

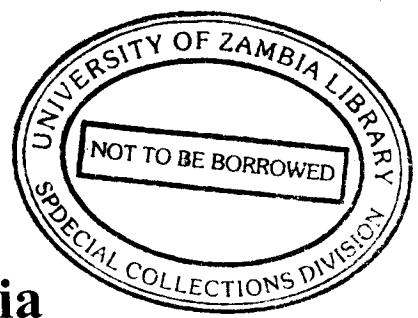
COPYRIGHT INFRINGEMENT IN ZAMBIA VERSUS SUSTAINABLE DEVELOPMENT

BY

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UNZA

2007/8



University of Zambia

Copyright Infringement in Zambia versus
Sustainable Development

By

Muyanza Hamanenga

University of Zambia-School of Law

December 2007

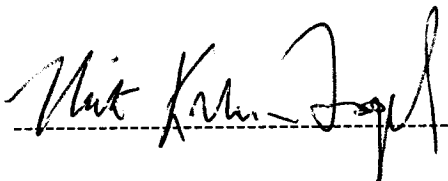
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award of the degree of Bachelor of Laws (LLB)

University of Zambia

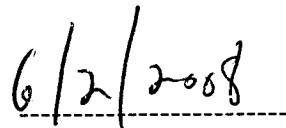
I recommend that the directed research paper under my supervision by Muyanza Hamanenga entitled-

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DEVELOPMENT

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



Mr. N. Kahn-Fogel
(Supervisor)



Date

Dedication

To my beloved parents; Mr. and Mrs. Hamanenga and my brothers and sisters; Paul, Sydney, Ema, Petronella, Moudy, Nchimunya, Lweendo, Mich, Jacob and Banji.

You mean a lot to me.

Acknowledgements

First and foremost, I thank the Almighty God from whom all blessings flow, for the grace and love that He has continued to show to me for all these years of my study.

To my supervisor, Mr. Kahn-Fogel for his professional guidance in enabling me to come up with this work, I say thank you.

Special thanks also go to my classmates, notably, Sandra, Chiluba, Mweshi, Reagan, Walu and Inutu for the support they offered me. I'll sure miss you guys.

To my special friend Will, thanks for all the words of encouragement and for being there for me through thick and thin.

Lastly, I would like to thank Mr. Muya for making my work easier by allowing me to use his laptop and for supporting me both academically and financially as I worked on this paper.

God richly bless you all.

Preface

Whenever a new product enters the market and is successful in attracting customers, it is very likely that competitors will sooner or later attempt to make similar or identical products. In some cases, competitors will benefit from economies of scale, greater market access, better connections with the main distributors or access to cheaper primary resources, and therefore able to make similar or identical products at a cheaper price, putting heavy pressure on the innovator of the original product or service. Often, this will drive the original creator or innovator out of business, especially as the same is likely to have invested significantly in developing the new product or work, while his competitors benefit from the result and get a free ride on the creativity and inventiveness of others.

This is the most important reason for Intellectual Property Rights also known as IPRs which provide protection over a given innovation or creative work, thus effectively limiting the scope for copying and imitation by competitors.

One of the aspects of Intellectual property is copyright. Indeed, the relationship that exists between copyright and economic development can not be over emphasised. This is because empowering and protecting the works of the creators and innovators themselves would ultimately result into benefit to government in terms of revenue and to the well being of society at large.

It is therefore generally agreed that knowledge and innovation have played an important role in recent economic growth. In line with this, the renowned economist Paul Romer suggests that 'the accumulation of knowledge is the driving force behind economic growth.' [Kamil Idris WIPO /June 2003-]

Muyanza Hamanenga
25th January 2008

Declaration

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

Signed..... Date.....

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A & M Records Inc. v. Napster Inc. 239. F 3d 1004 (US Court of Appeal, 9th circuit, 2004)

UMG Recording Inc. v. MP3 COM, Inc. 54 USPQ 2d. 1668 (US District Court, New York, 2000)

Performing Rights Society Ltd v. Francis Anthony Hickey (1979) ZR 66

STATUTES AND INTERNATIONAL INSTRUMENTS

REFERRED TO

The Copyright and Performance rights Act, Chapter 406 of the Laws of
Zambia

The National Arts Council of Zambia Act, Chapter 170 of the Laws of Zambia.

Berne Convention for the protection of Literary and Artistic Works.

Paris Convention for the protection of Industrial Property

WIPO Copyright Treaty

WIPO Performances and Phonograms Treaty

Trade Related Aspects of Intellectual Property (TRIPS)

ABSTRACT

The main objective of this Directed Research Essay is to illustrate the relationship that exists between effective copyright protection and sustainable development. To achieve this, the essay looks at selected provisions of the Copyright and Performance Rights Act, chapter 406 of the Laws of Zambia that bring out an understanding of copyright generally. The paper will then link development with copyright, drawing examples from other countries which have appreciated this link and have used copyright as an effective tool for economic development. Suffice to note also that the essay places much emphasis on the fact that if copyright infringement is to be combated, law enforcement officers, the owners of the various copyrightable works and indeed the public at large much have knowledge about copyright as it is an undisputed fact that 'knowledge is power'.

CHAPTER ONE

1.0 INTRODUCTION

Intellectual property is traditionally 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 examples of 'related rights,' that is, rights neighboring or related to copyright. Industrial property on the other hand deals with the protection of patents, trademarks, industrial design, utility models and unfair competition. Thus Intellectual property Rights (IPRS) mean the legal rights that result from intellectual activity in industrial, scientific, literary and artistic fields.¹

Virtually every country in the world has legislation protecting Intellectual Property. Over the years, there has been significant harmonization of the IP laws, and today most countries have enacted laws that provide for the main forms of protection of IP of which copyright is a part.

The two main pillars of the international IP system are the Paris and Berne conventions, which were adopted in 1883 and 1886 respectively. A number of other treaties have been adopted subsequently to guarantee that the system stays in line with current trends and values.

In recent years, new technologies such as the internet have continually posed a threat to the system. Because of this, increasing efforts are being made to ensure that the process of harmonization continues. A good example could be the WIPO Copyright

¹ World Intellectual Property Organisation Intellectual property reading material (WIPO) 1995, P.5

treaty and the WIPO Performances and Phonograms Treaty also known as the 'internet treaties' which entered into force in March and May of 2002 respectively. These treaties lay down the legal ground work to safeguard the interests of creators in cyberspace, enabling composers, artists, writers, performers and phonogram producers to use the internet with confidence to create, distribute and control the use of their works within the digital environment.

In 1995, with the entry in force of the agreements establishing the World Trade Organisation, further harmonization was achieved as all members of the WTO (146 countries in November 2003) have ratified the agreement on the Trade Related Aspects of Intellectual Property Rights (commonly known as 'TRIPS') which establishes the minimum standards for the protection of the main forms of IP rights.²

1.1 PROBLEM STATEMENT

Intellectual property rights have never been more economically and politically important or controversial than they are today. Patents, copyrights, trademarks, industrial designs, integrated circuits and geographical indications are frequently mentioned in discussions and debates on such diverse topics as public health, food security, education, the internet and the entertainment and media industries.

The importance of copyright to a particular society and to humanity at large is so crucial that it need not be over emphasized. If an author, who, after years of hard work of research comes up with a new discovery, publishes his findings but is not accorded copyright protection for his discovery, the same will be discouraged from carrying on further research. The reason is simple; such author, by not having had his publication legally protected by copyright will have been robbed not only of his mental endeavors but also of the pecuniary reward due to him by unrestraining other

² WIPO publication, Secrets of Intellectual Property.

people from dealing with his work freely. Thus in a knowledge based economy, there is no doubt that the an understanding of copyright and indeed Intellectual property rights is indispensable to informed policy making in all areas of human development. Furthermore, the advent of information-based technology such as the internet has posed a serious challenge to copyright law as it has created a conflict between the importance of technological advances on the one hand and on the other hand, the equally importance of effective motivation and appropriate reward to authors.

1.2 HISTORICAL BACKGROUND OF COPYRIGHT—Tracing the *Zambian* Act

There has been no consensus as to when copyright actually began. For instance, while there are claims that the origin of copyright can be traced back to the 15th century when the art of printing was invented in Europe, the technique of printing is said to have been in existence in China and Korea before it was discovered in Europe³ Initially, works of intellectual creation were regulated by the laws of property; the author of the manuscript, sculpture, etc became the proprietor of that material object and could sell it to another person. Two inventions were developed in relation to printing press. Johanns Gutenberg invented movable type machine, first used in 1455, and Caxton developed the printing press. Due to the invention of the printing machine, later books could be manufactured easily and in abundance such that the sole ownership of the manuscript no longer is constituted with exclusive ownership of a work since books which were the products of the manuscript could be bought, without necessarily counterfering copyright on the purchaser. As a result of this development, piracy or illegal publication of books emerged.

