

**UNIVERSITY OF RWANDA**  
**College of Arts and Social Sciences**  
**School of Law**

**Post Graduate Programme**

**COLLECTIVE MANAGEMENT OF  
COPYRIGHT AND RELATED RIGHTS  
UNDER RWANDAN LAW**

**Dissertation submitted by:  
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**Under the guidance and supervision of Dr. François-Xavier Kalinda**

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## ABBREVIATIONS AND ACRONYMS

<b>Art.</b>	: Article
<b>CCB III</b>	: Civil Code Book III
<b>CD</b>	: Compact Disc
<b>COGEBANK</b>	: <i>Compagnie Générale des Banques</i>
<b>CMO</b>	: Collective Management Organization
<b>FRW</b>	: Rwandan francs
<b>HC</b>	: High Court
<b>HCC</b>	: High Commercial Court
<b>Ibid.</b>	: Same source ( <i>Ibidem</i> )
<b>IP</b>	: Intellectual property
<b>IPL</b>	: Intellectual Property Law
<b>KIAC</b>	: Kigali International Arbitration Centre
<b>No</b>	: Number
<b>OG</b>	: Official Gazette
<b>ORINFOR</b>	: <i>Office Rwandais d'Information</i>
<b>P./PP.</b>	: Page / Pages
<b>P./pp.</b>	: Page(s)
<b>Para.</b>	: Paragraph
<b>R.Com</b>	: Commercial cases registration number
<b>RDB</b>	: Rwanda Development Board
<b>RSAU</b>	: Rwanda Society of Authors
<b>TRIPS</b>	: Trade-Related Aspects of Intellectual Property Rights
<b>V./vs.</b>	: Versus / against
<b>VOA</b>	: Voice of Africa
<b>WIPO</b>	: World Intellectual Property Organization
<b>WTO</b>	: World Trade Organization

## **ABSTRACT**

*The present study is entitled “Collective Management of Copyright and Related Rights under Rwandan law”. It’s focus is to highlight and discuss these critical issues facing and impeding the efficiency in the administration of the collective management organizations in Rwanda and consequently undermining their endeavor and basic objective of, inter alia, reducing the plight of the local authors and artists and reducing the negative attitudes towards protection of individual copyright and related rights.*

*In order to attain those objectives, the study was designed as a doctrinal-based with no component of qualitative study. It was conducted through a review of literature as well as an examination of relevant sources of law both statutory and judicial, and an analysis of international and foreign law. In that framework, Rwandan legal text books relevant to the topic were consulted, as well as various publications including journals, reports and electronic sources, among others.*

*The present work is subdivided into two chapters. The first chapter concerns the notion of collective management and their role in the exercise of copyrights and related rights. The second chapters highlights the organization and functioning of CMOs and their efficiency. The study ends in a general conclusion that summarizes key findings before formulating recommendations for the improvement and effectiveness in the protection of copyright and related rights.*

*Among other key findings, the study found that though violated, copyrights and related rights are protected by the 2009 IP law. However, the study found that that law presents some loopholes that need to be corrected through enacting a new law with more provisions relating to administration and monitoring collective management organisations for owners’ rights to be more protected. Loopholes at issue include provisions regarding critical issues facing and impeding the efficiency in the administration of the collective management organizations in Rwanda, the impracticability of individual monitoring the use of his/her works, infringements and prosecution which is subjected to the victim’s request, indemnification of the suspected infringer who wins the case, the pertinence of evidences, the*

*computation of damages referred to the exact suffered prejudice. The study furthermore found that the awareness of both the Rwandan community and copyrights and related rights owners on IPRs protection is still low.*

*In order to overcome challenges that prevent copyrights and related rights owners to enjoy their rights, recommendations were formulated.*

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## GENERAL INTRODUCTION

### 1. Background of the study

Copyrights are a bundle of rights, the owner of the right is permitted to a number of different things, such as copy the work, make adaptations of the work, issue copies of the work to the public, perform the work in public and broadcast or send a cable transmission of the work<sup>1</sup>. These rights are exclusive, individuals who are not the holder, should ask permission or authorization when they want to use the work. However, there are more rights connected to the copyrighted work, especially with musical works, such as neighbouring rights. These rights are usually owned by the company that organizes and publishes the recording.

The interplay between copyright owners and related rights owners can best be described as follows- “A musician (related rights owner) performs a musical work written by a composer (copyright owner); an actor (related rights owner) performs a role in a play written by a playwright (copyright owner); producers of phonograms-or more commonly “the record industry” (related rights owners)- record and produce songs and music written by authors and composers (copyright owners), played by musicians or sung by performers (related rights owners); broadcasting organizations (related rights owners) broadcast works and phonograms on their stations<sup>2</sup>.

While copyright protects the rights of authors, another set of similar rights, known as related rights or neighbouring rights”, protects the rights of other owners of rights, namely, performers, producers of phonograms and broadcasting organizations<sup>3</sup>.

The owner of these rights has the exclusive right to cause the recording to be heard in public, to broadcast the recording and to make another recording embodying this recording or any part of it<sup>4</sup>.

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<sup>1</sup> Firth, S. & Marshall, L. 2004. Music and copyright. Edinburgh: Edinburgh University Press Ltd, p.7.

<sup>2</sup> Ibid.

<sup>3</sup> What is copyright?, world intellectual property organization, 1



Copyright and related rights<sup>5</sup> are bundles of different rights which can be exercised individually or, where it is impracticable to enter into individual arrangements<sup>6</sup> can be managed by collecting societies<sup>7</sup> also known as CMOs.<sup>8</sup>

Copyright are rights granted to authors (copyright) and to performers, producers and broadcasters (related rights) to ensure that those who have created or invested in the creation of music or other content such as literature or films can determine how their creation can be used and receive remuneration for it.

Copyright include economic rights which enable right holders to control (license) the use of their works and other protected material (such as performances, records, audiovisual productions and broadcasts), and be remunerated for their use. These rights normally take the form of exclusive rights and include the right to copy or otherwise reproduce any kind of work and other protected subject matter, the right to distribute copies to the public and the right to communicate to the public performances of such works and other protected subject matter.

Authors are also granted moral rights which may include the right to decide on when or whether to make the work public, the right to claim authorship of the work and the right to object to any derogatory action in relation to the work.

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<sup>4</sup> *Idem*, p.8

<sup>5</sup> See W.A. Copinger and F.E. Skone James (1999) Copinger & Skone James on Copyright Vol. 1 14th Edition, Sweet & Maxwell, London; B. Sihanya (2009) Copyright Law in Kenya at 18-19. Available at: <http://innovativelawyering.com/attachments/article/26/Copyright%20Law%20in%20Kenya%20-%20Prof%20Ben%20Sihanya.pdf>. (last accessed on March 15, 2014); L. Bently, & B. Sherman, (Eds.) (2009) Intellectual Property 3rd Edition, Oxford University Press Inc. New York.

<sup>6</sup> See M. Fiscor (2002) "Collective Management of Copyright and Related Rights", World Intellectual Property Organization, Geneva at 6. Prof. Fiscor states that the reason why, in a number of cases, copyright and related rights cannot be exercised by individual owners of rights is that the works concerned are used by a great number of users. Individuals, in general, do not have the capacity to monitor all those uses, to negotiate with users and to collect remuneration.

<sup>7</sup> P. Goldstein (2001) International Copyright: Principles, Law and Practice, Oxford University Press Inc, New York at 228.

<sup>8</sup> See D.J. Gervais (2001) "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective", Department of Canadian Heritage, Canada at 82. Prof. Gervais states that collective management is a method, a tool that rights holders choose when the individual exercise of their right(s) to authorize is impracticable. Rights holders then choose to let users within a defined group or category use their works and all those within a repertory controlled by the respective collective management organisations. See also WIPO (1999) "Understanding Copyright and Related Rights", World Intellectual Property Organisation, Geneva. Available at: [http://www.wipo.int/export/sites/www/freepublications/en/intproperty/909/wipo\\_pub\\_909.pdf](http://www.wipo.int/export/sites/www/freepublications/en/intproperty/909/wipo_pub_909.pdf)(last accessed on April 1, 2014).

With the ever more widespread application of digital technology, including the advent of multimedia productions and the use of digital networks like the Internet, the exercise and the management of rights are facing new challenges. New technological solutions (encryption technology, digital identification numbers, rights management information systems, etc.) have been worked out in response to those challenges, and are still being developed. The freedom of owners of rights to choose between individual and collective mechanisms of their rights and among various possible forms of collective mechanisms seems to have grown. New methods of licensing and monitoring the use and collecting and distributing remuneration have been introduced.

In Rwanda, like in other countries, there exists the possibility to manage intellectual property rights collectively through what is known as collective companies of collective management of copyright and related rights.

Practically, few copyright or neighboring rights holders can personally manage their rights by, for example, negotiating directly the performance of a play, the publication of a book or the recording of a musical works. The majority of rights holders are incapable of controlling all the uses made of protected works, need the management services of one or more societies that can contact users, negotiate exploitation contracts, collect and distribute royalties and, if need be, go to court. Such societies are also of benefit to users such as broadcasters which cannot, within reasonable timescales, obtain all of the required authorizations from thousands of rights holders.

The new technologies give the public, for example through the Internet access to a very large number of works, thus increasing the number of rights holders with whom it is impossible to negotiate individually<sup>9</sup>. To ensure effective protection of copyright and neighboring rights, the question is not so much whether collective management is necessary in the digital age but rather how it should be done. It would seem that collective management has become the norm in the exercise of rights.

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<sup>9</sup> A. Lucas, "Nouvelles technologies et modes de gestion des droits" in *L'avenir de la propriété intellectuelle*, Paris, Litec, 1993, p. 28.

Though provided for by the law on the protection of Intellectual Property, Rwanda has already experienced the existence of such collective management organization. However, in countries where they exist and effectively operate, the roles of collective management organizations have played a pivotal role in fight against negative impact of piracy on the general economies of those countries. This is the reason why we judged important to tackle a topic entitled **“Collective Management of Copyright and Related rights under Rwandan law”**

## **2. Problem statement**

The traditional and normal way of managing economic rights in the field of copyright and related rights is through individual contracts. This is still the case in the publishing business and when it comes to public performance and broadcasting of choreographic works, theatre plays and other uses of the so-called “grand rights”<sup>10</sup>.

In other cases individual administration is not feasible or possible, such as public performance or broadcasting of musical works, photocopying/reprography and cable retransmission of TV programs. This is where collective mechanisms through collective mechanisms organizations become necessary. Those organizations/societies receive authorizations from the right-owners to grant rights in different respects and conclude agreements on the exploitation of such rights and collect and distribute the remunerations for the uses made.

Collective management is the exercise of copyright and related rights by organizations and societies representing the interests of the owners of such rights. These organizations or societies are usually referred to as licensing bodies.

Such collective mechanisms are in the interest both of the right-owners themselves and of the users. For right-owners such management is indispensable because they would be unable to control themselves the mass uses that take place. For users it is a great advantage to be able to conclude contracts with one party instead of having to contact thousands of right-owners that would be time-consuming and very difficult from a practical point of view.

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<sup>10</sup>WIPO national seminar on copyright, related rights, and collective management organized by the World Intellectual Property Organization (WIPO) in cooperation with the Ministry of Culture, Khartoum, February 28 to march 2, 2005.

As stated above, creators of original works have the exclusive legal right to do, authorize or prohibit certain acts in relation to such works. A classic example in point is the negotiation of a contract by a writer with a publisher for the publication of his or her book. However, the individual management of rights is virtually impossible with regard to certain kinds of works for practical reasons<sup>11</sup>.

A good example is the use of musical works in the country. It would be practically impossible for a given musician to contact every single radio station to negotiate licenses and remuneration for the use of his or her works. On the other hand it would be equally impractical for an FM radio station to contact every musician in order to seek permission for the broadcasting of the musician's work. This scenario underscores the need for collective management organizations, whose role is to serve as links between right owners and users. The existence of a collective management organization in a country provides a solution to the above-mentioned problems. The questions this research would attempt to answer are:

1. Whether there is a regulatory framework for collective management of copyright and related rights in Rwanda?
2. How the operational framework for collective management in Rwanda would operate?
3. To what extent owners of rights should be involved in the collective management of related right.

### **3. Objectives of the study**

The present study pursues the following objectives:

#### **3.1. General Objective**

In general, this study aims at highlighting the importance of CMOs in the promotion and protection of the economic rights of copyright and related rights holders.

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<sup>11</sup> Collective Management of Copyright and Related Rights available at [www.wipo.int](http://www.wipo.int), visited on 20/11/2013

### **3.2. Specific Objectives**

More specifically this dissertation shall:

- Analyze collective management of copyright and related rights and the role of collective management organizations in their protection;
- Examining the exercise of rights under collective management and the mode of operation of collective management organizations;
- Analyze the importance of collective management organizations in fighting against negative impact of piracy on the economy of Rwanda;

### **4. Methodology**

The qualitative approach was essential tool in examination of regulations, and also international instruments and case laws. Under circumstances interviews were also taken for collection of first-hand information and data. Basing on comprehensive or executive evaluations and discussions as regards certain selected topics were made using a qualitative approach, for example, often under the framework of some unified international instruments.

Main source of material is theory based on academic books and articles along with the recent case of Kayirebwa Cecile vs Media. Online sources were also used to a certain degree in order to follow progress in foreign recent case law.

### **5. Limitation of the study**

This study only examines the role of collective management of copyright and related rights under Rwandan Law. The study also looks at the importance of collective management organizations in the exercise of copyright and related rights. More specifically, the study intends to take a case study of Kayirebwa Cecile Vs Media to analyze how collective management organizations can contribute to the exercise of related rights.

### **6. Research outline**

Apart from the general introduction and conclusion, the content of this study is subdivided into two chapters. The first chapter concerns the notion of collective management and their role in the exercise of copyrights and related rights. The second chapters examines the organization and

functioning of CMOs and also consider the way forward and attempts the comparative analysis on the mode of operation of collective management organizations.

## **CHAPTER I: COLLECTIVE MANAGEMENT AND THEIR ROLE IN THE EXERCISE OF COPYRIGHTS AND RELATED RIGHTS**

In this chapter we will enhance on collective management historical perspective, their legal framework in Rwanda and the trends and challenges of CMOs. We will thereafter enhance deeper on collecting societies and their role in the exercise of copyright and related rights.

### **I.1. Historical development of Collective Management Organisations of copyrights and related rights**

The rise of collective management began in France with the French playwright Pierre-August Caron de Beaumarchais in the dark and dingy Parisian theatres in the 1700s. Beaumarchais was the first to express the idea of collective management of copyright. The first known CMOs were established by the French in 1777<sup>12</sup> followed by the British in 1914<sup>13</sup>.

