent and reward the creativity, sweat and toil of those who create and sell music. The real value is in the rights and the creativity that they protect. Enshrined in international law for over 200 years, copyright provides the economic foundation for creating and disseminating music, literature, art, film and other forms of creative work. Copyright in music is meant to protect culture and foster artistic integrity.

CHAPTER TWO

2.0 PIRACY

The 1990s saw government pursue free market economy policies aimed at improving the economy. The market economy or liberalization entails that you let the market forces determine the cost of goods and services and at affordable prices. We however cannot deny the fact that this had its repercussions, and one of these was piracy/counterfeits because consumers had at their disposal a wide range of goods to choose from. It is true that piracy is the greatest threat facing the music industry in Zambia today. The term piracy is generally used to describe the deliberate infringement of copyright on a commercial scale. In relation to the music industry, it refers to unauthorised copying. Therefore piracy is the unauthorized copying of copyright materials for commercial purposes and the unauthorized commercial dealing in copied materials.²⁰ Piracy falls into three categories. Firstly, there is simple piracy which is the unauthorised duplication of an original recording without the consent of the right owners. Pirate copies are often compilations, such as the “greatest hits” or a collection of a specific genre, such as dance tracks. Secondly, is the counterfeits, these are copied and packaged to resemble the original producer’s trademark and logos are reproduced in order to mislead the public into believing that they are buying an original product. Thirdly, is the bootlegs these are the unauthorised recordings of live or broadcast produced, duplicated and sold often at a premium price without the permission of the owner or record company²¹.

²⁰ World Intellectual Property Organisation Reading Material, (1998)P.47

²¹ <http://www.ifpi.org/site-content> (accessed 08/09/05)

According to Chisha Folotiya²² he contends that piracy in Zambia is in three levels or groups. The first involves criminal gangs who import copies of CDs, Cassettes and even DVDs of works that have been duplicated without the consent of the owners. This involves both local and foreign music. It has been discovered that these syndicates have started manufacturing their products right here in Zambia in high density areas such as Matero in Lusaka apart from those that come through the Nakonde border from Tanzania. This is said to be the origin of the pirated music found on the streets. Secondly, there has been a rise in CD burning facilities especially at internet cafes where people can easily go to and choose from a menu that they have stored on their hard drives. Thirdly, is he piracy carried out by people who have ready-burned compilations often sold in markets and offices. The law enforcement authorities have knowledge of all these activities but successes are seemingly few.

An essential part of piracy is that the unauthorized activity is carried on for commercial gain. This element of commercial gain implies that piracy will often be carried out on organized basis, since not only is the unauthorized reproduction of a work involved, but also the subsequent sale or distribution of the illegally reproduced work, which will require some form of organized distribution network or contact with potential purchasers. As the consumer, you can only see the end of the chain of such a distribution network in the form of one sales outlet selling a pirated product. It is nevertheless imperative to mention that in dealing with the piracy problem specifically, that behind such outlets will

²² He is the Managing Director of Mondo Music Corporation

be a systematically organized illicit enterprise, which illegally reproduces a copyrighted work and distributes it to the public via a number of outlets.²³

However, the question still remains to be answered, why is piracy illegal? Virtually everyone dealing with music piracy knows that it is illegal, but why it is illegal is not so well understood. The answer lies primarily in the way that copyright laws apply to music. Copyright springs from a simple notion, that the people that create, produce or invest in creative work should be the ones that decide how that work should be produced and made available to the public. To ensure there are proper incentives for companies to continue investing in the promotion and marketing of sound recordings, International treaties such as the World Intellectual Property Organisation and the Trade Related Aspects of Intellectual Property Agreement (TRIPs) grant producers of sound recordings various rights in those recording. These rights include the exclusive right to commercially copy the recordings and to distribute, import, export these copies. It is these rights that enable law enforcement bodies to take criminal action against those who make and distribute music without the permission of the recording companies that invest money in producing them. They also allow record producers to take civil actions to recover compensation for damages as a result of music piracy²⁴. While there are often other laws or regulations that are broken by music piracy such as tax laws and trademark laws, the rights of music producers under copyright are the fundamental basis for the illegality of music piracy. Recording companies who are usually music publishers as well, are essentially copyright producers and owners. They own the right in the actual

²³ World Intellectual Property Organisation Intellectual Property Reading Material, (1998) P.47

²⁴ <http://allafrica.com/stories/accessed> (03/07/05)

recording and make money by creating, manufacturing, distributing and marketing these copyrights²⁵.

It is important to mention that a successful song has a life beyond the actual record that it is first issued on. Record companies earn significant revenue from back catalog sales, because when something is successful once and finds its entrance on the market, it tends to have an extraordinary long life through revenues. For instance, songs done by the late Paul Ngozi, Chris Chali and P K Chishala are still being played on many radio stations and their music tapes, and CD's are also on the market. In this way artist make money from sound carrier sales and receive a royalty on each sale. Composers and authors who are often artist as well receive royalties for the various uses made of their compositions. These include recordings for which they receive a mechanical royalty and live performance and broadcasting of the compositions for which they receive performance royalties. Generally music publishers to whom authors/composer licence their compositions represent them. It is however, the publisher who seeks commercial opportunities for the work.

Artists and composers often sign away their rights to the music. They do this because there is not a good strong system of collection societies which ensures that royalties are collected and paid²⁶. For instance one of our musicians Winston Moya alluded to this fact as he himself signed a deal with Supershine Promotions a music recording company where he signed away his rights to his new album 'Mulungu Wanga'. He was saddened by the fact that even before this music was released to the public, pirates of this same

²⁵ <http://www.ifpi.org>

²⁶ <http://www.ifpi.org/site-content> (accessed 03/07/05)

album were being sold on the streets. As a result of this artists have no expectations of receiving a lot of money as royalties from record sales because of piracy and the inadequate collection of royalties, they expect a bigger single up-front payment. Thus, they expect the artist to work together with them to sell the album. However, for an artist who is first getting a one off payment, the only way to make money is by recording the absolute maximum number of albums and doing as many of these deals as possible. This makes it very difficult to build a career with a recording company. What makes this situation even worse is the plethora of dishonest producers and corrupt or incompetent managers who make the artists sign contract that will give them an advantage as regards the profit form the sale of the music, and places the artist in awkward position in that he or she cannot enforce the contract against the producer or manager. The contracts normally have lacunas in them.

