REGULATING FOR THE EQUITABLE REMUNERATION FOR MUSIC ARTISTS IN KENYA

by

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DECLARATION

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For mama and baba Ghati.

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ABSTRACT

Music artists are usually incentivized to create when they receive royalties or revenue from the commercialization of their music. Although copyright and related rights initially vest with music artists to enable them to extract the full value of their exclusive rights, many lack the resources to achieve commercial success independently. They often assign or license rights to intermediaries, leading to less favourable remuneration compared to the substantial earnings of powerful intermediaries. These contractual relationships are often shaped by unequal bargaining power, favouring intermediaries who control transactions and set remuneration terms. Some scholars argue that disparities are inherent in the music business model and unrelated to fairness/equity. Others contend that the position of music artists has improved, particularly for high profile artists with corporate-affiliations and access to professional services. However, many music artists still lack the market power of larger intermediaries and struggle to secure favourable remuneration.

This thesis explores the unequal dynamics between music artists and intermediaries, advocating for state intervention to promote equitable revenue distribution. It proposes a benchmark test grounded in the Rawlsian theory of justice and legislative interventions that prioritize protecting music artists as the least advantaged stakeholders. The thesis advances Rawls' application to copyright by focusing on the exercise of music artists' exclusive rights in contractual relationships with intermediaries. It outlines four principles: justice in the initial and subsequent acquisition of rights, transitional justice for reforms and reparative justice. Highlighting shortcomings in Kenya's copyright system, it recommends reforms informed by insights from Germany and South Africa.

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ABBREVIATIONS

ACA	Anti-counterfeit Authority
ADR	Alternative Dispute Resolution
AFM	American Federation of Musicians
AGM	Annual General Meeting
AGT	Applied Graphics Technology
AIDS	Acquired Immune Deficiency Syndrome
AoA	Articles of Association
ASMP	American Society of Media Photographers
BGH	Bundesgerichtshof (Federal Court of Justice in Germany)
BIEM	International Bureau of Societies Administering the Rights of Mechanical Recordings Reproduction
BVR	Bundeverband Regie (German Director's Guild)
CA	Communication Authority of Kenya
CAB	Copyright Amendment Bill
CAP	Chapter
CAPASSO	Composers, Authors, and Publishers Association
CBC	Competency Based Curriculum
CCC	Copyright Clearance Center
CDs	Compact Discs
CDSM	Copyright and related rights in the Digital Single Market
CIAM	International Council of Music Creators
CIPC	Companies and Intellectual Property Commission
CISAC	International Confederation of Societies of Authors and Composers
CJEU	Court of Justice of the European Union
CMOs	Collective Management Organizations

CRC	South African Copyright Review Commission
CS	Cabinet Secretary
CS Regulations	South Africa's Collecting Societies Regulations, 2006
CSPs	Content Service Providers
DJ	Disk Jockey
DMEs	Dependent Management Entities
DPMA	Das Deutsche Patent- und Markenamt (German Patent and Trade Mark Office)
DRM	Digital Rights Management
DSM	Digital Single Market
ECS	European Copyright Society
EPRS	European Parliamentary Research Service
EU	European Union
FTM	Fair Trade Music
FTMI	Free Trade Music International
GDT	Genossenschaft Deutscher Tonsetzer (Association of German Composers)
GEMA	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (German society for musical performing and mechanical reproduction rights)
GKG	Gerichtskostengesetz (Court Fees Act)
GVL	Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (German collecting society for neighboring richts of performers and producers)
GWB	Gesetz gegen Wettbewerbsbeschränkungen (German Act Against Restraints of Competition)
HIV	Human Immunodeficiency Virus
ICT	Information and Communication Technology
ID	Identification
IFRRO	International Federation of Reprographic Reproduction

	Organizations
IMEs	Independent Management Entities
IMR	International Music Registry
InfoSoc	Information Society
IP	Intellectual Property
ISPs	Internet Service Providers
KECOBO	Kenya Copyright Board
KES	Kenyan Shillings
KICA	Kenya Information and Communications Act, 1988
KIPI	Kenyan Industrial Property Institute
MCNA	Music Creators North America
M-commerce	Mobile commerce
MCSK	Music Copyright Society of Kenya
MITT	Music Industry Task Team
MoU	Memorandum of Understanding
MPAKE	Music Publishers Association of Kenya
MPRSK	Musicians Performing Rights Society of Kenya
MTTs	Mobile Telecommunications and Technology companies
NCOP	National Council of Provinces
NDAs	Non-Disclosure Agreements
NGO	Non-governmental Organization
NORM	National Organisation of Reproduction Rights in Music
PMG	Parliamentary Monitoring Group
PPMC	Permanent Presidential Music Commission
PRiSK	Performers Rights Society of Kenya
PRS	Performing Rights Society
PRSPs	Premium Rate Service Providers

PS	Principal Secretary
SA	South Africa
SABC	South Africa Broadcasting Corporation
SAC	Songwriters Association of Canada
SAG-AFTRA	Screen Actors Guild - American Federation of Television and Radio Artists
SAMRO	Southern African Music Rights Organisation
SARRAL	South African Recording Rights Association Limited
SDGs	Sustainable Development Goals
STAGMA	Statlich genehmigte Gesellschaft zur Verwertung musikalischer Urheberrechte (State-authorised society for management of musical authors)
TRIPS	World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights
UCT	University of Cape Town
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UrhG	Urheberrechtsgesetz (Act on Copyright and Related Rights)
UrhWahrnG	Urheberrechtswahrnehmungsgesetz (Act on the Management of Copyright and Related Rights by Collecting Societies)
UrhWG	Urheberrechtswahrnehmungsgesetz (Copyright Administration Act)
UrhWissG	Urheberrechts-Wissensgesellschafts-Gesetz (Act to Align Copyright Law with the Current Demands of the Knowledge-based Society)
USA	Unites States of America
VGG	Verwertungsgesellschaftengesetz (Collecting Societies Act)
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization

WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

CHAPTER ONE: INTRODUCTION TO THE REGULATION OF EQUITABLE REMUNERATION FOR MUSIC ARTISTS IN KENYA

1.1. Focus statement: The role of copyright in ensuring equitable remuneration for music artists in Kenya

This section explores the multifaceted role of copyright as a tool for revenue generation and a source of ongoing tension between music artists and intermediaries in the music industry.[1] The anticipation of revenue amongst copyright and related rights owners endures, whether it is achieved directly through assignment and licensing or indirectly through brand sponsorship, merchandising and music tours.[2] Even with licensing models like Creative Commons, which permit free use of copyright under specific terms, copyright infringement can still result in damages if the work is used outside the terms of the license. Moreover, content that is not originally produced for profit can generate revenue when distributed in a commercial setting.[3] This thesis probes the role of copyright as a revenue generation mechanism for two groups of copyright and related rights owners in the Kenyan music industry: those protected for their creative and artistic contributions (music artists); and those who benefit based on their investment and role in the commercialization of music created by the first group (intermediaries).

The distribution of the 'proverbial music revenue pie' in Kenya's music industry has long been associated with the exploitation of music artists by intermediaries such as record labels, music publishers, Mobile Telecommunications and Technology companies (MTTs), digital

[1] JJ Baloyi 'Demystifying the role of copyright as a tool for economic development in Africa: Tackling the harsh effects of the transferability principle in copyright law' (2014) 17(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 87 at 88-165; N Booth and JA Matic 'Mapping and leveraging influencers in social media to shape corporate brand perceptions' [2011] 16(3) *Corporate Communications: An International Journal* 184–191; DM Nyariki et al. 'The economic contribution of copyright-based industries in Kenya' (2009); World Intellectual Property Organization (WIPO) *Guide on surveying the economic contribution of the copyright-based industries* (2015)

[2] Booth and Matic op cit note 1 at 184-191; PK Yu 'Digital copyright and confuzzling rhetoric' (2010) 13 *Vanderblit Journal of Entertainment & Technology Law* 881 at 906; L Perice 'Music entrepreneurs in the Twenty-First Century: A case study on the career of Jay-Z' (2012) 12(1) *Music and Entertainment Industry Educators Association Journal Annual* 221 at 221.

[3] N Elkin-Koren 'User-Generated Platforms' in RC Dreyfuss, DL Zimmerman and H First, eds., *Working within the boundaries of intellectual property* 111-136.

platforms, music aggregators and Collective Management Organizations (CMOs).[4] There is a widely acknowledged perception that the music industry predominantly enriches intermediaries and large corporates, rather than the music artists who create the raw material (music).[5] This challenge becomes increasingly apparent with the introduction of new revenue streams through digitization. However, music artists do not sufficiently benefit from these revenue streams, contributing to the so-called "value gap".[6]

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[4] See, for example, notable jurisprudence on music revenue distribution and exploitation of music artists in Kenya: *Phillip Njoroge Kimani v Liberty Africa Technologies and Safaricom Limited* Constitutional Petition 147 of 2019 [2021] eKLR; *Laban Juma Toto & another v Kenya Copyright Board & 13 others [2017] eKLR*; *Kisumu Bar Owners Association & another v Music Copyright Society of Kenya & 2 others [2017] eKLR* [2017] eKLR; *Mercy Munee Kingoo & another v Safaricom Limited another* Petition 5 of 2016 [2016] eKLR; *Xpedia Management Limited & 4 others v Attorney General & 5 others* Petition 317 of 2015 [2016] eKLR; *Republic v Kenya Copyright Board ex parte Music Copyright Society of Kenya,* High Court Miscellaneous Judicial Review Application Number 133 of 2011 (unreported); *John Boniface Maina v Safaricom Limited* Civil Suit 808 of 2010 [2013] eKLR; *Music Copyright Society of Kenya Ltd v Safaricom Limited and another* Civil Case 509 of 2009 [2010] eKLR; *Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd* Civil Case 154 of 2009 [2009] eKLR; *Alternative Media Limited v Safaricom Limited* Civil Case No 263 of 2004 [2005] eKLR.

See also AK Kirui 'Ethical dilemmas and copyright challenges among independent artists in Kenya's music industry' (2024) 3(1) *Journal of Humanities and Social Sciences (JHSS)* 13-22; C De Beukelaer and AJ Eisenberg 'Mobilising African music: how mobile telecommunications and technology firms are transforming African music sectors' (2020) 32(2) *Journal of African Cultural Studies* 195 at 195-211; R Kagwi 'An Investigation on the Copyright structure in relation to the Kenyan Music Industry' (unpublished Thesis, University of Nairobi, Nairobi, 2014) 65; R Matheka 'Toa Kitu Kidogo Culture: Searching for contract model that is practical in Kenyan live music performance' (Bachelor Thesis, JAMK University of Applied Sciences, 2010); L Ilado 'Who gains from Kenya's dysfunctional music royalty space?' *Music in Africa* 11 October 2021 available at *https://www.musicinafrica.net/magazine/who-gains-kenyas-dysfunctional-music-royalty-space,* accessed on 12 December 2023; B Nyaga 'Kenyan Copyright Amendment Bill brings new hope' (2018) *Music in Africa* 22 January 2018 available at *https://www.musicinafrica.net/magazine/kenyan-copyright-amendment-bill-brings-new-hope,* accessed on 11 January 2024; V Achuka 'How top Kenyan singers signed away their millions in contract scam' *The Standard* 19 February 2017 available at *https://www.standardmedia.co.ke/m/article/2001229878/how-top-kenyan-singers-signed-away-their-millions-in-contract-scam,* accessed on 12 December 2023; A Klein '#ElaniSpeaks: Why Is This Popular Kenyan Band Calling Out Music Industry Corruption?' (2016) *Okayafrica* 13 January 2026 available at *https://www.okayafrica.com/elani-speaks-kenyan-band-calls-out-mcsk/,* accessed on 6 April 2023.

[5] The corporate copyright trope suggests that copyright is primarily enriching intermediaries and large corporates and not music artists or users, see definition of 'corporate copyright trope' in J Hughes and RP Merges 'Copyright and Distributive Justice' (2016) 92 *Notre Dame Law Review* 513-578 at 515. See further discussions in G Davis 'When Copyright Is Not Enough: Deconstructing Why, as the Modern Music Industry Takes, Musicians Continue to Make' (2016) 16(2) *Chicago-Kent Journal of Intellectual Property* 373 at 391-395; D Hesmondhalgh 'Is music streaming bad for musicians? Problems of evidence and argument' (2021) 23(12) *New Media & Society* 3593 at 3593-3615; R Xalabarder 'The Principle of Appropriate and Proportionate Remuneration of ART. 18 Digital Single Market Directive: Some Thoughts for Its National Implementation' (2020) 4 *InDret* 1 at 1-51; KM Gutsche 'Equitable Remuneration for Authors in Germany-How the Germany Copyright Act Secures Their Rewards' (2002) 50 *Journal of the Copyright Society of the USA* 257 at 258- 260.

[6] The term "value gap" was initially coined in the International Federation of the Phonographic Industry (IFPI) *Digital Music Report* (2015) at 22-23 available at *www.ifpi.org/downloads/Digital-Music-Report-2015.pdf,* accessed on 20 April 2023. It was introduced to highlight the disparity between the value extracted by music streaming platforms from music and the revenue generated for copyright and related rights holders. Further discussions on the value gap can be found in subsequent IFPI reports, including the IFPI *Global Music Report*

The impact of the COVID-19 pandemic on the consumption of music through streaming and the resulting revenue amplified the spotlight on the "value gap", underscoring the disparity between the value extracted by intermediaries from music and the revenue generated for music artists.[7] The International Federation of Phonographic Industries (IFPI) Global Music Report (2022) indicates that the commercialization of recorded music in 2021 generated revenue of about 25.9 billion.[8] Streaming accounted for 65% of this revenue since the COVID-19 pandemic induced restrictions on live performances and aided the continued decline of physical sales.[9] Music artists heavily relied on the streaming revenue since other revenue streams had been significantly affected by the pandemic.[10] Contrary to the common expectation that music artists would have been the biggest beneficiaries of the streaming revenue and be able to earn

(2023) available at *https://www.ifpi.org/wp-content/uploads/2020/03/Global_Music_Report_2023_State_of_the_Industry.pdf*, accessed on 20 April 2023 ; the IFPI *Global Music Report* (2022) *https://www.musikindustrie.de/fileadmin/bvmi/upload/06_Publikationen/GMR/IFPI_Global_Music_Report_2022-State_of_the_Industry.pdf*, accessed on 20 April 2023 and the IFPI *Global Music Report* (2021) *https://gmr2021.ifpi.org/assets/GMR2021_State%20of%20the%20Industry.pdf*, accessed on 20 April 2023.

See further discussion of the value gap in Xalabarder op cit note 5; Republic of Kenya, Ministry of Sports, Culture and the Arts *National Music Policy* (2015) iv and 2; Pricewaterhouse Coopers (PwC) *Entertainment and Media Outlook 2017:2021* 136-137; G Jansen 'Copyright owners, performers and streaming: a South African perspective on addressing the value gap' (2022) 2022(3) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 477 at 477-495; European Copyright Society (ECS) 'Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market' (2020) 11 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 133 para 1.

[7] J Sim, D Cho, Y Hwang and R Telang 'Frontiers: virus shook the streaming star: estimating the COVID-19 impact on music consumption' (2022) 41(1) *Marketing Science* 19 at 19-32; O Khlystova, Y Kalyuzhnova and M Belitski 'The impact of the COVID-19 pandemic on the creative industries: A literature review and future research agenda' (2022) 39 *Journal of Business Research* 1192 at 1192-1210 and IFPI (2022) op cit note 6.

[8] The global recorded music market grew by +18.5%, in 2021, an increase from the previous year's growth rate of +7.2%. There was a modest revenue growth of +9.6% in Sub-Saharan Africa in the same year, see IFPI (2022) op cit note 8.

[9] IFPI (2022) op cit note 6; Pricewaterhouse Coopers (PwC) *Africa Entertainment & Media Outlook 2022-2026* 10 available at *https://www.pwc.co.za/en/assets/pdf/entertainment-and-media-outlook-2022-26.pdf*, accessed on 5 January 2023; Sim, Cho and Telang op cit note 7 at 19-32; Jansen op cit note 6.

[10] IFPI (2022) op cit note 6 and PwC op cit note 9.

a living off it, this was not the case.[11] Governments in countries like Kenya and South Africa had to step up and provide stimulus packages to support music artists.[12]

In this thesis, the term 'music' encompasses the four distinct copyrightable works in a song—(literary works (lyrics), musical works (musical compositions), published editions of literary and musical works and sound recordings). It also includes the related rights of performers to control the fixation of their performances, as protected in sections 22, 23, 26(1), 28 and 30 of the Copyright Act, 2001.

The term 'music artists' refers to the authors of these copyrightable works—composers, lyricists, some producers/record labels and some publishers of the editions of the literary and musical works—and performers. Definitions for 'author' and 'performer' can be found in section 2(1) of the Copyright Act, 2001, with further detail provided in sections 1.1.1. and 1.1.2. of this thesis. Although the concepts of authors and performers are distinct, the thesis bundles them together under the description of music artists, as they are protected within the same Act in Kenya.[13] This approach underscores the shared foundation of their rights: their creative and artistic contributions.

It is crucial to note that the primary aim of this thesis is not to delve deeply into the nuanced distinctions between authors and performers – or between the different subcategories of performers. Instead, it focuses on providing a comprehensive analysis of the rights and protections available to all music artists under the Copyright Act. While this approach may be somewhat broad, further research into these distinctions could be valuable for future studies.

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[11] See for example Jansen op cit note 6; House of Commons Digital, Culture, Media and Sport Committee 'Impact of COVID-19 on DCMS sectors First Report' (2020) Third Report of Session 2019–21, 22-23, 25-26 available at *https://committees.parliament.uk/publications/2022/documents/19516/default*, accessed on 24 January 2024; Hesmondhalgh op cit note 5 at 3593-3615; D Sanchez 'What Spotify paid one artist in 2018' 19 December 2018 *Digital Music News* https://www.digitalmusicnews.com/2018/12/19/zoe-keating-spotify-2018-payout/, accessed 20 January 2024; L Marshall ''Let's keep music special. F—Spotify': on-demand streaming and the controversy over artist royalties.' (2015) 8(2) *Creative Industries Journal* 177 at 177-189.

[12] See, for example, the Work for Pay Fund in Kenya, Ministry of Sports, Culture and Heritage '100M for Artist, Musicians & Actors Stimulus Package' available at *https://sportsheritage.go.ke/stimulus-package/*, accessed on 20 June 2022 and the Presidential Employment Stimulus Programme (PESP) for the creative industries in South Africa, South African Government 'Open call for artists, sport and recreation professions to apply for a share of the Presidential Employment Stimulus Programme (PESP) in an effort to retain and create jobs in the Sport, Arts and Culture Sectors' [Media Statement] 30 October 2020 available at *https://www.gov.za/speeches/open-call-artists-30-oct-2020-0000*, accessed on 20 November 2022.

[13] In some countries like South Africa authors and performers are protected by two different Acts: the Copyright Act, 1978 and the Performers Protection Act, 1967.

That said, the thesis reveals important insights into the dynamics of rights acquisition and exercise, particularly in the Kenyan context, where performers are often more frequently employed by producers/record labels than authors. These performers may receive lump-sum payments rather than proportional remuneration. Thus, while the thesis acknowledges the significance of distinguishing among various categories of performers—such as featured artists, session musicians, and orchestral musicians—this differentiation will be addressed primarily insofar as it contributes to the broader discussion of music artists' rights and protections within the scope of this research.

'Intermediaries' refers to individuals and entities that facilitate commercialization by concluding assignments or licenses with music artists and are involved in the copyright management and licensing across various sectors, such as broadcast, retail and entertainment.[14] Examples include Mobile Telecommunications and Technology companies (MTTs), digital platforms, music aggregators, Collective Management Organizations (CMOs) and certain producers/ record labels and music publishers.

It is important to note that record labels and music publishers can be categorized as both music artists and intermediaries, as depicted in this thesis. They are considered music artists when the law affords them direct copyright protection as authors of sound recordings and published editions, and as intermediaries when they sign independent artists to facilitate the commercialization of music.[15]

In this thesis, 'music revenue' refers to royalties and any other profits from the commercialization of music, which are distributed among copyright owners (artists and intermediaries).

Music artists and intermediaries are often portrayed as allies based on their common interest in commercializing music, preventing infringement and profiting from the commercialization.[16]

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[14] These sectors are discussed in more detail in the value chain of the music industry as depicted in section 2.2. of this thesis.

[15] See description of "author" in relation to sound recordings and published editions in section 2(1) of the Copyright Act, 2001. The concepts of authorship and ownership are discussed in section 1.1.1. of this thesis.

[16] See Section 1.1.3 of this thesis, which discusses how music artists and intermediaries can be portrayed as allies or antagonists in their equal and unequal contractual relationships. See also, Guibault and PB Hugenholtz *Study on the conditions applicable to contracts relating to intellectual property in the European Union* (2002) Institute for information law 32-33; Y Nahmias 'The Cost of Coercion: Is There a Place for 'Hard' Interventions in

However, there is a structural antagonism between them when it comes to the exploitation of rights and the distribution of the revenue generated from the commercialization of music.[17] The intention of intermediaries to commercialize music at the lowest cost possible, aiming to maximize profits, often conflicts with music artists' aspirations for "equitable" remuneration in the commercialization of their music.[18] This is particularly evident in the Kenyan context, where local artists frequently struggle against established intermediaries who dominate the market.[19] The perceived asymmetry in bargaining power, tilted toward intermediaries, raises a significant risk of music artists being deprived of their "equitable" share of profits.[20] This complex dynamic prompts an exploration into how the regulation of music artists' remuneration can serve as a safeguard against potential exploitation by intermediaries.

Not all scholars endorse the portrayal of music artists as "poor, starving, weak, naïve, short-sighted" and being taken advantage of by the "big bad" intermediaries during the commercialization of music and distribution of revenue.[21] Regardless of the acceptance or

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Copyright Law?' (2020) 17(2) *Northwestern Journal of Technology and Intellectual Property* 155 at 161; Y Nahmias 'The Limitations of Information: Rethinking Soft Paternalistic Interventions in Copyright Law' (2019) 37 *Cardozo Arts and Entertainment Law Journal* 373 at 376-378; L Helman '*When Your Recording Agency Turns into an Agency Problem: The True Nature of the Peer-to-Peer Debate'* (2009) 50(1) *Idea 49*; DD Barnhizer '*Inequality of Bargaining Power'* (2005) 76 *University of Colorado Law Review* 139 at 159-160.

[17] Guibault and Hugenholtz op cit note 16 at 33; JO Asein 'Redefinition of first ownership under Nigerian Copyright Law-Lessons from an inchoate mutation' (2007) 38(3) *IIC-International Review of Intellectual Property and Competition Law* 299 at 314-315.

[18] Ibid. Section 2.3. of the thesis elucidates the concept of equitable in the context of the commercialization of music and the distribution of revenue.

[19] *Xpedia Management Limited & 4 others v Attorney General & 5 others* Petition 317 of 2015 [2016] eKLR; *Mercy Munee Kingoo & another v Safaricom Limited another* Petition 5 of 2016 [2016] eKLR; Achuka op cit note 6.

[20] Guibault and Hugenholtz op cit note 16 at 32-33; Nahmias (2020) op cit note 16 at 161; Nahmias (2019) op cit note 16 at 376-378; Helman op cit note 16 and Barnhizer op cit note 16 at 159-160.

[21] See, for example, support for the conventional argument based on the disparities in bargaining power between music artists and intermediaries in Nahmias (2020) op cit note 16 at 155-216 and Nahmias (2019) op cit note 16 at 373-413 (suggesting that the unequal relationship cannot be easily remedied by legislative interventions only). P Katzenberger *Protection of the author as the weaker party to a contract under international copyright contract law* (1988) (arguing that even famous and successful authors may be weaker parties even though they do not suffer from low bargaining power in the same way as typical authors). JC Ginsburg and P Sirinelli 'Private International Law Aspects of Authors' Contracts: The Dutch and French Examples' (2015) 39 *Columbia Journal of Law & the Arts* 171 at 171-194 (proposing private international law approaches that would enhance the protection of authors). Others acknowledge the importance of regulating author-intermediary relations for the protection of authors but offer different explanations for it. For example, O Alter 'Fairness towards Authors: Does It Necessarily Mean Caring for the Weak' (2018) 43 *Southern Illinois University Law Journal* 615 at 615-646 (rationalizing the protection using social psychology). Others are against the argument altogether, for example, GA Rub 'Stronger than Kryptonite-Inalienable Profit-Sharing Schemes in Copyright' (2013) 27 *Harvard Journal*

rejection of this perspective, it is acknowledged that the bargaining and negotiating powers consistently favour the intermediary.[22] This begs the question of how the remuneration of music artists should be regulated to protect music artists from exploitation by intermediaries.

Courts, policy makers and scholars often reiterate the importance of ensuring that music artists reap the full benefits of their music.[23] Still, there is insufficient analysis to determine the "equitable" balance between music artists and intermediaries in the distribution of music revenue in Kenya.[24] This may be because the remuneration of music artists is affected by a range of factors like demand for the music, the legal framework, music artists' and intermediaries' bargaining power, the prevailing market structure for commercialization of music, contracts concluded and the music artists' entrepreneurial capacity and legal expertise etc.[25] This thesis is an attempt to solve the challenge of remunerating music artists in Kenya. It

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of Law & Technology 49 at 79-86 (arguing against justifications based on 'starving artist myth' for restricting authors' rights to transfer or waive their termination rights) and ME Price 'Government policy and economic security for artists: The case of the Droit de Suite' (1967) 77 *Yale Law J*ournal 1333 at 1334-1336 (arguing against the justification in relation to artists' resale right in America).

[22] Nahmias (2019) op cit note 16 at 379. See similar arguments in Nahmias (2020) op cit note 16 at 155-216; Xalabarder op cit note 5; R Matulionyte 'Empowering authors via fairer copyright contract law' (2019) 42(2) *University of New South Wales Law Journal* 681 at 681-718; S Dusollier 'EU Contractual Protection of Creator: Blind Spots and Shortcomings' (2018) 41 *Columbia Journal of Law & Arts* 435 at 435-457; PÉ Lalonde 'Study Concerning Fair Compensation for Music Creators in the Digital Age' (2014) 22(10) *CIAM International Council of Creators of Music. Nashville, USA.*

[23] See Kenyan decisions regarding the collection and distribution of music revenue in fn 6 above. The Copyright (Amendment) Act No. 14 of 2022 and Copyright (Amendment) Act, 2019 made numerous amendments (sections 2, 5, 11, 19, 21, 22A, 22B, 22C, 22D, 26, 28, 30, 30B, 30C, 33, 35, 38, 38A, 39, Part VII etc.) to further regulate the commercialization of music and the music artist-intermediary relationship in Kenyan copyright law. These amendments are discussed in more detail in section 3.2. of the thesis. See also the National Music Policy, 2015. One key objective of copyright law is to grant exclusive rights to compensate music artists for their creative efforts, see for example, discussions on the incentive and reward rationales of copyright law in W Fisher *Theories of intellectual property: New essays in the legal and political theory of property* (2001); SA Pager 'The Role of Copyright in Creative Industry Development' (2017) 10(2) *Law and Development Review* 521 at 523; WM Landes and RA Posner 'An economic analysis of copyright law' (1989) 18(2) *The Journal of Legal Studies* 325-363; John Locke's justification of property in J Hughes 'The philosophy of intellectual property' *George Town Law J*ournal 77 (1988): 287-366; J Chege *Copyright Law and Publishing in Kenya* (1978) 24; B Sihanya 'Copyright Law in Kenya' (2010) 41(8) *International Review of Intellectual Property and Competition Law (IIC)* 926 at 938.

[24] Section 2.3. of the thesis clarifies the term equitable in the commercialization of music and distribution of revenue. For further discussion on the concept of "equitable", see E Elmahjub, N Suzor 'Fair use and fairness in copyright: distributive justice perspective on users' rights' (2017) 43(1) *Monash University Law Review* 274 at 277; R Towse 'What We Know, What We Don't Know, and What Policy-makers Would Like Us to Know About the Economics of Copyright' (2011) 8(2) *Review of Economic Research on Copyright Issues* 101 at 101; R Towse, C Handke and P Stepan 'The Economics of Copyright Law: A Stocktake of the Literature' (2008) 5(1) *Review of Economic Research on Copyright Issues* 1 at 15-16.

[25] CB Ncube 'The Creative Industry and South African Intellectual Property Law' (2018) 11(2) *Law and Development Review* 589 at 590; S Pager 'Making copyright work for creative upstarts' (2014) 22 *George Mason Law Review* 1021 at 1022; Baloyi op cit note 1 at 88-166; L Guibault and O Salamanca *Remuneration of authors*

explores the extent to which Kenyan copyright law should protect music artists from exploitation by intermediaries in the context of ensuring that music artists receive "equitable" remuneration from the commercialization of their music.

The thesis has two main objectives. The first objective is to examine and analyse the dynamics of two groups of copyright and related rights owners in the Kenyan music industry: music artists and intermediaries.[26] This is done to understand the problems that deprive music artists from reaping the full value of their exclusive rights. To this end, the research focuses on how Kenyan copyright law regulates the authorship and ownership of music, the commercialization of music and the distribution of music revenue.

