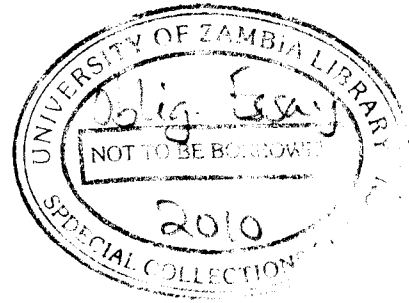


THE UNIVERSITY OF ZAMBIA
GREAT EAST ROAD MAIN CAMPUS
FACULTY OF LAW
LUSAKA



TITLE: ENFORCEMENT OF COPYRIGHT AND RELATED RIGHTS IN ZAMBIA-IS
THE LAW ADEQUATE?

BY

CLIFFORD SICHONE

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UNZA

2009/2010

**ENFORCEMENT OF COPYRIGHT AND RELATED RIGHTS IN ZAMBIA-IS THE
LAW ADEQUATE?**

**BEING A DIRECTED RESEARCH SUBMITTED IN PARTIAL FULFILLMENT FOR
THE AWARD OF A BACHELOR OF LAWS DEGREE (LLB)**

BY

CLIFFORD SICHONE

26130441

Supervised by: HONOURABLE DR. JUSTICE PATRICK MATIBINI SC

Approved by the Coordinator: DR. M. M. MUNALULA

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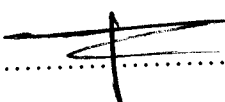
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ENFORCEMENT OF COPYRIGHT AND RELATED RIGHTS IN ZAMBIA-IS THE LAW ADEQUATE?

Accepted for examination. I have checked it carefully, and I am satisfied that it fulfils the requirements pertaining to the format as laid down in the regulations governing Obligatory Essays.

.....


HONOURABLE DR JUSTICE PATRICK MATIBINI SC
SUPERVISOR

..... 12th APRIL, 2010

Date

THE UNIVERSITY OF ZAMBIA
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ABSTRACT

Intellectual property is a term that refers to the legal rights which result from intellectual creations in the industrial, scientific, literary, and artistic fields. Intellectual property comprises creations that result from the mind, the human intellect. Intellectual property for some is an alien concept, while for others, intellectual property is well known, and developed. These countries have been able to use their power, and to fully exploit it to harness, and generate wealth for national development. It can be said that the development of the nation, does not depend only on the vast natural resources the country is endowed with but also on how much attention, progress, and achievement the country has made in the area of intellectual property.

More importantly, intellectual property can be used as a major tool for national development. Its protection can ensure value added to indigenous products, and services, serve as an incentive to the nation's talented inventors, and can assist the national products attain a competitive edge in international trade. Intellectual property consists of two branches namely; Industrial property, and Copyright and related rights. This paper has dealt with copyright enforcement in Zambia. Copyright protection, and enforcement in Zambia is governed by the Copyright and Performance Rights Act, - Chapter 406 of the laws of Zambia

In order to appreciate the contribution that intellectual property can make to the national development, it is important to have in place mechanisms that would ensure protection, and effective enforcement of these rights. All intellectual property systems need to be under-pinned by a strong judicial system for dealing with both civil and criminal offences, staffed by an adequate number of judges with suitable background, and experience. Generally speaking, intellectual property law aims at safeguarding creations, and other producers of intellectual goods and services by granting them certain time-limited rights to control the use make of those productions. Those rights do not apply to the physical object in which the creation may be embodied but instead, to the intellectual creations as such.

ACKNOWLEDGEMENTS

I wish to express my heartfelt appreciation to all who granted help and advice on this obligatory essay particularly Honourable Dr. Justice Patrick Matibini SC, of the High Court for Zambia, and a lecturer in Media Law, Electoral law, Anti-corruption, Intellectual property law, Administrative law and Constitutional law at the University of Zambia, who supervised this research in almost every minute, and for his willingness to entrust so much of the development of the research paper to my judgment. I wish to appreciate Mrs. Annie Chew Chanda, a lecturer in Human Rights (Women and Children), Family law, International trade and Jurisprudence in the Faculty of Law at the University of Zambia, and Mr. Gaibie (now the late) a lecturer who gave guidance and encouragement during the initial stages of this essay.

I wish to express my heartfelt gratitude to my brother Mr. Frightone Sichone who not only inspired me, but also provided resources for my program. I am also greatly indebted to my wife and children for their sacrifice, and support they gave me, during the period I deprived them of the fatherly presence while pursuing my studies, when they needed me most. In addition, I would extend my gratitude to the following colleagues for their constructive criticisms, comments, and valuable suggestions: Kennedy Mulwanda, Katati Morgan, Joshua Sikazwe Mitanga, Rev. Rodwell Chomba, Groy Shauma, Chola Musonda, and Elis Mwansa. The efforts and contributions from Morgan Katati, Louisa Mukuka and Mr. Frazer Sinkala as well as the graduating law class of 2008/9 cannot go unappreciated. I am so grateful. The complete devotion and camaraderie I have shared with these people, is really a valued source of inspiration.

