

UNIVERSITY OF RWANDA

College of Arts and Social Sciences

School of Law

LLM in Business Law

**ADDRESSING CHALLENGES OF COPYRIGHT
AND RELATED RIGHTS INFRINGEMENT
UNDER RWANDAN LAW**

Thesis submitted in the partial fulfilment of requirements to be awarded a Master's Degree in
Business Law (LLM)

BY

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Kigali, June 2015

DECLARATION

“I, Begumisa Safari Theonest, do declare that this dissertation is my own work. I have to the best of my knowledge acknowledged all authors or sources from where I got information. I further declare that this work has not been submitted to any university or institution for the award of a degree or any of its equivalents.

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

APPROVAL

This is to acknowledge that this dissertation has been submitted with my approval.

Supervisor's name: **Dr Kalinda Francois-Xavier**

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

DEDICATION

To my wife

To my children

To my mother who left when I had started writing this thesis and I believe she joined our
Creator in Heaven

To my entire family at large

To my friends

To those who invest their efforts in protecting copyrights and related rights and those who
recognize their contribution to the socio-economic development of our nation

ACKNOWLEDGEMENT

The accomplishment of this thesis would not be possible if there were not various persons to whom I owe a special recognition.

I acknowledge the contribution of my supervisor **Dr Kalinda Francois-Xavier** whose guidance has been of incommensurable importance.

In the same framework, may I forward special thanks to both academic and administrative staff of the University of Rwanda, LLM Business Law Program, who provided various types of support and therefore made the research possible. Their portrait shall remain kept at the bottom of my heart.

Moreover, I recognize today and in the future the contribution of my family and friends whose names cannot be all mentioned here.

For any other person not mentioned here who has contributed in a way or another to my studies and research, I will recognize that forever.

Begumisa Safari Theonest

ABBREVIATIONS AND ACRONYMS

Art.	: Article
CCB III	: Civil Code Book III (1888 Decree Law on Contractual obligations)
CCLAP	: Code of civil, labour and administrative procedure
CCP	: Code of criminal procedure
CD	: Compact Disc
COGEBANK	: <i>Compagnie Générale des Banques</i> (General Company for Banks)
CS	: Supreme Court
DJs	: Disc Joker
EC	: European Commission
FM	: Television
FRW	: Rwandan francs
GDP	: Gross Domestic Product
HC	: High Court
HCC	: <i>Haute Cour Commerciale</i> (Commercial High Court)
<i>Ibid.</i>	: Same source (<i>Ibidem</i>)
ICT	: Information, Communication and Technology
ILPD	: Institute of Legal Practice and Development
IP	: Intellectual property
IPL	: Intellectual Property Law
IPRs	: Intellectual property rights
JPO	: Judicial Police Officers
KIAC	: Kigali International Arbitration Centre
MINICOM	: Ministry of Trade and Industry
No	: Number
OG	: Official Gazette
ORINFOR	: <i>Office Rwandais d'Information</i> (Rwandese Office for Information)
P./PP.	: Page / Pages
P./pp.	: Page(s)

Para.	: Paragraph
R.Com	: Commercial cases registration number
RBA	: Rwanda Broadcasting Agency
RDB	: Rwanda Development Board
RLRC	: Rwanda Law Reform Commission
RNP	: Rwandan National Police
RSAU	: Rwanda Society of Authors
RTV	: Rwanda Television
TC	: <i>Tribunal de Commerce</i> (Commercial Court)
TRIPS	: Trade-Related Aspects of Intellectual Property Rights
TV	: Television
ULK	: Kigali Independent University
V./vs.	: <i>Versus</i> / against
VOA	: Voice of Africa
Vol.	: Volume
WIPO	: World Intellectual Property Organization
WTO	: World Trade Organization

ABSTRACT

The present study is entitled “Addressing Challenges of Copyright and Related Rights Infringement under Rwandan Law”. It had as objectives to explore negative impacts for copyright infringements prosecution to be initiated upon the victim request; to describe the victim indemnification obstacles as well as to highlight other challenges regarding copyright infringements remedies and to find out sustainable solutions to challenges that are facing victims of copyright infringements in both prosecution and indemnification.

In order to attain those objectives, the study was designed as a doctrinal-based with no component of empirical 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.

As far as the structure of the study is concerned, the present work is subdivided into three chapters. In addition to the general introduction which is centered to various motivations that led to the decision to undertake a research on copyrights owners’ protection, the first chapter reviews the existing literature on copyrights and related rights and their infringements. The second one highlights challenges that jeopardize copyrights owners’ rights protection, whereas the third suggests solutions to those challenges. The study ends in a general conclusion that summarizes key findings before formulating recommendations for the improvement and effectiveness in the protection of copyrights owners against copyright and related rights infringement.

Among other key findings, the study found that though violated, copyrights are protected by the 2009 IP law. However, the study found that that law presents some loopholes that need to be corrected through an amendment for copyrights owners’ rights to be more protected. Loopholes at issue include provisions regarding infringements 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 and submission of pre-trial measures to a court decision. The study furthermore found that the awareness of both the Rwandan community and copyrights owners on IPRs protection is still low until ignoring the existence intellectual property rights (IPRs) legal protection.

In order to overcome challenges that prevent copyrights owners to enjoy their rights, recommendations were formulated to MINICOM, RDB and Rwanda Law Reform Commission (RLRC) as institutions endowed with power to initiate legislation and related amendments for them to initiate the amendment of some IPL provisions and to raise the community and copyrights owners' awareness on the IPL enforcement. Recommendations were addressed to the parliament for same purposes and copyrights owners for their active involvement in their rights protection, including associations and federation creation. The judiciary was also recommended for it to apply at least available case laws and scholars' opinions on IPRs.

Key words: Intellectual property, intellectual property law, intellectual property policy, Intellectual property rights, copyrights and related rights, copyrights and related rights infringements, prosecution upon request, damages and indemnification

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GENERAL INTRODUCTION

1. Background to the study

The economic page of the world's media in general and African media in particular was dominated by the April 06th 2014 self declaration of Nigeria as the Africa's largest economy. Among other sectors that boosted the Nigerian economy, there are intellectual property rights which include music and the cinema of Nigeria, referred to informally as Nollywood. The latter's contribution was now worth some 853.9 billion naira (\$5.1 billion, 3.7 billion Euros) or 1.2% of the gross domestic product (GDP). Nollywood investors are now happier with their portrait in the Nigerian economy. Most of their films are sold as DVDs at the roadside, either at market stalls, from wheelbarrows or by hawkers at traffic lights, but this did not prevent them to rank among other economic stimulators¹.

Music and movies are some of intellectual property rights (IPRs) which also find their protection under the Rwandan Law. As Nigeria constitutes a good and recent example of the contribution of IPRs to the economic development², IPRs also deserve a special attention by not only the Rwandan legislation but also researchers. That is why in 2009, an IPR policy was adopted³ and a new IPR Law was enacted and published for enforcement⁴. It is also in the same framework that Rwandan specialized scholars invested their efforts in exploring some key areas of the same Law⁵.

¹ Hazlewood Phil, "Nollywood helps Nigeria kick South Africa's economic butt", in the *Sowetan* of April 7th, 2014, accessed at <http://www.sowetanlive.co.za/news/world/2014/04/07/nollywood-helps-nigeria-kick-south-africa-s-economic-butt>, on May 04th 2014.

² Keating J. Raymond, "IP Theft Hurts Creativity & Economic Opportunity", By *SBE Council*, 13 September, 2013, available at <http://www.sbecouncil.org/2013/09/13/ip-theft-hurts-creativity-economic-opportunity/>, accessed on May 04th 2014.

³ MINICOM, *Rwanda Intellectual Property Policy*, Kigali, November 2009.

⁴ Law n° 31/2009 of 26/10/2009 on the protection of intellectual property, Official Gazette n°50bis of 14/12/2009.

⁵ See F.X. Kalinda and T. Habumugisha, *Intellectual Property Law*, Institute of Legal Practice and Development (ILPD), Rozenberg Publishers, Amsterdam, 2012.

IPRs are comprised of two main branches which are industrial property on one hand and copyright and related rights on the other hand. The industrial property branch includes patents and utility models, industrial designs, trademarks and trade names, geographical indications, layout-design of integrated circuits, undisclosed information which include trade secrets and protection against unfair competition. The second main branch which is copyright and related rights covers literally, artistic, and scientific works, performances of performing artists, phonograms and broadcasts⁶.

According to various articles in the media, leaders' statements and IPRs opinion leaders' views, copyrights are more infringed than industrial property rights. For instance, from 2010 the Rwandan National Police (RNP) has been arresting suspects of copyright infringement which includes illegally copying films on DVDs, audio files, CDs and audio-cassettes and selling them⁷. Apart from criminal prosecution, after 2009 IPRs reforms, copyright authors started claiming for their copyright infringement indemnification, as did Kayirebwa Cecile while suing the Rwanda Television (RTV) and some local radios⁸.

However, as well illustrated by the problem statement, copyright infringement prosecution and indemnification are facing challenges which inspired the researcher to work on them under the following topic: ***“Addressing Challenges of Copyright and Related Rights Infringement Prosecution and Indemnification under Rwandan Law”***.

2. Problem Statement

Before helping the country as a whole to boost its economy as the above-seen example of Nigeria, IPRs constitute an element of authors' patrimony. Copyright owners can then live on

⁶ Id., pp. 14 – 15.

⁷ Musoni Edward, *Music Pirates Arrested*, <http://www.newtimes.co.rw/news/index.php?i=14183&a=26340>, visited on April 04th 2014; Uwimanimpaye C. M. Clemence, “Rubavu – 3 DJs arrested over copyright infringements” (translated from Kinyarwanda), accessed at <http://www.kigalitoday.com/spip.php?article10502em>, on April 04th 2014.

⁸ Karemera Carole, “Why the Rwandan creative sector does not enjoy intellectual property?” See <http://www.jamafest.org/downloads/presentations/Jamafest.Symposium.Presentation.Carole.Karemera.pdf>, visited on 04th May 2014.

their IPRs as other members of the society live on their other properties. In spite of that character for IPRs to belong to their authors, they remain abused, utilized, sold without their authors' consent or license. The breach of copyright is commonly known as copyright infringement.

In case copyrights are infringed, victims have right to remedy which can be envisaged through either criminal or civil proceedings or both of them. It is also possible to proceed to arbitration or other alternative modes of disputes resolution (AMDR), also known as amicable settlement of disputes. In any case, the victim needs legal remedies against his/her copyright abuse.

Copyright related infringements are defined by the Rwandan penal code as piracy. In its article 376, the code stipulates that “any person who wilfully or by gross negligence infringes copyrights or related rights protected by the law, for profit-making purposes and without owner's right consent, who knowingly sells, offers on sale, is making rent, detains or introduces on the territory of the Republic of Rwanda (...) shall be deemed to have committed the offence of piracy”. Moreover, article 383 of the same code includes, in the copyright infringement, “any broadcasting organization or communication company by means of radio electrical waves communicates a protected work, without prior authorization of right's owner or his/her rightful claimants”⁹. The Rwandan intellectual property law qualifies again the same act as forgery¹⁰.

However, the major problem is that proceedings against such acts are subjected to the request by the owner of the protected right¹¹, but not the mere will of the judicial police and prosecution as it is for the ordinary criminal procedure¹². Whereas copyright piracy has been

⁹ See the Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, Official Gazette n° Special of 14 June 2012.

¹⁰ Article 261 of the above-cited Law n° 31/2009 of 26/10/2009.

¹¹ Article 262 of the above-cited Law n° 31/2009 of 26/10/2009.

¹² See the Law n° 30/2013 of 24/5/2013 relating to the code of criminal procedure, see Official Gazette n° 27 of 08/07/2013.

omnipresent almost in the whole country¹³, it will be difficult for the owner to detect a possible maximum of copyright infringers and evidences before filing a case in the court.

When it comes to civil proceedings for the copyright infringement, the problem also arises. With technological development, songs and films are easily shared via Internet in general and social media tools in particular, as well as mobile phones, in both social and business purposes. In this framework, IPRs products easily go even beyond the Rwandan territory where the Rwandan legislation does not have jurisdiction. Yet, copyright owners need protection and especially indemnification for the loss suffered from infringements. Therefore, with such technological and transnational threats, how will s/he manage to be indemnified?

3. Research questions

The above exposed problem statement leads to the formulation of research questions which help the researcher to work with an accurate focus.

The main research question is: “How to address challenges that are facing victims of copyright infringement in both criminal and civil proceedings?”

This research question calls for the following sub-questions:

- What are the impacts of copyright infringement prosecution to be initiated upon the victim request?
- What are obstacles associated with the indemnification of the victim of copyright infringement?
- What are the sustainable solutions to challenges that victims of copyright infringement are facing?

¹³ Rwanda Focus, “Why piracy is so widespread in Rwanda”, in the *Rwanda Focus* of March 26th 2008, accessible at <http://focus.rw/wp/2008/03/why-piracy-is-so-widespread-in-rwanda/>, visited on May 03rd 2014; C. Karemera, “Why the Rwandan creative sector does not enjoy intellectual property?” See <http://www.jamafest.org/downloads/presentations/Jamafest.Symposium.Presentation.Carole.Karemera.pdf>, visited on 04th May 2014.

4. Objectives

The study had a general objective and specific objectives. Whereas the study was targeting the general objective to address challenges that are facing victims of copyright infringement in both criminal and civil proceedings, the specific objectives were:

- To explore negative impacts for copyright infringement prosecution to be initiated by the victim or upon the victim request;
- To describe and analyse the victim indemnification obstacles as well as to highlight other challenges regarding copyright infringement remedies;
- To find out sustainable solutions to challenges that are facing victims of copyright infringement in both prosecution and indemnification.