Beaumarchais created the general statutes of Drama in Paris. What began as a meeting of twenty-two famous writers of the comédie française over financial matters turned into a debate about collective protection of rights. They appointed agents that laid a foundation for the French Society of Drama Authors.<sup>14</sup> In 1838, Honoré de Balzac and Victor Hugo established a society of writers, which was mandated with the collection of royalties from print publishers. A net of authors' societies, shaped by cultural environment of each country, slowly spread throughout the world. As CMOs flourished in their own national states, the need for cooperation and harmonization on the international level became apparent. In 1925, Romain Coolus organized the committee for the Organisation of Congresses of Foreign Authors' Societies. This committee was founded to tackle some of the insurmountable problems involving international issues. Firmin Gémier succeeded in creating the Universal Theatrical Society. Both of these initiatives led to the founding congress meeting in 1926 of the International Confederation of Societies of Authors (CISAC).<sup>15</sup> The founding members identified the need to establish both uniform principles and methods in each country for the collection of royalties and the protection of works and to ensure

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<sup>12</sup> WIPO (2004) "WIPO Guide on the Licensing of Copyright and Related Rights", World Intellectual Property Organization, Geneva at 111.

<sup>13</sup> W.R. Cornish & D. Llewelyn (2007) Intellectual Property: Copyright, Trademarks and Allied Rights 6th Edition, Sweet & Maxwell, London at 406.

<sup>14</sup> [www.cptech.org/cm/copyrights.html](http://www.cptech.org/cm/copyrights.html)

<sup>15</sup> [www.cptech.org/cm/copyrights.html](http://www.cptech.org/cm/copyrights.html)

that literary and artistic property were recognized and protected throughout the World. Today CISAC has 225 member societies in 118 countries. a majority of which license either the public-performance and communication of musical works or the reproduction of those works.

Many countries have fostered the growth of CMOs via legislative initiatives in the belief that CMOs offer a viable solution to the problem of individually licensing, collecting and enforcing copyright. CMOs facilitate the establishment for collecting and dispersing royalties and negotiate licensing arrangements for works<sup>16</sup>.

The Rwandan IP Law was put in place and it recognizes this scheme of collective management of copyrights and related rights. The use and management of copyrights, rights of performing artists, of phonogram producers and of broadcasting organizations shall be entrusted to one or more private companies of collective management of copyrights and related rights<sup>17</sup>.

Basing on the above mentioned law, the Rwandan Society of Authors (RSAU) was inaugurated and it is already registered at Rwanda Development Board (No.1538 /10/NYR). The Rwanda Society of Authors (RSAU) is in charge of protecting the interest of artists and promoting of artists' works. RSAU comprises the Association of Musicians (INGOMA Music Association), the Association of Cinema Artists (IRIZA CARD), the Association of Writers (LA PLUME D'OR) and ISOKO Arts Rwanda.

The Rwanda Society of Authors (RSAU) is a collective management organisation acting on behalf of copyright owners' by collecting and receiving royalty fees from users (such as radio and television stations) of their copyright and related rights materials, and distributing the money to the rights owners.

As of today, the Intellectual Property Office in the Rwanda Development Board has already registered 570 film scripts, 168 films, 34 paintings, 8114 trademarks, 258 patents and 70 Industrial designs.

Rwandan society of author (RSAU) is a multidisciplinary society for all intellectual creators of Rwanda its objectives is:

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<sup>16</sup> Daniel Gervais (ed.), collective management of copyright and related rights, pg. 171.

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<sup>17</sup> Article 253 of IP Law.



- Represent, promote, protect and defend the interests of its members in Rwanda and abroad.
- Establish agreements with foreign societies of authors
- Assistance in preparation of contracts of its members.

Rwandan artists, that is to say musicians, film makers, music producers and many more, are now assured of security to some extent and patent of their productions like music, films, scripts, documentaries and many more through obeying piracy right by the users.

The importance of the RSAU is to follow up and enhance the rights of the artist, specifically the patent of the artist's production, be it films or music, as well as guiding the users of those productions like night clubs, restaurants and the rest of the hangout places around the country.

The institutions involved in the administration of copyright include Rwanda Development Board/Office of the Registrar General (RDB/ORG), which is in charge of registration and administration. Rwanda National Police (RNP), in charge of enforcement of intellectual property alongside the commercial court of Rwanda. Police is in charge of investigations while the commercial court undertakes the civil proceedings.

The commercial court and arbitration incase of infringement of a registered copyright they are in charge of undertaking legal proceedings. They can order the stopping of an infringement or award damages for the infringement.

Although CMOs were initially promoted as an efficient way to collect and disburse monies to compensate right holders for copyright works, increasingly the structure of CMOs, both on national and international level, has raised questions about their efficiency, in addition those significant structural issues, the market conditions and business trends of copyright and related rights owners are changing, and CMOs must adapt. Just as CMOs is revolutionary, so is their underlying stated efficiency. The system of the CMOs must be efficient and relevant.

The copyright holders have individual exploitation rights. It is difficult and impossible for a music artist to negotiate about every single contract with the end user, bar or restaurant who are

playing their copyrighted music. The creator does not have the ability to enforce copyright or do something against infringement of every single user, bar and restaurant, etc. This brings along high transactions cost for administering and enforcing copyrights<sup>18</sup>.

Therefore, licensing of the copyrights creates a solution. Special monopoly organizations administer the copyrights and related rights. The main function of these collecting societies is to overcome the high transaction cost. The economic rationale for copyright collecting societies is that there is a vast economy of scale in the administration of copyrights. Handke and Towse give two reasons for this. First for many users copyrighted work tend to have a small value. Secondly, it can be difficult and expensive to administer copyrights individually, because of the high fixed cost<sup>19</sup>.

Collective administration of copyright effectively allows rights holders to grant exclusive mandates to a single entity namely the CMO, which acts on behalf of the rights holders to grant authorisations through licenses to users under certain conditions and on the basis of a tariff system; to collect the remuneration from the licenses; to distribute it among the rights holders; to monitor the uses of their works; to negotiate with prospective users;<sup>20</sup> to prevent and detect infringement of rights; and to seek remedies for infringement.<sup>21</sup>

As was stated above, creators of original works have the exclusive legal right to do, authorize or prohibit certain acts in relation to such works. A classic case in point is the negotiating of a contract by a writer with a publisher for the publication of his or her book. However, the individual management of rights is virtually impossible with regard to certain kinds of works for practical reasons. A good example is the use of musical works. It would be practically impossible for a musician to contact every single radio or television station to negotiate licences and remuneration for the use of his or her works. On the other hand it would be equally

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<sup>18</sup> Handke, C. & Towse, R., Economics of Copyright Collecting Societies, International Review of Intellectual Property and Competition Law 38 (8), 2007, p. 938.

<sup>19</sup> *Idem*, p.17.

<sup>20</sup> M. Fiscor (2003), Collective Management of Copyright and Related Rights at A Triple Crossroads: Should It Remain Voluntary or May It Be "Extended" or Made Mandatory? at 1.

<sup>21</sup> WIPO (1999) "Understanding Copyright and Related Rights", WIPO, Geneva at 14.

impractical for an FM radio station to contact every musician in order to seek permission for the broadcasting of the musician's work.

This scenario underscores the need for collective management organizations, whose role is to serve as links between right owners and users. The existence of a collective management organization in a country provides a solution to the above-mentioned problems.

Therefore, there is a need to have a legal and institutional framework for collective administration of copyright which strikes an appropriate balance between the interests of the rights holders and the users of copyright works.

It is from the above mentioned back ground where Collective management is crucial in the exercise of copyright and related rights by organizations and societies representing the interests of the owners of such rights.

## **I.2. CMOs in Europe**

### **I.2.1. Experiences from France on Collective Administration of Copyright and related rights**

In France, Article L.321-1 of the Intellectual Property Code (CPI) states that all Royalty Collection and Distribution Societies (RCDS), whether they are administering copyright or neighboring rights, must be established as civil-law companies whose members are the holders of the copyright or neighboring rights, depending on the case. The following Article (article L.321-2) draws the logical conclusion, in conformity with French corporate law, that "Contract concluded by the civil law societies of authors or owners of neighboring rights, in implementation of their purpose, with users of all or part of their repertoire shall constitute civil law instruments." This determination has number of consequences.<sup>22</sup> First, the Court with jurisdiction if there is dispute is a common-law civil court. Second, collective societies are not supposed to make profits and must be content with pooling their resources to serve their

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<sup>22</sup> Daniel Gervais (ed.), collective management of copyright and related rights, pg. 171.  
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members. Third, collective societies are not subject to taxation or to commercial legislation, which is reserved for businesses.<sup>23</sup> Their civil character does not allow them to evade competition law. The RCDSs France are civil-law companies.

In France a collective societies in certain collection sectors are subject to specific authorization, which is issued or withdrawn by the Minister of Culture. This procedure is still quite rare, because the principle remains that there is freedom of establishment and collection when societies are duly mandated by their member right holders. Approval is implemented mainly for copyright and neighboring rights under mandatory collective management. Currently, approval must be issued in three categories of exploitation. The first is collective management of the reprography right, for which Act 95-4 of 3 January 1995 set out approval according to the criteria of professional qualification of the officers, the human and material resources proposed, and the equitable nature of the proposed means of distribution. Another statute, Act 97-283 of 27 March 1997, sets out an approval procedure for societies charged with management of rights for simultaneous, complete, unchanged retrans-mission in France of works broadcast on television in one of the EU member states. The approval has to be renewed every five years.

### **I.2.2. Experiences from Germany on Collective Administration of Copyright and related rights**

In Germany, like any other countries, of continental Europe, the collective or centralized management of authors' rights and related rights occurred as a consequence of the development and further evolution of copyright protection. At the outset, copyright protection or authors' rights consisted of right to authorize or prohibit the copying and distribution of works, which could be administered or controlled and made available individually. However, individual control and rights management became much more difficult, if not to say impossible in practice, when authors began to enjoy other rights to control exploitation, notably the public performance of their works.

As a consequence, the General Principles Enshrined in the Germany Law on collective Rights Management (LACNR) were put in place to provide a comprehensive legal framework for

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<sup>23</sup> Daniel Gervais (ed.), collective management of copyright and related rights, pg. 216.  
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collective rights management and the activities of CMOs in Germany. The law was based on several fundamental principles. It is driven by, and based on:

- Protecting and fostering creativity is an important function of copyright;
- Collective rights management is particularly required for protecting the creativity and defending the rights of natural persons, notably of authors and performers, via CMOs as their trustees;
- Collective rights management by CMOs is useful and beneficial for all parties notably rightholders and users, as well as for culture and society at large in many sectors of copyright (authors' rights and neighbouring rights);
- Collective management is therefore an indispensable part of the German copyright system;
- And, collective rights management can function well only on the basis of a reasonable balance of all interests and rights.

On the basis of these principles, the LACNR contains the following provisions:

- Chapter 1 ('Authorization for Doing Business') on the establishment of CMOs subject to prior authorization, where articles 1-5 of the LACNR the law has therefore sought to limit the number of CMOs, with a view to safeguarding their sustainable operation. The state was determined to make sure that those CMOs existed were reliable trustees for right holders and reliable partners for users. At the same time the law seeks to avoid raising any unjustified barriers for establishment of CMOs, not least in the light of article 12 of the Germany Constitution and the EU Treaty provisions on the freedom of establishment;
- Chapter 2 ('Rights and Obligations of the CMOs') on rights and obligation, and on the Arbitration Board and the access to the Courts, where articles 6-8 of LACNR refers directly to the relationship between CMOs and rightholders. Article 9 contains accounting obligations of CMOs, which are relevant both for rightholders and the public. Article 10-13c deal with the relation between CMOs and users.<sup>24</sup> The Germany legislator rightly assumed that, while copyright litigation is already something for experts and not easily accessible to the general Courts, cases involving CMOs and their sometimes complex dealings with users are even

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<sup>24</sup> German Patent and Trade Mark Office ('GPTO'), Annual Report 2008, at 53.

more complicated. In particular assessing the economic impact of an umbrella agreement under article 12 of the LACNR between the CMO and an association of users on rights of remuneration for private copying, rights of communication to the public or public lending rights may be easiest for the parties themselves with the assistance of neutral board;

- Chapter 3 ('Supervision over the CMOs') on the control over CMOs, one of the main motives behind the LACNR was to submit CMOs to comprehensive State control so as to cope better with the potential risks that result from their dominant position and their function as trustees. This specific state control, which is contained in chapter 3, article 18-20 of the LACNR, applies side by side with the control by the Germany Federal Antitrust Office and other forms of supervision by the state, depending on which organizational structure CMO has chosen.

### **I.3. CMOs in other parts of the world**

#### **I.3.1. Experiences from South Africa on Collective Administration of Copyright and related rights**

In South Africa the Minister responsible for the Act exercises his powers under section 39(cA)<sup>25</sup> of the Act and promulgate the "Regulations on the Establishment of Collecting Societies in the Music Industry Collecting Society".<sup>26</sup> Section 3(1) of these Regulations requires that new applicants for accreditation as CMOs must have at least fifty (50) members.

An important feature of the Regulations is that the time-lines<sup>27</sup> are clearly spelled out within which the Registrar of Copyright must act on an accreditation application and there is an in-built duty imposed on the Registrar to give written reasons<sup>28</sup> for any decisions relating to accreditation of a CMO. Finally, the South African Regulations provide, under section 3(5) that the

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<sup>25</sup> 317S. 39(cA) of the South African Act provides that the Minister may make regulations in consultation with the Minister of Finance, providing for the establishment, composition, funding and functions of collecting societies contemplated in section 9A, and any other matter that it may be necessary or expedient to regulate for the proper functioning of such societies.

<sup>26</sup> Department of Trade and Industry (2011), Copyright Review Commission Report, op. cit. at 24.

<sup>27</sup> See S. 3(4) of the South African Regulations.

<sup>28</sup> Ibid, at S. 3(4)(c) and 3(6).

accreditation of a CMO granted by the Registrar shall be valid for a term of five (5) years and renewable for 5 years.

In South Africa, the grant, renewal, refusal or non-renewal, and the withdrawal of an accreditation must be communicated to the CMO in writing together with reasons for the action.<sup>29</sup> This action must also be published in the South African Government Gazette by General Notice.<sup>30</sup> Once there has been publication in the Gazette of the Registrar's decision to grant, renewal, refusal or non-renewal, and the withdrawal of an accreditation, section 3(8) of the South African Regulations expressly provides that this decision shall be subject to judicial review on application to the High Court of South Africa, Transvaal Provincial Division (TPD), brought within three months after this publication.

Regarding the supervision of the activities of CMOs, section 4(1) of the South African regulations vests this power on the Registrar of Copyright who is required to keep a register of all accredited collecting societies and ensure that these CMOs discharge their obligations under the law.<sup>31</sup> Under section 4(2) of the Regulations, CMOs are required to invite the Registrar to their Annual and Special General Meetings of its membership in addition to submitting an Annual Activity Report, including financial records and any other documents that may be necessary to assess the degree of compliance of the collecting society with the Regulations, and the Copyright Act. Furthermore CMOs in South Africa have a duty under the Regulations to keep the Registrar of Copyright informed at all times of any and all occurrences or changes affecting its organisational and operational features within 30 days of the occurrence or change.<sup>32</sup>

If an accredited CMO in South Africa does not comply with its obligations under the Regulations, the Registrar may provide a period of between thirty (30) and ninety (90) days for the CMO to remedy the situation.<sup>33</sup> Where the CMO fails to comply, the Registrar is empowered

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<sup>29</sup> *Ibid*, at S. 3(6).

