

The SAGE Handbook of Intellectual Property

Musical Property Rights Regimes in Tanzania and Kenya after TRIPS

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Book Title: The SAGE Handbook of Intellectual Property

Chapter Title: " Musical Property Rights Regimes in Tanzania and Kenya after TRIPS"

Pub. Date: 2015

Access Date: April 17, 2015

Publishing Company: SAGE Publications Ltd

City: 55 City Road

Print ISBN: 9781446266342

Online ISBN: 9781473910027

DOI: <http://dx.doi.org/10.4135/9781473910027.n9>

Print pages: 148-165

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<http://dx.doi.org/10.4135/9781473910027.n9>

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Chapter 8: Musical Property Rights Regimes in Tanzania and Kenya after TRIPS

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Introduction

During the late 1990s and into the 2000s, over 30 African countries updated their intellectual property rights laws. The push to update these laws, many of which had been in place since the colonial era, came from several interests. Local artists, record companies and musicians' organizations in Kenya, Uganda and Tanzania, for instance, brought concerns about the outdated laws in their countries to government officials and ministers of trade. Through marches, protests, negotiations and court cases, these stakeholders encouraged the government to establish new legislation to better protect original compositions. In Uganda, local artists lobbied the Ministry of Justice and the Office of Constitutional Affairs, beginning in 1988 (Jjuuko 2002). In Kenya, artists established organizations and lobbied for better enforcement. In response, several elected officials in East Africa stated that they understood the cultural significance of the arts but were reluctant to acknowledge the economic potential of local music and, therefore, the need to update laws to protect the rights of artists.¹

The prevailing push to update copyright legislation in African countries came from the Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement). TRIPS is a World Trade Organization (WTO) agreement that requires any member country to update laws pertaining to patents, trademark and copyright. On January 1, 1995, many countries, including Kenya, Uganda and Tanzania, became members of the WTO, which meant that they officially had to update their intellectual property rights

(IPR) legislation by a given deadline. Each East African country needed to comply with TRIPS by either 2005 (for developing countries, such as Kenya) or 2021 (for less developed countries, such as Tanzania and Uganda).² In order to address the significantly outdated laws, however, each country passed new legislation well before their deadlines. In terms of copyright law, Tanzania updated their laws in 1999, followed by Kenya in 2001, and Uganda in 2006. Each of these countries also became members of the African Regional Intellectual Property Organization (ARIPO), which requires countries to harmonize their laws with other member countries, and the East African Community (EAC), which aims to promote national and regional protection of IPR.

Despite the passage of relatively uniform copyright legislation throughout East Africa [p. 149 ↓] and the formation of regional organizations meant to further standardize these laws, the protection of musical works in East African creative industries has varied significantly within and between each country. While enforcement remains weak throughout East Africa, each country has also taken a different path in the implementation of copyright policies meant to support musical property rights. These different trajectories can be explained, in large part, by the particular political, social and economic paths taken by East African countries toward the neoliberal present. In broad terms, Kenya is often referred to as a commercial center for East Africa with a stronger formal economy, international trade networks, and historic support for the commercialization of music. Kenya, however, has also suffered from high levels of crime, political violence, and despotic leadership, which have collectively hampered the development of a live music scene. Tanzania, in contrast, has been politically stable since independence though cracks in its peaceful image have emerged more recently. More practically, Tanzania supports a large live music scene in part due to the relative safety of its cities and towns, but has never been considered as commercially vibrant as its northern neighbor despite the prominence of Tanzania's music economy during the 2000s.

The particularities of each country's political, social and economic environments shape the daily routines of music in these countries and impact the legal landscapes of musical rights. Each country approaches legal matters from the perspective best suited to the interests of the nation and individuals who work with the laws and music. This can range from the strength of collective management organizations meant to collect

royalties on behalf of rights holders to the willingness of local media outlets to pay for the right to play music on their stations. Understanding these differences illustrates the ways that similar legal frameworks can take on new meanings within local contexts. Rather than consider normative properties of intellectual property rights, we argue that it is important to recognize the contexts of law, as well as contestations over who has the power and authority to construct its meaning (Benda-Beckmann et al. 2009: 3). An examination of different trajectories in Tanzania and Kenya can thereby move away from univocal interpretations of law and, instead, recognize the potentially divergent outcomes of similar legal frameworks.

In order to understand the different trajectories of copyright law in East Africa, the next two sections explore political, social and economic circumstances of post-TRIPS reforms on musical property rights regimes in Tanzania and Kenya. We describe the ways in which these different trajectories are animated by historical differences between the two countries with respect to: (1) language and educational policy; (2) the culture of bureaucracy; (3) the organization of musical unions and collective management organizations; and (4) state orientations toward music as national culture. A significant argument is that efforts to harmonize copyright legislation through TRIPS, as well as various regional organizations, has not been strong enough to counter local interests in and conceptions of rights, property and music. Instead, the specific environments that absorb these laws reinterpret their meaning based on the specific lived experiences of those who can exert the most control over them. Without comprehending these differences, attempts to standardize intellectual property rights policy in the region may remain unpredictable and often unsuccessful.

Copyright Law and Music in Tanzania

On April 13, 1999, the Copyright and Neighboring Rights Bill was introduced to the Tanzanian Parliament. On the following day, members of parliament debated the law's merits and disadvantages. The Minister of Industry and Commerce, Iddi Simba, started the discussion: 'The law that existed [p. 150 ↓] before was blind and left an opening for composers and artists of these works to fail to receive payment from their work, which, from time to time, benefited businessmen in and outside this country' (United Republic

of Tanzania 1999: 18).³ In his speech, Simba went on to explain the importance of protecting the rights of composers and creators. He made it clear that passing a comprehensive and up-to-date Copyright Act would benefit the country's entrance into international trade agreements, namely TRIPS, which would thereby allow Tanzania to continue to be recognized as a trading partner with other members of the WTO. Without passing up-to-date legislation, Tanzania could find itself facing trade sanctions.