5. Significance of the study

As introduced previously, IPRs contributed a lot to the Nigerian national economic development and is one of sectors that made Nigeria the first African economy¹⁴. Therefore, keeping in mind the role of IPRs in the development of a given national economy, carrying out a legal research on copyright and related rights infringement prosecution and indemnification under the Rwandan Law presents societal, research and academic interests.

As far as societal interests are concerned, once copyright infringement prosecution and indemnification shall be effectively conducted, the contribution of copyrights to the national economy will be in turn visible. For public interest, the prosecution of copyright and related rights infringement can also deter infringers from violating authors' rights and therefore stimulate creativity.

¹⁴ P. Adepoju, "Nollywood, telecoms help make Nigerian economy Africa's largest", published on Mon, April 7th 2014, 16:30 at <http://www.humanipo.com/news/42333/nollywood-telecoms-help-make-nigerian-economy-africas-largest/>, visited on May 03rd 2014.

For academic and research interests, the work enriches the Rwandan IPRs literature which for the moment remains poor. The present research also falls under other requirements to be awarded a Master's degree in Business Law by the University of Rwanda.

6. Methodology

This study is a doctrinal based study with no components of the empirical research. It was conducted through a review of literature as well as an examination of relevant sources of law both statutory and doctrinal, mainly the legislation, publications and court cases on intellectual property. In this framework, the methodological cornerstone of the present study is the “qualitative design” because it is interested in words, analysis of issues, prosecution and indemnification problems and their mechanisms of solution. In other words, the study is not statistical, does not produce numbers; which makes it qualitative and not quantitative.

Moreover, the Rwandan reality regarding copyright infringement prosecution and indemnification was compared to advanced legislations realities with a significant view of their historical background. In addition to the review of existing literature on copyright and related rights, the study also used a methodological approach to analyze IP Laws and case laws that have interpreted the same laws.

7. Limitations of the study

Addressing challenges of copyright and related rights infringement prosecution and indemnification as a study falls under IPRs which constitute a huge field subdivided into industrial rights and copyrights and related rights as seen above. However, copyrights and related rights seem to be the most violated rights among other IPRs in Rwanda¹⁵.

¹⁵ Rwanda Focus, “Why piracy is so widespread in Rwanda”, in the *Rwanda Focus* of March 26th 2008, accessible at <http://focus.rw/wp/2008/03/why-piracy-is-so-widespread-in-rwanda/>, visited on May 03rd 2014.

It is in the same framework that, as far as the object of the study is concerned, the work was limited to only copyrights and related rights. The geographical limitation obliged the research to be carried out onto the Rwandan territory, even though a significant look was directed to advanced legislations on copyrights. In time, the work was more concentrated on the period from 2009 when the IPRs Law into force was published to date.

8. Structure of the work

Apart from this introductory chapter, the work is subdivided into three main chapters. The first chapter reviews the literature of existing documents on copyright infringement prosecution and indemnification. Whereas the second chapter analyses challenges regarding the copyright infringement prosecution and indemnification, the third chapter suggests mechanisms to address challenges of copyright infringement prosecution and indemnification. The work ends in a general conclusion which embodies a summary of findings and recommendations.

CHAPTER I. COPYRIGHT INFRINGEMENT AND ITS PROSECUTION AND INDEMNIFICATION

Copyright and related rights constitute a component of IPRs which are protected by various international and domestic laws¹⁶. The legal protection at issue includes the criminal prosecution of suspects of copyright and related rights infringement as well as indemnification of the victims of these infringements.

This chapter reviews the existing literature on copyrights and their protection against infringement which include suspects prosecution in case copyright infringement takes place and indemnification of the victims.

1.1 Copyrights and related rights as a component of intellectual Property Rights

Copyrights and related rights as components of IPRs need to be defined and distinguished from other components of IPRs, that is industrial property, before proceeding with protected rights and their limitations within copyright and related rights framework.

1.1.1 Notion of copyright and related rights

Given that the 2009 Rwandan IP Law does not provide for the explicit definition of IP, the researcher sought for the position of the Rwandan legislator as far as the definition of IP is concerned, through referring to the Penal Code. The latter defines “intellectual property” as “rights relating to literary, artistic and scientific works, to performances of performing artists, phonograms, and broadcasts, to inventions in all fields of human endeavour, to scientific discoveries, to industrial designs, to trademarks, service marks, and commercial names and designations, to protection against unfair competition, and all other rights resulting from intellectual activity in the industrial scientific, literary or artistic fields”¹⁷.

¹⁶ WIPO, *What is intellectual property?*, accessible at <http://www.wipo.int/about-ip/en/>, visited on May 25th 2014.

¹⁷ Article 376, 1° of the Penal Code.

Under this definition, the Penal Code bases its definition on *literary, artistic and scientific works* which are main components of the intellectual property. When these components are shrunk more, the intellectual property gets only two main branches which are *industrial property* which corresponds to scientific works and *copyrights* corresponding to literary and artistic works.

Copyright relates to artistic creations, such as books, music, paintings and sculptures, films and technology-based works such as computer programs and electronic databases. In most European languages other than English, copyright is known as author's rights (deriving from the French, *droit d'auteur*). The expression copyright refers to the main act which, in respect of literary and artistic creations, may be made only by the author or with his authorization. That act is the making of copies of the work. The expression "author's rights" refers to the creator of the artistic work, its author. It thus underlines the fact, recognized in most laws, that the author has certain specific rights in his creation which only he can exercise (such as the right to prevent a distorted reproduction). Other rights (such as the right to make copies) can be exercised by other persons, for example, a publisher who has obtained a license from the author¹⁸.

After having analyzing these definitions, the researcher suggests the following as definition of copyright: "exclusive right to reproduce, communicate, distribute, perform and sell literary and artistic works".

I.1.2 Distinction between industrial property and copyrights

For the present study, it is also helpful to explore the distinction between industrial property and copyright in terms of the basic difference between innovation and creativity.

¹⁸ UNESCO, "Basic Notions about Copyright and Neighboring Rights", accessible at http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/creativity/pdf/copyright/basic_notions_en.pdf, visited on 15/12/2014.

Industrial property is dominated by innovation which may be defined in a non-legal sense as new solutions to technical problems. These new solutions are products and processes, and are protected as such. For example, the protection accorded to inventors constitutes a protection against any commercial use of the invention without the authorization of the owner. Even a person, who later makes the same invention independently, without copying or even being aware of the first inventor's work, must obtain authorization before he can exploit it¹⁹.

Unlike protection of inventions, copyright laws protect only the form of expression of ideas, not the ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colors and shapes. So copyright laws protect the owner of property rights against those who copy or otherwise take and use the form in which the original work was expressed by the author²⁰.

From this basic difference between inventions and literary and artistic works, it follows that the legal protection provided to each of them also differs. Since the protection for inventions gives a monopoly right to exploit an innovation, such protection is short in duration- usually about 20 years. The fact that the invention is protected must also be made known to the public. There must be an official notification that a specific, fully described invention is the property of a specific owner for a fixed number of years; in other words, the protected invention must be disclosed publicly in an official register²¹.

By contrast, the legal protection of literary and artistic works under copyright prevents only unauthorized use of the *expressions* of ideas. The duration of protection is much longer²² than in the case of the protection of inventions without damage to the public interest. Also, the law can be - and in most countries is - simply declaratory, i.e., the law may state that the author of an original work has the right to prevent other persons from copying or otherwise

¹⁹ WIPO, *What is intellectual property?*, accessible at <http://www.wipo.int/about-ip/en/>, visited on May 25th 2014.

²⁰ Ibid.

²¹ WIPO, *Understanding Industrial Property*, accessed at http://www.wipo.int/edocs/pubdocs/en/intproperty/895/wipo_pub_895.pdf, on 14/12/2014.

²² Whereas for a work of applied art, the economic rights shall be protected for a period twenty five (25) years from the end of the year in which the work was made (See Article 221 / 2009 IP Law (op. cit): Duration of protection of a work of applied art), copyrights and related rights shall be protected during the life of the author and for fifty years (50) after his/her death (See Article 217 / 2009 IP Law (op. cit): Duration of economic rights protection).

using his work. So a created work is considered protected as soon as it exists, and a public register of copyright protected works is not necessary²³.

I.1.3 Protected rights under copyright

Under copyrights, there are specific works which fall under the protection of the copyright law. The protection itself is extended to both economic and moral rights.

I.1.3.1 Protected works

Protected works are normally established by the Berne Convention. However, due to technological developments, it has been found that the list cannot be exhaustive. That is the reason why some countries included in their domestic legislations additional protected works, under copyrights.

I.1.3.1.1 Berne Convention's list

For the purposes of copyright protection, the term “literary and artistic works” is understood to include every original work of authorship, irrespective of its literary or artistic merit. The ideas in the work do not need to be original, but the form of expression must be an original creation of the author. According to the Berne Convention, the expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression²⁴. The Convention goes on to list the following examples of such works:

- books, pamphlets and other writings;
- lectures, addresses, sermons;
- dramatic or dramatico-musical works;
- choreographic works and entertainments in dumb show;

²³ WIPO, *Understanding industrial property*, accessed at http://www.wipo.int/edocs/pubdocs/en/intproperty/895/wipo_pub_895.pdf, on 14/12/2014.

²⁴ Article 2 of the Berne Convention for the Protection of Literary and Artistic Works.

- musical compositions with or without words;
- cinematographic works to which are assimilated works expressed by a process analogous to cinematography;
- works of drawing, painting, architecture, sculpture, engraving and lithography;
- photographic works, to which are assimilated works expressed by a process analogous to photography;
- works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science;
- “translations, adaptations, arrangements of music and other alterations of a literary or artistic work, which are to be protected as original works without prejudice to the copyright in the original work..
- collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations, are to be protected as such, without prejudice to the copyright in each of the works forming part of such collections.”

Member countries²⁵ of the Berne Union, and many other countries, provide protection under their copyright laws for the above categories of works. The list, however, is not intended to be exhaustive. Copyright laws also protect other modes or forms of expression of works in the literary, scientific and artistic domain, which are not included in the list such as computer programs and multimedia productions.

1.1.3.1.2 Protection of computer programs

The Berne Convention does not include the protection of computer programs on its list of protected works. However, the World Trade Organization (WTO) solved this issue under the

²⁵ For the Rwandan situation on domestication of the Berne list of protected works, see *infra*.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The Rwanda IPL also catered for the protection of computer programs.

i. Protection of computer programs under TRIPS

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international agreement administered by the World Trade Organization (WTO) that sets down minimum standards for many forms of IP. TRIPS agreements came in to enforce trade related IPR after the creation of WTO in 1995, where it filled in loopholes that were left by previous treaties which include the Berne Convention²⁶.

Computer programs are a good example of a type of work which is not included in the list in the Berne Convention, but which is undoubtedly included in the notion of a production in the literary, scientific and artistic domain²⁷ within the meaning of Article 2. Indeed, computer programs are protected under the copyright laws of a number of countries, as well as under the WIPO Copyright Treaty²⁸. In the same framework of international protection, later on, computer programs came to be protected under TRIPS agreements and made part of the Berne Convention: “Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)”²⁹.

ii. Protection of computer programs under Rwanda IPL

According to the Rwanda IPL, computer program means “instructions expressed in words, codes, schemes or in any other form, which is capable, when incorporated in a medium that

²⁶ T. Kaya, *A Comparative Analysis Of The Patentability Of Computer Software Under The Trips Agreement: The U.S., The E.U and Turkey*, Ankara Law Review, Vol.4 No.1 (Summer 2007), pp.43-81.

²⁷ J. H. Reichman, *The Know-How gap in the TRIPS agreement: why software fared badly and what are the solutions?*, Computer Law Symposium, “Straight talk about intellectual property in the computer industry”, University of California, Hastings College of Law, San Francisco, California, Feb. 2005.

²⁸ See the 1996 WIPO Copyright Treaty.

²⁹ WTO, Standards concerning the availability, scope and use of Intellectual Property Rights, Uruguay Round Agreement, TRIPS, accessed at https://www.wto.org/English/docs/e/legal/e/27-trips_04_e.htm, visited on 28/12/2014.

the computer can read, of causing a computer or any electronic device having information-processing capabilities to perform or achieve a particular task or result”³⁰.

Under the Rwanda IPL, computer programs works are protected either under copyrights or under patents, depending upon the will of the author³¹. However, this protection is subjected to some exceptions. For instance, the reproduction, in a single copy, or the adaptation of a computer program by the lawful owner of a copy of that computer program shall be permitted without the authorization of the author and without payment of a separate remuneration, provided that the copy or adaptation is necessary: (1°) for the use of the computer program for the purpose and extent for which it has been obtained; (2°) for archival purposes and for the replacement of the lawfully owned copy of the computer program in the event that the said copy of the computer program is lost, or rendered unusable³².

1.1.3.1.3 Multimedia productions

Multimedia productions are another example of a type of work not listed in the *Berne Convention*, but which clearly comes within the notion of creations in the literary, scientific and artistic domain. While no acceptable legal definition has been developed, there is a consensus that the combination of sound, text and images in a digital format, which is made accessible by a computer program, embodies an original expression of authorship sufficient to justify the protection of multimedia productions under the umbrella of copyright³³.

1.1.3.1.4 Protected works under the Rwandan IP Law

Protected works under the IP Law are literary and artistic works that are original intellectual creations in the literary and artistic domain, including in particular the following works:

³⁰ Art. 6, 33° of the of the 2009 IP Law.

³¹ Art. 18 *in fine* of the 2009 IP Law (op. cit.): Matters excluded from patent protection.

³² Art. 211 of the 2009 IP Law (op. cit.): Free reproduction and adaptation of computer programs.

³³ A Méndez-Vilas, *Copyright issues on multimedia production*, accessed at www.formatex.info/ict/book/108-114.pdf, on 15/12/2015.