<sup>30</sup> *Ibid*, at S. 3(7).

<sup>31</sup> See S.4(2) of the South African Regulations.

<sup>32</sup> *Ibid*, at S. 4(3).

<sup>33</sup> *Ibid*, at S..4(4).

under section 4(4) to withdraw the accreditation<sup>34</sup> and/or apply to court for relief including placing the CMO under judicial management or winding up or dissolution<sup>35</sup>.

Finally, within the context of licensing and supervision of CMOs, sections 6(1) and (2) of the Regulations expressly provide that all CMOs must distribute at least eighty percent (80%) of their incomes and not more than twenty per cent (20%) should be retained by the CMO after distribution to defray its administrative costs or apply otherwise.

In practice, South Africa's legal framework is narrow in scope since it excludes all other rights under collective management of copyright and related rights.<sup>36</sup> In this connection, Rwanda may wish to take lessons from the liquidation of South African Recording Rights Association Limited (SARRAL). SARRAL had been operating as an accredited CMO despite the fact that it had received a qualified audit report for three consecutive years, had failed to comply with the South African Companies Act with regard to the issuance of the audited financial statements, and had a pending case about its financial status.<sup>37</sup>

Therefore, the SARRAL case shows that the legal framework must have provisions in place for carrying out comprehensive investigation before any CMO license to operate is granted and/or renewed. This should be adopted in our Rwandan legal framework in order to make CMOs efficacy.

With regard to dispute resolution, the South African legal framework provide for the Competent Authority and Copyright Tribunal to act as arbitors in disputes arising between the various actors within the collective management system. However, there is need to strengthen the legal

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<sup>34</sup> *Ibid*, at S.4(4)(a). The Copyright Review Commission recommended in 2012 that the Copyright Act be amended to allow the Registrar to take over the administration (as opposed to the withdrawal of accreditation) of any relevant collecting society (SAMPRA, NORM or SAMRO) if the Registrar has reason to believe that there has been a material breach of the Copyright Act or Regulations. See Paragraph 6.3.1 in Department of Trade and Industry (2011), Copyright Review Commission Report, op. cit. at 40.

<sup>35</sup> S.4(4)(b) of the South African Regulations.

<sup>36</sup> See Paragraph 6.3.4 in Department of Trade and Industry (2011), Copyright Review Commission Report, op. cit. at 46.

<sup>37</sup> See Department of Trade and Industry (2011), Copyright Review Commission Report, op. cit. at Paragraph 6.1.4.



provisions relating to these bodies so as to enhance their efficiency and effectiveness.<sup>38</sup> In the South African context, the Commission suggested that all collecting societies be mixed (e.g. a collecting society for needle time should cater for both performers and record companies) and existing societies should be given a period of two years to merge, failing which an appropriate process should be used to appoint the mixed collection societies.<sup>39</sup>

### **I.3.2. Experiences from Nigeria on Collective Administration of Copyright and related rights**

The primary source of law for licensing and supervision of CMOs is the Copyright Act Cap C28, Laws of the Federation of Nigeria 2004 and the Copyright (Collective Management Organisations) Regulations 2007.<sup>40</sup> Section 39(8) of the Nigerian Act aptly defines a CMO as “an association of copyright owners which has as its principal objectives the negotiating and granting of license, collecting and distributing of royalties in respect of copyright works.”

The Nigerian Copyright Commission (NCC), established under section 34 of the Nigerian Act, is the statutory organ responsible for all matters affecting copyright in Nigeria as provided for in the Copyright Act. Under section 39(2) of the Nigerian Act, the NCC has the powers to give approval for any entity seeking to operate as a CMO for the purposes of the Act.<sup>41</sup> Like the

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<sup>38</sup> Ibid at Paragraph 6.3.4. The South African Copyright Review Commission recommended that the Copyright Tribunal should consist of 5 members namely a President and a Deputy President (both of whom should be High Court judges appointed by the President of the Republic on the recommendation of the Judicial Service Commission (JSC)) and three other members three other members appointed by the President of the Republic on the recommendation of the JSC, each of whom have at least five years' experience at a high level in industry, commerce, business, public administration education or the practice of a profession. The CRC further recommends that the sittings of the Tribunal should be held at such places and times as the President of the Tribunal determines. A quorum of the Tribunal should be constituted by one member, unless a party to a matter before the Tribunal requests that it be constituted by more than one member, in which event it should be constituted by not less than two members, one of whom should be the President or the Deputy President.

<sup>39</sup> Ibid. The implementation of this recommendation commenced in 2014 with the establishment of the Composers Authors and Publishers Association (CAPASSO). CAPASSO is a result of the merger of NORM's and SAMRO's mechanical rights units to form one collecting society for mechanical rights. More information on CAPASSO is available at: <http://www.capasso.co.za/index.php/about-us/our-history#>

<sup>40</sup> The NCC has discretionary powers under section 39(7) to make regulations which would specify certain conditions required for effective copyright collective administration of rights in Nigeria. Pursuant to these powers, the NCC issued the Copyright (Collective Management Organisations) Regulations 2007.

<sup>41</sup>In this connection, see the case of Musical Copyright Society Nigeria Ltd v Details Nigeria Limited discussed by O. O. Rotimi (2012) op cit.at 60. In this case, an ex-parte order had been obtained by the plaintiff against the defendants to which the defendant raised a locus standi objection. The defendant argued that since the plaintiff had claimed to represent more than two million artistes, and was essentially carrying out the activities of negotiating and granting of licenses, collection and distribution of royalties on copyright works, the plaintiff was functioning as a

Kenyan Act, the Nigerian Act criminalizes the act of performing the duties of a CMO without the approval of the NCC but it goes a step further to impose a graduated scale of fines and an imprisonment term.<sup>42</sup>.

Within the context of supervision of the activities of CMOs, section 2(3)(vi) of the Nigerian CMO Regulations states that the Articles of Association of the CMO must make provision for the attendance of a representative of NCC as an observer at the Governing Board and General Meetings of the CMO. Section 2(4) of the Regulations provides that NCC may require any new applicant to advertise, at its own cost, its application for grant of licence to operate as a CMO in designated national newspaper(s). Finally, section 2(9) of the Regulations provides that the license granted by NCC is valid for three (3) years and may be renewed every two (2) years for a successive 2 year period.

During the registration of a CMO, the Regulations impose certain positive obligations on CMO to furnish certain information both to the NCC as well as the general public. Section 8(1) provides that NCC must be notified by the CMO on the following issues: 1) any alterations to its Memorandum or Articles of Association or any internal rules; 2) any adoption of Tariffs and alteration thereof; 3) any Reciprocal Representation Agreements entered into with foreign collecting societies; 4) any alteration to the standard membership agreement; and 5) any decisions in judicial or official proceedings to which the CMO is a party, where the Commission so requires.

Furthermore, under section 8(4), the CMO must publicise any change in the tariff rates for any category of users through a medium that is accessed publicly by them. In the event of breach of the above conditions, the CMO and/or its officers may be liable to a written caution and be

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collecting society and required the approval of the Nigerian Copyright Commission to operate as a collecting society in order to be entitled to institute copyright infringement proceedings. The plaintiff on the other-hand denied commencing the action as a collecting society but rather as an owner, assignee and exclusive licensee as contemplated under Section 15 of the Act. The court ruled that the plaintiff is a collecting society. Therefore the fact that MCSN has not been registered pursuant to Section 32B(4) of the Act, it cannot be permitted to operate as such a CMO.

<sup>42</sup> S. 39(5) of the Nigerian Act.

required to rectify the breach within a specified time. Failure to rectify the breach within the specified period, the CMO shall be liable to a fine of fifty thousand Naira (N50, 000).

The Nigerian Regulations also provide for the appointment of an auditor at any time to audit the accounts of a CMO and the cost of such auditing shall be borne by the CMO. However, the Nigerian Regulations empower NCC to initiate criminal proceedings against the CMO where it appears that an offence has been committed by the CMO or by any of its officers.

An important feature of the Nigerian Regulations is section 11 which imposes a maximum limit of 30% out of the total royalties and fees collected that may be deducted by a CMO for administrative expenses during a year. However under section 11(2), the CMO may make a prior written application to NCC seeking the latter's approval to deduct more than 30% of its total revenue to cover administrative expenditures. In the event of breach, the CMO may be liable to a caution and/or written warning from NCC and be required to rectify the breach within a specified time. Where there is a dispute arising from any matter that falls within the purview of the Regulations, section 15 states that such disputes are to be referred to NCC which may set up a Dispute Resolution Panel.

Within the context of supervision of CMOs, section 18 is significant as it sets out certain conduct and practices deemed to be unethical including the following: 1) granting licenses, collecting and/or distributing royalties in respect of works for which the CMO is not authorized to administer; 2) making false representation in respect of any matter to which it is required to provide information knowing such representation to be false; 3) discriminating in the provision of licence to members of the same user class; inducing a user who is in the process of negotiating for a licence with another society or right owner to refrain from completing the licensing process; and 4) failing to make available to any other CMO information which is reasonably required by such other CMO to enable it effectively administer the rights held by it, doing anything or acting in a manner that has the effect of preventing any other CMO from carrying its functions as approved under the Regulations; among others.

With regard to deregistration of a CMO, the Regulations provides for revocation of a CMO's license. Section 3(1) states that NCC may on its own motion or on application by any interested person revoke the license of a CMO. Section 20 of the Regulations addresses how NCC deals with CMOs found to be in breach of the Regulations. In the first instance, the CMO may be liable to a written caution where it fails to act to address a breach of any of the sections in the Regulations. If the CMO fails to comply with a directive of NCC, then its license may be suspended pending the CMO's compliance. Where the CMO fails to comply with three months of the suspension, then the CMO's license may be revoked. Any officer of a CMO who has been cautioned for two times may be disqualified by NCC from holding any management position in any CMO unless he/she satisfies NCC on why he/she shall not be disqualified or why such disqualification should be lifted.

While it appears that Nigeria's legal provisions for regulation of CMOs are more stringent than those in South Africa, one must bear in mind that the Nigerian provisions have been the subject of many litigation battles pitting CMOs against both users and the regulator, NCC. For instance, several cases arose from the requirement under Nigerian Copyright Act that prohibited a CMO from instituting actions for infringement of copyright unless such CMO had been approved by the NCC.

#### **I.4. Legislative Options for Rwanda**

It is submitted that a common denominator of the legal frameworks in South Africa and Nigeria is two-fold: firstly the powers and functions of the South African and Nigerian regulators have been significantly enhanced and secondly, the obligations and duties imposed on registered CMOs in South Africa and Nigeria are greater than in the Rwandan context. Both South Africa and Nigeria have enacted special regulations dealing exclusively with the establishment, control and supervision of CMOs. This Study proposes that the following minimum legislative measures could be considered as contained in the legislative frameworks of Nigeria and South Africa.

## **I.5. Licensing terms and conditions for CMOs**

All the requirements along with any other terms and conditions of the CMO license must be contained in a set of Regulations which is systematic and clear. The duration of the CMO license must be considered. Among the jurisdictions analysed, South Africa's license is the longest at 5 years, followed by Nigeria at 3 years. Considering the duration of the CMO license upwards will serve to bring this provision in line with regulations which deals with Annual Reports and Audited Accounts<sup>43</sup>.

On the question of the CMOs' obligations, the terms and conditions of the license must clearly spell out cost-to-income ratio that will be applicable. It is generally accepted that if the cost remains within some 30% of income from the management of performance and broadcasting rights or within 25% of the income from the management of reproduction rights then the CMO can be deemed economically sufficient and viable.<sup>44</sup>

Among the countries considered, South Africa has a cost-to-income ratio at twenty percent (20%), followed by Nigeria at thirty per cent (30%). In this regard, it is important to note that the Nigerian Regulations provide that a CMO may make a prior written application to the regulator seeking the latter's approval to deduct more than 30% of its total revenue to cover administrative costs.

An important obligation on the CMO is to keep the government informed throughout its license period. In the both the Nigerian and South African Regulations, all registered CMOs are required to keep the regulator informed at all times, in addition to providing certain information to the users of their copyright works. The CMO must inform the regulator within a 30 day period in the event of any changes to the Constitution or rules of the CMO, Tariffs, Reciprocal Representation Schedule, Standard Membership Agreements, and any decisions of judicial or official proceedings involving the CMO. The CMO would also be under a duty to notify the public, in

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<sup>43</sup> The Act appears to frustrate KECOBO's supervisory mandate by prescribing that a CMO license shall be valid for one year yet it provides that CMOs shall only report to KECOBO once a year through their Annual Reports and Audited Accounts. This provision restricts KECOBO's ability to examine and evaluate the operations and performance of CMOs prior to the period of application for renewal of registration.

<sup>44</sup> U. Uchtenhagen (2005) "The Setting-up of New Copyright Societies - Some Experiences and Reflexions", op.cit. at 7.

particular, its licensees, about changes in its tariffs, licenses and other related information through public advertisements at the CMO's own cost.

In addition to the list of laws governing the activities of a CMO, the license must also require strict adherence to principles of good governance. Out of the two countries under review, South Africa presents the best argument for requiring CMO compliance with corporate governance principles. The collapse of SARRAL is noteworthy as it is attributed in part to corporate governance failure.<sup>45</sup> For the remaining accredited CMOs, the South African Copyright Review Commission identified several key areas of non-compliance with the principles of good corporate governance namely, lack of internal controls and audit functions overseen by an effective audit committee, lack of independent directors<sup>46</sup> on the boards of the CMOs and non-disclosure of directors' remunerations<sup>47</sup>.

The terms and conditions of the CMO license must prohibit CMOs from engaging in certain conduct and practices deemed to be anti-competitive and /or monopolistic vis-à-vis both users, members and other registered CMOs. This includes making any representations made to the users and the citizenry at large that any CMO is the sole CMO in the country without recognizing the other CMOs that may exist within the particular industry. In line with the Nigerian regulations, CMOs must also be prohibited from engaging in certain conduct and practices deemed to be unethical within the scope of collection and distribution of royalties.

Within the terms and conditions of the CMO license, specific timelines must be set for the CMOs to make all applications to the regulator including those for renewals, extensions, exceptions. Time limits must also be set for submission of all reports, and other information as required by the regulator.

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<sup>45</sup> See Department of Trade and Industry (2011), Copyright Review Commission Report, op. cit. at 52. Among some of the areas of non-compliance include: the breakdown or significant weaknesses in internal controls (the auditors issued qualified audit reports for 2003, 2004 and 2005 for failing to verify receipts from the South African Broadcasting Corporation and distribution of royalties to members); the internal rules of the CMO were in conflict with the constitutive documents of the CMO; The Managing Director was also the Chairperson of the CMO; The outdated constitutive documents were also in conflict with the South African Companies Act of 1973; The CMO made changes in its accounting policies, which resulted in breaching of the members' contracts.

<sup>46</sup> These directors are qualified but do not form part of the CMO's membership. The SA CRC Report recommends at least one-third of the Board should be comprised of independent directors.

<sup>47</sup> *Ibid*, at 53.