The second objective is to provide a framework for conceptualizing the "equitable" distribution of music revenue between music artists and intermediaries under copyright law. This framework builds on justifications of copyright as a property right that facilitates the commercialization of works and performances, guarantees a reward for creativity and artistic contribution, and provides satisfactory returns for investment in creativity and artistic contribution.[27] The framework is rooted in the Rawlsian theory of justice and legislative interventions designed to protect music artists within copyright law. It prioritizes the protection of music artists as the least advantaged stakeholders in the commercialization of music and distribution of revenue.

The Rawlsian theory of justice and legislative interventions designed to protect music artists within copyright law are proposed as the most suitable approaches for defining "equitable" copyright for music artists and intermediaries in Kenya. While the Rawlsian theory of justice is not a theory of copyright per se, it is particularly relevant in Kenya, where the concern for distributive justice is pivotal in addressing inequalities stemming from historical injustices.[28] This thesis advances the application of Rawlsian theory in copyright by focusing specifically

and performers for the use of their works and the fixations of their performances (2016) Publications Office of the European Union 61-101.

[26] See further discussion on the protection of music and music artists under Kenyan copyright law in sections 1.1.1. and 1.1.2. of the thesis.

[27] InfoSoc, rec 9; S Schroff 'The purpose of copyright—moving beyond the theory' (2021) 16(11) *Journal of Intellectual Property Law and Practice* 1262 at 1265-1268.

[28] M Mbondenyi and T Kabau 'Distributive Justice in Kenya's Development Process: Prospects under a Devolved System of Governance' in PLO et al. *Devolution in Kenya: A Commentary* (2016) 129-170.

on the core function of copyright: the exercise by authors and performers of their exclusive rights in contractual relationships with intermediaries such as producers, publishers, Collective Management Organizations (CMOs), Music Technology Platforms (MTTs), and rights aggregators. While previous scholarship has applied Rawls' principles to copyright in general, including limitations and exceptions,[29] this work takes a novel approach by addressing how justice as fairness can directly shape the contractual dynamics at the heart of copyright law.

By applying Rawls' principles, particularly the difference principle, this thesis envisions a system where fair contractual mechanisms ensure that authors and performers are not excluded from the economic benefits their creative contributions generate. This promotes equitable participation in cultural production and enhances cultural equity—goals aligned with broader social justice imperatives. Furthermore, such an approach reinforces the legitimacy of copyright law by fostering transparency, fairness, and greater support from both creators and the public.

Rawlsian theory also provides a valuable framework for balancing the competing interests within copyright. It acknowledges the need to incentivize intermediaries to invest in creative works while ensuring creators are protected from exploitation. In Kenya, where economic disparities are pronounced, applying the difference principle to copyright contracts ensures that authors and performers retain meaningful economic rights without discouraging industry investment.

By applying Rawlsian principles to the exercise of exclusive rights by authors and performers, this thesis tackles systemic inequalities in their contractual relationships. It illustrates how copyright law can function as a tool for distributive justice, ensuring fair treatment and equitable remuneration for authors and performers—often the most disadvantaged in the commercialization process. This approach not only deepens the theoretical understanding of copyright law, but also offers practical solutions to the challenges faced by authors and

[29] Hughes and Merges op cit note 5 at 515; G Bernstein 'In the Shadow of Innovation' (2010) 31 *Cardozo Law Review* 2257 at 2257-2312; J Litman 'Lawful Personal Use' (2007) 85 *Texas Law Review* 1871 at 1879–1882; V Houweling and M Shaffer 'Distributive values in copyright' (2004) 83 *Texas Law Review* 1535 at 1536, 1537-39 and 1567; L Shaver 'Copyright and inequality' (2014) 92 *Washington University Law Review* 117 at 117-168. S Yanisky-Ravid 'The hidden though flourishing justification of intellectual property laws: distributive justice, national versus international approaches' (2017) 21 *Lewis & Clark Law Review* 1 at 28; JJ Baloyi 'Demystifying the role of copyright as a tool for economic development in Africa: Tackling the harsh effects of the transferability principle in copyright law' (2014) 17(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 87 at 87-166; M Sunder *From goods to a good life: intellectual property and global justice* (2012); JH Reichman 'Intellectual property in the twenty-first century: will the developing countries lead or follow?' (2009) *Houston law review/University of Houston* 1115-1185.

performers in Kenya and comparable contexts. It aligns with Kenya's broader social justice objectives and provides a robust theoretical foundation for strengthening protections for authors and performers as economically disadvantaged groups within the value chain.[30] In the absence of empirical evidence, the Rawlsian theory rationalizes the unequal relationship between music artists and intermediaries and underscores the need for state involvement in regulating the commercialization of music and the distribution of revenue.[31] This theory supplements fairness and social welfare justifications of copyright to provide a unified description of "equitable" copyright, that is almost entirely missed in traditional copyright discourse.[32] Additionally, these approaches suggest that balancing the interests of music artists and intermediaries to protect music artists as the least advantaged group in the revenue distribution chain is a key criterion for "equitable" copyright for music artists.[33]

Kenyan policy makers and courts are increasingly recognizing the importance of incorporating these considerations to strengthen the copyright reward system and address long-standing inequalities.[34] Through the lens of Rawls' theory, copyright law can evolve beyond its traditional economic justifications into a tool for redistributive justice, ensuring music artists receive a fair share of the value their work generates. This shift not only addresses systemic inequalities in the music industry but also aligns copyright laws with broader societal goals of equity and justice.

Based on the Rawlsian theory of distributive justice and legislative interventions designed to protect music artists within copyright law, this thesis answers the question of whether and to what extent Kenyan copyright law should intervene in the commercialization of music and distribution of music revenue to protect music artists who act irrationally or against self-interest in their interactions with intermediaries. Considering that copyright and related rights initially

[30] Ibid.

[31] Elmahjub and Suzor op cit note 24 at 275, 277-278.

[32] Hughes and Merges op cit note 5 at 513-578; A Rubí-Puig 'Fairness vs. welfare in the discussion of copyright laws and policies: royalties for the resale of artworks as a case study' in in D Gervais *Fairness, morality and ordre public in intellectual property* (2020) 76 at 90 discussing how to integrate fairness and utilitarian welfare perspectives in the discussion of Copyright Law.

[33] See ibid at 519 quoting J Rawls *Justice as Fairness: A Restatement (2001)* 47; J Rawls *A Theory of Justice* (1999) 68-69.

[34] Most of the recent amendments to the Copyright Act were meant for the protection of music artists against exploitation by intermediaries, see Copyright (Amendment) Act No. 14 of 2022 and Copyright (Amendment) Act, 2019. See also Kenya National Music Policy, 205.

vest in music artists, in most instances, it is noteworthy that music artists often opt to assign or license these rights to intermediaries despite the perception of unfavourable remuneration.

1.1.1. Authorship and ownership in Kenyan copyright law: Implications for music artists

Understanding how Kenyan copyright law regulates authorship and ownership is essential to examining its impact on the commercialization of music and the remuneration of music artists. It is essential to identify those recognized as authors and owners of copyright works that constitute 'music'. This requires identifying those recognized as authors and owners of copyright in works that constitute "music" under the law, including literary works (lyrics), musical works (compositions), published editions of these works, and sound recordings.[35] In Kenya, these works qualify for copyright protection if they are original and represent an expression of a creative idea that is reduced to a tangible form.[36] The Copyright Act allows voluntary copyright registration through the Kenya Copyright Board (KECOBO), although registration is not required for copyright enjoyment and enforcement.[37]

In copyright law, authorship and ownership are distinct but related concepts that establish the basis for claiming copyright protection and commercializing works. Authorship refers to the initial creator of a work, while ownership relates to the control and financial benefit derived from exploiting the work. Under Kenyan law, authorship is defined based on the type of work: for literary and musical works, the author is the original or first creator; for sound recordings, it is the person responsible for arranging the creation of the recording; and for publishers, it is the publisher of an edition .[38] This means that composers, lyricists, certain record labels or producers, and publishers are considered the authors of lyrics, musical compositions, sound recordings, and published editions, respectively. As creators, they hold initial ownership of

[35] See section 22 (1)(a), (b) & (e) of the Copyright Act, 2001. The related rights of performers to control the fixation of their performances are also described as part of 'music' in this thesis and discussed in section 1.1.2. of the thesis.

[36] Section 22 of the Copyright Act, 2001.

[37] See sections 22A, 34A, 34B and 34C of the Copyright Act, 2001. See further Regulations 4 and 5 of the Copyright Regulations, 2020 and Regulation 8(2) of the Copyright Regulations, 2001.

[38] Section 2(1) of the Copyright Act, 2001.

copyright, which grants them moral rights (based on authorship) and usually makes them the first holders of economic rights.

The default position in copyright law is that the author or joint authors of a copyright work will be the first owners or co-owners.[39] However, there are exceptions to this rule. When a work is created by an employee in the course of employment, the employer generally owns the copyright unless otherwise agreed.[40] Similarly, commissioned works are owned by the commissioning party unless there is an agreement stating otherwise.[41] For works commissioned by the government or non-governmental organizations, copyright ownership vests in these entities.[42]

The allocation of rights for works whose copyright is assigned to employers, commissioning parties, or the State falls outside the scope of this thesis. Although these stakeholders could be categorized with the intermediaries discussed here, since their protection similarly stems from their investment in the creation of the work or performance, they differ from intermediaries in one key aspect: they primarily function as end users.

Since authors are inextricably linked to the creation of works, they are granted special moral rights to protect their personal connection to their works and maintain creative autonomy. These moral rights entitle authors to claim authorship and object to any distortion, mutilation or other modification of or other derogatory action in relation to their works.[43] Although moral rights are not transmissible during the life of the author, they can be inherited by the author's heirs or successors.[44]

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[39] See section 31(1) of the Copyright Act, 2001. See also section 2(1) of the Copyright Act, 2001, which defines "work of joint authorship" as "a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors." See also Asein op cit note 17 at 311.

[40] Section 31(1)(b) of the Copyright Act, 2001.

[41] Section 31(1)(a) of the Copyright Act, 2001.

[42] See sections 25 and 31(2) of the Copyright Act, 2001.

[43] Section 32 of the Copyright Act, 2001. See also I Rutenberg, M Ouma and P Munyi *Intellectual Property Law in Kenya* (2019) Chapter 1, § 7, which discusses the scope of exclusive rights in general.

[44] Section 32(2) of the Copyright Act, 2001.

Moral rights have some economic aspects, as it is difficult to sharply distinguish the economic and non-economic aspects of their protection.[45] However, the details of moral rights are not in focus here since they are mostly perceived as possessing fewer economic aspects than economic rights.[46] Further, Kenyan copyright law is based on strong commercial traditions and prefers limited recognition of moral rights.[47]

Copyright also grants economic rights to owners, allowing them to control the commercialization of works and generate income during the duration of copyright, subject to the exceptions and limitations in the Copyright Act.[48] Copyright owners can generate three

[45] Alter op cit note 21 at 616 and G Resta 'The new frontiers of personality rights and the problem of commodification: European and comparative perspectives' (2011) *Tulane European & Civil Law Forum* 26 (2011) 33 at 61.

[46] Ibid.

[47] See how the Copyright Act, 2001 extensively regulates economic rights throughout the Act and only provides for moral rights in section 32.

[48] The economic rights attached to literary works, musical works, sound recordings are provided in sections 26 and 28 of the Copyright Act, 2001:

> **26. Nature of copyright in literary [and] musical. . .works**
> (1) Copyright in a literary…[and] musical . . . work shall be the exclusive right to control the doing in Kenya of any of the following acts—
> (a) the reproduction in any material form of the original work;
> (b) the translation or adaptation of the work;
> (c) the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement;
> (d) the communication to the public of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original;
> (e) the making available of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original; and
> (f) the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original.
>
> **28. Nature of copyright in sound recordings**
> (1) Subject to subsections (2) and (3), copyright in sound recordings shall be the exclusive right to control the doing in Kenya of any of the following acts in respect of the sound recording, namely—
> (a) the direct or indirect reproduction in any manner or form; or
> (b) the distribution to the public of copies by way of sale, rental, lease, hire, loan or any similar arrangements; or
> (c) the making available of the sound recording in whole or in part either in its original form or in any form recognizably derived from the original; or
> (d) the importation into Kenya; or
> (e) the communication to the public or the broadcasting of the sound recording in whole or in part either in its original form or in any form recognizably derived from the original.
> (2) The provisions of paragraphs (a), (f), (j) and (h) of section 26(1) shall apply mutatis mutandis to the copyright in a sound recording.

main forms of income. First, performance royalties, for public performances on radio, television, public transport, in concerts and non-interactive streaming.[49] Second, mechanical royalties, for licensing of recordings and their reproductions as audio files on storage media and interactive streaming.[50] Lasty, synchronization royalties, for synching music in other media like movie sound tracks.[51]

In Kenya, literary and musical works are protected for the life of the author plus "[f]ifty years after the end of year in which the author dies"; while sound recordings are protected for "[f]ifty years after the end of the year in which the recording was made".[52] Copyright owners are responsible for monitoring their works and may seek relief for infringement through damages, injunction, accounts or other reliefs available in any corresponding proceedings in respect of infringement of other proprietary rights.[53]

See sections 26(3) and 26C of the Copyright Act, 2001 and the Second Schedule to the Copyright Act, 2001 on the exceptions and limitations attached to the exclusive rights attached to literary and musical works.

Sections 28(3) and 28(6) of the Copyright Act, 2001 provide the exceptions and limitations to the exclusive rights attached to sound recordings.

See also I Rutenberg, M Ouma and P Munyi op cit note 43.

[49] See definition of "public performance" in section 2 of the Copyright Act, 2001. For a further discussion on these types of royalties, see IL Pitt *Economic Analysis of Music Copyright: Income Media and Performances* (2010) 15-24 and S Klingner et al. 'Direct memberships in foreign copyright collecting societies as an entrepreneurial opportunity for music publishers – needs, challenges, opportunities and solutions' (2021) 45 *Journal of Cultural Economics* 633 at 635-637.

[50] Ibid.

[51] Ibid.

[52] Section 23 of the Copyright Act, 2001.

[53] Section 35 of the Copyright Act, 2001 and articles 22 and 23(3) of the Constitution of Kenya, 2010. The Copyright Act provides for civil and criminal liability for copyright infringement. Civil liability for copyright infringement attaches where a person other than the copyright owner makes, distributes or imports for commercial gain an infringing copy of protected works. Despite the provision on criminal liability for copyright infringement, no criminal case has been instituted in Kenya. Article 23(3) of the Constitution of Kenya provides the remedies for copyright infringement- declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24 (4); an order for compensation; and order of judicial review.

The Copyright Act vests the role of copyright enforcement on KECOBO, the National Police Service, the judiciary, and the Anti-counterfeit agency (ACA), see sections 3, 5 and 42 of the Copyright Act, 200. See also section 49 of the National Police Service Act (No. 11A of 2011) which empowers the Police to enforce any law; and chapter 10 of the Constitution of Kenya which regulates the role of the judiciary in interpreting the law.

Authorship grants initial ownership rights to the creators (lyricists, composers, certain producers/record labels and publishers). However, these rights are often transferred or shared with intermediaries, such as some publishers and record labels, CMOs, music aggregators, MTT companies, through assignments or licenses. These arrangements dictate how rights are exercised and how revenue flows through the value chain. Most authors lack the resource needed to effectively commercialize their works, often leading them to assign or license their rights to intermediaries. While copyright law designates authors as initial owners to give them economic leverage in negotiating with these intermediaries and benefitting from the full value of their exclusive right, this empowerment is rarely realized in practice.[54] Economic rights are easily given away to intermediaries due to the principle of contractual freedom, and authors have limited bargaining power compared to these entities.[55] As a result, authors may grant expansive rights over extended periods, with little opportunity for additional remuneration beyond their initial agreements.[56] This disparity becomes particularly problematic when a work gains substantial success over time, leaving authors without further financial benefit.[57]

Assignments often involve a full transfer of rights, making intermediaries (assignees) the new copyright owners, with authors having no further claim to revenue beyond the original agreement.[58] However, some assignments are limited in scope, as specified rights may be

[54] Dusollier op cit note 22; Asein op cit note 17 at 311.

[55] For the definition of contractual freedom, see RA Epstein 'Contracts Small and Contract Large: Contract Law through the Lens of Laissez-Faire' in F Buckley (ed), *The Fall and Rise of Freedom of Contract* (1999) 28; N Elkin-Koren 'Copyright policy and the limits of freedom of contract' (1997) 12(1) *Berkeley Technology Law Journal* 106-113 and J Yuvaraj 'Back to the Start: Re-envisioning the Role of Copyright Reversion in Australia and other Common Law Countries' (unpublished PhD thesis, Monash University, 2021) 58.

Aspects of extensive contractual freedom can be seen in how the Copyright Act, 2001 regulates the commercialization of music in section 33. The provision limits the contractual freedom of copyright owners and their assignees and licensees to some extent.

See discussion of music artists' weaker bargaining power than intermediaries in NS Kim 'Bargaining Power and Background Law' (2009) 12 *Vanderbilt Journal of Entertainment & Technology Law* 93 at 93-94; Helman op cit note 16; Barnhizer op cit note 16 at 159-60, 199-223; A Plant 'The Economic Aspects of Copyright in Books' (1934) 1(2) *Economica* 167 at 185-86; See fn 12 in Nahmias (2019) op cit note 16 at 378; Alter op cit note 21 at 631 and 635; Baloyi op cit note 1 87 at 89; Towse op cit note 24 at 101 and 106; M Kretschmer 'Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a Research Agenda' (2010) 18 *Journal of Intellectual Property Law* 141 at 141,144 and 160; Asein op cit note 17 at 311.

[56] Gutsche op cit note 5 at 259-260; Matheka op cit note 4; Achuka op cit note 4 and Ilado op cit note 4.

[57] See notable jurisprudence on music revenue distribution and exploitation of music artists in Kenya in fn 4 above.

[58] Ibid; Baloyi op cit note 1 at 105; see sections 33(1), (2), (3), (5) and (7) of the Copyright Act, 2001 for formal requirements for assignments to be contractual and in writing.

assigned only for specific periods, products, or geographical markets, meaning the authors are not completely divested of ownership.[59]

Licensing arrangements, on the other hand, allow authors (licensors) to keep copyright ownership while authorizing intermediaries (licensees) to exercise certain economic rights. Licensing may also be managed collectively through Collective Management Organizations (CMOs), where owners give exclusive licenses to CMOs which 'monitor the use of their works, negotiate with prospective users, give them licenses against appropriate remuneration on the basis of a tariff system and under appropriate conditions, collect such remuneration, and distribute it among [copyright owners]'.[60]

Composers and lyricists often sign agreements with publishers, assigning or licensing their economic rights in exchange for distribution and commercialization services. Through an assignment, authors may fully transfer ownership to the publisher, who then becomes the legal owner. Exclusive licenses, however, allow publishers to act as sole agents for specific rights while the author retains ownership. Producers typically assign their rights to record labels, which then gain ownership of the sound recording copyright, enabling them to exploit it commercially.

This commercialization pathway does not always ensure the "equitable" remuneration for authors, raising questions about the need for State intervention to protect authors from unfavourable agreements with intermediaries.[61] While copyright laws aim to grant authors initial control over their work, they often relinquish this control in exchange for inequitable remuneration. If authors deserve protection, it prompts further inquiry into the underlying reasons and the extent of such protection. The thesis contends that this scenario does not align with theories of distributive justice and legislative interventions to protect music artists under copyright law, and it endeavours to provide answers to these critical questions.

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[59] O Dean *Handbook of South African Copyright Law* (2015) 41, 143-144, 149, 150-151; Asein op cit note 17 at 151-154.

[60] For assignments and licenses, generally, see section 33 of the Copyright Act, 2001. The function of CMOs is described in M Ficsor *Collective Management of Copyright and Related Rights* (2002) 17.

[61] Chapter 2 of the thesis delves deeper into the concept of "equitable" practices in music commercialization and revenue distribution. For example, see Hughes and Merges (op cit note 5 at 515) and Davis (op cit note 5 at 391-395). A detailed discussion on payment flows within the value chain can be found in section 2.1 of the thesis.

1.1.2. Related rights of performers in Kenyan copyright law

This section explores the related rights of performers under Kenyan copyright law, highlighting their initial ownership and the implications for the commercialization of their performances.[62] The Copyright Act defines a "performer" as "an actor, singer, declaimer, musician or other person who performs a literary, musical work or a work of folklore and includes the conductor of the performance of any such work."[63] This thesis is concerned with the performers of literary and musical works, recognizing the diversity within this group.

There are three main categories of performers' protection rights in Kenya: economic, moral and 'remuneration rights'.[64] This thesis is concerned with the economic rights that give performers exclusivity to control the fixation of their performances.[65] The economic rights of performers are provided in sections 30 (1) of the Copyright Act, 2001. Performers may commercialize their related rights during the duration of protection, subject to the limitations and exceptions in the Copyright Act, by assigning or licensing their economic rights to intermediaries.[66] The commercialization of performers' related rights occurs in the same way as the commercialization of copyright works (literary and musical works and sound recordings); therefore, performers often suffer a similar predicament to that of authors when interacting with intermediaries.[67] Most performers do not reap the full benefit of commercializing the rights to their performances due to the unequal contractual relationship between them and intermediaries.[68]

[62] Section 30 of the Copyright Act, 2001.

[63] Section 2 of the Copyright Act, 2001.

[64] Section 30 of the Copyright Act.

[65] See section 30(1) of the Copyright Act, 2001.

[66] See, ibid for the economic rights of performers. Section 30(6) of the Copyright Act, 2001 provides the exceptions and limitations to the related rights of performers.

[67] Kim op cit note 56 at 93-94; Helman op cit note 15; Barnhizer op cit note 15 at 159-60, 199-223; Plant op cit note 56 at 185-86; See fn 12 in Nahmias (2019) op cit note 15 at 378; Alter 'op cit note 19 at 631 and 635.

[68] Ibid.

Kenyan copyright law grants moral rights to performers for the protection of their personal rights and artistic contribution in performing literary and musical works.[69] During their lifetime, they have rights to be identified as the performer of their performances and to object to any distortion, mutilation, or other modification of their performances, and to seek compensation for the infringement of these rights.[70]

Performers also benefit from 'remuneration rights'. Remuneration rights enable performers to claim remuneration from the owners of copyright in sound recordings and films, when they cannot control the commercialization of their performances.[71]

In Kenya, it is important to distinguish among various categories of performers, such as featured artists, session musicians, and orchestral musicians. Each category may be subject to different forms of remuneration and varying copyright rules, which can significantly impact their rights and remuneration.[72] Featured artists such as lead singers or soloists, are the main performers prominently featured in a musical work or performance.[73] They typically have a higher profile and may earn royalties or a share of profits from sales. Session musicians are hired for specific recordings or live performances on a temporary basis.[74] They often work under contracts that provide for a one-time fee or lump-sum payment and may not receive credit or ongoing earnings from the works they contribute to.[75] Orchestral musicians who perform as part of larger ensembles, such as symphonies or orchestras, usually play standardized roles and are remunerated through salaries or fixed fees.[76] This differentiation highlights the complexities of performers' rights, which are protected for fifty years after the end of the year in which the performance was fixed.[77] Understanding these distinctions is

[69] See section 30(5) of the Copyright Act, 2001. Some national laws, like the South African Performers' Protection Act, 1967 do not grant moral rights to performers.

[70] Ibid.

[71] Section 30B of the Copyright Act, 2001.

[72] Guibault and Salamanca op cit note 25.

[73] Ibid.

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] Section 30(4) of the Copyright Act, 2001.

crucial for analyzing the overall landscape of performer rights and their commercialization in Kenya.

1.1.3. The role of copyright and contract law in the commercialization of music

This section examines the interplay between copyright and contract law in the commercialization of music, emphasizing the crucial role that contracts—specifically assignments and licenses—play in this regulatory framework.[78] Assignments and licenses stipulate the agreements governing the scope of economic rights granted to intermediaries, delineate the distribution of revenue generated from the commercialization of music and guide the management of these rights.

For the most part, commercialization of music is based on the principle of contractual freedom, allowing parties to negotiate the terms and conditions of assignments or licenses.[79] However, this freedom can lead to problematic dynamics, as the contractual relationship between music artists and intermediaries often reflects significant inequalities.

An "unequal contractual relationship" occurs when one party possesses considerably more bargaining power than the other during negotiations. In the music industry, this imbalance is frequently observed between music artists and intermediaries, such as record labels or publishers. Various factors—including socio-economic status, education, and legal knowledge—determine bargaining power.[80] Intermediaries, often larger and better-resourced entities, wield greater influence in negotiations compared to individual artists, who may lack the same level of resources or industry expertise.[81] For instance, intermediaries often leverage their market position to dictate terms that disproportionately favour them. The concepts of "knowledge power" and "market power," further illustrate how superior understanding of

[78] M Kretschmer, E Derclaye, M Favale and R Watt *The Relationship between Copyright and Contract Law: A Review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy (SABIP)* (2010) 1;

[79] Section 33 of the Copyright Act, 2001 limits the contractual freedom of copyright owners and their assignees and licensees to some extent. See Copyright Act, 2001 generally, Epstein op cit note 55 and Yuvaraj op cit note 55.

[80] Kim op cit note 55 at 93-94.

[81] Ibid.

copyright law can enable intermediaries to shape contractual terms to their advantage.[82] This disparity often results in artists receiving a smaller share of the revenue generated from their work, undermining their economic rights.

Additionally, the presence of market power can foster norms that favour larger entities, perpetuating a cycle of exploitation and inequitable outcomes for music artists. The background law governing copyright often reinforces these imbalances. While copyright ownership typically defaults to the creator, contracts can assign or license rights in ways that may not be favourable to music artists. Nahmias notes that authors generally find themselves in a weaker negotiating position relative to intermediaries, affecting their ability to secure equitable remuneration.[83] In many jurisdictions, including Kenya, the lack of detailed remuneration data makes it difficult to ascertain the actual revenue-sharing dynamics between artists and intermediaries. This lack of transparency perpetuates the unequal relationship, as artists may not be fully aware of how much revenue is being generated from their work or how it is being distributed. Consequently, intermediaries can divert outcomes to their advantage, resulting in inequitable revenue distribution.[84]

The perceived unequal contractual relationship between music artists and intermediaries is not quite apparent. Sometimes it is an outcome of equal contractual relationships between music artists and intermediaries.[85] Scholars like Alter consider it an integral part of the music business model that compensates investment in a high-risk market based on high losses with exceptional profits in a few cases.[86] Additionally, some countries, like Kenya, lack remuneration-disaggregated data to highlight the amount of music revenue shared between music artists and intermediaries.[87]

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[82] Ibid.

[83] Nahmias (2019) op cit note 16.

[84] See Kim op cit note 55 at 93-94; Helman op cit note 16; Barnhizer op cit note 16 at 159-60, 199-223; Plant op cit note 55 at 185-86; See fn 12 in Nahmias (2019) op cit note 16; Alter op cit note 21 at 631 and 635.

[85] Music artists with a track record of success may be equal contractual partners to intermediaries. See Gutsche op cit note 5 at 259-260.

[86] Alter op cit note 21 at 643; RE Caves *Creative industries: Contracts between art and commerce* (2000) chapter 4.

[87] United Nations Conference on Trade and Development (UNCTAD) *Creative Economy Outlook: Trends in international trade in creative industries 2002–2015 Country Profiles 2005–2014* (2018) 13 available at

In contrast, an "equal contractual relationship" suggests a scenario where both parties possess comparable bargaining power, enabling them to negotiate mutually beneficial terms. While such instances are less common in the music industry, they can occur under certain conditions:

- When artists negotiate contracts that reflect their contributions more equitably, particularly when they possess strong industry connections or marketability. Scholars like Alter argue that some relationships in the music industry are characterized by a collaborative spirit, allowing artists and intermediaries to share risks and rewards more evenly [88].
- When artists and intermediaries enter into joint ventures, their interests may align more closely, enabling them to share profits and decision-making responsibilities.[89] In these instances, the traditional power dynamics may shift, allowing for a more balanced contractual relationship. For example, when authors take on the role of joint entrepreneurs, they can negotiate terms that reflect their contributions more accurately, aligning their interests with those of the publisher.
- When music artists gain leverage by mobilizing public support for their work through social media platforms. This shift can empower artists to negotiate more favourable terms with intermediaries, as demonstrated by independent artists who utilize social media platforms to circumvent traditional intermediaries.

The interplay between copyright and contract law in the commercialization of music illustrates how contractual freedom can lead to significant inequalities. While contract law aims to facilitate agreements based on mutual consent, the realities of the music industry often skew this ideal. As highlighted by Barnhizer, the economic regulatory frameworks and background laws can coerce parties into accepting terms that do not reflect their true value or interests.[90]

https://unctad.org/system/files/official-document/ditcted2018d3_en.pdf, accessed on 20 April 2023; There is data on the economic contribution of copyright-based industries to the GDP. See DM Nyariki et al. 'The economic contribution of copyright-based industries in Kenya' (2009). Music Copyright Society of Kenya (MCSK), for example, collects royalties on behalf of authors and publishers. Their annual report also indicates the aggregate amount of royalties for both groups.