1. works expressed by writing (books, pamphlets and other writings) including computer programs;
2. conferences, speeches, lectures, addresses, sermons and other oral works;
3. musical works accompanied with or without text;
4. dramatic, dramatico-musical works;
5. choreographic works and pantomimes;
6. audiovisual works;
7. works of drawing, painting, sculpture, engraving, lithography, tapestry and other works of fine art;
8. works of architecture;
9. photographic works, including works made by means similar to photographic process;
10. works of applied art like as handicraft works or works produced by industrial process.
The protection of industrial designs and models is granted by the provisions of this Law relating to industrial designs;
11. illustrations, maps, plans, sketches and three-dimensional works relating to geography, topography, architecture or science;
12. works deriving from Rwanda national folklore³⁴.

In regards to the protection of derivative works and collections of works, the Rwandan IP Law stipulates that the following are also protected as works and collections of works which include:

1. translations, adaptations, arrangements and other transformations or modifications of works and the works of expression of folklore;
2. collections of works, works of expression of folklore or of simple facts or mere data like encyclopaedia, anthologies, collections of data, whether in machine readable or other form, provided that such collections are original intellectual creations by reason of the selection or arrangement of their contents³⁵.

³⁴ Article 195 of the 2009 IP Law (op. cit): Protection of original works.

³⁵ Article 196 §1 of the 2009 IP Law (op. cit): Protection of derivative works and collections of works.

The protection of any derivative work shall be without prejudice to any protection of a pre-existing work or expression of folklore incorporated in or utilized for the making of such a work³⁶.

I.1.3.2 Protected rights

I.1.3.2.1 Economic rights

Subject to limitations mentioned by the provisions of this law, the author of the work shall have the exclusive right to carry out or to authorize the following acts in relation to the work³⁷:

1. reproduction of the work;
2. translation of his/her work;
3. adaptation, arrangement or other transformation of the work;
4. renting or authorizing renting or lending to the public the original or a copy of an audiovisual work, a work embodied in a phonogram or a computer program;
5. distribute or authorize distribution to the public the original or a copy of the work for sale or other transfer of ownership to third parties;
6. public performance of the work;
7. communication to the public of the work by broadcasting ;
8. communication to the public of the work by wire or any other means.

These are economic rights because their transfer or licensing is evaluable in money and therefore payable, which is different from moral rights.

I.1.3.2.2 Moral rights

The Berne Convention requires Member countries to grant to authors³⁸:

³⁶ Article 196 §2 of the 2009 IP Law (op. cit): Protection of derivative works and collections of works.

³⁷ Article 200 of the 2009 IP Law (op. cit): Economic rights.

³⁸ See article 6bis of the Berne Convention.

- i. the right to claim authorship of the work (sometimes called the right of paternity); and
- ii. the right to object to any distortion or modification of the work, or other derogatory action in relation to the work, which would be prejudicial to the author's honor or reputation (sometimes called the right of integrity).

These rights are generally known as the moral rights of authors. The Convention requires them to be independent of the author's economic rights, and to remain with the author even after he has transferred his economic rights. It is worth noting that moral rights are only accorded to individual authors. Thus even when for example a film producer or a publisher owns the economic rights in a work, it is only the individual creator who has moral interests at stake.

In addition to his/her economic rights to which he/she is entitled, even if such rights are transferred to others, the author of a work shall have the right:

1. to claim the authorship, in particular to have his/her name indicated prominently on the copies and in connection with any public use of his/her work, as far as practicable;
2. to object to any distortion, mutilation or other modification of, or other derogatory action in relation to his/her work which would be prejudicial to his/her honor or reputation;
3. to not have his/her name known or to use a pseudonym.

II.1.4 Limitation on copyright protection

As it is the case for the Berne Convention, the Rwandan legislation also has some works that are not protected. In other words, the protection of IP works is not extended to:

1. any official texts of a legislative, administrative or judiciary nature, as well as any official translation thereof;
2. published daily news or news communicated to the public;

3. any idea, procedure, system, methods of operation, concepts, principles, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work³⁹.

It is understandable for these rights to be legally made free of charge because they fall under public interests and would therefore benefit the society.

1.2 Legislation on justice administration in case of copyright infringement

When copyright infringement occurs, the victim has right to justice. According to the legislation into force, the suspect can either be prosecuted through criminal procedures or sued for civil remedies or indemnification of the victim.

1.2.1 Criminal prosecution of copyright infringements suspects

Prosecution is any act aimed at referring a matter to the court, summoning parties, appearing before court, preparing the hearing, litigating and using procedures for appeal⁴⁰. Therefore, copyright infringement as offense is subjected to the same procedure.

As per the Rwandan legislation, copyright infringement as an offense is stipulated in the following terms:

- “Any infringement of copyrights or related rights protected under this law, committed wilfully or by gross negligence, by any third person for profit-making purposes and without owner’s right consent shall constitute an act of forgery.
- Any third person, who knowingly sells, offers on sale, is making rent, detains or introduces on the territory of the Republic of Rwanda, the alleged infringing goods for commercial purposes, shall be considered as committing the same offence”⁴¹.

³⁹ Article 198 of the 2009 IP Law (Op. Cit): works not protected.

⁴⁰ Article 2, 2° of the Rwandan Code of Criminal Procedure.

⁴¹ Article 261 of the 2009 IP Law (Op. Cit): act of forgery.

Copyright infringers are punishable by criminal sanctions that appear in both the IP Law and the Rwandan Penal Code⁴² and in addition to such penalties, the competent court may also order the seizure, forfeiture and destruction of the incriminating items and of all materials or instruments used in the commission of such a crime.

I.2.2 Indemnification of copyrights infringements victims

Upon request by the owner of the protected right, the competent court shall order the infringer to pay the right owner damages and adequate compensation for the infringement of his/her intellectual property right provided that the infringer acted knowingly or with reasonable grounds to know of the infringement⁴³.

A victim of copyright infringement victim who wishes to be indemnified may choose either amicable settlement or court proceedings. When he/she opts for courts, the competent is the Commercial Court which deals with all commercial, financial and fiscal cases, which include, in their turn matters in connection with disputes related to intellectual property⁴⁴.

Contrarily to the copyrights infringements prosecution which needs to be undertaken in compliance with the criminal procedure⁴⁵, the indemnification sought through courts of Law must be sought in line with the civil procedure⁴⁶. What is common for both procedures in the copyrights infringements justice administration framework is that the action is initiated by the victim, or in other words, the justice is sought upon the victim request, one of major challenges faced to by copyrights owners, as evidenced by cases heard by Rwandan courts, so far.

The procedure at issue does not however prevent the ordinary civil liability based on articles 258 and 259 of the Civil Code Book III (CCB III) to apply. The latter have even been the

⁴² For details on these criminal sanctions, see Chapter III of the present thesis.

⁴³ Article 262 / 2009 IP Law (op. cit): Proceedings against an act of forgery.

⁴⁴ Articles 2 and 12 of the Organic Law n° 06/2012/OL of 14/09/2012 determining the organisation, functioning and jurisdiction of commercial courts, *Official Gazette n°45 of 05/11/2012*.

⁴⁵ Law n° 30/2013 of 24/5/2013 relating to the code of criminal procedure, *Official Gazette n° 27 of 08/07/2013*.

⁴⁶ Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, *Official Gazette n° 29 of 16/07/2012*.

basis of claims introduced to Rwandan courts by victims of copyright infringement as analysed in the next section.

1.3 Interpretation of copyright infringements by Rwandan Courts

Famous cases judged so far by Rwandan courts in regards to copyright infringement are: Kayirebwa Cecile vs. ORINFOR and others, Kayirebwa Cecili vs. Rwandair, Bushayija Pascal vs. COGEBANK and Gasake Augustin vs. Editions Bakame cases.

1.3.1 Kayirebwa Cecile vs. ORINFOR and others

The Case of Kayirebwa Cecile against ORINFOR and some other members of the media in Rwanda has been a good practical example of the interpretation of the 2009 IP Law by Rwandan Courts.

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 Radio⁴⁷.

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 evidences⁴⁸.

⁴⁷ 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.

⁴⁸ Ibid.

While ruling the case, the court based its decision to article 200, 7^o 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.

I.3.2 Kayirebwa Cecili vs. Rwandair

After preliminary negotiations between Cecile Kayirebwa and Rwandair, which negotiations did not lead to a binding contract, Rwandair started using Karibwa’s musical work (Inzozu) advertising the launch of Rwandair Kigali – Lagos flight. Rwandair denied having used her musical work, Inzozu, based on the fact that there was a “production and advertisement” contract with Radio Flash, to advertise the “Rwandair Kigali – Lagos” flight, an advertisement that was played on air at Radio Flash from 26/11/2011 up to 31/12/2011.

As of 05/04/2012, Kayirebwa approached Rwandair for a compensation of 130,000,000 to have utilized her song Inzozu without a license which was a case of copyright infringement. Rwandair defended itself saying that Kayirebwa sued the wrong defendant because she would have sued Flash FM which used her musical work, Inzozu. However, as before using the song, Rwandair had had preliminary negotiations, though they did not lead to any final agreement, this was good evidence that Rwandair played a role in selecting Inzozu as the song of the advertisement to start the Kigali – Lagos flight. The Court ordered to seek for expertise to confirm if they played song was belonging to Kayirebwa Cecile. It is in that framework that CC RAFIKI AFRICA Ltd was hired as an expert whose report proved that the song Inzozu used in the advert belongs to Kayirebwa Cecile.

The Court ruled in a quite similar manner as it was ruled in the case against ORINFOR and others, as a copyright infringement through the “communication to the public of the work by broadcasting”⁴⁹, as INZOZI song was heard on Radio Flash FM advertising the Rwandair Flight Kigali – Lagos Launch without Kayirebwa’s license. It was however quite easy to determine damages because the Court based their computation to the amount Rwanda was

⁴⁹ Article 200, 7o of the 2009 IP Law (Op. Cit.): Economic rights.

offering to pay Kayirebwa Cecile while they were negotiating an agreement to use her musical work in advertisement, though the agreement did not come to its existence⁵⁰.

Therefore, according to the research, the court has been fair in recognizing the singer's copyrights in disfavour of the infringer, Rwandair, who had proceeded to the use of her musical works without her license.

I.3.3 Bushayija Pascal vs. COGEBANK

Bushayija Pascal won a case against COGEBANK Ltd for having proceeded to the reproduction of artistic works that he had sold to COGEBANK without an expended license to do so. The initial license was limited to the use of arts in decorating COGEBANK head offices. Instead of abiding by the scope of license, COGEBANK made similar copies or reproduced arts bought from Bushayija Pascal and used the arts on the bank's diaries and cheque books⁵¹.

The Court ruled that the reproduction of arts bought from Bushayija Pascal went beyond the initial license and thus violated the scope of license to use his arts. The Court also ruled that COGEBANK, while using Bushayija's arts on cheque books and diaries was not decorating its offices but rather was advertising its own services. Based on that motivation, the Court decided an injunction for COGEBANK to stop using Bushayija's arts in advertisement, unless additional costs are paid, in addition to compensatory indemnities in favor of the winner – Bushayija Pascal⁵².

The copyright infringement based on reproducing works without his/her owner's license is also a breach of the 2009 IP Law, especially in its article 200 (1^o) which stipulates that it is prohibited to proceed to the "reproduction of the work" without the author's license or an agreement with the author of the work.

⁵⁰ Kayirebwa Cecile vs. RwandAir, Case no R.Com 0739/12/TC/Nyge of 21/06/2012, Nyarugenge Commercial Court.

⁵¹ Bushayija Pascal vs. COGEBANK, Case no RCOM A 0014/08/CS of August 06th 2010, Supreme Court.

⁵² Ibid.

Without any doubt, it would not be fair to go beyond the contract scope and reproduce artistic works sold to the buyer, without the seller, copyright owner's license.

I.3.4 Gasake Augustin vs. Editions Bakame

Gasake Augustin sued Editions Bakame for having reproduced, translated and performed in public and for commercial purposes Gasake's works embodied in his story book named Kageni where Seminega Fulgence was the story accompanying images designer and that Editions did all that since 2003 without Gasake Augustin's license or any agreement between both parties⁵³.

Editions Bakame defended itself saying that the original story bought from Gasake Augustin was named Nyabarongo, which was renamed as Kageni by Editions Bakame. However, Editions Bakame did not manage to provide evidences of the purchase at issue. However, the story book named Kageni was presented as an evidence that it was written by Gasake Augustin because it shows that the author is Gasake Augustin, but not Editions Bakame which failed to present evidences of license issued by Gasake Augustin to sell the story book⁵⁴.

Pursuant to article 195 of the Law no 31/2009 of 26/10/2009 on IPRs, the Court ruled that Gasake Augustin's works are part of IPRs and that they should therefore be protected. Article 200 of the same Law shows that reproduction, translation and performance in public for commercial uses constitute a copyright infringement. The Court also referred its ruling to the article 258 CCB III to determine the remedy in favour of the case winner, Gasake Augustin, that is 11,500,000 Rwandan Francs⁵⁵.

⁵³ Gasake Augustin vs. Editions Bakame, R.Com 0585/13/TC/NYGE, Commercial Court of Nyarugenge, 27/09/2013

⁵⁴ Ibid.

⁵⁵ Ibid.

1.4 Some examples of famous cases of copyright infringements on international scene

On international scene, the present section analyses Rogers Vs. Koons and the Associated Press Vs. Fairey cases.

I.4.1 Rogers vs. Koons

I.4.1.1 Case

Photographer Art Rogers shot a photograph of a couple holding a line of puppies in a row and sold it for use in greeting cards and similar products. Internationally, renowned artist Jeff Koons in the process of creating an exhibit on the banality of everyday items, ran across Rodgers' photograph and used it to create a set of statues based on the image. Koons sold several of these structures, making a significant profit. Upon discovering the copy, Rodgers sued Koons for copyright. Koons responded by claiming fair use by parody⁵⁶.

I.4.1.2 Outcome

The court found the similarities between the two images too close, and that a "typical person" would be able to recognize the copy. Koon's defense was rejected under the argument that he could have used a more generic source to make the same statement — without copying Roger's work. Koons was forced to pay a monetary settlement to Rodgers, amounting to 367,000 USD⁵⁷.