Equally, the terms and conditions of the CMO license must impose certain obligations on the regulator to ensure that the latter exercises its functions within the confines of its enabling statutes and all other applicable laws of the land. First and foremost, any decision to be made by the regulator regarding the grant, renewal, non-renewal, rejection or withdrawal of a CMO's registration must be time-bound. Such time allocations must be calculated from the date of receipt of the application by the regulator.

In this connection, the license terms and conditions must expressly provide that the regulator must furnish the concerned CMO with written reasons for any decision made in the scope of its licensing and supervision mandate. With regard to the appeals provision, should provide that on written request, an additional thirty (30) days may be allowed for a party to appeal before the Competent Authority. The appeals provision should also include interim or interlocutory applications pending final hearing and determination of the appeal.

In this regard, the Constitution clearly states that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.

Finally, the terms and conditions of the CMO license must spell out clearly the consequences of breach. In the case of breach by the regulator, the CMO should be entitled to reliefs, both pecuniary and non-pecuniary. In the case of breach by the CMO, the regulator must have several options ranging from written cautions, warning letters, show cause letters and culminating in revocation of the license to operate and withdrawal of registration as a CMO.

## **I.6. Supervision of CMOs**

As discussed above, the ideal situation is that there are clear terms and conditions for a CMOs license including the consequences of breach. However in order to ensure that CMOs comply with the license, the regulator must be empowered by law to carry out a wide range of supervisory functions with respect to the CMOs' activities.

The current situation in Rwanda is that the Law does not provide any mechanisms or measures for the state to effectively supervise the activities of CMOs. However there are useful provisions on government supervision of CMOs from Nigeria and South Africa that may be worth considering. In Nigeria, the audit of a CMO's activities by the regulator is clearly spelled out in law.

Such an auditor is vested with statutory powers relating to the supervision of a CMO's activities and appears to have a great deal of independence and autonomy from both the CMO and the Commission. Therefore it is submitted that Rwanda's legal framework must clearly articulate the audit function within the licensing and supervision of CMOs.

Quite separately from audit, the inspection of a CMO by the regulator is an important aspect of the regulator's supervisory role. Unlike audits, inspections ought to be continuous in nature and are intended to assess the degree with which the CMO's day to day activities are in compliance with the terms and conditions of its license. Therefore, Rwanda ought to have the function of CMO inspectorate alongside that of CMO audit within its legal framework for licensing and supervision of CMOs.

With regard to non-compliant CMOs, in Rwandan legal frame work there is no course of statutory course of action. However, in the two African jurisdictions under review, the law prescribes drastic measures and actions to deal with non-compliant CMOs.

In South Africa, the CMO is given a notice of non-compliance and a period of between thirty (30) and ninety (90) days is provided to remedy the situation. Where the CMO fails to comply, the Registrar is empowered under section 4(4) to withdraw the accreditation and/or apply to court for relief including placing the CMO under judicial management or winding up or dissolution Nigeria arguably has the most systematic framework for dealing with non-compliant CMOs. This framework is a combination of fines, penalties, cautionary letters, suspensions and disqualifications. As seen in the Nigerian context, the NCC is vested with a wide array of powers aimed at deterring non-compliance on the part of registered CMOs in Nigeria.



## **I.7. Legal framework of collective management of copyright and related rights**

### **I.7.1. International Conventions**

At international level, Intellectual Property protection is not a new phenomenon. The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) was adopted in September 1886. The Berne Convention deals with the protection of works and the rights of their authors. It is based on three basic principles (principle of national treatment, principle of automatic protection and principle of independence of protection) and contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them<sup>48</sup>. Before 1886, there was a proliferation of bilateral agreements regulating copyright protection between States. Under this regime, recognition of the rights of foreign authors was based on the principle of reciprocity. These bilateral treaties were deemed unsatisfactory. The need for a truly multilateral treaty was felt by all stakeholders<sup>49</sup>.

The Berne Convention is an international agreement which sets out to harmonise the way that copyright and related rights are regulated at an international level.<sup>50</sup> The Convention is administered by the World Intellectual Property Organisation (WIPO) and was first adopted in 1886 as an agreement to honour the rights of all authors who are nationals of countries that are party to the Convention.<sup>51</sup>

Berne Convention has been updated seven times, since its adoption in 1886, most recently in 1979.<sup>52</sup> As of January 2014, one hundred and sixty seven (167) countries had signed the Berne

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<sup>48</sup> Summary of the Berne Convention for the Protection of Literary and Artistic Works, available at [http://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html), visited on 13/09/2015.

<sup>49</sup> Tshimanga Kongolo, Historical Evolution of Copyright Legislation in Africa, in the WIPO Journal: Analysis of Intellectual Property issues, vol. 5, issue 2, 2014, p. 164

<sup>50</sup> See for instance, J.W. Chege (1978) *Copyright Law and Publishing in Kenya*, Kenya Literature Bureau at 98; M. Wekesa & B. Sihanya (2009) "Intellectual Property Rights in Kenya", *op. cit.* at 4, 8, 76 and 152.

<sup>51</sup> The UK Copyright Service (2004) "International copyright law - The Berne Convention", Available at: [http://www.copyrightservice.co.uk/copyright/p08\\_berne\\_convention](http://www.copyrightservice.co.uk/copyright/p08_berne_convention)

<sup>52</sup> WIPO (2013) Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886), Available at: [http://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html)

Convention, Rwanda inclusive. The Convention provides briefly for the collective management of copyright and related rights.<sup>53</sup>

Article 5 of the Convention contains the principle of national treatment for authors. According to this principle, foreign rights holders ought to receive the same treatment as national rights holders.<sup>54</sup> In the context of licensing and supervision of CMOs, the relevant legal framework must ensure that CMOs collect and distribute all royalties equally on behalf of both their Rwandan members and their foreign affiliates.

Article 11*bis* and Article 13 of the Berne Convention provide that it is a matter of national law-makers in the Berne member countries to determine and/or impose conditions under which exclusive rights under copyright and related rights may be exercised. In the Rwandan context, intellectual property law doesn't explain in detail how these provisions of Berne have given rise to a voluntary licensing system for collective management of copyright and related right through private non-profit companies called CMOs.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) is an international agreement administered by the World Trade Organization (WTO). It sets out minimum standards for intellectual property regulation as may be applied by nationals of WTO Members.<sup>55</sup> It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994 and came into effect on January 1, 1995<sup>56</sup>.

It is important to note that TRIPs includes nearly all the conditions of the Berne Convention as is contained in Articles 9 through 14 of TRIPs.<sup>57</sup> Therefore, TRIPs effectively brought the laws of those WTO member states that had not signed the Berne Convention into harmony with the laws

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<sup>53</sup> See M. Fiscor, *Collective Management of Copyright and Related Rights at A Triple Crossroads: Should It Remain Voluntary or May It Be "Extended" or Made Mandatory*, at 3-5

<sup>54</sup> See for instance, M.M. Frabboni, "Collective management of music rights: a test of competition and Industrial Organisation theories, Published PhD Thesis, Queen Mary University of London, 2009 at 109-110.

<sup>55</sup> WTO (2013) "Overview: the TRIPs Agreement" Available at:

[http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm).

<sup>56</sup> *Ibid.*

<sup>57</sup> J. Watal, *Intellectual Property Rights in the WTO and Developing Countries*, Kluwer Law International, 2001 at 210.

of those countries that are signatories to Berne.<sup>58</sup> In 1994, the TRIPS agreement was introduced, aiming at reducing those distortions and impediments to international trade. This pressure, led to the expeditious enactments and reforms of IP laws in developing countries and subsequent setting of enforcement measures before having enough time prior to enforcement during which these countries can adapt their political, economic, social and cultural situations for such enforcement.

Related Rights find their origin in the Convention of Rome 1961<sup>59</sup>, which offers international protection to rights of performers, producers of phonograms, and broadcasting organisations. These neighbouring rights are important for performing artist, such as singers, musicians, dancers, phonograph producers, broadcasting organizations, film producers and other individuals who perform their work of literature or art on stage. The performing activity is protected and these rights offer protection for the reproduction of their performance.

### **I.7.2. National Legal framework**

Due to impracticability of managing copyright and related rights individually both for the owners of rights and for the users, creates a need for collective management organizations in Rwanda, whose role is to bridge the gap between them in those key areas most especially the key function of the legal and institutional framework for collective administration of copyright and related rights which sets out adequate provisions for the licensing and supervision of CMOs by the State.

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<sup>58</sup> M. N. Ouma, "Enforcement of Copyright in the Music Industry: A Critical Analysis of the Legal and Institutional Framework on Enforcement in Sub Saharan Africa", Unpublished PhD Thesis, Queen Mary University of London, 2009 at 171 and 172

<sup>59</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organization. This Convention was adopted in 1961 and is jointly administered by the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Labor Organization (ILO) and WIPO.

### **I.7.3.1. The Constitution of Republic of Rwanda**

According to Article 200 of the Constitution, the Constitution is the supreme law of the Republic. Any law which is contrary to this Constitution is null and void and binds all persons and all State organs at both levels of government. Article 190 of the constitution provides that upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary laws except in the case of non compliance by one of parties, which includes Berne and TRIPs agreements.

The Constitution expresses that the national values and principles of governance binds all State organs, State officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements public policy decisions. Article 9 of this Article provides non-exhaustive list of national values and principles of governance including building a state governed by rule of law and establishing appropriate mechanisms to ensure social justice. Within the context of licensing and supervision of CMOs, in Rwanda there are some specific laws which should comply with Article 9 of the Constitution.

Article 29 of the Constitution provides for protection of the right to property. It provides that every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Rwanda. In Article 29 include any vested or contingent right to, or interest in or arising from intellectual property. Therefore just like any other tangible property, copyright and related rights are construed as property and as such copyright owners, copyright assignees, copyright licensees are recognised as holders of rights.

It may be argued that in licensing and supervising CMOs, in Rwanda the Ministry of Trade and Industry is the specific organ giving effect to Article 29 and Article 190 of the Constitution by supporting, promoting and protecting the rights under copyright assigned to CMOs. This “constitutionalisation” of intellectual property law in Rwanda is unprecedented and significant as it empowers CMOs and their respective members i.e. the rights holders to demand that there is need for specific organ to acts positively to protect their rights under copyright and related rights.

However the intellectual property rights controlled by CMOs as guaranteed by the Constitution are not absolute and must be balanced against other competing rights in the Intellectual property law.

### **I.7.3.2. Other Laws in Rwanda**

Rwanda has had some form of legal framework for Intellectual Property since colonial times. Following independence in 1962, patents, trademarks and industrial designs were governed by the Law of 25 February 1963<sup>60</sup>; copyright by the Law of 15 November 1983<sup>61</sup>; and unfair competition by various unfair competition regulations dating from the colonial era<sup>62</sup>.

While the policy and legal environment has evolved and incremental changes have been introduced over the years, Rwanda's drive to advance its current national development goals highlighted the need to overhaul the country's Intellectual Property system. The enactment of a swathe of new laws in 2009 has effectively transformed Rwanda's Intellectual Property landscape, replacing outdated laws and regulations with new legislation that supports Rwanda's aspirations in attracting foreign direct investment, establishing a viable technological base and fulfilling obligations under international treaties<sup>63</sup>.

The government has invested a great deal in hard and soft information technology (IT) infrastructure, recognizing that information is the lifeblood of development, the lifeblood of technology, of products and services, of Government, and of business. Information is value. It is therefore increasingly important that information is codified and that its value is recognized. Intellectual property defines the limits under which information in the form of creations and innovations can be owned and how it can be transferred.

Science and technology are given priority when selecting candidates for government scholarships at home and abroad. Education and information and communication technologies

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<sup>60</sup> Laws of February 25, 1963 on Industrial Designs; Patents; Factory or Trade Marks

<sup>61</sup> Law n°27/1983 of November 15, 1983 governing the Copyrights

<sup>62</sup> See for example the Decree Law n° 41/63 of February 24, 1950 on the elimination of unfair competition

<sup>63</sup> See Law N° 31/2009 of 26/10/2009 on the protection of Intellectual Property, Official Gazette N°50 bis of 14/12/2009 and Rwanda Intellectual Property Policy available at [www.minicom.gov.rw](http://www.minicom.gov.rw)

(ICT) are top priorities in advancing Rwanda’s national development strategy. This is reflected in Rwanda’s Intellectual Property policy which states that *“for a low-income country such as Rwanda, the extent of growth in the medium and long term will be determined by how our people access and utilize information, how technologies from abroad that suit the needs of our economy are accessed and how we innovate and create value within Rwanda. It is therefore vital that Rwanda has a functioning intellectual property system, to allow people to realize the full value of their creations, and to allow them to access the creations of others.”*<sup>64</sup>

The new Intellectual Property Law brings together substantive legislation on patents, copyright, trademarks, geographical indications, industrial designs, utility models and unfair competition. Under the new Intellectual Property Institutional Framework, the Ministry of Trade and Industry is responsible for the policy framework, supervision of the implementation of IP policy and the body in charge of Intellectual Property registrations.

The Ministry of Culture is responsible for protecting the moral rights of creators, promoting and providing services to artists and performers as well as promoting and protecting Rwanda’s national culture and heritage while granting industrial property titles and registration of Intellectual Property Rights and their publication is entrusted in the Office of the Registrar General under the Rwanda Development Board. It also provides technical information services on patents and utility models and on other technical matters to facilitate evaluation, selection, acquisition and assimilation of technologies by industry and research institutions.

It is from this background that Rwanda had to put in place the law on protection of intellectual property and there by including in the law a provision of possibility of creating collective management organizations that are an important link between creators and users of copyrighted works to ensure that the owners of rights as creators receive payments for the use of their works.

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<sup>64</sup> See Rwanda Intellectual Property Policy, p.3. The policy’s aim is to create “an environment in which the Rwandan sectors of business, Government and culture create ideas and innovations that are protected in a way that ensures the greater prosperity of the Rwandan people, while making optimal use of international technologies to promote growth and productivity for the whole Rwandan nation”.

According to article 253 of the Rwandan law on protection of intellectual property, it stipulates the possibility of creating private companies of collective management of copy right and related rights. These private companies once created and registered, they can operate as commercial companies or associations. These are the ones empowered with authority for representation and management of license, granting scheme, collection, calculation and distribution of remuneration arising from the use of protected works.

### **I.8. Trends and challenges of collective management of copyright and related rights in Rwanda**

The exercise of copyright and neighbouring rights can generally take place in two ways: either individually by the right holder which negotiates directly with the commercial user of the protected work, or collectively via recourse to the services of collective licensing bodies. In the case of collective management, right holders transfer or entrust their rights to the intermediate collective manager which acts in their interest and on their behalf, and negotiates rates and exploitation terms with users<sup>65</sup>.

The current legal and institutional framework for collective administration of copyright and related rights in Rwanda provides inadequate mechanisms and safeguards for regulation of CMOs. The Rwandan law of intellectual property article 253 provides the possibility of creating one or more private companies of collective management of copyrights and related rights. However this article of the above mentioned law, in its paragraph 2 provides that “*one or more private companies of collective management of copy rights and related rights shall apply the Law concerning the organisation and the functioning of commercial companies in Rwanda*”.