Finally I thank my family whom I am proud of, and words in their nature can never express how much I value, and appreciate your support, encouragements, and sacrifices you all made towards my academic life. I owe you so much. Above all, I thank the almighty God for the insight, strength, ideas and guidance that he always gives to me, "to God be the glory"

Thank you.

DEDICATION

To my father Mr. Laivas Sichone, my mother Namukoko Mesinala and Eunice Namukwasa, to my virtuous wife Loveness Gondwe Sichone, to my beautiful daughters Melinda, Memory, Suwilanji Namonje and my handsome sons Donald, Kafwimbi and Waampah Sichone. To my brothers Molen, Boyd, Evans, Frightone, Harrison, Millan, Frechard and to my sisters Loveness, Cathreen, Pauline, Selina and in memory of my late sister Eunice and late brothers Roy, Joel, Mastered, Benson, Lemon, and Daniel. (May their souls rest in eternal peace)

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CHAPTER ONE

1.0 INTRODUCTION

In recent years, there has been emphasis on the need to promote intellectual property because it is evidently clear that it is a tool for promoting economic and social development. The subject of intellectual property is growing in importance, and more especially in the industrialised countries. Most developed countries have effectively embraced intellectual property, as a driving force in their social and economic development, while third world nations including Zambia, have just been making gradual progress in this area. Intellectual property law deals with legal rights associated with creative effort or commercial reputation and goodwill.¹ It protects applications of information and ideas that are of commercial value.² Intellectual property is basically divided into two branches, namely Copyright and Related Rights, and Industrial Property. Literary, artistic and scientific works belong to the copyright branch of intellectual property. Performances of performing artists, phonograms and broadcasts are called 'related rights,' that is rights related to or neighbouring to copyrights.

Unlike the protection of inventions, copyright law protects only the form of expressions of ideas, not the ideas themselves. This long-standing principle of copyright law is affirmed by **Article 9(2)**³, which states that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colours, shapes etc. Copyright law protects the rights of the owner in literary, musical, dramatic and artistic works against those who 'copy' or otherwise take and use the form in which the original work is expressed by the author.

¹ Bain bridge D.J. *Intellectual Property Rights* 4th Ed (1998) p. 3

² Cornish W.R. *Intellectual Property: Patent, Copyright, Trademark and Allied Rights* 2nd Ed (1989), p. 3

³ Trade-Related Aspects of Intellectual Property Rights, (TRIPS Agreement)

Copyright protection arises automatically upon the work being created provided it fulfills the criteria for copyright protection, such as the work being original; there is no need to apply for copyright registration. The Copyright and Performance Act, makes registration of copyright work not mandatory. It further provides that the existence of enforceability of a copyright shall be independent of whether or not it is registered under the Act.⁴

However, copyright law protects the owner of the rights against those who use the form in which his original work was expressed by the author or a substantial part of that form. This exclusive right is nevertheless tampered with by certain exceptions, limitations and compulsory licenses such as fair dealing provisions. Copyright work therefore, may be copied for the personal and private use of the person who makes the reproduction. Another example, is the making of quotations from a protected work, provided the source of the quotation, including the name of the author, is acknowledged, and the extent of the quotation is compatible with fair practice, the copyright protection lasts for the life of the author, plus fifty years, though some countries like the United Kingdom and the United States of America have extended this term to seventy years.

1.1 BACKGROUND TO THE PROBLEM

In Zambia like many other common law countries, (whose legal system is founded on the United Kingdom or English legal system due to colonial history), the history of copyright law traces its roots or origin from the UK copyright system. It was not until 1710, when the Statute of Anne, was passed into law for the first time, provided for the protection of copyright in books and other writings by an Act of parliament. This was during the reign of Queen Anne.

⁴ Section 39(4), Copyright and Performance Act, Chapter 406 of the Laws of Zambia

In 1883, there was a meeting in Berne which was followed by a Convention in Berne in 1886, which adopted the international convention on copyright called the Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention required its member countries to provide the same protection to authors from other member countries as it provided to its own authors. It was this Berne Convention of 1886, which helped the reconciliation of the fundamentally different nature of the United Kingdom copyright law with the French law of copyrights.

The Berne Convention introduced major changes to the United Kingdom law, which came into force on 1st July, 1912. It must therefore be stated that it is this Copyright Act of 1911, which formed the basis of the copyright law throughout the British Empire, and accounts for the similarities in copyright law between the United Kingdom, and countries such as Zambia.⁵ Zambia continued to rely on archaic foreign copyright laws until 31st December, 1994, when the Copyright and Performance Act,⁶ entered into force. The Act provides for copyright protection of literary, dramatic, musical, artistic works, computer programs, audiovisual works, sound recordings, broadcasts, and cable programs, and for the rights of performers. Therefore, all these enactments border on the rationale that taking a person's intellectual property, and using it without permission or payment is equivalent to taking his or her material property unlawfully, and that is nothing less than theft, and the owner can seek redress in the Courts of competent jurisdiction.

Copyright law provides that if a person performs one of the acts restricted by copyright without the permission or licence of the copyright owner, the latter can sue for copyright infringement, and obtain remedies such as damages, injunction or seizure of the infringing copies. Copyright law does

⁵ Ibid p. 20

⁶ Chapter 406 of the Law of Zambia

not give rise to monopolies, and it is permissible for any person to produce a work that is similar to a pre-existing work, as long as the later work is not taken from the first.

