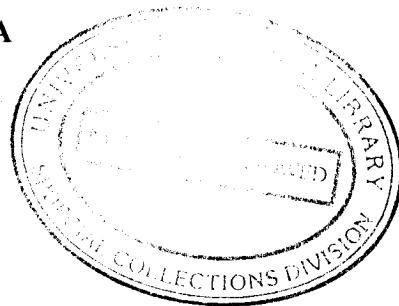


**THE UNIVERSITY OF ZAMBIA**

**SCHOOL OF LAW**



**THE ENFORCEABILITY OF INTELLECTUAL PROPERTY LAWS IN THE DIGITAL**

**AGE.**

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**BY**

SIK

2012

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**NAMONJE SIKOMBE**

**(28076133)**

A dissertation submitted to the University of Zambia in partial fulfillment of the requirements for the degree Bachelor of Laws (LLB) of the University of Zambia.

**MAY**

**2012**

## DECLARATION

**NAMONJE SIKOMBE**, computer number- **28076133** do hereby declare that I am the author of this Directed Research entitled: The enforceability of Intellectual Property laws in the digital age. I further declare that due acknowledgement has been given where work of other scholars has been used. I verily believe that this research has not been previously presented for a degree at the University of Zambia or any other University.

Student's Signature: *Namonje Sikombe*

Date: 8 / 5 / 2012



**THE UNIVERSITY OF ZAMBIA**

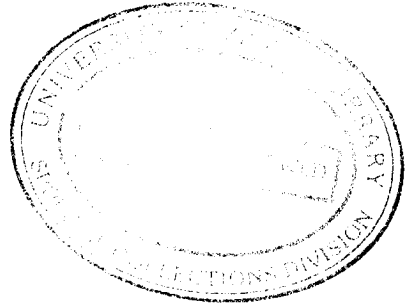
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Entitled:



**THE ENFORCEABILITY OF INTELLECTUAL PROPERTY LAWS IN THE DIGITAL  
AGE.**

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## **ABSTRACT**

This dissertation considers the right to copyright and related works and how to ensure that owners of such works are protected from the increasing levels of piracy. The paper begins by giving an overview of the concept of copyright and related rights. It also looks at how such rights can be enforced and the challenges that owner's of such works face. It goes further to stating what role the law plays in enforcing the copyright and related rights in the digital age. The research also shows the important role that copyright and related rights play in the development of the country's economy, thus the importance of having an efficient and effective legal system to enforce these rights.

The dissertation through research and interviews found that copyright laws play an essential role in the economic development of the country; it does so by ensuring that there is no tax evasion. The research has also found through the research that the use of security holograms as an instrument to enforcing authors rights as a positive move to preventing the high levels of piracy. From these findings, the research has concluded that a country's development depends to a large extent on the creativity and innovation of its people.

As such, the research recommends that there is need to make the people aware of the value of intellectual property laws and the essential role that it plays in contributing to the economic growth of the country. The other recommendation is that there is need to implement the use of holograms as a security tool to curb the increasing levels of piracy by ensuring that the government releases the much needed funds for the implementation of these tools. The paper also recommends that there is need for Zambia to keep pace with the advancement in technologies in enforcing copyright works.

## ACKNOWLEDGEMENTS

I would be betraying my faith if I did not acknowledge and thank the God almighty from whom all is given for the role that he has played during my stay at University and indeed Law school. It is only through time and patience that this work has come to completion.

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To all my family members and those dear to my heart: Womba Silumbu, Florence Munsaka and Kapembwa Chipungu, thank you for the encouragement you offered when I needed it the most. I love you guys a great lot.

## **DEDICATION**

This work is dedicated to my beloved father and mother, Ntula Shadson Sikombe and Jennipher Shandavu Sikombe. For the love and compassion you always show to me. I am very grateful for all the great things you do for me.

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# CHAPTER ONE

## GENERAL INTRODUCTION

### 1.1 INTRODUCTION

The exploitation of an intellectual property system can be used as an important tool for wealth creation and poverty reduction for developing countries and Zambia is not an exception. It thus follows that an efficient and effective enforcement mechanism of intellectual property rights would be essential to the number of violations of intellectual property rights, and thus ensures that the rightful owners and society as a whole reap the benefits from the intellectual property system.

Intellectual property law including copyright protection prevents others from copying or reproducing the creators or authors work.<sup>1</sup> Copyright law protects the rights of the owner in the literary, musical, dramatic and artistic works against individuals that merely copy or take and use the form in which the original work is expressed by the author.<sup>2</sup> The Copyright and Performances Rights Act<sup>3</sup> defines Copyright as a property right which subsists in original literary, musical, dramatic, artistic works and computer programme, and typographical arrangements of published editions of literary works. The purpose of intellectual property laws is to protect the creations of the human mind or the human intellect.

The rationale behind the protection of copyright laws is such that it instills in the author's the ability to invest time, patience, skill and creativity. It is thus necessary to give authors the

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<sup>1</sup> F Hart, *Intellectual Property law* (India: Replika Press pvt.ltd, 2008), 161.

<sup>2</sup> G M Kanja, *Intellectual Property Law* (Lusaka: UNZA Press, 2006), 16

<sup>3</sup> Chapter 406 of the Laws of Zambia, Section 7

incentive to carry on their work by providing the means to ensure their livelihood and recoup their investment. Furthermore, there is need to note that copyright protection encourages learning in that it enables other people to build on the ideas and information that is conveyed by the work. Promotion of the economy and protection of Human Rights as is stated in Article 27 of the Universal Declaration of Human Rights which provides that everyone has the right to protection of moral and material interests that result from any scientific, literary or artistic production can be regarded as some of the justification for protecting copyright laws.

The prevention of piracy and counterfeit is also regarded as an essential factor that justifies the protection of copyright laws in the sense that piracy and counterfeits are regarded as the disincentive to creation of copyright works.<sup>4</sup> When the levels of piracy and counterfeits are high, it is seen that local authors or creators of work cannot make a living from their works nor recoup any investment. It is important to also note that government loses revenue as no taxes are paid where there is rampant piracy and counterfeit.<sup>5</sup>

The proposed study is thus intended to give an assessment on the enforceability of intellectual property laws in the digital age. This will be achieved by looking at an overview of the effective mechanisms that have been put in place in developed countries, the United Kingdom in comparison to what mechanisms Zambia is putting in place in protecting creators of works from infringement of their rights.

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<sup>4</sup> G M Kanja ( 2006), 23

<sup>5</sup> S Shavell. "Rewards against Intellectual Property Rights." XLIV Journal of Law and Ec., 534 IIC 525

## 1.2 STATEMENT OF THE PROBLEM

Considerable literature has been written on the protection of Copyright and Performance Rights in Zambia, and such literature is as a result of the massive infringement of the intellectual property rights. It is not doubtful that such violations can be protected by the law which guarantees protection of the copyright and performance rights to the author or creator of the said works. The Copyright and Performance Rights Act mainly deals with the protection of authors to prevent others from copying or reproducing their literary, musical and artistic works, computer programs, audiovisual works, sound recordings, broadcasts and cable programs as well as provide for rights in performances.<sup>6</sup>

Even with a good legal framework, it can be seen that there is no capacity for enforcement, and a lack of government will to enforce such intellectual property laws in the digital age. What laws then can authors or creators of copyright and performance works look to for the protection of their property rights? The problem that this investigation intends to inquire into pertains to the continued infringement of the intellectual property laws even with the enactment of laws prohibiting such. What is missing in the Copyright and Performance Rights Act that has led to the continued infringement of the Intellectual property laws? Also, what is the impact of such failings?

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<sup>6</sup> Chapter 406 of the Laws of Zambia

## 1.3 DEFINITIONS

### **Intellectual property<sup>7</sup>**

This is regarded as property; it establishes the property rights that give the owner to do certain things in relation to the subject matter. It protects the creations of the human mind, the human intellect.

### **Copyright<sup>8</sup>:**

This is the right granted for the protection of original literary, dramatic, musical and artistic works; and other works such as computer programmes, compilations, sound recordings, broadcasts and films which result from the authors own intellectual creation.

### **Author<sup>9</sup>:**

Reference is made to works prescribed in section 8 of Chapter 406 of the Laws of Zambia or any other works, the individual that created the work.

### **Work<sup>10</sup>:**

Means a product of creativity in a category referred to under section eight (8)

**Infringing copy<sup>11</sup>:** This is the making of a copy of work in which copyright subsists without consent from the author.