The greatest limiting factor on the sales of music is piracy. Almost no country in Africa has a piracy level of not less than 25%²⁷. In some countries, piracy levels are as high as 85% to 90%²⁸. While piracy is not a recent phenomenon, a number of developments have occurred which have caused it to assume alarming proportions, and to threaten the basis of the copyright system specifically in the music industry. Firstly, is the huge growth of the compact disc-recordable disc (CD-R). The latest trend is for small, garage-based pirate CD-R labs, which are taking over from the mass manufacturers of pirate CD's at optical disc plants. Furthermore, there has been a wide spread availability of cheap CD-R replication equipment and high speed burners. As earlier been alluded to this can even now be done at internet café's and offices were these equipment have been

²⁷ World Comercial Piracy Report, 2005

²⁸ *ibid*

bought for official use. This has sharply lowered the barriers of entry for commercial pirates. A typical commercial pirate operation now comprises rows of high speed CD burners stored in a garage or CD-R lab²⁹. This switch to CD-R has created several new problems for the music industry. Firstly is the fact that the CDR operations are more numerous, more concealed and portable than CD plant operations and secondly, there has been an increase in the pirating of local music. While larger CD plants concentrate on pirating music by major international artists that they can export, smaller CD-R based operations have captured the market for domestic artists.³⁰ This means reduction in the average prices of pirated discs, tapes or DVDs. Since pirate music sold on CD-R tends to be slightly cheaper than the pressed disc variety. Secondly is due to the advances in the means by which intellectual works may be communicated. The medium of the printed word has been supplemented progressively by the media for communication of audio and visual recordings in the form of phonograms, music cassettes, films and videograms.

Furthermore, the widespread commercialization of the computer has added a further means of recording and communicating information. The advent of the digital technology has had a tremendous impact on the creation, dissemination and use of works³¹. The copyright system has however responded to these changes by expanding the subjects over which the creators intellectual works are rights. These expansions, however, have increased the scope for pirates to interfere in the control which an author exercises over the dissemination and use of his works by the public.³² Simultaneously with the advances in the means of communication, intellectual works there have been

²⁹ Ibid

³⁰ Ibid

³¹ Intellectual Property Reading Material, WIPO (1998) P. 48

³² Ibid

significant advances in the means of reproducing tangible records of those works. For instance, there has been the invention of the magnetic tape, the advent of the compact disc, and the development of higher quality and cheaper cassette recorders which enable not only the playing of pre-recorded cassettes, but also the recording of music from live performances or radio³³. Now, this has had an enormous impact and this has been manifested in the difference in cost between, on the one hand, the making of the original recording by an author and on the other hand, the reproduction of such a recording by others therefore the advances in recording technology have produced the means whereby pirates can easily produce illegal versions of the original work. Since the pirate has not made, and therefore does not need to recover the cost of any investment in the production of the original work, the pirated copies are usually sold at reduced prices, thereby undermining the original authors, performer's investor's and distributor's possibility of obtaining a just moral and economic reward for their work and investment³⁴.

Last year illegal pirate music was worth US\$4.6 Billion globally (1.5 Billion Units), the equivalent in size to the entire legal markets of the UK, Netherlands and Spain combined. In 31 countries, fake recordings outsell legal copies.³⁵ One third of discs sold worldwide are pirates³⁶. Another reason for the rampant piracy level in the country is attributed to the high poverty levels in the country. In Zambia, more than 75% of the population lives on less than \$1 a day. As earlier been stated, pirated CD's or tapes are a lot cheaper than

³³ ibid

³⁴ ibid

³⁵ World Commercial Piracy Report, 2005

³⁶ ibid

originals and this means that their price on the market is also cheaper. It is therefore important to mention that only 7% of this crime is detected³⁷.

2.1 Socio-Economic and Cultural Implications

Piracy is sometimes and mistakenly called a 'victimless crime'. It is not. The economic losses due to piracy are enormous and are felt through out the chain. The victims include artists whose creativity gets no reward. Piracy has social, economic and cultural implications. Firstly, the greatest victim of piracy is local culture. The people who invest in the music Industry spend million money in this new talent. Secondly, piracy nurtures organised crime. Very often the money that is paid for pirate CDs or tapes will be channeled into drugs trade, money laundering or other forms of serious organised criminal activity.³⁸ Thirdly, piracy act as a brake on investment, growth and employment. In today's global economy, intellectual property is a motor of economic growth. It was said by one American artist, Shaggy that "music piracy is theft, it robs young and promising artist of the fruits of their creative endeavour"³⁹. This is a real loss to the music world. Piracy is blight on culture and a drain on economies.

While consumers may sometimes see short-term benefits in the availability of cheaper music as a result of piracy, the quality of reproductions made by pirates is often very inferior. Consumers are also disadvantaged in the long term by piracy as a result of the absence of remuneration given to authors by pirates, and of the misappropriation of the economic returns to producers. This diversion of economic rewards from authors and

³⁷ CYCROP Managing Director Ann Chiluba Chimanse (cycrop is a security consultancy that focuses of fighting piracy among other things).

³⁸ Commercial Piracy Report, 2005

³⁹ This was during his visit to Africa (south Africa) while commenting on the music industry in Africa.

their business associates to pirates removes the incentive to the investment of time, effort, skill and resources in the creation of new works. In the case of *Macmillan v Cooper*⁴⁰ Lord Atkin enunciated the principle of sufficient skill, labour and judgement to be expended by the author. This principle is the bedrock of what constitutes copyrightable material. Thirdly, since piracy is a clandestine activity, this means that the profits derieved by pirates are not subject to tax, and as a result government is also losing money.

