

**UNIVERSITY OF ZAMBIA**  
**SCHOOL OF LAW**

*Obituary Essay*

*2003*

**TOWARDS ERADICATING PIRACY IN MUSIC: A  
ZAMBIAN PERSPECTIVE.**

**BY**

**YADIKA MKANDAWIRE**

**A DISSERTATION SUBMITTED IN PARTIAL  
FULFILMENT OF THE REQUIREMENT FOR A  
BACHELOR OF LAWS DEGREE AT THE UNIVERSITY  
OF ZAMBIA**

**UNIVERSITY OF ZAMBIA  
LUSAKA  
NOV, 2003**

**UNIVERSITY OF ZAMBIA  
SCHOOL OF LAW**

*Obing Essay*

*2003*

**TOWARDS ERADICATING PIRACY IN MUSIC: A  
ZAMBIAN PERSPECTIVE.**

**BY**

**YADIKA MKANDAWIRE**

**A DISSERTATION SUBMITTED IN PARTIAL  
FULFILMENT OF THE REQUIREMENT FOR A  
BACHELOR OF LAWS DEGREE AT THE UNIVERSITY  
OF ZAMBIA**

**UNIVERSITY OF ZAMBIA  
LUSAKA  
NOV, 2003**

I recommend that the obligatory essay prepared under my supervision by Mkandawire Yadika

Entitled:

**TOWARDS ERADICATING PIRACY IN MUSIC: A ZAMBIAN PERSPECTIVE.**

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing obligatory essays.

  
.....  
**MR. KANJA MPUNDU**  
**SUPERVISOR**

16.12.08  
.....  
**DATE**

**To Natasha  
With love**

## Contents

<b>Dedication:</b>	i
<b>Contents:</b>	ii
<b>Preface:</b>	iv
<b>Acknowledgements:</b>	v
<b>Quote:</b>	vi
<b>1. INTRODUCTION:</b>	<b>1</b>
1.1 COPYRIGHT:	1
1.2 PERFORMANCE RIGHTS:	3
1.3 PROTECTION OF COPYRIGHT AND PERFORMANCE RIGHTS:	3
1.3.1 Infringement:	3
<b>2. LEGAL FRAMEWORK:</b>	<b>7</b>
2.1 Historical Background:	7
2.2 Overview of the Law:	10
<b>3. PIRACY:</b>	<b>19</b>
3.1 DEFINITION:	19
3.1.1. Infringement as Piracy:	21
3.2 PREVALENCE:	23
<b>4. EFFECTS OF PIRACY</b>	<b>28</b>
4.1 VICTIMS OF PIRACY:	28
4.2 EFFECTS OF PIRACY:	29
4.2.1. Economic Effect:	29
4.2.2. Cultural Effect:	30
4.2.3. Intellectual and Social Effect:	32
<b>5. TOWARDS ERADICATING PIRACY</b>	<b>34</b>
5.1 EFFORTS TO CURB PIRACY:	34
5.1.1. Enactment of Copyright:	34
5.1.2. Amendment to Customs and Excise Act:	35
5.1.3. Raids:	35
5.1.4. Information to Public:	37
5.1.5. Ratification of International Conventions:	37
5.1.6. Reciprocal Representation Agreements:	37
5.1.7. Awareness amongst Enforcement Agencies:	38
5.2 STATUS QUO:	38
5.3 RECOMMENDATIONS:	39
5.3.1. Political Will:	40
5.3.2. Strengthening the law:	41

5.3.3. Institutions:.....	41
5.3.4. Awareness Campaigns:.....	45
5.3.5. Law Enforcement Agencies:.....	46
5.3.6. Partnership with IFPI:.....	48
5.4 CONCLUSION	
<b>BIBLIOGRAPHY:.....</b>	<b>52</b>

## **PREFACE**

An entire generation in Zambia has grown up knowing only pirated material. Most Zambians think that tapes and compact Discs sold at the black market are genuine original tapes because they have the phrase 'original tape' written on them. Little do they realise that this is the work of a calculating surplanter who is out to make profits at the expense of stakeholders of the original product.

Pirates are criminals who steal the products of other people's talents, skills and investment. It usually appears like the low price at which the pirate material is sold to the public is beneficial to the local community but critically evaluated the disservice piracy does to the community is obvious.

This paper is designed to highlight the negative impact of piracy and offer solutions on how it can be reduced and eventually eradicated. Like any other vice in society, piracy can be prevented, but can it be eradicated? Enjoy this reading!

Yadika Mkandawire  
November 2003.

### **ACKNOWLEDGEMENTS**

I wish to acknowledge the considerable help and advice received from the following people: Mr. Kanja Mpundu, late Wapolina Mkandawire, Chola Folotiya, William Mubanga, Barnabas Bwalya, Mainza Chipenzi, Harold Chaala and Dr. M. Munalula.

My gratitude is also expressed to the following organisations which have assisted with information and provided me with material: Mondo Music, Zambia Union of Musicians, Zambia Music Copyright Protection Society, Zambia Revenue Authority, Zambia Police and the International Federation of the Phonographic Industry.

I am particularly grateful to God who has made all this possible.



**“Copyright is not a dry legal concept. It is at the very heart of anyone who seeks, to make a living out of music. It is the bedrock of a healthy music culture and a thriving music economy”**

**Jean – Michael Jarre,  
Artist and European Industry Artist Spokesman.**

# **CHAPTER ONE**

## **INTRODUCTION**

Intellectual Property Law, though a novel subject has enjoyed a tremendous reception by many nations, including developing countries like Zambia. This is because the tentacles of Intellectual Property law spread over every aspect of human life – the marking on a bottle of Mosi, the rights in music, drama, films, books and electronic information sources we all use. This extends even to the shape of one's pencil.

Intellectual Property deals with the results of human creativity which form new ideas. Such ideas are beneficial to mankind in their respective applications. The value of these ideas ranges from the industrial and commercial, to the world of literature, art and design, contributing to technology, economic, social and cultural progress. Protecting the development and application of new ideas helps in realising the benefits derived from them.

Copyright and performance rights constitute a branch of Intellectual Property Law. The protection here is with regards the form and appearance.

### **1.1 COPYRIGHT**

Copyright is a statutory property right. It subsists in a work thereby conferring exclusive rights on the copyright owner for a substantial period. This allows the

copyright owner to exploit ideas once they have been embodied in a work. Copyright, therefore, is not about ideas, but about the material expression of ideas on which the work is based. This means that it is the material expression of the author or creators ideas that is protected, or for which purpose the right is secured and not the ideas themselves.

Works are created by authors but copyright will only subsist if the work qualifies for protection. Although it is a statutory right, the protection arises automatically once the work has been created and recorded. Copyright subsists without any formality; there is no application, examination or registration that can be consulted in order to ascertain the rights subsisting in a work.

Besides the requirement that copyright works have tangible form, for instance, films, videos, sound recordings, broadcasts, it must be original. In principle this means that a work must emanate from its author, and the author must have exercised a modicum of 'skill, labour, and judgement' in the works creation.<sup>1</sup> To be original a work must not be a copy. Furthermore, where an element of 'skill, labour and judgment' have been expended in their creation, the works will be regarded as original. This remains so even if the work has been derived from other sources.<sup>2</sup>

---

<sup>1</sup> Colston C., Principles of Intellectual Property Law, (1999).

<sup>2</sup> Ibid.

## **1.2 PERFORMANCE RIGHTS**

Performance rights on the other hand are property rights ensuring from a copyright owner. Though statutory too, they differ from copyrights in the sense that they relate to the performance of a copyright creation: For instance, the right to sing “J.K’s” songs at a night club or the right to play Suke Chile’s music on a radio station. A person or organisation with such a right can exploit a qualifying performance.

## **1.3 PROTECTION OF COPYRIGHT AND PERFORMANCE RIGHTS**

As has already been mentioned, the rights conferred on the copyright are exclusive to the owner of the work. The rights in performance are equally exclusive to the person or organisation to whom the right is granted. This means that no one is allowed to exploit a copyright without the owners permission. Similarly, a performer must have been authorised to exploit such a performance. Any exploitation without authority is contrary to the law and will amount to an infringement of the mentioned property rights.

### **1.3.1 Infringement**

Infringement is doing any of the restricted acts without a licence or authority of a holder of a right. It can be classified as primary and secondary infringement. Primary infringement constitutes the exploitation of the exclusive rights without the copyright owner’s permission. Secondary infringement on the other hand amounts to different ways of dealing commercially with infringing copies or the

means of making these copies. It includes all those who might be regarded as authorising infringement by facilitating performance of a work.