³ The ABC of Copyright. UNESCO, 1981. P.11

Copyright protection was thus demanded by the stationer's company and the draft bill 'for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies during times therein mentioned' was introduced in the House of Common on the 11th of January 1709. The draft became law on the 10th of April 1710 and was known as Queen Anne's statute. Needless to note that early copyright law was associated with the interests of domestic printers rather than authors. Thus as noted by Paul David, an economic historian, "copyright law, from the beginning, has been shaped more by the economics of publication than by the economics of authorship."⁴ Thus the Statute of Anne was the first law of copyright in the modern sense of the term that recognized the existence of an individual right to protection of a published work.

Later, Hogarth, who was a victim of piratical copyright of his drawings, led a successful move for the protection of artists, designers and printers, which resulted in the enactment in 1735 of the Engravers Act⁵

The passage of the Sculpture Copyright Act of 1814 marked the protection by Copyright of sculptures. The duration of protection was fourteen years with a further reversionary term of fourteen years to the author if then living.

Next in line of protection were public performance rights since musical and dramatic compositions were already accorded protection under the copyright Act under literary works. The Bulwer Lytton's Act of 1833 was the Act that granted public performance rights. This Act, as noted by Copinger and James, 'only referred to the dramatic pieces, but section 20 of the literary copyright Act of 1842 dealt with the performing rights in both musical and dramatic pieces, and extended protection to the performance rights in both classes of works for a like period to that provided for

⁴ UNCTAD-ICTSD Project on IPRs and sustainable development p. 34

⁵ P. Abel, 'Copyright from the international view point': Journal of world trade law (1967) vol.1 399

duration of copyright in books, namely, a period of forty-two years, or the life of the author and seven years after which ever is longer⁶.

The last class of works to receive statutory copyright protection was that of paintings, drawings and photographs that were protected by the Fine Arts Copyright Act of 1862.

In 1884, the U.K. parliament passed the International copyright Act that established a system under which foreign authors would be entitled to protection under English copyright law if the English authors were protected by the copyright laws of that author's country. In the following year, a conference at Berne, which in fact resulted in the establishment of the Berne convention, was convened whose aim was to conclude a convention relating to the international protection of foreign authors at which meeting, Britain was represented.

In the year 1909, a committee in Britain was appointed with a purpose of considering the inconsistencies of the 1884 Act and the convention. The recommendations of the committee led to the enactment of the copyright Act of 1911 which came into force on the 1st of July, 1912. This Act was applicable to Britain and extended to Her Majesties dominions that were not self-governing.⁷ Thus Zambia, having been a colony of Britain since 1924 had the Act extended to apply to it by virtue of section 1. The 1911 Copyright Act was repealed in 1956, following the enactment of another copyright Act.

Zambia enacted its own copyright legislation (which in essence was almost a replica of the 1956 Act) in 1971-chapter 701 of the laws of Zambia. In 1994, the 1971

⁶ Copinger and James on copyright, 11th ed., p.13

⁷ Copyright Act of 1911, Section 1

copyright Act was repealed and replaced with the copyright and performance rights Act that is referred to as chapter 406 of the laws of Zambia.

1.3 DEFINING COPYRIGHT

Like all fields of intellectual property, copyright is concerned with protecting the work of human intellect.

Due to the diverse range of intellectual creations that copyright is directed at protecting, a single conclusive definition is almost impossible to arrive at. Under the current Zambian Act which is the Copyright and Performance Rights Act, copyright has been defined as a property right which subsists in original literary, musical, dramatic, artistic works and computer programs; compilations, audiovisual works; sound recordings, broadcasts, cable programs; and typographical arrangements of published editions of literary works.⁸

The owner of the copyright subsisting in a work has the exclusive rights to do certain acts in relation to the work, such as making a copy, broadcasting or selling copies to the public. Also, he can control the exploitation of the work, for instance, by making or selling copies to the public or by giving permission to another person to do this in return for a payment.

The word copyright is thus used to describe the complex of rights that the creator of an original work has in his/her product. The creators of such works – our authors, dramatists, composers, lyricists, painters and sculptors depend for their living on the exploitation of these rights. Just as the laborer is worthy of his/her hire, so is the creator entitled to an equitable remuneration for the use of his/her work by others.

⁸ Chapter 406 of the Laws of Zambia, S. 8 (1)

‘The state of a man’s mind is as much a fact as the state of his digestion.’⁹ The mind being the seat of a man’s conscience, harbors innovative ideas that in certain circumstances are peculiar and may be attributed to the individual so exercising his mind. The ‘expression’ of such ideas should be regarded as belonging to such individual like any other form of property.

According to Merville¹⁰;

This form of property concerns newly created things which necessarily are unique. However, far from being against the public interest, the creation of these new and useful or artistic things...is of the essence of life itself, which constantly renews itself in nature, producing in a way, new forms of life which represent an advance of what has been in the past.

In Zambia, musical works, for example enjoyed no legal protection for a long time and their composers have suffered great injustice. Prominent composers such as Nashel Pichen Kazembe and Paul Ngozi died before implementation of the performing rights administration. As a result they received no royalties for performances such as *Nshalimalonda* and *Bauze Ngozi*.¹¹

It is today generally recognized that an enlightened copyright law, to promote the things of the spirit as well as the material ones, is one of characteristics of a civilized community.

It can be argued that copyright is the simplest form of intellectual property since it arises automatically as a right vested in an author of an original work immediately it is created.

⁹ Edington v. Fitzmaurice (1885) 29 Ch. D 459 at 482

¹⁰ Merville, L.W., Forms and Agreements on Intellectual property and International licensing, 3rd ed., P. 12

¹¹ ZAMCORPS-General Information

Copyright covers cultural artifacts from the areas of education, entertainment and the arts. It is generally accepted that copyright is not a monopoly but merely a right to prevent others from copying. As a branch of Intellectual Property, copyright seeks protection of a wide variety of subject matter of intellectual creativity. The bastion of this protection was aptly stated by Peterson J in **University of London Press v. University Tutorial Press**¹²

“...there remains the rough practical test that what is worth copying is *prima facie* worth protection.”

1.4 IS COPYRIGHT A HUMAN RIGHT?

Copyright theory is based on the need to have a balance between the quest for society at large to acquire knowledge from works of other people on the one hand, and the need to encourage the search for more knowledge on the part of those who are in constant search of discovering more of it on the other hand.

These two interests were noted by Universal Declaration of Human Rights (UDHR) through the United Nations General Assembly when it entrenched as follows;

- (1.) Everyone has the right to freely participate in the culture of the community, to enjoy the arts and to share in scientific advancement and into benefits;
- (2.) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.¹³

¹² (1916) 2 Ch 601

¹³ Article 27 of the declaration

Clearly, the UDHR recognizes the right of the author to the protection of his moral and material interests in the work of his mental labor. It is in effect, saying that the author has three interests in a work viz- the moral, economic and an inalienable human right. However, the same article is to the effect that mental creations, which culminate into the object of copyright, are a human right of which everyone is entitled to protection. This, in my view, is debatable.

1.4 STUDY OBJECTIVE

This research paper aims at investigating the law of copyright in Zambia. The paper is essentially a study of how the country have fared in as far as protection of copyrights is concerned. It endeavors to discuss the link, if any, that exists between copyright protection and sustainable economic development. Thus the nature of copyright is looked at, culminating into a comprehensive assessment of the copyright laws in Zambia vis-à-vis the level of development.

1.5 RESEARCH QUESTIONS

1. Does the state play any major role in the advancement of copyright and other works of the mind?
2. How effective, in the case of Zambia, is the administration and enforcement of copyright law by the authority/authorities entrusted with the task?
3. Are Intellectual property rights which include copyrights directly relevant to sustainable development?
4. If so, how can developing countries use Intellectual property tools to advance their development strategy?

5. Are the existing intellectual property laws capable of accommodating multimedia products and how has technology in developing countries been in touch with copyright laws?

1.6 METHODOLOGY

This research is a qualitative research, involving desk research and field investigations. It will include both primary and secondary data. Therefore data will be collected from various sources ranging from the statutes, writings by various scholars and authors, judicial decisions, to open-ended interviews in order to obtain opinions expressed to the author by people who are placed in positions where administration or enforcement of copyright would be within their jurisdiction.

1.7 STUDY SCOPE

This research paper will be confined to the study of one of the branches of Intellectual property law, which is copyright and neighboring rights as opposed to the other branches which include patent rights, trademarks, industrial designs utility models and unfair competition.

The paper will discuss copyright law generally and relate it to its role in enhancing sustainable development in Zambia. The paper will also endeavor to discuss the impact of technological advances on copyright and the effort that has been made, if any, to reconcile the two.

1.8 CHAPTER OUTLINE

This chapter is divided into four chapters. The first chapter is mainly introductory and sets the parameters of the dissertation.

The second chapter briefly discusses the characteristics and nature of copyright and goes on to briefly discuss the impact of technology as a tool of production of copyright subject matter which, on the other hand has contributed to the vast instances of copyright infringement.

The third chapter attempts to bring out the relationship that exists between effective copyright protection and economic development. It then zeros down to what is obtaining on the ground in Zambia in as far as enforcement of copyright is concerned.

