

ADQUACY OF COPYRIGHT LAW IN THE FIGHT AGAINST

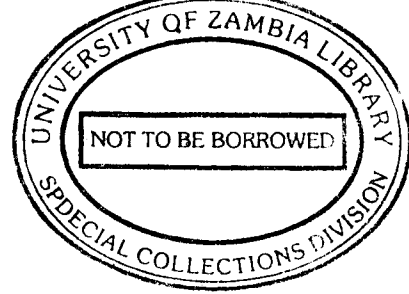
PIRACY IN ZAMBIA

BY

MWAPE MBEWE

UNZA

DECEMBER, 2006.



UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

I recommend that the Directed Research prepared under my supervision

By

MWAPE MBEWE

entitled

ADQUACY OF COPYRIGHT LAW IN THE FIGHT AGAINST PIRACY IN ZAMBIA

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 Directed Research.

12.01.07
.....
DATE

M. M. Mbeve
.....
SUPERVISOR

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

DIRECTED RESEARCH

ON

ADQUACY OF COPYRIGHT LAW IN THE FIGHT AGAINST PIRACY IN ZAMBIA

BY

MWAPE MBEWE

COMPUTER NUMBER 21023999

SUBMITTED TO THE UNIVERSITY OF ZAMBIA LAW FACULTY IN PARTIAL
FULFILMENT OF THE CONDITIONS FOR THE AWARD OF THE BACHELOR OF
LAWS (LL.B) DEGREE.

SUPERVISOR: MR MPUNDU KANJA

DECLARATION

I MWAPE MBEWE Computer Number 21023999, do hereby declare that the contents of this directed research paper are entirely based on my own research and that I have not in any manner any persons work without acknowledging the same to be so. This is the first submission of this work; it is it the subject of any previously submitted work in any University.

I bear absolute responsibility for errors, defects or any omissions therein.

DATE...12.01.07.....

SIGNITURE.....Mwe.....

DEDICATION

To my two mothers, Kutemwa and Musunga, who have inspired me with their love, you are the greatest mothers in the whole world. Thankyou for always encouraging me to work hard. May God bless you always.

To Thoko, Teza and Zanji, you are my inspiration, you have taught me to believe in myself and your love has seen me through all the hard times.

To Chipsy my little brother, you have made me a better person and you have made me believe that there is enough love in this world to go round.

ACKNOWLEDGEMENTS

I wish to thank God for always guiding me and for always being there for me.

I would like to extend my gratitude to Mr M. Kanja, who as my supervisor has been patient and understanding and has guided me through out the research.

I also wish to extend my gratitude to my mum for typing my work and helping me find the information I needed for my essay.

I also wish to thank Mirriam for encouraging me and guiding me whenever I needed help.

I also wish to thank Shoko who was helpful and patient.

I also wish to thank my friends Judy, Fiskani, Sylvia, Bwalya, Momba, Angie, Makumba, Dez and Philip for helping and encouraging me with my studies at campus and making university life a wonderful experience.

ABSTRACT

In Zambia today the music industry has started to blossom but already many people are disinvesting because of the high levels of piracy. Copyright law is basically the means to combat piracy which is destroying the livelihood of many musicians. One way of ensuring that piracy is reduced is through ensuring that our copyright law is adequate to fight piracy.

Since the blossom of Zambia's music industry, the Zambian government has been trying to fight piracy, this is evidenced by the establishment of the Copyright and Performance Rights Act, the copyright registrars office, the anti piracy squads and being a party to various international conventions. However these institutions have not been able to win the fight against piracy.

Therefore with our copyright law in place it is hoped that it will help in the fight against piracy, however this can only be achieved by having a strong legislative, administrative and enforcement mechanism in place.

LIST OF ABBREVIATIONS

CD	Compact Disk
DVD	
TRIPS	Trade Related Aspects of Intellectual Property Agreement
UNZA	University of Zambia
WCT	World Intellectual Property Organisation Copyright Treaty
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
ZAMCOPS	Zambia Music Copyright Protection Society
ZRA	Zambia Revenue Authority

TABLE OF CONTENTS

	PAGE NUMBER
Title	
Dedication	
Acknowledgements	
Abstract	
List of abbreviations	
Chapter One	
1. introduction	1
1.1 Defination and Nature of Copyright Law	1
1.2 Rationale of Copyright Protection	4
1.3 Moral nad Economic Rights	6
1.4 Related Rights	7
Chapter two	
2. Protection of Intellectual Property Rights on the International Level	10
2.1 Protection Under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)	12
2.2 Protection Under the Berne Convention	19
2.3 Protection Under the Rome Convention	23

2.4	Protection Under the World Intellectual Property Organisation Copyright Treaty (WCT)	25
-----	---	----

Chapter three

3.	The State of Piracy in Zambia	29
3.1	Table 1: Ratio of Pirated Tapes	29
3.2	table 2: Estimated Nation Wide Piracy data (2002)	30
3.3	Table 3: Estimated Nation Wide Piracy Occurance in Zambia	31
3.4	Piracy Levels	32
3.5	Awareness Chart	33
3.6	Adquacy of the Copyright and Performance Rights Act	34

Chapter four

4.	Analysis of the Legal Framework in Zambia	35
4.1	Problems and Shortcomings in the Copyright and Performance Rights Act	35
4.2	Other Institutions which Protect Copyrighted Works	41

Chapter five

5.	Recommendations and Conclusion	44
----	--------------------------------	----

5.1	Recommendations	44
5.2	Conclusion	48

Bibliography

CHAPTER ONE

What is Copyright Law

1. Introduction

Copyright laws are part of the general corpus of intellectual property law. Copyright laws like any other aspect of intellectual property law, are concerned primarily with the protection of works produced by the human intellect.¹ The term intellectual property covers various forms of intellectual rights, namely; industrial property and copyright and neighboring rights. Industrial property law deals with the protection of patents, trademarks, industrial designs, utility models and unfair competition. Copyright and neighboring rights on the other hand deal with the protection of literary, artistic and scientific works, performances of performing artists and broadcast rights. In this essay, I will be discussing piracy with a primary focus on the music field although there are many other fields of piracy ranging from video games to films to brand duplication.

1.1. The Definition and Nature of Copyright Law.

Copyright is a right granted for the protection of literary, dramatic, musical and artistic works and other works resulting from the authors own intellectual creation.² It is also a property right in the product of creativity.

In Zambia the piece of legislation governing copyright and performance rights is the Copyright and Performance Rights Act, Chapter 406 of the laws of Zambia. Section 8 of

¹ K.K. Mwenda and D.A. Ailola: *Frontiers of Legal Knowledge : Business and Economic Law in Context.* Carolina Academic Press. (2003) p62

² G. M. Kanja: *Intellectual Property Law.* UNZA Press. (2006) p23

the Act provides that copyright subsists in any original works of: literary works, musical works, artistic works or computer programs, compilations, and audiovisual works. Sound recordings, broadcasts, cable programs, typographical arrangements of published editions of literary works.

The owner of copyright in a protected work may use the work as he wishes, but not without regard to the legally recognized rights and interests of others and may exclude others from using it without his authorization.³ This means that the owner of the work in which copyright subsists has the exclusive right to exploit gain from his or her work financially and economically. Copyright is not a monopoly but merely a right to prevent others from copying. This is because it is possible for two people to come up with the same work or very similar work as long as the work is created independently, it can be protected under copyright law even if it is a work similar to a work already in existence.