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<sup>7</sup> G M Kanja (2006), 2

<sup>8</sup> Chapter 406 of the Laws of Zambia, Section 8

<sup>9</sup> Chapter 406 of the Laws of Zambia, Section 2

<sup>10</sup> Chapter 406 of the Laws of Zambia, Section 2

## **1.4 SPECIFIC OBJECTIVES**

- (i.) To identify the rights that authors of Copyright and Performance works have under Chapter 406 of the Laws Zambia and assess the extent to which such rights are violated.
- (ii.) To ascertain the actual impact that the introduction of holograms would have on the enforceability of intellectual property laws in the digital age
- (iii.) To explore the likely impact on the economy as a whole in the event that effective measures are put in place to enforce intellectual property laws
- (iv.) To determine whether the laws on Copyright are sufficient, or if there is need to strengthen the said laws or enact further laws so as to ensure the adequate protection of the works
- (v.) Finally, in view of the above, recommendations shall be made.

## **1.5 RATIONALE AND JUSTIFICATION**

This study is justified on the basis that it is cardinal to evaluate copyright and performance rights in intellectual property law. The overall purpose of the study is to give an assessment on the enforceability of intellectual property laws in the digital age. Specifically, it will look into;

- (i.) Rights of the authors or creators of works under the Copyright and Performance rights Act, Chapter 406 of the Laws of Zambia.
- (ii.) The extent to which the Amendment is effective in the enforcement of intellectual property laws in the digital age.

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<sup>11</sup> Chapter 406 of the Laws of Zambia, Section 2

- (iii.) A comparative study of the effective mechanisms that the United Kingdom and Zambia have put in place in protecting authors of the copyright works from infringement: An overview.

The research is justified on the basis that it is important to establish the standard by which copyright and performance rights are to be protected. It is also significant in that it aims to come up with practical and legal solutions to the problems that creators of intellectual property activities face. In this regard, this study will render an assessment on the enforceability of intellectual property laws in the digital age.

## **1.6 RESEARCH QUESTIONS**

1. What is the importance of having Copyright and Related rights in Zambia?
2. What impact does copyright and related rights have on the economic growth of the Country?
3. What impact does the use of holograms have on the implementation as well as the enforcement of Copyright and Related Rights?
4. What is the best solution to curb the increasing levels of piracy in the digital age?

## **1.7 RESEARCH METHODOLOGY**

The study will be a qualitative one, based on both primary and secondary sources of information. The primary sources of information will include interviews with individuals who have written on and researched on the study area. Secondary sources of information will include statutes, textbooks, scholarly articles, magazine articles as well as the internet where text books and scholarly articles fall short.

## 1.8 THE CONCEPT OF COPYRIGHT AND RELATED RIGHTS

Intellectual property, very broadly, means the legal rights which result from intellectual activities in the industrial, scientific, literary and artistic fields. Countries have laws to protect intellectual property for two main reasons: One is to give statutory expression to the moral and economic rights of creators in their creations and the rights of the public in access to those creations. The second is to promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development.<sup>12</sup>

Generally speaking, intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions. Those rights do not apply to the physical object in which the creation may be embodied but instead to the intellectual creation as such. Intellectual property is traditionally divided into two branches, “industrial property” and “copyright.”<sup>13</sup>

Copyright law is, in essence, concerned with the negative rights of preventing the copying of physical material existing in the field of literature and the arts. Its object is to protect the owner of the works from the unlawful reproduction of his work. It is not concerned with the reproduction of ideas as was held in the case of *Donoghue v Allied newspapers ltd*,<sup>14</sup> and it does not give a monopoly to any particular form of words or design. Copyright does not protect ideas but the material that has embodied the ideas. Copyright is rightfully called property in that nothing can with greater proprietary be called a man’s property than the fruit of his brains. The

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<sup>12</sup> P J Grooves, *Source book on Intellectual property law* (London: Cavendish Publishing Ltd, 1997), 24

<sup>13</sup> WIPO Intellectual property handbook: Policy, Law and Use (1996), 3

<sup>14</sup> (1983) Ch. 106 at 109 and 110

labour of one's mind is no less arduous and consequently no less worthy of the protection of the law.<sup>15</sup>

The existence of copyright in a particular work restricts the uses that can be made of the work. For example, a person who purchases a book in which copyright subsists cannot legally photocopy the book. Similarly a person who buys a protected CD cannot legally rip the recordings from that CD for a friend to use on her mp3 player. As well as being inconvenient and expensive, copyright has the potential to inhibit the public's ability to communicate, to develop ideas, and to produce new works.

From the said examples, one can firmly state that the owner of the copyright in a work is given exclusive rights to use the work as he wishes or perform certain acts in relation to the work and to prevent others from using the work without his authorisation.<sup>16</sup> As was said by Lord Diplock L.J. in the case of *Francis day & Hunter, ltd. v Bron*<sup>17</sup>; 'the copyright work must be the source from which the infringing work was derived.'

The four basic facts on copyright laws include: copyright does not protect the ideas; it merely protects the expression of the ideas, it does not give rise to monopolies and it is permissible for one to produce a work that is similar to a pre-existing work, as long as the later is not taken from the first. Copyright does not continue indefinitely, however, ownership will remain with the creator of the works. There are a number of reasons that have been advanced to justify the existence of copyright and related rights and these include the following: promotion of the

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<sup>15</sup> P J Grooves (1997), 25

<sup>16</sup> G M Kanja, (2006), 133

<sup>17</sup> (1963) Ch. 587

economy, reward for labour by the authors, encourages foreign direct investment, prevention of piracy and counterfeit.

## **1.9 CONCLUSION**

This chapter has defined the term ‘copyright’ as defined by the Copyright and Performance Rights Act (Chapter 406 of the Laws of Zambia) and other written works. It has also made reference to the two categories of intellectual property as well as the importance of protecting copyright works. Because copyright law has the potential to inhibit the way people interact with and use cultural objects, it is important that we re-assess its legitimacy. In this context, it is important that we ask whether and why copyright is desirable. This paper will essentially give an assessment on the enforceability of intellectual property laws in the digital age.

## CHAPTER TWO

### ENFORCEMENT OF COPYRIGHT AND RELATED RIGHTS

#### 2.1 INTRODUCTION

As stated in the preceding chapter, Copyright has the potential to inhibit the way people interact with and use cultural objects and it is because of this that it is important that its legitimacy is constantly re-assessed. With the advent of the internet, there are many who think that copyright unjustifiably stifles our ability to make the most of the new environment or that it impinges upon the public domain. Others consider while that some aspects of copyright are justifiable others are not. Typically, the arguments are that copyright has gone too far. In response to these copyright skeptics, five basic arguments are used to support the recognition and further extension of copyright: natural rights, reward arguments, incentive arguments, neo-classical economics, and arguments from democracy.<sup>18</sup>

The owner of a copyright in a work is given 'exclusive rights' to use the work as he wishes or perform certain acts in relation to the work and to prevent others from using the work without his authorization. Thus, anyone will not infringe the copyright in the work if he performs acts which are not restricted or controlled by the copyright owner. Besides, he does not need to get permission from the owner of the copyright owner for the acts in relation to work not restricted or controlled by the copyright owner. It is because of this that for one's works to be protected they must fall within the ambit of the restricted works.

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<sup>18</sup> For an overview, see M. Spence, "Justifying Copyright" in D. Mclean and K. Schubert, *Dear Images: Art, Culture and Copyright* (2002), 388

This chapter aims to outline and explain the legal rights that authors have under Chapter 406 of the Laws of Zambia and how these rights are enforced. Chapter 406 of the Laws of Zambia is the piece of legislation that governs copyright and performance rights in the Copyright and Performance Rights of authors. Furthermore, the chapter looks at some of the drawbacks of the Act.

## **2.2 OVERVIEW OF THE COPYRIGHT AND PERFORMANCE RIGHTS ACT (CHAPTER 406 OF THE LAWS OF ZAMBIA)**

Chapter 406 of the Laws of Zambia provides for Copyright and Performance Rights. Copyright deals with the rights of intellectual creators in their creation. Most works, for example books, paintings or drawings, exist only once they are embodied in a physical object whereas; others exist without embodiment in a physical object for example music or poems are works even if they are not, or even before they are written down by a musical notation or words. Performance rights on the other hand are referred to related rights. These are rights that are granted to persons who present creative works to the public but who are not considered as creators of works in their own right. Related rights are the rights that are derived from the works that are protected by copyright and are granted to performers.<sup>19</sup>

Part I of the principle Act (Chapter 406 of the Laws of Zambia) looks at the preliminaries of the Act: Short title, interpretation, works of unknown and joint authorship, publication and general publication and application to all existing works.

Part II looks at the nature, duration and infringement of copyright.<sup>20</sup> Part III looks at the enforcement of copyright. The Copyright and Performance Rights Act divides copyright

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<sup>19</sup> G M Kanja (2006), 26

<sup>20</sup> Chapter 406 of the Laws of Zambia, Section 22

enforcement into four categories: conservatory or provisional measures, civil remedies, criminal sanctions and measures to be taken at the border.