There is need to strengthen this framework so as to ensure that the interests of rights holders and users of copyright and related rights works are maximized through CMOs. That is one of the reasons why Rwanda, although it has enacted law for IP protection, which include enforcement provisions, Rwanda is still facing many critical problems which hamper the promotion and

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<sup>65</sup> European Parliament, Hellenic Foundation for European and Foreign Policy, Study on Collecting Societies and Cultural Diversity in the Music Sector, Directorate General for Internal Policies, Culture and Education, 2009, p.16

protection of intellectual property rights such as enforcement of the law and others which are going to be discussed below.

### **I.8.1. Enforcement**

Taking Rwanda as one of the cases to the point, although the law was enacted to make it TRIPS compliant, and the government made the necessary improvements in the enforcement machineries, piracy continues at an alarming pace for example this can be seen in the following cases:

- Case no R.Com 0178/12/HCC, of Kayirebwa Cecile v. ORINFOR, City Radio, Contact FM, Voice of Africa, Radio Flash and Radio Isango Star;
- Case no R.Com 0455/13/HCC of Gasake Augustin vs. Editions Bakame,
- Case no R.Com 0739/12/TC/Nyge of Kayirebwa Cecile vs. RwandAir; and
- Case no RCOM A 0014/08/CS of Bushayija Pascal vs. COGEBANK, August 06<sup>th</sup> 2010, Supreme Court.

In all the above cases, court found that copyright and related rights protected works were exploited unfairly by defendants and hence court awarded damages to the claimants even though damages were not fair on my point of view, the court found that there was lack of sufficient evidences related to the commercial loss incurred by claimants.

### **I.8.2. Lack of Awareness**

One of the critical impediments retarding the promotion of the protection of copyright and related rights in Rwanda is lack of awareness on the importance of intellectual property issues and their crucial role in the development process among all carders and calibers of people-right holders such as authors, performers, producers of phonograms and broadcasting organizations, essential users of those works such as broadcasting organizations, hotels, restaurants, discotheques and clubs, law enforcement agents, decision and policy makers.

This lack of awareness leads to the negative attitudes towards the protection of the copyright and related rights works in Rwanda and consequently the copyright and related rights protected



works are exploited unfairly at the expense of the right owners to the benefit of the users. There can hardly be any contract for adapting or communicating the work to the public between the parties for fair exploitation of the work and if the owner of the right demands one, he is branded as being untrustful<sup>66</sup>.

### **I.8.3. Adequate funding to the law enforcement agents**

Rwanda's political will and commitment is demonstrated not only by the enactment or amendment of laws that are TRIPS compliant but, however, to the allocation and disbursement of funding is adequate to the law enforcement agents. With limited resources as the result of economic performance complicated by many competing priorities, law enforcement agents receive very limited budget allocation, which consequently force them to prioritize various categories of crimes.

Hence because the priority is given to more serious offences which attract stiff punishments, and the fact that the police as the law enforcement agents have a discretion as to whether to investigate an offence or not, the intellectual property law enforcement receives low priority as its offences are considered and categorized as less serious because of the low penalties. The law enforcement agents are not to be blamed for this because if they do otherwise, ultimately they will be blamed for "misallocating" resources to less serious offences.

### **I.8.4. Lack of Skills of Enforcement Agents**

Likewise one of most critical problems the intellectual property law enforcement agents in developing countries face Rwanda inclusive is their inability to differentiate counterfeited goods from the originals such as CDs and audio and video cassettes. This is because sometimes, as a result of the digital technological advancement that is capable of making the counterfeited products look so much like the original, the difference is hardly detectable by bare eyes.

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<sup>66</sup> KITIME, J. "Problems in the protection of the rights of the artists in Tanzania" p. 2. A Paper presented at the Seminar of Copyright and Related Rights Stakeholders held at the Institute of Finance Management In Dar-es-Salaam, Tanzania (The paper is originally in Swahili).

On the other hand, some copyright infringement acts like piracy are nonobvious crimes, as, for example, the detection of CDs requires special skills. As the technological advancement, as argued above, has made it possible for the counterfeited CDs to look so similar to the legitimate ones, the law enforcement agents cannot act against any suspicious act of piracy unless they are informed of the act by the right holders.

#### **I.8.5. Lack of trust of right owners on CMOs**

Another critical problem facing the CMOs in Rwanda is the reaction of the right holders against the CMOs and other enforcement agents for their allegedly inaction against infringement of their works; forgetting that any reaction of the latter would mainly depend on the information provided by the right owners. Collaboration between the enforcement agents and the right owners is not provided for in the enforcement mechanism in Rwanda.

In Rwanda many authors and artists have been reluctant to join the newly established collective management organisation (Rwanda Society of Authors (RSAU) whilst waiting to see whether the society will bear any fruits to its authors and artists respectively. This behavior depicts skepticism the authors and artists have over performance of the society.

#### **I.8.6. Lack of Judges' expertise**

The judge's expertise on the side of the judges towards intellectual property is another impasse to the effective enforcement of intellectual property law. Emergence of expertise by the judges may result from the "wrong perceptions of the functions of the intellectual property rights and their relevance to the society".

The examples is the Chinese judges who unreasonably require plaintiffs to produce additional evidence that may be difficult or expensive to obtain and consequently causing delays or to refuse to grant interlocutory injunction or inspection order or awarding unreasonable fines and penalties when an infringer is held liable or guilty<sup>67</sup>, which is the same case in Rwanda most

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<sup>67</sup> Sodipo, B., *op. cit.*, p 263.

especially in the case of KAYIREBWA Vs Rwandan local media and Rwanda Air<sup>68</sup>. Another example is from Chile where judges were reluctant to authorize search warrants and consequently hampering law enforcers' pursuit against software piracy<sup>69</sup>.

The piracy of the local companies, as the cases in Nigeria<sup>70</sup> and Malaysia<sup>71</sup> where books and videotapes piracy respectively constituted a lucrative industry, are considered to be providing social services especially where the original products are scarce or unaffordable. Having this in mind, some judges believe that they are patriotically duty bound to protect their small local companies against the big multinational corporations<sup>72</sup>.

### **I.8.7. Tracking and monitoring**

Although it is easy to track, monitor and prove use or appropriation of property other than IP, such as land or other immovable property, when such use or appropriation takes place without authorization of the owner, this is not the case in IP rights. It is difficult for the right owners and CMO to monitor all uses in Rwanda, when and where they occur and how to prove infringement. Infringers know that their activities are illegal, and so it is expected that they would destroy and hide the relevant evidence.

Nowadays another reason is the threat of digital technology. Technologies has changes during the century, first music was recorded on vinyl, later in the seventies this changed to tapes, but the technology to record music also changed. Suddenly it was possible for consumers, although the quality of the music changed, to record music on blank tapes. The development of technology

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<sup>68</sup> Kayirebwa Cecile vs. RwandAir, Case no R.Com 0739/12/TC/Nyge of 21/06/2012, Nyarugenge Commercial Court.

<sup>69</sup> Sodipo, B., *op. cit.*, p 264.

<sup>70</sup> *ibid.* Sadipo, B. quoting comments by a recently retired judge "Mr. Sodipo, while I respect you for your efforts in the copyright campaign in Nigeria, I do not think history will forgive you for your role. ..., where do you want the ordinary to get money to buy books for his children, given the unreasonable prices the books are sold at? The pirates are doing a social service" at foot note 93.

<sup>71</sup> "Infringement of copyright raises questions of bread and butter. As at the end of September 1984 alone there were 3,000 videotape dealers in Malaysia. This was an official estimate. If videotape piracy constitutes a flourishing industry infringement of copyright then becomes a question of economics. It will boil down to a long-drawn battle between multinational firms and native cottage industries. ..." By Justice Hashim Yeop A. Sani, Judge Supreme Court of Malaysia. The Judiciary and the Intellectual Property System in Malaysia, Regional forum of the Judiciary and and Intellectual Property System, Pakistan: WIPO 1986, p. 275 at 278 as quoted by Sodipo, B. *ibid.*

<sup>72</sup> Sadipo, B. *op. cit.* p. 264.

did not stop, in the eighties music could be recorded on CDs, later it became possible for consumers to buy CD burners on their home computer, so they could copy their own CDs without loss of quality.

With the development of internet as a manner to distribute music, it was possible for a broader consumer group to share music files and burn them on CDs. Nowadays, there are many Peer-to-Peer networks and music can be compromised into small mp3 formats, so consumer could easily download or share a lot of music. The new digital technology is a threat for the music industry, because of the lost in revenue for the music producer and the artists<sup>73</sup>. Therefore, government created intellectual property law to stimulate creativity. However monitoring the use of works is still a big problem.

The good example is the Case of Kayirebwa Cecile against ORINFOR and some other members of the media in Rwanda has been a good practical example of how tracking and getting proof to prove infringement is difficult for right owners and even CMO in Rwanda as can be seen bellow:

Kayirebwa Cecile, a famous Rwandan singer, sued the Rwanda TV and Radio, as well as some other domestic radios that are City Radio, Contact FM, Voice of Africa, Radio Flash and Radio Isango Star, before the Commercial High Court, for having used her musical works without her license. However, she only won the case regarding claims against Rwanda Television (RTV), Radio Rwanda (ORINFOR in general) and Isango Star Radio<sup>74</sup>.

In this case, all sued radios and ORINFOR confessed having played her musical works. City Radio, Contact FM, Voice of Africa and Radio Flash managed however to provide the Court with Kayirebwa's e-mails requesting them for playing her musical works in a marketing framework. ORINFOR and Isango Radio did not manage to provide the same or similar evidences<sup>75</sup>.

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<sup>73</sup> Hill, C.W.L. 2007. Digital piracy: Causes, consequences, and strategic responses. *Asia Pacific Journal of Management*, Volume 24, p.12.

<sup>74</sup> Kayirebwa Cecile v. ORINFOR, City Radio, Contact FM, Voice of Africa, Radio Flash and Radio Isango Star, Commercial High Court, case no R.Com 0178/12/HCC of 15/02/2013, pp. 1-27.

<sup>75</sup> Kayirebwa Cecile v. ORINFOR, City Radio, Contact FM, Voice of Africa, Radio Flash and Radio Isango Star, Commercial High Court, case no R.Com 0178/12/HCC of 15/02/2013, pp. 1-27.

While ruling the case, the court based its decision on article 200, 7<sup>o</sup> of the 2009 IP Law that prohibits the “communication to the public of the work by broadcasting” as an act of copyright infringement among other acts. The court awarded KAYIREBWA 5.000.000FRWS only instead of 80.000.000frws that was requested by the claimant, basing on the fact that the offense had no aggravated circumstances. The court further ruled that the defendant didn’t provide the evidence to prove the profits ORINFOR got from the usage of the works of KAYIREBWA.

Regarding claims against CITY RADIO, the court found that the audio recorded by NKUSI Arnaud is not sufficient to prove that CITY RADIO played the KAYIREBWA’S musical works called Tarihinda due to failure to prove that the musical works was played in CITY RADIO’S studio and also court was not convinced that even the recorded voice is the “Jingo” that belong to City Radio since the voice in the musical works recorded may belong to anyone else, the Court also urged that the witness explained that the recorded musical works with City Radio’s Jingo was done in the taxi boarded by the witness NKUSI not in the City Radio’s studio. Hence Court concluded that City Radio never used KAYIREBWA’S musical works.

Regarding claims against CONTACT FM, on paragraph 38 of the judgment the court found that in 06/2009 KAYIREBWA asked Contact FM to advertise her works basing on email dated 23<sup>rd</sup> /06/2009 asking Farther INCIMATATA representing CARITAS Library to buy CD’s that belong to KAYIREBWA mentioning that she contacted Albert Bryon and he pledged to her advertisement of her works, she went further to explain that Contact FM and CARITAS Library can work together to have concert in three different area in the country can facilitate in the selling of many CD’s and remainder can be stored in CARITAS library for sale. On 12/07/2012, Albert RUDATSIMBURWA wrote to CARITAS library with a copy to KAYIREBWA informing it that Contac FM will try the best to advertise KAREBWA’s works on its radio station, he also mentioned that they will try to share it with other Radio stations and what they will agree on will be notified to them in order to prepare the communication.

The Court found that KAYIREBWA didn’t write to Contact FM informing it that the offer for advertisement requested by her was cancelled by her and she was the one who gave an offer,

which means that the means used by her were also applied by Contact FM in the acceptance of the offer.

Paragraph 39 of the judgement, the court found that regarding that Contact FM used the KAYIREBWA's works without authorisation before 2009 has no base since the witness NDAGIJIMANA Landry was not sure on the period which Contact FM used the KAYIREBWA's works he only mentioned that he heard the music in 2007 without precision. The testimony offered on internet by email from MUKURARINDA Julien and MUKAMUSONERA Alain was not admitted by court since it was not made in Court. Furthermore the court also found that in the letter written by RUDATSINDURWA Albert named "My Thoughts on Cecile KAYIREBWA's Case" did not mention the number of years KAYIREBWA's works were used in order to know whether the works were even used before 2009.

Regarding claims against VOICE OF AFRICA, paragraph 49 the witness SAFARI Eric witnessed that he heard on Radio, Voice of Africa using the works of KAYIREBWA like in end of February or in early March last year when he heard the music when he raised a call in the show prepared by BAGABO Kamichi called "Request Line Show" and requested for a song called Iwacu and was given to him, then he recorded it while in the office of attorney KIZITO Safari because he was his servant, and also said that in that song he heard the Jingo of Voice of Africa.

In paragraph 52 of the Judgment, the court found that the testimony of SAFARI Eric cannot be based on since he is not sure of the exact month when he asked for the song at Voice of Africa and again he didn't prove where he recorded his voice while requesting the song and where they agreed to play the music of KAYIREBWA as requested.

Regarding claims against RADIO FLASH, on paragraph 64 of the judgement the court found that the testimony given by SAFARI Eric cannot be admitted since he is not sure of the exact dates he heard the KAYIREBWA's music called Rukundo since he said it may be in May 2012, but still can't recall well the exact month, that it might be in the beginning of the year or in

January. The court concluded that it cannot consider that Radio Flash used the works of KAYIREBWA.

Regarding claims against RADIO ISANGO STAR, paragraph 80 of the judgement the court found that audio and visual recorded in the studio of Isango Star concerned the show with KAYIREBWA where it used her works and also she sung her works live and she also talked to the listeners of the show. Therefore the court found the Isango Star did not use the works of KAYIRWEBWA since she was the one in the show, which means she had given her consent.

However, the voices recorded in show Tsimburana ibakwe broadcasted on Isango Star in February 2012 included the works of KAYIREBWA called Tarihinda, and on 04/05/2012 the show also included the works of KAYIREBWA called Ngarara and those shows were prepared by Ines and NIKOBASANZWE Andre and Radio Isango Star does not deny that they were its employees.

Therefore the argument that NIKOBASANZWE testimony should not be based on due to issues he has with Radio Isango Star has no base since the voices in that show included the works of KAYIREBWA and the testimony is supported by another one of NDAGIJIMANA Landry. The court finally found that Radio Isango Star used the works of KAYIREBWA without her authorisation and therefore court ordered the Radio to stop using the works in Tsimburana ibakwe show.