The fourth chapter gives the conclusion and recommendations of the research findings. It basically outlines the major reasons and causes attributed to the rampant copyright infringement cases in Zambia and the way forward in view of the findings of the research undertaken.

CHAPTER TWO

2.0 CHARACTERISTICS/ NATURE OF COPYRIGHT

2.1 SUBJECT MATTER OF COPYRIGHT

For a work to be protected, it must belong to the subject to which copyright applies. Section 8 of the Copyright and Performance Rights Act lists the works in which copyright subsists as being,

1. Original literary, musical, artistic works or computer programs;
2. compilations;
3. audiovisual works;
4. sound recordings;
5. broadcasts;
6. cable programs;
7. typographical arrangements of published editions of literary works.

2.2 IDEAS / EXPRESSIONS DICHOTOMY

This concept, which happens to be one of the fundamental principles of copyright law, generally, propounds that the mere idea of the author is not protected, only the expression of the idea. In the words of Farwell, J. ;

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 appears 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 idea 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 rights in that product.¹⁴

¹⁴ Donoghue v. Allied Newspapers Ltd (1938) Ch 106

This concept is also stipulated in article 9 of the Trade Related Aspects of Intellectual Property (TRIPS) Agreement which provides that copyright protection shall extend to expressions and not to ideas, procedures, methods of operations or mathematical concepts as such.

One of the ways in which this principle manifests itself is illustrated by the protection criteria. In common law countries such as Zambia, the United Kingdom and Australia, a work is not protected unless it is fixed or recorded in some material form. Thus a literary and musical work will be expressed in form of words; a dramatic work, in form of action, and so on. Article 2 (2) of the Berne Convention provides that union countries may prescribe that works in general, or any specified categories of works, shall not be protected unless they have been fixed in some material form.

In **Falwell v. Penthouse International Ltd**¹⁵ the chief judge Turk, in determining whether or not the plaintiff had copyright in an interview stated that however different or unique the plaintiffs thoughts or ideas may have been, the expression of these opinions or thoughts was too general and abstract to rise to the level of a literary or intellectual creation that may enjoy the protection of copyright.

Another way in which the 'idea/expression of idea' principle manifests itself is as regards authorship and ownership of copyright. Authorship and ownership are, in relation to copyright, two distinct concepts, each of which attracts its own peculiar rights namely; the author having moral rights and the owner possessing economic rights. As Kanja has rightly noted, ownership flows from authorship¹⁶. Thus the general principle is that the author of a work shall be the first owner or beneficiary of

¹⁵ 215 USPQ 975 (US District Court, West Virginia, 19810)

¹⁶ George M. Kanja, Intellectual Property Law, p.75

the copyright which subsists in a work.¹⁷ However, Section 10(3) of the Act goes on to stipulate that where a work, other than a broadcast or a cable program is made by the author in the course of employment, the employer shall be the first owner of the copyright.

In the Donoghue case the court defined an author as 'the person who gives a work the form in which it is expressed, not the person who provides the ideas for the work.'

Thus in **Kenrick & Co. v. Lawrence & Co.**,¹⁸ the court, in dismissing an employers claim to sole authorship, held that in an Act which gives copyright to drawings, the author must mean a person who has at least some substantial share in the putting the touches on paper.

2.3 MORAL RIGHTS AND ECONOMIC RIGHTS

The above are the two types of rights under copyright which are granted to an author. Moral rights are concerned with the protection of the personality of the author and the integrity of his work. It has therefore been submitted that such rights cannot vest in a body corporate. Article 6bis of the Berne Convention recognizes moral rights of the author, that is, both the paternity and integrity rights. In the same vein, section 24(2) of the Copyright and Performance Rights Act provides that notwithstanding the transfer of the copyright, or any part of it, the author or director of audiovisual work shall have the right:

- a. to be identified as the author or director of the works; and
- b. to object to any distortion, mutilation or other modification or derogatory action in relation to the work that would be prejudicial to his honour or reputation.

¹⁷ Copyright and Performance Rights Act Cap. 406, S. 10(2)

¹⁸ (1890) 25 QBD 99

Economic rights, on the other hand, enable the author or other right owner to control the commercial or industrial exploitation of his work and participate in the economic benefits of the use of his work. These rights can be classified into the following categories:

- a. reproduction rights
- b. translation rights
- c. adaptation rights
- d. public performance rights
- e. broadcasting rights
- f. communication rights
- g. distribution rights

2.4 DURATION OF COPYRIGHT

The duration of copyright always depends on the type of work in question. In Zambia, moral rights are attached to the life of the author hence expire at the death of the author.¹⁹ The duration of original works begins from the moment the work is created until fifty years after the death of the author.²⁰ The term of protection for derivative works lasts fifty years from the date of creation.²¹ Typographical arrangements of published editions last for twenty-five years from the end of the calendar year in which the edition was first published.²²

2.5 DEALING IN COPYRIGHT

Copyright is a property right. A key characteristic of any property is that the owner has the exclusive authority to determine how that property is to be used. Unlike physical property, which can only be used by one or a limited number of people at any moment, intellectual property (i.e a work in which copyright subsists) can potentially be used or enjoyed by an unlimited number of people without

¹⁹ Copyright and Performance Rights Act Cap 406, S. 24(3) This, however is not the case in other jurisdictions like the UK.

²⁰ Section 12

²¹ Sections 13,14 and 15

²² Section 16

depriving its owner of its use or enjoyment. The two main ways of dealing with copyright are by way of assignment and licensing (exclusive or non-exclusive). Both assignment of copyright and license can be restricted in terms of either the acts that are permitted to be done or the geographical area to which the said allowed acts should be confined, or indeed in relation to the term.

2.6 INFRINGEMENT OF COPYRIGHT

The Copyright and Performance Rights Act ²³ provides that the owner of copyright shall have the exclusive rights to do or to authorize others do controlled acts which include

- a. to copy or reproduce the work;
- b. to publish or issue copies to the public;
- c. to perform, show or play the work in public;
- d. to broadcast the work or include it in a cable program;
- e. to make an adaptation of the work or do any of the above in relation to an adaptation.

Section 18 of the Act clearly stipulates what amounts to copyright infringement when it provides that

“Copyright in a work is infringed by a person who, without the consent of the owner of the copyright, does, or authorizes another person to do, a controlled act in relation to the work.”

Generally there are two types of copyright infringement, namely primary and secondary infringement.²⁴ In the words of Kanja²⁵, primary infringement arises where

²³ Section 17

²⁴ In cases of secondary infringement, it has to be shown that the defendant was aware or could have been aware that the goods were infringed copies which requirement is not necessary in primary infringement cases.

one performs any of the acts restricted or controlled by copyright such as copying or reproducing the work. Secondary infringement arises where one deals commercially in infringed copies of copyright works such as selling pirated musical cassettes or compact discs (CDs).

2.7 DEFENCES TO COPYRIGHT INFRINGEMENT

The defenses to copyright infringement are provided for under section 21 of the Copyright and Performance Rights Act. The said defenses include; consent of the copyright owner²⁶, reproductions for judicial purposes, where a restricted act is done in the public interest²⁷ and where a restricted act is considered 'fair dealing' in cases of ; private study or research²⁸, criticism or review provided there is sufficient acknowledgement, and fair dealing as regards reporting current events.

Suffice to note that the permitted acts or defences to copyright infringement are intended to provide a balance between the rights of the copyright owner and the general public to get access to the work. In other words, the idea behind this is the need to restrict the exclusive rights granted by copyright in cases where it is felt they go too far. This is particularly important as copyright is extremely wide in scope and its term of protection is longer than any other intellectual property rights.

2.8 ENFORCEMENT AND REMEDIES

The conferring of rights on copyright owners would be meaningless if it lacks an enforcement mechanism. It is in this regard that part three of the Act contains

²⁵ George Kanja (2006) *Intellectual Property Law*, p. 133

²⁶ *Mellor v. Australia Broadcasting Commission* (1940) 2 All ER 20

²⁷ *Lion Laboratories Ltd v. Evans* (1984) 2 All ER 411; QB 526; (1984) 3 WLR 539

²⁸ *Sillitoe v. McGraw-Hill Book Co. Ltd* (1983) FSR 525

provisions that empower the copyright owners to institute proceedings against infringement. Section 28 of the Act creates offences for anyone to make, sell, let for hire, offer for sale, possess, distribute, exhibit in public or import any infringing copy or to possess articles used in making infringing copies unless he acted in good faith and did not believe copyright would be infringed.

The relief's available include damages, injunctions, account of profits or relief otherwise available in respect of other property right.²⁹

Other provisions aimed at consolidating the position of the copyright owner are the right to delivery of infringing copies to the copyright owner and restriction on importation of infringing copies.³⁰

Further, if the proprietor reasonably suspects that there are infringing copies in the house or premises, they may give such information to a magistrate who may issue a search warrant by virtue of which any police officer above the rank of inspector may enter such premises, search and seize any such article.³¹

2.9 COPYRIGHT VERSUS TECHNOLOGY

The importance of technology as a tool of production of copyright subject matter cannot be underscored. This is evident in the modern equipment used in the production of a work. A good example is the transition from the era of typewriters to computers and printers which transition has greatly enhanced the quality and quantity of works in the arena of copyright.