Part IV of the Act looks at the registration of Copyrights. As copyright protection arises automatically upon the work being created provided it fulfills the criteria for copyright protection such as the work being original, there is no need of applying for copyright registration. It is also a requirement that for literary, dramatic, musical and artistic works to be protected, they must be original and expressed in a fixed form. Besides, copyright protection is not dependent on the literary, artistic or musical quality of the work. Where the copyright in a work is owned by more than one person otherwise than as joint owners, the rights held by each of those persons shall be regarded as a separate copyright.<sup>21</sup>

Part V of the Copyright and Performance Rights Act grants rights in performances to the performers and to the person who has recording rights in relation to their performance. The Act defines a performance as a live performance given by one or more individuals which is a performance of drama, dance or mime, a musical performance, a ready recitation of a literary work, or a performance of a variety act or any similar presentation. The Act grants a performer a right called the 'performers rights' to exploit a qualifying performance by means of the recording, broadcast or inclusion in a cable programme service of the performance. Part VI looks at the miscellaneous provisions of the act.

Even with the above provisions of the Act, prosecuting experience against copyright infringement is a long process and one is faced with many challenges. Chapter 406 of the Laws of Zambia offers no concrete protection once copyright works are infringed. Although several cases are before the courts of Law with others having been disposed of, the Zambia Police

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<sup>21</sup> Chapter 406 of the Laws of Zambia, Section 39

Service has been facing a lot of challenges in enforcing the Copyright and Performance Rights. Some of the weaknesses of the principle Act include:<sup>22</sup>

### **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 congestion of the High Court calendar in this country, this makes it difficult to prosecute offenders under this Act as the Courts are not enough. However, there is need to note that with the inclusion of the Magistrate Courts, cases will not be as congested as it was before.

### **Ignorance is a defense**

Chapter 406 of the Laws of Zambia has recognized ignorance as a defense. It is almost impossible for one to pirate on another person's work without the knowledge of infringement. The law needs to be written with zero tolerance attitudes to ignorance. It is common knowledge that ignorance of the Law is not an excuse or defense. In the case of *Performing Rights Society v Hickey*<sup>23</sup> an application for injunction and claim for damages for infringement of copyright was made. The 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 this infringement was for one day; the defense raised that the infringement was done innocently and under mistake.

### **Weak penalties for copyright infringement**

The penalties for infringement under this Act are specified in Section 28 (g) and are not stringent. This makes it difficult for the law enforcement agents to adequately prosecute the offenders. Looking at the high levels of piracy, there is need that the penalty for the infringement

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<sup>22</sup> Chapter 406 of the laws of Zambia, Section 28(g)

<sup>23</sup> (1979) Z.R 66

of copyright is most stringent. In Zambia today 80% of all music tapes, CDs, DVDs and Video tapes sold on the market are pirate copies that do not benefit any of the owners of the works.<sup>24</sup>

### **2.3 RIGHTS THAT ONE CAN ENFORCE WHENEVER THERE IS AN INFRINGEMENT**

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

- (i.) To copy or reproduce the work;
- (ii.) To publish or issue copies to the public
- (iii.) To perform, show or play the work in public;
- (iv.) To broadcast the work or include it in a cable programme
- (v.) To make an adaptation of the work or do any of the above in relation to an adaptation.<sup>25</sup>

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

For one to be successful for copyright infringement, one has to prove misappropriation of his work. In order to find out whether or not a copyright work has been misappropriated any of the

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<sup>24</sup> Interview with Inspector of Police(Dr Malama) on 12<sup>th</sup> January, 2012

<sup>25</sup> Chapter 406 of the Laws of Zambia, Section 17

following elements must be proved: Causal link or connection; subconscious copying and the intention of the infringer; indirect copying; and substantial copying.<sup>26</sup>

It is a general principle that copyright protects the expression of ideas and not ideas and therefore, copyright infringement will not arise where a work expressing the same idea is created or reached by individuals independently or where a common source of information is relied upon. In other words, there must be a connection between the work of the plaintiff and that of the defendant, and that the defendant must be proved to have copied the work through having access to the plaintiff's work. Furthermore, there must be a similarity between the two works.

There is copyright infringement where one unconsciously copies the work which is protected by Section 17 of the Act (Chapter 406 of The Laws of Zambia). Some judges have accepted that where a person reads, sees or hears a work, forgets about it, but then reproduces the same, honestly believing it to be his own. In such a scenario, proof of copying, as stated by Wilberforce J. in *Francis, Day & Hunter v Bron*<sup>27</sup> will be dependent on a number of composite elements: The degree of familiarity; the character of the work, the objective similarity of the defendant's work, the inherent probability that such similarity as is found could be due to coincidence, the existence of other influences on the defendant composer's own evidence on the presence or otherwise in his mind of the plaintiff's work.

Copyright is a right of property and one is entitled to come to the court for the protection of that property, even though he does not show or prove actual damage. Intention of the defendant or the infringer is irrelevant to influence the finding for copyright infringement, as the infringement occurs once the defendant does an act that is reserved to the copyright owner, unless the defendant can bring himself within the exception set out in the act or some other statute. One can

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<sup>26</sup> G M Kanja( 2006),134

<sup>27</sup> (1953) Ch. 587

also infringe copyright laws by way of indirect copying. This is where the work is presented in some form other than its initial presentation.

Section 17 (7) of the Copyright and Performance Rights Act provides that copyright in a work is infringed by taking all the protected portion of the work. Substantial Copying includes any part of a work which on its own can be identified as part of the work by someone who is familiar with the work, and this makes it easy for one to prove infringement. What will constitute substantial copying must be assessed from both the qualitative and quantitative perspective. A number of factors have been considered by the courts when assessing whether there has been substantial taking:

- (i.) The quality and quantity of the material taken;
- (ii.) The extent to which the defendants use adversely affects the plaintiff's activities and diminishes the value of the plaintiff's copyright;
- (iii.) Whether the material taken is the proper subject matter of a copyright;
- (iv.) Whether the defendant intentionally appropriated the plaintiffs work to save time and effort; and
- (v.) Whether the material taken is used in the same or a similar fashion as the plaintiff's.<sup>28</sup>

Where the owner of the copyright work proves that there has been infringement of the work, he can enforce the rights as seen in section 17 of the Copyright and Performance Rights Act.

Original literary, dramatic, musical and artistic works, computer works and compilations are copied through the reproduction in any material form.<sup>29</sup> Reproduction is the copying of protected works. The right of reproduction is the first and best- known rights that is given to copyright owners, it is also regarded as the oldest right that is given to copyright owners. This means that a

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<sup>28</sup> Hager v ECW press limited (1988) 85 CPR (3d) (Canada: Federal Court, Trial Division)

<sup>29</sup> Chapter 406 of the Laws of Zambia, Section 17 (2) and (3)

person will infringe when they reproduce a copyright work on a computer screen, or store it in computer memory, as much as when they copy the work from disk to disk.

It is important to remember that the narrow protection given to the entrepreneurial works is balanced by the fact that protection arises irrespective of whether or not the work is original. One of the consequences of reproduction being defined very narrowly is that copyright in a sound recording of a speech is not infringed where a person transcribes the speech. Similarly, copyright in a film is not infringed when somebody writes a description of the film, or stages a play replicating events in a film is not infringed where a person transcribes the speech.<sup>30</sup>

The owner of the work in all categories of the work is given the right to issue copies of the work to the public.<sup>31</sup> This is commonly known as the 'Distribution right.' Essentially, the distribution right is a right to put each tangible copy which has not previously been circulated into commercial circulation. The right of distribution does not include 'any subsequent distribution,' copyright owners cannot control resale.

Although the copyright owner cannot control resale of his works, it is important for mechanisms to be put in place so that such inability to control the resale can be observed so as to prevent copyright infringement of such works.

While subsequent distribution of copies of the work is not generally within the copyright-owner's control, the owner of copyright does have the right to control the rental and lending of the work. Rental and lending both involve the making of the original or a copy of a work

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<sup>30</sup> L Bently, *Intellectual Property Law* (New York: Oxford University Press, 2009), 45 (Third edition)

<sup>31</sup> Chapter 406 of Laws of Zambia, Section 18

available for use on terms that the work will be returned. The distinction between renting and lending is that the act of rental involves a commercial advantage, whereas lending does not.<sup>32</sup>

It can be seen that one limitation to the rental and lending rights is that it does not make available a copy for public performance, playing or showing in public, or broadcast. The exclusion also seems to cover a variety of other commercial practices such as the rental of jukeboxes and possibly also the rental of sheet music.