In paragraph 85 of the Judgement, the court ordered Isango Star to pay damages equivalent to 1.000.000frws for using the works in February and May 2012 instead of 20.000.000frws request by claimant, the court argued that the works were used only on two different dates and it cannot be considered as serious tort compared to when the Radio could have gained commercial benefit, since it only argued that it used the works in the show to attract the listeners.

The Court in its discretion also ordered Isango Star to pay moral damages equivalent to 1.000.000frws instead and 10.000.000frws requested by claimant arguing that the amount request was too much. The court in its discretion further ordered Isango Star to pay 300.000frws

for advocate fees instead of 2.000.000frws requested by claimant which was considered as too much.

### **1.8.7.1 Discussion**

The above case of KAYIREBWA, shows that individual management of rights is virtually impracticable with regard to certain types of use for practical reasons. An author is not materially capable of monitoring all uses of his works; he or she cannot for instance contact every single radio or television station to negotiate licenses and remuneration for the use of his works. Conversely, it is not possible for a broadcasting organization to seek specific permission from every author for the use of every copyrighted work. Thousands of musical works are broadcast on television every year, so thousands of owners of rights would have to be approached for authorization.

The very impracticability of managing these activities individually, both for the owners of rights and for the users, creates a need for **collective management organizations**, whose role is to bridge the gap between them in these key areas, among others. Moreover, the unregulated great number of users makes it very difficult for the CMOs to detect use of works, performances and sound recordings.

In the case of uses by the broadcasting organizations, it is only possible to prove the use of the copyright protected work if there are agreements between the broadcasters and the CMOs, which oblige the broadcasters to submit their daily programs to the CMOs, so that they can easily know each and every use that took place, and to which work.

The CMOs face critical hurdles in monitoring the uses by other types of users. There is great number of hotels, discotheques, restaurants, shops, clubs, services centers and means of transportation scattered all over the country. With the obsolete manual monitoring mechanisms the CMOs in developing country like Rwanda can hardly trace and monitor all the uses, which occur in all these places twenty-four hours a day. CMOs, there is need for large number of officers and means of movement for the purpose of monitoring and tracing the uses of the copyright protected works. Those officers need to be well trained and made aware of their tasks



and the rights they are protecting. This is of course expensive and exceeds the administration cost.

### **I.8.8. Problem of Coherence**

It is sometimes very difficult in developing country like Rwanda and especially in African countries, to unite all authors under one umbrella CMO and encourage them to assign their rights to it on a mere speculations that some of these CMOs are managed on the regional grounds, or by composers of specific category of music. The absence of a whole group of authors renders the collective administration of rights very weak in developing countries.

It is also sometimes very difficult for the CMOs to conclude agreements or contracts with foreign similar CMOs for reciprocal protection of rights since no foreign CMO will sign such a contract unless there is a guarantee that there is equal treatment for nationals and foreigners. The national authors do not appreciate that easily as they would prefer to be favoured by their local CMO. In this case the foreign CMO may act through agency, and the existence of more than one body-the national CMO and the foreign agency-will lead to lack of proper exercise of Copyright protection.

### **I.8.9. Entertainment Industry**

The entertainment industry in developing countries like Rwanda has, in recent years, witnessed development in the increasing production of film and music industries which has consequently produced both negative and positive effects. Positively the increase has extended the market as well as intensifying the competition.

Negatively, because of lack of effective mechanism for monitoring the use of the works, unauthorized copying, reproduction as well communication to the public of these works have been rampant; rendering the authors and creators of these work back to their same predicament instead of recouping for the investment they have made in the production of the works. The situation is worsen by the emergence of both private film and music recording companies and

private media institutions especially television and radio stations which want to immediately and handsomely recoup the investment they have made in the industry at the expense of poor creative artists, who ultimately only secure fame.

#### **I.8.10. Non-participation of the authors and publishers**

In some, if not many, of the developing countries like Rwanda and especially in Africa, some CMOs are not state organizations; the authors and publishers are hardly represented in the administration and decision-making process. In such a situation the CMO lacks the knowledge and experience necessary in classifying and differentiating elements of different kinds of works as only the professional creators and performers or staff specifically trained in, say musical identification, acquire such knowledge.

#### **I.8.11. Internal balance of power**

Before very recent economic reforms and democratization process in most of the developing countries like Rwanda, the broadcasting organizations were, and many still are, state bodies. Thus in such a situation and especially where the CMO is not a state organ, it is difficult for it to fight ardently to achieve the best and higher royalties for their members because broadcasting organizations, being state bodies, the order of their senior officials prevail; and the CMO officers may be in the weaker position to argue against.

The State bodies users tend to take for granted that they are under no obligation to negotiate payments with CMOs; therefore they inequitably decide the royalties. Other categories of users such as hotels, restaurants, dance halls, concert organizers, producers of phonograms, cinemas, means of transportations, etc., always complain against high tax and fight fiercely against all kinds of payments which they deem unjustified demands while the State administration gives weight to these categories of users.

### **I.8.13. Accountability**

Authors always need and demand precise and detailed accounts and information about the income for each work. Users also want to make sure that greater percentage of their payments is distributed to the right owners equitably and only the necessary amount for administrative expenses has been deducted. This is not successfully effected because such organizations do not give information about their accounts and reports to the public as they operate under closed doors. This will definitely reduce the confidence in such CMOs and consequently complicates and slows down the development of collective management of rights.

To conclude chapter one, Rwandan government should meet the requirements of administrative costs of the CMO until it maintains strong position to manage itself. CMO must create an effective rights management system with a reliable mechanism for monitoring actual use of works, collection and distribution of royalties. It also need, as well, to establish dispute resolution mechanism, which will reduce the cost of dispute settlement for the rights owners and bridge the gap between the users and the right holders.

Law enforcement agents need to be well trained so as to acquire skills for effective administration in copyright related cases as their objectives can only be achieved in an environment where copyright law is respected and where it can be effectively enforced if not complied with since effective mechanisms for enforcement are required under international treaty obligations.

As advancement in digital technology has also created new opportunities for infringement of copyright, it is of fundamental importance that copyright owners are able to effectively trade in and enforce their rights in the new digital era. This can only be achieved if there is also a strong cooperation between rights holders, the police forces and different enforcement agents. In our view, it is in best interest of authors and other creators of artistic works to foster a culture which respects copyright and to make concerted efforts to reduce copyright infringement and commercial piracy. Therefore greater co-operation between Government, law enforcement agencies, right holders and users is vital in achieving this.

## **CHAPTER 2: ORGANISATION AND FUNCTIONING OF CMOs**

In this chapter we will enhance on organizational structure, the types of CMOs, functioning of CMOs and the ways CMOs can seek remedies for piracy. We will thereafter enhance deeper on Collective Management Organisations and their role in protecting copyright and related rights.

### **II.1. Organizational structure of CMOs**

#### **II.1.1. The nature and status of CMOs**

The nature and status of CMOs may differ in various respects depending on the choices of the legal systems involved. They differ in respect of the form and extent of government supervision. In some countries CMOs are the departments of the central governments like SIAE in Italy, the Nigeria Copyright Council (NCC) and the National Copyright Council (CNDA) of Brazil, which, as central offices have been set up for collection, and distribution of authors fees.

In some countries, especially developing ones and especially in Africa public or semi-public copyright organizations manage the rights on behalf of the rights' holders. The cases to this point are ONDA in Algeria, BSDA in Senegal and BMDA in Morocco. In some countries, CMOs are autonomous agencies or private bodies such as RAO in Russia and BMI in the US<sup>76</sup>.

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<sup>76</sup> Ficsor, M. "Collective Management of Copyright and Related Rights", WIPO, 2002, p 40–42

## **II.1.2. Different types of CMOs**

### **II.1.2.1. Audiovisual authors' organizations**

The main types of CMOs in the audiovisual field are authors', performers' and film producers' organizations. As there are great variations in the mix of rights that are managed collectively, rights holders have grouped together in a large number of groups.

Audiovisual authors, performers and producers have organized their collective licensing and collection of remuneration in a number of different ways, reflecting historical, operational and economic realities in their countries. The number of variations is almost limitless and a great deal of cooperation is needed among different CMOs representing audiovisual rights holders, as revenue in many instances needs to be shared among different CMOs.

There is no single model for collective management societies administering audiovisual authors' rights. However, there is a common factor in that all societies emerged as a result of the desire of audiovisual authors to form groups so their rights and remuneration could be collectively managed. A few types of CMOs existing in Europe<sup>77</sup> and on other continents are listed below.

#### **II.1.2.1.1 Screenwriters and directors together**

Screenwriters and directors are grouped together in the following countries, among others: SACD<sup>78</sup> and SCAM<sup>79</sup> in France, DAMA<sup>80</sup> in Spain and SSA<sup>81</sup> in Switzerland. The underlying idea is to group together two main groups of authors of audiovisual works.

#### **II.1.2.1.2 Screenwriters and directors separately**

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<sup>77</sup> Audiovisual Authors' Rights and Remuneration in Europe, op. cit.

<sup>78</sup> Société des Auteurs et Compositeurs Dramatiques (SACD), France, [www.sacd.fr](http://www.sacd.fr).

<sup>79</sup> Société Civil des Auteurs Multimedia (SCAM), France, [www.scam.fr](http://www.scam.fr).

<sup>80</sup> Derechos de Autor de Medios Audiovisuales (DAMA), Spain, [www.damautor.es](http://www.damautor.es).

<sup>81</sup> Société Suisse des Auteurs (SSA), Switzerland, [www.ssa](http://www.ssa).

There are separate CMOs for screenwriters and directors. In the United Kingdom, for instance ALCS<sup>82</sup> represents writers and Directors UK<sup>83</sup> represents directors; in the Netherlands, LIRA<sup>84</sup> represents writers and VEVAM<sup>85</sup> represents directors. Where all kinds of literary authors have their own CMOs in a given country, such as in the United Kingdom and the Netherlands, directors have established their own CMOs. In Argentina, ARGENTORES<sup>86</sup> represents writers, including screenwriters and DAC65 represents directors of films and audiovisual productions. In Japan, WGJ<sup>87</sup> represents some 1,500 screenwriters and grants the license to any secondary uses of their screenplays.

### II.1.2.1.3 Multi-purpose CMOs for authors' rights

Some CMOs are called multi-purpose organization as they represent different repertoires, including both audiovisual and music. This is the case, for instance, with SIAE<sup>88</sup> in Italy and SPA<sup>89</sup> in Portugal. The management of all authors' rights jointly has economies of scale and can be more accessible in countries where collective management is applied.

In Senegal, BSDA<sup>90</sup> is a multi-purpose CMO that also manages audiovisual rights. The same applies to ONDA<sup>91</sup> in Algeria.

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<sup>82</sup>The Authors Licensing and Collecting Society (ALCS), the United Kingdom, [www.alcs.co.uk](http://www.alcs.co.uk).

<sup>83</sup>Directors UK (formerly DPRS), the United Kingdom, [www.directors.uk.com](http://www.directors.uk.com).

<sup>84</sup>Stichting LIRA, the Netherlands, [www.lira.nl](http://www.lira.nl).

<sup>85</sup>Stichting VEVAM, the Netherlands, [www.vevam.org](http://www.vevam.org).

<sup>86</sup>Sociedad General de Autores de la Argentina (ARGENTORES), Argentina, [www.argentores.org.ar](http://www.argentores.org.ar).

<sup>87</sup>Writers Guild of Japan, (WGJ), Japan, [www.writersguild.or.jp](http://www.writersguild.or.jp).

<sup>88</sup>Società Italiana degli Autori ed Editori, (SIAE), Italy, [www.siae.it](http://www.siae.it).

<sup>89</sup>Sociedade Portuguesa de Autores, (SPA), Portugal, [www.spautores.pt](http://www.spautores.pt).

<sup>90</sup>Bureau Senegalais du Droit d'Auteur (BSDA), Senegal, [www.bsda.sn](http://www.bsda.sn).

<sup>91</sup>Office National des Droits d'Auteur et des Droits Voisins (ONDA), Algeria, [www.onda.dz](http://www.onda.dz).

#### **II.1.2.1.4 Umbrella organizations:**

Umbrella organizations for several rights holders' organizations and repertoires exist in the Nordic countries, for example, KOPIOSTO<sup>92</sup> in Finland and COPYSWEDE<sup>93</sup> in Sweden. The underlying rationale is to group together all CMOs and associations of rights holders where licensing involves different repertoires and genres of works and performances. For instance, KOPIOSTO in Finland manages reprography and digital copying, cable retransmission and other forms of secondary uses of audiovisual works.

#### **II.1.2.2. Audiovisual performers' organizations**

With authors' CMOs, there is no single model for the management of performers' rights. In general, performers' organizations have been established later than those for authors, due to legislative developments. In many countries, related rights protection was added much later than authors' rights.

Below are some examples of audiovisual performers' CMOs in different countries.

##### **II.1.2.2.1. Related rights holders together**

All related rights holder in the field of music and audiovisual works are grouped together in a number of countries. An example is INTERGRAM<sup>94</sup> in the Czech Republic. In the field of music, the rights holders are performing artists and producers of phonogram and in the audiovisual field, actors and dancers.

##### **II.1.2.2.2. Separate CMOs for related rights' holders in audio and audiovisual fields**

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<sup>92</sup> KOPIOSTO, Copyright Society, Finland, [www.kopiosto.fi](http://www.kopiosto.fi).

<sup>93</sup> COPYSWEDE, Sweden, [www.copyswede.se](http://www.copyswede.se)

<sup>94</sup> Independent Association of Executive Artists and Producers (INTERGRAM), the Czech Republic, [www.intergram.cz/en/](http://www.intergram.cz/en/).

Related rights holders are grouped in separate organizations in the field of music and audiovisual works. For instance, in Denmark, GRAMEX<sup>95</sup> represents performing artists and producers of phonograms and FILMEX<sup>96</sup> represents performers in the audiovisual area. FILMEX was established in 1995 by the Actors' Union for the management of audiovisual performers' rights. The underlying rationale is specialization, as there are differences in both rights and types of uses in the two fields.

In Chile, *ChileActores*<sup>97</sup> represents actors and collects remuneration for communication to the public in all its forms, such as television, cable, cinema, transportation vehicles, hotels, etc.

#### **II.1.2.2.3. Joint CMOs for audio and audiovisual performers**

In some countries performing artists in the audio and audiovisual field have grouped together and work in partnership with phonogram and audiovisual producers. This is the case, for instance, with SWISSPERFORM<sup>98</sup> in Switzerland. This type of CMO has a strong performer representation and can partner with producers and share revenue collected for related rights.

#### **II.1.2.2.4. Film directors and actors together**

Another variation is a joint audiovisual CMO for directors and actors, such as VDFS<sup>99</sup> in Austria. As literary authors have their own CMO, *Literar-Mechana*,<sup>100</sup> the other main rights holders have founded their own CMO.

#### **II.1.2.3 Audiovisual producers' organizations**

Producers have a joint international management body for cable retransmission rights. An example is AGICOA in Switzerland. It is an international organization that collects

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<sup>95</sup> GRAMEX, Denmark, [www.gramex.dk](http://www.gramex.dk).