However, when disputes arise under the Copyright and performance Act, in Zambia, the Registrar of copyright administers those disputes, unlike in the United Kingdom where the Copyright Act provides for the tribunal to administer the disputes.

There are two types of copyright infringement, namely; primary and secondary infringement. Primary infringement arises where one performs any of the acts restricted or controlled by copyright such as copying or reproducing the work. Secondary infringement, on the other hand, arises where one deals commercially in infringed copies of copyright works such as selling pirated musical cassettes, compact discs (CDs) or videos or DVD, without the consent of the copyright owner. Copyright can also be infringed vicariously, where for instance a person without the permission of the copyright owner authorises or assists another to do a restricted act such as to make copies or uploading or downloading a literary work.

It can be said that the development of the nation does not depend only on the vast natural resources the country is endowed with, but also on how much attention, progress and achievement, the country has made in the area of intellectual property. Examples of countries that have developed quickly but without abundant natural resources are Japan and the United States of America among others. While a country like Zambia despite huge natural resources still lag behind with a limping economy. Intellectual property could only contribute effectively to social and economic development, if the country has put in place effective enforcement mechanisms to protect the infringement of intellectual property rights. The research paper will bring out the importance of strict enforcement of copyright

and other related rights in Zambia. It is crucial to have an enforcement mechanism of intellectual property rights in developing economy like Zambia.

In Zambia the significance of enforcement of copyright and other related rights cannot be over emphasised. The Copyright and Performance Act does not define a performer. Performers are considered to be actors, singers, musicians, dancers and other persons who act, sing deliver, declaim or otherwise perform literary or artistic works.⁷ Copyright protection is territorial in nature. This means that a work will only attract copyright protection if it meets the legal requirement of the copyright law of the country where protection is sought. It is therefore in this spirit that the research paper will critically analyse the enforcement, and protection of copyright and other related rights in Zambia. The research paper will identify the gaps that exist in the legislation and provisions that need reform in light of enforcement of copyright and other related rights.

1.2 STATEMENT OF THE PROBLEM

There has been rampant increase in infringement of copyright and other related rights in Zambia since the liberalisation of the economy in the 1990s, by the Movement for Multiparty Democracy (MMD) Government. This type of economy allows market forces to determine the cost of goods and services at affordable prices. This shift of market economy has its repercussions and one of these is piracy or counterfeit products. However, it is in this respect that the researcher undertakes to analyse the effectiveness of the copyright law in Zambia in order to establish whether enforcement mechanisms on copyright laws that are currently in place are in line with modern trends in copyright protection, especially, with the ever more widespread application of digital technology, including the advent of multimedia productions, and the use of digital networks like the internet which has made

⁷ G.M. Kanja; Intellectual Property Law (2006) Published by UNZA Press, Lusaka p.26

the exercise and the management of copyright works and related rights facing new challenges in the manner of effective enforcement.

Piracy is the unauthorised copyright of material for commercial purpose, and the unauthorised duplication of an original recording without the consent of the right owner. The problem includes the recording of live broadcast produced, duplicated and sold without authorisation of the owner or recording company. These problems call for expedient scrutiny of the effectiveness of the enforcement mechanisms of copyright and other related rights in Zambia, to enhance the benefit of creators and the public at large. The laws on copyright and related rights are not very clear so as to enable the right holder and the public understand the value of enforcing copyright and related rights. There have not been adequate sensitisation programs to bring awareness to the general public on the importance of having effective enforcement mechanisms on copyright works.

In an effort to educate the general public on the importance of having adequate, and effective enforcement mechanisms for copyright protection, the public must be made aware that they are also part, and parcel on the fight against copyright infringement. Copyright and performance Act provides that the person whose copyright has been infringed can bring a civil action against the infringer, for purposes of award of damages, and injunctions, while under Section 28 of the Act, it provides for acts that fall within criminal offences.

Since piracy is a clandestine activity, the profits derived by pirates are not subject to tax collection. Amongst the adverse consequences of this diminution in governmental revenue may be a reduction in the amount of government sponsorship available for the arts, as the level of such sponsorship may in part be determined by reference to the contribution which is made to the government budget by taxation derived from the distribution or sale of works subject to copyright protection and

enforcement of copyright laws. In this regard, piracy can be seen to have detrimental effects therefore on each of the elements that make up the copyright system. In consequence, piracy threatens to stultify the evolution and development of national cultural identity which the copyright system is designed to promote.⁸

These problems call for expedient scrutiny of the effectiveness of the enforcement mechanisms of copyright and related rights in Zambia, to enhance the benefit of creators and the public at large. However, it would be of great help to have copyright laws that are very clear so as to enable the right holder and the public understand the value of enforcing copyright and related rights. There have not been adequate sensitisation programs to bring awareness to the general public on the importance of having effective enforcement mechanisms. Inadequacy of competent and qualified law enforcement agencies in copyright laws such as the police and custom officials to detect infringing materials has hampered the effective enforcement of copyright and related rights. Detection of infringing materials need modern equipment and skill otherwise such materials would go unnoticed.