While there are acts which will not constitute infringement by virtue of them falling under the doctrine of 'fair use', this paper is concerned with discussing the prohibited acts that constitute infringement. Nevertheless, fair use may be defined as the amount of copying of a copyright work that does not give rise to a cause of action. The demand of news, comedy, learning and criticism have led to the development of this doctrine.

In discussing the subject of infringement, the term piracy will be used in its place, although it will be noted that in some cases the terms are used interchangeably. It is also worth noting that, the focus in discussing piracy is on musical works as intellectual creations.

#### Piracy in music

The prevalence of counterfeit and pirated musical works in Zambia today is worrisome. The impact is mostly felt by the people and organisations in the music industry. This is not to say that they are the only victims of piracy. They feel it more because they are directly involved in the industry. Piracy affects everybody, from the government to the ordinary citizen in the rural areas. Everyone is a victim.

Piracy not only affects the creator's personal welfare and income, but that of the country's economy and cultural heritage. It also affects the consumers enjoyment of the product purchased as well as their financial status due to 'substitute purchase' that have to be made because earlier purchases were of poor quality and unuseful.

The objective of this paper, therefore, is to highlight the effects of piracy and to recommend the steps that need to be taken in the fight against piracy. In doing so attention shall be drawn to the following:

- The law governing Copyright and Performance Rights (Chapter 2)
- The nature of piracy and its prevalence (Chapter 3)
- The effects of piracy (Chapter 4)
- The solutions to piracy (Chapter 5).

It is important to appreciate that the area of Copyright in Zambia is quite novel. In view of this, most of the source for the information needed to make this work possible has been through interviews with stakeholders. This is more so bearing in mind that our main concern is to evaluate the situation as it exists in Zambia. Such a view can only be obtained from stakeholders as there is very little material written on the subject reflecting the Zambian scenario. The second method of obtaining information has been through tours to the music market.

Thirdly, reference has been made to written literature on the subject of copyright.

Statutes too have been used as guidance in preparing this paper.

It is hoped that this expose not only makes interesting reading but also works as a weapon in the fight against piracy - dissemination of information.

## **CHAPTER TWO**

### **LEGAL FRAMEWORK**

The legal framework for the protection of copyrights and performance rights is the Copyright and Performance Rights Act, Chapter 406 of the Laws of Zambia (herein referred to as the Act).

#### **2.1 HISTORICAL BACKGROUND:**

For a long time musical works enjoyed no legal protection and its composers suffered great injustice. Most musicians died in abject poverty and were buried in pauper graves at the very time when people all over the world were making a lot of money from their performances. In Zambia for instance, prominent composers like Paul Ngozi and Emmanuel Mulemena died in poverty and without enjoyment of their creation through royalties. This injustice led to a world wide campaign to protect composers and give them their due with regards their labours.

Copyright and performance law in Zambia can be traced back to the early years of the 20<sup>th</sup> Century. It has its roots of origin from the British Copyright Law. Therefore, copyright law as it is understood today has its statutory beginnings in the British Copyright Act of 1709 (by modern reckoning 1711) or the Statute of



Anne<sup>3</sup>. According to Kent and Lancour, the Act for “the Encouraging of learning by the vesting of the copies of printed books in the Author’s or Purchasers of such copies during the Times herein mentioned” gave legal recognition to the position of the author for the first time in history<sup>4</sup>. Previously (i.e before this Act) entrepreneurs took the risk to exploit the literal works of the authors and consequently desired exclusive rights in the publication of the works to protect them against copiers (as the development of the printing press, in the 15<sup>th</sup> century made printing of multiple copies of literal works possible). Hence stationers organised themselves into a guild and the crown granted the stationers a charter in 1556.

The Statute of Anne has great significance not only in that it was the first new Copyright Act enacted, but that it was a successor to a series of privileges, monopolies, decrees and licensing Acts in Sixteenth and Seventeenth Century England. These Acts had been designed to maintain governmental control of the press and the monopolies position of the Stationers Company (incorporated by the Crown in 1556) rather than the rights of the authors. Kent submits that if it can be said that “copyright” existed before 1709 it might be best defined as “Stationer’s Copyright” or “publisher’s copyright” and not copyright as understood by the British Parliament when it placed the Act of Anne on the Statute Book<sup>5</sup>. Hence, the Statute of Anne is of great significance in the history of copyright in

---

<sup>3</sup> A. Kent, Copyright-Current Viewpoints on History, Law, Legislation, 1972.pg.3

<sup>4</sup> P.3, copyright-Current Viewpoint on History, Law, Legislation

<sup>5</sup> A. Kent, Copyright-Current Viewpoints on History, Law, Legislation, 1972.pg.4

many states including Zambia as it serves as a model for the early copyright Acts of many states.

As has already been mentioned, Zambia's copyright law stems from the British copyright law. By virtue of being a British colony, Zambia automatically invoked the British Copyright Act of 1911. Hence, this was the first copyright Act used in Zambia in protecting property rights in music and other subjects of copyright. In 1971, however, Zambia enacted its own copyright law, this being, the Copyright and Performance Act Chapter 701 of the Laws of Zambia. Like the present Act (The Copyright and Performance Rights Act of 1996 – Chapter 406) the content of the first Zambian Act has basically remained the same as the British Act of 1911 (As amended in 1965).

What is of great significance is that there is a national law in Zambia today that secure the rights of respective authors or creators in their works. This is a necessary tool in combating the evils of counterfeiting and piracy. As one learned man has submitted “ It is much easier to eradicate counterfeit at the source with a set of minimum protection rules than afterwards at a national border once they are in circulation<sup>6</sup>.”

---

<sup>6</sup> Patrick Matibini, Lecturer at the University of Zambia, (2002).

## **2.2 AN OVERVIEW OF THE LAW**

The rights of creators or composers in music are secured by the Copyright and Performance Rights Act. As has already been mentioned, Section 8(1) of the Act reads as follows:-

“The products of creativity in which copyright may subsist under this Act are the following category of works:

- a) Original –
  - i) literary works;
  - ii) musical works;
  - iii) artistic works; or
  - iv) computer programme.
- b) Compilations;
- c) audiovisual works;
- d) sound recordings;
- e) broadcasts;
- f) cable programmes;
- g) typographical arrangement of published editions of literary works.

The Act in Section 8(3), however, brings out that general but fundamental principle in copyright law that a work must be in a particular fixation. Failure to put the work in a tangible form will not attract copyright protection.

The Act places, some qualifying conditions with regards protection. These qualifications have to do with the location of the works that “deserve” copyright protection. For copyright to subsist in a work the author of the work at the time of completion of such a work must have been a citizen, or habitual resident in Zambia or a convention country<sup>7</sup>. A body corporate incorporated in Zambia or a convention country will also enjoy protection under the Act. Furthermore, a musical or sound recording which was first made or first published in Zambia or a convention country will be protected by the Act<sup>8</sup>.

Section 10 of the Act deals with the aspect of ownership of a copyright. According to this Section, the author of the work shall be the first owner of such a work. However, where the work is authorised during one’s course of employment or on the commission of some other person, then the employer or the person who commissioned the work shall be the first owner of the copyright. Where a copyright in a work is owned by more than one person (otherwise than as joint owners) the rights held by each of those persons shall be regarded as a separate copyright. A Copyright, however can be assigned to someone else. Such a transfer makes the person to whom it is transferred the new copyright owner.

---

<sup>7</sup> Copyright and Performance Act, Cap. 406, S.9(1)(a).

<sup>8</sup> Copyright and Performance Act, Cap. 406 S.9(b) and 9(1) (c).

The transfer has to be done by testamentary disposition or by operation of law. It must be in writing, signed by or on behalf of the assignor. An assignment may be limited by reference to the following:

- i) one or more particular acts which the copyright owner has the exclusive right to authorise under the Act,
- ii) a part of the period for which the copyright subsists under the Act,
- iii) a specific country or geographical area<sup>9</sup>.

Provided for in the Act also is assignment of a copyright which is expected to arise in the future.

Despite the assignment, however, the author will retain what are known as moral rights. These moral rights go to the protection of the integrity and reputation of the artistic creator after he has parted with his work. The author therefore, has a right to be identified as the author or producer of works and also to object to any changes that may be done to the work. These rights expire upon the death of the author or producer.