On the other hand, it is no longer a disputed fact that technology has in a way contributed to the vast instances of copyright infringement.

The discussion will now briefly consider the new copying technologies;

1. Photocopying machines:

²⁹ Section 25

³⁰ Section 28

³¹ Section 33

The emergence of the copying machine has clearly posed a threat to the economic interests of copyright holders in literary works. Bush³² has argued that before the development of photocopying, users found it easier to buy the desired printed work than to make a machine copy of it. The consequence of this development in literary works is that the publisher who usually owns copyright will have lost a sale because of this new technology. As at 1967, Gerald Sophar, executive Director of the committee to investigate problems in the U.S.A. found that industrial library was the only real economic threat to copyright owners then.³³ Needless to note that new technologies have emerged that has further strained copyright protection.

2. Facsimile

This is yet another technological development that threatens copyright owners. The facsimile transmission is an outgrowth of new found ability to transform images from a printed page into electronic signals. Such signals can be transmitted over the telephone lines from one location and create a copy at a receiver at another location.³⁴

3. Computers

Unlike other technologies which are restricted to only literary or printed works, computers extend their long arms to encroach musical works, artistic works, computer programs, compilations, audiovisual works, sound recordings, broadcasts, cable programs and typographical arrangements.

4. Internet

Dissemination of works via the internet is but the latest development which raises new questions concerning copyright. It is for this reason that the World Intellectual Property Organisation (WIPO) has administered the WIPO Copyright Treaty and the

³² George P. Bush, (1972) Technology and Copyright, p. 68

³³ According to an interview with him by Stewart Mills in Washington D.C. September 1, 1967

³⁴ George P. Bush (1972) Technology and Copyright, p. 68

WIPO Performance and Phonogram Treaty (often known together as the “Internet Treaties”), which set out the international norms aimed at preventing unauthorized access to the use of creative works on the internet or other digital networks. Thus the treaties contain-“special provisions for which prohibit circumvention of such measures of technological protection for copyright works”³⁵

When the CD swept away vinyl records and music cassettes, it gave the music industry an opportunity to resell its existing catalogues in CD format. A similar process is taking place with audiovisual productions in digital format. Indeed, the new DVDs offer high quality and fairly cheap entertainment that a whole new generation of consumers is now repurchasing audiovisual productions in this format. However, as noted by Idris³⁶, the content of DVDs is easy to copy and to post on the internet and as such, millions of copies could potentially be pirated in this way. He further notes as follows:

The introduction and enhancement of new media, information and telecommunication technology such as video cassette recorder (VCR) in the late 1970s, the digital revolution in the 1980s and the internet in the 1990s has consistently changed both copyright laws and the cultural industries and communities that live and prosper under them.

The MP3 technology is a typical example of just how technology has negatively impacted on copyright. This technological advancement has made it easy to compress music files so that they take up considerably less space, easy to upload and download over the internet and can be neatly stored in mobile devices. Suffice to note that, because of the ease of use of such technologies, they can be used to download and

³⁵ Kamil Idris (2003) Intellectual property. A power tool for economic growth. WIPO/- 2nd ed. p. 25

³⁶ Ibid.

copy without the knowledge or consent of the holders of the rights to the music, in violation of the spirit and express provisions of copyright law.

A case in mind in such situations would be the case of **A&M Records Inc.v. Napster Inc.**³⁷. Similarly, in the case of **UMG Recordings Inc. v.MP 3. COM, Inc.**³⁸ the court stated as follow;s-

.... Thus, although the defendant seeks to portray its services as the ‘functional equivalent’ of storing its subscribers’ CDs, in actuality the defendant is re-playing for the subscribers converted versions of the recordings it copied, without authorization, from plaintiffs’ copyrighted CDs.

Having discussed the general nature of copyright law, we shall now proceed to chapter three which basically illustrates with examples and case studies what exactly is obtaining on the ground in as far as copyright protection in Zambia is concerned and the relationship that exists between effective enforcement of copyright laws on the one hand and economic development on the other hand.

³⁷ A&M Records Inc v. Napster Inc (239 F.3d 1004 (US Court of Appeals, 9th Circuit, 2001).

³⁸ 54 USPQ 2d 1668 (US District Court, New York, 2000).

CHAPTER THREE

3.0 COPYRIGHT INFRINGEMENT VERSUS DEVELOPMENT

3.1 INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT

Development is a multidimensional concept and as such means different things to different people. Todaro³⁹ has defined the term development from an economic perspective as ‘the capacity of a national economy, whose initial economic condition has been more or less static for a long time, to generate and sustain an annual increase in its gross national product (GNP) ...’

He goes on to note that the challenge for development... is to improve the quality of life. Especially in the world’s poor countries, a better quality of life generally calls for higher incomes-but it involves much more. It encompasses as ends in themselves better education, higher standards of health and nutrition, less poverty, a cleaner environment, more equality of opportunity, greater individual freedom, and a richer cultural life.⁴⁰

One of the weakest links in development strategies is the one between development, on the one hand, and innovation, creativity and intellectual property on the other. For many years, economists have tried to provide an explanation as to why some economies grow fast while others do not- in other words, why some countries are rich and others are not.

In the last century, it became clear that development depends on the existence of reliable institutions within which human beings think, interact, and carry on business and that one of the essential elements supporting such institutions is property rights. In this present century, among such property rights, intellectual property rights are

³⁹ Michael P. Todaro and Stephen C. Smith (2003) Economic Development, 8th ed., p.49

⁴⁰ *ibid*,p.51

gaining increasing importance as our activities become increasingly knowledge driven. Thus it has been noted that;

Now, more than ever, our development depends on whether and how our intellect will be expressed and respected in property rights and how the fruit of our intellectual activities-the results of innovation and creativity will be used and disseminated in society. Our future, our security and our well-being lie in our hands and not only in what used to be the formula for survival: land, labor and capital.⁴¹

There are certain misconceptions about intellectual property that seem to discourage its use as a tool for development. Intellectual property is seen as:

- Something only for wealthy countries and not for those of low income; thus weak IP system is somehow better for the national industries of such low income nations.
- An obstacle to access to information and essential drugs; and
- An obstacle to competition.

In their book,⁴² Idris and Arai have endeavored to illustrate how harnessing innovation and creativity can lead to a cycle of wealth creation and development and how this cycle can be accelerated by well-founded policies integrating intellectual property considerations. They argue that a country that puts this cycle in motion by implementing a clear development strategy is an intellectual property-conscious nation and that such a country can use intellectual property to contribute to meeting global challenges, including the United Nations Millennium Development Goals (MDGs).

⁴¹ Kamil Idris and Hisamitsu Arai: The Intellectual property-conscious nation. Mapping the path from deveping to developed., p.40

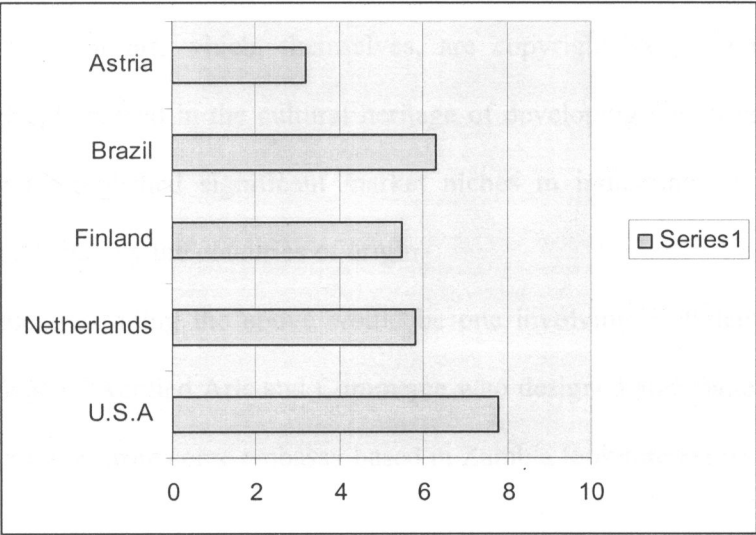
⁴² Ibid.

3.2 COPYRIGHT AND DEVELOPMENT

First and foremost, there is need to clarify the role of the state in as far as copyright protection is concerned. It has been argued that enforcement of copyright and other IP branches should be the concern of the owners of the rights therein only and not the state. Indeed, the preamble of the TRIPS agreement recognizes that IP rights are private rights. Suffice to state, however, that although there are no obligations on ex-officio action and a civil suit has to be instituted by the right holder in defending his IPRs, ‘the state has an obligation to institute criminal remedies and measures on copyright piracy...’

In my view, the drive towards development should be spearheaded by the state and it is therefore imperative that the state plays a key role in copyright protection since effective copyright protection has a bearing on a country’s development status.