The bill quickly passed through Parliament and on June 4, President Mkapa signed the 1999 Copyright and Neighboring Rights Act into law. But, the passing of the law was far easier than what lay ahead. There were numerous conceptions of ownership in Tanzania and little consensus among anyone, including members of parliament and legal scholars, as to the best means of enforcing the Act. Very few lawyers and judges had knowledge of or training in copyright law. Customs officials were unsure of their role in hindering the importation of pirated goods. Even musicians, who were the ones who had potentially the most to gain from the introduction of the law, were unable to agree on the best way to move forward. While it took over a decade to push a copyright bill through Parliament, it appeared far more daunting by the early 2000s to actually administer and enforce the parameters of the Act.

The difficulty in implementing and enforcing the Copyright Act came from a number of sources. Perhaps one of the more obvious problems was that the law was initially only discussed, debated and printed in English. Most Tanzanians rely on Swahili in daily life, including in primary and secondary education, the informal economy and in the home. Most television and radio stations throughout the country use Swahili, though there are a number of significant exceptions. English, on the other hand, tends to be favored by the more elite members of society, including those working in commercial businesses, institutions of higher education and various branches of government. For the law to be effective, particularly in protecting rights holders, it would need to be explained and explored in Swahili.

Over the next decade, many more meetings, organized by international and local organizations, continued to present the importance of intellectual property rights. Those held by international organizations tended to be conducted in English, though translators were present at a few. At these meetings, the task of explaining

and debating the implementation, enforcement and effectiveness of copyright law frequently came from non-Tanzanians, such as lawyers, staff of international copyright organizations, or copyright administrators from neighboring countries. While well versed in copyright law, these individuals were far less knowledgeable about issues related to Tanzanian music and business. They also needed to rely on English to discuss copyright matters, which meant that they would alienate many in the audience.

At one conference organized in April 2001 by the United States Embassy, titled 'Understanding and Enforcing Copyright in Tanzania', artists, lawyers, judges, police officers, custom officials, and others heard talks about the meaning of copyright law, its enforcement in East Africa, and particular policies that impacted each of the groups of people attending. Conducted mostly in English, in part because the main speakers came from outside of Tanzania, the long speeches on legal issues frustrated an audience wanting to hear about the basics of the law. During the question session, many people stood up, concerned and angered, asking about the meaning and potential future benefits of the law. All of the questions came in Swahili, and it was clear that few had understood the content of the entire day-long session.

Even when these meetings were well-organized and planned, with specialized workshops on issues that could significantly [p. 151 ↓] impact local practices, participants frequently grew frustrated at the use of English and the challenging content of the meetings that often assumed basic knowledge of intellectual property rights. Whereas there was widespread interest in these meetings in the early 2000s, far fewer artists attended later in the decade due to frustration in comprehending the content of the sessions.

Those meetings presented by local organizations in Swahili also tended to be unproductive since the individuals who were given the task of lecturing about IPR in Swahili were often not experts in the field. Organized by state institutions, including the National Arts Council (BASATA), the Business Registration and Licensing Agency (BRELA), and the Copyright Society of Tanzania (COSOTA), as well as independent musicians' organizations, such as the Tanzanian Music Dance Association (CHAMUDATA), meeting organizers often had difficulty finding people knowledgeable about both copyright policies and the local music economy. A few key people, such as Ruyembe Mulimba, who started the organization Rulu Arts Promoters, and John

Kitime, a musician and copyright activist, became prominent figures in the local music scene due to their ability to understand the complexities of copyright law and the music business, which they could then communicate in Swahili. Kitime, who is now a board member of BASATA and the chairman of the Tanzanian Musicians Network, was vocal in both lobbying for legislative changes and educating musicians on ways to protect their works. Despite the effort of these individuals, however, there remained a gulf between various stakeholders. Those who had better familiarity with English could read the law, search online for discussions about copyright law, and even contact international rights organizations with questions. Those less familiar with English had to rely on the few organizations, individuals and publications that could provide them with a basic understanding of the law.

The reliance on Swahili, which was historically an effort by the Tanzanian government to unite local populations and promote local traditions, also had broader impacts that indirectly related to people's comprehension of IPR. The lack of fluency in English prevented many citizens from continuing their education overseas or working with individuals from other parts of the world. In the fall semester of 2011, for instance, there were 3,898 new Kenyan students enrolled in American universities, whereas there were only 950 new Tanzanian students (Mugwe 2013, see also Ishengoma 2008: 433). The inability to attain overseas training has meant that there are fewer formalized academic or business relationships between Tanzania and other parts of the world. While language is not the only reason for the paucity of these relationships and partnerships – Kenyans' greater financial wealth and stronger ties to Europe also play a significant role – Tanzania's particular approach to and use of language has prevented stronger knowledge of foreign policies, laws and economic practices among ordinary citizens.

One group that spoke English fluently in Tanzania and used their knowledge of English to better understand copyright law was Asian traders. Asians is a term used in East Africa to refer to people of South Asian descent, most of whom trace their roots in the region to the influx of Indian traders and indentured laborers in the nineteenth century (Mangat 1969). During the 1930s, members of this community became instrumental in the distribution and sale of records imported from either overseas or South Africa. By the 1980s, some Asian traders also expanded their businesses to include the unlicensed sale of both local and foreign cassettes. These traders became so dominant

that they managed to saturate markets controlling many music economies in eastern and southern Africa. Their dominance in the 1990s was so significant that copyright officials in other countries, such as Malawi, Uganda and Kenya, commented that their musicians often lost money on the sale of their music to Tanzanian traders only a few days after an album was released in their country.[p. 152 ↓]

Part of the success of these traders came from the extensive networks that had been historically established in the region. Asian businessmen often had family or trade networks that stretched from North America and Europe to various parts of East Africa, which allowed them to gain access to the latest music both internationally and locally. They could then duplicate and circulate a wide variety of music throughout the region. Outside of major cities, such as Dar es Salaam and Nairobi, few people were familiar with copyright law, which allowed the traders to continue with their business unimpeded even after the Copyright Act became law. These businesses became so effective that new albums could arrive in Tanzania from another country on the day they were released and be duplicated and redistributed within two days. These unlicensed copies also looked identical to the original cassette tapes or compact discs.