The Act in Section 39(2) provides for a register of copyright in works other than broadcast or cable programs. The copyright owner may register his work by lodging it with the Registrar. A certificate will be issued and any claim for copyright in relation to a work already on the registrar will not be accepted.

---

<sup>9</sup> Copyright and Performance Act, Cap. 406 S.11(2)

It is worth mentioning that copyright protection is not forever. It has a time limit to it. Section 12(1) of the Act, states that protection or a right shall subsist in a musical work during the lifetime of the author or producer (Copyright owner) and fifty years from the end of the calendar year in which he dies.

It has been submitted by many learned legal scholars that copyright protection is not enough unless the authors has some means of enforcing his rights. The Zambian Act in this respect is not silent. As has already been mentioned the owner of a copyright has the exclusive right to do or to authorise others to do as he pleases with regards his work. The acts which an author has exclusive right to do are known as controlled acts. Section 17(2) defines the controlled acts in a musical work as being:

- a) the publication;
- b) the reproduction in any material form;
- c) The broadcasting or inclusion in a cable programme;
- d) The communication to the public by any means;
- e) The importation into Zambia of copies; and
- f) Adaptation of the work.

This means that performance of the above acts by a person other than the copyright owner or a person authorised to perform such acts by the copyright owner amounts to infringement. Sections 19 and 20 highlight other acts that amount to infringement but the subject of infringement is dealt with in detail in the

next chapter. Suffice it for now to say that the Act does address the issue of enforcement of infringed rights. An infringement of a copyright is actionable in a court of law at the suit of a copyright owner<sup>10</sup>. Relief is available to the copyright owner by way of damages, injunction accounts or otherwise. Proof of actual damages to a copyright owner shall not be required in any action under the Act. It is enough that there has been an infringement. However, where a defendant shows, that he reasonably did not believe that copyright subsisted in a work, the plaintiff (copyright owner) will not be entitled to damages. Also, no injunction will be issued which requires a completed or partly built building to be demolished, neither that which prevents the completion of a partly built building. Where a person, however, has infringing copies in his possession such copies may be forfeited and delivered up to the owner of the copyright. Another remedy that is available to a copyright owner is the restriction on importation of infringing copies.

Apart from civil remedies, the Act also provides for criminal penalties for infringement of a copyright as section 28 makes certain infringing acts an offence. Acts that are said to be infringing copyright, and consequently amount to an offence include the following:

- i) making for sale or hire any infringing copy;
- ii) selling, letting for hire or by way of trade, exposing or offering for sale or hire any infringing copy,
- iii) Distributing infringing copies,

---

<sup>10</sup> Copyright and Performance Act, Cap 406 S.25(1)

- iv) possessing, otherwise than for private and domestic use any infringing copy,
- v) exhibiting in public any infringing copy by way of trade
- vi) Importing into Zambia otherwise than for private use, an infringing copy,
- vii) Making or having in possession any article used or intended to be used for the purpose of making infringing copies.

For an offence not to lie, the accused must satisfy the court that he acted in good faith and that he had no reasonable grounds for supposing that copyright would be infringed by doing what he did. The penalties for offending the law under this section include a fine or imprisonment. The Act in this regard has made a difference in the extent of punishment to be met out to first time offenders and to those who have previously committed an offence in copyright. The penalties are stiffer for subsequent offences<sup>11</sup>.

Interesting to note too is the fact that in any proceedings brought under the Act, a person who has in his possession, custody or control five or more infringing copies of a work in the same form shall be presumed to be in possession of, or to have imported, the copies otherwise than for private domestic use<sup>12</sup>. This means that if a person has in his possession less than five copies infringing of a work they will not be guilty of an offence. The Act has, therefore, placed a numerical

---

<sup>11</sup>Copyright and Performance Act, Cap. 406 S.28(1)

<sup>12</sup>Copyright and Performance Act, Cap. 406 S. 29.



limit to what qualifies possession of a work for domestic or commercial purposes. The Act in sections 30 to 38 provides for procedure in enforcing copyright law. These include issuing of warrants, and power to detain persons amongst other procedural provisions.

Relevant to this essay and covered by the Act are rights in performance. Part V of the Act provides for performance right. Performance rights can be said to be right that ensure in the performance of dramatical and musical works. Performance has been defined to be:

- a) a performance of drama, dance or mime;
- b) a musical performance;
- c) a reading or recital of a literary work;
- d) a performance of a variety act or any similar presentation.

Insofar as it is a live performance by one or more individuals<sup>13</sup>."

The performance has what are termed as 'performer's right'. This means that he can exploit a qualifying performance by means of the recording, broadcast or inclusion in a cable program service of the programme.

Unlike copyright, performer's rights (even though a property right) are not transferable during one's lifetime. They can only be assigned on death by

---

<sup>13</sup> Copyright and Performance Act, Cap. 406 S. 44,

testamentary disposition or by the operation of law.<sup>14</sup> The duration of rights in performance is fifty years from the end of the calendar year in which the performance takes place. Acts said to be amounting to infringement of performance rights are stipulated in Section 48 of the Act. Provisions for the infringement of recording rights is covered by Section 49.

However, infringement of a performer's right is actionable in a court of law at the suit of a performer or his successor<sup>15</sup>. Similarly, infringement of a recording right is also actionable in the courts but at the suit of the holder of recording rights<sup>16</sup>. Relief is available by way of damages, injunctions, accounts or otherwise<sup>17</sup>. The Act in Section 52, makes it an offence to do an act which constitutes an infringement of performer's rights or recording rights in relation to an offence, where such a person knew or has reason to believe that the act would constitute infringement. The penalties like under copyright include a fine or imprisonment or both.

Of great importance in the *Zambian Copyright and Performance Act* is the provision made for collecting societies. A collecting society has been defined to mean "an association, partnership or body corporate whose principle purpose, is the representation of copyright owners in the negotiation and administration of

---

<sup>14</sup> Copyright and Performance Act, Cap. 406 S. 46(1).

<sup>15</sup> Copyright and Performance Act, Cap. 406 S.51(1).

<sup>16</sup> Copyright and Performance Act, Cap. 406 S51(2).

<sup>17</sup> Copyright and Performance Act, Cap. 406 S.51(3).

collective copyright agreements<sup>18</sup>. A collective society may apply for registration to the Registrar of Copyright who shall register it as such. However, even though collecting societies are meant to represent copyright owners, they must be requested to do certain acts by copyright owners. The owners of copyright, therefore, may authorise a collecting society to negotiate and administer collective copyright licence agreements on behalf of the owner and other copyright owners<sup>19</sup>. The office of the Registrar of Copyright is created by Section 54(1) of the Act. His duties and functions include:

- i) monitoring activities of collecting societies;
- ii) encouraging and facilitating the development of collecting societies;
- iii) examining cases of alleged infringement and where appropriate to advise the Director of Public Prosecution;
- iv) providing information and advice on copyright matters to the Minister; and
- v) performing such duties and functions as are provided for under the Act.

The only relates to acts done after its commencement. Therefore, no act done before the commencement of the Act shall constitute an infringement of copyright conferred by the Act or an offence against the Act<sup>20</sup>. Where an act done before the commencement of the Act was then an infringement of copyright,

---

<sup>18</sup> Copyright and Performance Act, Cap. 406 S.22(1).

<sup>19</sup> Copyright and Performance Act, Cap. 406 S. 22(3)

<sup>20</sup> Copyright and Performance Act, Cap. 406 S. 58(1)

proceedings in respect of that act may be taken as if the Act had not been passed.

## CHAPTER THREE

### PIRACY

#### 3.1 DEFINITION

As has been mentioned earlier, copyright can subsist in a musical work. This affords the copyright owner the privilege of exploiting his work exclusively. Therefore, unless permitted by the copyright owner exploitation of a musical work by another person or entity amounts to infringement. The Act, describes copyright infringement to be:

- “ a) doing or authorising another person to do a controlled act<sup>21</sup> without the consent of the copyright owner;
- b) importation of infringing copies otherwise than for domestic use or private purposes;
- c) making or trading in articles for making infringing copies.”<sup>22</sup>

Not only can a musical work enjoy copyright protection but there can be performance rights ensuing from such work. Performance rights as we have seen are also protected by the Act. With regards performance rights; Section 48 stipulates what constitutes infringement. Therefore, infringement of performance rights lies in the following instances:-

- a) making a recording of the whole or any substantial part of a qualifying performance otherwise than for private use;

---

<sup>21</sup> Copyright and Performance Act, Cap. 406 S.