On the international level the global pirate market total 12.9 billion units in 2001.⁴¹ The International Federation of Phonographic Industries (IFPI) estimates that in 2001, 27% of all CD's sold were pirate-up from 2% the year before. CD-R piracy has continue to proliferate rapidly world wide. In 2000, one in ten pirate products sold were on CD-R format.⁴²

In 2002 Music Publishing Houses, Sounds Investments, Mondo Music Corporation and Fine Beat teamed up with Zambia Music Copyright Protection Society (ZAMCOPS) to fight the musician killer monster 'piracy'. Despite raids on retailer ships and street vendors, supplemented by seizures by customs at boarder entry points, let along the continental sensitization campaign by ZAMCOPS, piracy of audio tapes is still rampant. Raids on pirates have cost ZAMCOPS over K15 million in the past 9 years.⁴³ The costs involved are transportation and disposing merchandise once seized. Zambia has for a long time experienced and influx of pirated goods through the Nakonde border where

⁴⁰ (1923) 93. L. P. J.113

⁴¹ World Commercial Piracy Report, 2005

⁴² <http://www.ifpi.org/site-content> (accessed 03/07/05)

⁴³ International Federation of Phonographic Industries (IFPI) Report 2005

Zambia shares borders with Tanzania. Zambia is losing huge sums of money through the movement of such goods. About three years ago parliament recommend that a Zambian delegation comprising of copyright experts, police, customs officers and senior government officials should travel to neighbouring Tanzania to discuss with Tanzania the best measures that the two countries can put in place to curb the influx of pirated goods.

2.2 Systems in Place to Fight Piracy

Intellectual property rights can be meaningless if legal procedures and sanctions do not detect and punish violations. In 2002, the Ministry of Information and Broadcasting services established a National Copyright Taskforce. This an advisory body to the government on copyright matters.⁴⁴ This body was established after it was realised that the Ministry of Information could not manage to address the copyright issues single handedly, but with the help of key players in the field. The task force which is chaired by the Permanent Secretary in the Ministry of Information comprises members form the following institutions:

Ministry of Information and Broadcasting ;

Ministry of Justice;

Zambia Revenue Authority;

National Arts Council;

Book Publishers Association;

Ministry of Community Development and Social Services;

Zambia National Broadcasting Services;

⁴⁴ Zambia Music Copyright Newsletter, Issue No., Vol. 2, July-Sept 2002

Zambia Music Copyright Protection Society;

Mondo Music Corporation;

Patents and Companies Registration Office;

National Writers Association;

Computer Association of Zambia;

The office of the Registrar of Copyright in conjunction with the copyright taskforce, in 2002, designed a program to sensitize the law enforcement agencies such as the police, customs and immigration officers on copyright issues.⁴⁵ It was observed that the majority of key stakeholders lacked knowledge on copyright. And these were the people who were supposed to be enforcers. Enforcement officers indicated that lack of knowledge on copyright and Neighboring Rights was the major reason for their failure to enforce these rights. Since 2003, five ant-piracy sensitization workshops have been conducted in Lusaka and Nakonde boarder town as well as Lusaka, Ndola and Kitwe. The Ministry of Information has continued with these sensitization programs with the support from copyright stakeholders such as the International Federation of Phonographic Industries, Multi-choice, Music Publishing house and Microsoft.⁴⁶ And anti-party squad which falls under the Zambia police-force has also been established. This squad is a specialized body that has been mandated to handle copyright infringement cases. All the staff belonging to this squad have been trained in copyright in general and piracy in particular. They are therefore, in a competent position to handle cases of piracy.

⁴⁵ D. Chileshe, paper presented at the sub-regional workshop on Copyright and Related Rights I Lilongwe, Malawi, 25-28 April 2005.

⁴⁶ Ibid

A survey conducted in 2002 revealed that 8 out of 10 musical tapes, CD's sold were pirates and that more than 50,000 are sold every week in two major markets, the city and town centre market. The survey further established that the Zambian government was losing revenue amounting to K15 million per annum through the piracy crime.⁴⁷ Music publisher also confirmed that they are losing million of kwacha per day because of piracy. With all these measures that have been put in place to fight piracy level, can it be said that piracy level has reduced in Zambia? Or is there is a lot to be done to deal with problem? It is important, first destroy the social prestige involved in buying a pirate tape or CD. In one way or another people should feel the same way as in other cases of theft. Throughout the 1990's poor or non-existent copyright laws and weak and non-existent enforcement, coupled with weakened economy made it almost impossible to implement effective anti piracy measures. Music is one of the great global industry of today. It is one of the leading creative industries and drives the development of modern economies. Copyright is the essential building block of the music business. Protecting copyright, fighting piracy and promoting the value to modern economic legitimate music industry should be a core aim to the creativity of a developing country like Zambia. Government therefore, should not permit this critical asset to be devalued by piracy.

It has therefore been observed that piracy is not only a problem in Zambia, it is also an issue globally. Destroying the prestige that is attached to buying a piracy will have a great impact on the sale of such tapes or CD's. Government should have a responsibility to recognize the threat that organised intellectual property crime poses to their economies, culture and international reputation. In the case of *University of London*

⁴⁷ Zambia Music Copyright Protection Society Newsletter, Issue No. 2, Vol. 4, July-Sept 2002.

*Press v London Tutorial Press*⁴⁸ Petersen J. stated that what is worth copying is prima facie worth protecting. This is the essence of the copyright law.