I.4.1.3 Significance

This is one of those famous cases that encompassed a larger issue in the art world, the issue of appropriation art. Can you build upon another's work to create your own original piece? And if you do so, does that constitute derivative work? It also brought up the issue of photography as art, was photography just a documentation of the world, or is it a creative and

⁵⁶ IPO, Copyright infringement, accessed at <http://www.ipo.gov.uk/types/copy/c-manage/c-useenforce/c-infringe.htm>, 20/05/2014.

⁵⁷ Ibid.

artistic product? Neither of these issues was entirely answered by the case, of course, but it has also become a reference used in many cases afterward⁵⁸.

Therefore, photography as one of components of copyrights is protected and once violated, the victim has right to bring a case in court of justice.

I.4.2 The Associated Press vs. Fairey

I.4.2.1 Case

Famous street artist Shephard Fairey created the Hope poster during President Obama's first run for presidential election in 2008. The design rapidly became a symbol for Obama's campaign, technically independent of the campaign but with its approval. In January 2009, the photograph on which Fairey allegedly based the design was revealed by the Associated Press as one shot by AP freelancer Mannie Garcia — with the AP demanding compensation for its use in Fairey's work. Fairey responded with the defense of fair use, claiming his work didn't reduce the value of the original photograph⁵⁹.

I.4.2.2 Outcome

The artist and the AP press came to a private settlement in January 2011, part of which included a split in the profits for the work.

I.4.2.3 Significance

Though there wasn't a court case and an actual verdict, this case created a lot of discourse around the value of work in these copyright battles. It's unlikely that Garcia's work could have ever reached the level of fame it did, if not for Fairey's poster. Garcia himself stated he was "so proud of the photograph and that Fairey did what he did artistically with it, and the

⁵⁸ Ibid.

⁵⁹ Ibid.

effect it has had”, but still had a problem with the fact that Fairey took the image without permission and without credit for its originator⁶⁰.

In sum, the present chapter introduced the scope of protection of copyright and related rights under the Rwandan Law into force. The copyright is protected in terms of economic and moral rights vested to copyright owners. Among other works, there are books, pamphlets and other writings, including computer programs. There are also, conferences, speeches, lectures, addresses, sermons and other oral works, musical works accompanied with or without text, dramatic, dramatico-musical works, works of architecture, photographic works, including works made by means similar to photographic process and others as stipulated in the 2009 IP Law⁶¹.

The copyright infringement occurs when those works are used without any consent from their authors. The use at issue may include reproduction, translation of his/her work, adaptation, distribution, public performance, communication to the public of the work by broadcasting, wire or any other means and other practices prohibited by the 2009 IP Law⁶². The present chapter showed that some of these prohibited practices took place and that cases against such acts were filed in court.

The basis legislation on copyrights protection is there both on domestic and international level. The same legislation was referred to by victims of copyrights infringements to enforce the protection of both their economic and moral rights on their works. However, though plaintiffs won their cases, there are still challenges connected to copyright and related rights infringement prosecution and indemnification.

⁶⁰ Ibid.

⁶¹ Article 195 of the 2009 IP Law (op. cit): Protection of original works.

⁶² Article 200 of the 2009 IP Law (Op. Cit.): Economic rights.

CHAPTER II. ANALYSIS OF CHALLENGES RELATING TO PROSECUTION AND INDEMNIFICATION OF COPYRIGHT INFRINGEMENT

The protection of IPR owners is associated with problems that need to be analyzed in order to have a smoother way to find their solutions. Some of these problems are related to copyright protection whereas others are related to the prosecution of suspects in case copyrights have been infringed. They also include challenges relating to evidences production and the implementation of conservatory and preventive measures provided for by the IP Law.

II.1 Challenges related to copyright protection

The protection of copyrights owners as provided for by the Law n° 31/2009 of 26/10/2009 on the protection of intellectual property⁶³ is jeopardized by the use of their products without their licenses as the first challenge of copyrights protection. Another challenge is the breach of the scope of the author's license where it can be found. The use of ICT within copyrights infringements constitutes another challenge against copyrights protection. Under this section, the non-recognition of intellectual property rights compared to other types of properties is also discussed as a challenge against copyrights protection.

II.1.1 Use of copyright owners' works without authorization

In line with article 200 of the Rwandan IPR Law, the author of the work shall have the exclusive right to carry out or to authorize various acts in relation to the work which include the reproduction of the work. The exclusive right at issue also includes translation, adaptation, arrangement or other transformation of the work, renting or authorizing renting or lending to the public the original or a copy of an audiovisual work, a work embodied in a phonogram or a computer program, distribute or authorize distribution to the public the original or a copy of the work for sale or other transfer of ownership to third parties. The exclusive right furthermore includes public performance of the work, communication to the public of the work by broadcasting and communication to the public of the work by wire or any other means.

⁶³ Official Gazette n°50bis of 14/12/2009.

Among all those rights, cases that are known to have been decided by Rwandan competent courts, the most violated right is the broadcasting and communication to the public of the work without the author's license. This is notable in the case Kayirebwa Cecile vs. ORINFOR and others⁶⁴ and the case Kayirebwa Cecile vs. Rwandair⁶⁵ where in both cases, her musical works were broadcast without her authorization. Another violated exclusive right so far known to have been decided by courts in Rwanda is the reproduction of works without their authors' authorization. This is the case for Gasake Augustin vs. Edition Bakame⁶⁶ where books were reproduced and the case Bushayija vs. COGEBANK⁶⁷ where artist works were reproduced without his authorization as well.

Though there are no cases judged by courts so far, the use of copyrights protected works without their authors' authorization also includes their direct commercialization without copyright owners' consent. For instance, from 2010 the Rwandan National Police (RNP) has been arresting suspects of copyright infringements which include illegally copying songs and films on DVDs audio files, on CDs and audio-cassettes and selling them. This has gone beyond copyrights owners' control because these sellers named themselves DJs where they sell musicians' products, for example, without their license⁶⁸.

During police operations, suspects recognized that they selected songs for wedding, burial ceremonies, church ceremonies and related events, night clubs selections, music to be played in buses, restaurants, hotels, anniversaries that include birthdays' celebrations. These infringers openly sell musicians' products in shops or even on the front size of commercial and residential buildings, in markets and on streets where they expect to meet clients. The same infringers are found in both urban and rural areas and have clients of various categories from domestic workers to events managers and to family members who buy musicians'

⁶⁴ Kayirebwa Cecile v. ORINFOR, City Radio, Contact FM, Voice of Africa, Radio Flash and Radio Isango Star, case no R.Com 0178/12/HCC of 15/02/2013, Commercial High Court.

⁶⁵ Kayirebwa Cecile vs. RwandAir, Case no R.Com 0739/12/TC/Nyge of 21/06/2012, Nyarugenge Commercial Court.

⁶⁶ Gasake Augustin vs. Editions Bakame, R.Com 0455/13/HCC of 17/01/2014, High Commercial Court.

⁶⁷ Bushayija Pascal vs. COGEBANK, Case no RCOM A 0014/08/CS of August 06th 2010, Supreme Court.

⁶⁸ Musoni Edward, *Music pirates arrested*, <http://www.newtimes.co.rw/news/index.php?i=14183&a=26340>, visited on April 04th 2014.

products for only family use, from the so-called DJs to bar owners, from adolescents to aged persons; all done without copyrights' owners' licenses⁶⁹.

More surprisingly, when asked why they commercialize copyright owners' products without their license, they said that they do it in copyright owners' interests because they are marketing them, though there is no marketing contract. They also added on that the illegal sale of such products fall under the Government's policy to incite youth create jobs and that therefore they have invested in copyright infringements instead of becoming thieves⁷⁰, as if what they do does not constitute theft. This brings in another challenge of ignoring intellectual property rights as protected rights.

II.1.2 Breach of the scope of authorization to use a protected work

Breaching the scope of license may include using the same products or carrying out the same works reproduction.

II.1.2.1 Breaching the scope of license through using initial products

In the case Kayirebwa Cecile against ORINFOR, City Radio, Contact FM, Voice of Africa, Radio Flash and Radio Isango Star, it was noticed that in despite of license to use musicians' products, some radio stations were accused of having breached the scope of license.

For instance, the Court ruled that Radio Isango Star breached the scope of the license to utilize Kayirebwa's songs. The Radio presented defenses including the collaboration with the Director of Contract FM in regards to Kayirebwa's albums advertisement. The Court held that the arrangement that was headed by Mr. Albert Rudatsimburwa, the Director of Contact FM who collaborated with other local radios for the advertisement purpose was based on a previously granted license from the copyright owner to advertise her products which is equivalent to clear license to use copyright owners' products. However, as Isango Star went beyond advertisement and played Kayirebwa's song on air between February and March

⁶⁹ Ibid.

⁷⁰ Uwimanimpaye C. M. Clemence, "Rubavu – 3 DJs arrested over copyright infringements" (translated from Kinyarwanda), accessed at <http://www.kigalitoday.com/spip.php?article10502em>, on April 04th 2014.

2012, the Court ruled that the act to breach the scope of license constitutes a breach of copyright and therefore punishable⁷¹.

II.1.2.2 Breaching the scope of license through reproduction for business purposes

According to the Rwandan IPL, the author of the work shall have the exclusive right to carry out or to authorize the various acts in relation to the work that include reproduction of the work⁷², except for the private reproduction of a published work, where a single copy shall be permitted to be subject to reproduction without the authorization of the author and without any remuneration, where it is made for a natural person exclusively or other purposes than business-oriented⁷³.

Apart from musicians as being part of copyrights owners, artists also face cases of copyrights infringements. For example, Bushayija Pascal won a case against COGEBANK Ltd for having proceeded to the reproduction of artistic works that he had sold to COGEBANK without an expended license to do so. The initial license was limited to the use of arts in decorating COGEBANK head offices. Instead of abiding by the scope of license, COGEBANK made similar copies or reproduced arts bought from Bushayija Pascal and used the arts on the bank's diaries and cheque books⁷⁴.

The Court ruled that the reproduction of arts bought from Bushayija Pascal went beyond the initial license and thus violated the scope of license to use his arts. The Court also ruled that COGEBANK, while using Bushayija's arts on cheque books and diaries was not decorating its offices but rather was advertising its own services. Based on that motivation, the Court decided an injunction for COGEBANK to stop using Bushayija's arts in advertisement, unless additional costs are paid, in addition to various compensative indemnities in favor of the winner – Bushayija Pascal⁷⁵.

The same precedent is also applicable to other copyrighted works. In the scenario presented previously where a group of singers known as “urban boys” reproduced Andrew Sebanani's

⁷¹ Kayirebwa Cecile v. ORINFOR and others, op. cit., p. 25.

⁷² Article 200 of the Law n° 31/2009 of 26/10/2009, pre-cited.

⁷³ Article 203 of the Law n° 31/2009 of 26/10/2009, pre-cited.

⁷⁴ Bushayija Pascal vs. COGEBANK, Case no RCOM A 0014/08/CS of August 06th 2010, Supreme Court.

⁷⁵ Ibid.

song – “Mama Munyana”, though there was even no license to use that song within commercial activities, the song was reproduced which constituted a breach to the intellectual property economic rights that were transferred to Sebanani’s legitimate successors, after his death⁷⁶. However, Sebanani’s family has not yet lodged any case before the court against those singers.

This is similar to Kayirebwa vs. Rwandair Case whereby in September 2012, Kayirebwa Cecile filed a lawsuit at the Nyagurenge, Commercial High Court against Rwandair for failing to adhere to provisions of an agreement the two parties were about to enter into. In addition to the advertisement of the flight launch using only one song (Inzozu), Rwandair used some other musical works belonging to Kayirebwa, not only in the advertisement but also in the launch of its Lagos route in 2012. The dispute was also extended to the use of the Kayirebwa’s song “Inzozu” (dream) as Rwandair’s planes soundtrack, out of both parties’ draft agreement scope⁷⁷.

Therefore, the protection of copyrights owners, in addition to the use of their products without their license, is also hampered by the fact of breaching the scope of license on copyrights. ICT might play a big role in this copyrights breaches and infringements.

II.1.3 ICT as a challenge within the copyrights infringements framework

Technology is making it cheaper to copy, transfer, and manipulate information and intellectual property. For example, devices such as optical disk storage systems may allow the average person to collect entire libraries of copyrighted textual, musical, and visual works in his home. Decreasing prices and increasing capabilities of information systems will permit more people to make use of more works. Consequently, enforcement efforts will have to reckon with a much larger volume of potential infringements than exists today. Brief,

⁷⁶ Irakoze Richard, Sabanani’s family unhappy with Urban Boys music group, <http://www.igihe.com/imyidagaduro/muzika/abahanzi/urban-boyz/amakuru/umuryango-wa-sebanani-ukomeje-kwikoma-urban-boyz>, September 03rd 2014.

⁷⁷ Ngarambe Alexis, Kayirebwa now sues Rwandair, <http://www.theeastafrican.co.ke/Rwanda/Business/Kayirebwa-now-sues-RwandAir/-/1433224/1701638/-/trwrnd/-/index.html>, September 03rd 2014.

technology is allowing the copy, transfer, and manipulation of information and intellectual property to occur more quickly⁷⁸.

The growing use of computers to handle and store information could make it even harder for copyright holders to enforce their rights. In the case of the right to control reproduction, the computer poses three major problems for copyright proprietors that are distinct in kind as well as in degree from other technologies used to store or copy information.

First, copying digital information can be done at a fraction of the cost and in a fraction of the time that it takes with photocopying or analog audio or video taping. Second, the digital nature of computer-mediated information means that an infinite number of perfect copies of material can be made. Possession of an *original* is not required to obtain subsequent copies of *original quality*. Thus, the information *content* of a work can be completely separated (or *unbundled*) from the medium that carries it⁷⁹. Third, in the normal course of operations, a computer makes many copies of parts of works. Some copies exist for only a few millionths of a second. Other copies may be held until the machine is turned off or the material is written over. Some copies may be held in permanent form on magnetic disk or tape⁸⁰.