<sup>22</sup> Copyright and Performance Act S.18, 19, & 20,

- b) broadcasting live the whole or a substantial part of a qualifying performance;
- c) showing or playing in public the whole or any substantial part of the performance by means of a recording which was made without the consent of the performer;
- d) importing into Zambia otherwise than for domestic purposes a recording of a qualifying performance without the consent of the performer;
- e) selling or letting for hire, or offering or exposing for sale or hire, or even distributing without the consent of the performer.

Furthermore, a musical work can have recording rights ensuing from the performance of such a work. For infringement to lie, in a recording right these must have been:

- a) a recording of the whole or substantial part of a performance;
- b) a showing or playing in public, or broadcast or inclusion in a cable programme service the whole or any substantial part of the performance by means of a recording;
- c) importation into Zambia otherwise than for domestic purposes; without the consent of the performer or that of the holder of the recording right<sup>23</sup>.

However, copyright in a musical work is not infringed by an act done at a time when, or in pursuance of arrangements made at a time when

---

<sup>23</sup> Copyright and Performance Act, Cap. 406 S. 48.

- a) a work is of unknown authorship;
- b) it is reasonable to assume;
  - that copyright has expired or ;
  - that the author died, fifty years or more before the beginning of the calendar year in which the act is done or the arrangements are made.

The above applies to rights in performance too as well as recording works. Section 50(1) provides for the above mentioned acts as not constituting infringement in performance rights or recording rights.

### **3.1.1 Infringement as piracy**

Infringement in musical works is commonly known as piracy. The term piracy is generally used to describe the deliberate infringement of a copyright on a commercial scale. In relation to the music industry, it refers to unauthorised copying, and in this context falls into three categories namely:

- Simple piracy
- Counterfeits
- Boot legs

#### **Simple piracy**

This is the unauthorised duplication of an original recording for commercial gain without the consent of the right's owner. The packaging of pirated copies is

different from the original, as the packaging used is often of cheaper quality with poor printing and colour separation (See fig.1) Pirate copies are usually compilations, such as “greatest Hits” of a specific artist, or a collection of a specific genre, such as dance tracks<sup>24</sup>. In some cases the cost of the inlay cards is dispensed with altogether and the contents of the recording are handwritten on the side of the cassette or on a sheet of paper serving as an inlay card. Copies like this are even cheaper than the ordinary pirate copies. Recording artists like “J.K.” and “Shatel” are the ones usually affected by simple piracy.

### Counterfeits

These are copied and packaged to resemble the original as closely as possible (See Fig.2). Like simple piracy, they too are without the authorisation of the copyright owner and are even harder to discern. The original producer’s trademarks and logos are reproduced in order to mislead the public into believing that they are buying an original product. In this type of piracy, the price difference between the genuine product and counterfeit copy is often minimal. Pirate compact discs and cassettes are usually easy to identify but this is not so with counterfeit products. Counterfeit products resemble the original products in every way; same trademark, same cover features and lyrics. Every detail is copied to its fullest potential to resemble the original product. You can be able to tell that it is a counterfeit by the low quality of the product as you play it. The sound and picture are usually poor. Recording artists are victims of this type of piracy too.

---

<sup>24</sup> International Federation of the Phonographic Industry, Music Piracy: The Facts, p.1 (2002).



what is  
pirate or  
counterfeit  
product?



## Pirate

Unauthorised duplication of music from legitimate recordings.

- for commercial gain
- without permission of rights owners
- usually poor quality

## Counterfeit

Copied and packaged to resemble the original sound recording.

- Intending to deceive
- using forged artwork, trademarks and logos

## What is suspicious?

No record company indicated

No song listing

Spelling errors:  
Artists' names  
or titles

No Trademarks or Logos

No © and ® notices

Poor images, blurred or poor contrast

Print on one side  
of inlay only

A pirated CD **could** contain any one or all of the indicators shown

Poor colour  
reproduction

Badly cut, trim  
or fold

CDs on spindles  
indicates illegality

Obliterated SID Codes,  
False SID Codes,  
or no SID Codes

CDs, plastic cases and Inlay  
cards packed separately are  
an indication of piracy



Genuine CD  
high quality finish



what is  
genuine  
product?

Fig 4



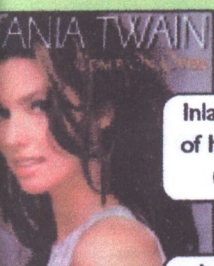
Some indicators of pirated products are:

No record label  
Poor quality inlay & graphics  
Promos & cover versions

• SID Code obliterated  
• No SID Codes  
• Incorrect spelling

• Low cost  
• CDs, plastic cases and inlay cards packed separately

## What is genuine?



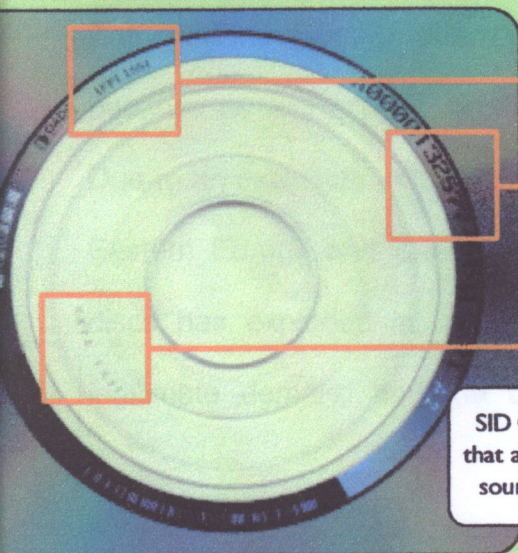
Inlay and disc artwork of high quality, often in multiple colours



Inlay artwork often printed as a booklet



© and ® notices clearly on view



SID Code (master)  
Source of music

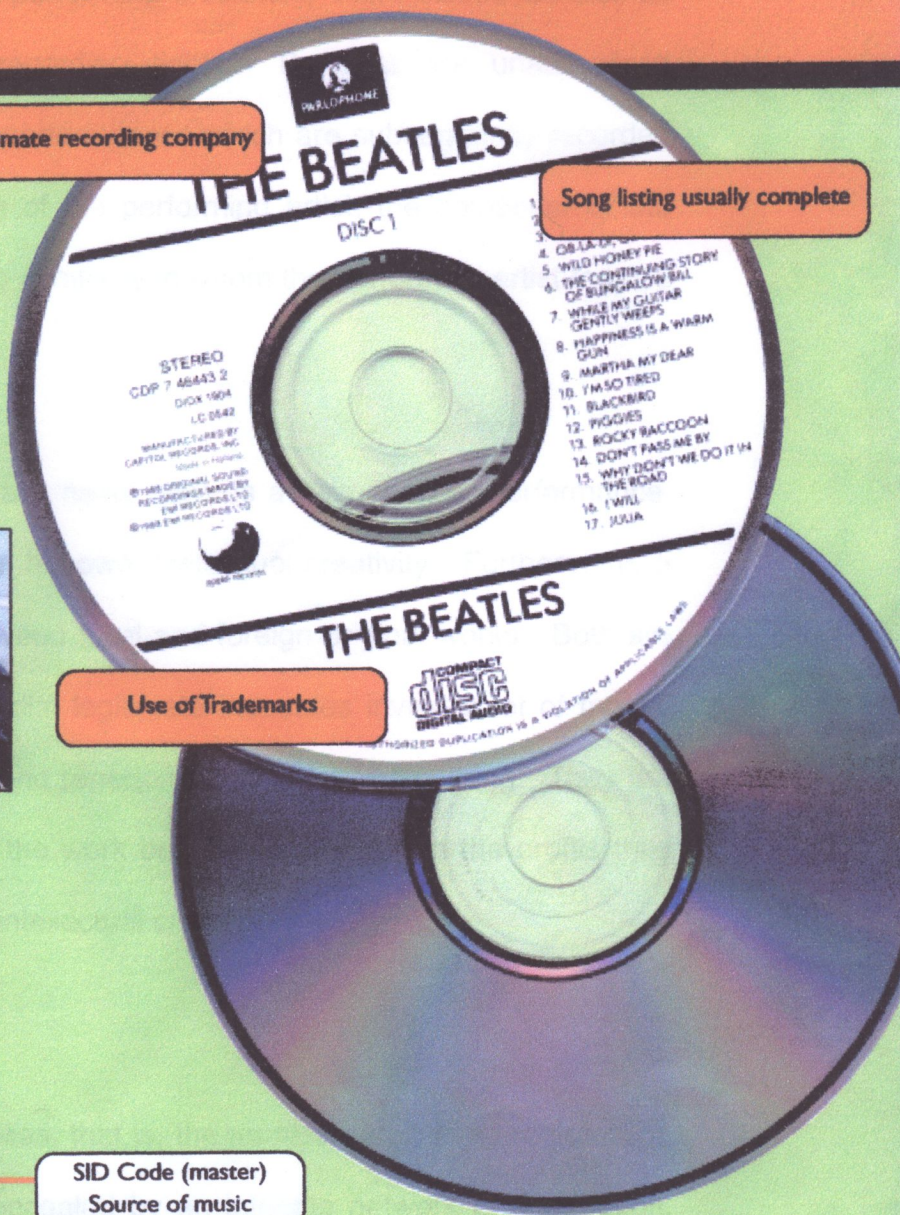
Matrix numbers  
catalogue the  
products - they do  
not prove legality