The following statistics illustrate the contribution of the total copyright based industries to the Gross Domestic Product (GDP) percentage. Needless to note that the total copyright based industries in the United States as at 2001, contributed an estimated US\$ 791.2 billion to the economy, representing approximately 7.75% of the GDP.



The importance of copyright is described in the preface to the guide to the Berne Convention as follows;

“Copyright, for its part, constitutes an essential element in the development process. Experience has shown that the enrichment of national cultural heritage depends directly on the level of protection afforded to literary and artistic work. The higher the level, the greater the encouragement for authors to create; the greater the number of a country’s intellectual creations, the higher it is renown; the greater the number of productions in literature and the arts, the more numerous their auxiliaries in the book, record and entertainment industries, and indeed, in the final analysis, encouragement of intellectual creation is one of the basic prerequisites of all social, economic and cultural development.”

Inarguably, the development of a sound copyright base in Zambia and other developing countries is not only of importance but it is of fundamental importance.

The following pages will deal with two copyrightable works and how the same enhance development.

3.2.1 ARTISTIC WORKS

Works of art such as paintings, drawings, woodcuts or carvings, sculptures etc, are a common sight in streets in a number of Zambian towns. What seems to be lacking is the realization by the artists of the cultural, economic, social, moral and national value of their pieces of art.

It is not a disputed fact that one of the most effective ways of portraying culture is through works of art, which, themselves, are copyrightable. Too often, cultural products deeply rooted in the cultural heritage of developing countries have crossed borders and established significant market niches in industrialized countries, not benefiting adequately the countries of origin.

An example illustrating the above would be one involving a student from Evelyn Hone College of Applied Arts and Commerce who designed and made a clay artifact which a diplomat from some embassy based in Zambia took interest in and eventually

managed to take into his possession without charge. The student later came to learn that the artifact had been taken to the diplomat's country where it was reproduced and distributed to that country's other embassies abroad as a decorative.⁴³

The link between cultural heritage, culture and economic development is now being more appreciated. It has been submitted that international and regional financial institutions such as the World Bank have begun to support cultural development projects which treat culture as an economic resource that is able to contribute to tourism, retention of creative talent, poverty alleviation, local job creation and foreign exchange earning.⁴⁴ It follows that developing countries need to put in place strategies and action plans to encourage and reward creativity by their own nationals and allow them to compete in regional and international markets, as a contribution to their economic, social and cultural development of their countries. Developing countries should also look into how best their nationals could leverage the cultural heritage of their countries by identifying, establishing and promoting a 'nation brand' because sophisticated consumers are concerned not only with quality and price but also with the origin of the particular products and services and the culture behind them.

Needless to mention, that some developing countries have strong cultural industries. For example, Brazil, Egypt, India and Mexico are exporters of film and television programming.⁴⁵ The first animated film series to come out of the African continent is about *kabongo the griot*, a west African storyteller. The film, made entirely in Africa, is the work of a small animation studio, *pictoan*, based in Senegal's capital Dakar. Broadcast on the canal France International Satellite Services, *kabongo* was an instant

⁴³ An interview with Mr. Kakompe, cultural operations manager-dept of culture.

⁴⁴ WIPO publication, *Secrets of Intellectual Property*, 78

⁴⁵ *ibid.* p.82

hit. Pictoon's founders, two Senegalese, plan to create more African cartoons, inspired from legends and stories that have passed from father to son for generations, because such stories, they believe, hold a universal appeal. The founders say "unless we know how to sell our culture, others will sell it for us. The art industry is really important to Africa because it creates an image for us."⁴⁶

It is interesting to note that some of the activities of museums have had a positive impact in enhancing creativity in the field of artistic works. In an interview with the Copper belt museum director, Mr. Stanford Siachoono, it was brought to light that most of the works of art displayed in the museum are collected from villages, citing the Northwestern province as the place where most of the works of art are gotten. Mr. Siachoono further pointed out that during colonial times, colonialists collected various pieces of artistic works by force in the name of studying ethnic groups. As at now, the Copperbelt museum, time and again, visits various places in the rural areas in search of creative works which works they obtain at negotiated prices.

Mr. Siachoono went on to state that on one occasion, the museum had to ask for permission to collect works of art from senior chief Ndungo of the Luvale people in the Northwestern province. Permission was granted coupled with terms of negotiation, which included prohibition to collect *Lekishi* masks as they are considered private in their culture and not for everyone to have access.

It is clear from the foregoing and as pointed out by Mr. Siachoono that people in the rural areas are beginning to realize that creative works of art are being appreciated and can, in fact, be used to generate means of survival which in turn would benefit the country as a whole.

⁴⁶ WIPO magazine, September-October 2005 pp.10-11.

3.2.2. MUSICAL WORKS

Copyright in music is meant to protect culture and foster artistic integrity. Copyright is further meant to ensure that artists and their recording companies are economically rewarded for their works which it is hoped in the long run enables the public to have access to quality musical works and sound recordings. Thus Copyright is an essential building block of the music business.

A musical composition can illustrate how copyright and related rights contribute to culture industry. More specifically, the creative uses to which it can be put can be seen quite clearly from the example below:

A famous British musician David Bowie over a course of his 30 year plus career, has written hundreds of musical compositions, as well as performing and recording them. From his recordings of these compositions, and from cover versions by other artists, an income stream has been produced and is likely to continue on into the future. A creative brokerage Organisation, the *Pullman Group* saw an opportunity to “securitize” the musical composition as an income producing asset. It licensed Bowie’s rights to his musical compositions for US \$55 million, which it paid to him. It then sold bonds to investors on the basis of a repayment and profit model using the income from musical compositions as both the security for the investment and the source of the repayment. Inarguably, this is a win-win-win situation in that;

- Bowie received present income based on many years of projected royalties.
- The Pullman group received fees and will receive profits from its creative business model.
- The investors will receive a return on their investment at much higher rates than normal.⁴⁷

⁴⁷ [http://www. Pullmanco. Com](http://www.Pullmanco.Com); Global Finance, November 1999.(website was visited on 30/11/07)

As early as 1990, there had been concern in the media over copyright infringement in the music field. John Kapesa, writing for Sunday Times of Zambia⁴⁸ noted as follows;

“Live band performances have again become popular in bars these days....What I dislike about live performances, however, is how most of them go for copyrights- you would think they were the original performers. Live performances of copyrights have reached alarming proportions. To perform any copyright one needs advance permission for a group to publicly stage a song, play or any type of show. I suppose those in musical circles and business are fully aware of the dangers but have given it a deaf ear.... With vim and vigor, we have heard our musicians several times churning out *Franco's*, *Bob Marley's*, *Kenny Rogers* music with little shame! The number of international musicians Zambians can copy from is endless.”

Music piracy in Zambia is one of the visible but invisible crimes that impact greatly on the development of a country's social economic dimension. In the early 1970's, Zambia had a booming music industry, which competed very well with international music. This led to the establishment of the Teal Record Company in Ndola to record the budding talent of young and old musicians in the country. This in turn, not only created jobs but also contributed to the income generation of the country through payment of taxes. Piracy, however, kicked in by the late 1970's-less than 10 years later, and the industry collapsed as Teal failed to compete with the pirates and was finally closed down.

The current levels of music piracy in Zambia are estimated at 90%.⁴⁹ The investigations carried out by Zambia Police Anti-Piracy Crack Squad and the Zambia Music Copyright Protection Society (ZAMCOPS) revealed that the major exporter of pirated musical tapes and CDs to Zambia and other surrounding countries is a company called SUPERSHINE based in Zanzibar. This company is known to be the

⁴⁸ Times of Zambia, 1st July 1990, p.5

⁴⁹ **Zambia's economic position in piracy**-paper presented by Mr. Alfred Soloti Chisanga, director of Sounds Investment Ltd

major force behind most of the infringing copies of both local and foreign musicians found on the Zambian market. ZAMCOPS and the Ministry of Information and Broadcasting are pursuing both diplomatic channels and other legal means to have this company closed and all its machinery seized for promoting piracy in the region.

3.3 PIRACY

It is no longer a disputed fact that the greatest limiting factor on the scale of music is piracy. It has been submitted that almost no country in Africa has been immune to piracy occurrences and that in other countries; piracy levels are as high as 85% to 95%⁵⁰

The reasons for this includes the fact that there is now a huge growth of the compact disc-recordable disc (CD-R). The latest trend is for small, garage-based private CD-R labs, which are taking over from the mass manufacturers of CD's at optical disc plants. Also, there has been a wide spread availability of cheap CD-Replication equipment and high-speed burners.

It is actually disturbing to note that one third of the discs sold worldwide are pirates.⁵¹ Some authorities indicate that in Zambia, only 7% of this crime is detected.⁵²

3.3.1 PIRACY AND DEVELOPMENT

Piracy is sometimes mistakenly called a 'victimless crime'. It is not. The Oxford Advanced Learners Dictionary defines piracy as 'the act of making illegal copies of video tapes, computer programs, books, etc.' Clearly, the victims include not only artists whose creativity gets no reward but society as a whole. Graig⁵³ puts it this way;

⁵⁰ World Commercial Piracy Report, 2005

⁵¹ *ibid*

⁵² CYCROP Manager Director Ann Chiluba Chimanse (cycrop is a security consultancy that focuses on fighting piracy among other things).