Knowledge of English among Asian traders proved to be an effective tool for keeping track of copyright law and its enforcement. Several of these traders attended copyright sessions, served on boards or committees that aimed to enforce copyright law, and took part in WIPO workshops in East Africa. Their fluency of English gave them a distinct advantage over many other people who attended these meetings, including musicians, artists and other businessmen working in the formal economy. The traders could easily follow the law's development, present their perspective on the best way to enforce the law, and keep up with the latest approaches to preventing the piracy of music. This astute business practice became an advantage as the traders could simultaneously keep track of advances in the law and find alternative methods for promoting their products, whether legally or illegally.

Though many Tanzanian artists and members of foreign music industries label these traders as 'pirates', it is important to realize that they operated in the equally 'informal' (i.e. unregulated) economies that dominated Tanzania during the 1980s and 1990s. Their role in creating vast distribution networks helped to establish a vibrant music economy in the country. Certainly, previous generations of Asian traders

benefitted from colonial rule, under which they often became important in local markets. In Kariakoo, for instance, a district of Dar es Salaam currently known as Tanzania's music distribution center, Indian traders controlled 396 of the 420 trading sites as early as 1927 (Brennan 2012: 38). After independence, however, this population was heavily maligned, opportunities to promote their companies were refused, and many had their businesses nationalized. Their political vulnerability meant that they used their extensive regional and international trade networks as a means to fortify their economic positions. By the late 1990s, after socialism ended, these networks ultimately gave the traders an advantage, which some used to promote the commercialization of local music through circulating recordings throughout the region. This would eventually provide opportunities to grow a viable local music market and, through the influence and perseverance of local musicians, encourage the distribution of legitimate albums (Perullo 2011).

Aside from tribulations posed by the use of language and the informal economy, another difficulty in enforcing the 1999 Copyright Act came from the historical relations of ownership and property in Tanzania. Tanzania gained independence from British colonial rule in 1961 and, under the leadership of President Julius Nyerere, the country moved toward establishing unified national policies. Drawing on a combination of neo-traditional ideologies and pan-African notions of community and development, Nyerere promoted racial and ethnic unification with a single-party government that represented the entire population. He emphasized policies that unified over 200 ethnic groups into a population committed to promoting a coherent nationalist vision. And, as already noted, the government promoted a single language, Swahili, in all trade, government activities, education, and even in art (music, theater, literature) to further these efforts. As the Tanzanian writer Godfrey Mwakikagile states, Nyerere [p. 153 ↓] was, 'the most successful African leader to unite different tribes and races to achieve national unity. No other African country is as united as Tanzania, in spite of the large number of tribes and racial minorities we have in the country, one of the largest in Africa' (Mwakikagile 2007: 628).

By the late 1960s, the country had moved toward socialist policies, particularly in promoting notions of self-reliance, single-party government and community-based living. Most industries in the country were nationalized, and ownership of land, property and businesses went to the government. Any private entities that remained either struggled to remain solvent or had to work through government agencies to import goods or

trade locally. The combination of socialist policies and nationalist efforts encouraged individuals to conceptualize property as either controlled by the state for the betterment of the people or as a national entity. Even today, the concept of private ownership in property, such as land, does not exist. Individuals and/or groups can only have the right to occupy or lease land for a particular duration of time (Sheuya 2010: 3). This notion of temporarily owning physical land in many ways relates to the view that many Tanzanians have toward music, particularly traditional music: it is shared and used, but not owned by individuals.

The development of law in the 1970s and 1980s took on many socialist ideologies and practices. In an article in the journal *Change*, C.K. Mtaki, a lecturer in law at the University of Dar es Salaam, discusses the transition that Tanzania's legal system underwent to accommodate the socialist political system. He writes, 'To give effect to the new [socialist] policies, a well calculated intervention in the legal system ... was made, specifically to inject in some new "socialist tailored legislation" that would cater for an economy dominated by state enterprises' (Mtaki 1996: 4). The movement toward a socialist legal system made individual ownership a contradiction of social practice. In terms of intellectual property rights, most individuals had no legal basis to complain about trademark, patent or copyright infringement, since the government owned, directly or indirectly, most of the works being produced. Even music, typically recorded at state-run studios, became the property of the government. Musicians had no legal basis on which to claim ownership of these works. One of the only options available to musicians to claim rights in compositions was to record their music outside the country, particularly in Kenya.

When the 1999 Copyright Act became law, many musicians understood that they now had rights in their lyrics, music and recordings. They could protect their compositions and attain royalties from the use of their songs on the radio (publishing rights remain elusive in Tanzania). However, many questions persisted. If songs are composed collectively in a group who owns the rights to the music? If a song uses a traditional rhythm, do you have to add the traditional ethnic group as a composer? And, how do you perform songs from the socialist past, which remain popular, if they are potentially owned by the government? These questions were not easily answered. Local organizations, such as COSOTA, BRELA, BASATA and CHAMUDATA, competed with each other to answer these questions for musicians. This meant that

the leadership of these organizations often did not agree on the best approaches to handle copyright matters such as hindering piracy, paying royalties, establishing a coherent understanding of authorship, and registering artists' original works. Without an institution that could convincingly resolve these issues, an ad-hoc, informal system emerged within the local music economy to establish rights. Different factions emerged around these organizations, each of which promoted unique ideas for determining rights, ownership and royalties in music. The lack of consensus among all stakeholders ultimately meant that there were divergent efforts to establish rights, ownership and royalties within the local music economy.

While the music community had conflicting views on the enforcement and protection [p. 154 ↓] of musicians' rights, many individuals not directly associated with the music economy argued that songs remained a social entity that could not be owned. Many of those who worked in law enforcement, for instance, did not see a reason for confiscating pirated goods. In the early 2000s, customs officials rarely stopped the movement of pirated cassettes because it did not appear illegal. Many members of the public were also unsympathetic with musicians' or artists' claims to royalties. This meant that, many times, artists were criticized for trying to enforce their rights. For instance, in discussions of copyright law with many non-musicians, a consistent argument emerged that there were far more important issues to fight over in Tanzania, including healthcare, poverty, unemployment and education. Copyright, from this vantage point, was a luxury. Even lawyers interviewed as part of this research argued that copyright law in the arts community was less important since there was so little value in litigating a copyright case in court. Legal fees would be more than the amount that could be made from winning a copyright case.