SID Code (replication)  
Source of manufacture

SID Codes - four character codes  
that appear on CDs and identify the  
source of music and manufacture

Legitimate recording company

Song listing usually complete



Use of Trademarks



representing the  
recording industry  
worldwide

Guidelines for determining legitimate  
product from pirate and counterfeit  
product produced by IFPI © 2001 IFPI

IFPI Secretariat  
Enforcement Department  
54 Regent Street London  
W1B 5RE United Kingdom  
Tel: +44 (0)20 7878 7900  
Fax: +44 (0)20 7878 7950  
e-mail: [info@ifpi.org](mailto:info@ifpi.org)  
website: [www.ifpi.org](http://www.ifpi.org)



## Bootlegs

Affected by bootlegs mostly are performing artists like 'Rare Roses' as well as people or organisations with recording rights. Bootlegs are unauthorised recordings of live broadcasts or performances which are subsequently recorded and sold without the permission of the performing artist, the composer of the song performed nor the recording company to whom the performing artist may be under contract.

The pirate in all the forms of piracy never records a new song or performance. He does nothing emanating from his own intellectual creativity. Furthermore, a pirate does not discriminate between local and foreign original works. Both are equally vulnerable to piracy. Whilst legitimate industries invest a lot of money every year in developing artists and repertoire, pirates invest nothing. They are not interested in the creation of the work but, only interested in the profits they can make from another persons intellectual creativity.

## 3.2 PREVALENCE

Too often the culprit in piracy cases, that is, the manufacturer, evades detection because he is protected and concealed by an intricate network of distribution. Due to an explosion in the number of Computer Disc plants, in particular in Asia, Eastern Europe and East Africa, worldwide manufacturing capacity for optical discs has exploded in, recent years. The increase exceeds the growth in legitimate demand and the capacity is now estimated to be about that of

legitimate demand. This massive surplus has inevitably led to an increase in piracy with millions of pirated compact discs flooding into markets across the world. Pirate sales of recorded music are estimated to be worth over five billion United States dollars and rising<sup>25</sup>. Globally, one in every three music carriers is a pirate copy.

In Zambia, the Zambian Music Copyright Protection Society (herein referred to as ZAMCOPS) conducted a survey in 1999. This survey revealed that the differences between country wide distribution of pirate tapes and that of genuine tapes was in the ratio of 38:1<sup>26</sup>. In spite of efforts to curb out this ill, there has been a sudden upswing in pirated material. One only has to go to retail shops to see how relevant piracy is. Furthermore, vendors popularly known as 'ego egos' are constantly seen selling pirated material. The high prevalence of pirated material was attested to by visiting International Federation Phonographic Industry (IFPI) African Region Coordinator Richard Redaman during his visit to Zambia in September 2003. Redaman who visited several streets to see the kind of music products on the market said most of it was pirated and inferior<sup>27</sup>. He further said that most of African music was pirated within Africa and that more than half seized music products was African music<sup>28</sup>.

---

<sup>25</sup> Booth R.J., Piracy: Ways and means to Fight it, at P.12. (2003)

<sup>26</sup> Mkandawire W., Fight against Piracy, p.3. (2002)

<sup>27</sup> Zambia Daily Mail, September 19<sup>th</sup>, 2003.

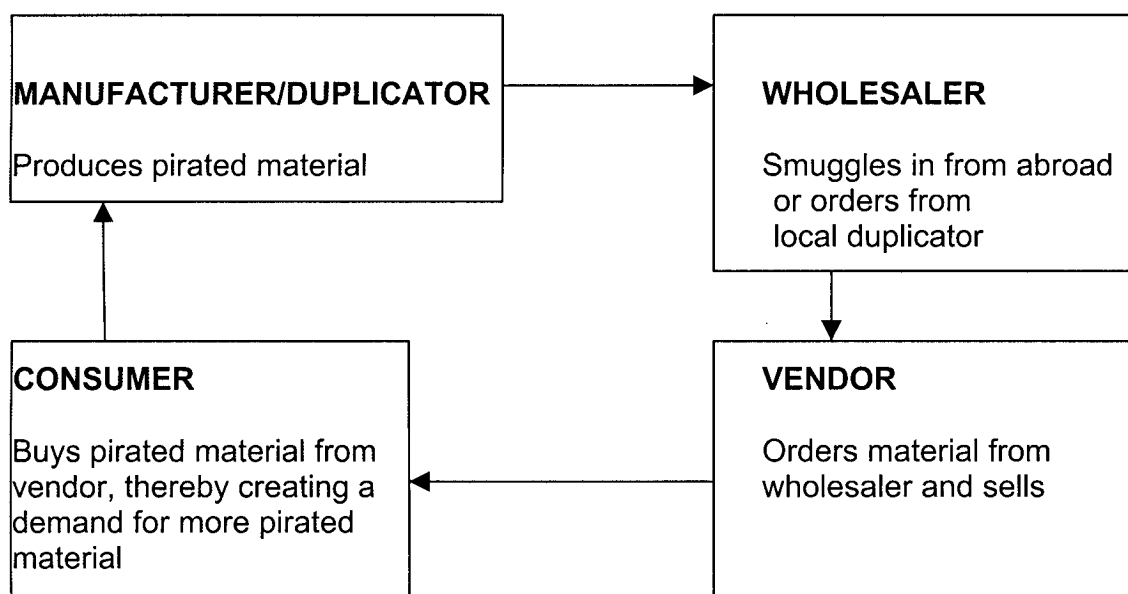
<sup>28</sup> Ibid.

The prevalence of piracy is further reflected by the many consumers harbouring pirated tapes in their homes purchased from vendors or retail shops. By its nature piracy assumes a chain like structure. It begins when consumers opt to buy audio or video tapes and compact discs from the "black market" because they view it as being cheaper than from the genuine or legitimate source. The consumer, thereby, creates a demand which the manufacturer of the pirated material eagerly seeks to meet due to the huge profits arising from the venture. (See fig.3)

Another area where piracy can be seen relates to performance. The Act clearly prohibits the performance, or causing the performance of copyright music in public without the permission from the copyright owner. The term 'in public' means anywhere outside domestic circles, such that for instance, performances in clubs, hotels or factories are public even if the audience is confined to club members or hotel guests. This is so whether or not any charges are made for admission to the place where the performance takes place and whether or not the performers are paid. It is of no consequence that the performance is given 'live' or by mechanical means like a tape-recorder, television or Compact Disc player. In most cases the proprietors of these venues do not obtain licences to perform the music they do, either because they are ignorant of the fact that they need to do so or because they do not want to pay for the use of the music. Furthermore, there are many weddings and variety shows that take place every

weekend where music is performed illegally. Churches too sadly but true are culprits in infringing performance rights.

From the above situations cited, it is evident that there is serious piracy in the arena of performance rights in Zambia today. The public are either unaware of the requirement to obtain a licence or are simply not willing to comply with the law in their enjoyment of an artistic creation. As a result of the high levels of piracy all stake holders face a serious threat in the realisation of their dreams and aspirations. The stakeholders include original creators of the work, the producers, the recording companies and other players in the music industry. Others include the government and the consumer.