[88] Alter op cit note 21 at 631 and 635.

[89] Ibid.

[90] Barnhizer op cit note 16 at 159-60.

The discrepancy in bargaining power, especially in the consumer market dynamics, is crucial to understanding these unequal relationships. While some artists may navigate the industry successfully and negotiate favourable terms, the systemic issues that favour intermediaries still persist, perpetuating a cycle of inequity.

This thesis acknowledges that there is a contractual element in the commercialization of music; however, contract law is not the focus of the research. The key problems and solutions will be discussed within the bounds of copyright law since copyright sets out the default ownership, and contracts depend on that first allocation.[91]

1.2. Research background and context

The research background and context reveal that the music industry plays a crucial role in economic development, as recognized by the United Nations (UN) and Kenyan development policies. The music industry is viewed as an essential development tool for achieving the first goal of the United Nations (UN) Sustainable Development Goals (SDGs)[92] and Kenya's Vision 2030[93] by creating opportunities for employment and income generation.[94] The number of music artists in Kenya who rely on music for a living is unascertainable. Still, it is safe to

[91] See similar reasoning in Nahmias (2020) op cit note 16 at 159, discussing the distinctiveness of copyright contracts in fn 9; Gutsche op cit note 5 at 257-258 uses this similar argument to explain the background for legislative revision of the copyright system to effectively cover copyright contracts despite the existence of contract law. For an in-depth discussion of copyright and contract law, see references to scholarship in Guibault and Salamanca op cit note 25; RT Nimmer 'Breaking barriers: the relationship between contract and intellectual property law' (1998) 13 *Berkeley Technology Law Journal* 827 at 827; Kretschmer, Derclaye, Favale and Watt *op cit note* 75; R Watt 'Copyright law and royalty contracts' in R Towse and C Handke, eds. *Handbook on the digital creative economy* (2013) 197-208; Matulionyte op cit note 22 at 681-718; R Watt 'Copyright and contract law: Economic theory of copyright contracts' (2010) 18 *Journal of Intellectual Property Law* 173 at 173-206; J Griffin 'The interface between copyright and contract: suggestions for the future' (2011) 2(1) *European Journal of Law and Technology*; FH Easterbrook 'Contract and Copyright' (2005) 42 *Houston Law Review* 953-974; A Lucas-Schloetter 'The remuneration of authors and performers in copyright contract law' in P Torremans *Research Handbook on Copyright Law* (2017) 254-272.

[92] The first goal of the UN SDGs is the eradication of poverty, see UN Sustainable Development Goals (SDGs) available at *https://www.un.org/sustainabledevelopment/sustainable-development-goals/*, accessed on 28 May 2023.

[93] Kenya Vision 2030 is Kenya's development blueprint for the period 2008 to 2030. The music industry contributes to this Vision by "transform[ing] Kenya into "a newly-industrialising, middle-income country providing a high quality of life to all its citizens". See Government of Kenya (GOK) *Kenya Vision 2030* (2007) available at *https://vision2030.go.ke/about-vision-2030/*, accessed on 28 May 2023.

[94] See Republic of Kenya *National Music Policy* 2015 v, 3, 11.

assume that many music artists create, at least in part, with the prospect of earning money from it.[95] This assumption is supported by the uproar and the number of cases filed in the context of the reported failure of Kenya's music revenue distribution system.[96]

The question of ensuring that music revenue is distributed in a way that ensures "equitable" distribution under existing copyright frameworks has become more pressing due to digitization.[97] Maintaining/achieving "equitable" distribution among various stakeholders has proven challenging. The rise of new commercialization models has introduced great uncertainties regarding revenue streams and new modes of remuneration, such as subscription and advertising. Additionally, the constant emergence of new business models often sees traditional and contemporary intermediaries converging, while the mandate of CMOs is frequently questioned.[98]

Since 2014, revenue generated from music industries in Kenya has increased, largely due to the growing consumption of digital music in Kenya.[99] However, increased music access and revenue generation has not transpose to "equitable" remuneration for most music artists. This disparity has led to the so-called "value gap" in Kenya's music industry.[100]

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[95] Kenya lacks disaggregated data in the creative economy. Nevertheless, we can gather that music artists depend on revenue from commercialization based on their membership in music CMOs. MCSK reported that there were about 15,362 registered members, as of 4 November 2022 see MCSK *Chairman Report 31 AGM* 04 November 2022 available at *https://mcsk.or.ke/downloads/*, accessed on 15 November 2022. The Performers Rights Society of Kenya (PRiSK) reported that it had membership of over 3,500 artists as of June 2019, see PRiSK 'The Performer' April-June 2019 available at *https://www.prisk.or.ke/index.php/en/prisk-media/magazine/32-prisk-magazine-issue-001/file*, accessed on 5 January 2023. The Kenya Association of Music Producers (KAMP) reported that it had membership of over 1440 producers as at 2021, see, KAMP 'The Music Producer' December 2021 available at *https://www.kamp.or.ke/index.php/en/kamp-media/magazine/59-the-music-producer-2021-issue-compressed/file*, accessed 5 January 2023.

[96] See cases and articles referred to in fn 6 above.

[97] KC Liu and RM Hilty *Remuneration of Copyright Owners* (2017) viii.

[98] Guibault and Salamanca op cit note 25 at 17-19; SM Njoroge 'Reality Check: Corporate Governance Tinges on the Collective Management Organizations in Kenya' (2020) 11 Special Edition *WIPO-WTO Colloquium Papers* 139; V Nzomo Rethinking the Regulation of Collective Management Organisations in Africa: Legislative Lessons from Kenya, South Africa and Nigeria' (2016) 1(1) *African Journal of Intellectual Property* 1-18.

[99] There was a slight drop in revenue in 2020 due to the COVID-19 pandemic but the revenue continued growing strongly after 2021, see Pricewaterhouse Coopers (PwC) *Africa Entertainment & Media Outlook 2022-2026* 3, 5, available at *https://www.pwc.co.za/en/assets/pdf/entertainment-and-media-outlook-2022-26.pdf*, accessed on 05 January 2023; PwC *Entertainment and Media Outlook 2017:2021* 136-137 available at *https://www.pwc.co.za/en/assets/pdf/entertainment-and-media-outlook-2017*.pdf, accessed on 30 April 2023.

[100] See Republic of Kenya *National Music Policy* (2015) iv. See further description of value gap in fn 8 above.

In contractual negotiations with intermediaries, music artists in Kenya are commonly viewed as the party with less bargaining power.[101] Their attempts to form a collective bargaining voice by registering a trade union (the Kenya Musicians Union (KeMU)) to strengthen their bargaining position have been unsuccessful since 2007.[102] In 2007 and 2017, the Registrar of Trade Unions argued that KeMU failed to meet the required minimum membership requirement of 50% plus one of employees in Kenya's music industry.[103]

Music administration is scattered through various governmental offices and bodies with no clear-cut jurisdictional boundaries.[104] Most of these offices and bodies have limited industry representation and focus more on lobbying.[105] Music administration is thus unstructured, making the need to protect music artists in their transactions with intermediaries even more pronounced.

Kenyan courts have attempted to define what "equitable" means in the context of the remuneration of music artists. They mostly point to factors such as the importance of "openness and transparency, perceived or real," on the part of intermediaries involved in the commercialization of music and distribution of revenue and proportionality to the actual or potential economic value of the work and the contribution of each party.[106] Still, they are yet

[101] Refer to examples of cases demonstrating the challenges of revenue distribution in Kenya in fn 6 above.

[102] International Labour Organization (ILO) *Challenges and opportunities for decent work in the culture and media sectors* Working Paper No. 324 available at *https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_661953.pdf*, 22 accessed on 28 May 2023; see also Music in Africa 'Kenya Musicians Union' (n.d.) available at *https://www.musicinafrica.net/directory/kenya-musicians-union* accessed on 28 May 2023.

[103] Ibid.

[104] The administration of music, in Kenya, is scattered through various governmental offices and bodies like the Minister of Sports, Culture and Heritage, the Minister of ICT, Innovation and Youth Affairs, the Minister of Industrialization, Trade and Enterprise Development, the Permanent Presidential Music Commission (PPMC), the Communication Authority of Kenya (CA) and the Kenya Copyright Board (KECOBO). See a description of the challenge of the lack of clear-cut jurisdictional boundaries between the offices and bodies in the Republic of Kenya Ministry of Sports, Culture and the Arts *National Music Policy*, 2015 and V Nzomo 'Draft National Music Policy – Your Comments are Welcome' *IP Kenya* (2012) available at *https://ipkenya.wordpress.com/2012/06/12/*, accessed on 15 April 2023.

[105] Republic of Kenya, Ministry of Sports, Culture and the Arts *National Music Policy* (2015) 7.

[106] See for example *David Kasika & 4 others v Music Copyright Society of Kenya Limited & another* [2016] eKLR at paragraph 99; *Phillip Njoroge Kimani v Liberty Africa Technologies and Safaricom Limited* Constitutional Petition 147 of 2019 [2021] eKLR discussed music artists' right to access information from MTT companies and the MTT companies' other contractual parties. See more Kenyan decisions regarding the collection and distribution of music revenue in fn 6 above.

to develop extensive jurisprudence on how the law should respond to the challenge of remunerating music artists.

Copyright law provides the main basis for the remuneration of music artists and thus largely influences how music revenue is distributed.[107] The mere grant of economic rights that can be licensed or assigned in exchange for remuneration does not efficiently secure a claim to mutually satisfying remuneration for music artists and intermediaries.[108] The thesis argues that there is, in fact, a gap in ensuring the "equitable" distribution of music revenue in Kenya. In its current form, copyright law offers insufficient solutions for strengthening the contractual position of music artists, who tend to be weaker than intermediaries in bargaining and enforcing contracts for the commercialization of music.[109]

The freedom of contract pervades the copyright system, making it challenging to balance music artists' and intermediaries' interests.[110] Areas that point to this extensive freedom of contract in the Copyright Act include alienability provisions that allow the licensing and assignment of far-reaching rights to intermediaries. Further, there are no contract adjustment mechanisms for ensuring that music artists profit beyond their initial deals with intermediaries when music appreciates in value.

CMOs play an important role in the distribution of music revenue in Kenya. Their operation and management affect how remuneration contracts between music artists and the other groups of intermediaries play out. One of the justifications for CMO operation is that they increase the bargaining power of copyright owners to negotiate with corporates and multinational users on

[107] See the rules on copyright authorship and ownership in section 1.1.1. of the thesis.

[108] R Xalabarder *International legal study on implementing an unwaivable right of audiovisual authors to obtain equitable remuneration for the exploitation of their works (2018)* 34 *CISAC Study* 4*;* Kretschmer op cit note 55 at 146-147 quoting notes by Professor Ruth Towse during the Symposium Copyright, Contract and Creativity held at Bournemouth University on 25 September 2009.

For cases, see the non-exhaustive list representative of notable jurisprudence on music revenue distribution in Kenya as highlighted in fn 6 above.

[109] See the regulations on scope, duration, and form of transfers in section 33(1) of the Copyright Act, 2001; part VII of the Copyright Act, 2001 on Collective Administration of Copyright; and regulations on remuneration dispute settlement mechanisms in section 48 of the Copyright Act, 2001, articles 165(3)(a), 166 and 167(4) of the Constitution of Kenya, 2010.

[110] See the Copyright Act, 2001, generally. Epstein op cit note 55 discusses the freedom of contract in more detail.

a more balanced basis.[111] However, CMOs' failure to execute their mandate to distribute royalties to copyright owners due to mismanagement and misappropriation of funds has brought their operations into disrepute. CMOs seem to be working against the copyright owners they are meant to represent.[112]

1.3. Research question

The research question guiding this thesis is: How can Kenya achieve a more equitable distribution of music revenue between music artists and intermediaries under copyright law, taking into account how music is commercialized, existing legal structures, and incorporating principles from the Rawlsian theory of justice and legislative interventions for protecting music artists?

1.4. Objectives and relevance of the research

This section outlines the research objectives that guide this thesis, emphasizing the challenges of achieving an equitable distribution of music revenue under Kenyan copyright law. In doing so, it also highlights the relevance and key contribution of the thesis.

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[111] D Gervais 'Collective Management of Copyright: Theory and Practice in the Digital Age' in *Collective management of copyright and related rights* 3ed (2016) 3-30; G Pessach 'Collective Administration of Copyright: Another View on Efficiency, Justice and Fairness Considerations' (2006) 2 *Din Udvarim - Haifa Law Review* 621.

[112] Cases in point are the CMO situations in Kenya, Nigeria, and South Africa. For the discussion of the effect of mismanagement and misappropriation of royalties by music CMOs in Kenya, Nigeria and South Africa, see J Band 'Cautionary Tales About Collective Rights Organizations, Part 2' (2018) available at *http://infojustice.org/archives/39886*, accessed on 3 April 2023 and V Nzomo 'Rethinking the Regulation of Collective Management Organisations in Africa: Legislative Lessons from Kenya, South Africa and Nigeria' (2016) 1(1) *African Journal of Intellectual Property* 1 at 1-18. For Kenya, see VB Nzomo *Collective Management of Copyright and Related Rights in Kenya: Towards an Effective Legal Framework for Regulation of Collecting Societies* LLM (University of Nairobi) (2014); SG Nyehita *The Operation and Regulation of Collective Management Organizations of Music Works in the Digital Era: A Review of Kenya's Legislative Framework* LLM (University of Cape Town (2017) and V Nzomo 'MCSK Board Unceremoniously Removes Long-serving CEO' *IP Kenya* (2016) 4 April 2016 *available at https://ipkenya.wordpress.com/2016/04/04/mcsk-board-unceremoniously-removes-long-serving-ceo/#more-6188*, accessed on 16 April 2023. For Nigeria, see Asein op cit note 17 at 362-377;

OR Ola *Operation and regulation of copyright collective administration in Nigeria: important lessons for Africa* LLM (University of South Africa) (2012); OA Olatunji, KI Adam and FO Aboyeji 'Collective management of rights in musical works and sound recordings: a critique of the copyright society of Nigeria' (2017) 48 *IIC-International Review of Intellectual Property and Competition Law* 838 at 838-863. For Nigeria and South Africa, see DO Oriakhogba *Strengthening the regulation regimes for collecting societies in South Africa and Nigeria: any room for competition law?* PhD (University of Cape Town) (2018).

In response to the research question, this thesis focuses on two primary objectives:

1. To analyse the dynamics of music artists and intermediaries in Kenya, focusing on how their interactions influence the commercialization of music and the distribution of music revenue.
2. To develop a framework that conceptualizes the "equitable" distribution of music revenue between music artists and intermediaries, within the context of Kenyan copyright law.

Six subsidiary objectives inform the research:

1. To provide a framework for conceptualizing what constitutes "equitable" distribution of music revenue, under copyright law, according to the Rawlsian theory of justice and legislative interventions designed to protect music artists.
2. To contextualize the dynamics of the relationships among music artists, intermediaries, and other stakeholders across the value chain of Kenya's music industry.
3. To analyse the legal framework governing the relationships among music artists, intermediaries, and other stakeholders across the value chain of Kenya's music industry. This will involve evaluating the existing legal framework and identifying areas within Kenyan copyright law that may require reform to establish a more equitable distribution of music revenue between music artists and intermediaries.
4. To explore the German, EU and South African approaches to achieving a more equitable distribution of music revenue between music artists and intermediaries under copyright law.
5. To explore solutions inspired by the South African, German and EU approaches that could assist Kenya in establishing a more equitable distribution of music revenue between music artists and intermediaries under copyright law.
6. To offer recommendations to Kenya for establishing a more equitable distribution of music revenue between music artists and intermediaries within the framework of copyright law.

The key contribution of this thesis is its proposal for a new approach to ensure "equitable" remuneration for music artists in Kenya. Rather than settling on increasing the revenue pie, the thesis zooms in on copyright's purpose in balancing the interests of music artists and intermediaries in the distribution of music revenue. The thesis develops a framework for

conceptualizing why distributive justice and legislative interventions designed to protect music artists should be integral to the copyright system and how this impacts the distribution of music revenue. It also provides an analytical commentary on Kenya's revenue distribution system based on the framework. Additionally, it proposes a better revenue distribution framework based on solutions presented in the German and South African examples. The proposals also explore the utilization of 'fair trade' certification and branding schemes that can influence the distribution of music revenue.

1.5. Research methodology

This section outlines the research methodology employed in this thesis, which primarily utilizes desk research to explore the remuneration of music artists under Kenya's copyright law. It relies on existing data from national regulations and regional and international instruments that regulate the remuneration of music artists for the commercialization of music. Further information is sourced from case law, published articles, chapters in books, journals, legal databases, and reputable websites.

This research integrates constitutional sociology, political economy, and cultural politics to examine the remuneration of music artists under Kenyan copyright law. Through a constitutional lens, it analyzes Kenya's legal framework, including the Constitution, the Copyright Act, and related statutes, with a focus on articles 10 and 41. Article 10 emphasizes national values such as equity, social justice, and transparency, which serve as a guide for evaluating the commercialization of music and revenue distribution. Article 41 guarantees the right to fair remuneration for workers, which is central to this analysis.

The thesis also explores how political and economic forces shape the enforcement of copyright laws and the distribution of music revenue in Kenya. It reviews the roles of key industry stakeholders—such as collective management organizations (CMOs), the government, and artist associations—to understand how power dynamics influence regulatory decisions.

In addition to Kenya's local legal framework, the research draws on the experiences of Germany and South Africa in enhancing the "equitable" distribution of music revenue. By drawing on experiences from these countries, valuable lessons are identified for Kenya. Notably, Germany has pioneered legislative reforms to safeguard music artists in their dealings

with intermediaries.[113] Germany's advanced copyright legislation serves as a blueprint for reform efforts in other jurisdictions, exemplified by the 2015 Dutch copyright reforms.[114]

Moreover, Germany's ongoing commitment to regulating music revenue distribution is evident in recent copyright legislation reforms aimed at enhancing enforcement of artists' payment claims and addressing intermediary revenue shares.[115] As a member of the European Union (EU), Germany offers a platform for discussing the EU's stance on regulating music revenue distribution.[116] While some scholars argue that German copyright law was already compliant with EU Directives, it is worth noting that the German legislators utilized Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (EU Directive) to address certain issues in their approach.[117] Furthermore, Germany's strict supervision of CMOs presents an interesting model for Kenya to consider in its regulatory framework.[118]

Likewise, South Africa's experiences as a Commonwealth country with a shared colonial legal heritage offer valuable lessons for Kenya as it seeks to empower its artists through equitable remuneration reforms. In 2011, South Africa conducted an extensive inquiry into this issue,

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[113] France is also considered a pioneer, in this regard. See Alter op cit note 21 at 617.

[114] M Senftleben 'More Money for Creators and More Support for Copyright in Society- Fair Remuneration Rights in Germany and the Netherlands' (2018) 41 *Columbia Journal of Law & Arts* 413 at 413-433; Alter op cit note 21.

[115] In December 2016, the German Bundestag adopted the "Copyright Act for improved enforcement of claims, which authors and professional artists have in case of adequate payment and regulations of issues concerning publisher shares" (Deutscher Bundestag: Beschlussempfehlung Und Bericht [BT] 18/10637) which entered into force on 01 March 2017. N Malevanny *Online Music Distribution-How Much Exclusivity Is Needed?: A Study of International, European, German and US Copyright Systems and Their Objectives* (2019) 97.

[116] Articles 18-22 of the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (EU Directive) provides that fair remuneration entails the provision of appropriate and proportionate remuneration., contract adjustment mechanisms, transparency obligation, right of revocation and alternative dispute resolution mechanisms. These provisions do not provide for a "maximal harmonisation". Member state like Germany could, therefore, choose to retain their existing music artists' protections or strengthen them.

[117] S Von Lewinski 'The Implementation of the Digital Single Market Directive of 2019 in Germany' *Revue Internationale du Droit D'auteur* 57-99 available at *https://la-rida.com/sites/default/files/2022-05/271-CEVA.pdf,* accessed on 01 March 2022. The Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes, 2021 (Act to Adapt Copyright Law to the Requirements of the Digital Single Market), came into force on 7 June 2021.

[118] See Verwertungsgesellschaftengesetz, 2016 (VGG) (Act on the Management of Copyright and Related Rights by Collecting Societies).

which prompted the ongoing copyright revision process.[119] One of the policy objectives underlying the reform of the SA copyright law is to empower music artists to receive equitable remuneration from the commercialization of their music.[120]

The CAB seeks to amend the Copyright Act, 1978, to reinforce the standard for equitable remuneration or a fair share of royalties in respect of literary and musical works. This ensures that authors of literary or musical works, are entitled to remuneration even after assigning their copyright or authorizing others to commercialize their work, as highlighted in section 6A.[121] The CAB aims to address power imbalances and vulnerabilities within the music industry by establishing a new entitlement to equitable remuneration or share of royalties for music artists and a 25-year term limit on assignments. This right seeks to rectify disparities between artists and intermediaries. Transparency, accountability, and fairness are emphasized as key principles guiding the distribution of revenue between these parties.[122]

While fair trade initiatives such as Fair Trade Music (FTM) certification present potential benefits for promoting transparency and equity within the music industry, this thesis will primarily focus on the legal and political mechanisms affecting revenue distribution. However, FTM will be briefly introduced to highlight the unique challenges in ensuring genuine compliance and consumer trust. The intersection of unfair competition, fair-trade practices, and copyright will also be briefly addressed to contextualize potential future developments, particularly regarding misleading practices and false representations.

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[119] One of the reasons behind the formation of the Copyright Review Commission was to assess the efficiency of CMOs in South Africa. This was also informed by the liquidation of SARRAL see Department of Trade and Industry Republic of South Africa *Copyright Review Commission Report* 43-6.

For the ongoing copyright revision process, see Copyright Amendment Bill, 2017 [B13FB-2017| 5 September 2023] and Performers' Protection Amendment Bill, 2016 [B24B-2016].

[120] Preamble and Memorandum on the Objects of the Copyright Amendment Bill, 2017 [B13F-2017| 5 September 2023]; MA Forere 'Reforming the Right to Remuneration in the South African Copyright Amendment Bill' (2021) *PIJIP Working Paper* No. 67 and A Myburgh et al. *Copyright Reform or Reframe?: A Critical Analysis of the Copyright Amendment Bill B13D of 2017 and the Performers' Protection Amendment Bill B24D of 2016* (2023); DO Oriakhogba and EO Erhagbe 'The Copyright Amendment Bill: A New Vista for Fair Remuneration for South African Creators and Performers?' (2024) 73(10) *GRUR International* 959-966.

[121] See proposed sections 6A in the Copyright Amendment Bill, 2017 [B13F-2017| 5 September 2023].

[122] Ibid.

Fair trade is often framed within the context of ethical consumerism, which refers to consumers' willingness to support products endorsed as fair trade compliant.[123] Fair trade certification aims to empower consumers by providing them with information to make ethical choices and has the potential to shift the power dynamics regarding remuneration from intermediaries to consumers.[124] Consumers can address this issue by advocating for revenue distribution that adequately balances the interests of music artists and intermediaries.

The success of fair trade initiatives in industries like coffee underscores its effectiveness in ensuring equitable compensation for producers. However, when applied in the music industry, fair trade encounters unique obstacles. For instance, consumers may become confused by a proliferation of misleading FTM marks, as anyone can create certification marks.[125] This situation raises concerns about unfair competition, as it can lead to consumer deception and undermine the credibility of legitimate fair trade efforts. Additionally, consumers may struggle to independently evaluate FTM standards, often relying on the certifier's credibility.[126] The absence of an organization ensuring compliance with FTM standards and ensuring independence between the certifier and the supply chain further complicates the concept of FTM in the music industry.[127]

Furthermore, the delivery of FTM by Fair Trade Music International (FTMI) is still in its nascent stages.[128] FTMI has thus far developed FTM standards only for music albums and

[123] J De Beer 'Making copyright markets work for creators, consumers, and the public interest' in R Giblin, K Weatherall *What if we could reimagine copyright* (2017) 174.

[124] R Hernandez 'A fair stream: Recommendations for the future of fair trade music' (2016) 19(3) *Vanderbilt Journal of Entertainment and Technology Law* 747 at 749-750.

[125] Ibid at 758; GE Helms 'Fair Trade Coffee Practices: Approaches for Future Sustainability of the Movement' (2011*)* 21 *Indiana International & Comparative Law Review* 79 at 98.

[126] Hernandez op cit note 124 at 759.

[127] Ibid.

[128] Fair Trade Music International (FTMI) in Canada is considered the umbrella organization for FTM. It is an independent not-for-profit organization that coordinates and oversees the FTM movement. FTMI was incorporated in 2015. See the role of the FTMI in promoting FTM from the FTMI website available at *https://www.fairtrademusicinternational.org/,* accessed on 15 January 2024.

single releases, posing challenges for certifying the entire supply chain.[129] Notably, FTMI does not certify the channel, label, digital platform, store, or venue where the music is sold.[130]

1.6. Structure of the thesis

This section provides an overview of the structure of the thesis, which is organized into seven chapters.

This **Chapter one** is introductory and sets the scope of the research. It introduces the who, what and why that are the focus of this thesis; the research background and context; the objective and relevance of the research and the research methodology. The chapter also provides an outline of the research.

Chapter two provides a framework for demystifying "equitable" distribution of music revenue between music artists and intermediaries under copyright law. The framework outlines a value chain that contextualizes interactions among six categories of stakeholders in the music industry (creative sector, creative production sector, copyright management and licensing sector, promotion, marketing, and publicity sector, broadcast, retail, and entertainment sector, and the buying public (users)); and highlights possible concerns in the commercialization of music and the distribution of revenue. The framework also discusses the purpose of copyright according to the Rawlsian theory justice and legislative interventions designed to protect music artists within copyright law. It then extrapolates four fundamental principles of an "equitable" copyright system for the commercialization of music and the distribution of revenue:

1. Justice in the initial acquisition of rights
2. Justice in subsequent acquisition of rights
3. Justice in reparations for violating the protection of music artists during the initial and subsequent acquisition of rights[131]

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[129] Hernandez op cit note 124 at 769-770.

[130] Ibid at 770-771.

[131] These issues were adapted from Robert Nozick's description of social justice in property rights. Nozick's and Rawls' description of social justice are similar to a large extent. Their views differ as regards state involvement in subsequent acquisition of rights. See R Nozick *Anarchy, state, and utopia* (1974) 151-152 and 174-178 and A Chander and A Chander 'Is Nozick Kicking Rawls's Ass-Intellectual Property and Social Justice' (2006) 40 *University of California Davis Law Review* 563 at 567-568.

4. Transitional justice when implementing reforms for distributive justice in copyright law.[132]

These principles are used to test the possible "inequity" in Kenya's copyright system and guide discussions in the succeeding chapters of the thesis.

Chapter three examines and analyses the dynamics within the relationship among music artists, intermediaries, and other stakeholders across the value chain of Kenya's music industry. It includes an analysis of existing business models and the environment within which music artists, intermediaries and other stakeholders operate. By doing so, the chapter highlights revenue distribution concerns in Kenya's music industry and explores the extent to which music artists can extract "equitable" remuneration from the commercialization of music in Kenya.

Chapter four sets out Kenya's approach to balancing the interests of music artists and intermediaries in the commercialization of music and the distribution of revenue. The chapter analyses the legal framework governing the relationship between music artists and intermediaries by exploring legislative developments and revenue distribution concerns. Drawing from the principles established in chapter two of an "equitable" copyright system developed in chapter two for an "equitable" copyright system, it assesses the legal framework and identifies areas in Kenyan copyright law requiring reform.

Chapter five discusses Germany's approach to addressing the challenge of establishing a more equitable revenue distribution system between music artists and intermediaries within the framework of copyright law. The chapter also discusses EU's stance on regulating music revenue distribution by discussing Germany's implementation of the EU Approach for equitable remuneration of music artists. Additionally, the chapter discusses the practical implications and broader significance of these approaches.

Chapter six discusses South Africa's approach to addressing the challenge of establishing a more equitable revenue distribution system between music artists and intermediaries within the framework of copyright law. It evaluates both the approach outlined in the Copyright Act, 1978 approach and the proposed amendments in the Copyright Amendment Bill, 2017 [B13F-2017] approach. Additionally, it discusses the practical implications and broader significance of these

[132] S Olsaretti *The Oxford handbook of distributive justice* (2018) 20-21.

approaches. Furthermore, the chapter explores solutions to better align Kenya with "equitable" music revenue distribution.

Chapter seven concludes the thesis by drawing conclusions about Kenya's revenue distribution framework and provides recommendations for aligning the framework more effectively with the "equitable" remuneration of music artists. By drawing inspiration from solutions presented in the German, EU and South African approaches, it proposes a more equitable revenue distribution framework for Kenya.

1.7. From overview to framework

In chapter one, the research is framed within the context of equitable remuneration for music artists, laying the groundwork for an in-depth exploration of the principles governing an equitable distribution of music revenue under copyright law, which is thoroughly examined in chapter two.