⁴⁸ (1916) 2 Ch. D P610

CHAPTER THREE

3.0 **ROLE OF COLLECTIVE MANAGEMENT OF COPYRIGHT- ZAMBIA MUSIC COPYRIGHT PROTECTION SOCIETY (ZAMCORPS)**

It has been mentioned that the creator of a work has the right to allow or to prohibit the use of his works; a playwright can consent to his work being performed on stage under certain agreed conditions; a writer can negotiate a contract with a publisher for the publication and distribution of a book; and a composer or a musician can agree to have his music or performance recorded either on tape compact disc. These examples all illustrate how the owners of the rights can exercise their rights in person. However, it is important to note that individual management of rights is virtually impossible with regard to certain types of use for certain practical reasons. An author of a work is not materially capable of monitoring all uses of his works; he cannot for instance contact every single radio or television station to negotiate licenses and remuneration for the use of his works. It therefore follows also that it is not practical for a broadcasting organisation to seek specific permission from every author for the use of every copyrighted work. So, if musical works are broadcast on television every day and every year, then it means that thousands of owners of rights would have to be approached for authorization. The very impracticability of managing these activities individually both for the owner of rights and for the user, creates a need for collective management organisations whose role is to bridge the gap between them in key areas. Throughout the world, the rights of authors are known to be their personal rights. They form part of the individual rights provided for in Article 27 of the Universal Declaration of Human Rights. They are called exclusive rights in the Berne Convention for the Protection of Literary and Artistic

Works.⁴⁹ Collective management of copyright can be said to be the exercise of copyright and related rights by organisations acting in the interest and on behalf of the owners of rights. Yet, one may still ask the question, why is collective management of copyright necessary? Composers, writers, musicians, singers, performers and other talented individuals are among society's most valuable assets. The fabric of our cultural lives is enriched by their creative genius and that is why copyright protection also has a cultural dimension because it has an impact on the culture of our people. Therefore, in order to develop their talent and encourage them to create, we have to give these individuals incentives, in the form of remuneration in return for permission to make use of their works. In the case of *Harper & Row Publishers v Nation Enterprises*⁵⁰, Justice O'Connor stated that by establishing a marketable right to the use of one expression, copyright supplies the economic incentive to create and disseminate ideas.

Collective management organisations are an important link between creators and users of copyrighted works such as radio stations and the public because they ensure that as owners of rights, creators receive payment for the use of their works. Membership of collective management organisations is open to all owners of copyright and related rights, whether authors, composers, publishers, writers, photographers, musicians, or performers. On joining the collective management organisation, members provide some personal particulars and declare the works that they have created. Information provided forms part of the documentation of the collective management organizations that allows the link between the use of works and payment for the use of works to be made to the

⁴⁹ *ibid* P.373

⁵⁰ (1985) 4711 US, 539 558

correct owner of the rights. The works declared by the organisation's members constitute what is known as the national or local repertoire⁵¹.

The commonest types of rights under collective management include the right of public performance such as music played or performed in discotheques, restaurants and other public places; right of broadcasting live and recorded performances on radio and television, the reproduction of works in CDs, tapes, vinyl records, cassette, mini-discs, right of reprographic reproduction of literary and musical works, and related rights which include the right of performers and producers of phonographs to obtain remuneration for broadcasting or the communication to the public of phonograms⁵². There are various kinds of organisations of collective management, it all depends on the type or category of work involved, whether it is music, art or literary works. Traditional collective management organisations acting on behalf of their members, in most cases negotiate rates and terms of use with users, issue licenses, authorizing uses and collect and distribute royalties.

In the field of musical works, encompassing all types of music, documentation, licensing and distribution are the three pillars on which the collective management of the rights of public performance and broadcasting is based. The collective management organisation negotiates with users such as radio stations, broadcasters, discotheques, cinemas, restaurants, or groups of users and authorizes them to use copyrighted works from its repertoire against payment and on certain conditions. On the basis of its documentation, information on members and their works and the programs submitted by users, for

⁵¹ <http://www.wipo>.

⁵² *ibid*

instance, logs of music played on radio, the collective management organisation distributes copyright royalties to its members according to established distribution rules.

Zambia has one copyright collecting society known as the Zambia Music Copyright Protection Society (ZAMCOPS). ZAMCOPS is affiliated to the Ministry of Information and Broadcasting Services through the office of the Registrar of Copyright. Section 22(1)⁵³ defines a collection society as an association, partnership or body corporate whose principle purpose, or one of whose principle purpose, is the representation of copyright owners in the negotiation and administration of collective copyright agreements. Further, collective management agreement is defined as an agreement between a group of owners of copyright and another person licensing the person to use material subject to any of the copyrights. This collecting society administers public performance rights of music composers. The rate that is charged depends on the type of user. Each user has a different rate. Section 22(3)⁵⁴ provides that the owner of a copyright may authorize a collecting society whether or not registered to negotiate and administer collective copyright license agreements on behalf of the owner and other copyright owners. ZAMCOPS has over 900 members registered with it⁵⁵.

3.1 Socio-Economic and Cultural Implications

Collective management does a valuable service to the world of music and other creative arts. By managing their rights, the system rewards creators for their works, and the creators in turn are more inclined to develop and apply their talents in an environment

⁵³ Chapter 406, Laws of Zambia

⁵⁴ CAP, 406, of the Laws of Zambia

⁵⁵ ZAMCOPS officials

that provides adequate copyright and related rights protection and an efficient system for the management and enforcement of such rights. Music users should not be left to use music without paying licence fees, because they are depriving the owners of these rights a right to the rewards of their creativeness. There have been instances where music users have been reluctant to pay licence fees or royalties to the ZAMCOPS which in turn is supposed to be redistributed to the musicians. In the case of *Performing Rights Society Ltd V Francis Anthony Hickey*⁵⁶, the plaintiff claimed an injunction to restrain the defendant by himself or by his servants or agents from infringing the plaintiffs copyright by way of communicating to the public or authorizing or procuring to the public three musical songs. The plaintiff also claimed damages. The defendant was said to have played three musical records whose copyright was vested in the plaintiff without a valid license. It was argued that the plaintiff was the Zambian agent for the performing right society whose objective was to protect copyright of music writers, artists, and composers. It was a representative society which collected fees on behalf of its members which was then distributed to the members. The plaintiff was on several instances written to, reminding him that the plaintiffs copyright was being infringed but to no avail. The defendant contended that he did not know that copyright subsisted in the records. The court found the defendant guilty of infringement of copyright for playing three musical records for one day in public without obtaining a license from the plaintiff who was the owner of the copyright. The plaintiff was not entitled to damages because the defendant had no reasonable ground for suspecting that copyright subsisted in the plaintiff. However the plaintiff was given an alternative to damages in that they were entitled to an

⁵⁶ (1979) Z.R. P.66

amount of profits in respect of the infringement for that one day. The injunction was also granted in respect on the three musical works.