<sup>96</sup> FILMEX, Denmark, [www.filmex.dk](http://www.filmex.dk).

<sup>97</sup> La Corporación de Actores de Chile (ChileActores), Chile, [www.chileactores.cl](http://www.chileactores.cl).

<sup>98</sup> Gesellschaft für Leistungsschutzrechte, (SWISSPERFORM), Switzerland, [www.swissperform.ch](http://www.swissperform.ch).

<sup>99</sup> Verwertungsgesellschaft der Filmschaffenden, (VDFS), Austria, [www.vdfs.at](http://www.vdfs.at).

<sup>100</sup> Literar-Mechana, Austria, [www.literar.at](http://www.literar.at).



retransmission royalties in 38 countries.<sup>101</sup> It has close to 10,000 members, both individual and institutional, customarily the producers' association or CMO of a country.

#### **II.1.2.3.1. Producers' organizations**

Audiovisual producers have established their own CMOs in a number of countries. They customarily cooperate with AGICOA for retransmission rights. This is the case, for instance, with TUOTOS<sup>102</sup> in Finland. There are also other uses apart from retransmission of broadcasts for which audiovisual producers can collect their share. One such example is educational recording of television programs. In Spain, EGEDA<sup>103</sup> represents and defends the interest of audiovisual producers. EGEDA has the authority of the Ministry of Culture for its activity. It also cooperates with AGICOA for retransmission of broadcasts.

#### **II.1.2.3.2. Audiovisual authors and producers together**

Some audiovisual CMOs represent both authors and producers. This is the case for SUISSIMAGE<sup>104</sup> in Switzerland and ZAPA<sup>105</sup> in Poland. In many countries, audiovisual rights are transferred to producers to a large extent, but certain remuneration rights are shared among authors and producers.

#### **II.1.2.4 Joint audiovisual organizations**

Discussions are underway in some developing countries to establish a joint CMO representing all rights holders in the audiovisual field. Ghana and Nigeria are examples of such initiatives. ARSOG<sup>106</sup> in Ghana secured its approval to function as a joint audiovisual CMO in 2011. It

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<sup>101</sup> [www.agicoa.org](http://www.agicoa.org) – countries as at May 31, 2015.

<sup>102</sup> Copyright Association for Audiovisual Producers in Finland (TUOTOS), Finland, [www.tuotos.fi](http://www.tuotos.fi).

<sup>103</sup> Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA), Spain, [www.egeda.es](http://www.egeda.es).

<sup>104</sup> Swiss Authors' Rights Cooperative for Audiovisual Works, (SUISSIMAGE), Switzerland, [www.suissimage.ch](http://www.suissimage.ch).

<sup>105</sup> ZAPA, Poland, [www.zapa.org.pl](http://www.zapa.org.pl).

<sup>106</sup> The Audio-Visual Rights Owners Association of Ghana (ARSOG), Ghana, [www.arsog.org](http://www.arsog.org).

represents producers, writers, actors and music in audiovisual productions. ARSOG started as an initiative of film producers, but grouping together all rights holders in the audiovisual field was felt to be the most appropriate solution for the local infrastructure. In Ghana, private copying remuneration has been collected for a number of years.

#### **II.1.2.5. Musical works organizations**

Musical works organizations depend also to the country's history in which the organization is being established like in Singapore, the CMO in field of musical works is called the Composers and Authors Society of Singapore Limited (COMPASS). It collectively administers the public performance right and, to a limited extent, reproduction rights as well. COMPASS is a public company limited by Guarantee. Its board comprises twelve directors, of which ten are elected from among members,<sup>107</sup> one non-member independent director and the Chief Executive Officer. On admission to COMPASS membership, each member is obligated to assign the performing right in his works to society, which include an assignment of rights "which now belongs to or shall hereafter be acquired by or be or become vested to the assignor".<sup>108</sup>

One key measure of any successful CMO is efficiency and accuracy of its distribution of royalties. In its initial year COMPASS had entered into a technical services agreement with CASH<sup>109</sup> to carry out the distribution of royalties due to both local and foreign right holders. Today, COMPASS, in collaboration with the musical works societies in Vietnam, Thailand, India, Indonesia and the Philippines jointly utilizes a common database known as the MIS @ Asia as the documentation and distribution system to perform these processes.

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<sup>107</sup> Of which there shall be at least one local publisher, which is defined in art. 1(a) (xiv) as a publisher who is permanent resident or citizen of Singapore and who is ordinarily resident of Singapore, in the case of individual or in case of corporation, where ever incorporated, a publisher in which Singapore citizen or permanent residents who are ordinarily resident in Singapore or Singapore corporations are interested or deemed to be interested by virtue of s.7 of the Companies Act, in the aggregate, to the whole of the issued share capital of such corporation.

<sup>108</sup> Deed of assignment of COMPASS, clause 2.

<sup>109</sup>The Composers and Authors Society of Hong Kong Limited.

Therefore, musical works organizations (CMOs) in Rwanda which collaborates with musical societies in East African Community should be established in order to jointly utilize a common database as the documentation and distribution system to perform these processes in efficiently and accurately.

#### **II.1.2.6. Sound Recording organizations**

The collective management of rights in sound recording is also established according to the legal framework in place in a certain country, for instance in Singapore the CMO administering the rights in sound recordings, RIPS<sup>110</sup> relies on the rights in music videos (treated as cinematographic films)<sup>111</sup> to support its licensing activities. The setup of RIPS is quite distinct from that of COMPASS.

It is a private shareholding company, wholly owned by the Recording Industry Association of Singapore (RIAS),<sup>112</sup> an association registered under the registrar of Societies. All six directors of RIAS are also directors of RIPS, with the chief executive office of RIPS completing the RIPS Board of Directors. Elected directors hold office for two-year term. Recording companies must first become a member of RIAS before RIPS can administer the public performance right in music video. Thereafter, the recording company enters into a non-exclusive contractual agreement with RIPS to empower the latter to exercise the rights with respect to the public performance of karaoke and/or music videos and reproduction of the aforementioned on karaoke-on-demand computers.

#### **II.1.2.7. Reprographic Rights organizations**

There are also other organizations in relation to reprographic rights, a good example is the Copyright Licensing and Administration Society of Singapore Limited (CLASS) which was established in 1999 and commenced operations in 2000 with one employee. It was started with

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<sup>110</sup> RIPS stands for the Recording Industry Performance Singapore Private Limited.

<sup>111</sup> Section 83 provides inter alia that copyright in relation to cinematograph film is the exclusive right to ... (b) cause film to the public.

<sup>112</sup> There are two main categories of RIAS membership, namely associate members, with no voting rights, and full members, which are in turn divided into three categories based on annual subscription fees that then determines the number of votes that each full paying member has in RIAS.

funding from the Federation of Reproduction Rights Organisations (IFRRO)<sup>113</sup> and local book publisher.

CLASS is a public company limited by guarantee. The Membership in CLASS is open to all persons who have appointed it their agent for the reproduction right in some or all their works<sup>114</sup>. There are two classes of members, namely, authors and publishers' members. Every member is entitled to one vote<sup>115</sup>.

There are not fewer than three and not more than ten Directors of CLASS<sup>116</sup>, each elected for a term of a two-year term<sup>117</sup>. The Board is composed of three authors directors and publishers directors and three independent directors appointed by the elected members of the Board. Quorum is three, with at least one director from each category present.

## **II.2. Functions of collective management organizations**

The CMOs also differ in respect of the scope of the role and the types of rights they manage. Some CMOs manage exclusively performing rights such as SACEM of France and some manage a combination of performing rights and mechanical rights such as GEMA of German. In other countries and especially in developing countries CMOs manage works in all categories of rights. Moreover, the CMOs differ in respect of whether they are the only CMOs responsible for the management of the rights or there are more than one such organization in the field for example in the US there are three such organizations namely ASCAP, BMI and SESAC<sup>118</sup>.

Any owner of a copyright or a related right can become a member of a collective management organization<sup>119</sup>. The general rule is that a person who creates an original work is the first owner of copyright in the work. This rule also applies to commissioned works- the creator of a commissioned work is also considered as the owner of copyright in the work, in the absence of

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<sup>113</sup> See [www.ifrro.org](http://www.ifrro.org) (last visit: 11 June 21015).

<sup>114</sup> Article of Association of CLASS, Art. 4(b).

<sup>115</sup> Ibid., Art. 26.

<sup>116</sup> Ibid., Art. 33.

<sup>117</sup> Ibid., Art. 35.

<sup>118</sup> Ficsor, M. "Collective Management of Copyright and Related Rights", WIPO, 2002, p 40–42

<sup>119</sup> Collective Management of Copyright and Related Rights, World Intellectual Property Organization, 1.

any written agreement to the contrary. An exception to this rule is a work created by an employee in the normal course of employment, in such cases, the employer is considered as the copyright owner.

As owners of copyright and related rights, authors, composers, publishers, writers, photographers, musicians, or performers qualify for membership of collective management organizations. Broadcasters are not included in the list because of the fact that they are considered as users. This is in spite of the fact that they are considered as owners of the related rights in their broadcasts.

Upon joining a collective management organization, copyright or related rights owners assign the rights in their work to the collective management organization. The right owners are obliged to provide some personal particulars and declare their works. This information is used by the collective management organization to create the documentation necessary to create a link between the use of works and payments for such use to the correct owner of the rights.

The declared works form part of what is known as the “local” or “national” repertoire. Foreign works managed by a collective management organization under reciprocal agreements with other collective management organizations form part of what is known as the organization’s “international” repertoire.

By serving as effective links between right owners and users, collective management organizations help in ensuring that right owners receive payment for the use of their works. This payment serves as an incentive for composers, writers, musicians, singers and performers, who, in many countries, are among society’s most valuable assets.

Another role of collective management organizations is to assist copyright and related rights owners to enforce their rights<sup>120</sup>. Copyright and related rights holders can obtain court orders to

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<sup>120</sup> Alhaji Tejan-Cole, collective management of copyright and related rights in the Caribbean, publication, 2003, p.6.

force the inspection of premises for evidence of production or possession of pirated goods<sup>121</sup>. Court orders can also be obtained in order to stop the activities of pirates<sup>122</sup>.

The right holders can also seek remedies such as damages for loss of financial rewards and recognition<sup>123</sup>. However, experience has shown that the rights of copyright and related rights owners can only be effectively enforced through collective management organizations. This statement is especially true for right holders in developing countries who are usually not as affluent as their counterparts in the more developed countries.

It also functions as an arbitration body in cases of disagreement concerning tariffs. The decisions of this arbitration body may, however, be taken to ordinary courts if parties are not satisfied with the decision. In Japan, the “Law on Management Business of Copyright and Neighboring Rights” has been in effect since October 1, 2001. The law introduced a registration system for those who engage in the business of copyright management, with the aim of securing a fair operation of such businesses, facilitating the exploitation of works<sup>124</sup>. WIPO has drafted guidelines for governments wishing to incorporate stipulations on CMOs into national law.

Therefore, the legal framework for collective administration of copyright and related rights is needed to ensure that the interests of rights holders are maximised at the least possible cost while creating a clearing-house or “one-stop shop” for users to obtain authorisations to use the works owned by the rights holders.<sup>125</sup> It follows that this legal framework guides the regulation of CMOs to ensure that the latter act in the public interest and do not abuse their dominant position<sup>126</sup> to the detriment of rights holders and users of works.<sup>127</sup> According to the World

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<sup>121</sup> What is copyright? Supra 25.

<sup>122</sup> *Ibid.*

<sup>123</sup> Alhaji Tejan-Cole, op. cit, p.7.

<sup>124</sup> [http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_emat\\_2014\\_1.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_1.pdf).

<sup>125</sup> P. Schepens (2000) “Guide to the Collective Administration of Authors' Rights”, The Administration Society at the Service of Authors and Users, UNESCO at 22.

<sup>126</sup> L. Bently & B. Sherman (Eds.) (2009) Intellectual Property 3rd Edition at 299. The authors note that any CMO, as a matter of fact or by operation of law, will be in a dominant position because it will represent the rights of a majority of a particular category of rights holders both national and foreign in any given territory

<sup>127</sup> *Ibid.* See also W.A Copinger & F.E Skone James (1999) Copinger & Skone James on Copyright Vol. 1 14th Edition at 1500.

Bank, Nigeria<sup>128</sup> and South Africa<sup>129</sup> are the leading economies in Africa with gross domestic products of \$522.6 billion and \$350.6 billion respectively against populations of 173.6 million and 52.98 million respectively whereas Kenya's GDP<sup>130</sup> stands at \$44.10 billion against a population of 44.35 million.<sup>131</sup> In the context of collective administration, the legal and institutional frameworks in Nigeria<sup>132</sup> and South Africa<sup>133</sup> have undergone more developments than Rwanda's framework.

## **II.2.1. Oversight of Collective Societies**

The system of monitoring the operations and distribution societies include both oversight system and external types of monitoring. This can be seen in the following ways:

### **II.2.1.1. Internal oversight**

In France, there are two types of internal oversight system: monitoring performed by the members of their society, and the audit performed annually by the statutory auditor.

### **II.2.1.2. Monitoring by members**

Article L.321-5 of the intellectual property code (CPI) in France sets out a short list of documents that members could obtain in the context of their right to communication and a decree

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<sup>128</sup> World Bank (2013) Country Profile: Nigeria. Available at: <http://www.worldbank.org/en/country/nigeria>.

<sup>129</sup> World Bank (2013) Country Profile: South Africa. Available at: <http://www.worldbank.org/en/country/southafrica>

<sup>130</sup> World Bank (2013) Country Profile: Kenya. Available at: <http://www.worldbank.org/en/country/kenya>

<sup>131</sup> *Ibid.*

<sup>132</sup> Blackfriars LLP (2008) Anarchy in the World of Collecting Societies in Nigeria: Implications for Copyright Protection of Foreign and Local Musical Works (part 1), January 2009 Volume 22 Issue 1 and Blackfriars LLP (2009) Anarchy in the World of Collecting Societies in Nigeria: Implications for Copyright Protection of Foreign and Local Musical Works (part 2), February 2009 Vol. 22 Issue 2. Following the introduction of a legal framework for collective administration in 1992, there have been three legislative changes to the framework namely the Copyright (Collecting Societies) Regulations, 1993, the Copyright Amendment Act, 1999 and the Copyright (Collective Management Organisations) Regulation, 2007.

<sup>133</sup> The South African Parliament enacted its first Copyright Act in 1916. South Africa's performing rights CMO, the Southern African Rights Management Organisation (SAMRO) was established in 1951, over thirty years prior to the establishment of MCSK in Kenya

dated 17 April 2001 described the right to communication of all members of RCDSs. The right to information has a permanent aspect and recurrent aspect.

Under the permanent right to communication, the member may ask the society of which he is a member, at any time, to communicate the list of company managers; a table showing over a five year period the annual amounts collected and distributed and the levies for management fees and other levies; a document describing the applicable distribution rules; the total royalties due to him over the last twelve months; and description of the manner in which this product is determined.