Furthermore, copyright law only protects the form of expression of ideas, not the ideas themselves. It would be absurd if copy right law was also to protect an idea. How can one protect an idea if it has not yet become an expression of his or her own thought? The expression of the idea encompasses the creativity involved in the arrangement of the work, choice of words, musical notes, colours, shape etc. copyright law therefore protects the owner of a copyrighted work against those people who take and use the form in which the original work was expressed by the author. For example, Stephen King does not have a monopoly in horror novels. Anyone else is free to write a horror novel since the concept of a horror novel is an idea and not protected by copyright. However writing a horror novel by taking parts of Stephen King's novel infringes copyright, because the actual novel is the expression of the idea.

³Justice Zikonda: WIPO Collogiuym on the Protection and Enforcement of Intellectual Property. (2004) p.8

The author of a work must exercise skill, labour, capital and also judgment, selection and experience in producing and creating a work. Not only must intellectual activity produce the right kind of work ,but also the input must show a minimum standard of effort.⁴

The owner of a copyright work has the exclusive right to do certain specific acts in relation to that work. This means that, the owner has the right to prevent others from doing those acts. The owner can either grant a licence of permission to a third party to perform those acts or bring an action for infringement against any unauthorized performance of those acts, and he/she can obtain remedies such as damages, an injunction or the right to delivery up of infringing copies. The acts which the copyright owner can control in respect of his or her copyrighted work are: copy, broadcast , including a work in a cable program, issuing copies to the public, performing or showing the work in public and adaptation of a copyrighted work.⁵

However, in copyright law there is a principle known as fair use, this principle is founded on the fact that it would be unjustified if all copyrighted works can not be used by others and every time they need to use the works they need to get permission from the author. An example of fair use is were a student is writing an essay on a particular subject and quotes some parts of a text book and acknowledges the author of the text book.

The author of a work is the person who creates it, or the person by whom the arrangement necessary for the creation of the work are undertaken. The author is the first owner of any copyright, subject to certain cases. In particular, were the work has been made by an employee in the course of his employment, his employer is the first owner.

⁴ W.R. Cornish. Intellectual Property. Universal Law Publishing Co.Pvt. LTD. Delhi. (2001) p.6

⁵ Section 17 of The Copyright and Performance Rights Act

Copyright arises automatically upon the fixation of the authors work in any tangible medium of expression. Therefore an author does not need to register his work for it to be protected. Copyright protects only the expression of the work, not the underlying idea, process, procedure, concept, system or discovery.⁶

Copyright law protects original works of authorship in literary, musical, dramatic and artistic works. In **University of London Press V University Tutorial Press**,⁷ Peterson J said “for a work to be original it must not be copied from another work, that is, it should originate from the author”.

Copyright is a form of property, which means that it can be transferred by assignment, testamentary disposition or by operation of the law.⁸

The duration of any protection a copyrighted work expires at the end of 50 years from the end of the calendar year in which either, the author dies, the work is made, or the work is first published in the case of an unknown author.⁹

1. 2. Rationale of Copyright Protection

The basis of copyright protection is to prevent theft of the skill and labour which has gone into the creative production.¹⁰ Copyright law protects the fruits of creative efforts and those who invest in those efforts.

There are various concepts which justify the protection of copyright and and some of them are:

⁶ D.A. Gregory, C.W. Saber and J.D. Grossman: Introduction to Intellectual Property Law. Washington DC: BNA Books (1994) p.168

⁷ (1916) 2 Ch Dp. 601

⁸ Section 11 of the Copyright and Performance Rights Act

⁹ Ibid section 12 (1) (2) (3)

¹⁰ Institute of Chartered Secretaries and Administrators: Study Text : English Business Law. BPP Publishing limited.(1990) p.235

Creative incentive: copyright law encourages people to be more creative as it protects their works. In **Twentieth Century Music Corp V Aiken**,¹¹ Justice Stewart stated that, the immediate effect of our copyright law is to secure a fair return for an authors creative labour. But the ultimate aim is by this incentive to stimulate artistic creativity for the public good.

Reward of labour: it takes a lot of time, patience, investment, skill and creativity for an author to come up with a work. Primarily, it is the intrinsic economic and moral argument that what constitutes an original or new expression of thought must be given protection for the exclusive moral and economic benefit of the person that expressed that thought which comes to the fore.¹²

Promotion of the economy: if no protection was offered to copyrighted works, no one would be willing to invest in the production of copyrighted works. Copyright is not only so much a system of incentive to production and distribution of new works, but also a mechanism for market facilitation for moving existing creative works to their highest socially valued use by enabling copyright owners to realize the full profit of their works in the market.¹³

Prevention of piracy: copyright law reduces the influx of inferior products on the market. Government also loses revenue, because no tax is paid on pirated goods. Local artists cannot make a decent living because they are unable to recoup their investment due to piracy. Foreign owners of intellectual property rights in copyrighted works stay out of the country and this hinders the development of Zambia's industries. Furthermore, a

¹¹ 422 US.151. (1975)

¹² K.K. Mwenda and D.A. Ailola: *Frontiers of Legal Knowledge : Business and Economic Law in Context*. Carolina Academic Press. (2003) p.63

¹³ Netahel D.E: *Copyright and Democratic Society*. 106 Yale Law Journal, 283 (1996) p.308

country's development depends a lot on the creativity of its people; hence, creations of the mind should be protected.

1.3. Moral and Economic Rights

There are two types of rights under copyright, namely economic and moral rights. Whilst economic rights such as reproduction and translation allow the owner of the rights to derive financial reward from the use of his works by others, moral rights such as the right to be identified as author of a work, allow the author to take certain actions to preserve the personal link between himself and the work.

Economic rights entitle the copyright holder to exclusive reproduction of his work, since he has the exclusive right to exploit gain from his or her work financially and economically. Therefore a copyright holder can reproduce his work so that he or she can sell more copies to the public.

A copyright holder also has a right of performance that is exclusive rights of public performance of his work. However a copyright holder may licence out this right to third parties and the licencing gives rise to rights such as the right of broadcasting, the right of mass communication and the right of distribution. Economic rights are lost by the author when he or she sells his or her rights in a work, for example when a person buys a CD from an authorized dealer, the buyer can re-sale the CD at his own price, the right to distribute the CD and profit from its sell is lost by the author, under these circumstances the right is legally lost.

Moral rights on the other hand vest only in the author of a copyrighted work and they are not affected by an assignment of economic rights. And moral rights cannot be transferred.

The originator of the expression of thought under copyright retains his exclusive moral rights to that expression because it is seen as morally appropriate to acknowledge the contribution of the original author.¹⁴

1.4. Related Rights

Related rights protect individuals, bodies and institutions that are involved, through the addition of substantial creative, technical and organizational skills, in bringing work protected by copyright to the public.

Singers: for example where Quincy Jones writes a song and it is performed and recorded by Whitney Houston. The original copyright would vest in Quincy Jones and Whitney Houston would have acquired related rights. Quincy Jones would not have been able to sing the song in the exact manner that Whitney Houston would.

Producers of sound recordings: producers of sound recordings put a lot of economic investment and organizational skills in a work, they have to find backing vocalists, people to play the instruments and they have to co-ordinate the harmony to the instrumental side of the music.