Collective management thus is meant to encourage creators to contribute to the development of the cultural sector, attract foreign investment and generally enables the public to make good of a broad array of works. Together, these factors have an undeniably favourable impact on national economy. In some countries, such as the US or even South Africa the music industry contributes quite a percentage of the gross national product. Income from the collective management of copyright and related rights accounts for a substantial part for that percentage. Like all its affiliates, ZAMCOPS is incorporated as a non-profit making society. All fees collected by it, after allowing for administrative expenses, are distributed among the composers, lyricist and publishers concerned in proportion to the use which has been made of their works for performances in public. ZAMCOPS also renders an invaluable service to the users of music in Zambia. No one may give a performance in public of music without their prior permission, for to do so would constitute an infringement of the copyright. Imagin if every user of music in public, every hotel or restaurant proprietor playing music to entertain his customers, every industrialist using music while working in his factory, every cinema proprietor, every concert organiser, every disco proprietor and a whole host of other people who use music in public everyday had to negotiate separately with the composers concerned for the use of their music the situation would be chaotic. In each single day each of them might play a hundred tunes composed by hundreds of different composers. To negotiate with all these people would be prodigious and cost prohibitive. Therefore in the music circles in Zambia, ZAMCOPS acts as a link between all these people by granting them

licences. Although it faces a number of challenges in its operation it has now extended its operations to other towns in the country in an effort improve the licensing system.

It is imperative to mention that where laws exist, their practical value depends on the establishment of an appropriate infrastructure in the form of a suitable authors organisation for collection and distribution fees. ZAMCOPS is also affiliated to composers societies all over the world, and through a system of reciprocal agreement it administers foreign music. Thus, ZAMCOPS administrates not only the music of its Zambian members, but also the great store of music in the repertoires of all those other societies⁵⁷. In this way, ZAMCOPS does invaluable work, rendering an essential service to creative music within and outside the country.

A Zambian composer whose music becomes popular and is widely played both at home and abroad would find it impossible to keep a check on the use of his or her works particularly in other countries. The work of ZAMCOPS is that whenever music is performed in public in another country, the local society collects the appropriate fees and then sends them to ZAMCOPS for distribution⁵⁸. Similarly, ZAMCOPS collects the fees for all performances in public, distributes the appropriate share to its own members.

3.2 Payment of Royalties

Many creative works protected by copyright require mass distribution, communication, and financial investment for their dissemination for example, sound recordings and films,

⁵⁸ Interview with officials from ZAMCOPS

hence, creators often sell the rights to their works to individuals or companies best able to market the works in return for payment. These payments are often made dependent on the actual use of the work and are then referred to as royalties.

Composers and lyricists and the publishers to whom they licence their works for commercial exploitation and share their revenues with receive two sets of royalties. Mechanical royalties are due on the sales of a sound carrier containing the work, and performance royalties are due on the public performance of a work, either in live performance or via broadcasting. If they are also artists, they will also receive royalties from their record company. The collection of mechanical royalties is easy and relatively cheap and, is accordingly far more copyright friendly. However, performance royalties are more costly to collect because performances have to be monitored and tariffs have to be negotiated with broadcasters, who as copyright users, and not producers see such royalties as a cost they want to keep down. And one way of doing this is not to pay.

Royalties are based on a percentage of air time revenues. When the music is played on air they log in the music and from this royalties are supposed to be paid per song played. The total value of music publishing revenues collected in Africa in 1997 was \$30.3 million. This accounted for 0.43% of the global value of music publishing in 1997. Of that \$30.31 million, \$29.663 million 98% was collected in South Africa. Mechanical income accounted for 35% of the total \$30.31 million for the whole of Africa and for the same percentage, 35% of the music publishing revenue is mechanical and about 40% is

performance⁵⁹. The reason why the ratios are lower in Africa as attributed to the high piracy levels as earlier been alluded to in the paper.

It is therefore, important to note that there can be no control on the part of the artist and no remuneration without some concrete set of rules that can evolve with the ever changing economic and socio-cultural wheel. While collective societies are a useful starting point, they are not the final answers vis-à-vis the widespread use of protected material by music users. Collective societies allow copyright owners to market their works in a way that enable them to compete effectively and to require a jointly operated entity to create and define a competitive market.⁶⁰ The purpose of copyright law is to make sure that artists and their record companies are economically rewarded for their work, which it is hoped in the long run, will enable the public to have access to quality musical works and sound recordings.

⁵⁹ Summit on the Development of Music in Africa, 2002

⁶⁰ See generally H, Siegel, Copyright and the Cyber-jukebox; Applying Fair use Doctrine to Music on the Internet

CHAPTER 4

4.0 ANALYSIS OF THE PROVISIONS OF THE COPYRIGHT AND PERFORMANCE RIGHTS ACT, 1994

The Copyright and Performance Rights Act⁶¹ governs the protection of copyright and related rights. Section 7⁶² provides that copyright is a property right which shall subsist in the products of creativity. The works of creativity in which copyright may subsist include works in original literary works, musical works, artistic, compilations, audio visual, sound recordings, broadcasts, cable programs and typographical arrangements of published editions of literary works⁶³. Section (3)⁶⁴ further provides that copyright shall not subsist in a literary or musical work or in a computer program unless and until it is recorded in writing or in some other form. Thus permanence is of paramount importance in copyright law. This also further highlights the fact that copyright does not protect ideas but the expression of the ideas⁶⁵. That is the reason why there should be sufficient skill, judgment and labour in order for a work to qualify for copyright. This therefore, brings us to the conclusion that once an artist puts his music onto a CD, tape, video, DVD it is then sufficiently substantial to attract copyright. Therefore a musical work is not the subject of copyright unless and until it is recorded in writing or otherwise⁶⁶. It is therefore generally agreed that copyright is not a monopoly but merely a right to prevent others from copying.