CHAPTER TWO: DEMYSTIFYING EQUITABLE REMUNERATION

2.1. Introduction to demystifying equitable remuneration

This section introduces the concept of "equitable remuneration" and its significance in the context of the Kenyan music industry.

In discussions of copyright law and music revenue distribution, the terms "fair", "optimal" and "equitable" remuneration are often misunderstood, used interchangeably or defined in varying ways.[1] At first glance, these concepts appear somewhat vague. In the context of Kenya's Copyright Act, the term "fair" is associated with harm-based compensation, particularly regarding blank tape levies, where compensation is determined based on the potential harm to authors from unauthorized copying.[2] This focus on harm aligns with traditional interpretations of fair remuneration, which typically considers the impact of infringement on creators.[3]

Conversely, "equitable remuneration" extends beyond the concept of fairness to encompass a broader notion of justice and fairness in resource allocation.[4] In Kenya's constitutional framework, "equitable share" refers to the fair distribution of resources among citizens, ensuring that everyone has access to opportunities and benefits that reflect the value of their contributions.[5] This idea of equity encompasses a holistic approach to fairness and justice in resource distribution, aligning with national values as articulated in the Constitution of Kenya.

In contrast, optimal remuneration represents an ideal level of compensation that maximizes an artist's earnings.[6] While optimal remuneration presents a desirable target, it is important to

[1] In Case C-467/08 Padawan ECLI:EU:C:2010:620, paras 32-33, the Court of Justice of the European Union (CJEU) ruled that "fair compensation" and "equitable remuneration" are distinct concepts in EU law, with "fair compensation" being primarily harm-based and "equitable remuneration" being value-based. For further discussion, see T Riis 'Remuneration Rights in EU Copyright Law,' (2020) 51(4) *IIC-International Review of Intellectual Property and Competition Law* 446 at 446-467; PB Hugenholtz et al *The future of levies in a digital environment* (2003).

[2] See sections 27, 28 and 30 of the Copyright Act, 2001.

[3] Riis op cit note 1 at 446-467.

[4] PB Hugenholtz et al *The future of levies in a digital environment* (2003)

[5] See articles 11, 60, 69, 92, 174 and 201 of the Constitution of Kenya (2010).

[6] G Calabresi and DA Melamed 'Property rules, liability rules, and inalienability: one view of the cathedral' in RA *Epstein Modern Understandings of Liberty and Property* (2013) 139-178.

acknowledge that it remains largely unattainable in practical terms due to the complexities of the music industry, including market volatility, varying business models, and technological advancements that continuously reshape the landscape.

While we would generally prefer to strive towards an optimal system of remuneration, practicality considerations lead us to rather aim for and examine in the remainder of the thesis an "equitable" system grounding the discussion in the practical realities of remuneration.

This chapter critically analyzes the Rawlsian theory of justice and legislative measures for protecting music artists within copyright law to clarify the concept of "equitable" remuneration, sufficiently to proceed with the enquiry in this thesis. It explores the theoretical and conceptual foundations that underpin this concept and explores the intricate interplay between stakeholder interests in the music industry's value chain and the distribution of music revenue. The chapter establishes a benchmark test to identify the qualifying circumstances under which a copyright system can be deemed "equitable" in the context of music commercialization and revenue distribution. This test is then used to assess potential "inequities" in Kenya's copyright law and guide subsequent discussions in this thesis.

2.2. The value chain of the music industry

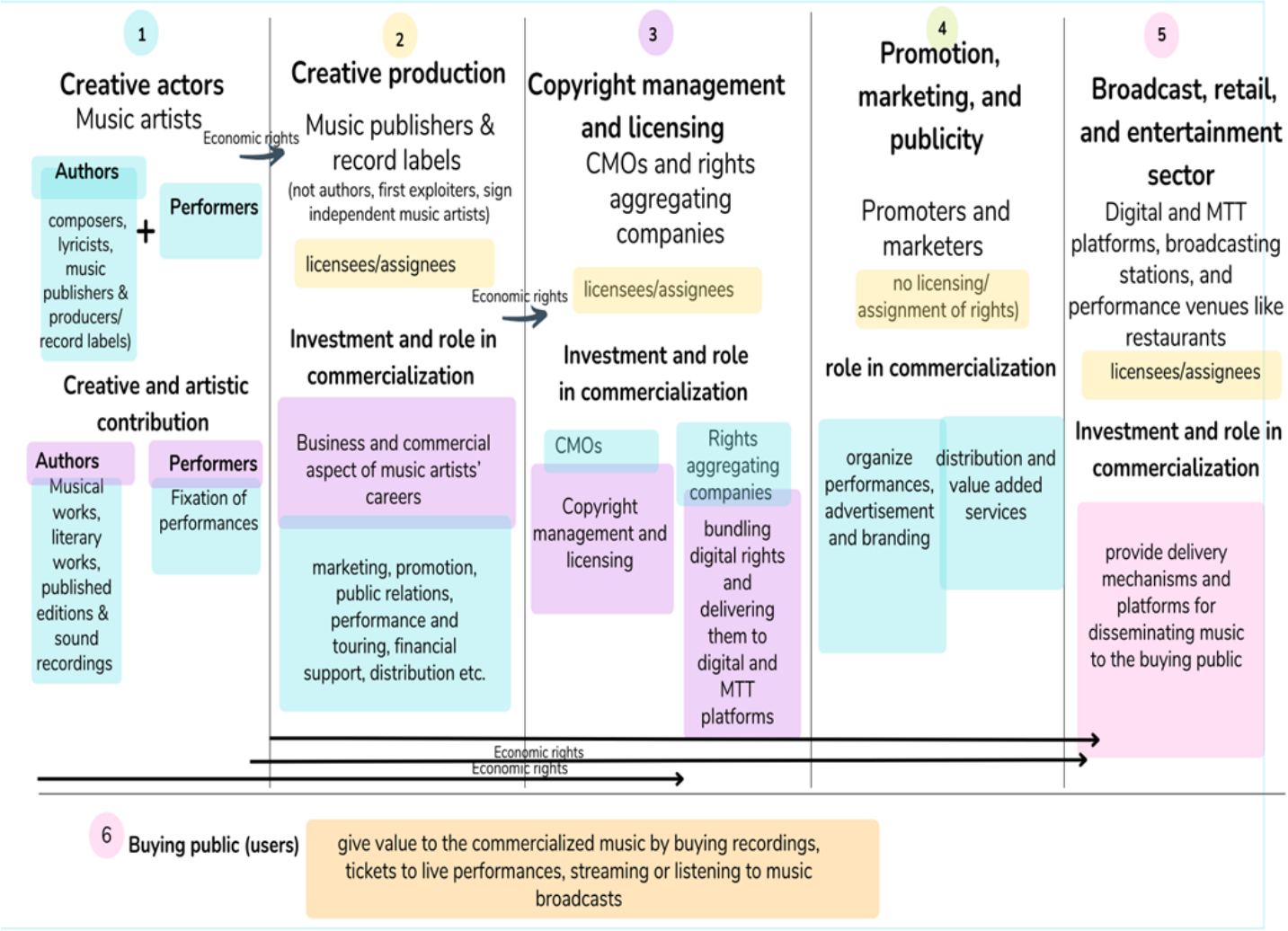
This section is a foregrounding premise for the thesis, emphasizing the importance of balancing stakeholder interests within the music industry's value chain. It explores how copyright plays a crucial role in this balance, particularly in the context of music commercialization and revenue distribution. By examining the various stakeholders involved in the music industry, this section highlights the complexities of their interactions and the impact these relationships have on achieving equitable remuneration for music artists.

Notably, it acknowledges that individual music artists often find themselves in a weaker bargaining position, making them more susceptible to exploitation compared to intermediaries. While intermediaries do not have a legal entitlement to "equitable" remuneration, they have the option to pursue other business opportunities if they are dissatisfied with their income.

What ultimately makes up the rights and music value chain is discussed in multiple sections of the thesis. Section 1.1. introduces the different rights and music value chain. Section 1.1.1. discusses the authorship and ownership of various types of works, including literary works,

musical works, published editions, and sound recordings, as well as how authors commercialize their works and the forms of payment they receive. Section 1.1.2 focuses on the related rights of performers and how they commercialize these rights, and the forms of payments they receive. Meanwhile section 2.0. delves into the broader value chain, explaining payment flows and the different forms of payment.

Figure 1: Value chain of the music industry



Some Aspects of this value chain were inspired by the discussion on the music industry value chain in the SADC as depicted in C Lambert Promoting the culture sector through job creation and small enterprise development in SADC countries: The music industry (2003) *International Labour Organization* 10-31 and L Guibault and O Salamanca *Remuneration of authors and performers for the use of their works and the fixations of their performances* (2016) Publications Office of the European Union 61-101, 103-120.

2.2.1. The role of creative actors in the music industry

Creative actors in the music industry represent the first link in the value chain. They comprise music artists, including authors of literary works, musical works, published editions of literary and musical works, sound recordings and performers.[7] Music artists are responsible for composing new songs, creating lyrics, producing published editions, arranging sound recordings, and fixing performances.[8] These activities may be undertaken by a single individual or collaboratively among multiple parties.[9] A single music artist may handle various roles, such as writing both lyrics and music and managing the entire creative process from inception to recording. In other cases, music productions may result from collaborative efforts, with one artist writing the lyrics, another composing the melody, and others contributing to the arrangement and recording. This section delves into the diverse roles and contributions of creative actors, highlighting their importance in the overall ecosystem of music production and commercialization.

Most creative actors expect to profit or earn a living from their creative endeavours, often in the form of royalties or a share of the revenue generated from the commercialization of their music.[10] Their most significant role after providing their creative and artistic contribution is to navigate the commercialization.[11] Despite the possibilities created by the digital environment for music artists to commercialize music independently, the role of intermediaries remains significant in the Kenyan music industry.[12] The assignment and licensing of rights to intermediaries typically mark the initial step in this process.[13] For creative actors to obtain an

[7] See sections 1.1.1. and 1.1.2. of the thesis for a discussion on the protection of music, authorship, ownership and related rights of performers in Kenyan copyright law.

[8] Ibid.

[9] Ibid.

[10] See J Chege *Copyright Law and Publishing in Kenya* (1978) 24; B Sihanya 'Copyright Law in Kenya' (2010) 41(8) *International Review of Intellectual Property and Competition Law (IIC)* 926 at 938; MW Carroll 'Creative commons as conversational copyright' (2007) *Public Policy Research Paper* 530; M Kim 'The Creative Commons and copyright protection in the digital era: uses of Creative Commons licenses' (2007) 13(1) *Journal of Computer-Mediated Communication* 187 at 187–209.

[11] O Dean *Handbook of South African Copyright Law* (2015) 31.

[12] S Dusollier 'EU Contractual Protection of Creator: Blind Spots and Shortcomings' (2018) 41 *Columbia Journal of Law & the Arts* 435 at 436.

[13] L Guibault and O Salamanca *Remuneration of authors and performers for the use of their works and the fixations of their performances* (2016) Publications Office of the European Union 63-64, 69-72, 79-83.

"equitable" share of the revenue generated from their music, they must exert control over their music, have access to data related to the commercialization of their music, receive proper accounting of payments made by users, and reduce costs of licensing and monitoring the use of their music.[14]

2.2.2. The role of the creative production sector in the music industry

The creative production sector encompasses key participants in the music industry, notably intermediaries such as music publishers and record labels. They can be categorized both as "music artists"—when they receive direct copyright protection as authors of sound recordings and published editions—and as "intermediaries," given their function in signing independent artists to facilitate the commercialization of music.[15] These intermediaries often become the primary exploiters of music through assignment and licensing agreements with independent music artists.[16] They play a pivotal role in financing, marketing, promotion, distribution, brand management, and trademark enforcement, all of which are critical for the further commercialization of music.[17] These intermediaries retain a significant portion of revenue to cover their operational costs and profit margins.

Understanding the dynamics between artists and these intermediaries is essential for grasping the overall landscape of music commercialization and revenue distribution. Music artists' remuneration is heavily influenced by the terms they negotiate with intermediaries in their initial contracts. Challenges often arise during these negotiations due to factors such as limited experience, information asymmetries or eagerness to be published or produced. Given the

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[14] CI Okorie *Multi-sided music platforms and the law: copyright, law and policy in Africa* (2019) 15; S Dusollier 'The master's tools v. the master's house: Creative commons v. copyright' (2006) 29 *Columbia Journal of Law & Arts* 271 at 280; M Perel and N Elkin-Koren 'Accountability in algorithmic copyright enforcement' (2015) 19 *Stanford Technology Law Review* 473 at 477.

[15] See description of "author" in relation to sound recordings and published editions in section 2(1) of the Copyright Act, 2001. The concepts of authorship and ownership are discussed in section 1.1.1. of this thesis.

[16] See value chain in section 2.2. of the thesis. See also Guibault and Salamanca op cit note 13 at 65-66.

[17] See the description of the functions of record labels in Kenya in the Kenya Association of Music Producers (KAMP) website available at *https://www.kamp.or.ke/index.php/en/membership/music-producer*, accessed on 23 July 2023.

unpredictable value of music prior to commercialization, artists may agree to lump-sum payments, and often miss out on securing remuneration for future commercialization.[18]

Further complicating this issue, intermediaries may retain control over music without significant efforts to commercialize it, particularly if there is no contractual obligation to do so.[19] Subsequent agreements between intermediaries and other third parties that further commercialize the music often lie beyond the control of the artists.[20] Such agreements may include undisclosed commercial advantages benefitting intermediaries but not reflected in revenue shares for music artists. Consequently, music artists risk being cut off from the commercialization chain, thus missing out on the revenue generated across the entire value chain.[21] Additionally, many music artists are reluctant to challenge the terms of their initial contract terms due to a lack of information and the fear of potential industry backlash or blacklisting.[22]

[18] JC Jarosz and MJ Chapman 'The Hypothetical Negotiation and Reasonable Royalty Damages: The Tail Wagging the Dog' (2013) 16(3) *Stanford Technology Law Review* 769 at 799-800; Jo Asein 'Redefinition of first ownership under Nigerian Copyright Law-Lessons from an inchoate mutation' (2007) 38(3) *International Review of Intellectual Property and Competition Law (IIC)* 299 at 314; R Xalabarder 'The Principle of Appropriate and Proportionate Remuneration of ART. 18 Digital Single Market Directive: Some Thoughts for Its National Implementation' (2020) 4 *InDret* 1 at 1-51.

[19] Ibid.

[20] Dusollier op cit note 14 at 448-449.

[21] Ibid, KM Gutsche 'Equitable Remuneration for Authors in Germany-How the Germany Copyright Act Secures Their Rewards' (2002) 50 *Journal of the Copyright Society of the USA* 257 at 259-260.

[22] See notable jurisprudence on cases that illustrate the reluctance of artists to assert their rights against MTTS LIKE Safaricom and the significant hurdles they faced in doing so*: Phillip Njoroge Kimani v Liberty Africa Technologies and Safaricom Limited* Constitutional Petition 147 of 2019 [2021] eKLR; *Laban Juma Toto & another v Kenya Copyright Board & 13 others* [2017] eKLR; *Kisumu Bar Owners Association & another v Music Copyright Society of Kenya & 2 others* [2017] eKLR; *Mercy Munee Kingoo & another v Safaricom Limited another* Petition 5 of 2016 [2016] eKLR; *Xpedia Management Limited & 4 others v Attorney General & 5 others* Petition 317 of 2015 [2016] eKLR; *Republic v Kenya Copyright Board ex parte Music Copyright Society of Kenya*, High Court Miscellaneous Judicial Review Application Number 133 of 2011 (unreported); *John Boniface Maina v Safaricom Limited* Civil Suit 808 of 2010 [2013] eKLR; *Music Copyright Society of Kenya Ltd v Safaricom Limited and another* Civil Case 509 of 2009 [2010] eKLR; *Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd* Civil Case 154 of 2009 [2009] eKLR; *Alternative Media Limited v Safaricom Limited* Civil Case No 263 of 2004 [2005] eKLR. See further AK Kirui, MN Wanyama and WO Shitandi 'Disruptive innovation: Exploring the impact of Skiza tunes on the Kenyan music industry' (2022) 1(1) *Journal of Music and Creative Arts (JMCA)* 1-10.

2.2.3. The role of the copyright management and licensing sector in the music industry

This section examines the critical role of the copyright management and licensing sector in navigating the complexities of rights management within the music industry. The fragmentation of rights, coupled with perceived bargaining imbalances between copyright owners and large digital and MTT platforms, along with the transaction costs associated with licensing, monitoring the use of works, collecting royalties, and digitizing works, creates significant challenges for copyright owners to undertake copyright management and licensing on an individual basis.[23]

Copyright owners usually authorize CMOs and rights aggregating companies to manage their rights and ensure remuneration for their works.[24] CMOs facilitate commercialization of music by licensing public performance and reproduction rights on behalf of their members. They negotiate licenses on a basis of tariffs and collect and distribute royalties for these rights.[25] Music aggregators aggregate the demands associated with the commercialization of music (rights attached to the sound recording) in digital and MTT platforms.[26] They bundle digital rights (e.g., sound recording rights) from copyright owners and deliver them to digital and MTT platforms, such as Safaricom's Skiza Tunes. They also secure permissions for works' use on digital platforms, including licensing economic rights related to sound recordings and, where applicable, the underlying compositions and lyrics. Music aggregators also perform other tasks like monitoring the status of rights, digitalization, adapting digital formats to the requirements of digital and MTT platforms and delivering marketing materials to digital and MTT platforms.

Safaricom's Skiza Tunes example is best to illustrate the role of music aggregators and CMOs in commercializing music in Kenya. Aggregators handle licensing agreements with Safaricom, ensuring the necessary permissions are secured. Safaricom collects subscription fees from users

[23] A Katz 'Copyright Collectives: Good Solution but for Which Problem?' in RC Dreyfuss, H First and DL Zimmerman *Working Within the Boundaries of Intellectual Property Law* (2010) 395-430 at 395; S Nérisson 'Remaining Scopes for Collective Management of Copyright in the Online World' *Remuneration of Copyright Owners* (2017) 71-83 at 72.

[24] Ibid.

[25] See definition of "collective management organization" in section 2(1) of the Copyright Act, 2001; see also M Ficsor *Collective Management of Copyright and Related Rights* (2002) 17.

[26] P Galuszka 'Music aggregators and intermediation of the digital music market' (2015) 9 *International Journal of Communication* 254 at 262-263. It is important to note that music aggregators do not deal with songwriters' rights, which must be negotiated with collecting societies and/or music publishers.

and allocates a portion of the revenue to aggregators. Aggregators distribute payments to copyright owners and music artists, often through CMOs. These payments are proportional to the number of downloads or plays a tune receives, based on usage data from Safaricom.

However, significant deductions are made at various stages. Safaricom reportedly retains about 60% of the revenue.[27] Aggregators and CMOs deduct administrative fees and service costs before distributing royalties to artists. As a result, the actual amount received by artists is often minimal.

Kenyan copyright law requires copyright owners to work through CMOs for the management of public performance and reproduction rights. This mandatory reliance on CMOs restricts copyright owners from bypassing these organizations to receive payments directly through aggregators, as highlighted in the case of *Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd*.[28]

While CMOs and aggregators are essential for managing copyright and distributing revenue, their role is accompanied by several concerns. These include delays and inefficiencies in royalty collection and distribution, limited transparency regarding revenue flows and deductions, which often leaves artists uncertain about their fair share, and a lack of oversight mechanisms to ensure that artists receive "equitable" remuneration.[29]

2.2.4. Promotion, marketing, and publicity sector in the music industry

The intermediaries in this sector negotiate and organize live performances with agents, broadcasters, and venue agencies, as well as manage advertising, branding, distribution, and

[27] R Matheka 'Toa Kitu Kidogo Culture: Searching for contract model that is practical in Kenyan live music performance' (Bachelor Thesis, JAMK University of Applied Sciences, 2010); V Achuka 'How top Kenyan singers signed away their millions in contract scam' *The Standard* 19 February 2017 available at *https://www.standardmedia.co.ke/m/article/2001229878/how-top-kenyan-singers-signed-away-their-millions-in-contract-scam*, accessed on 12 December 2023; L Ilado 'Who gains from Kenya's dysfunctional music royalty space?' *Music in Africa* 11 October 2021 available at *https://www.musicinafrica.net/magazine/who-gains-kenyas-dysfunctional-music-royalty-space*, accessed on 12 December 2023; Kirui 'Ethical dilemmas and copyright challenges among independent artists in Kenya's music industry' (2024) 3(1) *Journal of Humanities and Social Sciences (JHSS)* 13 at 13-22; BO Ouma 'Skewed Royalty Payments by the Music Copyright Society of Kenya; the Tragedy of an Ill-Equipped Regulatory Framework' (2020) *SSRN* 3561493.

[28] [2009] eKLR.

[29] See detailed discussion in section 3.5. of the thesis.

value-added services. While their contributions to music commercialization, artist visibility, and revenue generation are significant, this thesis does not focus on them, as their service delivery is not linked to an assignment or license of rights.

2.2.5. Broadcast, retail, and entertainment sector in the music industry

This section examines the role of intermediaries in the broadcast, retail, and entertainment sector, which provide essential platforms for music dissemination. These intermediaries include digital and MTT platforms, broadcasting stations, and performance venues like restaurants.[30] They claim a significant portion of the revenue generated from music commercialization on their platforms, often taking the largest share.[31] To recoup costs associated with developing these platforms, they frequently seek free or low-cost licenses with favourable terms, often citing privacy law compliance as a reason for their reluctance to share user data.[32]

Three main concerns arise in this context. The first pertains to how music revenue should be distributed among copyright owners (music artists and intermediaries in other sectors) and intermediaries in this sector. The second involves the process of remitting revenue from intermediaries in this sector to copyright owners, specifically, whether intermediaries should directly remit the net revenue to copyright owners or go through CMOs or rights aggregating companies. The third concern relates to the transparency and accountability obligations of intermediaries towards music artists. After assigning or licensing their rights to intermediaries in the creative production sector, most music artists are cut off from the commercialization chain. In the absence of adequate transparency and accountability obligations, music artists have limited means to evaluate the overall value of their music or audit the initial remuneration they negotiated for.

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[30] C Lambert Promoting the culture sector through job creation and small enterprise development in SADC countries: The music industry (2003) *International Labour Organization* 10 at 18.

[31] The National Assembly Departmental Committee on Communication, *Information and Innovation Report on the Consideration of the Copyright (Amendment) Bill, 2021* available at *http://www.parliament.go.ke/sites/default/files/2022-02/REPORT%20ON%20THE%20CONSIDERATION%20OF%20THE%20COPYRIGHT%28AMENDMENT%29%20BILL%2C%202021.pdf*, accessed on 01 March 2022.

[32] Okorie op cit note 14.

2.2.6. The role of the buying public (users) in the music industry

This section examines the essential role of the buying public, or users, in the music industry. Users contribute value to commercialized music through various means, including purchasing recordings, buying tickets for live performances, and streaming or listening to music broadcasts.

2.3. Towards a distributive justice agenda for copyright law in the commercialization of music and distribution of revenue: A Rawlsian and legislative perspective for protecting music artists

This section provides a comprehensive analysis of the nature and purpose of copyright, based on the Rawlsian theory of justice and legislative interventions for protecting music artists. It discusses the distributive realities inherent in copyright and explores how distributive justice can be attained in the commercialization of music and distribution of revenue through copyright law. Furthermore, it extrapolates four fundamental principles that define an "equitable" copyright system within this, setting the foundation for subsequent discussions on equitable remuneration for music artists.

2.3.1. Nature and purpose of copyright

This subsection provides an overview of the nature and purpose of copyright, acknowledging that a comprehensive literature review is beyond the scope of this thesis. Instead, it focuses on the key concepts and principles that define copyright, establishing a foundation for understanding its role in the commercialization of music and the "equitable" distribution of revenue.

The nature and purpose of copyright have long been subjects of debate; some consider it a natural right aimed at protecting music artists, whereas others view it as a property right that facilitates market exchanges of works and performances.[33]

[33] S Schroff 'The purpose of copyright—moving beyond the theory' (2021) 16(11) *Journal of Intellectual Property Law and Practice* 1262 at 1263-1264; R Giblin 'A New Copyright Bargain: Reclaiming Lost Culture

Despite these differing perspectives, there is a general consensus on the balance of interests embodied in copyright systems, especially regarding three main stakeholder groups: the creative actors, the intermediaries and the buying public (users).[34] This consensus emphasizes the fair and equitable allocation of resources, benefits, and burdens, commonly referred to as distributive justice. In this context, copyright aims to strike a balance between rewarding creators and intermediaries, while ensuring that creative works and performances remain accessible to the public. The overarching goal is to foster creativity, innovation, and economic well-being while promoting equitable access to the creative works and performances.

The evolving technological landscape has shifted the basic balance of interests in copyright policy, leading to concerns about how it contributes to the concentration of wealth and power in the hands of copyright industry conglomerates, mostly intermediaries.[35] Scholars have tried to readjust copyright policy, guided by rationales of copyright protection, stakeholder interests and the formulation of specific provisions.[36]

However, achieving the "equitable" balance of stakeholder interests, particularly in the context of the commercialization of music and revenue distribution among artists and intermediaries, remains a significant and persistent challenge within copyright.[37] Simon Schroff argues that

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and Getting Authors Paid' (2017) 41 *Columbia Journal of the Law & Arts* 369 at 372-373; L Bently and B Sherman *The making of modern intellectual property law: the British experience, 1760-1911* (1999); B Sihanya 'Reflections on Open Scholarship Modalities and the Copyright Environment in Kenya' In De Beer et al *Innovation & Intellectual Property* (2014) 203 at 206; M Ouma 'Copyright and the music industry in Africa' (2004) 7 *Journal of World Intellectual Property* 919 at 921.

[34] Schroff op cit note 33; C Geiger 'Freedom of artistic creativity and copyright law: A compatible combination' (2018) 8 *UC Irvine Law Review* 413 at 413-458; JJ Hua 'Balance of Interest in Copyright Systems and Imbalances Under Digital Network Environments' in JJ Hua *Toward a More Balanced Approach: Rethinking and Readjusting Copyright Systems in the Digital Network Era* (2014) 39-68.

[35] See chapter three of the thesis which discusses the commercialization of music in Kenya and the impact of digitization on the various stakeholders involved in the value chain of the music industry. The value chain is described in section 2.2. of the thesis. See also E Elmahjub and N Suzor 'Fair use and fairness in copyright: distributive justice perspective on users' rights' (2017) 43(1) *Monash University Law Review* 274 at 274-298; R Towse 'Creative Industries' in R Towse (ed) *A Handbook of Cultural Economics* (2011) 125, 127-8; AK Kirui 'Free music streaming for Kenyan independent artists: A blessing in disguise?' (2023) 12(2) *African Musicology Online* 90-102; AK Kirui, MN Wanyama and WO Shitandi 'Disruptive innovation: Exploring the impact of Skiza tunes on the Kenyan music industry' (2022) 1(1) *Journal of Music and Creative Arts (JMCA)* 1-10.

[36] Hua op cit note 34 at 39-68; R Giblin and K Weatherall *What if we could reimagine copyright* (2017); D Gervais and A Maurushat 'Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management' (2003) 2(1) *Canadian Journal of Law and Technology* 15 at 15-33; D Gervais *Fairness, morality and ordre public in intellectual property* (2020) generally.

[37] Kirui op cit note 35 at 90-102; Kirui, Wanyama and Shitandi (2023) op cit note 35 at 1-3; BO Ouma 'Skewed Royalty Payments by the Music Copyright Society of Kenya; the Tragedy of an Ill-Equipped Regulatory

this challenge stems from a lack of specificity in traditional copyright discourse, resulting in the creation of only broad guiding principles;[38] and implementing changes that are far from the status quo.[39] Consequently, it is argued that copyright should be based on new principles,[40] replaced by an alternative approach[41] or abolished altogether[42]. In the absence of a normative framework for defining an "equitable" copyright system in the commercialization of music and distribution of revenue, this thesis aims to clarify copyright's distributive justice role using the Rawlsian theory and legislative interventions designed to protect music artists. Although the Rawlsian theory is not a theory of copyright or even IP, it complements fairness and social welfare justifications of copyright by providing essential criteria for guiding the "equitable" distribution of revenue. These aspects are often overlooked in traditional copyright discourse.[43]

Framework' (2020) *SSRN* 3561493; RP Merges *Justifying intellectual property* (2011) 3; S Schroff 'The purpose of copyright—moving beyond the theory' (2021) 16(11) *Journal of Intellectual Property Law and Practice* 1262 at 1263-1264; Schroff op cit note 33 at 1262-1272; Elmahjub and Suzor op cit note 35 at 274, 277-278; A Story 'Balanced Copyright: Not a Magic Solving Word' *Intellectual Property Watch* 27 February 2012 available at *https://www.ip-watch.org/2012/02/27/%E2%80%98balanced%E2%80%99-copyright-not-a-magic-solving-word/*, accessed on 7 February 2022. The notion of balance for framing interests in copyright is the most popular approach for intellectual property, but it has been critiqued for being inappropriate and unresolvable. See for example, A Drassinower 'From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law' (2009) 34 *Journal of Corporation Law* 991 at 991-1008; N Suzor 'Access, Progress, and Fairness: Rethinking Exclusivity in Copyright' (2013) 15 *Vanderbilt Journal of Entertainment and Technology Law* 297 at 309-313; L Guibault and O Salamanca *Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works* (2016) European Commission 17-19; M Katz *Capturing sound: How technology has changed music* (2010); J Bockstedt, RJ Kauffman and FJ Riggins 'The move to artist-led online music distribution: Explaining structural changes in the digital music market' (2005) in *Proceedings of the 38th Annual Hawaii International Conference on System Sciences* 7; I De Voldere et al. 'Mapping the Creative Value Chains: A study on the economy of culture in the digital age' (2017) *Final report. Luxembourg: Publications Office of the European Union*.