The general malaise among lawyers toward musicians' rights has led to a dearth of legal cases concerning authors' rights. The only cases that have made it before judges are indictments against traders who sell unlicensed sound recordings. These cases are usually filed by the government-run Copyright Society of Tanzania (COSOTA). Even these cases, however, encounter many difficulties. Legal documents are lost or misfiled once they are submitted to the court, while lawyers, adept at foot dragging, stall in bringing cases to court. David Louis Finnegan notes that lawyers in Tanzania often hamper the rule of law through bribing judges, court clerks and other court employees in an attempt to 'obtain either speedier disposition of client matters or beneficial

delays' (2008: 103). There are court verdicts (almost comical for their inversion of statutes) in which judges dismiss cases of piracy claiming that the music distributor is simply operating a business and that the plaintiff, whether a musician or legal music distributor, is infringing on the rights of a legitimate and valued local business. Some of these dismissals may be due to a lack of knowledge about the law, but many people argue that some form of corruption is involved. In a 2012 Afrobarometer survey of 2,400 people in Tanzania, the vast majority of respondents only trusted the courts somewhat (42%) or just a little (20%) while some citizens (6.8%) stated that they did not trust the courts at all. The combined lack of trust and regular reports of bribery often equates to a lack of interest in using the local courts for copyright matters.

Despite the very significant obstacles to trying copyright cases, between 2001 and 2012 COSOTA brought lawsuits against several music distributors and had their inventory of unlicensed cassettes confiscated and destroyed. A small portion of these distributors were also asked to pay fines. These efforts put pressure on illegal music distributors to alter their strategies for selling cassettes. Many distributors avoided selling any pirated materials in Dar es Salaam, where the vast majority of artists and lawyers reside, but continued to move materials throughout eastern and southern Africa. Others found ways to transform their illegal operations into successful legitimate businesses. By 2010, the physical piracy of music cassettes had ceased to be a problem, however, as the massive growth in digital piracy replaced analog piracy in many parts of the country. While analog piracy was starting to be dealt with in some ways, digital piracy has thus far proved to be a far more omnipotent challenge for those interested in protecting the intellectual property of local and foreign musicians.

Given all of the issues discussed thus far, including the dominant use of English in copyright matters, socialist notions of ownership, and corruption in the country's legal system, the most significant factor in limiting the success of copyright matters in Tanzania may be the state-controlled Collective Management Organization (CMO). Most countries have organizations set-up to protect [p. 155 ↓] the rights of copyright holders. There are unions aimed at educating musicians about their rights and collective management organizations established to collect royalties on behalf of rights holders. While Tanzania has had many of these organizations in the past, only one currently has the authority to enforce, protect, register and collect royalties for all Tanzanian artists: the state-run organization, COSOTA.

Many issues arise from having a state-run organization collect royalties on behalf of artists. First, given that many CMOs work to push new amendments, policies and legislation through government, the lack of separation between the state and the CMO in Tanzania can make it difficult to encourage legislation that is in the best interest of rights holders. Second, many artists, particularly in Tanzania, do not believe that government staff are knowledgeable enough in copyright matters to effectively enforce their concerns. And, third, musicians do not trust the government to handle royalties. In two separate surveys conducted in Tanzania by Perullo in 2007/2009, and 2012/2013, most respondents believe that the government misuses funds collected through taxes, foreign aid or the collective management of music. As in other areas of East Africa, corruption is a common part of people's daily lives. Even if high levels of corruption were just a matter of public perception, many rights holders lack confidence in the government to handle funds collected for them. This means that there are regular and frequent complaints about COSOTA's ability to handle the role that they have been assigned by the state.

Despite these issues with a state-run CMO, COSOTA continues to collect royalties on behalf of artists. In the 2012/2013 fiscal year, COSOTA claimed to have collected Tsh98.8 million (US\$62,000) in royalties. COSOTA collects public performance royalties from bars, restaurants, clubs, buses, radio stations, hotels and other establishments that play recorded or live music. The organization also reported that they distributed Tsh88 million to rights holders. In surveys conducted in Dar es Salaam by Perullo in 2012/2013 with 250 Tanzanian musicians, who represent the primary members of COSOTA, 16 individuals stated that they received royalty cheques from COSOTA. Four stated that they received royalties on one occasion from between Tsh30,000 (\$18) to Tsh90,000 (\$55), and seven stated that they received payments between Tsh50,000 (\$31) and Tsh300,000 (\$124) on two or three occasions (four did not write the amounts that they received). Other musicians stated that they did not join COSOTA as they did not want to pay the annual fees (Tsh10,000 for an individual and Tsh50,000 for a band). The majority of the survey respondents, however, stated that they had never received any royalties from the organization. This latter group included well-established older musicians and younger artists who have had a number of popular songs on the radio over the past few years.

Almost since its inception, artists have complained about the lack of transparency at COSOTA and the potential misuse of funds. After years of criticism, in late October 2013, the Ministry of Information, Youth, Culture and Sports promised a gathering of copyright stakeholders that they would receive their royalties. The Deputy Permanent Secretary of the Ministry, Elisante Ole Gabriel, explained that he was not pleased to see musicians unable to attain the full rights of their labor. Gabriel argued that the lack of protection for artists' rights means that Tanzania falls behind the standard of living of other countries (Mani 2013).⁴ After the meeting, rumors in Dar es Salaam were that a foreign government threatened to remove financial aid to Tanzania if the Tanzanian government did not address and more stringently enforce intellectual property rights. The rumor was used as justification for the government's renewed interest in intellectual property rights. Whether valid or not, the rumor was seen as encouraging evidence to many musicians who believed that the government, including COSOTA, was at fault for the ineffectiveness of copyright in Tanzania and that only foreign pressure could strengthen local enforcement.[p. 156 ↓]

In response to the confusion over copyright law locally and bureaucratic ineffectiveness nationally, a stronger message now appears to be coming from local leaders and private entities, such as BASATA and the Tanzania Musicians Network, arguing that musicians need to become more self-reliant. Self-reliance, a notion derived from Tanzania's socialist past, promotes the concept that individuals need to take responsibility for the outcomes of their lives. Julius Nyerere famously stated that a self-reliant individual is someone who is willing to help and cooperate with others, but, 'who does not depend on anyone else for his food, clothing, or shelter' (1971: 151). Implied in this statement are the values of hard work, both for the individual and the nation, intelligence and cooperation. By the 1980s, when there was a scarcity of resources in the country, self-reliance took on slightly new meaning that included doing anything to survive (Perullo 2011: 7–12). This included hard work but also developing strategies to make a living with scant resources and limited government support.