⁵³ Joyce Graig et al. (1998) Copyright law p.52.

“The very fact that someone has cared enough to appropriate the product of another mind must indicate that those products were worth something and therefore deserving legal protection.”

Indeed, piracy has social, economic and cultural implications. The greatest victim of piracy is probably local culture. Culture reflects the common meanings of society whether presented as a common language, visual images or traditional forms of performance. Kanja⁵⁴ has rightly pointed out that composers, writers, musicians, singers, performers and other talented individuals are among societies most valuable assets because the fabric of our cultural lives is enriched by their creative genius. Thus in order to develop their talents and encourage them to create, the people who invest in the music industry must be given incentives namely remuneration.

Piracy on the other hand prevents people who invest in particular works from acquiring this remuneration since, as stated in the Commercial Piracy Report of 2005, pirates do not need to recover the cost of any investment in the production of the original work and as such the pirated copies are usually sold at reduced prices thereby undermining the original authors, performers, and distributors' possibilities of obtaining a just, moral and economic reward for their work and investment.

It has also been said that piracy nurtures organized crime. It has been submitted that very often, the money that is paid for pirate CDs or tapes will be channeled into drug trade, money laundering or other forms of serious organized criminal activity.⁵⁵ Needless to note also, that since piracy is a clandestine activity, this means that the profits derived by pirates are not subject to tax and as a result government also loses money.

⁵⁴ George Kanja (2006) Intellectual Property Law, p. 22

⁵⁵ Commercial Piracy Report, 2005

An insight of the levels of music piracy around prone areas, as indicated by a snap survey carried out in 2002 by ZAMCOPS, Police and Music Publishers reviewed the following:

- An average of 50, 000 tapes are sold per month at Lusaka town center alone, and about 2.5 million tapes and CDs the entire Lusaka in all markets places and streets annually.
- The estimated cost of the pirate market in Lusaka amounts to K15 billion annually.
- The Zambian Government is estimated to be losing about K3.7 billion in duty and VAT from pirated tapes and CDs sold in Lusaka alone annually.
- It is believed from the survey carried out in February 2002 that for every genuine tape on the market, there are 100 pirated tapes.

3.4. SYSTEMS PUT IN PLACE TO FIGHT COPYRIGHT INFRINGEMENT IN ZAMBIA

Copyright law can be meaningless if legal procedures and sanctions cannot be effectively enforced. Thus effective measures against copyright infringement depend on establishing criminal offences backed by severe penalties; civil remedies should also be available. Section 28(1) of the Copyright and Performances Rights Act does provide for certain criminal offences which amount to copyright infringement.

It follows that none enforcement of the law in clear cases of infringement is as good as not having any law regulating copyright.

In 2002, the ministry of Information and Broadcasting Services established a National Copyright Taskforce⁵⁶, which was to be an advisory body to government on copyright

⁵⁶ Zambia music copyright News letter , Issue No. Vol. 2, july-sept 2002

matters. The task force, which is chaired by the permanent secretary in the ministry of information, comprises members from the following institutions;

- Ministry of Information and Broadcasting;
- Ministry of Justice;
- Zambia Revenue Authority;
- National Arts Council;
- Book Publishers Association
- Ministry of Community Development and Social Services;
- Zambia National Broadcasting Services;
- Zambia Music Copyright Protection Society;
- Mondo Music Corporation;
- Patents and Companies Registration Office
- National Writers Association
- Computer Association of Zambia

In the same year, the office of the registrar of copyright in conjunction with the copyright taskforce designed a program to sensitize the law enforcement agencies such as the police, customs and immigration officers on copyright issues.⁵⁷

This was after it became apparent that one of the major reasons for the high rate of copyright infringement was that enforcement officers indicated lack of knowledge on copyright and neighboring rights. According to inspector Omari Muwowo⁵⁸, police officers have been blamed for failure to enforce copyright laws when in fact, police could not act on what they were not aware of.

⁵⁷ D. Chileshe, paper presented at the sub-regional workshop on copyright and related rights . I Lilongwe, Malawi, 25-28 April 2005

⁵⁸ Interview with Inspector Omari Muwowo conducted on the 31st October 2007 at Zambia Police Service headquarters.

Such awareness led to the formation of the **Anti-Piracy Crack Squad** in the capital city, Lusaka comprising of 35 police officers drawn from the criminal investigations, crime prevention and prosecution sections, who were later trained with the help of the **International Federation of the Phonographic Industry (IFPI)** to deal on a daily basis with enforcement of IP laws. These officers enjoyed the powers to investigate IP infringements reported to them; take action to search and seize infringing copies; and prepare and pursue prosecutions. Resulting from this development, several raids and seizures were conducted in various towns and cities in Zambia where counterfeit and pirated video tapes, DVDs, CDs, VCDs and cassettes were seized.⁵⁹

Below is a compilation of the operations conducted for the purpose of confiscating various copyrightable works:

▪ **FIRST OPERATION- CONDUCTED IN LUSAKA ON 10th OCTOBER 2003.**

A raid was conducted at COMESA and TOWN CENTRE MARKETS and the following pirated materials were confiscated:-

Audio Tapes, Video Tapes, CDs and DVDs all valued at **K480, 030,000=00**

▪ **SECOND OPERATION CONDUCTED IN LUSAKA ON 16th OCTOBER 2003.**

Six days later, another place was identified at ‘**Family 24**’ along Lumumba Road as being a mini market for pirated materials. The officers staged a snap raid and confiscated DVDs, Audio Tapes, Video Tapes, CDs and VCDs valued at **K3,000,000=00.**

▪ **THIRD OPERATION CONDUCTED IN KAPIRI MPOSHI AND NDOLA ON 18th OCTOBER 2003**

⁵⁹ Paper presented by Inspector Omari Muwowo- Criminal Enforcement of Intellectual Property Rights.November, 2007

KAPIRI MPOSH

(1) Audio Tapes, Video Tapes, CDs and DVDs all valued at **K1,060,000=00**

NDOLA

(1) Audio Tapes, Video Tapes, CDs and DVDs all valued at **K81,000,000=00**

- **FOURTH OPERATION CONDUCTED IN MONZE AND LIVINGSTONE ON 7th NOVEMBER 2003.**

MONZE

Audio tapes, video tapes, CDs and DVDs valued at **K40, 985, 000=00** were confiscated.

LIVINGSTONE

Audio tapes, video tapes, CDs and DVDs values at **K4, 380,000=00**

- **FIFTH OPERATION CONDUCTED IN NAKONDE ON 3rd FEBRUARY, 2004.**

A container full of audio tapes, video tapes, CDs and DVDs valued at **K200,000,000=00** were confiscated.

- **SIXTH OPERATION CONDUCTED IN SOLWEZI ON 9th FEBRUARY, 2004.**

Two shops and all make-shift stands in the district were raided and audio tapes, video tapes, CDs, and DVDs valued at **K104,000,000=00** were confiscated

- **SEVENTH OPERATION CONDUCTED IN LUSAKA'S TOWN CENTRE AT ONE SHOP ON 2nd MARCH, 2004.**

PERMANENT HOUSE

Articles adapted to be used in making infringing copies of music of both local and foreign artists were seized. This included a tape deck, a system unit, a monitor, a key

board, a combination of a copier, a scanner and a printer and compact discs of pirated music worth about **K8,000,000=00**

▪ **NINETH OPERATION CONDUCTED IN KITWE ON 31st MAY 2004**

CHISOKONE MARKET

Audio tapes, video tapes, CDs and VCDs valued at **K82,400,000=00** were confiscated

▪ **TENTH OPERATION CONDUCTED IN LUANSHYA ON 4th AUGUST 2004**

Audio and video tapes valued at **K50, 000, 000=00** were confiscated.

▪ **ELEVENTH RAID CONDUCTED IN MATERO (WAREHOUSE)**

Audio tapes, video tapes, CDs, VCDs valued at **K413, 240, 000=00** were confiscated

▪ **TWELFTH RAID ON SOFTWARE PIRACY ON 8th AUGUST 2007**

27 Computers seized. Value of software piracy **K54, 000, 000=00**

TOTAL VALUE----- K984, 665, 012=00 (This figure is only for the eleven days raid)

LOSS OF REVENUE FROM PIRATED MUSICAL VIDEOS, TAPES AND CDS -----Following the eleven days value, it is estimated that government loses **K20, 000, 000=00** per week

The table below illustrates the estimated national wide piracy occurrence in Zambia for the year 2004⁶⁰ ;

⁶⁰ ibid

TOWN	UNITS	PIRATE 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	1, 000, 000, 000
Kalulushi	52, 000	364, 000, 000	650, 000, 000
Luanshya	30, 000	210, 000, 000	375, 000, 000
Chililibombwe	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

US\$8, 986, 031.1

3.5 Zambia's Position in Regional Enforcement

In response to the need for regional coordination, the Southern Africa Regional Police Chiefs Cooperation Organisation (SARPCCO) met in Harare and critically looked at how best IPR infringements could be curbed through coordinated efforts.