The owner of the copyright has the right to perform, show or play the work in public. Copying is not the only act that is restricted by copyright. The Copyright and Performance rights Act prohibits issuing or publishing copies of a work other than a broadcast or cable programme to the public without the consent of the copyright owner.<sup>33</sup> The Act restricts the public performances or communication to the public by means or process of literary, dramatic, and musical works if done without the consent of the owner. It must be stated that the Copyright and Performance Rights Act like most other copyright laws in different jurisdictions does not define the term 'public'. The courts have often been called upon to interpret the term 'public' as it relates to the public performance, showing or playing the work in public.<sup>34</sup>

The owner of copyright in literary, dramatic, or musical work is given the exclusive right to make an adaptation of the work. Adaptation is defined differently for literary works, dramatic works, computer programmes, databases, and musical works. In relation to literary or dramatic works, adaptation means a translation such as one translated into French, or a dramatization of a non-dramatic work such as where a novel is turned into a screenplay or ballet or thereafter into a

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<sup>32</sup> L Bentley (2009), 134

<sup>33</sup> Chapter 406 of the Laws of Zambia, Section 17

<sup>34</sup> G M. Kanja (2006), 161

film. The adaptation right in a literary or dramatic work will also be infringed where the story or action is conveyed wholly or mainly by means of pictures.<sup>35</sup>

The Adaptation right that the owner of the copyright works is deemed to have has been used by a number of people to infringe on the owners works. Most of the works that are conveyed into another form are usually done so without the acknowledgement of the owners of the works.

On this premise, there is need for the government to protect copyright owners from infringement of their works by others. Former information Minister Ronnie Shikapwasha said, “Government attaches great importance to the role that Intellectual property plays in national development and has since enacted laws to protect the rights of innovators and creators to ensure they benefit from their work. Officiating at the commemoration of World Intellectual Property day whose theme was ‘Designing the future’ in Lusaka, he said it was important that artists and other creators were protected from piracy and counterfeiting to urge them to create more works. He further stated that artists contribute significantly to the national treasury through taxes while pirates evade tax as they do their activities.”<sup>36</sup>

It is important to note that the law is clear on the position of intellectual property and tries by all means to ensure that people’s rights are protected thoroughly. As has been seen from the overview of the Act, the owner of the copyright works has the exclusive rights over his works and can authorize others to copy, reproduce, publish, perform or broadcast his works provided they do so at a fee. It is the reproduction, distribution, adaptation, lending and rental rights that the owners tend to have that their works are infringed upon and this is because of the fact that they do not have exclusive control over their works once they allow for reproduction,

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<sup>35</sup> L Bently (2009), 153

<sup>36</sup> The importance of Intellectual Property to national development: Times of Zambia (27<sup>th</sup> April, 2011)

distribution and adaptation of their works. Whenever an individual misappropriates the work of another, he or she will be held liable for infringement of the owner's copyright works. There is need for the Copyright owners to be protected because copyright is desirable as the copyright owner expends time, energy, resources in creating their works and that one's innovation and creativity play an important role in the contribution of the country's economic growth.

## **2.4 CONCLUSION**

In conclusion, it can be noted that the owner of a copyright in a work is given 'exclusive rights' to use the work as he wishes or perform certain acts in relation to the work and to prevent others from using the work without his authorization. Misappropriation of the controlled works amounts to infringement of copyright laws and the owner of the copyright works can bring an action to that effect. There is also need to come up with effective and efficient measures to curb the weaknesses that have been seen in the Act: The High Court factor; ignorance as a defense; weak penalties for infringement. The reason for such measures is justified on the premise that Copyright works play an important role in national development.

## CHAPTER THREE

### THE LAW AND ENFORCEMENT MECHANISMS USED IN ENFORCING COPYRIGHT LAWS IN THE DIGITAL AGE

#### 3.1 INTRODUCTION

The development of science, technology and culture is impossible without corresponding protection of intellectual property rights of creators, inventors and scientists. One of the problems that are faced internationally is the illegal use of the objects of intellectual property, that is, piracy that crosses easily the borders of the country through satellite broadcasting and the global internet. Unauthorized use of books, films, music works, computer programmes and games has turned into a profitable illegal business attracting not only those seeking to make easy money but also organized criminal groups whose activities have international character.

Every state faces the problem of fighting against the offences against copyright works such as piracy. The solution to this problem is extremely important but complex as users promote piracy by buying cheap and in many cases low quality products. The question that is to be asked is whether the insertion of more provisions in Chapter 406 of the Laws of Zambia is the solution to such problems and what effect the use of holograms will play in the protection of the copyright works and enforcement of intellectual property in the digital age. One other question is whether the problem is the law or the enforcement (or both?).

This chapter will look at the Copyright and Performance Rights Amendment No. 25 of 2010 in totality; the provisions included under section 28, section 38 which looks at the need for holograms as securities in the protection of copyright owners; and will also analyze the other

provisions that have been inserted in the amendment in enhancing the enforcement of intellectual property (copyright laws) in the digital age.

### **3.2 THE IMPACT OF INCLUDING MORE PROVISIONS UNDER SECTION 28 ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY LAWS (COPYRIGHT)**

Section 28 of the Amendment provides for more provisions under which a person can commit an offence during the subsistence of copyright in the work. More provisions in Section 28 of the Amendment have been included and the effect is that during the subsistence of copyright works,

*“An individual shall not infringe on the works of copyrightable works by engaging in unlawful activities or synchronises music and visual works without the consent of the copyright owner; Unless the person satisfies the court that the person had acted in good faith and had no reasonable grounds for supposing that copyright would or might thereby be infringed, failure to which amounts to an offence.”*

On the above provision, it can be seen that the amendment to the Act was in line with the happenings world over on issues concerning intellectual property. The inclusion of more sections in the principle Act under Section 28, therefore seeks to protect intellectual property in general and copyright in particular, and ensure that it conforms to international norms and best practices.

Before the Amendment, the Principle Act was last amended in 1994, rendering the legislation irrelevant in the world of fast changing technological advancements. The levels of piracy had not only increased, but counterfeits had also become sophisticated and therefore the need for an updated law to deal with such infringement cases. Even with the introduction of the new

Amendment, it can be seen that the levels of piracy keep increasing. These infringement copies are not only confined to audio and video products, they extend to anything that is copyrightable.

To further discuss some of the present problems that Zambia is facing particularly in the area of copyright infringement, in particular piracy, it is estimated that 80% of musical products sold in the Zambian market is pirated.<sup>37</sup> The majority of the musicians are struggling to make a living because their music is being stolen through the illegal copying of their works immediately it is released on the market, and this primarily affects the Zambian economy.<sup>38</sup>

Looking at the operations that were conducted by the Intellectual Property Unit from 2008 to date, it can be observed that the grand total for the year 2009 for the infringement of the copyright works and other related rights was 55 billion whereas that in 2010-2011 was about 87 billion<sup>39</sup>. This notwithstanding, it can be seen that there tends to be an increase in the copyright and related works infringement and the reasons for the increase is mainly attributed to the advancement in technology in this digital age.

On this premise, it can be seen that the inclusion of more sections to the principle Act by the Amendment does not contribute positively to the protection and enforcement of Copyright laws in the sense that the law has retained the proviso that states:<sup>40</sup>

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<sup>37</sup> Obtained from an interview with Mr. Munsamvu, the Registrar of the Ministry of Broadcasting and Information Services on 9<sup>th</sup> March, 2012

<sup>38</sup> K Musamvu, "MIBs: Copyright a tool for development." (2010)

<sup>39</sup> Statistics obtained at the Intellectual property Unity, Zambia Police Headquarters.

<sup>40</sup> Chapter 406 of the Laws of Zambia, Section 28 Amendment No. 25 of 2010

*“Unless the person satisfies the court that the person had acted in good faith and had no reasonable grounds for supposing that copyright would or might thereby be infringed, commits an offence and is liable.”*

From the above, it is almost impossible for one to pirate another person’s work without the knowledge of infringement. The law needs to be written with zero tolerance attitudes to ignorance. It is common knowledge that ignorance of the Law is not an excuse or defense and as such, it is difficult for the owner of the copyright works to prove an infringement when a person states before the court that they acted in good faith and had no reasonable grounds that copyright would or thereby be infringed. It provides for an effective defense that might be used by unscrupulous people to escape conviction. In this regard, this section should be revised to seal all loopholes in ensuring that copyright works are protected and enforced whenever there is an infringement.

It is because of the piracy scourge that the government through the Ministry of information established the Anti- Piracy Crack Squad whose mandate is to monitor the implementation of the Copyright law in the Country. This taskforce also serves as an advisory body to the government on all copyright and related matters.