The technological development makes it possible to fix the performances on a variety of material, viz., records, cassettes, tapes and films. These technological innovations makes it possible to reproduce individual performances by performing artists, and to use them without their consent, and without the users being obliged to reach an agreement with them, have led to a reduction in the number of live performances. This creates what has come to be known as technological unemployment among professional artists, thus giving a new dimension to the protection of the interests of performers. The advancement in technology makes it easy for infringers to go unnoticed.

⁸ WIPO Intellectual Property Handbook: Policy, Law and Use. 2nd Ed No. 489 (E) (2004) WIPO Publication. Geneva. Switzerland. p. 47

1.3 SIGNIFICANCE OF THE STUDY

Realising the huge contributions which intellectual property can make to both social and economic development of Zambia, the researcher focuses on the effectiveness of the enforcement mechanisms of copyright laws. Copyright protects the creations of creative genius which include literary, dramatic, musical and artistic works. These works contribute to the economic development of the country. The creators of such works depend on the use and exploitation of these rights. Therefore, protection and enforcement mechanism which are effective must be attained. However, for copyright and other related rights to enjoy protection and enforcement, there must be sufficient skill, judgment and labour or selection, judgement and experience expended by the author in creating the work but the input must satisfy a certain criterion.

Lord Alan said that “there must be sufficient labour and capital expended by the owner in order to qualify for copyright,” this was in the case of **Macmillan V. Cooper**.⁹ The purpose of copyright is to ensure that artists and their recording companies are economically rewarded for their works.

Government of the Republic of Zambia should have a responsibility to recognise the threat that organised intellectual property crime poses to the economy, culture and international reputation of the country. It has therefore been observed that piracy is not only a problem in Zambia, but is also an issue globally hence the need to have enforcement mechanisms that are effective so as to protect creators’ works. In the English case of **University of London Press V. London Tutorial Press**,¹⁰ Petersen J. stated that ‘what is worth copyright is *prima facie* worth protecting, and this is the essence of the copyright law’

⁹ (1923) 93 L.J.P.C, 113.

¹⁰ (1916)2 Ch D p. 610

1.4 RESEARCH METHODOLOGY

This study has been undertaken based on the data collected basically from oral interviews with key informants such as personnel from Patents and Companies Registration Office, and the Intellectual Property Department under the Zambia Police Service. The study has also to a large extent relied on desk research which has included information from the statutes both local and foreign, internet journals and Newspapers.

1.5 THE GENERAL OVERVIEW OF THE ENFORCEMENT MECHANISMS FOR COPYRIGHT AND RELATED RIGHTS IN ZAMBIA

In Zambia like many other common law countries (whose legal system is founded on the United Kingdom or English legal system due to colonial history), the history of copyright law traces its roots or origin from the UK copyright system. In 1886, the Berne Convention adopted the international convention on copyright called the Berne Convention for the protection of literary and artistic works.

The Berne Convention required its member countries to provide the same protection to authors from other member countries as it provided to its own authors, and also put in place certain minimum levels of copyright protection.¹¹ The Berne Convention introduced major changes to the United Kingdom copyright law which came into force on 1st July, 1912. It must therefore be stated that it is this Copyright Act of 1911, which formed the basis of the copyright law throughout the British Empire and accounts for the similarities in copyright law between the United Kingdom and countries such as Zambia.¹² Zambia continued to rely on archaic foreign copyright laws until 31st December,

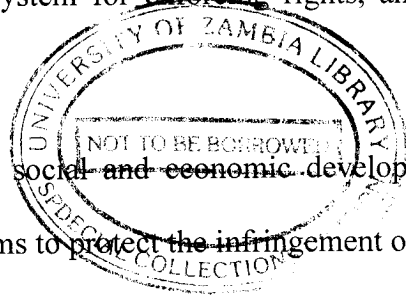
¹¹G.M Kanja; Intellectual Property Law; (2006) Published by UNZA Press-Lusaka Zambia p. 19

¹² Ibid p. 20

1994, when the Copyright and Performance Act,¹³ entered into force. The Act provides for copyright protection in literary, dramatic, musical, artistic works, computer programs, audiovisual works, sound recordings, broadcasts and cable programs and process, for the rights of performers.

These enactments border on the rationale that taking a person's intellectual property, and using it without permission or payment is equivalent to taking his or her material property unlawfully, and that is nothing less than theft, and the owner can seek redress in the Courts of competent jurisdiction. The enforcement of copyright and related rights need to be underpinned by a strong judicial system for dealing with both civil, and criminal offences, staffed by an adequate number of judges with suitable background, and experience. Copyright and related rights disputes are in the main matters to be decided under civil law, and the judicial system should make every effort to deal with them not only fairly, but also expeditiously. Without a proper system for enforcing rights, an intellectual property system will have no value.