⁶¹ Chapter 406, of the Laws of Zambia

⁶² Chapter 406, of the Laws of Zambia

⁶³ Section 8

⁶⁴ Chapter 406, of the Laws of Zambia...

⁶⁵ Cornish, W. R. Intellectual Property: Patents, Copyright, Trademarks and Allied Rights 2nd Ed. (1993) P.268

⁶⁶ *ibid* P. 278

4.1 What Constitutes Infringement?

The owner of copyright in a protected work may use the work but not without regard to the legally recognized rights and interest of others and may exclude others from making it without his authorization and as such , the rights that are bestowed by law on the owner of copyright in a protected work are usually referred to as “exclusive rights’ to authorize others to use the protected work. The original authors of works protected by copyright also have moral rights in addition to their exclusive rights of an economical nature. In relation to musical works the owner of the copyright in a work shall have the exclusive right to do, or to authorize others to do the controlled acts which are the right to publish, reproduce in any material form, broadcast, communicate to the public by any other means or, import into Zambia of copies or the adaptation of the work.⁶⁷ The right of the owner of copyright to prevent others from making copies of his or her works is the most basic right under copyright⁶⁸. For instance, the right of a phonogram producer to manufacture and distribute compact discs containing recorded performances of musical works is based in part, on the authorization given by the composers of such works to reproduce their compositions in the recording. Therefore, the right to control the act of reproduction is the legal basis for many forms of exploitation of protected works including music. So far as music is concerned, sound recordings is the most favoured means of communicating a work to a wide public. Thus, copyright in a work is said to be infringed when a person who, without the consent of the owner of the copyright does, or authorizes another person to do any of the controlled acts in relation to that particular work.⁶⁹ Importation of such a work without the consent of the copyright owner otherwise than for private and domestic

⁶⁷ Section 17(1), of Chapter 40 (b) of the Laws of Zambia

⁶⁸ Intellectual Property Reading Material, World Intellectual Property Organisation (1998) P. 35

⁶⁹ Section 19 of Chapter 406, of the laws of Zambia

use sells, lets for hire, offers or expose for sale or hire, exhibits in public or distributes, otherwise than in the course of trade or business, articles that are infringing copies, to an extent that it prejudicially affects the owner of the copyright constitutes infringement of that work⁷⁰. However, if it is proved that such an individual did not know and had no reasonable grounds for knowing that the articles were infringing copies he or she will not be held liable for infringement. Section 20 (1)⁷¹ provides that copyright in a work is also infringed by a person who, without the consent of the owner of the copyright imports or sells or lets for hire, or offers or exposes for sale or hire an article specifically designed for making infringing copies. Such a person shall be held liable unless it is proved that he did not know or had no reasonable grounds for knowing that the article would be used for making such infringing copies. It is infringement when a person who, without the licence of the copyright owner, transmits the work by electronic means knowing or having reason to believe that infringing copies of the work will be made by means of the reception of that transmission⁷².

However, there are exceptions which are commonly referred to as the fair dealing exceptions. The three most important exceptions turn upon a qualitative assessment, they exempt copying for certain purposes if it amounts to no more than 'fair dealing'. In these cases the courts are left to judge fairness in the context of the surrounding circumstances.⁷³ These exceptions include fair dealing of a work for private study or for the purposes of research done by an individual for his personal purposes, otherwise than for profit, for purposes of criticism or review provided there is sufficient

⁷⁰ Section 18(c) of Chapter 406, of the Laws of Zambia

⁷¹ OP cit

⁷² Subsection 2 of Section 20

⁷³ Cornish, W. R. Intellectual Property: Patents, Copyright, Trademarks and Allied Rights 2nd ed. (1993), P.301

acknowledgement, reporting current events, in a newspaper or magazine, provided there is sufficient acknowledgement, and the reproduction of a work for the purposes of judicial proceedings or for the purposes of the education system in Zambia⁷⁴. If an act conflicts with the normal commercial exploitation of a work or unreasonably prejudices the legitimate commercial interests of the owner of the copyright in a work it shall not be treated as fair dealing⁷⁵. Where a person however, reasonably believes that copyright in a musical work has expired or the author of the song is not known, such a person shall not be held liable for infringement⁷⁶.

4.2 Enforcement Mechanisms

4.2.1 Enforcement Under the Copyright and Performance Rights Act

Enforcement mechanisms in the administration of copyright law are very fundamental as they will determine the extent of infringement cases. Section 25 (1)⁷⁷ provides that an infringement of copyright shall be actionable in the court at the suit of the owner of the copyright. In an action for infringement of copyright all such relief by way of damages, inflictions, accounts or otherwise shall be available to the plaintiff as is available in respect of the infringement of any other intellectual property right⁷⁸. In some cases the court will order that the infringing copy or article designed for making copies of a particular work be forfeited or be delivered to the owner of the copyright.⁷⁹ It is not necessary that the copyright owner should show proof of actual damages. Furthermore,

⁷⁴ Section 21(1) of Chapter 406, of the Laws of Zambia

⁷⁵ Section 21(2) of Chapter 406, of the Laws of Zambia

⁷⁶ Chapter, 406, of the Laws of Zambia, s. 21

⁷⁷ *ibid*

⁷⁸ Section 25(2) of Chapter 406 of the Laws of Zambia

⁷⁹ Section 26 of Chapter 406, of the Laws of Zambia

in an action for infringement, the plaintiff shall not be entitled to damages if the defendant shows that he reasonably believed that no copyright subsisted in the work⁸⁰.