### **3.3 THE IMPACT OF USING HOLOGRAMS ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY LAWS IN THE DIGITAL AGE**

Section 38A provides for the use of security holograms in relation to sound recordings and cinematograph films intended or offered for sale, rental, hire, lending or otherwise distributed to the public or for commercial purposes within the republic. The hologram device shall be affixed to every cassette, disc, or other medium in which the sound recording or film is embodied, in

such a manner as to make the hologram visible to prospective buyers. A hologram is regarded as a tool of fighting piracy and counterfeits.<sup>41</sup>

The Copyright and Performance Rights Act has also taken into account the challenges that law enforcement officers face in enforcing the law on copyright and related rights. Among the challenges officer's face is how to distinguish an original copy from a pirated or counterfeited product. The hologram is a three dimensional security sticker that is affixed on audio and video products before they enter the market to help the enforcers to distinguish such products from the original ones. The hologram is expected to greatly reduce incidences of piracy and counterfeits in Zambia.

Clearly, pirated and counterfeited goods can be effectively addressed by border measures. Counterfeiting in Zambia as stated by Roncaglia "has successfully hindered growth of national productivity through legal channels, which consequently suffers economic losses and is unable to generate employment opportunities". It was advanced that piracy and counterfeiting leads to a staggering government deficit due to extensive tax evasion.<sup>42</sup> The Amendment to the Copyright and Performance Rights Act has revised the court of jurisdiction for copyright infringement matters and has included the Subordinate Courts. Having matters to be dealt with by the High Court alone has been a hindrance to speedy disposal of copyright infringement cases. The High Court is usually congested and cases take long to be disposed of, as shown by the statistics of the

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<sup>41</sup> "The nature of Holograms." [www.Mcconnellinternational.com](http://www.Mcconnellinternational.com) (accessed on 10<sup>th</sup> February, 2012)

<sup>42</sup> Paper prepared by Pier Luig Roncaglia, "*Handling of counterfeit goods*," (22<sup>nd</sup> November, 2005), 3

Intellectual Property Unit. It is, therefore, hoped that the revision of the Act to include other courts will speed up the disposal of such cases.<sup>43</sup>

The Amendment to the principle Act has also revised the rank of police officers to handle cases of copyright infringement cases. Previously, it was only police officers above the rank of inspector who could deal with such cases, but this has now been broadened to include other officers such as constables. Our artists cannot be in all parts of the country to police the use of their works. The current Act only recognizes the owner or his or her representative to complain on their behalf for the police to institute an action for infringement. The Amendment to the principle Act has, therefore, included the office of the Attorney-General to be the copyright holder for purposes of prosecution of an offence under this Act.<sup>44</sup> This in itself can be considered as a positive move by the law makers in that it broadens the representation of the copyright owners in ensuring that their rights are enforced whenever there is an infringement.

The measure in the Amendment will not only help fight piracy, but also help property right owners to be inspired and create more works which will increase the confidence of investors in this sector. It is, therefore, necessary that a neutral organization, such as the Zambia Music Copyright Protection Society (ZAMCOPS) or the Zambia Bureau of Standards be the custodian of the hologram.

Even with the use of holograms for security purposes, it can be seen that the process involved is not implemented and this is owing to the fact that not adequate funds have been released by the government to ensure that the holograms are made effective. It can also be seen that Zambia is

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<sup>43</sup> Chapter 406 of the Laws of Zambia, Section 2(a) of the Amendment which states that Court means a High court or a subordinate court

<sup>44</sup> Chapter 406 of the Laws of Zambia, Section 28 (5) of the Amendment No. 25 of 2010

lagging behind in the sense that the holograms will only be used in so far as the CDs and other sound recordings and also cinematography films, whereas in developed countries like the United Kingdom the protection also covers measures to protect the works on the internet.

In a survey conducted by ZAMCOPS in 2010, it was revealed that countrywide ratio of scales of the pirated tapes against genuine tapes was 40: 2, therefore going by the ratio, if 200,000 genuine copies were sold then 4, 000, 000 pirated copies were sold. This also meant that the government makes huge losses as a result of piracy warranting an immediate need to review the copyright laws in the country.

It can be seen that the introduction of holograms is not the most effective means in protecting copyright laws because it is made in such a way that it does not cater for all the categories of works in which copyright subsists as per section 8 of the principle Act.<sup>45</sup> The hologram is only restricted to CDs, other sound recordings and also cinematography films. Is the problem the law or is it the enforcement mechanisms that are put in place in protecting copyright works?

### **3.4 IS THE PROBLEM THE LAW OR SIMPLY THE ENFORCEMENT (OR BOTH) IN ENFORCING COPYRIGHT LAWS IN THE DIGITAL AGE?**

The administration of copyright consists of national copyright offices; training of stakeholders like the law enforcement officers, artists and users of copyrighted works; and the registration of copyright works which includes the Zambia Music Copyright Protection (ZAMCOPS), Zambia

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<sup>45</sup> Chapter 406 of the Laws of Zambia, Section 8

Reprographic Rights Society (ZARRSO).<sup>46</sup> In Zambia, responsibilities for intellectual property enforcement are dealt with by the Zambia Police Intellectual Property Unit (IPU).

The growing danger from crimes committed against computers, or against information on computers, is garnering attention in national capitals. In most countries around the world, however, existing laws are likely to be unenforceable against such crimes. This lack of legal protection means that businesses and governments must rely solely on technical measures to protect themselves from those who would steal, deny access to, or destroy valuable information.<sup>47</sup>

Outdated laws and regulations, and weak enforcement mechanisms for protecting networked information create an inhospitable environment in which to conduct business within a country and across national boundaries. Inadequate legal protection of digital information can create barriers to its exchange and stunt the growth of commerce. As business expands globally, the need for strong and consistent means to protect networked information will grow.<sup>48</sup>

The Copyright and Related Rights is administered by the Registrar of Copyright in the Ministry of Information and Broadcasting. The Zambian situation is such that it has a reasonably well established legal system and intellectual property office. Nevertheless, the resources for implementation and compliance of the TRIPS (TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS) Agreement would not be available for the simple reason that Zambia's foreign debt and the level of poverty are very high; it is very unlikely that

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<sup>46</sup> K Musamvu, "MIBs: Copyright a tool for development." (2010)

<sup>47</sup> Cyber Crime and Punishment: "An overview of Archaic laws threatening global information." (2000) [www.mcconnellinternational.com](http://www.mcconnellinternational.com) (accessed on 12<sup>th</sup> February, 2012)

<sup>48</sup> M B Wallerstein, M Moguee, R A Schoen, *Global Dimensions of Intellectual Property Rights in Science and Technology* (Washington, D.C: National Academy Press,1993), 34

extra resources would be made available for the purpose of ensuring that it complies with TRIPS Agreement at the expense of the said problems.<sup>49</sup>

Regardless of a number of laws that are enacted in protecting intellectual property laws in the digital age, it can be seen that there are a lot of challenges that enforcers of such laws face. The use of holograms as security entails that the copies of such works will be more expensive further encouraging users to buy cheap pirated products. It is for this reason that the law should be enacted in a manner that has no provision that provides for ignorance of the law as an infringement of copyright works as is stated in the proviso of section 28 of the Copyright and Performance Rights Amendment No. 25 of 2010.<sup>50</sup> Collective management copyright works are increasingly delivered in digital form via global networks such as the internet. As a result, the collective management of copyright and related rights by public, semi-public and market sector entities has to be re-engineered to take advantage of the efficiency gains offered by information technology.<sup>51</sup> The ever increasing opportunities offered to the right holders by the internet and the advent of multimedia productions are affecting the conditions of protection, the exercise and management of copyright and related rights and also the enforcement right.

In the online world, the management of rights is taking on a new dimension. Protected works are now digitized, compressed, uploaded or downloaded, copied and distributed on the internet to any part in the world. The expanding power of this network allows mass storage and online

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<sup>49</sup> Interview with Dr Zulu of the Patents and Companies Registration Office (PACRO) conducted on the 21<sup>st</sup> February, 2012

<sup>50</sup> An individual who infringes Section 28 will not be liable if he satisfies the court that he had acted in good faith and had no reasonable grounds for supposing that copyright would or might thereby be infringed thus allowing for ignorance of the law as an excuse for such infringement.

<sup>51</sup> Collective management of copyright and related rights (World Intellectual Property Organization, 1996)

delivery of protected material. The possibility of downloading the contents of a book, or listening to and recording music from cyberspace is now a reality. While this presents immeasurable opportunities, there are also many challenges for owners, users and collective management organization.<sup>52</sup>

With the advancement in the technology, and the added vulnerability from downloading information on the internet, makes it difficult for a country like Zambia to fully protect the owners of Copyright works from the infringement of their works by third parties in that it is very hard for the country to keep up with the technological advancements in this digital age.