[38] Schroff op cit note 33 at 1264.

[39] Ibid, PB Hugenholtz and M Kretschmer 'Reconstructing Rights: Project Synthesis and Recommendations' in PB Hugenholtz (ed) *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (2018) 1-10.

[40] PB Hugenholtz (ed) *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (2018); D Gervais *(Re) structuring copyright: a comprehensive path to international copyright reform* (2017); Giblin and Weatherall op cit note 36.

[41] Schroff op cit note 33 at 1262-1272; N Elkin-Koren and E Salzberger *The Law and Economics of Intellectual Property* 103-107.

[42] J Smiers 'Abandoning copyright: a blessing for artists, art, and society' 2005 *de Volkskrant* 380; J Smiers 'The abolition of copyright: better for artists, Third World countries and the public domain' 2000 62(5) *Gazette (Leiden, Netherlands)* 379.

[43] J Hughes and RP Merges 'Copyright and Distributive Justice' (2016) 92 *Notre Dame Law Review* 513 at 513-578; D Liu 'Copyright and the pursuit of justice: A Rawlsian analysis' (2012) 32(4) *Legal Studies* 600-622.

Copyright scholarship on distributive justice and its effect on the distribution of revenue is not very common.[44] The distributive view of copyright is mainly discussed in the context of encouraging further creativity, economic development, and public interest goals of access by expanding the scope of limitations and exceptions.[45] When discussed in the context of the commercialization of music, some scholars only go as far as recognizing the 'corporate copyright trope': how much wealth is created by copyright incentives and who holds the wealth.[46] This thesis advances the application of distributive justice to copyright by offering a novel approach that explores how justice as fairness can directly shape the contractual dynamics at the core of copyright law, particularly in the exercise of authors' and performers' exclusive rights in their relationships with intermediaries. This thesis relies on Hughes and Merges's interpretations of distributive justice as the most appropriate justification for defining "equitable" copyright.[47] Hughes and Merges argue that the distributive justice rationale for copyright provides solutions for the skewed distribution of wealth, especially for the least disadvantaged groups.[48] They advance the Rawlsian theory of justice and posit three main questions that should be addressed by copyright from a distributive justice perspective:

[44] Hughes and Merges op cit note 43 at 514 and 516.

[45] Hughes and Merges op cit note 43 at 515; G Bernstein 'In the Shadow of Innovation' (2010) 31 *Cardozo Law Review* 2257 at 2257-2312; J Litman 'Lawful Personal Use' (2007) 85 *Texas Law Review* 1871 at 1879–1882; V Houweling and M Shaffer 'Distributive values in copyright' (2004) 83 *Texas Law Review* 1535 at 1536, 1537-39 and 1567; L Shaver 'Copyright and inequality' (2014) 92 *Washington University Law Review* 117 at 117-168. S Yanisky-Ravid 'The hidden though flourishing justification of intellectual property laws: distributive justice, national versus international approaches' (2017) 21 *Lewis & Clark Law Review* 1 at 28; JJ Baloyi 'Demystifying the role of copyright as a tool for economic development in Africa: Tackling the harsh effects of the transferability principle in copyright law' (2014) 17(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 87 at 87-166; M Sunder *From goods to a good life: intellectual property and global justice* (2012); JH Reichman 'Intellectual property in the twenty-first century: will the developing countries lead or follow?' (2009) *Houston law review/University of Houston* 1115-1185.

[46] Hughes and Merges op cit note 43 at 515; G Davis 'When Copyright Is Not Enough: Deconstructing Why, as the Modern Music Industry Takes, Musicians Continue to Make' (2016) 16(2) *Chicago-Kent Journal of Intellectual Property* 373 at 391-395; J Litman 'Real Copyright Reform' (2010) 96(1) *Iowa Law Review* 1 at *27*-28; W Patry *Moral panics and the copyright wars* (2009) 76 and K Aoki '(Intellectual) property and sovereignty: Notes toward a cultural geography of authorship' (1995) 48 *Stanford Law Review* 48 1293-1356; PS Menell 'Property, intellectual property, and social justice: mapping the next frontier' (2016) 5 *Brigham-Kanner Property Rights Conference Journal* 147 at 147, 178; TW Bell 'Author's Welfare: Copyright as a Statutory Mechanism for Redistributing Rights' (2003) 69 *Brooklyn Law Review* 229-280.

[47] Hughes and Merges op cit note 43 at 513-578.

[48] Ibid.

> "Is our copyright system basically fair? Does it exacerbate or ameliorate the skewed distribution of wealth in our society? Does it do anything at all for disempowered people, people at the bottom of the socio-economic hierarchy?"[49]

The distributive realities of copyright law are an important consideration in discussions about the role of copyright. Economists and psychologists have raised concerns about copyright's efficacy in addressing distributional concerns.[50] Economists contend that copyright primarily serves to enhance economic efficiency rather than achieve the equitable redistribution of resources, which is a central tenet of distributive justice advocates.[51] They further argue that economic efficiency is a more suitable measure than distributive justice for evaluating the effectiveness of revenue distribution systems.[52]

Economic efficiency and social justice are based on the consequential effects of copyright and appreciate that copyright adjustment may have repercussions on other factors.[53] They are both concerned with fairness since they handle the consequences of revenue distribution but differ in their approach.[54] Economic efficiency is a consequentialist theory meaning that consequences are all that matters for its analysis, "regardless of other individuals and fairness".

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[49] Ibid at 514; GS Lunney Jr 'Copyright and the 1%' (2020) 23 *Stanford Technology Law Review* 1 at 19.

[50] On economic efficiency, see RO Zerbe *Economic efficiency in law and economics* (2002) 65; O Bracha, T Syed 'Beyond Efficiency: Consequence-Sensitive Theories of Copyright' (2014) 29 *Berkeley Technology Law Journal* 229 at 229-230; JE Penner *The idea of property in law* (1997) 103-04, 178, 206-07; Yanisky-Ravid op cit note 45 at 25-26; L Kaplow and S Shavell 'Why the legal system is less efficient than the income tax in redistributing income' (1994) 23(2) *The Journal of Legal Studies* 667-681 at 667, 669; Houweling and Shaffer op cit note 45 at 154; JL Harrison 'Rationalizing the Allocative/Distributive Relationship in Copyright' (2003) 32 *Hofstra Law Review* 853 at 856; Elmahjub and Suzor op cit note 35 at 276; RL Revesz 'Regulation and Distribution' (2018) 93 *New York University Law Review* 1489 at 1489; L Kaplow and S Shavell 'Fairness versus welfare' (2000) 114 *Harvard Law Review* 961; D Benoliel 'Copyright distributive injustice' (2007) 10 *Yale Journal of Law & Technology* 45 at 72; J Rawls *A Theory of Justice* (1999) 67; K Logue and R Avraham 'Redistribution Optimally: of Tax Rules, Legal Rules, and Insurance' (2002) 56 *Tax Law Review* 157, 158, 166; JR Hicks 'The foundations of welfare economics' (1939) 49(6) *Economic Journal* 696 at 712. On the intersection of the psychology of poverty and IP, see SP Bair 'Impoverished IP' (2019) 81(3) *Ohio State Law Journal* 523-566.

[51] Economic efficiency is defined as the state where resources are optimally allocated to each person while minimizing waste and inefficiency, see Zerbe op cit note 50.

[52] Ibid, See A Rawlsian Analysis of the Economic Fairness in Z Wu *A legal framework for global joint copyright management in musical works: based on Rawls's Theory of Justice* PhD (Lancaster University) (2017) 129.

[53] O Bracha and T Syed 'Beyond Efficiency: Consequence-Sensitive Theories of Copyright' (2014) 29 *Berkeley Technology Law Journal* 229 at 229-230.

[54] Ibid at 247.

On the contrary, distributive justice is "consequence sensitive": consequences are an essential element of its analysis, but they are not its exclusive element.[55]

The general rule is that legal regimes, like copyright, are solely designed for economic efficiency and should not be concerned with distribution.[56] Instead, specific legal regimes like income tax and social welfare systems are more appropriate for distributional matters.[57] Proponents of this argument contend that redistribution through copyright disrupts the economy in the long run, more than progressive taxation.[58] Another reason advanced is that using copyright will require constant state involvement in individual lives, leading to higher administration costs and adverse effects on work incentives.[59] They also argue that distributional remedies, like damages, only benefit a small portion of the population.[60]

While taxation and social welfare systems are the most common methods of ensuring equity in the distribution of resources, copyright law qualifies as an exception to the general rule restricting general laws from dealing with distributional concerns.[61] Notably, though, copyright is a different distributive justice tool that only operates in the copyright context and not for the entire population.[62] Three main arguments support redistribution through copyright law. First, copyright and allocation/ distribution rules are existential since all IP laws were initially designed according to egalitarian concepts.[63] Major principles of copyright law, like compulsory licensing, limitations, exceptions and the duration for protection are concerned

[55] See discussion on social justice meets efficiency in GB Ramello 'Access to vs. exclusion from knowledge: Intellectual property, efficiency and social justice' in A Gosserie, A Marciano and A Strowel *Intellectual property and theories of justice* (2008) 73 at 86.

[56] See Revesz op cit note 50 at 1489; Yanisky-Ravid op cit note 45 at 25; Kaplow and Shavell op cit note 50 at 667 and 669; Benoliel op cit note 50 at 72; Rawls (1999) op cit note 50 at 67.

[57] Revesz op cit note 50 at 1489; Yanisky-Ravid op cit note 45 at 25; Kaplow and Shavell op cit note 50 at 667 and 669; Benoliel op cit note 50 at 72; Rawls (1999) op cit note 50 at 67; Logue and Avraham op cit note 50 at 157, 158 and 166; Hicks op cit note 50.

[58] Benoliel op cit note 50 at 77.

[59] Ibid at 76-77.

[60] Ibid at 72 and 74; Yanisky-Ravid op cit note 45 at 25.

[61] Yanisky-Ravid op cit note 45 at 26.

[62] Ibid at 27; D Lewinsohn-Zamir 'In defense of redistribution through private law' (2006) 91 *Minnesota Law Review* 326 at 329-32.

[63] Yanisky-Ravid op cit note 45 at 19.

with distributive matters.[64] Yanishky argues that the preference for economic efficiency as the "only proper" rationalization of copyright is a product of policy makers' gradual and malicious modification of IP laws.[65]

Secondly, copyright is more appropriate than tax and social welfare systems in allocating rights and revenue related to copyright transactions since it defines the rights and interests of different stakeholders in the commercialization of music and distribution of revenue.[66] Finally, in Kenya, the most pressing issue for music artists is the fair distribution of the 'proverbial music revenue pie', and copyright is pivotal in addressing this challenge.[67]

A criticism has been raised at the intersection of poverty psychology and intellectual property (IP), suggesting that low-income groups may not benefit from distributive justice because adversity limits their creative potential.[68] The criticism asserts that IP cannot address inequalities because it does not cause them. Thus, assisting a non-creative, poor person seems futile, as IP fundamentally hinges on the act of creation.[69] This argument is debunked by the fact that copyright requirements do not require a complex skillset and can be readily met by people from different socioeconomic backgrounds.[70] This contention is particularly unpersuasive when considering the Kenyan context, where many music artists come from socioeconomically disadvantaged backgrounds and depend on music for their livelihood.[71]

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[64] Harrison op cit note 50 at 856; Benoliel op cit note 50 at 72; Rawls (1999) op cit note 50 at 67; see also a discussion on copyright's primary purpose: enlarging the creative pie in Houweling and Shaffer op cit note 45 at 1540.

[65] Yanisky-Ravid op cit note 45 at 3, 18-19.

[66] See similar reasoning Nahmias (2020) 17 (2) *Northwestern Journal of Technology and Intellectual Property* 155 at 159, fn 9 discussing the distinctiveness of copyright contracts; Gutsche op cit note 21 at 257-258 uses this similar argument to explain the background for legislative revision of the copyright system to effectively cover copyright contracts despite the existence of contract law; Guibault and Salamanca op cit note 13.

[67] Ibid, Kirui op cit note 27 at 13-22; Kirui (2023) op cit note 35; Kirui, Wanyama and Shitandi op cit note 35 at 1-10; Ouma (2020) *op cit note 27*; RD Willig and EE Bailey 'Income-distribution concerns in regulatory policymaking' (1981) *Studies in public regulation* 79 at 79-118; TE Keeler 'Theories of regulation and the deregulation movement' (1984) 44(1) *Public Choice* 103 at 103-145.

[68] Bair op cit note 50 at 523-566.

[69] Ibid.

[70] Ibid.

[71] For a further discussion on this position, refer to chapter three of this thesis.

The relationship between copyright and distributive justice is complex and there are different perspectives on how to best balance the competing stakeholder interests in the music industry. Nevertheless, it is evident that copyright significantly empowers different stakeholders to generate income and accumulate wealth, a fundamental element of distributive justice. This thesis considers the principles advanced by the Rawlsian theory and legislative interventions designed to protect music artists, applying them to copyright, the commercialization of music and the distribution of music revenue to analyze the role of copyright.

2.3.2. Rawlsian theory of justice and copyright law: achieving distributive justice in the commercialization of music and distribution of revenue

This section delves into the Rawlsian theory of justice, which serves as a framework for understanding the principles of an "equitable remuneration" in the context of copyright law.

> "Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust".[72]

The Rawlsian theory emphasizes the primacy of justice for laws, institutions and social systems. Rawls envisions a just society as one that guarantees a "fair" and "equitable" distribution of opportunities and resources, which entails equal basic liberties, equality of opportunity and maximizing benefits for the least advantaged when addressing inequalities.[73] The theory is based on two principles that are agreed upon by people in the 'original position': equal basic liberties principle and the difference principle.[74] It plays a significant role in

[72] Rawls (1999) op cit note 50 at 3.

[73] Yanisky-Ravid op cit note 45 at 17; R Wolff *Understanding Rawls: A Reconstruction and Critique of a Theory of Justice* (1977) 201; S Olsaretti *The Oxford handbook of distributive justice* (2018) 1-3.

[74] The Kantian focus on individual rights may be summarized as: the government exists to enhance individual liberties by allowing everyone to pursue their private interests, see F Rauscher 'Kant's social and political philosophy' (2017) *The Stanford Encyclopedia of Philosophy*; Rawls (1999) op cit note 50; Liu op cit note 43 at 600-621; Wu op cit note 52.

exploring relevant considerations for assessing the justice or fairness of laws, institutions and social systems that secure basic liberties and establish social and economic inequalities.[75]

2.3.2.1. The original position in the Rawlsian theory of justice

This subsection delves into the concept of the original position, which serves as a foundational element of the Rawlsian theory of justice. It introduces the idea of a hypothetical scenario where individuals, under a "veil of ignorance," are tasked with establishing principles of justice without knowledge of their own social status, abilities, or personal circumstances.

By doing so, Rawls argues that the resulting principles would be inherently fair and impartial, as they are formulated without bias or self-interest. This concept provides a basis for exploring how justice can be achieved in the creation and application of laws, including copyright law, ensuring a fair and equitable distribution of opportunities and resources.

The Rawlsian idea of justice is based on his description of an ideally well-ordered society.[76] A well-ordered society should be designed to advance the good of its members and regulated by a public conception of justice.[77] The conception of justice is created by rational individuals in the original position where rules are made behind a veil of ignorance.[78]

In the original position, the rules are dictated by free and equal people who are not influenced by their social status and natural factors like their fortune in the distribution of natural talents and abilities.[79] The 'original position' is meant to reflect rational preferences concerning justice as fairness and the initial equality of contracting parties.[80]

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[75] Olsaretti op cit note 73 at 1-3.

[76] J Rawls 'Political Liberalism: Reply to Habermas' (2012) in JG Finlayson and F Freyenhagen *Habermas and Rawls: disputing the political* (2012) 46-91.

[77] Ibid.

[78] Ibid.

[79] Yanisky-Ravid op cit note 45 at 16; Liu op cit note 43 at 608; Rawls op cit note 64.

[80] Rawls (1999) op cit note 50 at 25.

Rawls proposes two principles which he believes people in the 'original position of thought' would agree to govern the allocation of rights and resources:

> "First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.
>
> Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all".[81]

These two principles express three fundamental ideas: liberty, equality and rewarding contributions meant for the common good.[82]

The Rawlsian description of an ideal society has been critiqued for being highly abstract and inappropriate for evaluating institutions that exist in an imperfect society.[83] Indeed, Rawls's primary goal was the description of a fully just society, but he also treats his theory as a standard for assessing imperfect societies.[84] He anticipates that members of a society will still engage in "justificatory dialogue" when the veil of ignorance is lifted.[85]

The Rawlsian theory also requires direct state involvement in promoting justice.[86] This is often frowned upon for interference with individual liberties.[87] The argument against state involvement is based on the concept of free markets which suggests that industry insiders should be the primary decision-makers in any economic system.[88] Nevertheless, state

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[81] Ibid at 53.

[82] Olsaretti op cit note 73 at 1-2.

[83] Hughes and Merges op cit note 43 at 524-525.

[84] Ibid at 526.

[85] GA Cohen 'Incentives, inequality, and community' (1992) 13 *The Tanner Lectures on human values* 263-329, as quoted in Hughes and Merges op cit note 43 at 526.

[86] A Chander and A Chander 'Is Nozick Kicking Rawls's Ass-Intellectual Property and Social Justice' (2006) 40 *University of California Davis Law Review* 563 at 567.

[87] See, for example, RP Merges 'Contracting into liability rules: Intellectual property rights and collective rights organizations' (1996) 84 *California Law Review* 1293 at 1293-1394; R Nozick *Anarchy, state, and utopia* (1974); N Olsson 'The Importance of Collective Management of Copyright and Related Rights' (2005) *WIPO National Seminar on Copyright, Related Rights, And Collective Management* 2-3.

[88] Merges op cit note 87.

intervention is supported since even free markets depend on legal interventions like property law and the law of contract.[89] Additionally, the government must shape social norms and preferences and develop standards for measuring social well-being and the "equitable distribution" of resources.[90] It is also quite common for industry insiders to seek government intervention.[91]

2.3.2.2. Equal basic liberties principle

Having explored the foundational concept of the original position, we now turn to the first of Rawls' two principles of justice: the Equal Basic Liberties Principle. The equal basic liberties requires equality in the assignment of basic rights: "each person . . . [should] have an equal right to the most extensive basic liberty compatible with a similar liberty for others".[92] Every rational person in the original position is presumed to want these basic rights, thus, these rights should be equally distributed.[93] This principle takes precedence and requires society to be structured to guarantee individuals the maximum amount of liberties. The only reason for limiting basic liberties and making them less extensive is when they would interfere with other people's liberties, not trading them off for economic and social benefits.[94]

'Basic liberty', as construed by Rawls, is a means to achieve social justice and equality and essential for an autonomous or free life and adequate development.[95] Examples of these rights or liberties include the freedom of conscience and thought, freedom of expression, freedom of association, right to vote, the right to hold personal property and rights linked to democracy and the rule of law. According to Rawls, the right to personal property is justified as a basic liberty based on individual autonomy or integrity. When applied to Intellectual Property (IP),

[89] CR Sunstein *Free markets and social justice* (1997).

[90] Ibid.

[91] See for example, music artists seeking government intervention in music revenue collection and distribution in Olsson op cit note 87.

[92] Rawls (1999) op cit note 50 at 302; Wu op cit note 52 at 49.

[93] Ibid.

[94] Rawls (1999) op cit note 50 at 302.

[95] Elmahjub and Suzor op cit note 35 at 279; Rawls (1999) op cit note 35 at xii.

like copyright, the right is conceivable as a basic liberty "for those who would most benefit from creative independence and career fulfilment."[96]

However, copyright has relatively little impact in fulfilling the requirement that each citizen enjoys equal basic liberties compatible with other citizens' basic liberties.[97] The concept of exclusive rights, for example, creates property restrictions that may hinder other people's exercise of their basic liberties. Nevertheless, copyright law is generally in line with the equal basic liberties principle. Copyright offsets the access restrictions in a rather limited way through limitations, exceptions, and fair dealing provisions.[98] Copyright also contributes to the increase of the public domain since it does not protect all forms of expression, some expressions are free.

The principle of equal basic liberties can help ensure equal access and opportunity in the music industry by addressing barriers such as financial costs, lack of representation, and discrimination. To promote diversity, systems should offer financial and legal support to underrepresented creators while ensuring equitable access to distribution platforms and fair negotiations with record labels and streaming services.

2.3.2.3. Difference principle

Building on our understanding of the equal basic liberties principle, we now examine the difference principle, which offers a framework for addressing social and economic inequalities. The difference principle provides how social and economic institutions should arrange inequalities to ensure fair access to opportunities that yield above-average earnings, especially for the least advantaged.[99] This principle embodies two other sub-principles and states that social and economic inequalities should be arranged so that they are:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and

[96] Merges op cit note 37 at 110.

[97] Hughes and Merges op cit note 43 at 526-528.

[98] Ibid at 527-8.

[99] Ibid at 519; Rawls (1999) op cit note 50 at 68-69.

(b) attached to offices and positions open to all under conditions of fair equality of opportunity.[100]

The first sub-principle deals with income and wealth inequalities.[101] These inequalities are allowed if they enhance the benefits of the least advantaged.[102] The second sub-principle deals with inequalities related to opportunities. It requires that individuals with equivalent talents and abilities and with the same willingness to use them, should have the same prospects of success regardless of their social status.[103]

The difference principle suggests that it is rational for societies to pursue increased wealth even at the expense of equal basic liberties, provided that the distribution of the wealth prioritizes justice and opportunities for the least advantaged.[104] Inequalities are allowed if they enhance opportunities for those with fewer opportunities, mainly because institutions are in jeopardy when income and wealth inequalities exceed a certain limit.[105]

The difference principle requires social and economic institutions to maximize justice by regulating and maintaining a balance of the interests that accrue from it.[106] The difference principle also provides the ultimate standard for assessing and reforming economic institutions to eventually realize the "equitableness" prescribed by the equality and basic liberties principle.[107] Consequently, the Rawlsian conception of justice should guide the formation and revision of laws.[108]

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[100] This is an explanation of the difference principle in a simpler form. See Rawls (1999) op cit note 50 at 53, 72, 266 and Olsaretti op cit note 73 at 693.

[101] Rawls (1999) op cit note 50; Olsaretti op cit note 73 at 19-29.

[102] Rawls (1999) op cit note 50.

[103] LA Alexander 'Fair equality of opportunity: John Rawls'(best) forgotten principle' (1985) 11 *Philosophy research archives* 197 at 198.

[104] B Barry 'John Rawls and the priority of liberty' (1973) *Philosophy & Public Affairs* 274 at 276-277; Hughes and Merges op cit note 43 at 519.

[105] Rawls (1999) op cit note 50 at 245-246; Olsaretti op cit note 73 at 17.

[106] M Kretschmer, E Derclaye, M Favale and R Watt *The Relationship between Copyright and Contract Law: A Review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy (SABIP)* (2010) 16. For the different transactions, see the value chain discussed in section 2.2. of this thesis.

[107] Olsaretti op cit note 73 at 19-21.

[108] Rawls (1999) op cit note 50 at xii; Hughes and Merges op cit note 43 at 519.

The difference principle applies to copyright law since copyright causes distributional concerns in its application, especially concerning the distribution of revenue generated from the commercialization of works and performances.[109] When applied to copyright, the difference principle requires the copyright system to prioritize the protection of the least advantaged. Simply put, copyright should regulate and maintain an equitable balance of interests that accrue from it.

2.3.2.4. A Rawlsian approach to regulating the commercialization of music and the distribution of revenue

With the foundational principles of justice—specifically, the equal basic liberties principle and the difference principle—established, we can now examine their application within the music industry. This section explores a Rawlsian approach to regulating the commercialization of music and the distribution of revenue, highlighting the necessity for an equitable framework that ensures fair treatment for both music artists and intermediaries, the main stakeholders in this context. Distributive justice is a central tenet of the Rawlsian theory of justice. It underscores the moral obligation of the society, and by extension, the government to address inequalities and safeguard the interests of the least advantaged members of the community.[110] In the Kenyan context, distributive justice calls for equitable distribution of resources and opportunities to rectify existing disparities, ultimately striving for a more equitable society for all.[111] Within the context of copyright and the commercialization of music, distributive justice aims to ensure fairness in music creation, distribution, commercialization, and revenue distribution.

This thesis contends that copyright intervention serves as the most effective means for the State to promote distributive justice in the music industry. To align with the principles of distributive justice, copyright law must uphold equal basic liberties and difference principles. In this

[109] E Elmahjub and Suzor op cit note 35 at 274-298; Towse op cit note 35 at 125, 127-8.

[110] Rawls (1999) op cit note 50; Chander and Chander 'op cit note 86 at 567; OI Sarafa and S Oyewole 'John Rawls on the Theory of Justice' in D Abdulrahman et al. *Classical Theorists in the Social Sciences: From Western Ideas to African Realities*. African Books Collective (2023) ed. 347-358.

[111] Rawls (1999) op cit note 50; M Mbondenyi and T Kabau 'Distributive Justice in Kenya's Development Process: Prospects under a Devolved System of Governance' in PLO et al. *Devolution in Kenya: A Commentary* (2016) 129-170.

section, we explore the copyright framework that Rawls envisions for regulating the commercialization of music and the distribution of revenue.

The equal basic liberties principle requires justice in the initial acquisition of rights and liberties. Copyright may be considered a basic liberty for music artists and the intermediaries to the extent it provides creative independence and career fulfilment.[112] Although copyright is not fully compatible with some aspects of the equal basic liberties principle, the principle highlights the general importance of the Rawlsian conception of justice/fairness in regulating the initial acquisition of property rights by addressing barriers such as financial costs, lack of representation, and discrimination.[113]

The difference principle requires justice in the initial and subsequent acquisition of rights by protecting the least advantaged. When applied to copyright, it requires that copyright is structured to maintain an equitable balance amongst different stakeholders in the value chain.[114] In the context of this thesis copyright should maintain an "equitable" balance between music artists and intermediaries as the main beneficiaries of music revenue.

The ultimate standard for assessing the "equitableness" of copyright lies in the protection of the least advantaged. To contextualize the least advantaged in the commercialization of music and distribution of revenue according to the difference principle, we should determine the 'original position of thought' of music artists and intermediaries. The thesis uses the conflicting stakeholder interests highlighted in section 2.2. of the thesis to reflect this original position of thought. Intermediaries often need to make a profit to compensate for their investment in a high-risk market based on high losses with exceptional profits in a few cases.[115] They also seek to commercialize music at the lowest cost possible.[116] However, intermediaries

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[112] See the discussion of IP as a basic liberty in Merges op cit note 37 at 110.

[113] Rawls explains that the equal basic liberties principle is meant to guide the initial situation and formulation of rights, see Rawls (1999) op cit note 50 at 47.

[114] See the value chain of the music industry in section 2.2. of the thesis

[115] The term 'negotiating posture' is used in Jarosz and Chapman op cit note 18 at 799-800, to describe a hypothetical negotiation for reasonable royalty damages as compensation for a patent infringement. See a description of intermediaries' interests in O Alter 'Fairness towards authors: does it necessarily mean caring for the weak?' (2019) 43 *Southern Illinois University Law Journal* 615 at 643; S Balganesh 'The uneasy case against copyright trolls' (2013) 86 *Southern California Law Review* 86 at 723-782.

[116] L Guibault and PB Hugenholtz *Study on the conditions applicable to contracts relating to intellectual property in the European Union* (2002) 32-33; Y Nahmias 'The Cost of Coercion: Is There a Place for 'Hard' Interventions

often have conflicting interests with music artists, who typically require remuneration from the commercialization of their music, based on the actual or potential economic value of their music.[117] Due to the perceived unequal relationship between music artists and intermediaries and the possible concerns in the commercialization chain, intermediaries divert outcomes to their advantage, leading to inequitable revenue distribution.[118]

The success or failure of the copyright system is hinged on how well it protects music artists as the least advantaged, even if it leads to the reduction of the wealth of intermediaries as the most advantaged by the system.[119] If copyright fails in this respect, it should be reformed, and the transition should reflect an "equitable" balance of interests for music artists and intermediaries.[120]

Consequently, Rawls' vision for copyright would ensure justice and fairness in the distribution of revenue to all the stakeholders while prioritizing the protection of music artists as the least advantaged group during their interactions with intermediaries. This protection extends during contract negotiations and execution. During contract negotiations, the aim is to empower music artists to determine the scope and forms of exploitation, scope, conditions, and modalities of

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in Copyright Law?' (2020) 17(2) *Northwestern Journal of Technology and Intellectual Property* 155 at 161; Y Nahmias 'The Limitations of Information: Rethinking Soft Paternalistic Interventions in Copyright Law' (2019) 37 *Cardozo Arts and Entertainment Law Journal* 373 AT 376-378; L Helman '*When Your Recording Agency Turns into an Agency Problem: The True Nature of the Peer-to-Peer Debate'* (2009) 50(1) *Idea 49*; DD Barnhizer '*Inequality of Bargaining Power'* (2005) 76 *University of Colorado Law Review* 139 at 159-60.