In relation to copyright law, the notion of self-reliance means finding ways to exert pressure on those with power in the local music economy to better support local artists and their music. In many meetings, conferences, workshops, and other sessions, artists are told that they need to take action, become familiar with copyright law on their

own or through attending meetings, and implement changes in the ways that they do business on a day-to-day basis. This do-it-yourself approach, common in many areas of Tanzania's neoliberal economy, promotes the notion that the individual is responsible for altering his or her circumstances. While many artists still argue that some larger government – whether Tanzania's or a Western state – needs to help local artists, many recognize the long history of failed promises that comes from weak and ineffective laws and regulations in Tanzania. To make a living, these local artists are continuing to rely on their own initiatives and strategies in order to find effective means to benefit from the Copyright Act.

Copyright Law and Music in Kenya

Kenya's Attorney General Amos Wako brought new copyright and related rights legislation to the Kenyan Parliament in 1999. The decision to move forward six years in advance of the TRIPS deadline was evidently prompted by the glaring deficiencies of the existing IPR enforcement and administrative framework (Ouma 2004: 3), the growing anti-piracy campaign among Kenyan musicians (namely, the Kenya Music Anti-Piracy Association, set up by veteran musician Joseph Kamaru), and the threat of embargos by US entertainment and software companies if the government did not take steps to stem unlicensed distribution (Ondengo 2000). Wako drafted and redrafted the Kenya Copyright Bill between 1999 and 2001 in consultation with WIPO. The Bill ultimately passed in November 2001. It was signed into law a month later, and came into force in February 2003. The vote in Parliament was unanimous, though a couple of MPs who rose in support of the Bill nevertheless voiced skepticism about the benefits of a globalized copyright regime for Kenya, noting that 'people who infringe on copyright in Kenya are ... members of the informal sector [and] there are many [Kenyans] who depend on that kind of livelihood' (Republic of Kenya 2001a, statement of Ochilo Ayacko).

As in the Tanzanian case, the discourse around Kenya's millennial copyright legislation emphasized the idea that music artists comprise a class of citizens that need and deserve to be protected. In comments thanking the MPs for passing the Copyright Bill, Attorney General Wako noted that one of Kenya's most famous musicians, Daudi Kabaka, had recently passed away without leaving enough money behind to pay for his

own funeral. 'Had this Bill been there in time', he declared, '[Kabaka] would not have died a pauper' (Republic of Kenya, 2001b). Unlike in the Tanzanian case, however, Kenya saw few didactic speeches on the basics of intellectual property law. There was [p. 157 ↓] no need, as copyright issues had already been aired within the Kenyan National Assembly multiple times over four decades. Like Tanzania, Kenya first passed copyright legislation a few years after Independence (The Copyright Act, Chapter 130 of the Laws of Kenya, 1966), using the UK Copyright Act of 1911 as a template. But the Kenyan law was amended five times – in 1975, 1982, 1989, 1995 and 2000 – before being superseded in 2001.⁵ This greater attention to matters of copyright may be attributed to the historical presence of globally interconnected print publishing and music recording industries in the capital Nairobi.

Kenya's music recording industry has a history that stretches back to the post-World-War-II era, with the establishment of East Africa's first independent record company, East African Sound Studios Ltd, in Nairobi (Harrev 1989). By the 1960s, Nairobi had become a regional hub for commercial popular music production, attracting talented musicians from neighboring countries. By the late 1970s, it boasted a slew of serviceable recording studios (plus a world-class facility owned by CBS), a record pressing plant owned by Polygram, and a collection of multinational record companies. Polygram began operating in Kenya during the early 1970s, after it absorbed two other multinationals with Kenyan operations: Phonogram (Phillips) and Polydor. EMI and CBS both set up subsidiaries in Nairobi in the 1970s, seeking to profit off of an expanding East African market. Both companies partnered with local entrepreneurs. In EMI's case, it turned out to be a disastrous strategy. The company was swindled out of GB £100,000 (Wallis and Malm 1984: 93). But CBS did well for a while, thanks it seems to greater access to local knowledge: 'Peter Bond, who had previously worked for Polygram for thirteen years, was given overall responsibility for CBS African operations. Bond certainly knew Africa well, having done spells in Kenya, Zaire and Nigeria – he is Kenyan by birth and has the added advantage of speaking Swahili' (Wallis and Malm 1984: 94).

In the wake of the passage of the Copyright Bill, Energy Minister Raila Odinga, who would later become one of Kenya's most significant political figures, declared, 'The enactment of this Bill has now put piracy on notice' (Republic of Kenya 2001b). In the

past, Kenyan MPs had been focused on the exploitation of musicians at the hands of greedy producers, typically using the figure of ‘the *Muhindi*,’ the Asian, as a stand-in for carpetbagger capitalist. Take, for example, the comments of Parliamentarian Zephaniah Mogunde Anyieni in 1965:

There are people here ... [who] can play really good music. But the man who takes the copyright is the Asian[;] and it will be found that such people who are the Africans, though they have the talent they are still very, very poor people, and the man who makes the money is the Muhindi. This copyright should not be given to the Muhindi[;] it should be given to the African. (Republic of Kenya 1965)

Stereotypes of the Asian in East Africa as a foreign exploiter have been part of the discourses of nation building in Kenya since independence (see Furedi 1974: 358). As Asians were active in music production and distribution in Kenya (in Nairobi as well as Mombasa and Kisumu) until the 1970s, it was natural for Kenyan politicians to read the struggles of Kenyan musicians as an extension of the problem of Asian ‘exploitation’ of Kenya’s authentic ‘African’ citizenry.