The right to recurrent communication may be exercised only during annual general meeting-thus, once a year. It is provided that before the annual meeting at which the accounts are approved, any member every member has the right to see a certain number of documents to which members of civil-law companies must have access under common law. This right may be exercised during two months before the preceding the annual general meeting<sup>134</sup>.

However, the member must make the request in writing to the society specifying the documents he wishes to see. The collective society may organize to have documents consulted at its premises, without without the member being able to make a copy. This is a simple right to consultation. Aside from these documents linked to collective management, the decree extends to right of communication to documents of common law such as annual accounts, the text of resolution at the annual general assembly, the directors' reports, the amount of the five or ten highest pay-outs, the list of investments with their yield rate, a table of organizations in which the society has shares, and a statement of the main categories of users and the amounts of royalties paid during the year.

Any member who is refused communication may appeal to a special committee composed of atleast five members elected at the annual general meeting from those who are not corporate officers. Every year this committee must make a report and submit transmit it to the minister of culture.

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<sup>134</sup> <http://www.wipo.int/edocs/pubdocs/en/wipo>, visited on 14 July 2015.



The decree also sets out limits to the right of communication with view to protect collective society and demands that could put them at risk. For instance this right could be exercised only within the limits of rules of confidentiality and commercial confidentiality with regard to third parties.<sup>135</sup>

Aside from these provisions, the CPI allows members to force the designation of a minority expert. As stated at the end of article L.321-6, paragraph 1, ‘Any group members representing atleast one-tenth of the membership may take legal action for designation of one or more experts to be entrusted with submitting a report on one or more administrative operations.’ The same provision gives the equivalent power to the public prosecutor. This internal oversight is accompanied by oversight by the statutory auditor.

### **II.2.1.3. Oversight by statutory Auditors**

The provisions concerning the appointment of auditors are taken from the act on commercial businesses. Article L.321-4 of the CPI states, ‘The royalty collection and distribution societies shall be required to appoint atleast one auditor and one alternate from an official list. This text also subjects auditors to penal provisions in the business act crack down on non-revelation of tortuous facts and the confirmation of false information.

### **II.2.1.4. Mechanisms for External Audit**

In France, there are two types of external audit measures. First, audits are conducted by the ministry in charge of culture (and, incidentally, by the legal system) through a right to information. Second, after 1 August 2000, a permanent audit committee (la Commission Permanente de contrôle) was set up dedicated to ongoing monitoring of the activities of collective societies.<sup>136</sup>

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<sup>135</sup> Decision by the State Council of 25 Oct. 2002. This decision deemed that in setting out the limits to the right to information to members other than these resulting from the act (the member could not obtain information on distributions made to a member other than him), the authors of the decree did not set the terms for exercising the right to communication but defined its extent and thus ignored the provision of the act.

<sup>136</sup> Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, in *Collective Management of Copyright and Related Rights*, 2<sup>nd</sup> ed., 2010.

#### **II.2.1.4.1. Audit by Public Authorities**

Before the act of 1 August 2000, there was only one type of external audit in France, along with, of course, the audit by the judge who intervened to sanction, if necessary, an improperly held meeting, questionable distribution, or any other behavior subject to credit guarantee. But this type of audit is self-evident in any legal system with a minimum of organization.

The government had, and still has an audit power that is manifested in two ways: first, it benefits from a right to information which enables it to intervene in case of irregularities, and, second, it intervenes indirectly in process of formulating certain types of remuneration.

In Kenya the first comprehensive legal and institutional framework for collective administration was introduced in the Copyright Act No. 12 of 2001. The drafting and enactment of the revised Act in 2001 was mainly intended to comply with the standards set under the WTO TRIPs Agreement of 1994 and the WIPO Internet Treaties of 1996.<sup>137</sup> Section 3 of the Act establishes the Kenya Copyright Board (KECOBO), a state corporation whose mandate is the overall administration and enforcement of copyright and related rights in Kenya. KECOBO is specifically mandated under Section 5(b) of the Act to license and supervise the activities of CMOs as provided for under the Act. Part V of the Act specifically addresses collective administration of copyright. For a body to be licensed as a CMO by KECOBO it must meet the requirements set out in section 46(4) of the Act.

#### **II.2.1.4.2. Audit through the Right to Information**

If certain elected representatives felt that the collective societies were exerting a monopoly resembling a defacto monopoly.<sup>138</sup> The mechanism adopted in France was that the minister in charge of culture may require audit of RCDSs when they are formed and at certain key times in their existence.

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<sup>137</sup> B. Sihanya & M. Ouma (2010) op cit. at 10.

<sup>138</sup> Hearing of Jack Lang before the Commission spécial du sénat, Rapport Jolibois, No. 122, vol. 1, at 89.

#### **II.2.1.4.3. Royalty Collection and Distribution Societies (RCDSs) are formed**

In general, the minister of culture in France has an active audit power at the time that collective society is formed. The CPI accords the minister a right to intervene a posteriori. In fact, when a collective society is formed, it must send its draft statutes and general rules to the minister of culture, who may within one month after receiving them, demand that a civil-law judge dissolve them if he feels that they are real serious obstacles (such as obvious illegalities) to the creation of society. The criteria for evaluation are essentially linked to the professional qualifications of the society's founders and the human and material resources that they propose to implement to ensure recovery of royalties and the exploitation of repertoire<sup>139</sup>.

This power seems a bit disproportionate to be truly effective and put pressure on negligent directors. For instance the minister of culture may issue or withdraw approval for certain societies responsible for mandatory collective management of certain rights.

#### **II.2.1.4.4. Surveillance of the Formulation of Certain Kinds of Remuneration**

This aspect of the involvement of the public authorities in the activities of collective societies is special. It consists of surveillance and the assistance with the formulation of certain types of remunerations linked to non-voluntary licences or to obligatory collective management. The CPI provides for the creation of administrative committees with the mission of determining the amount of remuneration and the terms of collection. This determination is made through extensive consultation with representative of the right holders concerned, paying users and the state.

To date, in France two committees have been created. They have met to update the remuneration that they originally set:

- The commission *pour la fixation des montants de remuneration equitable pour la communication de phonogrammes du commerce dans les lieux publics ou leur radiodiffusion*.

It is the tool for determining and modifying fair remuneration for communication of

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<sup>139</sup> <http://www.wipo.int/edocs/pubdocs/en/wipo>, visited on 14 July 2015.

commercial sound recording in public places and broadcasting. This committee is chaired by a magistrate and composed of the State Council, a qualified person appointed by the minister of culture, and the representative of the right holders and the users concerned.

- The *Commission pour la détermination de la rémunération au titre de la copie privée*. This committee is chaired by a government representative, and its members are representatives of right holders (50%), media manufacturers and importers (25%) and consumers (25%). Its mandate is to determine, for private copying, the type of media, the remuneration rates and the terms of payment.

This type of involvement does not approach the oversight by public authorities of how RDCSs manage themselves. It is however an example of intervention in the essential process of negotiation over remuneration and modes of collection. Recourse to the committees system is closely linked to the obligatory collective management.

The oversight of RCDSs has been the creation of the *Commission Permanente de contrôle*.

#### **II.2.1.4.5. La Commission Permanente de Contrôle**

Article L.321-3 of the CPI, introduced through the Act of 1 August 2000, created the *Commission Permanente de Contrôle des sociétés de perceptions et de répartitions des droits*. This committee's five members, appointed by decree for a five-year term, are magistrates from the *Cour des Comptes*, the *Cour de Cassation* and the State Council and one member of the *Inspection générale des finances* and the *Inspection générale de l'administration des affaires culturelles*. The committee draws a large share of its status from the *Cour des Comptes*.

The Committee's mission is to oversee the accounts and the management of RCDSs. It examines the internal audit procedures; the use of sums for assistance in creation, which constitutes a particularly important aspect of its oversight; the statutes; and, for the largest societies, the distribution procedures. A decree describes the details of its operating terms.<sup>140</sup>

### **II.3. Suing piracy**

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<sup>140</sup> Articles R.321-1 to R.325-4 of the CPI, recently modified by a decree of October 2009.

In Rwanda the law enforcement agents lack the required cooperation of the right owners as well as the commitment and seriousness from the prosecuting authorities.

For the successful law enforcement process, cooperation does not end between the right holder and the police forces but it is, and ought to be, a chain of cooperation between different enforcement agents; i.e. from the customs authorities and police forces who make seizure of infringing goods and arrest of infringers to Department of Public Prosecution (DPP) and the courts.

## **GENERAL CONCLUSION**

In spite of the above-mentioned problems, the experience and technological development of recent years have increasingly confirmed that the individual exercise of right is impractical. With the more widespread application of digital technology, including the advent of multimedia productions and the use of digital network like the Internet, conditions the exercise and the management of right ought to face new and stiff challenges.

Having realized therefore the importance and usefulness of “collective management” of copyright and related rights for the interest of both right holders and users, developing countries have been incorporating provisions on the establishment of collective management of copyright

and related rights in the legislation drafting processes. Definitely this is one, first and most prerequisite condition for the effective protection-and promotion-of copyright and related rights and all intellectual property rights in general.

Nonetheless, mere enactment of good law is not tantamount to the improved efficiency in the management of copyright and related rights. In order for the Copyright law to be efficiently administered and enforced, there are number of factors which must be taken into consideration by all stakeholders. We will now take this opportunity to discuss these conditions and requirements for the efficient and successful operations of CMOs and enforcement of the Copyright and related right law.

There is a need for the Rwandan government as developing country to develop national policies for the promotion and protection of not only copyright and related right but also all intellectual property rights in general. The national policy helps in creating awareness among all stakeholders-right holders, users, and law enforcement institutions-and the public in general and, through the awareness, promotes intellectual creative activities.

Likewise it can create a forum among the stakeholders to discuss issues of concern among them for the interest of each and all of them. Nigeria is a good case to the point. Through the national policy, Nigeria has managed not only to raise public awareness about the copyright law and its importance to all the stakeholders and public in general but as well to promote indigenous artists. She has successfully changed national attitudes in favour of the local talents; and this has consequently witnessed a boom in indigenous music industries from the late 1970s.<sup>141</sup>

In order for these national policies not to remain decoration for the offices, a comprehensive national strategic development plans must be developed for the effective implementation of the national policies. These strategic development plans then must be included in the National Focused Plans of Action (NFPA) so as to enable the CMOs to develop effective mechanisms for the protection and management of rights on behalf of the rights holders. These new mechanisms ought to include modernization of the CMOs' infrastructure management in the use of

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<sup>141</sup> Sadipo, B. op. cit. p. 27-28

digital technology.

CMO in Rwanda as developing country is normally very weak in terms of meeting their administrative cost. This may be caused by the limited initial number of members, as is the case of Rwandan Society of Authors (RSAU) and the weak capacity of those members even to meet the payment of their annual membership fee, as they have been involved, for many years, in creating works but without any payment of remuneration in consideration of the exploitation of their works. In that regards, it is recommended that the Rwandan legislature should incorporate some provisions in Intellectual property law where semi-public copyright and related rights organizations shall replace Private copyright and related rights organization to manage the rights on behalf of the rights' holders in efficient and accuracy way. The regulations on system of monitoring the operations and distribution societies which include both oversight system and external types of monitoring should also be considered in order to have organization which is more credible.

Likewise, CMOs themselves must strive to create a reliable and cost effective rights management system such as creating effective mechanisms for royalty collection and distribution and monitoring the actual use of the works so as to ensure that the amount to be distributed as royalty is reasonably justifiable. The efficiency in the operation of these mechanisms will boost confidence of the members on their organization and thus attract more members, attain respect of other stakeholders as well as act as an exemplary to other CMOs around the globe.

As piracy is one of the notorious copyright and related right infringing activities at the commercial level across the territorial borders and thus deters the subsequent sales of the true legitimate copies of original work, CMOs in Rwanda must establish and strengthen close collaboration with other law enforcement agents such as police forces and judicial authorities as well customs authorities. It is through this close collaboration where various enforcement mechanisms and remedies especially provisional and border measures can be effectively enforced as these measures help to expeditiously prevent the release into the market of pirated goods and preserve the relevant evidence in connection with the alleged infringement. Likewise

through such collaboration, CMOs can lobby and advocate for remedies which offer adequate compensation to the right holders and deterrence to further infringement.

In addition for easy identification of the pirated goods having been distributed, CMOs, in partnership with the revenues authorities should introduce special duty stamps to be fixed on every legitimate copy of the works as other countries like Ghana have introduced. This will not only ensure that only legitimate copies enter the market but will also ensure that governments receive their share of revenue and consequently contribute to the growth of the national economy.

Considering the fact that the authors, artists and other creators of literary and artistic works in developing countries are poor, it is recommended that CMOs in Rwanda as developing country should consider the possibility of establishing dispute resolution mechanisms at different levels-national and regional. This will enable these right-holders to resolve their disputes with any infringer of their exclusive rights to exploit their works and authorize or prohibit others to use them. As this is purely administrative procedure, it will be more cost effective mechanism as it will enable all parties, and especially the right holders, to reduce the cost if these disputes were to be taken to the courts.<sup>142</sup>

In addition, this will help in bridging the gap between the users and the right holders as well as creating conducive environment for them to work together closely and friendly for the mutual benefit of all. If these are successfully achieved, any CMO can easily attract not only many more new members who will consequently make the CMO stronger but as well donors who would be ready to assist it in improving its efficiency.

CMOs in developed countries, because of the very high level of digital technological advancement they have attained and the strong positions they have, should extend technical assistance to CMOs in developing countries, which would assist these CMOs in strengthening their capacities especially in the introduction and application of the latest emerging digital

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<sup>142</sup> COSOTA for example, in its infancy stage, through its dispute resolution mechanism within the society has manage to settle 20 disputes according to Mtetewaunga, S. op. cit. p. 5



technology and training. It is through this kind of assistance where these CMOs in developing countries will be able to modernize their modus operandi such as the introduction of new methods of licensing, effective mechanisms in monitoring use and collection and distribution of royalties so as to ensure that the right owners-authors/creators and performers receive royalties in proportion to the actual use of their works.

On the aspect of enforcement of intellectual property law, in order for the fight against piracy and counterfeiting to be successfully achieved, it is recommended that each and every stakeholder - right holders, users, customs authorities, law enforcement agents, judges and national governments must vividly depict the will and commitment to fight.

Right holders must be in the forefront in enforcing their rights while at the same time taking necessary measures to bridge the gap that is used as a scapegoat by pirates to circulate their illegal products at a bargain price especially when the genuine products are not accessible or available at affordable prices in the markets.

Likewise law enforcement agents require tailor made training that will enable them, inter alia, to skillfully differentiate between genuine and counterfeited products and to be sensitized on how harmful piracy and counterfeiting are to the right holders, society and to the government whose image internationally is tarnished by not committing itself to meeting the minimum standards set by the TRIPS Agreement.

As the offences that bear low penalties reduce law enforcement agents' enthusiasm to investigate and prosecute them, it is strongly recommended that Rwandan criminal law be amended so as to categorize offences such as piracy at a commercial level as criminal ones with high penalties. This will not only resuscitate law enforcement agents' enthusiasm but will also create deterrence to the would-be pirates.

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