Broadcasting corporations: broadcasting corporations invest heavily in a show, therefore it is only fair that they should acquire some rights. They can cover their costs by selling viewing rights to other television stations.

Under the TRIPS agreement, the rights of performers and producers of phonograms are protected for 50 years from the date of fixation or performance, while the rights of broadcasting are protected for 20 years from the first date of broadcast.

¹⁴K.K. Mwenda and D.A. Ailola: *Frontiers of Legal Knowledge : Business and Economic Law in Context*. Carolina Academic Press. (2003) p.64

Copyright like any other intellectual property rights are not just domestic in that their enforcement may take a national approach but their effects are international. The next chapter looks at the international system of copyright protection.

CHAPTER TWO

2. Protection of Intellectual Property Rights on the International Level

This chapter seeks to look at the protection of copyright at the international level. The chapter will look at the various international conventions and treaties that member states have pledged to conform to.

Intellectual property rights are by their character international in that they transcend all geographical barriers. Though being abstract in nature, the subject matter of intellectual property is of universal application. To this end, this universality has precipitated a need for the harmonization of the rules governing intellectual property. Therefore, the harmonization of research production and trading relations across all industrial sectors has meant that the protection of intellectual property within and between states has required a parallel global focus.¹⁵

The importance of intellectual property has come about as a result of international trade, which has resulted in goods and services which are a product of intellectual property such as books, machinery or trade marked products being traded across national boundaries. This need of the protection of intellectual property is even more with the development of new technologies such as materials in digital form which are made

¹⁵ Andrew Webster & Kathryn Parker (ed); Innovation and the Intellectual Property System. Kluwer Law international Ltd. London (1996) P.6

available or transmitted on the internet.¹⁶ Therefore, there is need to protect intellectual property rights whether nationally, regionally or internationally.

Intellectual property is also important to the welfare of humanity because of its role in encouraging and fostering development. Therefore legislators develop intellectual property protection frame works to establish the conditions for the creators to exercise their rights while giving effect to the rights of members of society to enjoy the arts and share the benefits of scientific advancement.

However, it must be understood that any right which cannot be enforced by the court of law is of no use. It is important therefore, that any intellectual property system needs to be underpinned by a strong judicial system for dealing with both civil and criminal offences and be manned by adequate number of Judges with a good background and experience.¹⁷

Though there may be laws under national and international legislation to protect the intellectual property right owner, it is up to the right owner to act as his own policeman. He must keep an eye on the industry and commercial market on which he sells his products or on which he provides his services or in which his process might be used.¹⁸

In 1994 the WIPO general assembly passed a resolution by which the international bureau should be at the disposal of any state that expressly asks for their advice on issues

¹⁶ Justice A.R. Zikonda; WIPO Colloquium on the Protection and Enforcement of Intellectual Property.

¹⁷ Ibid. P1.

¹⁸ WIPO Handbook P. 207

of compatibility of its existing or planned national intellectual property legislation not only with treaties administered by WIPO, but also with other international norms and trends including the TRIPS agreement. In addition, during the WIPO general assembly held in 1995, a new resolution on the subject matter was adopted. On that occasion, it was agreed *inter alia*, that the members of either WIPO or the WTO would be assisted with translations of their intellectual property laws and regulations into one of the three WTO languages and should also make arrangements so as to be able to respond to requests from developing countries for WIPO's legal and technical assistance relating to the TRIPS agreement.¹⁹ Therefore WIPO recognizes that there is need for compatibility between the national intellectual property legislation and the international conventions and treaties.

2.1. Protection under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

In the early 1980's, an increasing concern about the rapid growth of international trade in counterfeit and pirated goods was observed. This was because a number of developing countries had no intellectual property regime in place. The majority of these countries had no intellectual property laws or if they had laws in place, lacked the means of enforcing them or provided inadequate remedies. It would appear that the Paris convention and the Berne convention had no suitable provisions for the dispute settlement mechanisms and were therefore ineffective in dealing with failure to enact

¹⁹ WWW.WIPO.int

minimum standards of intellectual property protection and ensuring that the laws were enforced.²⁰

This led to the creation of the TRIPS agreement under the world trade organization (WTO). The TRIPS agreement forms Annex 10 to the final Act embodying the results of the Uruguay round of the multilateral trade negotiations which was finalized in Geneva in December 1993 and ratified in Marrakech in 1994.

The aim of WTO for including on the agenda intellectual property negotiations was to formulate rules for stronger and more comprehensive international protection for a range of intellectual property rights and to strengthen the means of enforcement. The WTO charter established a council of the TRIPS agreement for monitoring government's compliance.

The TRIPS agreement is the most comprehensive treaty in the field of intellectual property pertaining to trade, as it sets minimum standards for the protection of a wide range of intellectual rights and has a mechanism for ensuring effective measures for implementation and enforcing the obligations. The agreement is not optional, once a country is member of WTO, then that country is bound by the agreement. Furthermore, counterfeit and piracy is not allowed to flourish. The members are required to put in place administrative enforcement mechanism, so as to ensure that the rights of intellectual property owners are protected, failure to do so may result in sanction being

²⁰ Justice A.R.Zikonda: WIPO colloquium on the protection and enforcement of intellectual property. P 1&2

imposed on such a member. The reason why counterfeit and piracy is not tolerated is because its activities seriously damage the interest of the right holders and industries which depend on intellectual property and also distorts international trade.²¹

The objectives of the TRIPS agreement are contained in the preamble, which include the reduction of distortion and impediments to international trade, promotion of effective and adequate protection of intellectual property rights and ensuring that measures and procedures to enforce intellectual property rights do not in themselves become barriers to legitimate trade. Furthermore, the preamble also contains a provision which recognizes the special needs of the least developed country members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base.

Under part one of the TRIPS agreement, Article one to be particular provides that *members shall give effect to the provisions of this agreement, members may, but shall not be obliged to implement in their law more extensive protection than is required by this agreement, provided that such protection does not contravene the provisions of this agreement. Members shall be free to determine the appropriate method of implementing the provisions of this agreement within their own legal system and practices.*²² This article clearly stipulates that all member countries must render at least a minimum standard of protection to their intellectual property which means that the protection being rendered need not be extensive.

²¹ Ibid

²² Article 1 of the TRIPS agreement

Article 3 and 4 of the agreement deal with issues of national treatment and most favored nations treatment respectively. For instance Article 3 states that each member shall accord to the nationals of other member's treatment no less favorable than that it accords to its nationals with regard to the protection of intellectual property and Article 4 states that with regard to the protection of intellectual property, any advantage, favor, privilege or immunity granted by a member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other members.²³

Part II of the agreement that is Article 9 to 14 lays down the minimum standards of protection. It defines the subject matter to be protected and the minimum period of protection. It incorporates the WIPO, Paris and Berne conventions by specifically referring to them, thereby binding members to the provisions of these conventions.

The TRIPS agreement outlines the minimum standards of protection to be provided by each member. It also defines the subject matter to be protected, the rights concerned and any permissible exceptions to those rights and minimum time period within which the protection is allowed.