Intellectual property can only contribute effectively to ~~social and economic~~ development, if the country has put in place effective enforcement mechanisms to protect the infringement of intellectual property rights. The Copyright and Performances Rights Act defines copyright as a property right which subsists in original literary, musical, dramatic, artistic works and computer programmes; compilations; audiovisual works; sound recordings; broadcasts; cable programmes; and typographical arrangements of published editions of literary works , such as computer programmers, compilations, sound recording, broadcasts and film which result from the author's own intellectual creation.¹⁴ Copyright normally vests at least in the first instance, in the author of the work, unless it is created by the employee in the course of employment. Therefore, if a person performs one of the



¹³ Chapter 406 of the Law of Zambia

¹⁴ Section 7, of Copyright and Performance Rights Act- Chapter 406 of the Laws of Zambia

acts restricted by copyright without the permission or licence of the copyright owner, the latter can sue for copyright infringement, and obtain remedies such as damages, injuries or seizure of the infringing copies.

Copyright protection arises automatically upon the work being created provided it fulfills the criteria for copyright protection such as the work being original; there is no need to apply for copyright registration. Although the Copyright and Performance Right Act provides for the registration of copyrights,¹⁵ the registration of copyright is optional,¹⁶ and the existence and enforceability of a copyright shall be independent of whether or not it is registered. There is no point in establishing a detailed and comprehensive system for protecting intellectual property rights and disseminating information concerning them, if it is not practically possible for the right owners to enforce their rights effectively. In instances where rights under copyright law are violated, owners of copyright suffer considerable economic loss, especially in a world where expanding technologies have facilitated infringement of protected rights to a hitherto unprecedented extent. An effective enforcement mechanism on copyright laws would greatly benefit not only individuals, and organisations involved directly in the music industry, but also the nation as a whole. In this regard, it must be noted that activities such as piracy generally hurt the most those productions which are successful. In the phonographic industry for example, only a small proportion of the productions are economically successful, and it is the income from those that makes it possible for the industry to support less successful, but perhaps more valuable productions.

Nevertheless, if this incentive is lost, the industry may not be able to continue those productions and the output will be qualitatively lower, something which is in the long run detrimental to the interests

¹⁵ Section 40 of the Copyright and Performance Rights Act

¹⁶ Ibid.

of consumers, and of society as a whole. Enforcement measures or mechanisms on copyright laws should be seen both in a short, and long term perspective. It is sometimes shallowly argued that piracy is not a bad phenomenon because it supplies the market with popular productions at low prices. Others have said that pirates employ a considerable workforce, and thus give increased job opportunities. Whatever the case, these arguments are naturally not valid if a state wants to maintain its international reputation, and participate in the international exchange of cultural information and entertainment and also help boost the local music industry.

Realising the important role which the music industry plays in the development of the country, there is urgent need to ensure that both protective and enforcement measures are readily available to all victims of infringements. The system of copyright and related rights is a branch of private law in that it grants personal exclusive rights to the individual beneficiaries. Therefore, the basic approach in most countries including Zambia has been that, it is for the injured party himself to take action. Consequently, the basic possibility for the victim of infringement is to take civil action. Copyright law infringement is not only a drawback to authors or an owner of creative works, but also retardation to national development, hence the need to protect and enforce copyright laws. The evolution of international standards for the enforcement of copyright and related rights has been dramatic in recent years, and Zambia has been gradually striving to reach international standards of enforcement of copyright. This evolution has been principally driven by two factors. Namely;

- (i) There is advance in technological means for the creation and use (both authorised, and unauthorised) of protected material, including most recently, the advent of digital technology which makes it possible to transmit and make perfect copies of any information existing in digital form, including works, and productions protected by copyright and related rights; and

- (ii) The other factor is the increasing economic importance of goods and services protected by intellectual property rights in the realm of international trade.

The importance of protecting and enforcing copyright infringement in Zambia cannot be over emphasized. The availability of appropriate provisional (conservatory) measures is an indispensable element of any efficient mechanism of the enforcement of copyright. Although civil remedies are not always sufficient deterrents, they help provide compensation for the prejudice caused by infringements, dispose appropriately of instruments used for infringing activities, and also grant injunctions to prohibit further infringement. These remedies should always be available irrespective of whether the infringement has been committed willfully and/or for profit making purposes. When it comes to enforcing and seeking copyright protection, the Copyright and Performance Act of 1994, provides that it is up to the owner of copyright to enforce the right. In this regard therefore, accessible, sufficient and adequately funded arrangements for the protection of rights are crucial in any worthwhile intellectual property system.

1.6 CONCLUSION

This first chapter has basically looked at the general overview of the protection and enforcement of copyright and related rights in Zambia. The next chapter focuses on the forms of infringements on copyright works, the enforcement mechanisms, and protection of copyright and related rights. The next chapter will also analyzed the roles played by various institutions involved in the protection and enforcement of copyright and finally, the remedies available to the successful plaintiffs.

CHAPTER TWO

ENFORCEMENT MECHANISMS FOR COPYRIGHT AND RELATED RIGHTS IN ZAMBIA

2.0 INTRODUCTION

In order to appreciate the effectiveness of the protection and enforcement of copyright and related rights in Zambia, it is crucial to understand what constitutes infringement in this regard. This second chapter therefore, looks at acts that amount to infringement, and also mechanisms that have been put in place to protect and enforce copyright and related rights. This is done by considering institutions involved in the protection and enforcement of these copyright and related rights and ascertain the degree of efficacy and challenges these institutions encounter in the execution of their duties.