[117] Guibault and Hugenholtz op cit note 116 at 32-33; Jarosz and Chapman op cit note 18.

Many music artists create, at least in part, the prospect of earning money. Kenya lacks disaggregated data in the creative economy. Nevertheless, MCSK reported that there were about 12, 153 registered music artists, as of 2016, see Kreston KM and Co. *Music Copyright Society of Kenya Annual Report and Financial statement for the year ended 30 June 2015* (2015). In 2019, the registered music artists were about 15,000, see Kreston KM and Co. *Music Copyright Society of Kenya Annual Report and Financial statement for the year ended 30 June 2019* (2019); Creative Industries Ease of Doing Business Report 1 - Music (2018) available at *https://issuu.com/hevafund/docs/heva_ci_edb_report_01_music*, accessed on 20 April 2023.

[118] See the value chain in section 2.2. of this thesis. For the unequal contractual relationship between music artists and intermediaries, see NS Kim 'Bargaining Power and Background Law' (2009) 12 *Vanderbilt Journal of Entertainment & Technology Law* 93 at 93-94; Helman op cit note 116; Barnhizer op cit note 116 at 159-60, 199-223; A Plant 'The Economic Aspects of Copyright in Books' (1934) 1(2) *Economica* 167 at 185-86; See fn 12 in Nahmias (2019) op cit note 117 at 378; Alter op cit note 115 at 631 and 635.

[119] Chander and Chander op cit note 86 at 567.

[120] Rawls (1999) op cit note 50 at xii; Hughes and Merges op cit note 43; Kretschmer, Derclaye, Favale and Watt op cit note 106 at 16. For the different transactions, see the value chain in section 2.2. of this thesis.

the transfer of copyright and receive equitable remuneration when their music is exploited.[121] Copyright law would establish minimum or recommended remuneration standards for the music industry.

Moreover, during the execution of the contract, the emphasis is on enforcing agreed terms of exploitation and remuneration and empowering music artists to revise their initial contracts and claim further remuneration for new modes of exploitation and unexpected revenue increases. The law would make provisions for accountability and transparency obligations for intermediaries, contract mechanisms to revise initial deals and proper dispute settlement mechanisms.

With the Rawlsian theory of justice in mind, this thesis offers a salutary point to commence the discussion concerning where the balance should be struck between the rights and interests of music artists and those of intermediaries.[122] The thesis argues that copyright should actively support the "equitable" protection of music artists, reflecting a distributive approach.[123] The Rawlsian theory of justice should dictate the standard of equity required by copyright, and legislative interventions (whether soft or more directive) should be used to achieve this while preserving some degree of contractual freedom. The link between distributive justice and legislative interventions designed to protect music artists is discussed in section 2.3.3. below.

2.3.3. Embracing legislative interventions to fulfil copyright's distributive justice role

This section explores legislative interventions in copyright law, emphasizing their potential to balance artist protections with market dynamics, thereby enhancing distributive justice in the music industry. In this thesis, "legislative interventions" denotes the imposition of policies and regulations that limit the choices of music artists to enhance better decision-making and ensure equitable remuneration when their music is commercialized.[124] The thesis argues that the music market is susceptible to manipulation by intermediaries due to the perceived unequal

[121] Dusollier op cit note 14 at 454.

[122] Liu op cit note 43 makes a similar statement with regards to balancing the rights of copyright owners and users.

[123] Nahmias (2020) op cit note 116; Nahmias (2019) op cit note 116 at 373 at 392.

[124] KJ Hickey 'Copyright paternalism' (2017) 19 *Vanderblit Journal of Entertainment & Technology Law* 415 at 415; Alter op cit note 115 at 617.

contractual relationship between music artists and these intermediaries.[125] Thus, allowing for extensive freedom of contract in copyright law would defeat copyright's distributive justice role.[126] Legislative interventions aimed at protecting music artists are discussed to provide a framework for understanding the appropriate level of state involvement in transactions between music artists and intermediaries in the commercialization of music and the distribution of revenue.

At this point, it is apt to explain contractual freedom and how it is described in the thesis. Contractual freedom is defined as 'the right to choose one's contracting partners and to trade with them on whatever terms and conditions one sees fit'.[127] The historical period often referred to as the 'golden age' of freedom of contract, spanning the 18th and 19th centuries, was marked by the classical contract theory and a laissez-faire approach to contracts.[128] However, even during this era, freedom of contract was never absolute.[129] Scholars recognize the importance of legislative interventions to safeguard the interests of music artists when entering into contracts for the commercialization of their music.[130] These interventions, whether occurring before (ex-ante) or after (ex-post) contract formation, serve to make negotiations more "equitable", particularly, for parties in a weaker bargaining position or those with limited experience in commercialization.[131]

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[125] Wu op cit note 52 at 14; JO Asein op cit note 18 at 314-315.

[126] See this discussion in section 2.3. of this thesis.

[127] RA Epstein 'Contracts Small and Contract Large: Contract Law through the Lens of Laissez-Faire' in F Buckley (ed), *The Fall and Rise of Freedom of Contract* (1999) 28 and J Yuvaraj 'Back to the Start: Re-envisioning the Role of Copyright Reversion in Australia and other Common Law Countries' (unpublished PhD thesis, Monash University, 2021) 58.

[128] A Chrenkoff 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36 at 40-41; Epstein op cit note 127 at 249.

[129] See e.g., World Intellectual Property Organization (WIPO) 'Working Group on Model Provisions for National Laws on Publishing Contracts for Literary Works (Geneva, June 18 to 22, 1984)' (1984) 9 *Copyright: Monthly Review of the World Intellectual Property Organization (WIPO)* 307 at 315: "Legislative regulation of essential aspects of certain types of contract, such as contracts of sale or lease, exists throughout the world and is considered a natural corollary to the principle' of freedom of negotiation."

[130] Hickey op cit note 124 at 415-472; C Buccafusco, ZC Burns, JC Fromer and CJ Sprigman 'Experimental Tests of Intellectual Property Laws' Creativity Thresholds' (2014) 92 *Texas Law Review* 1921 at1932–1943; Nahmias (2020) op cit note 116 at 137-154; Nahmias (2019) op cit note 116 at 373-414.

[131] Nahmias (2020) op cit note 116; Nahmias (2019) op cit note 116.

In line with the Rawlsian theory, copyright should ensure a proper balance of rights and interests when implementing legislative interventions that favour one party.[132] This thesis acknowledges that music artists' contractual freedom may need to be overridden to some extent in pursuit of their 'equitable' remuneration. However, the aim is not to disregard the just interests of intermediaries who have contributed to the success and commercialization of the music. Instead, copyright should ensure that each party is rewarded for their contribution in the most favourable way.

2.3.3.1. Rationalizing legislative interventions designed to protect music artists

Legislative interventions designed to protect music artists are justified based on behavioural economics, which depicts human beings as irrational economic actors who make decisions to their detriment based on emotions and external factors.[133] Behavioural economics portray music artists as "shortsighted…, lack[ing] bargaining power and respond weakly to distant and uncertain economic incentives".[134] These behavioural limitations create behavioural market failures, which accentuate the need for legislative interventions to protect music artists from the consequences of their own choices.[135]

Hickey identifies two stages in the life of a copyright work where behavioural failures manifest.[136] The first stage is during creation and concerns the behavioural influence on copyright's incentive to create,[137] particularly, as it relates to the effect of the intrinsic motivation to create and the human difficulty of valuing copyright works before they are commercialized.[138] These behavioural failures are explained according to the incentive model,

[132] Hughes and Merges op cit note 43.

[133] Buccafusco, Burns, Fromer and Sprigman op cit note 130 at 1932–43; Hickey op cit note 124 at 415-472.

[134] Copyright paternalism presupposes that music artists do not respond to economic incentives as envisioned by incentive theories, see Hickey op cit note 124 at 419.

[135] Hickey op cit note 124 at 434.

[136] Ibid at 440-441.

[137] Ibid.

[138] Ibid.

which justifies the social costs of granting copyright using the benefits of increased creativity due to copyright's economic incentive.[139]

A serious concern arises when copyright is granted to individuals who are intrinsically motivated to create.[140] The uncertainty of estimating the rewards of commercializing copyright works also undermines copyright efficacy as an incentive.[141] The value of works is usually unpredictable before commercialization because copyright does not directly guarantee economic returns to music artists.[142] The returns are dependent on the success of the work in the marketplace, among other factors.[143] Music artists may discount the possibility of an uncertain future reward, respond weakly to indirective incentives like copyright, or overestimate the possibility of a great reward.[144]

The second stage, where behavioural failures become evident, is during the acquisition of rights for commercialization.[145] Music artists usually assign or license their music to intermediaries and other third parties for commercialization. The behavioural concerns here relate to whether the music artists act rationally during transactions with intermediaries and if society is content with the distributive consequences of the transactions.[146] It is important to note that the legislative interventions in copyright law are based on the perception that music artists lack bargaining power in negotiating with intermediaries for the commercialization of music. The perceived imbalance in bargaining power experienced by music artists may be attributed to behavioural failures that influence their decision-making processes. These behavioural failures

[139] The social costs of granting copyright include making works more expensive and reducing their consumption and access to them. Copyright also hinders creativity, to some extent, by reducing public domain sources, see ibid.

[140] Ibid.

[141] Ibid at 444.

[142] JM Barnett 'Copyright Without Creators' (2013) 9 *Review of Law & Economics* 389 at 389-399.

[143] Other factors include the prevailing market structure, contracts concluded, an enabling environment for commercialization of the works and the music artists' entrepreneurial capacity and legal expertise to commercialize their copyright and related works etc. Baloyi op cit note 45 at 89; Wu op cit note 52 at 45; Hickey op cit note 124 at 440-441.

[144] Hickey op cit note 124 at 440-441.

[145] Ibid.

[146] Ibid.

are caused by three factors: bounded willpower, bounded rationality and bounded self-interest.[147]

Behavioural economics suggests that humans have bounded willpower, which is the most prominent cause of behavioural failures in humans.[148] Humans are short-sighted and tend to pursue immediate gratification at the expense of long-term interests.[149] Consequently, there is a concern that music artists discount the possibility of future remuneration and assign or license their music for minimal upfront remuneration. This concern aligns with the popular perception that music artists are pressed for funds and willing to commercialize their work in exchange for unfavourable remuneration.[150] For instance, the history of remunerating music artists in Kenya shows how they often exhibit bounded will power and act in ways that are inconsistent with their long-term preferences.[151]

Human decision-making is also influenced by bounded rationality, causing individuals to base their decisions on their limited cognitive abilities and limited information.[152] Additionally, humans exhibit a status quo bias, a tendency to overvalue goods initially allocated to them, and a greater sensitivity to losses in comparison to equivalent gains.[153] As a result, many decisions tend to be satisfactory but fall short of being truly equitable.[154]

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[147] Ibid at 434.

[148] Ibid at 442.

[149] Ibid at 433-434.

[150] Ibid at 442.

[151] Ibid (2017) at 433. See, for example, reports by Kenyan music artists like Peace Lydia Wairimu, Elizabeth Nyambere, Joan Wairimu are examples of other music artists who were also short-changed after they unknowingly signed away their rights to music aggregators. See V Achuka 'How top Kenyan singers signed away their millions in contract scam' *The Standard* 19 February 2017 available at *https://www.standardmedia.co.ke/m/article/2001229878/how-top-kenyan-singers-signed-away-their-millions-in-contract-scam,* accessed on 12 December 2023; L Ilado 'Who gains from Kenya's dysfunctional music royalty space?' *Music in Africa* 11 October 2021 available *at https://www.musicinafrica.net/magazine/who-gains-kenyas-dysfunctional-music-royalty-space,* accessed on 12 December 2023.

[152] Hickey op cit note 124 at 443.

[153] Ibid, M Rabin 'Psychology and economics' (1998) 36(1) *Journal of economic literature* 11 at 13-14.

[154] Hickey op cit note 124.

Lastly, human behaviour is characterized by bounded self-interest, meaning that our preferences are not solely driven by individual welfare.[155] Humans are often willing to sacrifice their self-interests when they perceive co-operation among others and anticipate punishment for those who violate the norms of cooperation.[156] Additionally, there is a preference for "equal/fair" allocation of resources over a focus on maximizing overall wealth and welfare.[157] These preferences align with the principles of the Rawlsian theory of justice, specifically, concerning the allocation of resources, as people tend to prefer criteria and outcomes that prioritize the least advantaged, such as music artists in our context.[158]

Many of the legislative interventions in copyright law seem to stem from the perception of music artists as irrational actors.[159] A key point of convergence between the Rawlsian theory of justice and legislative interventions designed to protect music artists is the contention that the determination of what constitutes "equitable" remuneration for music artists should not be entrusted to the discretion of music artists and intermediaries. Consequently, both advocate for State intervention in overseeing the commercialization of music and the distribution of revenue. This intervention serves as a safeguard for music artists who frequently engage in transactions with intermediaries in ways that are seemingly irrational or against their self-interests.

2.3.3.2. Forms of legislative interventions designed to protect music artists within copyright law

Legislative interventions in copyright law are categorized as either "more directive" or "soft".[160] More directive provisions involve mandatory interventions, such as those guaranteeing "equitable" remuneration for music artists.[161] On the other hand, soft

[155] Ibid at 443.

[156] Ibid, G Herbert et al 'Explaining altruistic behavior in humans' (2003) 24(3) *Evolution and human Behavior* 153 at 153-172.

[157] Hickey op cit note 124 at 442; Mbondenyi and Kabau op cit note 111 at 129-170.

[158] Ibid.

[159] For a general discussion on these interventions, see Hickey op cit note 124, generally. See discussions of the interventions in Kenyan copyright law in chapter 4 of this thesis.

[160] Hickey op cit note 124 at 419-420.

[161] Ibid at 420; Nahmias (2020) op cit note 116 at 169-170.

interventions guide or influence behaviour, but without imposing strict requirements or obligations.[162] Their focus is on preserving individual autonomy and liberties while providing a gentle nudge to steer individuals towards choices that are considered in their best interest.[163] These provisions are typically embedded in default rules, procedural requirements, and information disclosures.[164]

Nahmias argues that more directive interventions are preferable to soft ones for their effectiveness.[165] Soft interventions, especially those involving information disclosure, are critiqued for their susceptibility to abuse, relying on artists' ability to make rational decisions despite limitations like illiteracy and information overload.[166] In practice, music artists often face take-it-or-leave-it deals with intermediaries, and soft interventions may not offset the perceived unequal bargaining power effectively.[167]

This thesis endorses a balanced implementation of legislative interventions, incorporating both soft and more directive interventions to align the interests of music artists and intermediaries according to the Rawlsian theory of justice.

2.3.3.3. Legislative interventions designed to protect music artists

Legislative interventions aimed at protecting music artists involve the government or regulatory authority taking an active role in balancing stakeholder interests in the commercialization of music and distribution of revenue. This approach seeks to empower music artists to determine the scope and forms of exploitation scope, conditions, and modalities of the transfer of copyright and receive equitable remuneration when their music is

[162] Nahmias (2019) op cit note 116 at 392.

[163] Nahmias (2019) op cit note 116 at 392.

[164] Ibid.

[165] Nahmias (2020) op cit note 116 and Nahmias (2019) op cit note 116.

[166] Ibid. S Grundmann 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 *Common Market Law Review* 269 at 270-72; Nahmias (2019) op cit note 116 at 396, 375.

[167] P Johnson, J Gibson and G Dimita *The Business of Being an Author: A Survey of Author's Earnings and Contracts* Queen Mary University of London, Project Report, 2015; Nahmias (2019) op cit note 116 at 407 and 409.

exploited by implementing remuneration standards, [168] imposing accountability and transparency obligations on intermediaries,[169] establishing copyright contract mechanisms,[170] and creating dispute settlement mechanisms for equitable remuneration for equitable remuneration of music artists.[171]

However, legislative interventions can be controversial because they involve some degree of centralized decision-making, which some may view as limiting individual rights and freedoms. The key challenge lies in striking the right balance between safeguarding stakeholder interests and protecting individual autonomy when implementing this approach to copyright regulation.

2.3.4. Principles of an equitable copyright system in the commercialization of music and distribution of revenue

The principles of an "equitable" copyright system for music commercialization and revenue distribution integrate the Rawlsian focus on justice for the least advantaged with legislative interventions to guarantee "equitable" remuneration of music artists. They contextualize the key factors influencing the remuneration of music artists such as the expected value of their works and fixation of their performances, music artists' bargaining power, contractual norms and expectations and the existing legal framework.[172] These principles can be summarized as encompassing four objectives: justice in the initial acquisition of rights, justice in the subsequent acquisition of rights, justice in reparations for violating the protection of music

[168] WIPO op cit note 129 at 316-317; Dusollier op cit note 14 at 438.

[169] European Copyright Society (ECS) 'Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market' (2020) 11 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 133 para 1.

[170] Ibid, R Giblin and J Yuvaraj 'Copyright Reversion and the Author's Interest Project' *authorsinterest. org* (2020).

[171] ECS op cit note 169.

[172] L Guibault and O Salamanca *Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works* (2016) European Commission 8, 6-7. See also section 2.2. of this thesis on the discussion of these factors in the value chain.

artists during the initial and subsequent acquisition of rights, and transitional justice when implementing reforms for distributive justice in copyright law.[173]

2.3.4.1. Justice in the initial acquisition of rights

Justice in the initial acquisition of rights is essential for copyright owners to maintain control over the commercialization of music and derive a sustainable income from their creative and artistic contribution, investment and roles in the commercialization process. It focuses on establishing clear authorship and ownership guidelines, balancing music artist and intermediary rights (intermediaries in the creative production sector, often the initial exploiters of music). The goal is equitable agreements, with both parties fully informed of their respective rights and obligations, facilitated by ex-ante and ex-post copyright contract safeguards.
Ex-ante protection mechanisms safeguard music artists during contract formation and negotiations by granting an entitlement to equitable remuneration when music is commercialized, requiring written agreements, defining the scope of assignment and licenses, and mandating information disclosure, which impacts the validity and proof of the assignments or licenses.

Conversely, ex-post mechanisms empower music artists to oversee contract execution and revenue distribution, allowing them to ensure their remuneration corresponds to the actual revenue generated. These mechanisms also enable contract adjustments to accommodate changing situations or commercialization possibilities. Examples include accountability and transparency requirements for intermediaries, introducing copyright contract mechanisms, implementing equitable remuneration standards (including defining minimum remuneration that should be received by music artists and common remuneration standards) and establishing remuneration dispute resolution mechanisms.

[173] These issues were adapted from Robert Nozick's description of social justice in property rights. Nozick's and Rawls' description of social justice are similar to a large extent. Their views differ as regards state involvement in subsequent acquisition of rights. See Nozick op cit note 87 at 151-152 and 174-178, Chander and Chander op cit note 86 at 567-568 and Olsaretti op cit note 73 at 20-21.

2.3.4.2. Justice in the subsequent acquisition of rights

Justice in the subsequent acquisition of rights acknowledges that initial contracts may not always provide the best terms, and so, it strives to rectify any imbalances and ensure that music artists continue to receive equitable remuneration as their music is exploited and generates revenue at various stages of the value chain.[174] To achieve this, it involves ex-post mechanisms that hold music artists' contracting parties responsible for disclosing information about sub-licensees and third parties who are not direct contracting parties of the music artists, while also requiring transparency and accountability from these third parties.

2.3.4.3. Transitional justice when implementing reforms for distributive justice in copyright law

Transitional justice tackles barriers to "equitable" remuneration of music artists during copyright reforms, including the retrospective application of certain protection measures. It is vital to balance stakeholder interests in these reforms by not applying all artist protections retrospectively.[175] For example, retrospectively allowing artists to renegotiate contracts may be unfair, but introducing retrospective mandates for information disclosures and the revenue generated and improving dispute resolution mechanisms is a more acceptable approach.[176]

2.3.4.4. Justice in reparations for violating the protection of music artists during the initial and subsequent acquisition of rights

Justice in reparations for violating the protection of music artists during the initial and subsequent acquisition of rights is essential to rectify past and ongoing remuneration injustices. It encompasses all the mechanisms discussed in earlier aspects of justice, including legal protections to enforce safeguards, such as preventing circumvention through choice of law contracts.

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[174] Refer to the value chain in section 2.2. of this thesis.

[175] Olsaretti op cit note 73 at 20-21.

[176] ECS op cit note 169.

2.4. Conclusion on demystifying equitable remuneration

This chapter aimed to provide a framework for conceptualizing what constitutes "equitable" distribution of music revenue under copyright law, drawing on the Rawlsian theory of justice and legislative interventions designed to protect music artists. It established that an “equitable” copyright system must balance stakeholder interests—particularly those of music artists and intermediaries—by integrating principles of distributive justice along with legislative interventions aimed at protecting music artists. This balance necessitates limiting the contractual freedoms of both parties to safeguard the interests of music artists as the least advantaged stakeholders in the commercialization of music and revenue distribution. Furthermore, it ensures justice during the initial acquisition and subsequent acquisition of rights, transitional justice when implementing reforms for distributive justice in copyright law and allows for reparations for violations of music artists’ protections.

Having identified the core elements of an equitable revenue distribution system, the next three chapters will argue that Kenya’s copyright system is deficient in certain aspects. This will be explored in two steps: first, by discussing the dynamics of the relationship between music artists and intermediaries in the commercialization of music and revenue distribution, in chapter three; and second, by examining the overall legal context for commercialization of music and revenue distribution, in chapter four.

CHAPTER THREE: THE COMMERCIALIZATION OF MUSIC IN KENYA

3.1. Introduction to the commercialization of music in Kenya

Chapter three sets the stage for a comprehensive examination of the commercialization of music in Kenya, highlighting the intricate dynamics among music artists, intermediaries, and various stakeholders within the industry.[1] By tracing the historical development and current landscape of Kenya's music industry, the thesis delves into the interactions between these stakeholders and the impact of digital technologies in balancing interests and the remuneration of music artists.[2] Furthermore, this chapter evaluates both individual and collective management remuneration mechanisms to determine the most effective strategies for ensuring equitable remuneration of music artists.

3.2. The history and current status of Kenya's music industry

The history and current status of Kenya's music industry are explored through a chronological overview that highlights the post-independence evolution of the music industry and contemporary developments relevant to the thesis. The contemporary developments mainly relate to the technological changes affecting Kenya's music industry and the remuneration of music artists. It is imperative to highlight these technological developments to evaluate how they have resulted in shifting market powers due to the introduction of new intermediaries.[3] Kenya's music industry is recognized as a key driver of economic development, contributing

[1] See the value chain in section 2.2. of this thesis.

[2] Ibid.

[3] S Haunss 'The changing role of collecting societies in the internet (2013) *Internet policy review*. It should also be noted that the music industry is run by copyright law and technological changes partly explain the history of copyright law. The birth of copyright is attributed to the invention of the printing press by German goldsmith Johann Gutenberg in 1430. Further advances in technology such as the invention of photography, sound recordings, film, computers and dissemination of works through the internet have caused copyright law to adapt whilst regulating these inventions. See FA Rafiqi and IH Bhat 'Copyright protection in digital environment: Emerging issues' (2013) 2(4) *International Journal of Humanities and Social Science Invention* 6 at 6; D Bainbridge *Intellectual Property* 4ed (1999) 36; M Rose *Authors and Owners: the invention of Copyright* (1993) and LR Patterson *Copyright in Historical Perspective* (1968); AK Kirui, MN Wanyama and WO Shitandi 'Disruptive innovation: Exploring the impact of Skiza tunes on the Kenyan music industry' (2022) 1(1) *Journal of Music and Creative Arts (JMCA)* 1-10.

to the country's vision of becoming a newly industrialized, middle-income nation that ensures a high quality of life for all its citizens.[4]

The link to economic development is attributed to the industry's role in promoting national and cultural expression and recognition of science and indigenous technologies; and the creation of employment and generating income for the various stakeholders involved in the creation and commercialization of music.[5]

3.3. Creative actors in the music industry

Creative actors in the music industry include music artists, who play a pivotal role in the creation of music.[6] Their discussion is essential to understand the social context of music creation in Kenya and how this context influences the involvement of intermediaries in the commercialization of music. By exploring the contributions and challenges faced by these creative actors, we can better appreciate their significance within the industry and the dynamics that shape their interactions with intermediaries.

The history of the Kenyan music industry is fraught with reports of challenges that music artists face when negotiating and enforcing remuneration contracts with intermediaries.[7] This raises concerns about music artists' skills to control and manage the commercialization of music, especially with most of them reporting to unknowingly sign away their rights. Music and entrepreneurship education is a key area for skills development and growth of the music industry.[8] Music artists who have been exposed to music and entrepreneurship education are

[4] See Republic of Kenya Ministry of Sports, Culture and the Arts *National Music Policy* (2015) available at *https://www.prisk.or.ke/index.php/en/prisk-media/document-downloads/33-national-music-policy/file*, accessed on 28 May 2023. Kenya Vision 2030 is Kenya's development blueprint for the period 2008 to 2030. See Kenya Vision 2030 available at *https://vision2030.go.ke/about-vision-2030/*, accessed on 28 May 2023. Articles, 11, 33 and 40 of the Constitution of Kenya, 2010.

[5] Ibid.

[6] See the value chain of the music industry in section 2.2. of this thesis.

[7] AK Kirui 'Ethical dilemmas and copyright challenges among independent artists in Kenya's music industry' (2024) 3(1) *Journal of Humanities and Social Sciences (JHSS)* 13 at 13-22; BO Ouma 'Skewed Royalty Payments by the Music Copyright Society of Kenya; the Tragedy of an Ill-Equipped Regulatory Framework' (2020) *SSRN* 3561493.

[8] C Lambert *Promoting the culture sector through job creation and small enterprise development in SADC countries: The music industry* (2003) International Labour Organization 41-43; NC Wilson and D Stokes

likely to take more control of their creative processes and manage their careers than their counterparts who have not.[9] This education, therefore, enables music artists to commercialize their music and manage their careers in the absence of intermediaries.[10] The education is thus indicative of music artists' ability to take advantage of the opportunities presented in the digital era, negotiate with intermediaries on a more balanced basis and receive equitable remuneration for the commercialization of their music.

This section addresses three main issues related to the integration of music and entrepreneurship education in Kenya's school curricula. First, music and entrepreneurship education are present in Kenya's school curricula.[11] These subjects were introduced into the curricula to equip learners with employable skills at all levels.[12] The subjects are offered as examinable electives and courses in secondary school and university/technical vocational institute levels.[13]

Second, the implementation of music education at the primary school level has experienced inconsistencies.[14] From 1985 and 2000, music was a compulsory subject, but between 2000-2019, it was no longer examinable under the primary school curriculum.[15] The exam-oriented nature of the 8-4-4 system resulted in a decline in music instruction during this period.

'Managing creativity and innovation: The challenge for cultural entrepreneurs' (2005) 12(3) *Journal of small business and enterprise development* 366 at 366-377.

[9] Lambert op cit note 8 at 41-43.

[10] Ibid.

[11] Entrepreneurship education is offered in the form of business and commerce related subjects and courses. See for example the Competency-Based Curriculum (CBC) on the Kenyan Institute of Curriculum Development website available at https://kicd.ac.ke/cbc-materials/curriculum-design/, accessed on 20 January 2022. AM Wanjohi 'Development of education system in Kenya since independence' (2011) *KENPRO Online Papers Portal 5*; MN Wanyama 'Music Education: An Unexpected Goldmine in Kenya' (2006) *International Journal of Community Music;* MN Amutabi 'Competency Based Curriculum (CBC) and the end of an Era in Kenya's Education Sector and Implications for Development: Some Empirical Reflections' (2019) 3(10) *Journal of Popular Education in Africa* 45 at 45 – 66.

[12] Wanjohi op cit note 11; Wanyama op cit note 11 and Amutabi op cit note 11.

[13] Ibid.

[14] Ibid.

[15] Ibid.