Section 1 of part II of the agreement deals with copyright and related rights. Copyright protection shall extend to expressions and not to ideas, procedures and methods of operation or mathematical concepts as such.²⁴ Computer programs, compilations of data,

²³ Article 3 and 4; Ibid

²⁴ Article 9(2). TRIPS Agreement

performers, producers of phonograms and broadcasting corporations are accorded protection under the agreement.²⁵

The term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.²⁶

However, members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.²⁷

Members agree that some licensing practices on conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. Nothing in this agreement shall prevent members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a member may adopt consistently with the other provisions of this agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back

²⁵ Article 10 & 14. Ibid

²⁶ Article 12. Ibid

²⁷ Article 13. Ibid

conditions, conditions preventing challenges to validity and coercive package licensing in the light of the relevant laws and regulations of that member.²⁸

Part III deals with procedures, remedies and enforcement of intellectual property rights. It requires members to have in place administrative and judicial enforcement procedures for effective enforcement of intellectual property rights.

The TRIPS agreement under Article 41 puts an obligation on the members to ensure that under its laws provisions are made to permit effective action against any act of infringement of intellectual property rights, including remedies to prevent infringement. Furthermore procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

It should be stated that the agreement does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general.²⁹

The TRIPS agreement contains provisions of civil and criminal proceedings and remedies in great detail available to the right holders to enable them to effectively enforce their rights. The civil and administrative procedures and remedies may lead to injunctive as well as compensatory relief and delivery up for destruction of the infringing materials and means for producing it. Members must also ensure that fair and impartial justice is

²⁸ Article 40 (1c) & (2)

²⁹ Article 41 (5). TRIPS Agreement

seen to be available to those whose rights have been infringed. Furthermore, the judicial authorities can order the infringer to pay the right holder damages to compensate for the injury the right holder has suffered.³⁰

However, under Article 48, the judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.

Besides civil proceedings there are also criminal proceedings or sanctions provided under the TRIPS agreement. In this regard the agreement provides that members shall provided for criminal procedures and penalties to be applied at least in cases of willful trademarks and counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment, monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. In a **British case of Scott v Metropolitan Police Commissioner**³¹, where there was a conspiracy to defraud the owner of a film copyright by bribing cinema employees to tend over films so that they could be surreptitiously

³⁰ Article 43 – 46. TRIPS Agreement

³¹ (1975) AC. 19

copied and returned, the house of lords found that the owner had been defrauded by this practice.

2.2. Protection under the Berne Convention

The Berne convention was revised in Paris in 1971 and was amended in 1979.

The preamble of the Berne convention declares the desire of the countries of the union to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.

The countries to which the Berne convention applies constitute a union for the protection of the rights of authors in their literary and artistic works.³²

The expression literary and artistic works shall include every production in the literary, scientific and artistic domain, whatever may be the mode of form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico, musical works; choreographic works and entertainments in dumb show, musical compositions with or without words, cinematographic works to which are assimilated works expressed by a process analogous to cinematography, works of drawing, painting architecture, sculpture, engraving and lithography, photographic works to which are assimilated works expressed by a process analogous to photography, works of applied art, illustrations, maps, plans, sketches and three dimensional works relative to geography, topography, architecture or science. It shall however be a matter of legislation in the countries of the union to prescribe that

³² Article 1. The Berne Convention

works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.³³

This gives the members of the union the latitude to offer protection to certain works which are not in a permanent form. However for works which are not in a tangible form to be protected, there is need to prove the existence of a work.

The protection of this convention applies to authors who are nationals of the countries of the union for their works whether published or not, to authors who are not nationals of one of the countries of the union of their works first published in one of those countries or simultaneously in a country outside the union and a country of the union. And authors who are not nationals of one of the countries of the union but who have their habitual residence in one of them shall for the purpose of this convention, be assimilated to be nationals of that country.³⁴

It must be noted that under Article 5 of the convention the extent of protection as well as the means of redress afforded to the author to protect his rights are governed exclusively by the laws of the country where protection is claimed which means that the extent of protection of a work will be different in each member country depending on the law of a particular country.

³³ Article 2 (1) & (2). Ibid

³⁴ Article 3 (1) (a) & (b) The Berne Convention

Article 5 of the convention contains one of the most fundamental provisions of the convention, as it provide for the obligation to grant national treatment in respect of works protected under the convention. National treatment means that in countries other than the countries of origin of a work, the authors of works eligible for protection are supposed to enjoy the same rights as nationals of those countries.

The authors of literary and artistic works protected by this convention are granted the exclusive right of making and of authorizing the translation and reproduction of their works, throughout the term of protection of their rights in the original works.³⁵

It must be noted that Article 13 deals with compulsory licenses, it states that each country of the union may impose for itself reservations and conditions on the exclusive right granted to the authors of a musical work and to the author of any words, the recording of which together with musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such word, if any, but all such reservations and conditions shall apply only in countries which have imposed them and shall not, in any circumstances be prejudicial to the rights of these authors to obtain equitable remunerations which, in the absence of agreement, shall be fixed by competent authority.

In cases of infringement the author of a work is entitled to institute infringement proceedings in the countries of the union. And infringing copies shall be liable to seizure

³⁵ Article 8 & 9. IBID

in any country of the union where the work enjoys legal protection, in accordance with the legislation of that country.³⁶

The Berne Convention contains in its appendix special provisions regarding developing countries, the appendix is regarded as an integral part of the convention.

Under Article II of the appendix, any country which has declared itself that it will avail itself of the faculty provided for in this Article shall be entitled, so far as works published in printed or analogous forms of reproduction are concerned, to substitute for the exclusive right of translation provided for in Article 8 a system of non exclusive and non transferable licenses, granted by the competent authority.³⁷

Furthermore under Article III, any country which has declared that it will avail itself the faculty provided for in this Article shall be entitled to substitute for the exclusive right of reproduction provided for in Article 9 a system of non exclusive and non transferable licenses, granted by the competent authority, under certain conditions provided in section 2 of Article III.³⁸

Therefore, Zambia being a developing country, she can be able to use the special provisions provided in the appendix of the Berne Convention for her benefit.

³⁶ Article 16. The Berne Convention

³⁷ The Berne Convention

³⁸ IBID

Protection of copyrighted works under the Berne Convention is dependant on the national or domestic laws of each member. That is why the Berne Convention encourages its members to incorporate it in their national legislation. In the case of **Philips V Eyre**³⁹, it was stated that the action should also be wrongful by the law of the place where it occurred.

2.3. Protection under the Rome Convention

The Rome Convention was signed in Rome in 1961 in Rome for the protection of the rights of performers, producers of phonograms and broadcasting organizations.

The protection granted under this convention shall leave intact and shall in no way affect the protection of copyright in literacy and artistic works. Consequently, no provision of this convention may be interpreted as prejudicing such protection.⁴⁰

Each contracting state has agreed to grant national treatment to performers, producers of phonograms and broadcasting corporations.⁴¹

The protection granted to performers under the Rome convention is contained in Article 7, which states that the protection provided for performers by this convention shall include the possibility of preventing;

³⁹ (1870) 6 QB 28

⁴⁰ Article 1 The Rome convention

⁴¹ Article 4-6. Ibid

- (a) The broadcasting and communication to the public, without their consent, of their performance, except where the performance used in broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;
- (b) The fixation, without their consent, of their unfixed performance;
- (c) The reproduction, without their consent, of a fixation of their performance.