The deliberations led to the resolution referred to as **SARPCCO 26TH PCC/APRIL 05/RES 2** where all police Chiefs resolved that all SARPCCO member countries (Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe) must introduce specialized units to curb all manner of IP infringements. The battle lies upon Zambia as the Chair to make sure that all the 12 member states comply and implement the resolution. It is worth noting that in Zambia, an IP unit has been introduced though the same has not yet been commissioned.⁶¹

Clearly, copyright protection has a great impact on the development of any state and it is therefore a must for any country, developing or developed, to put in place effective and practical ways of enforcing copyright laws. From the foregoing, it is also clear that the emphasis lies on the responsibility of the state in responding to the threat to the structure of intellectual property in society, but again, the creators and their representatives should be able to support the state agencies in the fight against copyright infringement.

⁶¹ Interview with Inspector Omari Muwowo, Zambia Police Service Headquarters-31st October 2007

CHAPTER FOUR

4.0 CONCLUSIONS AND RECOMMENDATIONS

It has often been argued that successful problem solving requires finding the right solutions to the right problem. More often than not, we fail because we solve the wrong problem than because we get the wrong solution to the right problem.⁶²

The following are among the problems or the reasons attributed to the current state of affairs, i.e. rampant copyright infringement, contributing to the under development of Zambia;

4.1 Lack of proper understanding of copyright laws

One may argue that the problem being faced by Zambia and most developing countries is that of high rates of copyright infringement. In my view, probably the real problem here is not so much that of copyright infringement itself but that of ignorance of copyright.

Indeed, how can a problem be solved if the people who are expected to help solve the problem do not see any problem at all. The layman on the street in Lusaka either has very scanty knowledge on copyright or has no idea of copyright; the bus driver playing copyrightable music without a license to the passengers on his bus has no idea he is infringing copyright in the musical work being played. It seems however, that since '**ignorance of the law is no defence**, 'one would still be found liable for copyright infringement even after pleading and proving ignorance. The only reported

⁶² Abbot Fredrick, et al (1999) The International Intellectual Property System Commentarial & Material Part 1

Zambian case on copyright infringement illustrates this fact. In **Performing Rights Society Ltd V Francis Anthony Hickey**⁶³ the plaintiff sought an injunction and damages for infringement of copyright. The defendant played three musical records in public without obtaining a license from the plaintiff. The defendant on the other hand contended that it was not his intention to carry on breaking the copyright. He said before then, he received several letters from the plaintiff's solicitors asking him to stop playing copyright music but he did not know what they were asking him. He went on to testify that he had never in his life heard that there was copyright in music. The court held that the defendant was guilty of copyright infringement but that since the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work, the plaintiff was not entitled to damages against the defendant but to an amount of profits in respect of the infringement.

In an interview with an inspector of police, Mr. Omari Muwowo, it came to light that until recently, the majority of police officers have been ignorant of copyright laws and as such could not enforce the law. It is no wonder then that we see street vendors freely selling their pirated CDs and tapes even within the vicinity of police posts.

According to Inspector Muwowo, the Anti- Piracy Crack Squad was recently disbanded because it was felt that the Squad was limited to piracy only when there are a lot of copyrightable works not falling under copyright but deserving proper protection by the law enforcement officers. To that effect there has now been introduced a department called the Zambia Police Intellectual Property Unit to deal with, among other things, copyright infringement. It is, however, sad to note that this unit has not yet been commissioned and as such cannot commence serious operations.

⁶³ (1979) Z.R. 66

Another positive development as noted by Inspector Muwowo is that there has now been introduced the system of educating trainee police officers on basic intellectual property law principles at Lilayi police training college, Kanfinsa mobile unit and Paramilitary. It is thus hoped that since this knowledge will be imparted at training level, there would be effective copyright enforcement in the near future.

4.2 Poor enforcement

Indeed the role played by the police officers in as far as enforcement of copyright law is concerned is illustrated in a number of provisions in the Copyright and Performances Rights Act. Section 33(1) provides that where information is given on oath to a magistrate that there is reasonable cause for suspecting that there is in any house or premises any infringing copy or any article used or intended to be used for making infringing copies, or any other article book or document by means of which or in relation to which an offence against section 28 has been committed, the magistrate may issue a warrant under his hand by virtue of which any police officer, of or above the rank of Inspector, named or referred to in the warrant may enter the house or premises at any reasonable time by day or night and search for and seize any such copy, contrivance, article, book or document.

Section 34(1) provides as follows;

Any police officer of or above the rank of Inspector may in the exercise of powers conferred by or under section 33, if it is necessary so to do-

- (a.) break open any outer or inner door of a dwelling house or any other premise;
- (b.) forcibly enter any part of the premises;
- (c.) remove by force any obstruction to entry, search, seizure or removal; and

(d.) detain every person found on the premises until the premises have been searched.

Further, section 38 makes it an offence for anyone to, among other listed things, obstruct a police officer in the exercise of his duties such as refusing a police officer access to any place where the officer is seeking to exercise his powers or refusing to give a police officer any information relating to an offence or suspected offence, or any other information which may reasonably be required of him and which he has in his knowledge or power to give.

As has already been stated, ignorance of the law by the law enforcement officers themselves has contributed to poor enforcement. However, other possible causes of poor enforcement include the following;

- There has been very poor response from the stakeholders and the community at large. In order to fight a crime, it takes a whole society and not simply the effectiveness of the police or the government. Everyone must come on board. For instance, it has been submitted⁶⁴ that any fight against piracy must inherently have the support and inclusion of local authorities since most infringing copies are sold from the council markets. It is sad to note that among the few who are knowledgeable about copyright laws, a greater number of them seem to be convinced that nothing much can be done to curb this crime. .

⁶⁴ paper presented on the 'multi-sectoral support in the fight against piracy and its off-shoots in Zambia.'

There is rampant police and judicial corruption. When suspects are caught or the police discover a place where these infringing goods are being made, they are simply bribed and the case dies a natural death. An example was given where a state advocate in Ndola simply entered a *nolle prosequi* and the suspected copyright infringers were released on the ground that the judge who had conduct of the matter had misplaced the seizure sheet. Sometimes the artists and creators themselves take those who are found in possession of infringing copies and the police would ask what they should do with these people. According to Inspector Muwowo, have been a number of cases where the police have actually taken steps to seek legal action but often fail to proceed with the matter because they cannot find a complainant. Section 25(1) of the Copyright and Performance Rights Act provides as follows

An infringement of copyright shall be actionable in the court at the suit of the owner of the copyright.

Thus it appears that the requirement of *loci standi* seems to be a hindrance to prompt prosecution of these offenders.

Inspector Muwowo went on to point out that as at present, there are a number of copyright infringement cases that are still pending in court. These cases are rarely followed up due to lack of money on the part of the copyright owners and recording companies to pay legal fees.

- Lack of funds and resources on the part of the law enforcement section to follow up cases of infringement.

- The failure by government to complement the work of the stakeholders. Government is supposed to be a major player in the fight against this scourge because millions of kwacha which would be going to productive sectors of the economy.

4.3 Technological advances

Technology has, on the one hand, acted as a catalyst in the economic and sustainable development of many countries. On the other hand, the problem of copyright infringement has been compounded by the advances in technology. Technology promotes widespread unauthorized copying of musical works without payment to those who created it. It is interesting to note that in other jurisdictions, there are statutes being enacted to address the problem of copyright infringement in light of new technology. For instance, a journalist and well-known helicopter pilot in Los Angeles has filed suit against video-sharing site YouTube, claiming that it encouraged users to violate copyright law.

Robert Tur says video he shot of the beating of trucker Reginald Denny during the 1992 Los Angeles riots was posted at YouTube without his permission and viewed more than 1,000 times. Tur says in his lawsuit, filed Friday in U.S. District Court, that YouTube is profiting from his work while hurting his ability to license his video.

Passed in 1998 to protect copyright holders from technology that facilitated piracy, the DMCA also offered protection to Web service providers by limiting their liability in cases where their customers were found guilty of copyright violation.

Those in the video-sharing sector had for months expected someone to challenge YouTube in court. The San Mateo, Calif.-based company lets users post videos to its site without prescreening them, and a staggering amount of copyright video exists on the site. YouTube prohibits the uploading of such material but has also benefited in the past when someone has posted a professionally made clip that catches fire with the public.

Tur is asking the court for \$150,000 per violation and an injunction barring any further use of his material.⁶⁵

4.4 Lack of political will

There seems to be lack of political will to combat copyright infringement. In my view, the reason for the lack of political will is because creativity has not, in the first place, been promoted in Zambia. As a consequence, combating copyright infringement would not seem to be a matter of priority on the part of the government.