In short, ICT facilitated the copyrights infringements and therefore prevented artists from selling their products and getting associated benefits. Music shared using various telephone applications, is played using computers and telephones, is sold using computers, is spread using various electronic applications. Therefore, these IT devices negatively permit infringers to breach copyrights related provisions of the IP Laws.

II.1.4 Lack of awareness of copyright holders' rights

Copyright is based on the idea that “we are all entitled to the fruits of our labors”. It is the ownership of intellectual property, like patent, trademark, and trade secret. Copyright is a legal concept giving the creator of an original work of authorship exclusive rights to it, usually for a limited time, after which the work enters the public domain. Generally, it is "the right to copy", but also gives the copyright holder the right to be credited for the work, to

⁷⁸ United States, National Technical Information Service, Intellectual property rights in an age of electronics and information, DIANE Publishing Amazon.com, 2014, p. 97.

⁷⁹ http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap3.html#_ftn362.

⁸⁰ Ibid.

determine who may adapt the work to other forms, who may perform the work, who may financially benefit from it⁸¹.

Unfortunately, in Rwanda, so many people do not know copyright, both authorship moral and economic rights. So many people still think that it is allowed to play songs in night clubs, bars, hotels, buses and sell them without owners' licenses. This also includes live performance of songs belonging to others. Even musicians themselves ignore their rights and remain divided with regards to the right way to fight against copyright infringements. For instance, some music sellers say that they created their own jobs as urged by the Government, through selling music, though in absence of licenses from copyrights owners. Some musicians support such idea on pretext that these illegal sellers promote musicians, when they are selling to the public or playing their songs in night clubs, bars, buses and in such business areas; which remains one of key challenges of copyright protection under the Rwandan Intellectual Property Law⁸².

Thus, as far as challenges related to protected works are concerned, the protection of copyrights owners faces plenty of obstacles that include the use of their products and works without their licenses, breaching the scope of license where the license was granted, the use of ICT within copyrights infringements, as well as the non-recognition of intellectual property rights compared to other types of properties. When it comes to procedures meant for victim's compensation or copyright infringers' punishment, additional obstacles prevent copyrights owners from making their rights protected.

II.2 Challenges related to the prosecution of copyright infringement

Copyrights infringers can be attacked through exercising either a criminal action or a civil action for damages compensation and profits recovery. Copyrights owners, once their rights are infringed, the victim can choose a criminal action. However, whereas the essence of the criminal action is that it belongs to the prosecution in representation of the whole society, for copyright infringements, it belongs to the victim to exercise the penal action. Therefore, the

⁸¹ Stephanie Ballard, Give Credit Where Credit is Due: Avoiding Plagiarism and Copyright Infringement, <http://library.alliant.edu/screens/plagiarism.pdf>, 10/09/2014.

⁸² Mogis, Piracy is killing the Rwandan music – Iyakaremye, <http://tuskerprojectfame.tv/new/piracy-is-killing-rwandan-music-iyakaremye/>, 10/09/2014.

victim has a duty to first determine if the infringers' acts constitute an offense and therefore, exercise his/her obligation to start up the criminal action⁸³, which exercise is associated with challenges.

II.2.1 Determination of copyright infringement as an offense

A criminal action cannot be exercised, unless the attacked acts can be qualified as criminal acts, an obligation belonging to the victim of copyrights infringements. An offence is an act prohibited or an omission which manifests itself as a breach of the public order and which the law sanctions by a punishment⁸⁴. Both the Rwandan Penal Code⁸⁵ and the IP Law⁸⁶ provide for copyright infringements penalties.

According to the Rwandan IP Law into force, copyrights infringements qualified as offenses are all infringement of copyrights or related rights, protected under the IP Law, also found in the Penal Code⁸⁷, committed willfully or by gross negligence, by any third person for profit-making purposes and without owner's right consent shall constitute an act of forgery. Note that any third person, who knowingly sells, offers on sale, is making rent, detains or introduces on the territory of the Republic of Rwanda, the alleged infringing goods for commercial purposes, shall be considered as committing the same offence⁸⁸.

A question regarding why it belongs to the victim first to determine if committed acts constitute an offense can raise here. But the direct answer could be that it is because the criminal action cannot be taken if it is not endorsed by the victim⁸⁹. This is a challenge because normally, acts are not qualified by victims. On contrary, it belongs to the Judicial Police Officers (JPOs) to institute investigation on their own initiative, or upon complaint or

⁸³ Art. 261 and 262 of the Rwandan IP Law.

⁸⁴ Article 2 of the n° 01/2012/OL of 02/05/2012 Organic Law instituting the penal code (herein referred to as Rwandan Penal Code), *Official Gazette n° Special of 14 June 2012*.

⁸⁵ See articles 376 – 386 of the Rwandan Penal Code.

⁸⁶ See articles 255 – 264 of the Rwandan IP Law.

⁸⁷ Acts punished by the Penal Code include piracy (Art. 377), being a fraudulent producer of phonograms and its publisher (Art. 381), being a retailer of forgery products (Art. 382), Communication of work without prior authorization (Art. 383), Granting or using an authorization in the name of performing artists without authorization by the owner (Art. 384).

⁸⁸ Art. 261 of the IP Law.

⁸⁹ See for EG article 262 of the Rwandan IP Law.

instruction from the Public Prosecution⁹⁰ who will conduct prosecution before the court⁹¹. It is exceptionally that the victim may institute a criminal action by filing a case in a criminal court by way of private prosecution⁹². Therefore, the victim of copyrights infringement has the obligation to really know if his allegations fall under acts qualified as offense against copyrights, before presenting his complaint to the JPOs, instead of being a JPOs' initiative as it is for other offenses, by principle⁹³.

In short, as the criminal action cannot be exercised without the victim's complaint, it is also obvious that it is the same victim who must detect and qualify the constituent elements of the copyright infringements which constitutes a procedural challenge and puts the victim in a weaker position to see his/her rights really enforced by a judicial organ.

II.2.2 Obligation to prosecute upon the victim's request

An offense is assumed to be committed against the whole society of a given territorial jurisdiction, except for universal crimes that fall under the universal jurisdiction which gives any interested country, by principle, to prosecute the suspect, as per various international treaties. Copyright infringement that are considered as offenses are by principle those committed within a commercial framework, which makes them more private than public and therefore are actionable upon the victim's request⁹⁴.

This is also the case of the Rwandan legislation where copyright infringers cannot be prosecuted, unless the action is initiated by the victim⁹⁵. This seems to classify copyright infringements among offences breaching the right to privacy, as it is the case for example for adultery, defamation, public insult and violation of person's domicile, as well defined by the Penal Code⁹⁶.

⁹⁰ Article 20 of the Law n° 30/2013 of 24/5/2013 relating to the code of criminal procedure (CCP), *Official Gazette n° 27 of 08/07/2013*.

⁹¹ Article 41 of the CCP.

⁹² Article 3 of the CCP.

⁹³ Article 20 of the CPP.

⁹⁴ Australian Copyright Council (ACC), *Infringement: Actions, Remedies, Offences & Penalties*, Information Sheet, Strawberry Hills NSW, 2012, p. 3.

⁹⁵ Article 262 of the Rwandan IP Law.

⁹⁶ See articles 280 – 291 of the Rwandan Penal Code.

As it can be seen, it remains a challenge for IPR owners to know at least copyrights infringements that are being committed within the national territory and therefore cannot successfully initiate a criminal action. Besides, IPR owners do not have means to go all over the country to detect copyright infringements.

II.3 Challenges related to the indemnification of the victim of copyright infringement

The plaintiff for copyright infringement is exposed to a hybrid challenge as far indemnification is concerned. Apart from having obstacle to determine the exact damages of the infringement, the copyright owner can in the end find him/herself in a situation where he/she is the one to indemnify the defending party.

II.3.1 Damages computation issue

To date, the bulk of the copyright case law has remained heavily a matter of civil law, with private party copyright owners as plaintiffs. If civil actions are more preferred to criminal actions, this means that IPR owners priority is to be paid damages for their infringed rights⁹⁷.

Therefore, in case the civil action is chosen and successfully exercised, upon order by competent court, the IPR owner whose protected right has been infringed is entitled to payment, by the infringer, of damages for the prejudice suffered. The right compensation is fixed taking into account the importance of the prejudice suffered by the owner of the right, the importance of the infringer's profits attributable to the infringement as well as the payment of expenses caused by the infringement in undertaking proceedings before administrative authorities and competent court by the owner of the protected right⁹⁸.

For a claimant to recover his costs of a civil case, he must be awarded his costs by the court and the defendant must have the money to meet his obligations under the court order and he must actually pay the money over. In theory the process of determining what sum should be paid to a successful IPR owner after it has won an infringement action is determined by a separate litigation process called an enquiry as to damages, which involves a process similar,

⁹⁷ Trotter Hardy, *Criminal Copyright Infringement*, 11 Wm. & Mary Bill Rts. J. 305 (2002), p. 2.

⁹⁸ Article 260 of the IP Law.

in many respects, to trial on liability, with disclosure, witness statements, expert reports, skeleton arguments and a trial on quantum⁹⁹.

It has been noticed that to determine the quantity of financial losses caused by copyright infringement constitute a hard legal obligations. In the Bushayija case against COGEBANK, the plaintiff was asked to determine the real loss he encountered due to the multiplication by COGEBANK of artistic objects that he had sold to the bank, without necessarily transferring the whole IPR he had on his artistic objects¹⁰⁰. This has also has been the case when Kayirebwa's lawyer was asked to determine the real value of encountered loss¹⁰¹.

It is true that, in addition to IP Law provisions on the determination of damages, the general liability civil code pending revision, compensation is paid against a clear loss¹⁰². Given the nature of copyrights market in Rwanda, songs, movies, books and other varieties of literary rights are not professionally traded, and this on a so low demand that the IPR owner cannot mathematically know how much money he/she made within a given period of time, which also makes the process to compute the encountered loss quasi-impossible. This is the same for any infringer to quantitatively detect how much money she/he made from copyright infringements. For some infringers like the media, as it was the case in the case involving Kayirebwa and ORINFOR, the latter could not know earnings resulting from the use of Kayirebwa's songs¹⁰³.

On the other side however, the Rwandan IP legislation grants a waiver on damages computation in some conditions. Thus, where the infringer did not know or had no reasonable grounds to know that he/she was in infringing activity to protected title provided by the IP law, the competent court may determine damages for the prejudice suffered equivalent to the amount the infringer received in the infringement committed¹⁰⁴.

⁹⁹ Simon Hamlet, *Civil and criminal remedies for intellectual property infringement*, LexisNexis, 2012, p. 3

¹⁰⁰ Bushayija Pascal vs. Rwandair, Case no RCOM A 0014/08/CS of August 06th 2010, Supreme Court.

¹⁰¹ 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.

¹⁰² Article 258 of the Decree of 30 July 1888 instituting the Civil Code Book III, on contracts and contractual obligations.

¹⁰³ See Kayirebwa Cecile v. ORINFOR and others, case no R.Com 0178/12/HCC of 15/02/2013, pp. 1 – 27.

¹⁰⁴ Article 260 of the IP Law.

This practice works well for infringers branded with good faith where they can only be asked to pay amount equivalent to their earnings, without necessarily counting damages, an assignment which seems to be hard to perform up.

It is common that both the criminal and civil actions are lodged in court of justice, though copyrights owners remain exposed to challenges regarding their introduction to court, especially producing required evidences, as well as convincing the court about the quantity of damages suffered from. It is good that in addition to criminal penalties and losses compensation that are usual in court proceedings, the legislator has provided for conservatory, preventive and corrective measures, though also still present challenges in disfavor of IPR owners.

II.3.2 Special codification of the indemnification of a wrongfully enjoined defendant

The civil code stipulates that any wrongful act that causes harm to some else obliges the wrongdoer to indemnify the victim, which constitutes a civil liability, known as tort in common law system, applicable to all cases where the harm was detected¹⁰⁵. This means that there was no need for the legislator to introduce a similar provision in the IP law stipulating that in case the copyrights owner fails to prove the copyright infringement, s/he is obliged to indemnify the accused party.

According to article 266 of the IP Law, “the competent court may order an applicant who requested for measures to be taken for another person and who fraudulently initiated court proceedings, to pay to a defendant wrongfully enjoined or restrained adequate compensation for the injury suffered by virtue of such an abuse. Where it considers it adequate in view of the gravity of the abuse, the competent court shall also order the person who employed fraud in initiating court proceedings to pay the injured party expenses meant for the defendant including appropriate counsel's fees”.

Basing on that article, the Court ruled that Cecile Kayirebwa owed indemnities to City Radio, Flash FM, Contact FM and Voice of Africa radios for having failed to prove that these radios played her songs without her license or consent¹⁰⁶. This decision would have been taken

¹⁰⁵ Article 258 of the CCB III.

¹⁰⁶ See Kayirebwa Cecile v. ORINFOR and others, case no R.Com 0178/12/HCC of 15/02/2013, pp. 1 – 27.

basing on article 258 of the CCB III, even in absence of indemnification provision in the IP law.

The researcher considers this a discouraging provision to the IPRs owner because it is not easy, in the civil law system, to know if the plaintiff will win the case, contrarily to the common law system practice, where at least, precedents practice helps to guess what will be the court decision, where also the plaintiff may decide either to sue or not to sue because he is approximately aware of what will be the court decision¹⁰⁷. Therefore, having codified the indemnification provision disfavors IPR owners which remain a challenge to IPR owners.

II.4 Evidences production as a special challenge in copyright infringement issues

The Law n° 15/2004 of 12/06/2004 relating to evidence and its production applies to copyright infringement. Generally, parties to a court case have obligation to prove the veracity of their allegations and defenses, as general rule¹⁰⁸.