Any contracting state may, by its domestic laws and regulations, specify the manner in which performers will be represented in connection with the exercise of their rights if several of them participate in the same performance. This provision is important because most performances involve two or more performers.⁴²

A contracting state may in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this convention as regard private use, use of short excerpts in connection with the reporting of current events, ephemeral fixation by a broadcasting organization by means of its own facilities and by its own broadcasts and use solely for the purpose of teaching or scientific research.⁴³ Under this Article member countries are able to provide for exceptions to the protection offered by this convention.

The Rome Convention has got a non retroactive effect. This means that, the convention shall not prejudice rights acquired in any contracting state before the date of coming into force of this convention for that state.⁴⁴

⁴² Article 8
⁴³ Article 15. The Rome Convention
⁴⁴ Article 20. Ibid

Upon ratification of the Rome Convention member states are required to take measures which are necessary to ensure the application of this treaty.⁴⁵

The Rome Convention does not contain any provision for enforcement of the rights of the performers, producers of phonograms and broadcasting organization. Enforcement is therefore left to the contracting states to choose one of the means available in their national laws.

2.4. Protection under the World Intellectual Property Organization Copyright Treaty (WCT)

The WIPO copyright treaty is one of the WIPO internet treaties adopted in Geneva on December 20, 1996. As the name indicates, it is administered by WIPO.

The preamble of the WCT declares that the contracting parties desiring to develop and maintain the protection of the rights of authors in literary and artistic works in a manner as effective and uniform as possible. The contracting parties recognize the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments. The parties also recognize the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works. The parties further emphasize the outstanding significance of copyright protection as an incentive for literary and artistic creation. And lastly the parties recognizes the need to maintain a balance between the

⁴⁵ Article 26. Ibid

rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.

Authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public will access these works from a place and at a time individually chosen by them.⁴⁶

Contracting parties may in their national legislation provide for limitations and exceptions to the rights granted to authors of literary and artistic works under this treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.⁴⁷ This provision permits contracting parties to carry forward and approximately extend into the digital environment limitation and exceptions in their national laws which have been considered applicable under the Berne convention. Similarly, these provisions should be understood to permit contracting parties to devise new exceptions and limitations that are appropriate in the digital network environment.⁴⁸ Contracting parties can therefore provide limitations and exceptions in their national legislation.

Article II provides that contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technology measures that are used by authors in connection with the exercise of their rights under this treaty and

⁴⁶ Article 8. The WCT

⁴⁷ Article 10 (2)

⁴⁸ Mihaly Ficsor; Guide to copyright and related rights treaties administered by WIPO and glossary of copyright and related rights terms. P212

restricts acts in respect of their works, which are not authorized by the authors concerned or permitted by law.

Furthermore, contracting parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement of any right covered by this treaty; that is to remove or alter any electronic rights management information without authority or to distribute, import for distribution, broadcast or communicate to the public without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.⁴⁹

Furthermore, contracting parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this treaty and to ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.⁵⁰

In all it can be stated that while there are a number of international conventions and treaties which protect copyright, these conventions and treaties only set out the minimum standards which member states have pledged to conform to. The actual protection of

⁴⁹ Article 12. The WCT

⁵⁰ Article 14. Ibid

copyright is left to the member states which are encouraged to implement the conventions and treaties in their national laws.

CHAPTER THREE

3. The State of Piracy in Zambia

In Zambia today of 80% all music tapes, DVDs, CDs, Video CDs and Video tapes sold on the market are pirated copies that do not benefit any of the owners of the works, that is artists, record companies and government.

In a survey conducted by ZAMCOPS in 1999 it was revealed that country wide the ratio of sales of pirated tapes against genuine tapes was 38:1.

3.1. Table 1: Ratio of Pirated Tapes

	PIRATED CASSETTES	GENUINE CASSETTES
Ratio of tapes sold (1999)	38	1
Retail price per tape	US \$ 0.50	US\$4
Possible Revenue 100,000 units	US\$50,000	US\$400,000
Tax Revenue (output vat)	Nil	US\$59,575
Revenue Loss to Government	US\$17,500	Nil

Going by the ratios as obtained by ZAMCOPS in 1999, if 100,000 genuine tapes were sold then 380,000 pirated tapes were also sold.

And according to the results of the survey by Sounds Investments Zambia Limited, conducted at Lusaka Town Centre Market in February 2002, more than 2.5 million units of pirated tapes were sold each year. This is equivalent to more than US\$ 2.5 million lost revenue from the industry. The survey also revealed that the Lusaka City Centre Market alone turns over close to 50,000 pirated tapes per week. To put it all into perspective, below are the estimated nation wide piracy data in Table 2.

3.2. Table 2: Estimated Nation Wide Piracy Data (2002)

TOWN	ESTIMATED UNITS FOR PIRATED TAPE SALES	ESTIMATED SALES FOR PIRATED TAPES US\$
Lusaka	5,200,000	2,600,000
Ndola	520,000	260,000
Kitwe	1,300,000	650,000
Kabwe	52,000	26,000
Kapiri Mposhi	3,500,000	1,750,000
Mufulira	52,000	26,000
Chingola	80,000	40,000
Kalulushi	52,000	26,000
Luanshya	30,000	15,000
Chililabombwe	15,000	7,500
Kafue	15,000	7,500
Mazabuka	20,000	10,000
Monze	20,000	10,000
Choma	15,000	7,500
Livingstone	35,000	17,500
Chipata	25,000	12,500
Kasama	10,000	5,000
Mongu	4,000	2,000
Mansa	6,000	3,000
Solwezi	3,000	1,500
TOTAL	10,954,000	US\$5,477,000

These figures indicate the huge loss of revenue to government due to piracy in 2002.

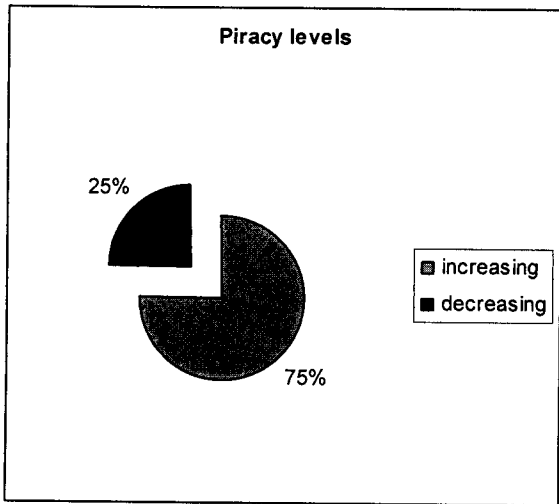
The next table shows a table on estimated national wide piracy occurrence in Zambia in 2004, the survey was carried out by in house research country wide.