It is important to note that the problem in enforcing the intellectual property laws (copyright in particular) is mainly attributed to the outdated laws, and regulations, and weak enforcement mechanisms for protecting networked information. The inadequate legal protection of digital information is also seen to be another barrier to growth of the economy. It is thus both the law which is seen to have a number of loopholes as well as the weak enforcement mechanisms that are a problem in enforcing the intellectual property laws (copyright). There is need to ensure that the law is enacted in such a way that there are no lacunas and from this, it is important for the law to be revised and amended so as to ensure that copyright works are protected and enforced effectively. Effective mechanisms must also be put in place to ensure that copyright works are protected and such mechanisms must be in line with the advancement in technology in this day and age.

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<sup>52</sup>Stimulating creativity and Innovation in Developing Countries. The UNICEF Benchmarking Report, 2006

### 3.5 CONCLUSION

Having analyzed the Amendment in its entirety, it is important to state that copyright protection is above all one of the means of promoting, enriching and disseminating the national cultural heritage. A country's development depends to a very great extent on the creativity of its people, and encouragement of individual's creativity is a *sine qua non* for progress. It can also be observed that this chapter has tried to show the essential role of copyright in developing countries and the role of the government in this activity could thus include the financial assistance especially on the implementation of the holograms so as to provide security for the works of copyright owners. It has also tried to show the importance of considerable socio-economic on one hand, and the rapid strides in the technological development on the other hand bringing substantial changes on the outlook in relation to copyright.

## CHAPTER FOUR

### ENFORCEMENT OF INTELLECTUAL PROPERTY LAWS

#### 4.1 INTRODUCTION

The Copyright and Performance Rights Act divides Copyright enforcement in four categories: Conservatory or provisional measures, civil remedies, criminal remedies, criminal sanctions and measures to be taken at the border.<sup>53</sup> The enforcement of intellectual property rights could be considered by examining the different remedies that an intellectual property right owner is able to seek upon realizing that his rights are being infringed upon.

Conservatory or provisional measures are measures that prevent the entry of infringing works that are protected by copyright into the entry of channels as well as imported goods after clearance by customs and to preserve relevant evidence concerning the alleged infringement.<sup>54</sup>

Civil remedies are remedies that look at the compensation of the copyright owner for the economic injury that is suffered because of the infringement and this is in the form of monetary damages, and creates an effective means to deter someone from further infringement and in most cases the courts destroy the materials that have been used for producing such copies. An injunction may also be issued against such acts, failure to comply with the order subjects the infringer to a payment of a fine.<sup>55</sup>

Criminal sanctions intend to punish those who willfully infringe copyright works and related rights on a commercial scale, and like civil remedies, to deter further infringement. The purpose

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<sup>53</sup> Chapter 406 of the Laws of Zambia, Part iii

<sup>54</sup> Chapter 406 of the Laws of Zambia, Section 26

<sup>55</sup> Chapter 406 of the Laws of Zambia, Section 25

of punishment is served by the imposition of substantial fines, and by sentences of imprisonment to those applied to crimes of a similar nature.<sup>56</sup> Measures to be taken at the border deal with actions that are taken by the customs authorities rather than by the courts. It enables the copyright owner to prohibit the importation of infringing copies as well as suspending the release into circulation of goods which are suspected of infringing copyright. There is need for there to be a prima facie evidence of the infringement.<sup>57</sup>

Under the Copyright and Performance Rights Act, copyright arises even though an application for protection has not been made because protection exists as soon as the work is written or comes into being. What this means is that copyright arises automatically upon creation. Any infringement or interference in copyright is actionable in court at the suit of the copyright owner. In a suit for copyright infringement, the plaintiff need not provide proof for actual damages.<sup>58</sup>

International copyright is concerned with treaties or conventions between nations requiring their signatories to respect, in their own countries, the copyright of nationals of other signatories. There is no general principle of international law requiring such protection. In some countries, such conventions or treaties are regarded by the courts as part of the law of the land but, in the United Kingdom, this is not the case. The courts, except in very limited circumstances, are not concerned to interpret treaties or conventions, but only Acts of parliament and Orders in Council made for the purpose of giving effect thereto. In considering copyright from an international

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<sup>56</sup> Chapter 406 of the Laws of Zambia, Section 28

<sup>57</sup> Chapter 406 of the Laws of Zambia, Section 27

<sup>58</sup> Chapter 406 of the Laws of Zambia, Section 25 (3)

aspect, there is need to deal with the general body of conventions and treaties regulating the copyright relations between different countries.<sup>59</sup>

## **4.2 ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS WITHIN THE ZAMBIAN CRIMINAL PROCEDURE PERSPECTIVE.**

The fundamental issue that must be appreciated is the mere fact that intellectual property laws do not generally criminalize intellectual property infringement. However, what is observed is that whenever there is an overlap between civil and criminal liability, the right holder has a choice whether to pursue the one or the other route.<sup>60</sup> In light of this, Article 61 of TRIPS makes criminal procedures and penalties that include imprisonment and monetary fines sufficient to provide a deterrent obligation. The Copyright and Performance Rights Act provides for certain criminal offences for copyright infringement.<sup>61</sup>

Zambian criminal law and procedure on intellectual property infringement is largely confined to counterfeit and piracy. This is due to the fact that piracy and counterfeit products have grossly dominated the market in Zambia and hence the need to attach criminality to intellectual property with the hope of deterring offenders. The local police and the Director of Public Prosecution office (DPP)<sup>62</sup> have jurisdiction over any matter relating to any alleged crimes. However, what happens in reality is that the police do not execute their duties, notwithstanding the fact that they are charged with the duty to investigate and reasonably prosecute criminal matters in conjunction with the DPP's office.

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<sup>59</sup> Hepburn, Samantha J. *Principles of Property Law*. 3<sup>rd</sup> ED. Newport: Cavendish, 2001.

<sup>60</sup> Information obtained from interview with Mr Kenneth Munsamvu (Copyright registrar) dated 21<sup>st</sup> February, 2012: Ministry of Broadcasting and Information services.

<sup>61</sup> Chapter 406 of the Laws of Zambia, Section 28

<sup>62</sup> An office established by the Constitution of Zambia, Article 56: prosecute any criminal ,matter

Some of the reasons that are advanced are that penalties stipulated in the law are weak and cannot effectively deter people from engaging in illegal intellectual property businesses. Most individuals that are involved in the selling of pirated materials anticipate a fine or a suspended sentence and not imprisonment. In the case of *The People v Tembo*,<sup>63</sup> there was overwhelming evidence of piracy and the accused was found guilty and convicted as per provisions of the copyright law. This case would have been a landmark case of the court imposing a custodial sentence but instead, a two years suspended sentence was granted. Ineffective punishment means that the levels of piracy will keep increasing owing to the fact that the culprits are rarely criminalized. In this vein, the author submits that Zambia has a comprehensive legal criminal procedure and institutions that it could use to effectively curb the high levels of piracy.

#### **4.3 ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS VIS-À-VIS ECONOMIC DEVELOPMENT**

The enforcement of intellectual property rights assists in the creation of economic growth.<sup>64</sup> Development is defined differently by different people, it is imperative at the outset that a working definition for the purposes of this paper should be employed. The definition of development takes a broad approach because development as understood in modern times is a multi-faceted concept.

As Todaro, M writes in his book, **ECONOMIC DEVELOPMENT**,<sup>65</sup> “Development must be conceived as a multi-dimensional process involving major changes in social structures, popular attitudes, and national institutions, as well as the acceleration of economic growth, the reduction

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<sup>63</sup> (1999) Z.R 112

<sup>64</sup> C Fink and K E Maskus, *Intellectual Property and Development* (New York: Cavendish Publishing Ltd, 2009), 2

<sup>65</sup> M Todaro & S Smith, *Economic Development*, 10<sup>th</sup> edition (Dehli: Pearsons Ltd, 2010), 51

of inequality, and the eradication of poverty. Development must be regarded as a transition from a condition of life widely perceived as unsatisfactory toward a situation or condition of life regarded as materially and spiritually better.”

It must be noted that intellectual property laws, copyright laws in particular, is being presented as a possible major player in a country’s development efforts and must thus be given its just recognition, especially in developing countries which are lagging behind like Zambia.

There is a strong link between development on one hand and creativity on the other. A number of reasons have been advanced as to why certain countries get richer whereas others are getting poorer. It is clear that development in most of these developed countries depend on how the human mind tends to operate when it comes to creativity and innovation and that one of the essential elements is property rights. In the digital age among such property rights are intellectual property rights that are becoming important by the day as most activities that people engage in are knowledge driven.

The preface to the guide to the Berne Convention states that; “Copyright, for its parts 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 the authors to create; the greater the number of a country’s intellectual creations, the higher it is renown and indeed in the final analysis, encouragement of intellectual property creation is one of the basic prerequisites of all social, economic and cultural development.”