According to the IP Law, as far as pertinent evidences are concerned, “the competent court may, where a party has presented reasonable evidences sufficient to support the claims and has specified evidences relevant to substantiation of the claims which lies in the control of the opposing party, order that these evidences be produced by the opposing party, subject, in appropriate cases, to conditions which ensure the protection of confidential information. In case a party to a proceedings voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, the competent court may make preliminary and final determinations, affirmative or negative, on the basis of the information presented to it, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or pertinent evidences”¹⁰⁹.

¹⁰⁷ Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, accessible at www.upf.pf/IMG/doc/16Pejovic.doc, visited on Feb. 21st 2014.

¹⁰⁸ Article 3 of the Law n° 15/2004 of 12/06/2004 relating to evidence and its production, Official gazette special number of 19 July 2004.

¹⁰⁹ Article 267 of the IP Law.

In some cases, these special evidences seem expensive to produce, which also constitutes another challenge to the IPR protection and enforcement. For example, when Cecile Kayirebwa took RwandAir to court for allegedly using her song as a soundtrack in its planes, her lawyer was requested to refer to a music expert, to assess if the soundtrack used by Rwandair was Kayirebwa's. In fact, the company had earlier attempted to enter into an agreement with the popular traditional singer, to use her *Inzosi* song as a soundtrack to advertise the launch of the Lagos route¹¹⁰.

The draft agreement was about to use the song within the new route advertisement and during the inaugural flight to Nigeria, but RwandAir went on playing the song without her permission. In court, RwandAir denied that the song it played was Ms Kayirebwa's, saying it belonged to a Nigerian singer called Enyanya. This prompted the hiring of the services of music experts by the plaintiff¹¹¹.

In the previous case that opposed Kayirebwa Cecile against ORINFOR and other broadcasting organizations, it was observed that evidences production remains a serious challenge to copyright owners. The Court did not give reason to witnesses who testified having heard some radios playing Kayirebwa's songs, and when the lawyer presented recorded songs where those radios was including their jingle and related narrations, the defending parties said that the plaintiff can mix up his songs with radios jingles to use that combination in suing them, that there was no tangible evidence, which the court gave reason¹¹².

ORINFOR and Isango Star lost their cases because they confessed to have played Kayirebwa's songs but after getting her consent which the court rejected, whereas City Radio, Flash FM, Contact FM and VOA totally reflected allegations to have played Kayirebwa's songs¹¹³. This makes evidences production in copyrights infringements

¹¹⁰ IGIHE, *After Rwandans media, the Rwanda singer Kayirebwa Cecile now sues Rwandair*, accessed from <http://www.rwandan-flyer.com/after-rwandans-medias-the-rwanda-singer-cecile-kayirebwa-now-sues-rwandair>, on Sept. 11th 2014.

¹¹¹ Ibid.

¹¹² 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.

¹¹³ Ibid.

proceeding tougher, unless the suspect is caught red-handed, which could be possible for illegal music sellers via physical materials¹¹⁴.

In case the IPR victim manages to produce evidences, though exposed to evidence related obstacles, s/he also faces challenges to convince the court regarding the exact damages computation.

II.5 Implementation of measures for the protection of copyrights exposed to or under infringement

Both preventive measures for the protection of copyrights exposed to infringement and corrective measures for the protection of copyrights under infringement are subjected to a decision by a competent court, as it is the case for the victim indemnification as well as criminal penalties. Subjecting all these measures to judicial proceedings constitute a thorny implementation of the same measures, as illustrated under the following paragraphs.

II.5.1 Subjecting preventive and conservatory measures to a competent court decision

Preventive and conservatory measures against acts of copyrights infringements consist in ordering the infringer to stop IPR infringing acts and if necessary seizing utilized materials and assets within infringement processes. Where such measures are decided by courts, a court order bans a party from certain actions until their lawfulness are ascertained. These measures are good because even before a court ruling at an ordinary trial, they generate information that can contribute to the possible settlement by a court decision¹¹⁵.

Under the Rwandan context, upon request of the owner of copyrights and related rights or the licensee, the competent court may order measures to prohibit the committing of infringement of works, or unlawful act or in violation of any right protected under the IP law¹¹⁶. The competent court may, on a request of protected right owner, grant damages and any other

¹¹⁴ Musoni Edward, *Music pirates arrested*, <http://www.newtimes.co.rw/news/index.php?i=14183&a=26340>, visited on August 04th 2014.

¹¹⁵ Thomas D. Jeitschkoy and Byung-Cheol Kim, *Signaling, Learning and Screening Prior to Trial: Informational Implications of Preliminary Injunctions*, School of Economics, Georgia Institute of Technology; Atlanta, EAG 11-2, February 2011.

¹¹⁶ Article 256 of the IP Law.

compensation to an alleged infringement in accordance with Rwandan law on civil and commercial procedure¹¹⁷.

For the conservatory and preventive measures to be ordered by a competent court would not only delay the process to stop copyright infringing acts but also facilitate the manipulation of evidences by the defending party. This remains a challenge to IPR owners because as discussed above, IPR evidences are fragile and can therefore be exposed to risks while the court is deciding on conservatory and preventive measures, which is a procedural stage, instead of deciding on the criminal responsibility or the civil liability of the defending party, suspected of having committed the copyright infringement.

The codification of these measures which include seizing the infringement suspects' assets in a special law and upon the court decision constitutes another challenge, because seizure of objects involved in a crime commission, is by principle governed by the Code of the Criminal Procedure (CCP) as a general law, which gives that power to the Judicial Police Officer (JPO), without necessarily referring to a court decision¹¹⁸.

Another challenge is that conservatory and preventive provisional measures are ordered by the court upon a contradictory procedure before the court, which seems to be an ordinary court proceeding, because the suspect defends him/herself in the same way as in ordinary proceedings. It is only exceptionally that the pretrial ruling can be held without the suspect's presence. In fact, where appropriate, in particular where any delay is likely to cause irreparable harm to the right owner or where there is a demonstrable risk of evidence being

¹¹⁷ Article 256 of the IP Law.

¹¹⁸ A Judicial Police Officer may seize objects wherever they are found if the confiscation provided for by law can be enforced on such objects and seize all items which can serve as evidence incriminating or exculpating the suspect. The objects seized shall be shown to the owner for acknowledgement. If the objects seized are perishable, may depreciate or may pose a serious danger to people's health, safety and property risk, a Judicial Police Officer may, on his/her own initiative or upon request by any interested person, immediately take necessary measures and make a written statement thereon, a copy of which is given to the owner (Article 30 of the CCP). A statement of seizure shall indicate details of the objects seized and be signed by the person who had such objects in his/her possession and witnesses, if any. If the person who had such objects in his/her possession is unavailable, unable or refuse to append his/her signature to the statement of seizure, this must be mentioned in the statement, a copy of which is given to the person who had such objects in his/her possession (Article 30 of the CCP).

destroyed, the competent court shall order provisional measures without giving the other party an opportunity of being heard¹¹⁹.

In short, conservatory and preventive measures are connected with challenges to have been more procedural compared to similar measures where JPOs have right to proceed to their implementation, without waiting for a court decision. Another challenge is that related proceedings before the court are contradictory where the suspect is also heard, which therefore can give him/her a room to manipulate evidences that would be needed in the trial phase. The last but not the least is the challenge whereby the IP law provided for compensation to the suspect, in case the infringement is not confirmed by the court. It is a challenge because compensation is generally provided for by the civil code¹²⁰. Its special codification in a special law constitutes a threat that can prevent IPR victims from filing their cases for conservatory and preventive measures against IPR infringement acts.

Preventive and conservatory measures against acts of copyright infringement were also negatively criticized by the European Commission (EC), as far as IPRs are concerned within the European Union (EU). In fact, these measures, like other procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by the Enforcement of Intellectual Property Rights Enforcement Directive (IPRED), had been shown to be insufficient or inadequate to protect intellectual property rights-holders in many cases¹²¹.

That is why it was recommended that those measures should be fair and equitable and shall not be unnecessarily complicated nor costly, nor entail unreasonable time-limits nor unwarranted delays. They must also be effective, proportionate and dissuasive and should be applied in such a manner as to avoid the creation of barriers to legitimate trade and to allow the application of safeguards against their abuse. It was also revealed that the rights-holders in many cases had no opportunity to stop infringements in progress by means of an injunction against an intermediary service that the infringer was using. Fortunately,

¹¹⁹ Article 257 of the IP Law.

¹²⁰ Article 258 of the CCB III.

¹²¹ Brohm Ronald, *Injunctions in intellectual property rights*, EC, Brussels, 2009, p. 6.

consistent with Article 8(3) of Directive 2001/29/EC – which requires that rights-holders be able to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right –, the IPRED made a major advance by allowing rights-holders to request injunctions against intermediaries, without any requirement that the intermediary necessarily be complicit in or culpable for the infringement¹²².

They are not only preventive and conservatory measures that are subjected to court proceedings, practice that does not really advantage the IPR victim, because corrective measures towards copyrights infringement are also subjected to court decisions.

II.5.2 Subjecting corrective measures to a competent court decision

Upon a request by the owner of the protected right, by the licensee or by any interested person, the competent court may order the cessation of an unlawful act and any infringing act to rights protected under the IP law; the seizure, forfeiture or destruction of copies of works or phonograms made or imported or suspected of being made or imported without the authorization of the owner of any right protected under this law; and the seizure, forfeiture or destruction of the packaging of copies of those works or phonograms, instruments or materials that could be used for the making of, and the documents, accounts or business papers referring to such copies (...)¹²³.

As discussed previously, subjecting corrective measures to a court decision, as it is for preventive and conservatory measures, was made more procedural by the legislator whereas for similar measures in other proceedings, these measures can be taken by JPOs to safeguard evidences and accelerate the procedure, to reduce costs involved these proceedings, besides the saved time.

However, as it is the case when the presumed victim of copyrights infringements was seeking for preventive, conservatory and corrective measures fails to prove his/her rights violation, where he/she is obliged to pay compensation in favor of the presumed suspect; it is also the case for a trial cases when the presumed victim loses the case, a situation considered as a procedural challenge against IPRs owners.

¹²² Ibid.

¹²³ Article 259 of the IP Law.

CHAPTER III. LEGAL MECHANISMS FOR THE PROTECTION OF COPYRIGHTS OWNERS AGAINST COPYRIGHTS INFRINGEMENTS

Copyrights owners are protected by the IP Law, though persisting challenges, some of which are in the same IP Law itself as well illustrated in the previous chapter. The present chapter suggests mechanisms that can solve challenges faced to by copyrights owners in regards to their IPR protection. Some of suggested mechanisms are short term oriented, whereas others are long term mechanisms. However, though they have not been treated as challenges, there are issues that need to be addressed before they become real challenges to copyright infringements prosecution and indemnification. This is also catered for by the present chapter.

III.1 Short term mechanisms

In the meantime, when the IP law has not been reviewed yet, the first short term mechanism to challenges faced by copyrights owners would be to enforce the IP law together with its policy, because it is not yet enforced in its totality, whereas it provides some relief. Other short term mechanisms would include referring to precedents and scholars' opinions.

III.1.1 Enforcement of the intellectual property law and policy

As well introduced in the first chapter of the present work, since the creation of the Commercial Courts in May 2008, few IP cases have been brought before them. In the branch regarding musical works for example, few cases that concern more copyrights and therefore literary works owners are almost all Cecile Kayirebwa's, when she was suing the local media and when she was suing Rwandair for having played her songs without any license or because they have breached the license scope¹²⁴. When Kayirebwa brought complaints before

¹²⁴ See Kayirebwa Cecile v. ORINFOR and others, case no R.Com 0178/12/HCC of 15/02/2013.

the commercial courts, so many negative criticisms were brought against her by the public¹²⁵, as if she had no right to sue, a sign of low awareness on IP rights as any other right. This is a good sign that since 2009, the IP law is enforced at a very low rate.

The 2009 IP policy had revealed that the poor enforcement of previous IP laws and conventions was associated with the level of damages payable for infringement and lack of awareness for civil cases, whereas in criminal cases, the lack of testing and detection ability meant that it was difficult to surmount the requirements of proof in court, was another challenge among challenges that the 2009 IP policy was supposed to resolve¹²⁶, which is not the case yet.

Therefore, a lot still needs to be done in regards to the implementation of the IP law. Though it was criticized within the present study, its enforcement constitutes a possible minimum of IPR owners' rights protection, right to exclusively use their IPRs and transfer them when they want. The IP law enforcement will need the unification of efforts of all involved organs, both judicial and executive¹²⁷, besides the IPR owners will to initiate civil and criminal actions, because the IP law still needs their first step for their rights protection. In other words, copyright infringements remain offences and breaches that are actionable upon IPR owners' complaints or requests¹²⁸.

IPR owners need to dare enforce the IP law regardless challenges covered within previous developments. The obligation to produce pertinent evidences¹²⁹, as well as the risk to compensate defendants in case they lose IP related cases¹³⁰, would not refrain them from lodging their cases to commercial courts for their rights to be safeguarded, because where the IP law presents loopholes, IPR owners can make their rights prevail using available precedents and scholars' opinions.

¹²⁵ IGIHE, *After Rwandans media, the Rwanda singer Kayirebwa Cecile now sues Rwandair*, accessed from <http://www.rwandan-flyer.com/after-rwandans-medias-the-rwanda-singer-cecile-kayirebwa-now-sues-rwandair>, on Sept. 11th 2014.

¹²⁶ MINICOM, *Rwanda IP Policy*, Kigali, November 2009, p. 6.

¹²⁷ *Id.*, p. 14; Lauren Vogel, "Intellectual Property Laws Not Yet Effective", in the *Rwanda News Agency*, 07 June 2011, accessed from <http://www.rnanews.com/national/5041-intellectual-property-laws-not-yet-effective>, on September 04th 2014.