The emphasis on ‘piracy’ in the parliamentary debates surrounding Kenya’s millennial copyright legislation reveals the pressures from within and outside the country that were driving the legislation process. It also speaks to the common understanding in the country of the damage that unlicensed music distribution has wrought. Nairobi’s thriving recording industry had nearly collapsed by 1990. All the multinationals had left, studios were no longer being built or upgraded, and Polygram’s record pressing plant was being put in mothballs. This turn of events is generally attributed to the introduction of the audiocassette, which enabled large-scale phonogram piracy and informal sharing (‘cassetting’) while ‘[flooding] the market [p. 158 ↓] with cheap copies of Western, soul, disco, rock and reggae records’ (Graham 1989, 2; cf. Nyairo 2004, 11–13; Wallis and Malm 1984, 6–7). In truth, economic and political factors had already taken a heavy toll on the industry prior to the cassette revolution. Economic decline in the 1980s left Kenyan music consumers unable to pay for luxuries like records and record players (Stapleton and May 1987: 272). At the same time, opportunities for creating music for export diminished due to certain ‘institutional changes brought about by [governmental] policies intended to lead to economic development’ (Blewett and Farley 1998: 247).

These included 'import, visa, and foreign exchange restrictions [which] severely reduced the flows of peoples, ideas, musics, and technologies from the rest of the African popular music world' (Blewett and Farley 1998: 247); and the Kenyan government's Africanization policy during the 1970s, which saw a transfer in the ownership of River Road-based music production and distribution companies to Kikuyu entrepreneurs who lacked the 'contacts, trading history, [and] reputation mechanisms' of their 'Asian predecessors' (1998: 242). But 'piracy' has always received more attention from the Kenyan media and music industry stakeholders than any other factor negatively impacting local music production and distribution.

It is unclear what effect Kenya's 2001 Copyright Act has had, or will have, on unlicensed music distribution in Kenya. Enforcement activities have certainly intensified in recent years, with high-profile raids and seizures regularly being carried out (and publicized) by a new government body established by the Act, the Kenya Copyright Board (KECOBO), and the Anti-Counterfeit Agency (established by the 2008 Anti-Counterfeit Act). But there is as yet no evidence that the level of 'music piracy' in Kenya, routinely estimated at over 90% of all recorded music sold in the country (e.g. Iseme et al. 2009: 7; KECOBO 2011: 3), is diminishing. Foreign business coalitions attribute the persistence of piracy in Kenya to deficiencies in Kenya's Copyright Act, which they argue depress both 'the levels of fines levied on offenders, and the number of prosecutions' (BASCAP 2013: 17; IIPA 2003). KECOBO, meanwhile, argues that it is due to a lack of knowledge of copyright among law enforcement officers and rights holders, unwillingness among rights holders to follow through on copyright enforcement, and 'the challenge of technology-based piracy represented by downloads, MP3/4, flash disks and other versatile storage media' (KECOBO 2011: 6). Less discussed by these groups, for reasons one can easily intuit, are the obstacles to adequate enforcement posed by 'the pervasiveness of corruption in Kenya' (BASCAP 2013: 12). Kenyan musicians are vocal about this issue, however. Rapper and entrepreneur Nonini (Hubert Nakitare), for example, has been quoted as saying, 'those who pirate our music use their deep pockets to shield themselves from being held to account for their illegal activities' (Ramah 2012).

Where Kenya's Copyright Act has had an undeniable and significant impact on the local music economy is in the administration of musical property rights. In addition to meeting Kenya's obligations vis-à-vis TRIPS and the WIPO Internet Treaties, the Act overhauls

the regulation of collective management activities in the country by granting KECOBO the mandate of registering and overseeing CMOs. Setting up and staffing KECOBO was far from a smooth process. But once the body was up and running in 2006, it had an immediate impact on musical property rights administration in Kenya. Under the leadership of Marisella Ouma, a Kenyan lawyer with a doctorate from Queen Mary, University of London, KECOBO fostered a speedy expansion of the institutional network for the administration of musical royalties. Only one music CMO, the Music Copyright Society of Kenya (MCSK), existed as a functioning entity when the 2001 Act was passed. Ouma saw to it that two more were added to collect on behalf of 'neighboring' rights holders (phonogram producers and performers). The Kenya Association of Music [p. 159 ↓] Producers (KAMP) was initially founded by a group of producers in 2003. Ouma walked the Association's leadership through all the necessary steps to become registered as a CMO under the Copyright Act, which they did in 2008. She then worked with some KAMP members and pop singer and human right lawyer Angela Ndambuki to establish the Performers Rights Society of Kenya (PRISK), which was registered in 2009.⁶

MCSK was also transformed by the implementation of the 2001 Copyright Act. A group of Kenyan musical luminaries with international experience established the Society in 1983. It was the height of the multinational labels' influence in Nairobi, and a number of Kenyan music-industry cooperatives and organizations were emerging to represent the interests of various constituencies (Malm and Wallis 1992: 86). The idea behind the founding of MCSK was to wrest control of public performance royalty collection in Kenya away from the Performer's Rights Society of London. Operating without any official authority or capacity for enforcement, MCSK established a reputation for corruption and general dysfunction. By the time the 2001 Copyright Bill was signed into law, it was undergoing a major restructuring, prompted by an incident in which some members briefly took control of MCSK offices to force the ousting of General Manager Jennifer Shamalla. The advent of the Copyright Act and KECOBO did much to shape this reform process. Aware that the Society would have to be vetted by KECOBO in order to continue operating after 2007, MCSK's Board of Directors brought in Maurice Okoth, a man with experience in both law and administration, as Chief Executive Officer in 2005. With training from WIPO, and financial and logistical support from the International

Confederation of Societies of Authors and Composers (CISAC), Okoth succeeded in getting MCSK registered with KECOBO within a couple of years of his appointment.⁷