If an owner of a copyright in a musical work reasonably believes that someone is importing infringing goods, the owner of the copyright may, if the work has been published give notice to the customs controller that he requests the controller to treat them as prohibited goods. If the controller is satisfied that there is a reasonable probability that attempts may be made to import infringing copies of work, and that it is in the public interest that the copies be made prohibited imports, he shall name a notice prohibit the imports; and during this period no person shall import copies of the work concerned, otherwise than for his private or domestic use⁸¹. Section 28(1)⁸² provides that any person who during the subsistence of copyright in a work makes for sale or hires any infringing copy, lets for hire or by way of trade, exposes or offers for sale or hire any infringing copy, distributes infringing copies, or possesses, otherwise than for his private and domestic or makes or has in his possession any article intended o be used for making infringing copies shall, unless he satisfies the court that he had acted in good faith and had no reasonable grounds for supposing that copyright would or might thereby be infringed , be guilty of an offence and shall be liable to a fine, imprisonment or to both.

The police also have the authority if they have information that there is reasonable cause for suspecting that there is in any house or premises any infringing copy or any article used or intended to be used for making infringing copies or any other article. In such a

⁸⁰Section 26(4) See also the case of Performing Right Society Limited v Francis Anthony Hickey (1979) ZR 66

⁸¹ Section 27(1) of Chapter 406 of the Laws of Zambia

⁸² Chapter 406, Laws of Zambia

case they may enter the house or premises at any reasonable time by day or night and search for and seize any such material⁸³. It is however, imperative to note that in the context of piracy, because it is often carried out as an organised activity, the effectiveness of these remedies may be hindered by a number of reasons. Firstly, the organizer in the making and distribution of illegal reproductions may be using a large number of sales outlets of an impermanent nature such as a garage or a warehouse. The copyright owner may be confronted with a situation in which it is possible to locate only a small proportion of these outlets, without being able to prove any linkage between these outlets or any common source of supply for the outlets. Secondly, the service of a writ commencing an action for infringement, by giving notice to the pirate or to those distributing the works which he has illegally reproduced may precipitate the destruction of vital evidence required to indicate the source of supply and the extent of sales which have taken place⁸⁴. In addition, since piracy often involves an international dimension, there is a risk that the financial resources and other assets of a pirate may be removed from the jurisdiction in which legal proceedings are commenced against him, thereby depriving the copyright owner of the possibility of receiving damages.

Copyright laws are meaningless if the procedure to fight piracy activities does not work or the penalties for infringement are low. In order to deter and eliminate copyright theft, it simply must be more risky, and expensive to engage in pirate activities than to obey the law. If it cannot be eliminated at least it should be kept at minimum levels. It can be noted from the above that the Copyright and Performance Rights Act 1994, has civil, administrative as well as criminal remedies. The International community recognized

⁸³ Section 33(1)

⁸⁴ Intellectual Property Reading Material. WIPO, (1998) p. 37

this important principle in making the TRIPs Agreement part of the obligation that World Trade Organisation members must meet. The TRIPs Agreement requires that enforcement procedures must be circularly to permit “effective action” against infringement and that expeditions remedies be provided as a deterrent to further infringement.

4.2.2 Enforcement under the Trips Agreement

The Trips agreement calls for enforcement procedures that permit for effective action against intellectual property infringement which not only prevent and provide for remedies, but also avoids the dangers of the measures taken being barriers to legitimate trade and provide safeguards against abuse⁸⁵. It is therefore imperative to mention that without enforcement these rights would be meaningless. The TRIPs agreement therefore, provides for both civil and criminal proceedings against the infringer. The civil remedies include injunctions, damages and account of profits. A party will be ordered to desist from an infringement, in relation to the entrance of such goods into the market that infringe intellectual property rights⁸⁶. The authorities also have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of an individuals intellectual property by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activities⁸⁷. In addition, the infringer can also be asked to pay appropriate attorney fees, and in some instances order the recovery of profits and/or payment of damages.⁸⁸ Other remedies include the order that the goods that have been found to be infringing including

⁸⁵ Article 41 of the TRIPs Agreement

⁸⁶ Article 44 of the TRIPS Agreement

⁸⁷ Article 45 of the TRIPS Agreement

⁸⁸ Article 45(2) of the TRIPS Agreement

the materials and implements used in the creation of such goods be disposed of without compensation so as to avoid any harm caused to the right holder.⁸⁹ Section 47⁹⁰ provides that the infringer informs the right holder of the third parties involved in the production of and distribution of the infringing goods and of their channels of distribution. It is however important to mention that Zambia has not yet acceded to the TRIPs Agreement and as such, enforcement will of these provisions will only be effective after accession.

4.2.3 Enforcement under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

This convention protects performers from the possibility of preventing the broadcasting and communication to the public without their consent of their performance, if the original fixation or reproduction was made for purposes different from those for which the performers gave their consent⁹¹. It should be noted that the Rome Convention is essentially an anti-piracy convention. The Rome Convention as it is commonly known particularly pays attention to developing countries like Zambia. By protecting Phonograms it guarantees the dissemination of national culture since as Africans we put so much emphasis on culture and tradition through our music. It thus intended to protect those who contribute to the dissemination of this culture and heritage so that our own people benefit and not others.

⁸⁹ Article 46 of the TRIPS Agreement

⁹⁰ The TRIPPS Agreement

⁹¹ Article 7 of the ROME Convention

4.2.4 Enforcement under the Berne Convention

The Berne convention provides for the seizure of infringing copies in any country of the Union where the work enjoys legal protection⁹². However, this seizure can only take place in accordance with national legislation. It therefore highlights the importance of national legislation to be at par with what is provided for under the mentioned international conventions. Because without proper national enforcement, enforcement of international provisions provided for by international conventions would be impossible. Thus the Berne Convention has three fundamental principles.

Thus, the Copyright and Performance Rights Act has adequate provisions for the protection of intellectual property rights music being inclusive. What is lacking is the proper enforcement of these provisions. Besides the Copyright and Performance rights Act, there is inadequate enforcement in the domestic legislation. It however, is very difficult to monitor infringement of intellectual property rights such as music if the existing institutions are either moribund or are simply not doing their work. As earlier been alluded to, international conventions highly depend on national legislation for their enforcement. It was said in the case of *Twentieth Century Music Corporation v Aiken*⁹³, by Justice Stewart that, the immediate effect of our copyright law is to secure a fair return for an author's creative labour. But this ultimate aim is this incentive to stimulate artistic creativity for the public good. With all these effective and efficient legislation, the question still remains to be answered, why is there no effective enforcement of these provisions? Winston Moyo a Zambian musician stated that the enforcement authorities should enforce the law on copyright just like any other law for

⁹² Article 16 of the Berne Convention

⁹³ (1975), 422, us.iji.156

example child defilement or fraud in elections⁹⁴. He states that protecting copying should not only be about recouping the time, effort and money spent in producing that work, but having a positive life and creating wealth for the owner of the work.