¹²⁸ See for EG article 262 of the IP Law.

¹²⁹ Article 267 of the IP Law.

¹³⁰ Article 266 of the IP Law.

III.1.2 Use of precedents and scholars' opinions

Precedents and scholars' opinions are recognized as the Rwandan sources of Law. According to the code of civil, labour and administrative procedure (CCLAP), "judges shall decide cases by basing their decisions on the relevant law or, in the absence of such a law, on the rule they would have enacted, had they to do so, guided by judicial precedents, customs and usages, general principles of law and written legal opinions"¹³¹.

It is true that IP related precedents are still few in Rwanda, but Kayirebwa¹³² and Bushayija¹³³ cases have been good examples where IPR owners are relieved when their products were utilized without their license or when the license was abused or when the licensee went beyond the license limitations set for by IPR licensing contracts.

Given that scholars' opinions remain few in regards to IP law, foreign scholars' opinions can be referred to while enforcing the IP rights, provided that they are not contradicting the domestic IP law. This is the same for Rwandan precedents which are also limited in numbers, which means that Rwandan courts can refer as well to foreign precedents¹³⁴.

III.1.3 Prioritization of a civil action within criminal proceedings

As it has been the case for four court cases heard so far by Rwandan courts in regards to copyright and related rights infringement, as seen in two previous chapters, victims opted for lodging their complaints in civil courts and therefore aimed at civil remedies. Given that the study proved that this necessitates a tough procedure with tough evidence demonstration, there is possibility for the victim to seek for support from the prosecution, through choosing a civil action within criminal proceedings in order not only to ease the indemnification in

¹³¹ Article 6 §1 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure (CCLAP Law), Official Gazette n° 29 of 16/07/2012.

¹³² Kayirebwa Cecile v. ORINFOR and others, case no R.Com 0178/12/HCC of 15/02/2013.

¹³³ Bushayija Pascal vs. COGEBANK, Case n° RCOM A 0014/08/CS of August 06th 2010, Supreme Court.

¹³⁴ Judges shall not in any case refer to foreign courts' decisions or foreign written legal opinions when they are in contradiction with the principles of public order or the Rwandan legal system (Article 6 §4 of the CCLAP Law).

general, but also to intimidate imminent offenders for them to refrain from committing copyright and related rights infringement.

III.1.3.1 Easing evidence production and management

A person aggrieved by an offence may choose not to file a civil action and a criminal action in a same court and hence bring directly the civil action before a civil court to claim for compensation for the damage as a result of the acts committed against him/her¹³⁵. This is what Kayirebwa Cecile did while suing Rwandair and when she sued some members of the Rwandan media, as did Gasake while suing Editions Bakame, the same for Bushaija while lodging a case in court against COGEBANK¹³⁶.

As seen in previous developments, the infringement of copyrights and related rights constitute an offense which is even prosecuted upon the victim's request. In other words, With this facultative procedure, a person aggrieved by an offence may, from the filing of the case in the court to the closing of the proceedings, bring before a competent court an action for recovery of damages by giving notice of the action in the court registry or in the course of the hearing with an acknowledgment of receipt¹³⁷. This means that the victim has right to either choose the civil procedure, as did four victims presented above, or the criminal procedure. However, the combination of both procedures remains possible.

Whereas a criminal action is an action exercised on behalf of the public before criminal courts and aimed at punishing the offender¹³⁸, a civil action is an official complaint, made

¹³⁵ Article 146 of the Law n° 30/2013 of 24/5/2013, aforementioned.

¹³⁶ *Bushayija Pascal vs. COGEBANK*, Case no RCOM A 0014/08/CS of August 06th 2010, Supreme Court; *Kayirebwa Cecile v. ORINFOR*, City Radio, Contact FM, Voice of Africa, Radio Flash and Radio Isango Star, case no R.Com 0178/12/HCC of 15/02/2013, Commercial High Court; *Gasake Augustin vs. Editions Bakame*, R.Com 0455/13/HCC of 17/01/2014, High Commercial Court and *Kayirebwa Cecile vs. RwandAir*, Case no R.Com 0739/12/TC/Nyge of 21/06/2012, Nyarugenge Commercial Court.

¹³⁷ Article 140 of the Law n° 30/2013 of 24/5/2013, aforementioned.

¹³⁸ Article 2 of the Law n° 30/2013 of 24/5/2013, aforementioned.

by a person, physical or moral, in a law court against another person who is said to have done something to harm him/her¹³⁹.

Without necessarily deepening the criminal procedure as a whole, it is well known that it ends in inflicting a criminal penalty against the declared offender by the competent court, whereas a civil action aims at civil remedies¹⁴⁰. However, there is possibility to combine both actions, in order to aim higher as far as interests of the victim of copyright infringements are concerned.

When a civil action is instituted before a criminal court, the court shall hear such action in accordance with laws governing civil procedure¹⁴¹. However, in such a case, Proceedings in civil action shall be suspended until the criminal case is finally adjudicated if the criminal action was instituted before or in the course of civil proceedings¹⁴².

Even in case the prosecution did not file a case to the criminal court so that the victim can make his/her civil interests protected, there is possibility to make the case tried via introducing a civil action by private action. This is a claim a person aggrieved by an offence files in a criminal court demanding that the offender, his/her co-offender or accomplice be punished and ordered to pay for the damages caused¹⁴³.

Among other evidences presented by the victim for the suspect's criminality to be established by the court, there are tools utilized to commit the offense. These tools include computers, DVDs, CDs, audio-cassettes, reproduced books and similar products, as they have been subject to seizure by the judicial police since 2010s, though victims ended up in giving up the prosecution of suspected offenders¹⁴⁴.

¹³⁹ Cambridge Dictionary, Civil action, retrieved at <http://dictionary.cambridge.org/dictionary/british/civil-action>, on 05/06/2015.

¹⁴⁰ Article 9 of the Law n° 30/2013 of 24/5/2013, aforementioned.

¹⁴¹ Article 12 of the Law n° 30/2013 of 24/5/2013, aforementioned.

¹⁴² Article 14 of the Law n° 30/2013 of 24/5/2013, aforementioned.

¹⁴³ Article 142 of the Law n° 30/2013 of 24/5/2013, aforementioned.

¹⁴⁴ Musoni Edward, *Music pirates arrested*, <http://www.newtimes.co.rw/news/index.php?i=14183&a=26340>, visited on April 04th 2014; Uwimanimpaye C. M. Clemence, "Rubavu – 3 DJs arrested over copyright infringements" (translated from Kinyarwanda), accessed at <http://www.kigalitoday.com/spip.php?article10502em>, on April 04th 2014.

Whereas the judicial police in partnership with the prosecution have power to proceed to the seizure of objects and items linked to the offense and can use them as evidence incriminating or exculpating the suspect¹⁴⁵, the victim of copyrights infringements cannot him/herself seize such objects and items while opting for a civil action, which therefore results in lack of evidences or strong evidences.

Therefore, though the prosecution is meant to represent the society in court of justice, the direct victim of copyright and related rights infringements also benefits from the implication of the prosecution in his/her case. Though the criminal action prevails over the civil action¹⁴⁶, once there are evidences, the suspect is likely to lose the case, which in turn favors the victim who claims for civil remedies.

In this framework, the case ends up in inflicting criminal penalties against the offender and providing civil remedies to the victim, which can be interpreted as a hybrid and more productive procedure. This also plays a preventive role, because imminent copyright infringers can refrain from committing the offense, fearing to be subjected to similar penalties.

III.1.3.2 Intimidating imminent infringers and necessity of criminal sanctions

Victims of copyright and related rights infringement would not by principle be interested in sanctions of offenders whether through criminal or civil procedure. But rather, they would be more comfortable if their rights were not breached. Therefore, prevention is better for them than sanctions. In this context, measures aiming at preventing copyright and related rights infringement from happening, would be welcome.

As discussed by criminal law authors, criminal sanctions do not only play a punitive role but also an intimidating role within the society, to avoid imminent offenders to perpetrate more

¹⁴⁵ Article 30 of the Law n° 30/2013 of 24/5/2013, aforementioned.

¹⁴⁶ Article 14 of the Law n° 30/2013 of 24/5/2013, aforementioned.

offenses¹⁴⁷, fearing to be subjected to same sanctions. This shows how much criminal sanctions are still needed in the reaction against copyrights infringement.

In the Rwandan history of court proceedings against copyright and related rights infringement, there has been yet no case brought before the criminal court for the judge to pronounce criminal penalties and thus intimate the rest of the society, whereas the penal code provides for criminal sanctions against copyright and related rights infringement. It is in this context that a civil action brought before a criminal court would play this additional role to intimidate imminent infringers as far as copyright and related rights infringement is concerned.

Apart from suggested short term mechanisms to deal with IPR challenges, that is enforcing the IP law and using IPR precedents and IPR scholars' opinions, there are also long term mechanisms that should be envisaged.

III.2 Long term mechanisms

Long term mechanisms to deal with IPR enforcement challenges as herewith suggested are amendment of the IP law, the creation and strengthening of copyrights owners' professional associations, as whereas the increment of the community awareness on copyrights protection for attitude change.

III.2.1 Amendment of the intellectual property law

Key challenges highlighted by the present study in regards to IPR protection, challenges linked to the status of the IP law into force, are more procedural than substantive. That is why suggested amendments put emphasis on procedural issues that are the prosecution upon the victim's request when the criminal action has been chosen, damages evidencing and

¹⁴⁷ John h. Langbein , *Comparative Criminal Procedure*, American casebook series, St. Paul, Minn. West Publishing CO, 1977, p. 50.

computation, ordering of conservative, preventive and corrective measures (pre-trial measures) and the special codification of the indemnification to the IPR infringement suspect.

III.2.1.1 Amendment of provisions about the prosecution of IPRs suspected infringers

As seen previously, a criminal action against copyrights infringements cannot be taken if it is not endorsed by the victim¹⁴⁸, whereas these infringements can easily be spread all over the country which makes the situation so worse that the victim cannot detect them and therefore introduce claims before JPOs for further actions.

The IP law was promulgated because IP contribution to the development of the country was taken into consideration. Therefore, making copyrights infringements offenses committed against the society, as a whole, would enable JPOs to detect offenses and prosecutors to initiate prosecution for public interest, without waiting for the victim's request.

Therefore, the IP law provisions recognizing the right to authorize investigations and prosecution to the victim or IPR owners would be amended accordingly.

III.2.1.2 Amendment of provisions about damages evidencing and computation

As it is normal for every party to a court case to be obliged to prove the veracity of his/her allegations and defenses using the law on evidences production and administration¹⁴⁹, special provisions in the IP law obliging the IPR owner to provide pertinent evidences would be ignored because it is an emphasis which has no additional value to IPRs, except threatening IPR owners and therefore preventing them from suing suspected IPR infringers.

¹⁴⁸ See for EG article 262 of the Rwandan IP Law.

¹⁴⁹ Article 3 of the Law n° 15/2004 of 12/06/2004 relating to evidence and its production, Official gazette special number of 19 July 2004.

For damages computation before deciding on compensation, the IP law would also be amended allowing courts to award remedies to IPRs owners without necessarily obliging them to count each and every loss because they are not easily computable. It is not easy to determine the loss caused by songs played on radio stations, TVs, DJs in night clubs, songs multiplied and sold on DVDs, CDs, memory cards without the IPRs owner's license and this in the whole country. Damages determination by average would be envisaged, in order to protect more IPRs owners' rights.

III.2.1.3 Amendment of provisions on pre-trial measures

Pre-trial measures that include preventive, conservatory and corrective measures for the protection of copyrights exposed to infringement are subjected to tough procedures, as seen previously, including being decided by a competent court. These provisions would be adapted to general rules regarding pre-trial measures, which rules give even the authority to the JPO to take some measures for evidences protection, as well as the victim's rights protection.

III.2.1.4 Amendment of provisions about indemnification of the suspected IPRs infringer

The civil code stipulates that any wrongful act that causes harm to someone else obliges the wrongdoer to indemnify the victim, which constitutes a civil liability, known as tort in common law system, applicable to all cases where the harm was detected¹⁵⁰. This means that there was no need for the legislator to introduce a similar provision in the IP law stipulating that in case the copyrights owner fails to prove the copyright infringement, s/he is obliged to indemnify the accused party.

Therefore, provisions obliging the losing IPRs owner to compensate the suspected IPRs infringer would be amended, whereby this procedure would remain recognized by the

¹⁵⁰ Article 258 of the CCB III.

general rule as found in the civil code, in order to limit the fear that some IPRs owners would have to file a case in a civil law system where winning a case is not easily foreseeable¹⁵¹.

III.2.2 Creation and strengthening of copyrights owners' professional associations

In Rwanda, one of disorganized industries would be the IPR industry. Whereas other industries have many associations, clubs, organizations whatever name can be used to identify them, which associations are in their turn grouped into federations and professional countrywide associations; the IPR industry remains virgin or simply has ghost associations.

Copyrights owners like musicians, for example, remain separated on this issue because among few and poorly operating associations, they do not know which to join or they do not find their portrait in those weak associations because of music varieties and styles. For instance, the Rwanda Federation of Music would deserve to be called a federation if it had some other independent associations (with legal personality) under its authority, which is not the case, according to its chairperson, Karemera Pierre. The Federation for Music Associations known as RILAM has the same problem, whereas Ingoma Music Association headed by Runyurana Jean Pierre at least has a certain name in the country¹⁵², as an association that managed to remember its peers perished during the genocide¹⁵³. Ingoma music association also a member of the the Rwanda Society of Authors (RSAU), which was legally established and officially registered with the Rwanda Development Board in May 2010, together with the Association of Cinema Artists (IRIZA CARD), the Association of Writers (LA PLUME D'OR) and ISOKO Arts Rwanda¹⁵⁴.

¹⁵¹ Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, accessible at www.upf.pf/IMG/doc/16Pejovic.doc, visited on Feb. 21st 2014.