MCSK grew exponentially, both in terms of membership and income, after becoming a duly registered CMO. Once the Society was operating as a registered CMO, Okoth sought to boost membership, with a view toward forging reciprocal relationships with international royalty collection societies beyond PRSK. He managed to engineer an astounding nearly ten-fold increase in membership, from around 600 to over 5,000, between 2005 and 2011, largely by offering an immediate public performance royalty payout to each new member. (The strategy was controversial, as it brought in fraudulent members who were not actual composers but simply relatives or friends of composers.) At the same time, with the law behind it, the Society moved aggressively to enforce compliance among music users. It became notorious for employing police and private security to carry out checks, levy fines, and even seize property (such as computers from cyber cafés and radios from public service vehicles) from noncompliant users. It also took advantage of opportunities that arose with Kenya's ICT revolution. With the rise of Internet distribution and various forms of music m-commerce (including ringtone and ring-back tone sales and subscriptions), MCSK took on the task of mechanical licensing for digital platforms, adding a mechanical rights rider to the membership agreement (Eisenberg 2012). More recently, it has taken advantage of software provided by WIPO and the entrance of digital media monitoring firms into Kenya to bring radio broadcasters into full compliance while also instituting 'scientific distribution' for its members. The advent of digital media monitoring for collecting and distributing public performance royalties brought an end to the days when even MCSK's most prominent members would receive paltry sums, or nothing at all, from the Society (see Wanyama 2007: 38–39). MCSK is keen to advertise this fact, in light of the lack of trust that has built up between MCSK leadership and its members over the years. Large payouts, such as the nearly \$5,000 given out to veteran hotel pop band Safari Sounds in April 2012, are touted in press releases, media interviews and MCSK's annual award 'gala' (Muchangi 2012).**[p. 160 ↓]**

As part of their strategies for increasing collection revenue, all three of Kenya's music CMOs have worked to shape local understandings of how music may be 'owned' and 'used'. MCSK has been most effective in this regard, simply by virtue of its growth.

Fraudulent or not, the thousands of new MCSK members began to ask questions about royalty collection, sparking discussion and debate within the music industry and public culture at large (John Katana recorded interview with A. Eisenberg, 1 August, 2012). The result has been an increased copyright consciousness, which is highly evident at annual and occasional industry events. Meanwhile, through lobbying and ‘sensitization’ activities, KAMP and PRiSK have been working to instantiate a conception of the musical ‘rights holder’ within Kenya’s laws and music industry, so that it is not only copyright holders but also phonogram producers and performers who profit from the sale or use of recorded music. With respect to legal doctrine, they have been successful: a 2012 amendment to the Copyright Act grants producers and performers the right of equitable remuneration through a registered CMO. But transforming understandings of musical property rights among music makers and users in Kenya has so far proven more difficult.

The successes of Kenya’s music CMOs to date may be attributed to capable and committed technocrats like Marisella Ouma, Maurice Okoth, and the two women at the helms of the neighboring rights CMOs at the time of writing (June Gachui and Angela Ndambuki, both singers and lawyers with graduate training in intellectual property law), who are all products of Nairobi’s Anglophone middle class. Also important have been other music industry stakeholders who were introduced to Euro-American corporate music culture by the multinationals in Nairobi during the 1980s – individuals like John Katana, who has long been active in MCSK and is now a member of KECOBO. While some Tanzanians also engaged with Euro-American corporate music culture – Orchestra Talaka with Remmy Ongala, for instance, ‘signed a [generous] contract with Polygram Records Limited in 1982 that allowed the group to maintain the copyright in all their musical works and earn royalties from each of their recordings’ (Perullo 2011: 290) – it was Kenyans who had the opportunity to propagate it. The case of John Katana’s band ‘Them Mushrooms’ is illustrative. Signed to Polygram and then CBS Records during the 1980s, they built their own recording studio in 1987 and started up a label shortly thereafter, forming it as ‘a fully-fledged record company’ in the mold of Polygram and CBS (recorded interview with A. Eisenberg, 1 August, 2012).

Where Kenya’s music CMOs have failed so far is in the realm of cooperation. KAMP and PRiSK have worked in partnership since PRiSK’s founding. Their ties with MCSK have been fractious, however. The three societies managed to agree in principle on a

basic royalty split of 50% (MCSK)/25%/25%. But beyond that, they have not had much success in working together. The situation was exacerbated when KECOBO temporarily deregistered MCSK in 2011 based on an audit that suggested it was spending too much on administrative overhead. Since that incident, MCSK's leadership have been reluctant to incur administrative costs by collecting on behalf of the younger, smaller CMOs (Maurice Okoth, recorded interview with A. Eisenberg, 20 March, 2012). Without an agreement between the three CMOs, the organizations are necessarily less effective at collecting royalties, and sensitizing and lobbying for increased copyright protections.

Conclusion

Despite the similarity of their millennial copyright legislation, the distinct political-economic histories of Kenya and Tanzania have fostered divergent trajectories of musical property rights reform over the past decade. In Kenya, the partial formalization and internationalization of the music economy during the 1970s and 1980s established [p. 161 ↓] business practices modeled on those of the music recording industries in Europe and the United States. Such practices have always competed with other, less 'Western' ways of doing business. Nevertheless, at the turn of the millennium, Kenya's music economy still comprehended certain 'immutable mobiles' (Latour 1986) from the Global North – formal contracts, royalty payments, and collective management – that stood ready to combine with and reinforce globally 'harmonized' intellectual property law. Additionally, some lawyers in the country had familiarity with or studied intellectual property law. This meant that after the introduction of the 2001 Copyright Act a small but significant population of legal professionals were willing and able to participate in various ways in the difficult process of implementation. Some of these individuals have worked with a missionary zeal grounded in the belief that intellectual property law holds the promise of creating a more just society. Lawyer, former KECOBO intern and prominent blogger Victor Nzomo, for example, developed a passion for copyright law after seeing his mother's academic career negatively impacted by what he saw as intellectual theft (recorded interview with A. Eisenberg, 3 August, 2012).⁸ Coupled with the partial formalization and internationalization of the music economy, the presence of professionals with experience and interest in intellectual property law led to a situation in Kenya whereby a set of individuals and institutions, including a trio of music CMOs,

emerged as agents of legal, juridical and epistemic change, potentially instantiating functioning, Western-style musical property rights regime in the country (though such a state of affairs is still a long way off).