The right of the owner of copyright to prevent others from making copies of his works is the most basic right under copyright.¹⁷ The first of the acts restricted by copyright is “reproduction.” By reproduction is generally meant the right to multiply copies of the work, the production of even one copy being an infringement. Reproduction is not defined in any of the Acts, but its meaning is probably very similar to “copy.” What is a copy will be a question of fact and degree. Therefore, when the copy is not exact, the Court must examine the degree of resemblance with this in mind: that for infringement to arise there must be such a degree of similarity as would lead one to say that the alleged infringement is a copy or reproduction of the original having, in other words, adopted its essential features and substance.

¹⁷ World Intellectual Property Handbook; (2004), Policy, Law and Use. 2nd Ed WIPO Publication no. 489 (E), Geneva, Switzerland. p.43

2.1 WORKS IN WHICH COPYRIGHT AND RELATED RIGHTS SUBSISTS

The subject matter of copyright protection includes every production in the literary, scientific and artistic domain, whatever the mode or form of expression. For a work to enjoy copyright protection, however, it must be an original creation. The ideas in the work do not need to be new, but the form, be it literary or artistic, in which they are expressed must be an original creation of the author.¹⁸

Works eligible for copyright protection are, as a rule, all original intellectual creations. These are contained in the Copyright and Performance Act.¹⁹ This Act provides for the work in which copyright subsists, subject to the qualifications as being;

- (i) Original literary, musical, artistic works or computer programs;
- (ii) Compilations;
- (iii) Audiovisual works;
- (iv) Sound recordings;
- (v) Broadcasts;
- (vi) Cable programmes; and typographical arrangements of published editions of literary works.²⁰

It must be noted however that, protection is independent of the quality or the value attaching to the work. The work will be protected whether it is considered, according to taste, good or a bad literary or musical work, and even of the purpose for which it is intended, because the use to which a work may be put has nothing to do with its protection. Lord Chancellor in the English case of **Walter V. Lane**²¹ stated that copyright arose in a book 'whether that book be wise or foolish, accurate or inaccurate, literary merit or of no merit whatever.' In terms of typographical arrangements, copyright

¹⁸ Ibid p.42

¹⁹ Chapter 406 of the laws of Zambia

²⁰ Section 8(1)(g)

²¹ (1900)AC 539

arises in relation to published editions of the whole or any part of one or more literary, dramatic or musical works.

The copyright however exist only in relation to the published editions of the whole as it is published by the publisher, irrespective of how its content is composed. Thus, in **Newspaper Licensing Agency Ltd V. Marks and Spencer Plc**,²² the position of the Court was that the copyright existed in relation to the newspaper as published, rather than in relation to the arrangement of individual articles within the newspaper. There are instances when the Court would be entitled to refuse to enforce copyright if the work is

- (i) Immoral, scandalous or contrary to family life;
- (ii) Injurious to public life, public health and safety or administration of justice;
- (iii) Incites or encourages others to act in a way referred to in (ii)

This was stated in the English case of **Hide Park Residence Ltd V. Yell and**,²³ where the United Kingdom Court of Appeal refused to enforce copyright on the ground of public policy.

In Zambia and the United kingdom, the Courts will refuse to enforce copyright if the work itself is against public policy, but other jurisdictions such as United States of America and Canada, have however enforced copyright even when the work is against public policy or is obscene as can be seen in the case of **Baron V. Hood**,²⁴ where the Court stated that; “copyright, of course, does not

²² (2000) ALL ER 239

²³ (2001) 3 WLR 215

²⁴ (1987)17CPR(3d) 161; Canada Federal Court, Trial Division

reside only in artistic or literary works which are noble, sober and serious, but also in those which are vulgar, humorous or even gross.”

2.2 FORMS OF INFRINGEMENT ON COPYRIGHT AND RELATED RIGHTS

There are basically two types of copyright infringement, namely primary and secondary infringement. Primary infringement arises where one performs any of the acts restricted or controlled by copyright such as copying or reproducing the work. Secondary infringement, on the other hand, arises where one deals commercially in infringed copies of copyright works such as selling pirated videos or DVD, musical cassettes, compact discs (CD's), without the consent of the copyright owner.

Copyright can also be infringed vicariously, where for instance a person without the permission of the copyright owner authorises or assists another to do a restricted act such as to make copies or uploading or downloading literary work. This was the position of the Court in the case of **A and M Records Incorporation V. Napster Incorporation**,²⁵ where the defendant Napster operated a website which enabled any body to log on, locate computer, and download the desired file on his or her own computer. The Court held that Napster was guilty of the vicarious liability, and had direct financial benefit.

²⁵ 239F.3d 1004(US Court of Appeal 9th circuit, 2001)

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²⁵ 239F.3d 1004(US Court of Appeal 9th circuit, 2001)

Section 17 of the Copyright and Performance Rights Act,²⁶ provides that the owner of the copyright in a work shall have exclusive right to do or to authorize others to do the following acts or controlled acts;

- (i) to copy or reproduce the work;
- (ii) to publish or issue copies to the public;
- (iii) to perform, show or play the work in public;
- (iv) to broadcast the work or include it in a cable program;
- (v) to make an adaptation of the work or do any of the above in relation to adaptation.