3.3. Table 3: Estimated National Wide Piracy Occurrence in Zambia. (2004)

TOWN	UNITS	PIRATED VALUE	MARKET VALUE
Lusaka	2,600,000	18,200,000,000	32,500,000,000
Ndola	520,000	3,640,000,000	6,500,000,000
Kitwe	1,300,000	9,100,000,000	16,250,000,000
Kabwe	52,000	364,000,000	650,000,000
Kapiri Mposhi	3,500,000	24,500,000,000	43,750,000,000
Mufulira	52,000	364,000,000	650,000,000
Chingola	80,000	560,000,000	43,750,000,000
Kalulushi	52,000	364,000,000	650,000,000
Luanshya	30,000	210,000,000	375,000,000
Chililabombwe	15,000	105,000,000	187,500,000
Kafue	15,000	105,000,000	187,500,000
Mazabuka	20,000	140,000,000	250,000,000
Monze	20,000	140,000,000	250,000,000
Choma	15,000	105,000,000	187,500,000
Livingstone	35,000	245,000,000	437,500,000
Chipata	80,000	560,000,000	1,000,000,000
Kasama	45,000	315,000,000	562,500,000
Mongu	35,000	245,000,000	437,500,000
Mansa	35,000	245,000,000	437,500,000
Solwezi	60,000	420,000,000	750,000,000
	8,561,000	59,927,000,000	107,012,500,000
	Lost revenue VAT	15,938,031,915	
	Lost Revenue Duties	20,006,092,500	
	Estimated Gross Revenue Lost	35,944,124,415	

The author of this essay carried out a survey in Lusaka and her sample size was 8 respondents of which 3 were music producers, 2 music distributors, the Zambia police force, ZAMCOPS and the registrar of copyright. A sample of the questionnaire is in the appendix.

3.4. Figure 4: Piracy Levels

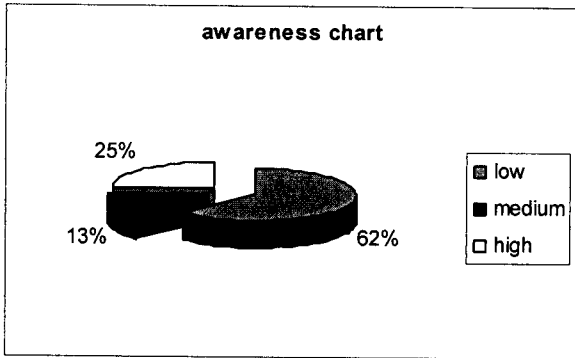


From the pie chart above it can clearly be seen that piracy levels in Zambia are still increasing. This is because 75% of the respondents stated that piracy levels are increasing, furthermore 5 respondents stated that they are very affected by piracy and 3 of them said that they are affected by piracy. This just goes to show that apart from the artists, the producers, distributors of music and indeed the public at large are all affected by piracy as government losses revenue which can be used for developmental purposes for the good of the country.

Three respondents also stated that the reason why there is so much piracy in Zambia is because the awareness levels are low 5 stated that it is because there is lack of enforcement mechanisms, however the respondents stated that they have put in place

programmes to increase the awareness levels by conducting seminars, they have created advertisements on how destructive piracy is. The pie chart below represents the awareness levels of piracy.

3.5. Figure 5: Awareness Chart



However a lot remains to be done if the awareness levels are going to be increased.

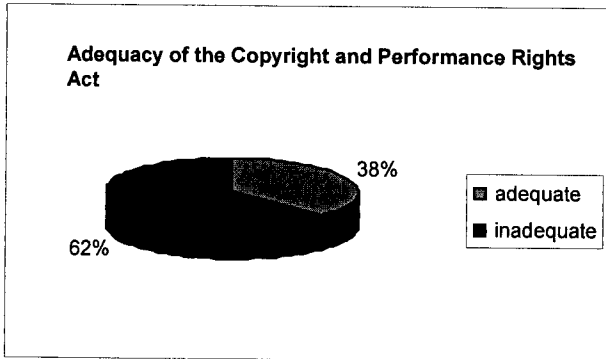
Furthermore the respondents also stated that they have joined the fight against piracy.

This is done by reporting piracy cases to the police, carrying out raids, music registration by the producers, the producers also do not allow copying of music without prior consent from the copyright owners. Mondo Music has been helping the police and ZAMCOPS to identify suspects and carry out raids. This was first done on the Copperbelt in May 2002.

Another major operation was done at Lusaka City Market in September 2002, and is credited to have resulted in the formation of the National Copyright Task force.⁵¹

⁵¹ Parliamentary Report on Piracy by C.L. Folotiya, 17th April, 2003. P13

3.6. Figure 6: Adequacy of the Copyright and Performance Rights Act



In all can be clearly seen from the pie chart above that the Copyright and Performance Rights Act is inadequate in protecting the rights of copyright holders. This is because 62% of the respondents stated that the Copyright and Performance Rights Act is inadequate and only 38% stated that it is adequate. The next chapter will analyze the legal framework in Zambia which fights piracy.

CHAPTER FOUR

4. Analysis of the Legal Framework in Zambia

Music piracy is one of the invisible but visible crimes that impact greatly on the development of a country's cultural and social economic dimension. It is invisible in the sense that it is virtually ignored by government in its infancy but becomes a major problem as it develops due to its difficulty in its eradication. As a result of this, musicians and investors reduce their investment in the music industry as they are robbed of a return on investment.⁵²

This chapter aims to analyze the legal framework in Zambia which protects copyright owners. The piece of legislation governing copyright and performance rights is the Copyright and Performance Rights Act, Chapter 406 of the laws of Zambia. However it must be understood that no matter how well a piece of legislation is drafted, it must be updated time from time to ensure that it suits the current economic, technological and social needs. And due to the advancement in technology our Act needs to be updated because a lot has changed since its enactment in 1994. The proposition is that within which commercial activities operate should continually be adapted to the changing economic and social needs of the country. To serve its purpose law should not conflict but should change in accordance with national policies and objectives.⁵³

⁵² Interview with inspector Muwowo on 30th October, 2006.

⁵³ Lisimba V.M.(1981) Company Law in Zambia. Its Impact on Members, Creditors and Workers. P. 16

4.1. Problems and Shortcomings in the Copyright and Performance Rights Act

Prosecuting experience against copyright infringement is a long and involved process that is fraught with obstacles and difficulties. Because of the sheer scope of the piracy problem and the number of offenders and their various crimes; it is very difficult to process individual cases against all of them. Working under the Act is that it offers no concrete protection once our copyrights are infringed.

Although several cases are before the courts of law with others having disposed of, the Zambia Police Service has been facing a lot of challenges in enforcing the copyright and performance act. The Act has a number of flaws, loopholes and weaknesses, as detailed below.

The High Court Factor

Section 2 of the Act prescribes that matters involving infringement and enforcement of copyright shall be dealt with in the High Court. Taking into account the congested calendar of the High Courts in this country, this makes it very difficult to actually prosecute offenders under this act as these courts are not enough. Getting a court date is very hard and court officials sometimes give priority to other crimes such as murder, rape, aggravated robbery, etc. Added to this is the fact that a much higher level of preparation is needed for High Court cases.

Need For a Complaint

A piracy infringement case can only be undertaken by the police once a complaint has been received from the copyright owner. This means that it is impossible for a copyright owner to seek protection in cases that he is not aware of. It also means copyright owners (both local and international) have to patrol markets and the streets to see if their works are being pirated. It puts a burden on the victim rather than the perpetrator.

Need For a Search Warrant Enforced By a Police Inspector

Section 34(1) requires a police officer of or above the rank of inspector to break open any outer or inner door of a dwelling house or any other premises, forcibly enter any part of the premises; remove by force any obstruction to entry, search, seizure, removal; and detain every person found on the premises until the premises have been searched. This causes delays and allows suspects to escape or relocate.