Meanwhile, Tanzania relied on a combination of state policies and informal practices in the implementation of copyright law. Even after the official end of socialism in the early 1990s, the government attempted to control all issues related to the commercialization of the arts. All bands and artists needed to register with the state-run National Arts Council (BASATA) and all copyright policies were handled by COSOTA. This state-centered control of the arts often became a nuisance for artists who typically found ways to circumvent any government policies that they believed stood in their way of earning a living. Through evading state control, in the early 2000s, the music economy grew at a rate faster than almost any other African country (WIPO 2012). This meant that artists relied on the informal economy to dictate the creation of contracts, authors' rights in music, and the payment of fees related to using other artists' songs. As a result, the standardization of copyright law within the country did not take place given the poor relationship between artists and the state, the lack of legislation aimed at addressing copyright issues, the absence of broader education about copyright law in the country, and the patchy payment of royalties.

It is important to note that the copyright situation is not necessarily enforced or administrated better in one country over another. The hundreds of formal interviews and informal discussions with Kenyan and Tanzanian musicians and music producers carried out by the authors of this chapter reveal that neither country has a musical property rights administration that works to the satisfaction of the citizens whose livelihoods it is meant to protect and creativity it is meant to support. There is substantial corruption in the legal systems of both countries; high rates of digital piracy are present all over eastern Africa; and rights holders continue to struggle to receive royalty payments (though MCSK's increased payouts represent a hopeful improvement in Kenya). Government agencies in both Kenya and Tanzania, particularly those in charge of IPR-related issues, also focus more on patents and technology, particularly biotechnology and pharmaceuticals, since these are seen as both greater concerns for the region and more financially lucrative.⁹ This emphasis on patents over copyright has

meant less government investment in improving the administration and enforcement of copyright law.

Nonetheless, through detailing the different trajectories of copyright law in Kenya [p. 162 ↓] and Tanzania, this article emphasizes the country-specific approaches taken to similar legislation. In discussing human rights in Argentina, Karen Ann Faulk describes the ‘vernacularization of human rights discourses’ where people and groups imbue international human rights with local meanings (2013: 5). A similar process is at play in East African countries where local histories, ideologies and uses of music shape the meaning of rights, music and ownership. This, in turn, impacts the outcome of copyright law in each country. While these countries also greatly influence each other – a topic not discussed in this article – the linguistic, cultural, economic and political differences between them create divergent approaches to rights. Being able to interpret these differences provides a means to comprehend the dynamic and shifting outcomes of law in African contexts.

Acknowledgements

Andrew Eisenberg’s contribution to this chapter draws from data collected under the auspices of the European Research Council-funded ‘Music Digitization, Mediation’ project led by Georgina Born at Oxford University. He gratefully acknowledges the generous ERC funding and essential input from Georgina Born. Both Alex Perullo and Andy Eisenberg would like to thank the Tanzanian and Kenyan musical and legal professionals who freely shared their knowledge and views for this article.

Notes

1 Before copyright laws were passed in East Africa, Alex Perullo conducted informal interviews there with elected officials from Malawi, Tanzania and Uganda about copyright law and artists’ rights. While often sympathetic and supportive of artists’ concerns, most believed that the other forms of intellectual property, such as patents and trademarks, were more important for the vitality of the local economy. In later

interviews, this relation to the economic viability of the arts shifted in part due to the significant expansion of the music business in East Africa (Perullo 2011).

2 Originally set for 2006, extended to 2013 and then extended again to 2021, the most recent extension on the deadline for least developed countries was made on June 11, 2013 by the World Trade Organization as a means to give these countries more time to protect intellectual property rights.

3 British colonial authorities established the first copyright law in Tanzania on August 1, 1924. The law was an extension of the United Kingdom (Imperial) Copyright Act, 1911, which was enacted in most of Britain's colonies. After gaining independence from the British in 1961, the Tanzanian government created a new copyright law to better protect its interests. President Julius Nyerere officially passed the law, Copyright Act No. 61, in December 1966. The law made provisions for the copyright of literary, musical and artistic works, cinematographic films, sound recordings and broadcasts.

4 The one-day event was called the 'Stakeholders Dialogue Meeting', and took place at the Nyumbani Lounge in Dar es Salaam.

5 For an overview, see Sihanya (2010).

6 PRiSK was abbreviated to PRSK until June 2012, when they voluntarily changed their abbreviation to avoid conflict with the Public Relations Society of Kenya.

7 On an official visit to Nairobi in 2007, officials from CISAC made a 'lobbying visit to the Kenya Copyright Board Chairman and CEO, and the Ministry of Culture to discuss the obtaining of a license to operate as a collection society by MCSK' (CISAC 2007: 20).

8 Nzomo's blog, IPKenya (<http://ipkenya.wordpress.com/>), is the most prominent blog on IP issues in Kenya. KECOBO and Kenyan CMOs often share and comment on IPKenya posts on social media sites.

9 Kenya's KECOBO, of course, focuses exclusively on copyright matters. But it is situated within the Attorney General's office, which, in the view of a leading Kenyan IP scholar, has not given it the resources it requires (Sihanya 2005, 2010: 17). KECOBO also spends a great deal of time dealing with the matter of software piracy, most

recently through an initiative with Microsoft (CIO East Africa 2013). In Tanzania, COSOTA also focuses on copyright matters but has faced numerous setbacks including a lack of funding from the state and a constantly shifting leadership (these details come from interviews with COSOTA staff and other agencies in Tanzania). Meanwhile, patents and biotechnology tend to be an important financial and administrative focus of the government. [p. 163 ↓] The Tanzanian president, Jakaya Kikwete, is said to be an 'enthusiastic supporter' of biotechnology, and there is reported to be constant pressure from 'US driven biotech industry' in many parts of Africa (Visram 2013).

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<http://dx.doi.org/10.4135/9781473910027.n9>