It is in this regard that most developed countries have expressed their commitment to the incorporation of the intellectual property as a relevant tool to enhance cultural values and thus

regarding them as of the essence for the progress or development of the society. Even with the good investment climate, it can be submitted that Zambia has not done enough to embrace and put on its agenda the important aspect of intellectual property. Little has been done in ensuring that a good intellectual property policy blended with the political will to attain an intellectual property policy oriented society, there is need for the country to be working on this goal if it is to attain this objective.

#### **4.4 ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES**

Section 25 of the Copyright and Performance Rights Act provides a number of remedies for copyright infringement. It states that such an infringement is actionable in the court at the suit of the owner of the copyright. The remedies for copyright infringement are the same as those that are available for the infringement of any other property right.<sup>66</sup>

It is important to note that Zambia is endeavoring to provide a fair and equitable environment in the manner it handles its civil proceedings. Principles on Impartiality by the courts are strictly adhered to. In this respect, it can be seen that Zambia is seen to be striving to achieve the objective of Section 45 of the TRIPS Agreement.

It is important to note that in an action for copyright infringement, proof of actual damage shall not be needed.<sup>67</sup> An individual can pray to court in the event of infringement of copyright laws pending the full determination of the case. Before one can be successful on this remedy, it must be established that there is a threatened or an apprehended injury; that there is a serious question

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<sup>66</sup> Chapter 406 of the Laws of Zambia, Section 25 (2)

<sup>67</sup> Chapter 406 of the Laws of Zambia, Section 25(3)

to be tried; that the balance of the convenience favours the grant of an injunction and that the applicant has no other satisfactory remedy. It is in these circumstances that the court will issue out an order that is commonly known as an *Anton Piller Order* for the search and seizure and the *mareva* injunction to prevent the defendant from removing or disposing off his assets.<sup>68</sup>

It should be stated that the grant of an injunction does not mean the end of the action but rather it is a means for a status quo, until the matter is amicably adjudicated upon to its final conclusion. Damages are granted to the author of the copyright works whose works have been infringed and this is to compensate the plaintiff for the harm or injury that is caused by the defendant without any justifiable cause. The granting of damages aims at placing the plaintiff in the position he would have been in had the damage not occurred.<sup>69</sup> With respect to punitive damages, it should be noted that the courts in Zambia are reluctant to award such damages owing to the fact that intellectual property law is seldom criminalized.

In line with the border measures, it is important to note that at the international level, the TRIPS Agreement provides the procedure for the exercise of border controls. Article 51 of the TRIPS Agreement puts emphasis on the fact that members are obliged to implement border measures which enable a right holder who has valid grounds for suspecting that the importation of the pirated goods may have taken place.

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<sup>68</sup> Anton Piller Orders originated in the U.K and are permitted in all common law jurisdictions.

<sup>69</sup> Cornish and Llewelyn, *Intellectual Property: Patent, Copyright, Trademarks and Allied right*, 5<sup>th</sup> edition, (London , Sweet and Maxwell, 2003), 74

#### **4.5 A COMPARATIVE STUDY OF ZAMBIA AND THE UNITED KINGDOM ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: AN OVERVIEW.**

The United Kingdom is party to several international treaties which have influenced the British copyright law.<sup>70</sup> In the United Kingdom, the international treaties and conventions are not regarded as self executing; domestic legislation is needed in order to give effect to the treaty obligations and to become part of the British law. The British courts as it is known just interpret the Acts of Parliament and Orders in council which implemented the provisions of the international treaties into national law, not the international treaties themselves. The most significant treaties on Intellectual property laws under the United Kingdom include:

##### **1. The Berne Convention for the protection of Literary and Artistic works (1886)**

*The Berne Convention is an important international treaty that looks at the issues of copyright and related rights. Its provisions entered into force in the United Kingdom on 5<sup>th</sup> December, 1887. The treaty has been amended several times. It had an influence on the development of British Copyright law. It contains three basic principles: adopted the principle of 'national treatment'.*

This means that the signatory must not discriminate between the works originating from a national author and from an author of a contracting state. The second principle is that the protection must be granted automatically and must be free from compliance with any formalities. Thirdly, this protection has to be independent of the protection in the country of origin. Article 8 of the Berne Convention provides that the signatories must provide for

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<sup>70</sup> Copinger and Skone James on *Copyright*,(1994), 2-4

minimum standards of protection. Article 6bis of the Convention commands the member states to give authors moral rights and integrity rights.

## **2. The Rome Convention for the protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961)**

*“The Berne Convention does not cover the protection of performers, producers of phonograms and broadcasters.”<sup>71</sup> This is why the Rome Convention was signed in 1961. The central provision is the principle of ‘national treatment’, like in the Berne Convention. The Rome Convention obliges its signatories to grant these creators substantive rights. Part II CDPA 1988 provides several rights outlined in the Rome Convention”.*

## **3. TRIPS (1994)**

*TRIPS is an international treaty that is administered by the World Trade Organization (W.T.O).<sup>72</sup> Since the U.K is a member of the W.T.O, it’s laws have to be in line with the provisions of the TRIPS. TRIPS covers all the areas of the intellectual property laws and lays down the minimum standards of protection. It is the most comprehensive international treaty on Intellectual Property. There is need for all the W.T.O members to recognize the provisions that are laid down.*

It is important to note that in the U.K, TRIPS does not have direct effects on the national. The High Court in the case of *Lenzing Attorney General v Courfauld (fibres) ltd*,<sup>73</sup> it was held that TRIPS is not directly applied in the U.K. It argued that neither the words of Art. 1 (1) of TRIPS

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<sup>71</sup> Rome Convention, Article 2 (1), Article 9.

<sup>72</sup> The Agreement on Trade Related Aspects of Intellectual Property Rights, 1994

<sup>73</sup> (1997) RPC 245

indicate that TRIPS was to have direct effect in member states, nor the nature of the WTO as an international organization administering the international agreements. It was also stated that Article 32 of TRIPS is too ambiguous to have direct effect.

As earlier stated, Zambia tends to enforce intellectual property laws within the criminal procedure perspective, vis-à-vis economic growth as well as through the civil and administrative procedures and remedies. The United Kingdom has also outlined its legal structure on the protection of copyright and related rights as well as the enforcement of intellectual property rights. In determining how these two countries enforce Copyright and Related Rights, it must be stated that the Copyright law throughout the British Empire accounts for the similarities in Copyright Law between the United Kingdom and countries such as Zambia and South Africa.<sup>74</sup> Like in Zambia, Copyright is automatic in the United Kingdom and is generally enforced by the copyright owner. When one's work is infringed upon, an individual can seek redress from the courts and remedies like injunctions, damages for infringement or orders to deliver up infringing goods are usually granted.

As has been shown above, the United Kingdom is a member to several international Conventions in this field, notably the Berne Convention for the protection of Literary and Artistic works and TRIPS Agreement. In enforcing the Intellectual Property Rights, the United Kingdom points to the fact that development of an indigenous scientific and technological capacity is essential to a good intellectual property system. There is need to give an explicit recognition to both the benefits and costs of Intellectual Property protection and the corresponding need to adjust domestic regimes in developing countries to ensure that the costs do not outweigh the benefits.

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<sup>74</sup> G M Kanja (2006), 20

Zambia, in enforcing current copyright laws, aims at ensuring that they are in conformity with the international Conventions. The international level has a profound influence worldwide in the development of intellectual property rights and they enact different remedies that an intellectual property rights holder can seek to enforce and as such, there is need to enact laws that conform to international conventions so as to be in line with the international standards of intellectual property protection.

The TRIPS Agreement for instance looks at the enforcement standards, being the procedures and remedies available for effective enforcement. Part III of the TRIPS agreement establishes a set of obligations and further incorporates minimum standards that member states are obliged to adhere to for purposes of enforcing intellectual property rights. This implies that members are under a basic obligation to ensure that they have enforcement procedures, which facilitate right holders to take the effective actions against the infringement of any intellectual property rights covered by the agreement.<sup>75</sup> From this provision, it can be seen that the TRIPS Agreement sets up the general principles of enforcement and obligations for precise areas being: Civil and Administrative measures, Border measures and Criminal procedures. On the earlier discussion on the enforcement of intellectual property in the Zambian context, it can be seen that Zambia is trying to achieve such principles in its attempt to enforce intellectual property laws. The United Kingdom being signatory to this treaty are under an obligation to abide by such principles.<sup>76</sup>

As a result of the perceived complexity of the English legal system, not only in the intellectual property but in litigation cases generally, significant changes to civil law procedure were made in 1999 and this is what is referred to as the Woolf Reforms and were consolidated by new rules

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<sup>75</sup> TRIPS Agreement, Article 41 (1).