⁹⁴ Interview conducted with Winston Moyo

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS

A total of 18 musicians based in Lusaka were interviewed as well as officials from major recording companies such as Mondo Music Corporation, Super Shine, Sounds were also interviewed. Ministry of Information and Broadcasting Services officials responsible for copyright protection issues in the country were also interviewed. An average of 90 percent response rate was achieved. The following were the research findings.

5.1 *Lack of proper Knowledge and understanding of Copyright Laws*

Many of the interviewees talked to showed minimal knowledge of the copyright laws. They know that there is an Act which regulates copyright music, but did not seem to know any more than the fact that it protects works of intellectual creativity. They did not seem to understand their rights under the copyright and performance rights Act.

5.2 *Piracy*

It was also undeniably agreed that piracy was a major threat to the music industry in Zambia. Piracy is said to be a major threat to the growth of the music industry. Some musicians reported that even before their music is released to the public, they find that their music already sells on the streets of the major towns in the country.

5.3 *Poor Enforcement*

Despite the many measures that have been put in place, the most recent being the anti-piracy circles squad, the music industry has achieved few successes. The following are among the reasons attributed to the current state of affairs:

- i. there has been very poor responses from the stakeholders and the community at large. In order to fight a crime everyone has to come on board. The stakeholders in the music industry have not united enough to fight the scourge. They have relied on other people to do the work for them.
- ii. the failure by government to complement the work of the stakeholders. Government is supposed to be a major player in the fight against this scourge because millions of kwacha which would be going to productive sectors of the economy.
- iii. lack of co-operation from these who are supposed to be the law enforcers. On several occasions, that when suspects are caught with merchandise, their docket disappears in mysterious circumstances and they are left to go back to their businesses again.
- iv. there is rampant police and judicial corruption. When suspects are caught or the police discover a place where these infringing goods are being made, they are simply bribed and the case dies a natural death. There have been instances where some artists would take those found to be in possession of infringing copies and the police would ask what they should do with these people. These cases are rarely followed up

because of lack of money on the part of the musicians and also recording companies who sometimes have been sold these rights because of high legal fees.

- v. Lack of funds and resources in the law enforcement section to follow up cases of infringement.
- vi. Non payment of duty. It is felt that if the music industry was paying duty for each Compact Disk (CD) or Tape that is made, it would take the fight against piracy very seriously because it would then be losing huge sums of money.

5.4 *Technological advances*

Technology was said to be a major challenge. The problem of piracy has been compounded by the advances in technology. People can easily download music from the internet. The internet provides tremendous opportunities for new music businesses to develop, and to make more music available. These promote widespread unauthorised copying of music without payment to those who created it.

5.5 *Ineffective Music Promoters*

It was felt that music promoters in Zambia do not do their job effectively because if they were the music industry would be better than it is today. Most of the times they are preoccupied with the making of profits without creating a conducive environment in which these profits would be maximized or realized for the benefit of themselves and for the people whose music they are promoting. Musicians have the talent, but they do not

have capacity. It involves a lot of money and very few are willing to invest in the music industry. Investment will only come with good promotion. Music programmes on Zambia National Broadcasting Services such as 'SOUNDS' feature too much of foreign music.

5.6 *Lack of political will*

Musicians feel that there is a general lack of political will and absence of co-ordination between government agencies. The government must put in place deliberate programmes to help improve the music industry otherwise as the situation is now very little successes if any will be achieved without the political will.

It was however agreed, that the Copyright and Performance Rights Act does have effective and enforcement mechanisms, but the major problem lies with enforcement of this legislation.

The importance of the music industry cannot be overemphasized. Intellectual property is meaningless if violations cannot be detected and punished. Because intellectual property is a motor of economic growth it is fundamental that proper measures are put in place to protect the intellectual property embodied in the music industry. Zambian music should be able to reach a level where it can be played anywhere in the world like South African Music or West African music. This cannot happen without everyone putting in an effort. We all have a part to play and this is embodied in recognizing intellectual property rights for the benefit of our country and our posterity.

5.7 Recommendations

In view of the findings of the research, the following are the recommendations to improve the running of the music industry in Zambia.

- 5.7.1 Programmes should be introduced through out the country aimed at educating the various stakeholders and the general public at large on copyright and related issues. There is need to educate the stakeholders and the community at large on the importance of protecting copyright in the music industry.
- 5.7.2 Should call for improvement in enforcement of the anti-piracy laws which should include international co-operation to prevent pirated goods from entering into the country.
- 5.7.3 Should call for urgent and co-ordinated government action and the courts must treat copyright infringement as a crime and impose deterrent sentences.
- 5.7.4 Should educate the public on disadvantages that are inherent in piracy.
- 5.7.5 The Zambia Music Copyright Protection Society should be highly connected to government to ensure compliance.
- 5.7.6 ZAMCOPS is a performing rights society, there is need for a society also to deal with mechanical rights.

- 5.7.7 There should be an independent body for record companies.
- 5.7.8 The Zambian music industry should respond to the technological advances that are taking place especially digital technology. The right holders need to be able to use the technologies of the internet to manage and control the use of the works.
- 5.7.9 Promoters should come together and form an alliance with the musicians and lay down clear rules of conduct that will be enforceable
- 5.7.10 There should be strong political will between government agencies because without it, then it means little substantial progress.
- 5.7.11 The Zambian community should invest in the local music. Most of these artists have good talent, but they do not have the money to make this music of an internationally accepted standard.

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