Anyone who does or allows another to do any of the aforesaid restricted or controlled acts by copyright without the permission, contractual or otherwise, by the copyright owner will infringe copyright subsisting in a work. Thus, copyright in a work is infringed by anyone who without the consent of the owner of the copyright does or authorises another person to do a controlled act in relation to the work such as issuing copies or communicating a work to the public.²⁷

As copyright protects not the ideas, but only the form of expression of the ideas, this long-standing principle of copyright law is affirmed by Article 9(2) of the Trade Related Aspects of Intellectual Property Right (TRIPS), which states that copyright protection shall extend to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such. Provisions of Article 9(2)²⁸ have been invoked in several cases by the Courts in order to establish what constitute

²⁶ Chapter 406 of the Laws of Zambia

²⁷ Section 18, Copyright and Performance Rights Act, Chapter 406 of the Laws of Zambia

²⁸ TRIPS Agreement

infringement. This was the Court's holding in the case of **Donoghue V. Allied Newspapers Ltd**,²⁹ where Farwell J stated, "there is no copyright in an idea or in ideas. A person may have a brilliant idea for a story, or for a picture, or for a play, and one which appear to him to be original; but if he communicates that idea to an author or an artist or a playwright, the production which is the result of communication of the ideas to the author or the artist or the playwright is the copyright of the person who has clothed the idea in form, whether by means of a picture, a play, or a book, and the owner of the idea has no right in that product."

This position is buttressed by the more recent English case of **Designer Guild Ltd V. Russell Williams (Textiles) Ltd**,³⁰ where Lord Hoffman of the House of Lords stated that "plainly there can be no copyright in an idea which is merely in the head, which has not been expressed in copyrightable form, as a literary, dramatic, musical or artistic work. This case is an illustration that for an alleged infringement to have occurred, the idea must have been expressed in some form. Copyright infringement, then, is the infringement of an intangible right in the expression of an idea. Therefore, the work should also be dissociated from its physical, tangible carrier, as for instance, when someone buys a painting, he buys the piece of paper or cloth on which the painting has been done, but the ownership of the copyright in the painting is not transferable to the buyer. With this idea in mind therefore, if one buys a CD containing music, while he retains the ownership of the physical object (CD), on which the music is incorporated, the copyright in music on that CD, remains with the author.

²⁹ (1938)Ch. 106

³⁰ (2000)1 WLR 2416, HL

Copyright infringement puts the onus on the plaintiff to prove that the defendant has misappropriated his work. In order to determine whether appropriation has been done on the copyright work, any of the following elements must be proved namely, causal link or connection, subconscious copyright and indirect copying.

2.2.1 (a) Causal link or connection.

To establish a causal link the plaintiff must prove that, directly or indirectly, the defendant's alleged infringement is taken from the work or subject-matter in which he claims copyright. A causal connection between the copyright work and the alleged infringement is essential, and is a major distinction between the protections afforded by patents, and registered designs- both of which are full monopolies.³¹ The plaintiff must show that this causal connection is the explanation of the similarity between the two. But if for example, they both copied from a common source, or they arrived at their results truly independently, there will be no infringement.

In short, to prove appropriation or copyright infringement in a work the plaintiff must prove that:

- (i) the works are similar;
- (ii) the plaintiff's work was created first, and
- (iii) the defendant had access to the plaintiff's work, of which he must have availed himself.³²

³¹ World Intellectual Property Handbook: Policy, Law and Use. 2nd Ed (2004) WIPO Publication No. 489 (E), Geneva. Switzerland. p. 226.

³² Kanja G.M. Intellectual Property Law. (2006) Published by UNZA Press p. 136

2.2.2 (b) Subconscious

There is copyright infringement where someone unconsciously copies the work which is protected by copyright. However, particular difficulty arises when the defendant denies any intention to copy and the Court believes him. Some judges have accepted that copying could occur subconsciously where a person reads, sees or hears a work, forgets about it but then reproduces it, genuinely believing it to be his own. In such instance, proof of copying, as stated by Wilberforce J. in **Francis, Day and Hunter V. Bron**,³³ will depend on a number of composite elements, such as the degree of familiarity, if proved at all or properly inferred, with the plaintiff's work, the character of the work, particularly its qualities of impressing the mind and memory, the objective similarity of the defendant's work, the inherent probability that such similarity as is found could be due to coincidence, the existence of other influences on the defendant composer, and not least the quality of the defendant composer's own evidence of the presence or otherwise in his mind of the plaintiff's work.

2.2.3 (c) Indirect copying

Copying of a work protected by copyright can either be direct or indirect. Lindley L.J. in **Hanfstaegl V. Empire Palace**³⁴ stated that, it has long been accepted that a work may be copied by imitating a copy of it: 'to hold otherwise would be to open the door to indirect piracies, which I am not at all disposed to do.'