<sup>76</sup> P A Dubois & J Shepherd, *Enforcement of Intellectual Property rights* (New York: Norton & Company, 1999), 43

and procedures for intellectual property disputes which came into force in April 2003. These have introduced simplified procedures, giving the courts much greater control over, and responsibility for managing litigation and providing a more efficient, effective and faster route of enforcing intellectual property laws.<sup>77</sup> This is done in conjunction with the specialized and scientifically literate intellectual property judges who sit on the English Bench, availability of the broad disclosure, the international regard for English judgments and the six- year limitation period in which proceedings may be commenced, make England a key jurisdiction in which to enforce intellectual property.

Intellectual Property in England is characterized by pre- action protocols, need to prepare case before filing a suit, specialized Intellectual Property judiciary, Adversarial system, choice of venue and speedy trial, Automatic disclosure, oral evidence, availability of emergency relief, single court dealing with both validity and infringement issues, case management as well as the perceived weight of judgment.<sup>78</sup> Comparing this to the Zambian system, it can be seen that our legal system is also characterized by similar principles. However, one has neither choice of venue nor a speedy trial to such cases and this is because of the congested calendar of the High Court which is flooded with cases and as such these cases are not easily disposed. It is because of the need for speedy trials that the Copyright and Performance Rights Act Amendment (No. 25 of 2010) Section 2 of the principle Act includes the Magistrate court to the already existing High Court to what constitutes a court under the Act to look into issues of intellectual property laws.

Proceedings may be commenced in one of two tiers of the English courts: the High Court (Chancery Division) or in the Patents Court (a specialized court within the chancery division

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<sup>77</sup> Bentley and Sherman, *Intellectual Property Law* (London: Sweet & Maxwell, 2003), 37

<sup>78</sup> Bentley and Sherman, (2003), 56

which deals exclusively with patents, registered designs and semiconductor topographic cases) or the Patents County Court. In Zambia, however, such cases are only presented before the High Court and the Magistrate Court. There is no specialized court that looks at the issues of intellectual property laws. In creating a more efficient and effective enforcement of intellectual property law, there is need for Zambia to take measures to create an independent court that will only specialize in such matters for speedy trials.

The English Intellectual Property courts have a variety of remedies available at their disposal to compensate the claimant for the damages that are suffered including: damages, an account of profits in lieu of damages, injunctive relief. Damages are essentially compensatory in nature to indemnify the claimant. Although the English courts do not award punitive damages other than in certain copyright cases where willful conduct can be shown, the courts recognize that infringement of IP rights usually causes damages to the claimant.

#### **4.6 CONCLUSION**

This chapter has shown how intellectual property rights protect the interests of creators by giving them property rights over their creations. The importance of protecting intellectual property is recognized in a number of instruments, and the reasons for having laws to protect these intellectual property is to give statutory expression to the moral and economic rights of creators, as well as promote creativity, encourage fair trade which would contribute to social and economic development. Essentially for intellectual property to be appreciated and seen to be an essential tool to the economy, there is need to create an effective and efficient system that would ensure that intellectual property rights are respected, recognized and enforced. There is need to create a conducive or enabling atmosphere for consistent research and development, foreign

direct investment and technology transfer is guaranteed. This is what seems to be the challenge that most developing countries face.

## CHAPTER FIVE

### RECOMMENDATIONS AND CONCLUSION

#### 5.1 GENERAL CONCLUSION

As has been shown in the paper, Copyright protection plays an essential role in promoting, enriching and disseminating the national cultural heritage. Copyright infringement is seen to be profitable but the profits are only beneficial to a few at the expense of the majority. A country's development depends to a great extent on the creativity of its people and the encouragement of individual's creativity is an essential tool for development. Economic trends have shown that a nation's ability to generate wealth and protect its cultural heritage depends on its access to and use of the intellectual property system. Intellectual property should be approached in the context of broader societal interests and developments and these are the related concerns in Article 7 of TRIPS. The right of the country's to implement their international obligations in accordance with their own legal systems and practices as clearly foreseen by Article 1.1 of the TRIPS should be safeguarded.<sup>79</sup>

#### 5.2 RECOMMENDATIONS

1. Essentially, there is need to make people aware of the value of intellectual property and the essential role it plays in contributing to the economic growth of the country. Musicians must be enlightened on the importance of their rights. This can only be achieved by putting in place education programs that are designed to help the public as

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<sup>79</sup> (WIPO, General Assembly, 31<sup>st</sup> Extraordinary Session, Geneva, September 27<sup>th</sup> October: 2004, Proposal by Argentina and Brazil for the establishment Development Agenda of WIPO, See [www. Wipo.int.](http://www.Wipo.int))

well as the musicians on their rights and how best they can manage them. As has been shown in the preceding Chapter, Zambia does not lack the necessary minimum law for a just, fair and prosperous society.

2. There is also need to bridge the widening gap that exists between the developed and developing countries. As seen in the paper, the developed countries are deemed to have an equally effective and comprehensive intellectual property system. The developing countries are disadvantaged because they do not have the technical, material and legal structures that are necessary to support and further development in this arena with the capacity to make significant contributions to a country's Gross Domestic Product (GDP).
3. As regard to the international Intellectual Property Rights regime, there is need to involve the developing countries in the formulation of the international property policy. In the framework of the World Trade Organization, paragraph 19 of the Doha Ministerial Declaration in setting a mandate for the TRIPS Council in the context of the DOHA Agenda refers explicitly to the need to take fully into account the developing Countries dimensions.
4. There is need to implement the use of the holograms for security purposes. The hologram is an effective and efficient tool that can be relied upon especially in curbing the problem of the increasing levels of piracy. An essential part of piracy is that the unauthorized activity is carried on for a commercial gain. This element of commercial gain implies that piracy will often be carried out on an organized basis; The unauthorized reproduction of a work involved, and the subsequent sale or distribution of the illegally reproduced work require some form of organized distribution network or contact with the potential customers. Because of this, there is need for the government to ensure that the holograms

are made effective and this can only be achieved by the government releasing sufficient funds to implement the holograms. It is for this reason that Zambia should create mechanisms within its border control systems so as to curb the large quantities of pirated works that have flooded the Zambian market. Need for the implementation of the holograms because the pirated goods are substantially undermining the legitimate business to the extent that international companies often withdraw from the market to invest because the high levels of piracy do not create a good investment climate.

5. In protecting the Copyright owners, there is need for Zambia to domesticate the several Conventions that Zambia is a signatory to and this in itself will make it easy for the enforcement of the Copyright laws. The effect of domestication is such that a country is bound by whatever agreement that it enters into failure to which will be subjected to a penalty. There is also need for Zambia like is the case in the United Kingdom to come up with an independent court to look into issues of intellectual property laws.
6. There is need for the government to have an enthusiastic political will to harness resources and fund copyright law rights institutions, like the courts and the police wings involved. It is also important to train the police so as to help in protecting the copyright and related rights of the authors by ensuring that they do not just rely on the suits that are brought by the owners of the copyright works but to also ensure that they deter the public from engaging in such infringement. Government must also consider creating incentives for local producers of copyrightable works so as to produce their works at reduced amounts thus reducing the infringement cases.
7. As has been shown in the preceding chapter, criminalizing the offenders that infringe copyright laws is very essential in the enforcement of intellectual property laws in the

digital age. The issue of predictability by the offenders on the suspended sentences as well as fines must be done away with and the courts must ensure that such offenders are criminalized so as to ensure that the issues to do with predictability are done away with.

8. Zambia is lagging behind in the enforcement of the Copyright and Related rights and this is because of the advancement in technology in the digital age. The development of digital media and computer network technologies has led to a number of challenges in enforcing copyright laws and it is because of this that there is need to keep pace on the new dimension that knowledge is being transmitted. Protected works are now digitized, compressed, uploaded, downloaded and distributed all over the world via internet, thus the need for the owner's copyright works to be protected. There is need to come up with the solutions to enforce such rights in that the ever increasing opportunities offered to the rights' holders by the internet are affecting the conditions, exercise and management of the copyright and related rights.

### **5.3 CONCLUSION**

In the main, the paper has attempted to elaborate on the significance of the enforcement of intellectual property rights (copyright and related rights) in the Zambian context and reference was made to the United Kingdom context as was shown in the comparative study. It has also attempted to show how a country's development depends to a very great extent on the creativity and innovation of its people. Like the industrialized countries, the greater the number of a country's intellectual property, the higher its renown and the encouragement of intellectual creation is one of the prerequisites of all social, economic and cultural development. As evidenced, Zambia has a comprehensive legal regime on intellectual property and the paper's contention is that there is need for a consistent, effective and efficient implementation of these

laws to create a good investment climate both internationally and locally on intellectual property laws.

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