A good example to illustrate the absence of political will is by considering the operations of the National Arts Council (NAC) which is a quasi-government body. The functions of this body, as provided for under section 5 the National Arts Council of Zambia Act⁶⁶ include the following;

- To promote quality artistic leadership in performing and visual arts⁶⁷;
- To develop, promote, regulate and encourage all forms of amateur and professional arts on a national basis in conjunction with associations and the government.⁶⁸

⁶⁵ <http://www.news.com/2100-10303-6095736.html> (website was visited on 04/01/08)

⁶⁶ Chapter 170 of the Laws of Zambia

⁶⁷ Section 5(c)

Clearly, NAC is involved in copyright issues in Zambia because it deals with the artists whose works are infringed. In an interview with the director of the National Arts Council, Mr. Victor Makashi⁶⁹ it became apparent that NAC is facing a number of problems in the execution of its functions. According to Mr. Makishi, one of the problems is that of lack of infrastructure. The theatre houses are dilapidated while others have been closed down.⁷⁰ Secondly, the council has not been adequately financed by the government. A look at the national budget reveals that the cultural sector receives less than 1% of government funds in a year. In 2006, the actual percentage allocated to the cultural sector was 0.3%, while the percentage in 2007 was 0.9%.⁷¹ Also, Mr. Makashi lamented the attitude towards art by government, the public, the judiciary, and indeed many sectors of society. This, in my view, has a serious bearing on the successfulness or failure of our fight against copyright infringement. If people hold the view that copyright protection has no relationship with the development of a country, then the fight against copyright infringement is almost like 'a chase after the wind.'

From the table shown in chapter three, the difference between the pirate value and the market value due to piracy in the year 2004 was K47, 085, 500, 000. Further the lost revenue in terms of VAT and the lost revenue as regard duties was over K15 billion K20 billion respectively. All in all, the estimated gross revenue lost in the year 2004 was about K35, 944, 124, 415=00. The above figures cannot simply be ignored. One would expect more initiatives apart from the few sensitization programs already noted to be undertaken so as to show seriousness in the fight against copyright infringement.

⁶⁸ Section 5(d)

⁶⁹ Conducted on the 30th of November 2007-14:15hrs

⁷⁰ Venus theatre in Kabwe was turned into a juvenile court.

⁷¹ Budget address by the Honourable N'gandu P. Magande, MP, 2007

In my view, the mere fact that the Copyright and Performance Rights Act has never been revisited or revised since it came into force in 1958, over forty years ago leaves much to be desired and challenges the political will to reduce these alarming figures. Inarguably, the government and society at large stand to lose a lot from copyright infringement. It has already been noted that the total copyright based industries in the U.S.A in the year 2001 contributed an estimated US\$791.2 billion to the economy, representing approximately 7.75% of the gross domestic product (GDP).

4.5 RECOMMENDATIONS

It is apparent from the foregoing that for an intellectual property system to be effective, it must be pinned by a strong enforcement mechanism. It is also apparent that no intellectual system, however well its basic laws are drafted and however efficiently they are implemented, can make an effective contribution to the economic and technological development unless the system is known to, and used by those for whose benefit it was established.

In view of the findings of the research, the following are the recommendations to improve the protection of copyright and use the same as an effective tool to attain sustainable development.

1. Programs should be introduced through out the country aimed at educating the various stakeholders and the general public at large on copyright and related issues. It is illogical to educate the police officers on how to enforce a law on people who are not aware of the law being enforced. Thus it is clear that educating the public on copyright and related issue is an inevitable task to embark on if we

are to be successful in the fight against copyright infringement, which has adversely affected our economic development. A look at the 'Fact sheet P-05: Copyright Infringement'⁷² issued in March 2003 and last amended on the 20th of April 2006 provides a good example of the basic information needed especially by the various owners of copyrightable works as it outlines, in a layman's language, the suggested procedure to follow in the event that one's work is infringed. The following is what it states in part:

1. Who can take legal action?

Only the owner of a work (or his exclusive licensee) can bring legal action against the infringer.

2. Has a copyright infringement actually occurred?

Be clear in your mind that an infringement has actually occurred and that this is not simply a case of incidental inclusion or coincidence.

The work should be substantially similar in design, structure or content, to the degree that it can be said that the work was copied or adapted from your original, rather than simply a similar idea or concept.

It is a good idea to show both works to a friend or colleague for a more objective opinion.

3. Gather your evidence

The success or failure of your case will rely on the quality of the evidence, so take time to gather your facts carefully.

Your evidence should include:

(a.) A copy of the infringing work

Wherever possible, obtain a copy of the infringing work, this will prove valuable if the other party later changes the content in an attempt to deny your claim.

(b.) A copy of your work

⁷² <http://copyrightservice.com.UK/copyright/p05-copyright-infringement> (website as visited on 04/02/08)

Print off a copy of your work and mark specific examples of where the two works are similar, particularly good evidence is if you can find duplication of unique aspects of your work, for example, if an error in your original has been duplicated in the copy.

(c.) Copy of the registered version of your work (if different)

If the work has evolved since registration, it is a good idea to also print a copy of the registered version, and match the infringing work against this.

(d.) Date of registration

This can be found on the registration certificate, and represents the date from which you can prove that the work was in your possession.

(e.) Other dated documents

Any letters or other documents referring to the work before the date of infringement.

(f.) Developmental work

Rough drafts, previous versions, synopsis etc. These represent what is called evolution of ideas and are good as evidence to demonstrate that you developed the work rather than stealing it.

4. Contact the infringer

The first step is to make the infringer aware of your objection and put forward a reasonable settlement and time scale to reach the settlement.

In your letter you should include:

- The words 'without prejudice' at the start of the letter.
- The name of the work(s) you are objecting to.
- The reason why this is an infringement, i.e. an unauthorised copy, adaptation etc.
- State that you believe this act constitutes an infringement. That your work is protected under law and that this constitutes a breach of your legal rights.
- State that this is unacceptable and must stop.
- State what action is required to resolve the dispute, usually you would request the withdrawal of all copies of the work, (and any other encroaching materials).
- Specify a deadline for your conditions to be met (28 days is a typical period).
- State that you are seeking legal advice and that the case will be pursued if they do not comply with your request within the time period.

It is normal to simply request the withdrawal of all infringing work as the first course of action, if however you believe that you are entitled to financial remuneration, such as damages or royalties, then contact a solicitor immediately.

5. Important points to note

- Wherever possible, keep a dated copy of the infringing material, (and ideally also send this to your solicitor). This will ensure that you always have evidence of the infringement in case of future problems.
- Keep a copy of all correspondence you send or receive.
- Do not enter into negotiations yourself, unless you are certain what you agree is in your interest.
- Do not sign any contracts or agreements unless you are certain what they involve.
- If you are in any doubt, or do not receive satisfaction, speak to a solicitor.
- If you are a trading company, and your work is being used by a competitor with a similar name, though not directly a copyright claim, if you can establish that you were there first, then the infringer may also be guilty of trading off your name or reputation.
- Always remain calm and courteous in your correspondence, do not allow yourself to get drawn into heated argument or debate. A professional and fair attitude will be a credit to you in the long run.

6. Contact a solicitor

If you have not settled the dispute within the 28 day deadline, or if you believe that you are entitled to damages and/or royalties, then you should present your evidence to your solicitor.

The paper concludes by stating as follows,

...by having such strong evidence you are often unlikely to need it in a formal legal proceeding. When the other party realizes strength of your case they will normally wish to come to an amicable agreement.

2. The government should consider creating incentives for local producers of copyrightable works such as musical works so that companies such as Sounds Investments Limited could produce them at reduced amounts. In this way, the prices for such goods would be reduced which, in turn would reduce copyright

infringement cases since the same is usually as a result of failure to purchase original products due to high prices.

3. The other existing associations aimed at promoting and protecting copyright in other copyrightable works must be economically empowered. These associations include;

- The National Association of writers.
- The book sellers and publishers association.
- Zambia National theatre Arts association

4. There should be established an effective system of guarding the rights of copyright in music by ZAMCOPS. Inspectors could be employed to read advertisements and check for any places where discos, shows, concerts are taking place so as to check what songs will be featured as well as finding out if there is compliance with copyright laws. Inspectors could also visit restaurants, shops and other public places where music is likely to be performed in public to ensure compliance with the law.

5. There should be a call for an urgent and coordinated government action and the courts which must treat copyright infringement as a crime and impose deterrent sentences.

6. The Intellectual property unit, otherwise called the IP unit, of Zambia must be commissioned as soon as possible so that operations can take full force.

7. The Zambian copyright industry should respond to the technological advances that are taking place especially in digital technology. The right holders need to be able to use the technologies of the internet to manage and control the use of the works.
8. There should be strong political will because even if people are creative, there is need for effective support from the government agencies such as the National Arts council.
9. Effective international assistance from international bodies such as WIPO should be sought. In other words, there should be strong political will because without it, there would be no substantial progress.

It is not easy to draw a line as to who should shoulder the blame for ineffectiveness of copyright protection because the government on its part would claim that since it has already enacted a law to this effect, it is up to the creators to enforce their rights. The creators of copyrightable works, on the other hand, could argue that government bears the task of publicizing the law because government also benefits from copyright protection. As has been stated, this is a fight in which everyone must come on board and work together so as to enhance development.

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