However, the Ministry of Education continued to appreciate its development and practice as a co-curricular activity through the annual Kenya Music Festival.[16]

Third, these fluctuations in music education contributed to a decrease in the number of secondary schools offering music, which in turn led to reduced demand for music teachers and a decline in university enrolment for music courses.[17] Fortunately, music was reintroduced into the primary school curriculum as a compulsory examinable subject in 2019 through the Competency-Based Curriculum (CBC).[18] This curriculum is gradually being implemented from pre-primary to grade four and holds promise for providing formal music and entrepreneurship education for emerging music artists.[19]

Beyond the school curriculum, there are a few Non-governmental Organizations (NGOs) initiatives that offer music and entrepreneurship education.[20] In the absence of a registered trade union or music artists' association, there is a gap in the provision of industry-specific education to music artists, professional support for contract negotiations or assist in the development of common remuneration standards that would contextualize the equitable remuneration of music artists.[21] Despite their efforts to registering a trade union, known as the Kenya Musicians Union (KeMU), to enhance their bargaining power, music artists have faced

[16] See for example the Ministry of Education Calendar of activities available at *https://www.education.go.ke/index.php/media-center/ministry-calendar-of-events,* accessed on 11 January 2024.

[17] WM Mindoti 'The Development of Music as an Academic Discipline in Kenya' *in MN Wanyama Music in Kenya: Development, Management, Composition and Performance: A Tribute to Daniel T. Arap Moi* (2010).

[18] Ibid.

[19] Ibid.

[20] UNESCO 'Kenya: Training programme for musicians and visual artists' available *https://en.unesco.org/creativity/activities/kenya-training-programme-musicians-visual-artists,* accessed on 20 June 2023.

[21] Trade unions or associations usually take up the training of their members to promote their social and economic well-being. Music artists' trade unions and associations play a crucial role in the negotiation of common remuneration standards. See the functions of trade unions and associations in J Child, R Loveridge and M Warner 'Towards an organizational study of trade unions' (1973) 7(1) *Sociology* 71 at 71-91; KD Ewing 'The function of trade unions' (2005) 34(1) *Industrial Law Journal* 1 at 1-22; C Anyango et al 'Factors Affecting Performance of Trade Unions in Kenya' (2013) 2(2) *American Journal of Business and Management* 181 at 181-185. See also Lambert op cit note 8 at 13-14, which provides that music artists' associations play an important role in providing training for music artists. See the description of common remuneration standards in M Senftleben 'More Money for Creators and More Support for Copyright in Society- Fair Remuneration Rights in Germany and the Netherlands' (2018) 41 *Columbia Journal of Law & Arts* 413 at 413-433.

setbacks since 2007. [22] The Registrar of Trade Unions rejected their applications in both 2007 and 2017, citing KeMU's failure to meet the minimum membership requirement of 50% plus one of employees in Kenya's music industry. Despite these challenges, it is noteworthy that the Kenya Musicians Union maintains an online presence through its social media pages. [23]

Music and entrepreneurship education in Kenya is grossly sub-optimal.[24] Consequently, music artists are seldom educated with skills that empower them to effectively control or participate in the creative production and subsequent commercialization of their music. Although at a cost of internet connection and payment for online courses, the digital era has presented opportunities for music artists to self-educate on music and entrepreneurship. [25] Digital technologies and the internet have also enabled artist-led creative production, copyright management and direct access to users.[26] Despite these possibilities for music artists to bypass intermediaries, most music artists in Kenya still rely on intermediaries to commercialize their works. Political economy also shapes the commercialization process, where music artists often assign or license their rights to intermediaries due to a lack of resources. This reflects imbalances in bargaining power, as many artists must navigate systemic barriers—including financial constraints and the industry's monopolistic tendencies—to access commercial opportunities. These dynamics are intensified by cultural politics, which impact which groups or genres of artists are given visibility and protection in negotiations, often disadvantaging marginalized communities.

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[22] Music in Africa 'Kenya Musicians Association' (n.d.) available at https://www.musicinafrica.net/directory/kenya-musicians-union, accessed on 28 May 2023.

[23] See, for example, their Instagram page available *at https://www.instagram.com/kenyamusiciansunion/*, accessed on 10 May 2023 and their LinkedIn page available at *https://www.linkedin.com/in/kenya-musicians-union-91394b5b/?original_referer=https%3A%2F%2Fwww%2Egoogle%2Ecom%2F&originalSubdomain=ke*, accessed on 10 May 2023.

[24] This is one of the reasons that led to the introduction of the CBC curriculum in 2019, see Amutabi op cit note 11 at 45 – 66. See also Wanjohi op cit note 11.

[25] Most Kenyans have access to the internet and have active mobile subscriptions. Out of a population of 49 million people, 30.8 million had internet subscriptions by September 2017. By September 2016 87.3% of the population in Kenya had active mobile subscriptions. See CA *First Quarter Sector Statistics Report for the Financial Year 2016/*2017 (2016) 8 available at *http://ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q1%202016-2017.pdf*, accessed on 30 September 2023. For online courses, see, for example, the music and entrepreneurship online courses offered by Coursera Incorporation available at *https://www.coursera.org/*, accessed on 20 August 2023.

[26] RJ Kauffman and FJ Riggins 'The move to artist-led online music distribution: Explaining structural changes in the digital music market' (2005) in *Proceedings of the 38th Annual Hawaii International Conference on System Sciences* 7.

The history of the Kenyan music industry is fraught with reports of challenges that music artists face when negotiating and enforcing remuneration contracts with intermediaries.[27] This raises concerns about music artists' skills to control and manage the commercialization of music, especially with most of them reporting to unknowingly sign away their rights.

Peace Mulu's ordeal is exemplary of Kenyan music artists who were short-changed after they unknowingly signed away their rights to music aggregators and other intermediaries.[28] In 2015, Peace had just been discharged from hospital when she was approached by Liberty Afrika (a music aggregator) who offered to settle her medical bill subject to signing a licensing agreement.[29] The licensing agreement was for the commercialization of her music on Safaricom's Skiza Tunes platform.[30] She reports having unknowingly licensed her songs for five years in an agreement that would be renewed automatically unless either party issued a 1 year prior notice of intention.[31] Further, more than 1, 700, 000 KES was paid out to Liberty Afrika for the commercialization of the music from March to May 2016.[32] Between July 2015 to February 2016, 4, 600, 000 KES was paid, and Peace received approximately 13,500 KES.[33]

It should be noted that CMOs can fill the gap in skills development and support for music artists by, for example, organizing music and entrepreneurship programmes, funeral benefits and

[27] R Matheka 'Toa Kitu Kidogo Culture: Searching for contract model that is practical in Kenyan live music performance' (Bachelor Thesis, JAMK University of Applied Sciences, 2010); V Achuka 'How top Kenyan singers signed away their millions in contract scam' *The Standard* 19 February 2017 available at *https://www.standardmedia.co.ke/m/article/2001229878/how-top-kenyan-singers-signed-away-their-millions-in-contract-scam*, accessed on 12 December 2023; L Ilado 'Who gains from Kenya's dysfunctional music royalty space?' *Music in Africa* 11 October 2021 available at *https://www.musicinafrica.net/magazine/who-gains-kenyas-dysfunctional-music-royalty-space*, accessed on 12 December 2023; Kirui (2024) op cit note 7 at 13-22; Ouma (2020) op cit note 7.

[28] Lydia Wairimu, Elizabeth Nyambere, Joan Wairimu are examples of other music artists who were also short-changed after they unknowingly signed away their rights to music aggregators. See Achuka op cit note 27 and Ilado op cit note 27.

[29] Peace Mulu told the Standard Newspaper that she had a bill of almost a million Kenyan Shillings (1,000,000 KES) and Liberty Afrika offered her a cheque of four hundred and fifty thousand Kenyan Shillings (450,000 KES) which was about one hundred and fifty thousand Kenyan Shillings (150,000 KES) per song. See Achuka op cit note 27.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Ibid.

annuities for their members.[34] However, Kenyan music CMOs have yet to take over such roles.[35]

3.4. Creative production, broadcast, retail and entertainment, and users

Income generation for a majority of music artists in Kenya, like in other African countries, is tied to live performances, sale of recorded music and celebrity marketing.[36] Celebrity marketing rides on the music artists' fame to attract brand endorsements and partnerships or enhance the sale of non-music items like fashion and perfumes. Fame also contributes to increased revenue from sale of music recordings and tickets or access to live performances. However, this thesis focuses exclusively on remuneration aspects in the recording and performance industry, excluding income derived from celebrity marketing.

This section discusses the interaction of the various stakeholders in Kenya's music recording and performance industry that affects the remuneration of music artists.[37] Due to the strong intersection of stakeholders in the creative sector, the creative production sector, broadcast, retail and entertainment sector and users, the thesis discusses their interactions together.[38] The

[34] See the socio-cultural functions of the Southern African Music Rights Society (SAMRO). See SAMRO *Integrated Report* (2015) available at *https://www.samro.org.za/sites/default/files/Samro_IR_9175_FULL%20IR_4Nov_WEB_FINAL%20REPORT.pdf*, accessed on 4 September 2023.

[35] See MCSK website available at *https://mcsk.or.ke/*, accessed on 20 October 2023; KAMP website available at *https://www.kamp.or.ke/index.php/en/*, accessed on 20 October 2023 and PriSK website available at *https://www.prisk.or.ke/*, accessed on 20 October 2023.

[36] See description of celebrity marketing in A Keel and R Nataraajan 'Celebrity endorsements and beyond: New avenues for celebrity branding' (2012) 29(9) *Psychology & marketing* 690 at 690-703. See also broad discussion on how musicians make money in see S Knopper 'Seven Ways Musicians Make Money Off YouTube' (2013) 13 *Rollingstone.com* available at *https://www.rollingstone.com/music/news/seven-ways-musicians-make-money-off-youtube-20130919*, accessed on 30 April 2023. See discussion on the African music market and Kenya's music recording and performance industry in C De Beukelaer and AJ Eisenberg 'Mobilising African music: how mobile telecommunications and technology firms are transforming African music sectors' (2018) *Journal of African Cultural Studies* 195 at 198; AJ Eisenberg 'Digital Technology and the Music Recording Industry in Nairobi, Kenya' (2015) *European Research Council -Music Digitisation Mediation (MusDig) project* 2 and WIPO Magazine 'On the Beat - Tapping the Potential of Kenya's Music Industry' July 2007 available at *https://www.wipo.int/wipo_magazine/en/2007/04/article_0001.html*, accessed on 20 April 2023.

[37] See the value chain of the music industry in section 2.2. of this thesis.

[38] Ibid.

history and current status of the copyright management and licensing sector is discussed separately due to the unique perspective it offers to Kenya's revenue distribution system.[39]

Nairobi, the capital city of Kenya, emerged as a regional hub for commercial music production decades after World War II.[40] In 1947, the East African Sound Studios started operating as the first local music recording facility.[41] The company released local songs under its Jambo label, especially guitar-driven dance songs that would later define African popular music in the genres of *twisti*,[42] *rhumba*[43] and *benga*[44]. This variety of music was produced in Nairobi, during the 1960s and the 1970s, due to the presence of a large community of talented musicians from Africa, a world-class recording studio owned by CBS (now Sony Music Entertainment), and a profitable record pressing plant owned by PolyGram (now part of Universal Music Group).[45] Kenyan music sold well locally and regionally during the 1960s and 1970s.[46] Live bands and performances were popular during this period until the late 1970s when they were being replaced by DJs and sound systems.[47]

In the 1980s, there was a virtual collapse of the industry due to a drop in sales due to piracy and Africanization policies. The rise of the audio cassette (as a technological advancement from the vinyl), enabled large-scale phonogram piracy and informal sharing (casetting) while

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[39] Ibid.

[40] Eisenberg op cit note 36; WIPO Magazine op cit note 36; B Sihanya 'Copyright Law in Kenya' (2010) 41(8) *International Review of Intellectual Property and Competition Law (IIC)* 926 at 926-948.

[41] Eisenberg op cit note 36.

[42] *Twisti* is a musical genre that reigned in Kenya's music scene in the 1960s. *Twisti* is characterized by its bright, bouncy, guitar music, usually in two-part harmonies, and a shuffle beat inspired by American rock-and-roll as well as South African *kwela*. See P Douglas 'Kenya Special Selected East African Recordings From the 1970s & 80s' (2013) *CD liner notes* as quoted in Eisenberg op cit note 36.

[43] Imported from Zaire and Tanzania, sounds similar, except that it features a Cuban song groove.

[44] *Benga* was first developed by ethnic Luo musicians in western Kenya, has a 'hard-edged' sound relative to *twisti* and *rumba* and is 'characterized by plain, trebly harmonies, spirited guitar licks and a swooping, plunging bass line. See C Stapleton and C May 'African all-stars: the pop music of a continent' 1987 *Quartet* at 230-31 as quoted in Eisenberg op cit note 36.

[45] Eisenberg op cit note 36.

[46] Stapleton and May op cit note 44.

[47] Music in Africa 'The Kenyan recording industry' 24 August 2015 available at *https://www.musicinafrica.net/magazine/kenyan-recording-industry,* accessed on 12 April 2023.

flooding the market with cheap copies of western, soul, disco, rock, and reggae songs.[48] Piracy and the Africanization policies forced multinational companies to shut down and transfer the thriving music production and distribution companies in Nairobi's downtown (River Road) to locals.[49] This created opportunities for local artists, producers, and distributors to thrive in an environment where access to music was abundant but largely unregulated. As a result, River Road became a hub for independent music production, with numerous studios, performance venues, and record shops catering to the burgeoning market. Thus, piracy played a significant role in shaping the vibrant music ecosystem along River Road.[50]

Although the new proprietors could not do business across vast distances and national borders, and they facilitated a considerable amount of piracy, music artists were forced to work with the distributors in River Road due to a lack of legitimate distributors.[51] The new proprietors were also appealing due to lower production costs than the big labels that operated before.[52] Over time, the once internationally marketable Nairobi sound lost its appeal due to a perceived "lack of originality," characterized by repetitive melodies being excessively exploited.[53] Meanwhile, the music industry was also hit by an economic slowdown characterized by stifling visas to foreigners, imports, and foreign exchange, and the tragic loss of talent to the HIV/AIDS pandemic in the 1990s.[54]

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[48] K Malm and R Wallis *Media Policy and Music Activity* (2003) 6-7; R Graham *Stern's Guide to Contemporary African Music* (1989) 2.

[49] Africanization policies were adopted by Kenya in 1964 as a development plan to 'Kenyanize' or replace non-citizens with citizens in key sectors of the economy, see D Himbara 'The failed Africanization of commerce and industry in Kenya' (1994) 22(3) *World Development* 469 at 469; see the effect of Africanization in Kenya's music industry in Eisenberg op cit note 36.

[50] RA Blewett and M Farley 'Institutional constraints on entrepreneurship in Kenya's Popular Music Industry' (1998) *African entrepreneurship: theory and reality* 233 at 242.

[51] Malm and Wallis op cit note 48 at 86-7; D Paterson 'Kenya: The Life and Times of Kenyan Pop' (1999) 1 *The Rough Guide to World Music* 509 at 512-4; WIPO Magazine op cit note 36.

[52] Malm and Wallis op cit note 48 at 86-7; Paterson op cit note 51 at 512-514.

[53] Stapleton and May op cit note 44.

[54] Ibid. HIV is the acronym for Human Immunodeficiency Virus while AIDS stands for acquired immunodeficiency syndrome. .

There was a renewed boom in the late 1990s and the millennium due to the emergence of a new music genre (*Genge*) and privately owned radio.[55] Urban Kenyans' engagement with foreign music led to a new urban youth culture that influenced the change of music style to *Genge* music.[56] *Genge* music also led to the grooming and discovery of new talent by independent producers like Calif Records and Ogopa Deejays.[57] Finally, the introduction of private radio through the sale of frequencies to more Kenyan Media houses, in the 1990s through the millennium, created a platform for access to foreign and local music.[58] The new radio stations led to the revival of the River Road music business as the heart of music commercialization in Kenya.[59]

The advent of digitization in Kenya's music industry is best described as the period after the early millennium when Compact Discs (CDs) became a popular medium for disseminating music.[60] The CDs, like the cassettes, increased piracy and severely reduced the revenue from

[55] Eisenberg op cit note 36 at 5.

[56] The term "Genge," derived from Swahili, denotes a collective group and has been adopted to characterize a music genre associated with Kenya. Genge music blends elements of Swahili, Kikuyu, and Jamaican patois. In the context of Kenyan music, Genge music serves a comparable role to *Bongo music* in Tanzania, *Kwaito* in South Africa, and *Afrobeats* in Western African nations, see Eisenberg op cit note 36; C Wasike 'Jua Cali, genge rap music and the anxieties of living in the globalized city of Nairobi' (2011) 8(1) *Muziki* 18-33; JK Park, JN Michira and SY Yun 'African hip hop as a rhizomic art form articulating urban youth identity and resistance with reference to Kenyan genge and Ghanaian hiplife' (2019) 16 (1-2) *Journal of the Musical Arts in Africa* 99 at 100. For further discussions refer to *Bongo music* in M Suriano 'Hip-Hop and Bongo Flavour Music in Contemporary Tanzania: Youths' Experiences, Agency, Aspirations and Contradictions' (2011) 36 (3-4) *Africa Development* 113-126; description of *Kwaito* in G Steingo 'South African music after apartheid: kwaito, the "party politic" and the appropriation of gold as a sign of success' (2005) 28(3) *Popular Music and Society* 333-357 and Afrobeats in BN Ekweonu *A Hip Hop Episteme: Understanding Hip Hop Culture's Ways of Knowing and Expressing Knowledge through Time Travel and Traditional African and Afro-Diasporic Spirituality* Black Studies Senior Thesis (Swarthmore College) (2020) 21-25.

[57] Calif Records and Ogopa Deejays were the pioneering youth music labels in Kenya. Other record labels operating during this period included Ingoma, Homeboyz Studios, Decimal Media and Ketebul music. Calif Records and Ogopa Deejays websites are not available but they are active on their social media pages at *https://www.facebook.com/califrecordings/* and *https://twitter.com/ogopadeejays, respectively*, accessed on 12 April 2023. The website addresses for Homeboyz Studios, Decimal Media and Ketebul music are available at *https://www.homeboyz.co.ke/, http://decimal.co.ke* and *www.ketebulmusic.org* accessed on 12 April 2023. See further, Music in Africa op cit note 47 and Eisenberg op cit note 36 at 11.

[58] This was part of the liberalization measures introduced by former president Daniel Moi, see Eisenberg op cit note 36 at 7.

[59] JW Shipley 'The Birth of Ghanaian Hiplife: From Black Styles to Proverbial Speech in African Hip Hop' (2012) in E Charry *Hip hop Africa: New African music in a globalizing world* (2012) 37; Eisenberg op cit note 36 at 7.

[60] Eisenberg op cit note 36 at 11; AK Kirui 'Free music streaming for Kenyan independent artists: A blessing in disguise?' (2023) 12(2) *African Musicology Online* 90 at 90-102.

the commercialization of music.[61] Since then, the most revolutionary developments in Kenya's music industry have resulted from technological advancements in the ICT sector, shifting music distribution from physical to online formats.[62] Kenya's ICT sector, often called *Silicon Savannah* due to its influential role in digital technologies in Africa, has catalyzed this transformation. This dynamic, driven by innovations such as MPesa (mobile money), Ushahidi (a global crowdsourcing application), the iHub innovation center, and government support through ICT policies, has spurred a digital revolution. Increased internet subscriptions and mobile phone penetration have significantly expanded access to digitized and digital music. Overall, digital exploitation of music has also become more popular than physical exploitation,[63] with digital music revenue overtaking the physical revenue since 2014.[64]

The digital revolution is partly characterized by the growth of M-commerce in Kenya's music sector.[65] MTT companies and music aggregators are the main patrons who run the M-commerce music sector.[66] MTT platforms disseminate music content in ringtones, ringback

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[61] Ibid.

[62] L Poggiali 'Seeing (from) digital peripheries: technology and transparency in Kenya's Silicon Savannah' (2016) 31(3) *Cultural Anthropology* 387 at 387-411; JNK Kinuthia and DM Akinnusi 'The magnitude of barriers facing e-commerce businesses in Kenya' (2014) 4(1) *Journal of Internet and Information Systems* 12 at 12-27; (CA) *Sector Statistics Report Q2 2017-2018* (2017) 10 available at *http://ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q2%20%202017-18.pdf,* accessed on 30 September 2023; W Jack and T Suri 'Mobile money: The economics of M-PESA' (2011) No. w16721 *National Bureau of Economic Research*; T.S 'Why does Kenya lead the world in mobile money?' (2013) *The Economist* 2 March 2015 available at *https://www.economist.com/blogs/economist-explains/2013/05/economist-explains-18,* accessed on 18 April 2023.

Digitization is defined as a combination of technologies used in mechanical systems, communication and infrastructure, see United Nations Conference on Trade and Development (UNCTAD) *Information Economy Report (2017): Digitalization Trade and Development* (2017) 3-9 available at *http://unctad.org/en/PublicationsLibrary/ier2017_en.pdf,* accessed on 20 October 2023.

[63] The digital revenue has matched physical sales for the first time see International Federation of the Phonographic Industry (IFPI) *Digital Music Report 2015* available at *www.ifpi.org/downloads/Digital-Music-Report-2015.pdf,* accessed on 30 September 2023; Decline of revenue from the physical sale of music by 7.6% grew by 17.7% to US$7.8 billion, driven by a sharp 60.4% growth in streaming revenue – the largest growth in eight years. For the first time, digital revenues make up 50% of the share of total recorded music industry revenues see The International Federation of the Phonographic Industry (IFPI) *Digital Music Report 2017* available at *www.ifpi.org/downloads/Digital-Music-Report-2017.pdf,* accessed on 30 September 2023.

[64] PwC *Entertainment and Media Outlook 2017:2021* 136-137 available at *https://www.pwc.co.za/en/assets/pdf/entertainment-and-media-outlook-2017.*pdf, accessed on 30 April 2023.

[65] M-commerce is a huge contributor to Kenya's economy. As of December 2017, there were 308.6 million mobile commerce transactions valued at Ksh.1.1 trillion see CA 2016/2017 Report. Beukelaer and Eisenberg op cit note 36 at 13-14; AK Kirui 'Free music streaming for Kenyan independent artists: A blessing in disguise?' (2023) 12(2) *African Musicology Online* 90-102; Kirui, Wanyama and Shitandi (2022) op cit note 3 at 1-10.

[66] Beukelaer and Eisenberg op cit note 36.

tunes, downloads, and streams.[67] While dissemination of music is not the main business for MTT companies, an empirical study of Kenya's music sector reveals that the music sector and the MTT sector are reliant on each other.[68] One prominent example of an MTT platform engaged in the music business is Safaricom's caller ring-back tune service called Skiza Tunes.[69]

It is reported that MTT companies are the biggest revenue earners from the commercialization of music in Kenya.[70] The convergence of the music and MTT sectors has raised concerns about replicating oligopolistic power relations that side-line music artists in contract negotiations and adversely affect their remuneration.[71] In addition to the revenue from music sales, MTT companies profit from the increasing data usage and growth of advertisers who prefer to use MTT platforms.[72]

Music aggregators emerged as a market response to the high level of transaction costs associated with the commercialization of music in digital and MTT platforms.[73] They have intersecting roles in the value chain sectors since they aggregate various demands associated with the commercialization of music in digital and MTT platforms.[74] This thesis is more concerned with their role in the copyright management and licensing sectors, concerning bundling digital rights and delivering them to digital and MTT platforms. The thesis specifically addresses how digitization has impacted collective management and remuneration of music artists in Kenya. This discussion is detailed in section 3.5 of the thesis.

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[67] Ibid.

[68] Beukelaer and Eisenberg op cit note 36 at 11.

[69] M-commerce is a huge contributor to Kenya's economy. As of December 2017, there were 308.6 million mobile commerce transactions valued at Ksh.1.1 trillion see CA op cit note 25.

[70] Beukelaer and Eisenberg op cit note 36 at 11; Kirui, Wanyama and Shitandi (2022) op cit note 3 at 1-10.

[71] Beukelaer and Eisenberg op cit note 36 at 205-207; Kirui, Wanyama and Shitandi (2022) op cit note 3 at 1-10.

[72] Beukelaer and Eisenberg op cit note 36.

[73] P Galuszka 'Music aggregators and intermediation of the digital music market' (2015) 9 *International Journal of Communication* 254 at 262-263.

[74] Refer to section 2.2. of this thesis for an exploration of the value chain, delineating the roles of music aggregators in copyright management and licensing, along with the additional value-added services they offer to various stakeholders within the music industry.

Contracts for the commercialization of music in MTT platforms are negotiated between MTT platforms and music aggregators. These contracts are usually covered by NDAs leaving music artists with no way to assess deals that have a bearing on their remuneration. Music artists end up earning the least from this form of commercialization.[75] They receive between 8% and 15% of the revenue, while the rest is shared amongst MTT platforms and music aggregators.[76] The High Court has likened these arrangements to an intricate web that circumvents measures meant for protecting music artists and ensuring their equitable remuneration.[77] The distribution of revenue earned from the commercialization of music in MTT platforms thus remains a thorny issue in Kenya.[78]

The years 2017-2019 were a period that marked the rise and new defining of Kenya's genre of music popularly known as "Gengetone". This genre of music is best described as a blend of *Genge* music with reggae and dance hall, which gained prominence for representing a fascinating fusion of music styles turning seemingly ordinary local news into chart-topping hits.[79] The rise of *Gengetone* is associated with a non-traditional approach to music distribution which taps into matatu culture, social media platforms, and local pubs, as opposed to radio and television broadcasting.[80]

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[75] Eisenberg op cit note 36 at 13-15.

[76] Eisenberg op cit note 36 at 3-15.

[77] *John Boniface Maina v Safaricom Limited* Civil Suit 808 of 2010 [2013] eKLR.

[78] The constant battles over the distribution of ringback tunes revenue are one of the reasons behind the Copyright (Amendment) Act, 2021. Prominent cases regarding ringback tunes revenue and the operation of music aggregators in Kenya include *Phillip Njoroge Kimani v Liberty Africa Technologies and Safaricom Limited* Constitutional Petition 147 of 2019 [2021] eKLR; *Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd* Civil Case 154 of 2009 [2009] eKLR; *Alternative Media Limited v Safaricom Limited* Civil Case No 263 of 2004 [2005] eKLR; *Music Copyright Society of Kenya Ltd v Safaricom Limited and another* Civil Case 509 of 2009 [2010] eKLR; *John Boniface Maina v Safaricom Limited* Civil Suit 808 of 2010 [2013] eKLR; *Mercy Munee Kingoo & another v Safaricom Limited another* Petition 5 of 2016 [2016] eKLR; *Xpedia Management Limited & 4 others v Attorney General & 5 others* Petition 317 of 2015 [2016] eKLR.

[79] Reggae and dance hall are defining music genres from Jamaica that emerged around the 1969-the 1980s, see KOB Chang and W Chen *Reggae routes: The story of Jamaican music* (1998) x; M Kasuku 'Gengetone-The Defining Sound of 2019?' available at *https://www.kenyabuzz.com/lifestyle/gengetone-the-defining-sound-of-2019/*, accessed on 1 October 2023.

[80] Matatu culture refers to the roaming minibuses, renowned as the most popular means of public transport in Kenya that play local music and mixtapes. Some examples of *Gengetone* music artists include Ethic, Ochungulo family, and Sailors gang. See C Storm 'Gengetone is the New Sound Accelerating out of Kenya's Streets' (2020) *Boiler Room* 24 January 2020 available at *https://boilerroom.tv/article/rise-gengetone,* accessed on 26 October 2023; A Odhiambo 'From Genge to GengeTone: The Evolution of Genge Music in Kenya' *WZLY* 2 February

Despite facing challenges such as insufficient investment in production, limited distribution networks for recorded music, and disruptions from digitization and piracy since the 1980s, Kenya's music recording industry has shown signs of growth.[81] While mastering of recordings is often outsourced, [82] live performances—whether online or in person—continue to be a significant source of revenue for Kenyan music artists.[83]

3.5. Copyright management and licensing sector in the music industry

The copyright management and licensing sector in the music industry is vital for ensuring the equitable remuneration of music artists, with Collective Management Organizations (CMOs) playing a key role in collecting and distributing royalties.[84] It is reported that a major part of music revenue globally comes from the royalties distributed by CMOs.[85] Over the past decades, digitization has created opportunities for individual management and altered some traditional pretexts that previously served as a basis for the operation of CMOs. This section discusses the evolution of collective management in Kenya and evaluates the alternatives to collective management to establish which system would enhance the equitable remuneration of music artists.

3.5.1. Concerns arising from royalty distribution by CMOs

MCSK is the most prominent music CMO in Kenya. The thesis suggests that its prominence results from controversies surrounding mismanagement, misappropriation of funds, and

2020 available at *https://wzly.net/post/190611298042/from-genge-to-gengetone-the-evolution-of-genge*, accessed on 24 February 2023.

[81] WIPO Magazine op cit note 36 and Eisenberg (2015) op cit note 3.

[82] Ibid.

[83] Ibid.

[84] Refer to the value chain in section 2.2. of this thesis.