**Fig. 3**

## **CHAPTER FOUR**

### **EFFECTS OF PIRACY**

#### **4.1 VICTIMS OF PIRACY**

While the music industry has always been a victim of piracy, the current levels of piracy is now posing a greater threat to the culture and economy of most countries. This is especially so in developing and newly industrialised nations like Zambia. With the advent of globalisation and cross-boarder trade being pursued by most countries around the world, the economic benefits derived from intellectual property by creators and those who manage their rights are heavily being outweighed by local and international pirates.

Contrary to the popular perception that piracy only affects musicians, I submit that everyone is a victim of piracy. If it is generally accepted that the government, consumer and music industry are stakeholders, then piracy does affect them all. In fact it affects everyone either economically, culturally, intellectually or socially.

For instance, consumers lose out in many ways. Unlike the legitimate recording industry, pirates are not interested in investing in local music, the local economy or job creation. Consumers are victims of piracy as many illegal copies are of



inferior quality and consumers have no right of redress should the Compact Disc or Cassette they have purchased prove to be inoperative.

## **4.2 EFFECTS**

As has been discussed, everyone is a victim of piracy. The effect cannot only be discussed in relation to the victims but also in relation to the sectors of development. Piracy has a negative effect on development in the following areas:

- i) Economy
- ii) Culture
- iii) Intellect

We shall, therefore, discuss the effect of piracy in relation to the above mentioned areas. It is worth mentioning that the effects are usually interrelated, for instance an economic effect can usually lead to a social or intellectual effect. What is of great importance to this paper however, is not so much the distinctions in the effects as is highlighting the effects of piracy.

### **4.2.1 Economic effect**

Firstly, pirates take no financial risk whatsoever. They simply misappropriate the best recordings available and reproduce and sell them for immediate profits. In contrast, an original producer makes significant investment in producing new recordings. Unfortunately for him, for every recording which is financially

successful, almost nine are produced at a loss by the legitimate producer, and he has to apply part of the profits from the one successful products to recoup the losses on the other nine. The pirate keeps all his profits. For instance just a few weeks before “J.K.” launched his album entitled Helena, the black market was already flooded with pirated copies. “J.K.” and his producer lost out on a lot of money which they would have made from sales after the official launch. People already bought the music before it was ‘out’, hence saw no need to buy the music again. Furthermore, the pirate makes no payment to the record producers in respect of production and distribution costs, so that in the case of a local production, the economic base of the local producers is eroded and his capacity to support local creativity is reduced.

Secondly, the pirate never pays any royalty to the composer, arranger, and lyric writer. This deprives an original creator of an income which he would obtain from a legitimate music deal. Thirdly, piracy not only causes financial loss to the various interests responsible for the creation, production and distribution of legitimate material, but it leads to considerable direct and indirect loss of revenue from unpaid taxes. A pirate does not pay tax as his merchandise is illegal.

#### **4.2.2 Cultural effect**

Music has been for many generations used as a vehicle of transporting culture. Music in many ways reflects the culture of the source of the music. In this way cultural heritage is able to be preserved as people in society always have a need

for songs and music to be used at celebrations be they traditional or western. A nation's culture can also be shared with other countries thereby, interplaying relations through social and cultural interactions.

Looking at the current financial risk involved in investing in music in Zambia today, producers are reluctant to produce and maintain a range of diverse cultural content. As no producer can ever be sure as to whether a particular recording will bring returns on his investment, the little profits generated by the few recordings are preferably used on producing more songs than enlarging the horizon, through the inclusion of more artists with diverse cultural background. It follows, therefore, that if a legitimate sound recording industry cannot function, an important element within the culture of the country will be eliminated. This process becomes all the more damaging when pirated recordings in one country flow into another and stifle the development of the latter's indigenous culture. This is true in Zambia where a lot of pirated material from the neighbouring Congo (Former Zaire) flooded the market in the late eighties transmitting with them a new and foreign culture, which impacted the Zambian people. One only had to look at the new trends in fashion; the hairstyles, dressing and the shift in entertainment from western music to Congolese music in places of entertainment to see how much pirated materials had brought into the country a foreign culture. What was bad with this situation was not so much the foreign culture as was the effect of stifling and impling the local music industry. Local musicians and producers could not compete with the neighbouring market, as the cost of producing local music was more expensive and less profitable due to the influx of

pirated material. An entire generation has grown up knowing only pirate tapes. Most people think that the tapes found at the black market or Asian shops are genuine because they have never known genuine materials. Producers and other music dealers have been reluctant to invest in the legitimate industry for reasons mentioned above. Genuine or legitimate material due to it being rare and expensive could only be found amongst the elite.

#### **4.2.3 Intellectual and Social effect**

As we have discussed in Chapter three, the quality of the pirated material is usually poor. The technical quality of the pirate reproduction may be so bad as to cause the public to fail entirely to appreciate the artistic value of the music. This results in an artist losing popularity and also stifling his potential to impact the music market, as both the artist and his work are 'thrown out' of the consumer's collection. They are rejected. Having lost the market and consequently potential income, there is little or no motivation for the artist to continue creating intellectual works. As many individuals and groups are talented with intellectual creativity in music, a large group of people are negatively affected by this reception by the public; that is, rejecting the work. Most prefer to keep their intellectual creativity to themselves than venture into an industry that will fail them. The result is that, not only is, a nation robbed of intellectual contributions, but is also faced with a greater challenge of dealing with the great number of unemployed people. The music industry, well developed, has the potential of creating jobs. It is also a well known fact that

musicians like “J. K.” earn their living from their talent. He is therefore, self-employed, which is by far better than being unemployed.

While it is true that there is a growing number of young Zambians venturing into the music industry, the rising levels of piracy each year are serious derailing efforts to resurrect the industry. Piracy robs musicians potentially because they do not gain from their work.

The question to pose at this juncture is, is there a cause? There certainly is. Pirates are criminals who take advantage of the industry's success, stealing the creative talents of the artists and composers and the investment by record companies. Piracy costs governments around the world millions of money every year in terms of lost tax revenues. The lure of huge profits has attracted professional international criminals who are also involved in other serious crime, like drug trafficking<sup>29</sup>. Recent investigations have confirmed the growing influence of organised criminal groups in music piracy across the globe<sup>30</sup>.

---

<sup>29</sup> Mubanga William, Piracy: A guide on how to fight it. 2002, p. 5 at p.5. (2002).

<sup>30</sup> *ibid*

## **CHAPTER FIVE**

### **TOWARDS ERADICATING PIRACY**

#### **5.1 EFFORTS TO CURB PIRACY**

It would not only be untrue but, also unfair to say that no efforts have been made to eradicate piracy in Zambia. While the increase of piracy is happening at an alarming rate, there have been certain steps and measures taken to reduce the rate of piracy. These efforts include the following:

- Enactment of Copyright Act.
- Raids.
- Amendment to Customs and Excise Act.
- Information to Public.
- Ratification of International Conventions.
- Reciprocal Representation Agreements.
- Awareness amongst Enforcement Agencies.

##### **5.1.1 Enactment of Copyright Act**

Zambia's first law on copyright was the British Copyright Act of 1911. This 'received' law was as a result of Zambia having been a British Colony. This Act was, however, replaced by the Copyright and Performance Act, Cap 701, which was subsequently replaced by the Copyright and Performance Rights Act,

Chapter 406 of the Laws of Zambia. It is the latter Act, enacted in 1996, which currently regulates Copyright and Performance rights in Zambia. It is a well established fact that the law is there to regulate conduct in society and make it run smoothly. Therefore, by enacting the Copyright law, Zambia had taken its first and important step towards eradicating piracy.

### **5.1.2 AMMENDMENT TO CUSTOMS AND EXCISE ACT**

The year 1999 witnessed the amendment of the Customs and Excise Act, Chapter 322 of the Laws of Zambia<sup>31</sup>. What is of relevance to our subject with regards the amendment is that, pirated material became prohibited goods<sup>32</sup>. As a result the Customs Department of the Zambia Revenue Authority went into action, confiscating bulks of pirated material from the Tanzania-Zambia entry boarder of Nakonde, as well as at the Tanzania-Zambia Railway terminal in Kapiri-Mposhi. They have since continued to confiscate all pirated material.

### **5.1.3 Raids**

On 9<sup>th</sup> July 1996, the first raid was carried out by ZAMCOPS in collaboration with the Zambia Police<sup>33</sup>. About two hundred pirated audiotapes, mostly by local artists were confiscated and burnt publicly. The incident was well covered by the press and as a result of this step; there was a sudden reduction in the level of piracy. It was, however, short-lived as vendors continued to trade in the pirated material when the 'dust had settled'. What is interesting to note about this

---

<sup>31</sup> As revealed by Mpundu Bwalya, ZRA Employee Customs Division. (2003).