³³ (1963)Ch. 587

³⁴ (1894)3 Ch.109 at 127, cited in Cornish.W.R. Intellectual Property 3rd Ed (1966) Universal Law Publishing Co. Pvt. Ltd p. 361

2.2.4. (d) *Substantial taking*

In an event that there has been copying and all or virtually all of the work is taken without emendation, the proof of infringement is straightforward; difficulties arise to the extent that this is not the case.

To constitute infringement, the Copyright and Performance Rights Act,³⁵ provides that copying in a work will be infringed by taking all of the protected work or a substantial part of the protected portion of the work. The Act defines substantial part to include any part of a work which on its own can be identified as part of the work by someone who is familiar with the work. In this respect, what is 'substantial' will again depend on the facts and circumstances of each case, and will be for the Court to assess. It has been said in the case of **L. B (Plastics) Ltd V. Swish Products Ltd**,³⁶ by Whitford J, that 'the question whether the defendant has copied a substantial part depends much more on the quality than the quantity of what he has taken.' This is because even production of one copy would amount to an infringement.

In the case of **University of London V. University Tutorial Press Ltd**,³⁷ Peterson J, had the following to say "...after all, there remains the rough practical test that what is worth copying is *prima facie* worth protecting." The Court now assesses whether, assuming a causal connection, the defendant has helped himself to too liberal a portion of another's labour or work.

³⁵ Chapter 406 of the Laws of Zambia

³⁶ (1979)RPC 551 at p. 568-569

³⁷ (1916) 2 Ch. 601

The rights of an owner of copyright are infringed when one of the acts requiring authorisation of the owner is done by some detail the types of activity which constitute infringement of the various forms of copyright. In this paper, the researcher has dealt with four basic matters involving copyright;

- (i) the need to distinguish copyright from rights in the physical embodiment of the original work;
- (ii) the subject matter improperly taken;
- (iii) the need to show that the defendant has misappropriated the actual work and that this has been to a substantial extent; and
- (iv) the degree to which the infringer may infringe by authorising acts of others.³⁸

The right of the owner of copyright to prevent others from making copies of his or her works is the most basic right under copyright.³⁹ The owner of copyright in a protected work may use the work, but not without regard to the legally recognised right, and interest of others and may exclude others from making it without his authorisation 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 authorise others to use the protected work.

It is imperative to note that though authors create copyright works, they rarely wish to deal with or exploit the works commercially by themselves, but rather prefer to authorise other persons, usually legal entities such as publishing companies, or record companies to exploit works on their behalf. Some of the reasons for this include; the copyright owner’s lack of financial resources to publish, manufacture, produce, distribute, market and sell the work. Also in case of infringement, the

³⁸ W. R. Cornish; Intellectual Property Law 3rd Ed (1996), Universal Publishing Co. Ltd. p. 359

³⁹ World Intellectual Property Organization; Intellectual Property Reading Material, (1998) WIPO Publication

copyright owner may have no capacity and means to deal with infringement, such as taking legal action against persons infringing copyright in the work.

It should also be noted that copyright, like any other intellectual property right, is an investment. Therefore, authors may wish to create work with the hope of earning an income by assigning or licensing the work to others who have the ability to exploit it commercially. Copyright may also be used as security for a loan, or other financial transactions.

2.3.0 ENFORCEMENT MECHANISMS AND PROTECTION OF COPYRIGHT AND RELATED RIGHTS IN ZAMBIA

Copyright protection is above all one of the means of promoting, enriching and disseminating the national cultural heritage in Zambia, and it is the researcher's view that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works. And since in the cultural life of countries, including Zambia, due importance is attached to the artistic heritage, the protection of related rights affords rights to those who contribute to the interpretation and dissemination of that heritage.

The availability of appropriate provision (conservatory) measures is an indispensable element of any efficient mechanism for the enforcement of copyright. The most important objectives of such measures are the prevention of acts of infringement, and the seizure of infringing copies, reproducing equipment, and other implements that could be used for (further) infringements. This

action helps in obtaining essential evidence which can disappear if not brought under the control of the Court. These measures must be available on an ex parte basis where giving the defendant prior notices could be counterproductive.⁴⁰

2.4.0 INSTITUTIONS INVOLVED IN THE PROTECTION AND ENFORCEMENT OF COPYRIGHT AND RELATED RIGHTS IN ZAMBIA.

The administrative role of the State in the field of copyright and related rights varies greatly from country to country. A minimum role generally implemented in a government structure is the policy level function, monitoring legislation, and enforcement strategies.⁴¹ In addition, a number of administrative tasks may be performed, depending on the role attributed by national legislation to public administration. In Zambia, some of the institutions that are involved in the protection and enforcement of copyright and related are discussed below.

2.4.1 THE ROLE OF THE ZAMBIA POLICE SERVICE IN ENFORCEMENT OF COPYRIGHT AND RELATED RIGHTS

The Zambia Police Service is an institution whose role cannot be left out in the enforcement of intellectual property laws. The Zambia Police Service has created a Department known as the Intellectual Property Unit, whose functions are especially to;

⁴⁰ WIPO Intellectual Property Handbook: Policy, Law and Use. 2nd Ed.(2004) WIPO Publication No. 489 (E), Geneva, Switzerland. P. 212

⁴¹ Ibid p. 386