¹⁵² Timothy Munuku Mwangi, "Baseline Research on Cultural and Local Content Production in the Media Sector", *Report*, Media High Council, 2013, Kigali, p. 27.

¹⁵³ Uwizeyimana Chantal, "Commemorating musicians killed during the genocide against the tutsi", *Izuba Rirashe*, 08/04/2014, available at <http://www.izuba-rirashe.com/m-5672-abahanzi-bishwe-muri-jenoside-bazibukwa.html>, accessed on September 10th 2014.

¹⁵⁴ WIPO, "Rwanda Transforms its IP Landscape", In the *WIPO Magazine*, August 2010, accessed at, on September 10th 2014.

If copyrights owners could protect their interests through associations, if they could unify their efforts to monitor their products all over the country, they would know where copyrights infringements are being committed or where their IPRs are violated and therefore initiate various actions. But this will continue to be impossible if existing associations are not strengthened, new ones created and most importantly united in a strong, visionary and professional federation.

However, the creation and strengthening of copyrights owners' associations would go parallel with raising the awareness of the Rwandan community on the IP law in general and copyrights in particular.

III.2.3 Making the community aware of copyrights protection for attitude change

Throughout the history of Rwanda, the society was used to sing, dance and narrate traditional songs whose authors were even ignored. It is in 1980s when the new legislation on IPRs was promulgated¹⁵⁵ and revisited in 2009¹⁵⁶, in addition to various IPR conventions to which Rwanda is a party or signatory.

Therefore, the Rwandan community in general still believes that it is their right to listen to any music, in a commercial manner, without a license from the author. They are also supported by some artists who think that freely dispatching their products in the community will make them famous and open other windows through which they can get money¹⁵⁷.

This calls upon the Ministry having trade in its attributions, RDB, the Ministry having culture in its attribution and effective copyrights owners' associations, as well as WIPO in the region, to conjugate their efforts and organize awareness campaigns or proceed with any possible means to raise the community's awareness on the protection of IPRs.

¹⁵⁵ Law n° 27/1983 of November 15, 1983 governing the Copyrights.

¹⁵⁶ See the 2009 IP law.

¹⁵⁷ RUTAGANDA, "Is it necessary for musicians to bribe journalists for his/her songs to be popular?", *Umuseke*, available at <http://www.umuseke.rw/ese-ni-ngombwa-ko-umuhanzi-yishyura-umunyamakuru-ngo-indirimbo-ze-zimenyekane.html>, accessed on September 14th 2014 (translated from French).

III.3 Solutions to imminent challenges

Tough the study did not find mismatching of provisions in the penal code and in the IP Law as challenge, this remains an imminent challenge that needs to be addressed before it occurs. There is first a need to harmonize both laws in regards to copyright and related rights infringement in general, and recognizing the superiority of the penal code in particular.

III.3.1 Harmonization of IP Law and Penal Code definitions: infringement and piracy

According to article 200 of the IP Law, the copyright and related rights owner has exclusive rights of reproduction, communication, performance in public, distribution of his/her works. When this is done without her/his license, the IP Law qualifies it as copyright and related rights infringement. The terminology “infringement”, in this context, appears in lots of provisions of the IP Law that include articles 117, 151, 176 and others.

On the other side, the Penal Code does not use the terminology “infringement” but rather uses “piracy” for the same unlicensed acts¹⁵⁸. According to the article 376 of the Rwandan Penal Code into force, “any person who willfully or by gross negligence infringes copyrights or related rights protected by the law, for profit-making purposes and without owner’s right consent, who knowingly sells, offers on sale, is making rent, detains or introduces on the territory of the Republic of Rwanda, the alleged infringing goods for commercial purposes, subsequently uses another person’s trade name, be it in the form of a trade name, mark or collective mark, in the same way as any use of a similar trade name or a similar mark likely to mislead the public shall be deemed to have committed the offence of piracy”.

The terminology “piracy” also appears in the same Penal Code, article 377 which stipulates that “Any person who commits an offence of piracy shall be liable to a term of

¹⁵⁸ See for example article 376 and 377 of the Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, aforementioned.

imprisonment of two (2) years to five (5) years and a fine of two million (2,000,000) to ten million (10,000,000) Rwandan francs”.

The situation is complicated more by the IP Law that also qualifies copyright infringements as “forgery”. The latter appears for example in articles 261¹⁵⁹, 263¹⁶⁰ and 264¹⁶¹ of the IP Law. This means that there are three (3) terminologies that are interchangeably used: infringement, forgery and piracy.

Within cases that have been so far judged by Rwandan courts, the issue of terminology is not raised but constitutes a challenge to the legislative drafting and which can be utilized as an obstacle in court, in case the suspect is for example accused of infringement or forgery and defends him/herself arguing that copyrights forgery or infringement does not exist in the penal code, but rather piracy.

The research would recommend to keep “infringement” is a legal and technical term embodying piracy and forgery in the context of breach against copyright and related rights. This is not only due to the terminology that appears in the topic of the present thesis, but also to its general character, because consulted scholars’ writings as presented throughout the present thesis, they like utilizing more “infringement” than piracy and forgery.

¹⁵⁹ “Any infringement of copyrights or related rights protected under this law, committed wilfully or by gross negligence, by any third person for profit-making purposes and without owner’s right consent shall constitute an act of forgery. Any third person, who knowingly sells, offers on sale, is making rent, detains or introduces on the territory of the Republic of Rwanda, the alleged infringing goods for commercial purposes, shall be considered as committing the same offence”.

¹⁶⁰ For an IPR owner who manages to successfully initiate a criminal action, the infringer can pay a fine of fifty thousand Rwandan Francs (50.000) to five hundred million Rwandan Francs (500.000.000) or a maximum term of imprisonment of five (5) years, or one of the two penalties, for IPR forgery.

¹⁶¹ any person, who knowingly performs an act constituting an act of forgery of copyrights and related rights shall commit an offence and shall be liable for the following penalties:

1. to a phonogram producer and to a publisher: a term of imprisonment of five (5) to ten (10) years and a fine of five million Rwandan francs (5,000,000RWF) to ten million Rwandan francs (10,000,000 RWF) or one of the two penalties;
2. to a distributor and a bookseller: a term of imprisonment of one year to five (5) years and a fine of five hundred thousand Rwandan francs (500,000 RWF) to one million Rwandan francs (1,000,000 RWF) or one of the two penalties;
3. to a retailer: a fine of twenty thousand Rwandan francs (20,000 RWF) to one hundred thousand Rwandan francs (100,000 RWF).

Therefore, for preventive interests, terminologies defining breaches against copyright and related rights, that is mainly infringement and piracy, and accessorially forgery, would be harmonized through amending concerned laws for the same purpose. The harmonization would also be extended to criminal sanctions that appear in both the IP Law and the Penal Code.

III.3.2 Reserving criminal sanctions to the Penal Code instead of the IP Law

The challenge to have criminal sanctions against copyright infringement in both the IP Law and the Penal Code has not yet been raised before the court. However, this is likely to happen because some parties and their advocates would benefit from this situation and create case delaying obstacles.

This can be qualified as delaying obstacles because by origin they would not be a problem because the Penal Code is superior to the IP Law for two (2) main reasons. One, the IP Law would not have provided for criminal sanctions because this is anti-constitutional. In fact, according to article 20 §3 of the Rwandan Constitution, “offences and related penalties shall be determined by an Organic Law”. This constitutes good evidence that criminal sanctions provided for by the IP Law are assumed inexistent.

On the other hand, the Penal Code into force, having been instituted by an Organic Law¹⁶², it remains superior to the IP Law which is an ordinary Law. This also means that that sanctions that appear in the Penal Code are the ones to be considered. However, this can be subject to court delaying obstacles and therefore breach against justice interests, not to delay the justice, for it not to be denied.

Note that penalties provided for by the Penal Code are less serious than those ones that were thought of in the IP Law. For example, the IP Law was punishing to a phonogram producer and to a publisher: a term of imprisonment of five (5) to ten (10) years and a fine of five

¹⁶² According to article 93 of the Rwandan Constitution, aforementioned, Organic Laws are superior to Ordinary Laws in terms of Law hierarchy.

million Rwandan francs (5,000,000RWF) to ten million Rwandan francs (10,000,000 RWF) or one of the two penalties¹⁶³. For the Penal Code, penalties for fraudulent producer of phonograms and its publisher range between 3 and 5 years, imprisonment and a fine of ranging between 2 and 10 million francs¹⁶⁴.

No problem for the seriousness of these penalties. The problem is that they are contradicting in their different legal instruments, which can be subject to delaying obstacles in court, which is considered as an imminent challenge against copyright and related rights, together with mismatching definitions of copyright and related rights breaches, which necessitate to be corrected through amending concerned laws.

¹⁶³ Article 261 of the Rwandan IP Law.

¹⁶⁴ Article 381 of the Rwandan Penal Code.

GENERAL CONCLUSION

The present study was entitled “Addressing Challenges of Copyright and Related Rights Infringements Prosecution and Indemnification under Rwandan Law”. It had as objectives to explore negative impacts for copyright infringements prosecution to be initiated upon the victim request; to describe the victim indemnification obstacles as well as to highlight other challenges regarding copyright infringements remedies and to find out sustainable solutions to challenges that are facing victims of copyright infringements in both prosecution and indemnification.

The study found that there are persisting challenges that hamper the protection of copyrights owners under the Rwanda IP law. Some of these challenges are associated with both substantive and procedural provisions of the IP law, whereas others are associated with the enforcement status of the IP law itself which include the poor understanding of IP rights by the community as well as copyrights owners themselves.

For problems resulting from the status of IP law itself, the researcher found that there are some provisions that disfavor copyrights owners, whereas the IP law would envisage first their protection. These provisions threaten copyrights owners given that there is no clear use to introduce them in the IP law as a special law, whereas they are already provided for by other and general legal instruments. Provisions at issue are articles 255 – 260 and 266 (IP Law) that oblige the copyrights owners who lose the case to indemnify the defending party, a philosophy that is generally governed by the tort law which has article 258 CCB III as its legal regime. The same provisions also include article 267 of the IP law which obliges the plaintiff copyright owner to produce pertinent evidences, whereas this is already provided for by a general law on evidences production and administration¹⁶⁵. Subjecting pre-trial measures appreciation (injunctions, seizure of infringement tools, etc.) to a court decision is also a legal challenge that could delay the recognition of copyrights owners’ rights.

¹⁶⁵ Law n° 15/2004 of 12/06/2004 relating to evidence and its production, Official gazette special number of 19 July 2004.

Moreover, the study found that the nature of suffered from injuries do not allow the plaintiff to know and defend before the judge the exact amount of damages occasioned by the copyright infringement, whereas the IP law emphasizes that the right compensation is fixed taking into account the importance of the prejudice suffered by the copyright owner¹⁶⁶, whereas it is difficult for the copyright owner to prove that exact prejudice.

As far as the criminal action is concerned, the study found that copyrights infringements are actionable upon the victim's request or complaint lodged before the judicial police. Which means that even when the copyrights owner is not aware of infringements that are being committed all over the country, whereas other members of the community even governmental officials are at such crime scene, no criminal prosecution is possible, unless the victim is first aware of infringements at issue, have corrected pertinent evidences to avoid indemnifying the defendant in case s/he loses the case, and thereafter initiate the prosecution him/herself. The study found that this procedure is tiring, financially costly and quasi-impossible in terms of copyrights control and management vis-à-vis technological developments and the hugeness of the territory where infringements are committed.

The last but not least key finding is that the community and copyrights owners themselves ignore the legal protection of IP rights, which make the enforcement of the IP law difficult. IPR owners are not also grouped in associations that could help them to conjugate their efforts in protecting their rights.

The study findings led the researcher to formulate recommendations to the judiciary, to some governmental institutions, to the legislative power and to copyrights owners.

Precedents and scholars' opinions are recognized as the Rwandan sources of Law and the present study highlighted some domestic case laws where copyrights owners won cases. Therefore, in addition to the interpretation of the IP law, the Rwandan judiciary is recommended to take into consideration available domestic precedents and even scholars' opinions while dealing with IPRs cases.

¹⁶⁶ Article 260 of the IP law.

The right to initiate and amend legislation shall be concurrently vested in each Deputy and the Executive acting through the Cabinet¹⁶⁷. The present study showed that the IP Law needs to be amended for a better protection of copyrights owners. MINICOM and RDB who have IPRs protection and management in their mandates, as well the Rwanda Law Reform Commission who is in charge of legislative drafting, as governmental institutions belonging to the executive, are recommended to initiate the amendment of provisions of the IP law that hamper the effective protection of copyrights owners, especially provisions regarding infringements prosecution upon the victim's request, indemnification of the suspected infringer who wins the case, the pertinence of evidences, the computation of damages which would refer to an averaged sum instead of exact suffered prejudice and submission of pre-trial measures to a court decision.

MINICOM and RDB are also recommended to raise the awareness of both the Rwandan community and copyrights owners on IPRs protection in general, and the copyrights protection in particular, in the framework of the 2009 IP law and the 2009 IP policy enforcement.

As per article 90 of the Constitution, the parliament is also invested in the right to initiate and amend legislation. Therefore, the parliament is also recommended to initiate amendment of the IP law provisions as highlighted in the previous recommendations to some governmental institutions. Once amendments at issue are initiated by the Executive, the parliament is recommended to consider concerned amendments.

The study revealed that copyrights owners play a role in the slow and poor enforcement of the IP law because some ignore their rights and others are not well grouped into associations that can help them to effectively contribute to their rights protection. Therefore, copyrights owners are recommended to actively make their rights prevail as embodied in the 2009 IP law. They are also recommended to create strong associations and federations aiming at protecting their rights and easing both civil and criminal actions when their copyrights are infringed.

¹⁶⁷ Article 90 of the Constitution of the Republic of Rwanda of 04/06/2003 as revised to date, Official Gazette special no of 04/06/2003.

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