<sup>32</sup> Ibid.

<sup>33</sup> Mkandawire Wapolina, ZAMCOPS Secretary, (2003).

incident is that when an application was made to the magistrate to destroy the confiscated materials, the magistrate was ignorant of the law on that issue.

In another raid, the following year and three thousand five hundred eight thousand five hundred audiotapes, video tapes, both local and foreign were confiscated. This raid was carried out on selected retailer ships most of which are owned by Asians. The exercise was carried out by the police in conjunction with ZAMCOPS and sponsored by Multi-choice. Attempts to litigate failed on a technicality. The matter was taken to the magistrate court where the presiding Justice dismissed the matter citing lack of jurisdiction. He stated that the mention of the word court in the Act referred to the High Court. Consequently, the matter was taken to the Director of Public Prosecution (DPP) in order to institute litigation in the High Court. According to the late Musician and then Zambia Union of Musicians Chairman, Webster Malama, the DPP summoned him and the Registrar of copyright and strongly advised them against litigating. The DPP was quoted as having said "Michael Jackson doesn't live here". A letter from the DPP was later sent to Mr Malama stating that he, the DPP had not received a complaint from Michael Jackson. It is alleged that the Asians whose properties were confiscated were constantly at the DPP's office and it was felt by the complainant that there was interference in the execution of the law as a result of those visits. On the other hand, Mr. Stanley Mkandawire, then Board Secretary for ZAMCOPS submitted that the reason that the DPP could not prosecute the retailers was that the plaintiff (ZAMCOPS) had no documented proof that they



had authority to litigate on behalf of foreign artists in the Zambian territory. Hence the matter did not proceed beyond the DPP's office. The retailers got away with their offence.

#### **5.1.4 Information to the public**

The Ministry of Information and Broadcasting Services in collaboration with ZAMCOPS have embarked on informing the public on the existence of the Copyright law and the dangers of piracy. This has been done mainly through posters. There has also been radio and television awareness a few times. This has been with the view of educating the masses so that they too can be a part of the solution to eradicating piracy.

#### **5.1.5 Ratification of international convention**

Zambia in its effort to protect intellectual property has ratified international Conventions. Some of the conventions related to copyright protection that it has ratified are the Berne Convention , the Agreement on Trade Related Aspects of Intellectual Property Rights and the Rome Convention. This secures international protection of Zambian artists. It also protects foreign artist as by ratifying the conventions, there is an obligation on member states that foreign artist are accorded the same protection or treatment as it would accord its nationals. This is widely known as the principle of national treatment.

#### **5.1.6 Reciprocal representation agreement**

ZAMCOPS has signed reciprocal Agreements in its efforts to represent foreign artists in their rights. ZAMCOPS has agreements with the following:

- Copyright Society of Malawi (COSOMA)
- Southern African Music Rights Organisation (SAMRO)
- Performing Rights Society of UK (PRS)

This way, it ensures that performing rights of artists from countries which have an agreement with ZAMCOPS are protected. ZAMCOPS can represent them.

#### **5.1.7 Awareness amongst enforcement agencies**

In a bid to curb piracy there have been seminars and short courses for enforcement agencies. For instance, in 1997 a seminar was held to impart copyright knowledge to the Police force. This was in conjunction with Multi-Choice whose products were being pirated. More recently, a visiting International Federation of Phonographic Industry African region coordinator, Richard Redaman, held talks with Zambia's enforcement agencies. Mr. Redaman held talks with the Zambia Police, The Drug Enforcement Commission and the Zambia Revenue Authority<sup>34</sup>.

---

<sup>34</sup> Zambia Daily Mail, 19<sup>th</sup> September, 2003.

## 5.2 STATUS QUO

In spite of the numerous steps taken in an effort to curb piracy, there is a sudden upswing in pirated material. The situation is worse now with every corner in the streets in town flooded with pirated material. Reports continue to be heard about how certain musicians materials, are on the market even before the official release of the album. More and more pirate tapes continue to be confiscated at boarder entry points. Notwithstanding the vigilance of the customs officers at the boarder entry points, more sophisticated way, of bringing pirate tapes into the country are being employed. Illegal routes and not boarder points are being used to import such material. Furthermore, corruption by some officials at ZAMCOPS where authorisation is given to manufacturers to bring in such materials in the pretext that there are genuine product is worrisome. It is believed that some officers have written letters to the Customs Department at the boarder post recommending that certain materials be allowed in as they are genuine products when they are in fact pirate materials to the knowledge of the officers.

Corrupt practices by some enforcement agencies, where culprits are let to go free without accountability are also a growing concern amongst many stakeholders.

The steps taken in the fight against piracy so far are commendable. However, there is need to employ more strategies in order to fight piracy successfully as the current methods have shortcomings.

### **5.3 RECOMMENDATIONS**

The following strategies have been recommended in strengthening the fight against piracy:

- Political will
- Strengthening the law
- Representative institutions
- Awareness campaign and training
- Fight corruption
- Specialised Enforcement agencies
- Partnering with international institutions

#### **5.3.1 Political will**

If the copyright system is to continue to serve effectively the purpose for which it was designed then, there has to be substantial adaptation. This mean that government action is urgently needed to bring about directly or encourage, the various measures, that are essential, if the preservation of the important public interest in maintaining the rule of law is to be safeguarded and respect for private rights upheld.

The authorities must first of all see music as an industry and that a problem currently exists, that the economic, industry, career, culture are at stake. While stakeholders may be able to acknowledge the problem, if there is no political will on the part of the government which stirs the course of direction for any country, then the fight against piracy is doomed.

### **5.3.2 Strengthening the law**

There is need to address the laws, strengthen them and consequently implement them. The law on copyright and performance rights as it is today leaves much to be desired. Even supplementary legislation on the subject, like the Customs Act as well as other legislation need urgent attention for the problem of piracy to be tackled successfully.

### **Copyright and performance right act**

#### **a) The Litigant**

The scope of who a litigant is in infringement matters is too narrow. The police should be included, that is, they should be able to prosecute on their own, even where the owner has not complained as they are everywhere (i.e. in every city, district, village). They should be able to move in on their own volition since a copyright owner or their agent can not be found in every city, hence it is difficult for them to know of every infringement and litigation. The police on the other hand can easily spot pirate materials, and should be free to litigate like they are able to do with any other criminal offence.

Furthermore, Mondo music as an agent can only litigate on behalf of Zambian artists and only for those Zambian artists whose music they manage. This leaves a whole lot of other artists uncatered for as mondo music chooses who their clients will be. Sounds investment on the other hand though licenced in the Southern Africa region to deal in international music can only protect the interests of those musicians whose music they sell. In both cases both Mondo music and Sounds investment can only act on behalf of a certain number of musicians whose music they promote or sell. What happens to the rest of musicians, both local and foreign?

(b). Jurisdiction

Jurisdiction for copyright infringement is in the High Court. The Court should be reduced to include the subordinate Court to enable dealing with matters expediently.

(c). **STIFFER PENALTIES**

Much as the Act has included criminal remedies for infringement, the penalties should be stiffened. The following penalties are proposed:

- Revoking trading licences;
- Charges and sanctions should be applied even in the first offences.

The issue of warning before proceedings can commence should be

removed. Besides perpetrators in most cases do not give their real names.

- Custodial sentences should be applied in respect of each copyright and performance right infringed.
- Penalties should be increased for second and subsequent offences.

On the overall, penalties should be able to reflect the gravity of the offences and thus act as a deterrence to further infringing acts.

(d) Quantity for conviction

The quantity of piracy material for conviction is five. A person should be held to have infringed or pirated on the basis of one copy. Upon finding just one infringed copy, such a person should be arrested. The problem of the current provision is that if a particular person finds only one of their musical product on the market, with four others by another artist there is nothing he, can do about it as only one of theirs is a pirate product. It is not always possible to get in touch with the other person whose product is pirated so that such a person can be arrested on the basis of all five copies since his one copy does not give him a cause of action. In the meanwhile the vendor gets away copyright pirated material.