Ignorance is a Defence

The copyright and performance rights act recognises ignorance as a defence.⁵⁴ It is almost impossible for an individual to pirate another person's work without knowing that they are actually infringing on someone's right. The Law needs to be written with a zero tolerance attitude to ignorance. Furthermore it is common knowledge that ignorance of the law is not a defence. In the case of **Performing Rights Society V Hickey**⁵⁵, this was an application for injunction and claim for damages for infringement of copyright. The

⁵⁴ Section 28(g) of the copyright and performance rights act

⁵⁵ (1979) Z.R 66

defendant played three musical records in public without obtaining a license from the plaintiff who was the owner of the copyright. The court found that the infringement was for one day. The defence was that the performance was done innocently and under mistake.

Held:

(i) Under s. 13 of the Copyright Act, copyright is infringed if an act is done falling within the copyright without licence of the person in whom copyright is vested.

Infringement is actionable at the suit of the owner.

(ii) If it is proved and admitted that the infringement was committed but that the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work, the plaintiff shall not be entitled to any damages against the defendant but to an account of the profits in respect of the infringement whether any other relief is granted or not.

(iii) On the evidence of the instant case, and taking into account the defence put up by the defendant, the plaintiff was not entitled to any damages but to an account of profits in respect of the infringement.

(iv) Injunction granted and the plaintiff is entitled to profits.

Weak Penalties for Copyright Infringement

The penalties for infringement under this act are specified in Section 28 (1) (g) and are rather lenient. This makes it difficult for the law enforcement agents to adequately

prosecute the offenders. Looking at the rate at which piracy is growing in Zambia, it is only logical that the penalty should be stiff. The government is losing a lot of revenue and the musicians are not benefiting from their own creativity. In Zambia today 80% of all music tapes, CDs, DVDs, Video CDs and Video tapes sold on the Zambian market are pirate copies that do not benefit any of the owners of the works that is artists, record companies including government.⁵⁶

Need for Affidavit from Copyright Owner or Agent

Section 32 states the need for the owner of a copyright or their agent to make an affidavit that can be used to act against a person infringing their rights each and every time. This is a long and cumbersome process that causes delays. It also puts the burden of proof on the victim rather than the offender.

Ambiguity on Disposal of Infringing Copies

Under Section 28 (4) the disposal after a conviction of infringing copies and articles used in their manufacture can be either ... “destroyed or delivered up to the owner of copyright in question or otherwise dealt with as the court thinks fit. This last part is open to interpretation and allows for possible distribution on the market through corrupt means.

High Number of Infringing Copies as Evidence

⁵⁶ Interview with inspector Omari Muwowo on 31st October, 2006.

Section 29 states that five or more infringing copies of the same product are necessary for a case. The reality is that some offenders have resorted to keeping less than five copies of a particular item in stock in order to avoid this clause.

Absence of the International Federation of the Phonographic Industry Number

The copyright and performance rights act does not contain provisions on how to identify pirated works. An original CD or DVD is supposed to have an international federation of the phonographic industry number, this should be stipulated in our Act so that it would be easy to identify pirated works.

Absence of Piracy Crimes from the Penal Code and Police Training

One of the biggest problems in the fight against piracy is that the crimes prescribed in the current Copyright and Performing Rights Act does not appear in the Penal Code. This makes it very near to impossible for many police officers (for whom the Penal Code is a guide set in proverbial stone) to understand the crime of piracy and act against suspects. They have difficulty in identifying crimes that are not mentioned in the Penal Code, as well the punishments and procedure.

As most selling or pirated material takes place in markets run by local government authorities, we propose that all town and city councils in Zambia should pass laws to bar the selling and offering for sale of pirated material.

Furthermore, although Zambia is a signatory to several conventions, most of them have not been domesticated, thereby cannot be enforced. The only convention which has been domesticated is the Berne convention, which does not have enforcement provisions.

4.2. Other Institutions which Protect Copyrightd Works

Apart from the Copyright and Performance Rights Act under which copyright owners are protected there are various institutions which are involved in ensuring that copyright works are protected and these are:

- (a) The copyright tribunal which falls under the registrar of copyright.
- (b) Zambia Music copyright protection society.
- (b) Zambia Revenue Authority.
- (c) Zambia Police Service.

The Copyright Tribunal

The copyright tribunal settles disputes; it acts as a mediator when a complaint has been lodged by a musician. But before a complaint can be brought before the copyright tribunal, it must first of all be lodged with ZAMCOPS, and only when ZAMCOPS fails to resolve the dispute can it be brought before the copyright tribunal.

Zambia Music Copyright Protection Society

ZAMCOPS is a collecting society and according to section 22(1)⁵⁷, collecting society means, an association, partnership or body corporate whose principle purpose, or one of whose principle purposes, is the representation of copyright owners in the negotiation and administration of collective copyright agreements. ZAMCOPS aims at promoting and

⁵⁷ The Copyright and Performance Rights Act

protecting creativity. ZAMCOPS also acts as a mediator when a complaint has been lodged by a musician, for example when Micheal Sata was campaigning for the 2006 presidential and parliamentary elections; he was using Nathan Nyerendas Mwemakufi in his political adverts. Nathan Nyerenda lodged a complaint and he was granted an injunction.

Zambia Revenue Authority

ZRA collects revenue on behalf of government and since they are found at all boarder points they should ensure that no pirated goods find their way in Zambia.

Zambia Police Service

The police are the enforcers of the law, therefore they should ensure that they enforce the Copyright and Performance Rights Act effectively. However most police officers are ignorant about copyright law and the crime of piracy. For example the police officer who I found at the front desk when I went to central police did not know what I was talking about when I told him about the paper I was writing and that I needed to ask him a few questions. He referred me to inspector Mwale. Copyright enforcement should be introduced at the Police training college. In addition, a series of refresher courses and/or educational literature should be provided to serving officers across the country.

Stakeholders and government have teamed up in the last few years to set the necessary ground work to launch a serious fight against piracy. This has included sensitization of the public, musicians and musicians. And since the offending copies are sold at council markets it is only logical that the fight against piracy must inherently have the support of

the local authorities. It is evident that the involvement of councils in fighting market based crimes has proved quite effective and the involvement of councils would make the fight against piracy a major success.

For our music industry to be protected, there is need to ensure that effective legislation is in place, the administrative sector which in this case is ZAMCOPS is efficient and the enforcement mechanism must also be effective. In the meantime it is quite clear that our legislation is inadequate as it has already been pointed out, the administrative sector is quite inadequate as ZAMCORPS fails to collect royalties on behalf of musicians and the enforcement mechanism is also inadequate, apart from our police officers being ignorant, the anti piracy crack squads were all dissolved in June this year.

CHAPTER FIVE

5. Recommendations and Conclusion

Piracy is very profitable, but the profits are realized by only a few at the expense of many, many others. The only way that creations of the mind can make a contribution to the Zambian economy is when piracy is reduced to the minimum. According to the results of the survey by sounds investment Zambia limited at Lusaka town center market in February 2002, more than 2.5 million units of pirated tapes were sold each year. This is equivalent to more than US\$2.5 million lost revenue from the industry. The survey further revealed that the Lusaka city center alone turns over close to 50,000 pirated tapes per week. This was in 2002, the situation now is even worse because on 27th April, 2006, the minister of information and broadcasting, Vernon Mwangi, stated that government has continued to lose huge sums of revenue as a result of piracy. A recent survey in Lusaka revealed that government is losing close to K15 billion in the capital only due to piracy⁵⁷

It is quite clear that for Zambians music creators to be protected, there is need to put in place effective legislation and an effective enforcement mechanism. Therefore, even though we have the copyright and performance rights act there is need to update it and to ensure that it is underpinned by a strong enforcement mechanism.

⁵⁷ The Times of Zambia, April, 27th, 2006.

5.1. Recommendations

The fight against piracy can be won with massive sensitization and empowering the law enforcement agencies. This is because although some people are aware of piracy, the majority of the citizens are ignorant about it, including the owners of the works. It would be a good start if the musicians themselves conducted seminars where they can explain to the general public what piracy is and how much it is affecting them and our economy. This is because people pay attention to what musicians sing about and what they say. Advertisements on television and on radio would also greatly help in the sensitization process.

Another recommendation is the introduction of a levy on blank CDs and tapes. This is because we cannot put a stop to the sell of blank CDs and tapes and putting a levy on them is the only way to remunerate copyright owners for private recordings. What is needed however is a way of collecting these levies and remitting them to copyright owners. The collecting of these levies can be done by ZAMCOPS.

Furthermore, the importation and operating of the equipment that can be used to make copies cassettes and CDs should be strictly controlled by government. This would mean that one would need a license from a body (say the Ministry of Commerce) to import into Zambia, sell or operate any CD or cassette replicating equipment. This however, does not include ordinary CD or DVD burners which are legitimately used in many homes and offices. The emphasis would be on equipment of an industrial nature and that is manufactured and bought for the purpose of mass production.

And since it is very difficult to arrest the manufactures of pirated works, the punishment should be very stiff for those people found dealing in pirated works. This will deter would be offenders alike.

Since Zambia is a signatory to several conventions, these conventions should be domesticated and made into law, thereby making it easy to enforce them.

Most of the pirated music which is sold in Zambia is manufactured outside Zambia, therefore boarder officials such as Zambia Revenue Authority should be vigilant and ensure that they seize any pirated works at the boarder. This will ensure that there is less pirated works on the Zambian market.

Another recommendation is that the police should carry out raids on a regular basis, in 2004 a lot of raids were conducted in Lusaka, Chipata, Monze, Kapiri Mposhi, and on the Copperbelt, but Morris a music producer at Romaside studio stated that this was not enough, he said that the police should carry out raids on a regular basis, as this would greatly help in the fight against piracy because the perpetrators would know that any time their goods might be seized and they will end up in prison and therefore very few people would risk to sell pirated goods.

The musicians should also be enlightened about their rights, they must know that each time their music is played on radio, television and in night clubs they must be paid. This is the responsibility of ZAMCOPS. ZAMCOPS is a collecting society and it is their duty

to collect royalties on behalf of musicians and remit them to the musicians. However according to Funti K a Zambian musician, ZAMCOPS does not seem to be doing their job and the musicians cannot go around each radio station, television station or night club and collect royalties for each of their songs which receives air play, because this is like owning a dog and going out to bark when there are intruders.

Copyright Infringement is a crime and should be included in the Penal Code so that Police can act without a complainant. Another suggestion would be to incorporate piracy offences into existing clauses on counterfeiting.

In addition, crimes such as these are not taught at our police training facilities. This means that many serving officers and those currently being prepared for service are not aware of piracy as a crime. More police officers should be trained in copyright matters and be able to handle them. Each Provincial Command should have at least one officer who will be competent to handle these matters. An educational and awareness campaign involving training sessions and literature should be carried out so that police officers in charge of police stations around the country are aware about piracy. This should start at provincial level and filter down to district and then individual police stations and posts⁵⁸.

Furthermore the amendment of the Copyright and Performance Rights Act would do wonders in fight against piracy. The amended Act should address all the shortcomings of the present Act which have been alluded to in chapter 4.

⁵⁸ Parliamentary Report on Piracy by C.L. Folutiya, 17th April, 2003

5.2. Conclusion

The music industry in Zambia is growing at a rapid pace and for it to contribute effectively to our economy there is need to stop piracy which seriously damages the interests of the copyright holders and other industries which depend on copyright. It is evident that our musicians cannot even make a decent living due to their work being pirated.

The major problem is that piracy is not recognized and accepted as a major crime, and has been relegated to minor status by many government and enforcement arms. It is seen as an 'economic' and 'sophisticated' crime that does not affect society as a whole.

We would argue that piracy is crime that affects a potentially lucrative and culturally important sector of our economy. It is also robbing the government of much needed revenue and great contribution to national development. Bold steps need to be taken to bring the issue to the national agenda.⁵⁹

Although Zambia has got legislation in place concerning the protection of copyrighted works, there is still a lot of piracy going on, this is because the legislation is not adequate and there is lack of enforcement mechanisms. The main problem we have encountered has been lack of manpower and commitment from the police. The officers are often assigned to other duties that appear to take precedence over their activities to track down and apprehend piracy suspects.

⁵⁹ *ibid*

Therefore a lot needs to be done if our music industry is to be protected. And since we already have the copyright and performance rights act in place, it should be implemented effectively to curb piracy even though it is quite inadequate. If the copyright and performance rights act is implemented effectively, there would be a reduction in piracy because the problem which we have is the lack of enforcement mechanism.⁶⁰ Copyright involves creativity and it is through creativity that real development can come about.

⁶⁰ Interview with Chishya Folotiya on 16th November, 2006.

BIBLIOGRAPHY

- BPP. ICSA Study Text. English Business Law. London. BPP Publishing LTD. 1990
- Ornish W.R. Intellectual Property. Delhi. Universal Law Publishing Co. PVT. LTD. 2001. 3rd Edition.
- Gregory D.A. Saber C.W. and Grossman J.D. Introduction to Intellectual Property Law. Washington DC. BNA books. 1994.
- Manja G.M. Intellectual Property. Lusaka. UNZA Press. 2006.
- Metahel D.E. Copyright and Democratic Society. Yale Law Journal. 1996.
- Mihaly F. Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms.
- Mwenda K.K. and Ailola D.A. Frontiers of Legal Knowledge, Business and Economic Law in Context. Carolina. Carolina Academic Press. 2003.
- WIPO Hand Book

UNPUBLISHED MATERIALS

- Mlotiya C.L. Parliamentary Report on Piracy 2003
- Msimba V.M. Company Law in Zambia. Its Impact on Members, Creditors and Workers. 2001
- Muwowo O. Economic Impact of Piracy on the Zambian Market. 2005

Muwowo O. Multi-Sectoral Support in the Fight Against Piracy and its off-shoots in Zambia

Justice Zikonda A.R. WIPO Collogiuym on the Protection and Enforcement of Intellectual Property.

LEGISLATION REFERED TO

The Copyright and Performance Rights Act. Chapter 406 of the Laws of Zambia

Trade Related Aspects of Intellectual Property

The Berne Convention

The Rome Convention

World Intellectual Property Organization Copyright Treaty

CASES

British case of Scott v Metropolitan Police Commissioner. (1975) AC. 19

Performing Rights Society V Hickey. (1979) Z.R 66

Philips V Eyre (1870) 6 QB 28

Twentieth Century Music Corp V Aiken. 422 US.151. (1975)

University of London Press V University Tutorial Press. (1916) 2 Ch Dp. 601

OTHER SOURCES

llafrica.com

mes of Zambia-April 26, 2006

mes of Zambia-May10, 2006

www.whatiscopyright.org

www.wipo.int

www.totse.com