(e) Foreign artists

Even though Zambia has ratified some international conventions which provide for the principle of National Treatment, there is need to expressly provide for foreign artists protection within the Act as the domestic law. This is because the enforcers of the law in most cases are not aware of such conventions, neither will they know what they contain, such that even with principles of national treatment where whose authors of member countries are supposed to be accorded the same protection as that accorded to nationals of a particular country, foreign artists interest in many nations, like Zambia continue to suffer. Hence reactions by some law enforcers like “Does Michael Jackson stay here”. However, once the domestic law expressly provides for the protection of foreign artists such problems will be minimised. The Act does not include Foreign Copyright and Performances therefore, expressly, a complainant cannot complain on behalf of copyright and performance rights owners abroad whose works are more pirate: Once local pirates are confiscated police do not know what to do as no complaint has been raised. In most cases, if not all cases, foreign artists are not even aware that their products are being pirated in a particular country by a particular person so cannot come to litigate. Also sending representatives to come over is expensive and impractical in many cases since piracy happens, all over the world. This fact further justifies the need to have copyright institutions that can act on behalf of foreign artists as well.



## Penal Code

Include piracy in Penal code under counterfeiting so that the police can enforce law without the owner. The police have the capacity to cover the whole country at the same time. As such many infringement will be noticed and punished. The police view the penal code as their own law.

## Customs and Excise Act.

Reduce taxes. The high taxes discourage many people from dealing in legitimate or genuine products. They would rather deal with pirates as this way taxes will be avoided.

Tax blank tapes either at the border entry point or in the retail shops. This way blank tapes will become expensive and in the long run it will prove more expensive to buy blanks in order to record a pirate or make pirates than purchase an original product.

## Constitution

Entrench Intellectual Property Rights in the constitution. This will show the sacrosanctity of such rights as the constitution is the highest law in the land and is sacred.

### 5.3.3 Institutions

In view of the above there is also need to create representative institutions which can represent all musicians on all copyrights and all performance right ZAMCOPS only deals with performance rights. Moreover it is not all of these rights. that are protected. For instance, operas, ballet, musical plays are not represented by ZAMCOPS. Such institutions once created, must play a supervisory role with teeth with which to bite, that is, arrest and litigate. These institutions must be a watchdog and be well equipped to carry out their tasks. There is need for the government to adequately fund such institutions to facilitate their effective extension of the institutional duties.

### 5.3.4 Awareness Campaigns and Training

- More and vigorous public awareness on the vice of piracy. Such awareness must be translated in vernacular too as most local dealers in pirated material are from compounds, where levels of literacy are low.
- Proprietors of hotels and discos and other Service providers which play music in public must be furnished with information about what they, need to do in order for their public performances to be legitimate.
- Special training of varying durations and scope must be given to enforcement agencies as well as special intellectual property experts trained. In the former vein, only police in Lusaka have had a chance to hear about piracy and the law but seminars and training are needed in

other towns and district as piracy is in every province. With regards training specialists, restrictions must not be had to law students at University of Zambia but extended to the qualoqium of judges and magistrates most of whom are ignorant of copyright and performance law. Also other short courses should be introduced in other institutions of learning where interested people who are not able to gain access to University of Zambia can be trained.

### **5.3.5 Law Enforcement Agencies**

However, comprehensive the legislation in any country it will have little signifance without effective enforcement. There is increasing evidence to link piracy and organised crime.<sup>35</sup> Fighting these sophisticated dangerous, and often armed criminals is a major policing job. The police have the capacity to cover the whole country at the same time.

However, many laws in other countries in relation to corporate and white collar crime, as well as other regulatory offences are not enforced by the police.<sup>36</sup> Instead they are the responsibility of specialist government agencies such as the health and safety inspectors, Anti Corruption Commission or Custom Department.

---

<sup>35</sup> William Mubanga, Piracy: A guide on How to fight it; p.3 (2002).

<sup>36</sup> Ibid.

In light of the above, it is recommended that Zambia establishes specialised public enforcement agencies to implement and enforce the country's intellectual property laws. In Hong Kong for instance, the Customs and Excise Service includes a copyright division numbering some fifty officers who are trained to deal on a daily basis with the enforcement of intellectual property laws.<sup>37</sup> Not only do they thus gain knowledge and experience in dealing systematically with infringement of intellectual property rights but they also enjoy special powers of search, seizure and arrest under the copyright laws of Hong Kong. The enforcement of copyright law thus becomes a priority task for the division, a matter of initial importance (not as is the case of many public enforcement agencies around the world).

In Cote d'Ivoire, West Africa, an enforcement agency known as the Economic Police has been established to deal with all cases of counterfeiting including the piracy of sound recordings<sup>38</sup>. This body consists of ten teams of five men who report directly to the Ministry of Justice which can authorise detention of those arrested by the economic police during raid, until trial.<sup>39</sup>

It is further recommended that the Anti Corruption Commission an already established specialised agency in Zambia must be vigilant in dealing with the corruption of enforcement officers in copyright matters as well.

---

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

### 5.3.6 Partnership with IFPI

Zambia due to its poor economy is incapable of taking certain actions in the fight against piracy. For instance, white raids, are good, Zambia cannot beat the source of piracy, that is, the manufacturer, as most pirated music in Zambia is manufactured outside Zambia. It is, therefore, recommended that recording companies affiliate themselves to the International Federation of Phonographic Industry (IFPI).

The IFPI is an organisation which was established in the 1990's to promote and the interests of recording companies world wide.<sup>40</sup> It is a copyright owner's representative. It has over one thousand three hundred members recording companies in over seventy countries.<sup>41</sup> One of the major tasks is the representation of its members rights in their original sound recordings by those engaged in the production of unauthorised copies.

IFPI has the capacity to deal with piracy and counterfeiting at an advanced level. The massive increase in piracy with the increasing globalisation of the problem call, for a tough approach to fighting piracy. The IFPI anti-piracy policy centres on the following amongst others:

- Zero-tolerance approach to manufacturers: hitting the source of illegal CD's is the key.

---

<sup>40</sup> International Federation of the Phonographic Industry fact Sheet, 2002.

<sup>41</sup> Ibid.

- Litigation: taking major international piracy operations through civil and criminal litigation against illegal CD manufacturers.
- Security Measures: IFPI in collaborations Philips Consumer Electronic developed the Source Identification Code (SID) to enhance the security of CD manufacturing at and both the mastering and replication stages. The advantage of this programme is that every disc carrying the SID Code can be traced back to the point of manufacture or replication.
- Internet piracy: IFPI is co-ordinating the industry's international initiative against on-line piracy.
- Enforcement: First, in conducting investigations IFPI is able with its own employees to have sufficient flexibility to develop all sources of information. Secondly, IFPI personnel almost always accompany public enforcement agencies to direct which artists may be seized as constituting infringing copies. Thirdly, as an industry representative body, IFPI is able to establish the title of its individual members in the respective copyright with which have been infringed.

#### **5.4 CONCLUSION**

The benefits of copyright and performance rights protection to any country are profound. Eradication of piracy is a key element in signalling a developing country acceptance of international standards on the protection of intellectual property rights. So vital is this to the creation of an environment for foreign investment in

high-technology enterprises and for ensuring a continuous transfer of technology and expertise. This in turn promotes and develops the skills of the population out of information and communication technology fostering both economic development and the necessary infrastructure. As this process continues, the logic of copyright will become even more apparent as reliance on foreign intellectual property is reduced and in many cases reversed.

The measures recommended in this paper are already in existence in many jurisdictions and a number of them have been relied upon constantly during many years of work in fighting piracy of sound recording. With concerted effort and determination, the fight against piracy can be won.

## **BIBLIOGRAPHY**

1. Brown R.S. Jr, Kaplan and Brown's Copyright (The Foundation Press, New Haven 1974).
2. Bush P.G., Technology and Copyright, (Lammond System, Maryland, 1972)
3. Colston C., Principles of Intellectual Property Law, (Cavendish Publishing Ltd, London, 1999).
4. Cornish W.R, Intellectual Property, (Universal Law Publishing Co. Pvt Ltd; New Delhi, 1996).
5. Diekman C., Ellis E, and Goldring J, Society, Law and Justice, (Oxford University Press, Melbourne, 1992).
6. Kent A and Lancour H, Copyright: Current Viewpoints on History, Law and Legislation. (R.R. Bowker Company, London, 1972).
7. Siedeil H.A, What the General Practitioner should about trademarks and copyright. (ALIABA, Philadelphia, 1967).
8. Berne Convention 1886.
9. Copyright and Performance Rights Act Chapter 406.
10. Customs and Excise Act Chapter 322.
11. Rome Convention 1961.
12. TRIPS Agreement 1994.
13. Zambia Daily Mail.