[85] Berklee Institute of Creative Entrepreneurship (Berklee ICE), Project 'Rethink music: transparency and payment flows in the music industry' (2015) *https://www.berklee.edu/sites/default/files/Fair%20Music%20-%20Transparency%20 and%20Payment%20Flows%20in%20the%20Music%20Industry.pdf* 6, accessed on 25 May 2023.

royalty distribution challenges. Some of the major controversies occurred in 2011, 2016, 2017-2018, 2019, 2020 and 2021. In 2011, MCSK was temporarily deregistered for spending KES 137 million out of the KES 185 million collected on administrative costs.[86] In 2016, the then Chief Executive Officer (CEO) of MCSK was suspended by the MCSK Board and later resigned from office, following criminal cases implicating him and other officials for alleged misappropriation of MCSK funds.[87] MCSK funds were also frozen to investigate the fraud allegations.[88] In the same year, a campaign, #Elanispeaks, led by a music group called Elani, called out MCSK for corruption and paying music artists fewer royalties compared to the amount of airplay their music was getting on radio and television.[89] Elani reported that MCSK paid them almost ten times what they initially received shortly after launching the campaign.[90]

In 2017, MCSK was deregistered and MPAKE was registered in its place. This was followed by a series of cases in 2017-2018.[91] In an unprecedented turn of events, KECOBO did not renew MPAKE's license for 2019 and licensed MCSK instead.[92] However, MPAKE remains operational as it was licensed to collect blank tape levy.[93] In 2020, MCSK hit the headlines

[86] See the notice for the deregistration in Gazette Notice 5093 of Kenya Gazette, 6 May 2011; VB Nzomo *Collective Management of Copyright and Related Rights in Kenya: Towards an Effective Legal Framework for Regulation of Collecting Societies* LLM (University of Nairobi) (2014) 13 quoting A Gakuru 'Copyright Board deregisters Music Copyright Society' (2011) *International Law Office Newsletter* and Press Statement (For Newsroom Release) signed by Maurice Okoth, the then CEO of MCSK.

[87] *Music Copyright Society of Kenya v Chief Magistrate's Court & Inspector General of Police* [2015] eKLR; V Nzomo 'MCSK Board Unceremoniously Removes Long-serving CEO' *IP Kenya* (2016) 4 April 2016 *available at https://ipkenya.wordpress.com/2016/04/04/mcsk-board-unceremoniously-removes-long-serving-ceo/#more-6188*, accessed on 16 April 2023. MCSK funds were also frozen to investigate the fraud allegations. In the same year, a campaign, #Elanispeaks, led by a music group called Elani, called out MCSK for corruption and paying music artists fewer royalties compared to the amount of airplay their music was getting on radio and television. Elani reported that MCSK paid them almost ten times what they initially received shortly after launching the campaign. See A Klein '#ElaniSpeaks: Why Is This Popular Kenyan Band Calling Out Music Industry Corruption?' *Okayafrica* 13 January 2016 available at *https://www.okayafrica.com/elani-speaks-kenyan-band-calls-out-mcsk/*, accessed on 6 April 2023.

[88] Ibid.

[89] See Klein op cit note 87.

[90] Ibid.

[91] *Kisumu Bar Owners Association & another v Music Copyright Society of Kenya & 2 others* [2017] eKLR; *Laban Juma Toto & another v Kenya Copyright Board & 13 others* [2017] eKLR and *Laban Toto Juma & 4 others v Kenya Copyright Board & 9 others* [2018] eKLR.

[92] See I Rutenberg, M Ouma and P Munyi *Intellectual Property Law in Kenya* (2019) at footnote 60.

[93] Ibid.

again when popular music artists were disgruntled after receiving KES 2,530/=.[94] MCSK later explained their distribution calendar and that KES 2,530/= was a general distribution due to all its members.[95] MCSK later made the scientific distribution according to the airplay the music received.[96]

In 2021, KECOBO deregistered the three music CMOs (MCSK, KAMP and PRISK) over breach of administrative cost limits and the diversion of royalties to an undeclared bank account.[97] The CMOs reportedly distributed Kshs. 41 million (35.9%) instead of Kshs.79 million (70%) out of Kshs.114 m collected at the end of July 2021 in defiance of the KECOBO license conditions. Following the revocation of licenses, the collection of royalties has been suspended for a period of three months or until further advised. They also failed to meet the conditions stipulated in the provisional licenses set out by KECOBO earlier that year.[98] Due to these controversies, some music artists opt to withdraw their CMO membership.[99]

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[94] See I Omondi 'Relief for Kenyan musicians as MCSK announces Ksh.37M royalty distribution' *Citizen Digital* 27 February 2020 available at *https://citizentv.co.ke/lifestyle/relief-for-kenyan-musicians-as-mcsk-announces-ksh-37m-royalty-distribution-324508/*, accessed on 01 March 2023.

[95] Ibid.

[96] Ibid.

[97] KECOBO 'KECOBO DEREGISTERS KAMP, PRISK & MCSK' *copyright.go.ke* 24 August 2021 available at https://copyright.go.ke/media-center/news-updates/kecobo-deregisters-kamp-prisk-mcsk, accessed on 21 September 2021. The decision to deregister the CMOs was later set aside in *Kenya Copyright Board v Music Copyright Society of Kenya (MCSK) & 2 others; Attorney General & 2 others* (Interested Party) (Petition E276 of 2021) (Constitutional and Human Rights) (30 August 2021) (Ruling) [unreported], see press statements quoting the decision in KAMP, PriSK and MCSK *The Collective Management Organizations (KAMP-PRISK-MCSK) Statement on Quashing of KECOBO's Revocation Notice by the High Court* 31 August 2021 available at *http://mcsk.or.ke/wp-content/uploads/2021/08/KAMP-PRISK-MCSK-Press-Statement-.pdf*, accessed on 15 September 2023 and KAMP, PriSK and MCSK 'Royalty Collection and Distribution by KAMP-PRISK-MCSK' available at *https://mcsk.or.ke/wp-content/uploads/2021/09/KAMP-PRISK-MCSK-PUBLIC-NOTICE-.pdf*, accessed on 15 September 2023.

[98] The decision was later set aside, see KECOBO op cit note 97 and KAMP-PRISK-MCSK op cit note 97; Omondi op cit note 94.

[99] John Boniface (JB) a music artist revealed that he withdrew his MCSK membership during litigation in *John Boniface Maina v Safaricom Limited* Civil Suit 808 of 2010 [2013] eKLR. The court noted the importance of following the correct CMO withdrawal procedure in this matter. In 2020, Kaligraph Jones tweeted and permitted his music to be pirated and asked MCSK to stop collecting royalties on his behalf. See T Rajula 'MCSK faces artistes' wrath in row over royalties' *Daily Nation* 15 August 2019 available at *https://nation.africa/kenya/news/MCSK-faces-artistes-wrath-meagre-royalties-/1056-5236154-ggn38f/index.html*, accessed on 19 August 2023. It should be noted that MCSK's Articles of Association prescribe the procedure for termination of membership and such an announcement on Twitter does not constitute one of the modes. See MCSK Articles of Association available at *http://mcsk.or.ke/wp-content/uploads/2019/08/MEMORANDUM-AND-RTICLES-OF-ASSOCIATION.pdf*, accessed on 3 April 2023.

Mismanagement, misappropriation of funds and royalty distribution challenges are not the only challenges facing CMOs in Kenya. In the analogue world, joining CMOs constituted one of the initial steps of commercializing music.[100] Individual management was "impossible, impractical [and could] . . . not guarantee the equitable remuneration of [music artists]".[101] This, however, is no longer the case in the digital era. More alternatives to collective management have evolved with the increased use of digital platforms and technologies.[102] These digital platforms and technologies lower licensing, monitoring, enforcement and copyright administration costs.[103] The continued mismanagement of CMOs, the shift in the feasibility of individual management, and more licensing of music being conducted online than in the analogue world foreshadow the diminishing role of collective management in Kenya.[104] The continued existence and efficiency of CMOs, in their current state, is thus questioned, with some proponents arguing that digitization and technologies will phase them out.[105] In contrast, others advocate for a change in their roles or regulation to help them adapt to these changes.[106]

[100] See J Tournier and C Joubert 'Collective administration and competition law' (1986) 3 *Copyright* 96-103 wherein they argue that individual management of music works is deemed 'materially, economically, and legally [impractical].'

[101] RM Vučković 'Remunerations for Authors and Other Creators in Collective Management of Copyright and Related Rights' (2016) 66(1) *Zbornik Pravnog fakulteta u Zagrebu* 35 at 40; WIPO *WIPO Good Practice Toolkit for CMOs (The Toolkit)* (2018) 6; Tournier and Joubert op cit note 100.

[102] N Gallini 'Competition policy, patent pools and copyright collectives' (2011) 8(2) *Review of Economic Research on Copyright Issues* 3 at 29. See further discussion on possibilities for individual management of music in Kenya in section 3.5.3. of the thesis.

[103] Ibid.

[104] R Towse 'Economics of Copyright Collecting Societies and Digital Rights: Is There a Case for a Centralised Digital Copyright Exchange?' (2012) 9(2) *Review of economic research on copyright issues* 3 at 8; BO Ouma 'Skewed Royalty Payments by the Music Copyright Society of Kenya; the Tragedy of an Ill-Equipped Regulatory Framework' (2020) *SSRN* 3561493.

[105] A Katz 'Copyright Collectives: Good Solution but for Which Problem?' in RC Dreyfuss, H First and DL Zimmerman *Working Within the Boundaries of Intellectual Property Law* (2010) 395-430; YW Chin 'Copyright collective management in the twenty-first century from a competition law perspective' in S Frankel and D Gervais eds. *The Evolution and Equilibrium of Copyright in the Digital Age* (2015) 269-284; See also chapter six in DO Oriakhogba *Copyright, Collective Management Organisations and Competition in Africa* (2021), generally.

[106] D Gervais 'Collective Management of Copyright: Theory and Practice in the Digital Age' in D Gervais *Collective Management of Copyright and Related Rights* 3 ed (2016) 20-30.

3.5.2. Evolution of collective management in Kenya

The music industry in Kenya emerged when collective management was popularized for saving transactional costs involved in licensing, collection, and distribution of music royalties.[107] The Performing Rights Society (PRS) in London was the prototype for CMOs in Kenya.[108] PRS was formed under the East African Order in Council that regulated Kenya as a British colony. During the reign of PRS, there were massive complaints that PRS did not distribute collected royalties to its members.[109] These complaints marked the beginning of the plight of music artists in Kenya. The Musicians Performing Rights Society of Kenya (MPRSK) was formed to alleviate the shortcomings of PRS through the introduction of an indigenous CMO to work in collaboration with PRS. Even then, the status of royalty distribution remained largely unchanged, and it is argued that this was a result of PRS's continued operation in Kenya. MCSK took over the operations of MPRSK in 1983 at the height of this royalty distribution controversy. [110] For this reason, MCSK may be rightfully described as a "victim of circumstance" regarding its tainted reputation concerning royalty distribution. However, it should be noted that other factors aggravated MCSK's tainted image way after the PRS and MPRSK.

3.5.3. Possibilities for individual management of music in Kenya

This section discusses how music artists exercise their remuneration rights showing the shift from the sole reliance on collective management to the introduction and popularization of systems that allow for individual management. The shift is described as an outcome of the growth of technologically savvy music artists and users who thrive on instant gratification. The exercise and management of remuneration rights face new challenges worldwide, including in

[107] This is the period after World War II, see Eisenberg op cit note 36 at 2.

[108] The PRS was formed in 1914 see the full history of PRS available at PRS for Music 'History' (n.d.) available at http://www.prsformusic.com/aboutus/ourorganisation/ourhistory/Pages/default.aspx, accessed on 18 September 2023.

[109] R Andrews 'Kenya Taking Control of local Royalty Payment' *Billboard Newspaper* 28 March 1981, 56 available at https://www.americanradiohistory.com/Archive-Billboard/80s/.../BB-1981-03-28.pd, accessed on 18 September 2023.

[110] See letter addressed to the MCSK General manager, SN Ndemange 'Royalty Payment' (1984) as cited in Nzomo op cit note 86 at 45.

Kenya. The section evaluates remuneration mechanisms based on collective and individual management to establish which system would enhance the equitable remuneration of music artists.

In individual copyright management, the right to remuneration is exercised individually by music artists, copyright owners or their agents and representatives.[111] In this system, music artists can freely negotiate remuneration for the use of their works and directly control rights management processes like licensing, collecting royalties, and enforcement of copyright.[112] Before digitization, individual management was only practical in the publishing and film industries since these industries had fewer stakeholders than the music industry. [113] Remuneration mechanisms based on individual management are on the rise thanks to increased use of digital and MTT platforms, digital rights management systems and blockchain.[114] These have alleviated the concerns for exercising individual management for music by enabling management of work with large-scale production use.[115] Music artists may also use these technologies to save on administration costs charged by CMOs to manage their music.

Individual copyright management has become more feasible and efficient for online uses.[116] Individual licensing and pricing are more lucrative than a collective management system for some music artists.[117] Individual management is appealing to these music artists for two main reasons. Cut-throat competition among these individual management entities and CMOs drives innovation. They constantly seek better ways to serve artists and maximize remuneration and

[111] Vučković op cit note 101 at 38.

[112] K Köklü 'Individual Licensing of Copyrighted Works' (2017) in KC Liu and RM Hilty *Remuneration of Copyright Owners* (2017) 177-180.

[113] Z Wu *A legal framework for global joint copyright management in musical works: based on Rawls's Theory of Justice* PhD (Lancaster University) (2017) 13, H Olsson 'The Importance of Collective Management of Copyright and Related Rights' (2005) *WIPO National Seminar on Copyright, Related Rights, And Collective Management* 2.

[114] Ibid.

[115] Gervais op cit note 106; A Kefalas *The relevance of traditional Collective Management Organisations in the digital age: Current challenges and future possibilities* Master's thesis (University of Agder) (2017) p. 58

[116] Köklü op cit note 112 at 133.

[117] Ibid at 177-180.

royalty distribution.[118] Second, the lack of strict regulation of individual management allows music artists to negotiate licensing fees with users more freely than in collective management.[119]

The feasibility of individual management of music works has increased with the increased usage of digital platforms, especially User Generated Content sites like YouTube. Kenyan YouTubers commercialize their online content and get remunerated based on viewership.[120] This trend is also catching the commercialization of music, but the most popular commercialization method here is allowing background music for YouTube advertisements.[121] It is argued that YouTube has the market capacity to replace a lot of CMO businesses.[122] YouTube is a registry of copyrighted music that operates on a voluntary basis.[123] YouTube has also proven efficient in distributing remuneration and offering usage data to music artists and their CMOs.[124]

Despite its popularity, YouTube has not replaced the CMO system in Kenya. Instead, it has created an additional revenue creation system.[125] YouTube has enhanced the collection of royalties through its Content ID system, which helps music artists and their CMOs monetize audios and videos containing infringing music.[126] The Content ID system scans videos uploaded on YouTube against a database of files submitted by music artists.[127] A user gets a

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[118] Ibid.

[119] Vučković op cit note 101 at 39-40.

[120] GD Mwendwa 'The Rise of the YouTuber in Kenya' (2018) *Daily Nation* 20 October 2018 available at https://www.nation.co.ke/lifestyle/buzz/Rise-of-the-YouTuber-in-Kenya/441236-4814316-84k80/index.html, accessed on 19 March 2023.

[121] Robin Thicke's "Blurred lines" used this strategy, and he made a profit of approximately $250,000 see Knopper op cit note 36.

[122] Kefalas op cit note 115 at 58.

[123] Ibid.

[124] Ibid.

[125] NT DeLisa 'You (Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platforms' (2015) 81 *Brooklyn Law Review* 1275-1318.

[126] See Knopper op cit note 36; YouTube Help 'How Content ID works' (n.d.) available at *https://support.google.com/youtube/answer/2797370?hl=en*, accessed on 22 February 2023; DeLisa 'op cit note 125.

[127] YouTube Help op cit note 126.

Content ID claim when a match is found, and the copyright owner or their CMOs collect advertising revenue or decide what happens with the content.[128]

The propensity of music aggregators to replace CMOs has been tested in Kenya. The High Court of Kenya set its stand on the rationale of CMO operation in *Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd*.[129] In this case, MCSK members attempted to bypass the CMO and sign off their rights to a music aggregator (Cellulant) to increase their royalty earnings. The court held that CMOs are better suited for music royalty collection and distribution than the music aggregator due to their expertise and mechanisms. Two conclusions can be made from the decision. First, copyright in the online world still needs to be organized through collective management due to increased modes of reproduction and revenue generation.[130] Second, it is highly unlikely that regulation and court decisions will favour other intermediaries and disregard the Berne Convention structures, making CMOs irrelevant.[131] This is because the CMO system has been developed for over a century, dating back to the Berne Convention.[132]

The potential of Internet Service Providers (ISPs) and MTT companies to lower transaction fees associated with collective management of online uses is also apparent.[133] Liu and Hilty argue that ISPs and MTT companies are better positioned than CMOs to monitor usage and collect fees.[134] Therefore, it would make better sense to require ISPs and MTT companies to pay music artists on behalf of their subscribers.[135] The music artists could then be charged a lump sum or per-use payment for these services.[136] The main concern for remunerating music

[128] Ibid.

[129] [2009] eKLR.

[130] See similar arguments in Gallini op cit note 102 at 29-30 and D Gervais and A Maurushat 'Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management' (2003) 2(1) *Canadian Journal of Law and Technology* 15 at 19.

[131] Kefalas op cit note 115 at 58.

[132] Ibid.

[133] KC Liu and RM Hilty *Remuneration of Copyright Owners* (2017) vii.

[134] Ibid.

[135] Ibid.

[136] Ibid.

artists through ISPs and MTT companies is abusing their mandate and collecting data.[137] There is also a risk of unfair consumer prices since ISPs and MTT companies are not regulated by independent price controls like the CMO tariff system.[138]

Digital Rights Management (DRM) technologies and systems also facilitate individual management of music works. Some believe that DRM technologies provide better rights clearance solutions than the traditional CMOs; by enabling automated licensing and access to protected works.[139] However, fully automated DRM technologies are rare.[140] Most systems require manual operation by music artists or CMOs.[141] Multinational corporations owning a large repertoire of music may have the capacity to utilize DRM systems for individual management but small copyright owners and music artists may not.[142] That said, DRM technologies have not discounted the need for CMOs in Kenya.

Judging from the success of Bitcoin, another promising possibility for individual management is through blockchain technology.[143] Blockchain, which originated in the field of financial technology, has expanded its scope and is now gaining traction in the realm of intellectual property (IP) and copyright.[144] It is "an open ledger of information that is exchanged and verified on a peer-to-peer network and can be used for recording and tracking transactions".[145]

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[137] Ibid.

[138] Ibid.

[139] See B Clark and B McKenzie 'Blockchain and IP Law: A Match made in Crypto Heaven?' *WIPO Magazine* (2018) February 2018 available at http://www.wipo.int/wipo_magazine/en/2018/01/article_0005.html, accessed on 15 June 223; I Pedro 'ECMS: Electronic Copyright Management Systems' (1999) 20 *Ariadne*.

[140] Most systems require manual operation by music artists or CMOs. Currently, fully automated licensing functions are found in Media Image Resource Alliance (Mira) systems created in the USA through collaborative action by the Copyright Clearance Center, Inc. (CCC), Applied Graphics Technology (AGT) and the American Society of Media Photographers (ASMP). See D Gervais 'Electronic rights management and digital identifier systems' (1999) 4(3) *Journal of electronic publishing* 1 at 1-19; D Gervais 'Electronic rights management systems' (2000) 3(1) *The Journal of World Intellectual Property* 77 at 77-95.

[141] Gervais (1999) op cit note 140 and Gervais (2000) op cit note 140.

[142] BH Kobayashi 'Opening Pandora's Black Box: a Coasian 1937 view of performing rights organizations in 2014' (2015) 22(4) *George Mason Law Review* 925 at 925-942.

[143] B Bodó, D Gervais and JP Quintais 'Blockchain and smart contracts: the missing link in copyright licensing?' (2018) 26(4) *International Journal of Law and Information Technology* 311 at 312.

[144] Ibid at 311.

[145] See Clark and McKenzie op cit note 139; Bodó, Gervais and Quintais op cit note 143 at 314; A Narayanan et al. *Bitcoin and Cryptocurrency Technologies: A Comprehensive Introduction* (2016).

This technology allows multiple parties to verify what is entered in the ledger and restricts changing the entries later.[146] Blockchain offers improved transparency and efficiency of online music licensing and presents an opportunity for individual management by crowdsourcing oversight and doing away with the need for a central authority.[147]

Kenyan legislators have shown interest in blockchain, as evidenced by the active discussions over the regulatory framework for applying this technology in cryptocurrency.[148] During the August 2018 elections, Kenya exhibited indications of adopting and implementing blockchain technology.[149] Additionally, TMX Global Coin was launched in Kenya to serve the growing demand for blockchain in the country. Nevertheless, blockchain is still in its early stages of application. Blockchain technology requires a lot of coordination on-chain and between on and off-chain transactions for copyright licensing to ensure synchronous representation on blockchain and non-blockchain contracts.[150] It follows that there must be some form of coordination (perhaps technologically automated) amongst CMOs for these systems to work globally.

3.5.4. The evolving role and continued relevance of CMOs in Kenya's Music industry

Based on the above, it is argued here that CMOs are not obsolete in Kenya, but their roles are evolving, creating a need to evolve their internal practices and framework. As desirable as remuneration mechanisms based on individual management may seem, collective management

[146] Ibid.

[147] PJ Quintais, B Bodò and L Groeneveld 'Blockchain Copyright Symposium: Summary Report' *Kluwer Copyright Blog* 4 August 2017, available at http://copyrightblog.kluweriplaw.com/2017/08/03/blockchain-copyright-symposium-summary-report/?doing_wp_cron=1597972316.0605220794677734375000, accessed on 28 August 2023.

[148] I Aru 'Kenya's Blockchain Task Force Advises Gov't to Replace Cash with Digital Currency' (2018) *CCN* available at *https://www.ccn.com/kenyas-blockchain-task-force-advises-govt-to-replace-cash-with-digital-currency*, accessed on 6 April 2023.

[149] Ibid.

[150] Bodó, Gervais and Quintais op cit note 143 at 322.

seems to still offer the most workable solution for collecting and distributing royalties in Kenya.[151]

Nevertheless, the realities and possibilities of the internet and digital technologies to offer low-cost alternatives to collective management are not wholly untenable. They are a call for CMOs to level up in their digital game.[152] The future of CMOs leans towards cooperative and centralized management like setting up common ICT infrastructure and databases and exploring DRM systems for rights management for online and offline uses.[153] Although these proposed solutions sound more technological, the thesis is concerned with how Kenya's legislative framework should facilitate the efficiency of CMOs and discusses it in this chapter.

CMOs in Kenya are adapting their activities to the new technological advancements and have even come up with new administration structures.[154] MCSK attempted to assert its relevance by partnering with music aggregators to place their members' music on digital and MTT

[151] See *Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd* Civil Case 154 of 2009 [2009] eKLR. See similar argument in J Lee 'Overlapping Rights in Different Business Models' in KC Liu and RM Hilty *Remuneration of Copyright Owners* (2017) 15; JH Cohen 'The Future of Copyright Collective Societies' (2001) 23(3) *European Intellectual Property Review* 134 at 134-139; MA Lemley 'Dealing with Overlapping Copyrights on the Internet' (1997) 22(3) *University of Dayton Law Review* 547 at 547-585; Oriakhogba (2021) op cit note 105, chapter six.

[152] CMOs' efficiency is, however, dependent on the existence of online databases with search capabilities that enable users to easily identify the music artists or copyright owners of the works they need to license and the willingness of music artists and copyright owners to offer online licenses, Katz op cit note 105 at 406.

[153] WIPO recognized the potential of online databases to enhance the functions of Collective Management Organizations (CMOs) and proposed the International Music Registry (IMR) in 2011. According to WIPO, the IMR system would not replace the need for CMOs but rather support their licensing operations by offering global and centralized access to various CMOs worldwide. The IMR was designed to allow users to select CMOs based on their online music catalogs. However, WIPO suspended work on the IMR in 2013, with the Director-General issuing a statement asserting that a music-only solution was not suitable. WIPO 'What Copyright Infrastructure is needed to Facilitate the Licensing of Copyrighted Works in the Digital Age: The International Music Registry?' (n.d.) available at *https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_aut_ge_11/wipo_ip_aut_ge_11_t12.doc*, accessed on 24 January 2024; United States Copyright Office *Copyright and the Music Marketplace: A Report of the Register of Copyrights Paperback – December 21, 2015* (2015) and P Hardy *Nickels & Dimes: Music Publishing & It's Administration in the Modern Age* (2014). Multi repertoire multi-territorial licenses enhance rights clearance for multimedia uses. Examples of agreements that have attempted to functionalize the multi repertoire multi-territorial licenses are the Simulcasting agreement crafted by IFPI, the Santiago Agreement crafted by BMI (USA), Performing Rights Society (PRS – UK), Society of Authors, Composers and Publishers of Music (SACEM) and the Barcelona Agreement crafted by the International Bureau of Societies Administering the Rights of Mechanical Recordings Reproduction's (BIEM). See discussion on multi-repertoire multi-territorial licenses in DO Oriakhogba *Strengthening the regulation regimes for collecting societies in South Africa and Nigeria: any room for competition law?* PhD (University of Cape Town) (2018) 33-34. Kefalas op cit note 115 at 55; S Ne´risson 'Remaining Scopes for Collective Management of Copyright in the Online World' in K Liu and RM Hilty *Remuneration of Copyright Owners* (2017) 77.

[154] See Liu and Hilty op cit note 133 at vi explaining how CMOs are asserting their relevance in the digital era.

platforms.[155] Kenyan music, sound recording and performers' CMOs have also appreciated the need to develop and utilize online delivery of their services and simplify tariff structures—they license users through a joint online licensing platform.[156] The Attorney General approved the joint music royalty tariffs for the first time in 2017.[157]

3.6. Conclusion on the commercialization of music in Kenya

The objective of this chapter was to contextualize the dynamics among music artists, intermediaries, and other stakeholders within the value chain of Kenya's music industry. This chapter has established that the current trajectory for the commercialization of music in Kenya and the remuneration of music artists significantly impacts the remuneration of music artists. While digitalization offers new opportunities for independent music management, intermediaries still play a vital role in the Kenyan music industry. CMOs remain to be the most workable solution for music artists to exercise their remuneration rights collectively.[158] However, issues such as sub-optimal music and entrepreneurship education, coupled with a lack of transparency and accountability among intermediaries, often lead to inequitable remuneration for music artists. The industry's preference for intermediaries and large corporations over individual artists exacerbates this inequity.[159] As a result, the

[155] See MCSK, for instance, in Eisenberg op cit note 36 at 12-13.

[156] See details on the MCSK, PRiSK and KAMP joint license available at https://www.kamp.or.ke/index.php/en/licensing/what-is-a-music-license, accessed on 30 April 2020.

[157] In this system, royalty collection is joint, and the respective CMOs distribute to their members. Legal Notice No 57 the Joint Music Royalty Tariffs of 2017 available at *http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2017/57CopyrightAct_CollectingSocietyTariffs___2017.pdf,* accessed on 30 April 2023.

[158] CMO membership is voluntary. Some music artists also withdraw their CMO membership due to, inter alia, misappropriation and mismanagement. The nature of collective management in Kenya is discussed in more detail in section 4.3.1.1. of this thesis.

[159] Corporate copyright trope is the theme advancing that copyright is primarily enriching intermediaries and large corporates and not music artists or users, see definition of 'corporate copyright trope' in J Hughes, RP Merges 'Copyright and Distributive Justice' (2016) 92 *Notre Dame Law Review* 513-578 at 515; G Davis 'When Copyright Is Not Enough: Deconstructing Why, as the Modern Music Industry Takes, Musicians Continue to Make' (2016) 16(2) *Chicago-Kent Journal of Intellectual Property* 373 at 391-395.

commercialization of music in Kenya does not consistently lead to equitable remuneration for music artists.

Political economy also shapes the commercialization process, where authors often assign or license their rights to intermediaries due to a lack of resources. This reflects imbalances in bargaining power, as many artists must navigate systemic barriers—including financial constraints and the industry's monopolistic tendencies—to access commercial opportunities. These dynamics are intensified by cultural politics, which impact which groups or genres of artists are given visibility and protection in negotiations, often disadvantaging marginalized communities.

CHAPTER FOUR: LEGAL FRAMEWORK AND ANALYTICAL COMMENTARY ON THE COMMERCIALIZATION OF MUSIC AND THE DISTRIBUTION OF REVENUE IN KENYA

4.1. Introduction to the legal framework governing Kenya's music industry

This chapter explores the legal framework governing the relationships among music artists, intermediaries, and other stakeholders across the value chain of Kenya's music industry. Through an examination of key concepts, legislative developments, and revenue distribution concerns, it sheds light on Kenya's approach to balancing the interests of music artists and intermediaries. The chapter serves as a crucial foundation for exploring potential avenues for reforming Kenyan copyright law to effectively balance the interests of music artists and intermediaries in the commercialization of music and the distribution of revenue.

4.2. Constitutional obligations for ensuring equitable remuneration of music artists in Kenya

Constitutional provisions concerning the protection of Intellectual Property (IP) rights, as well as those outlining national values, principles of governance, and labour relations, collectively impose on the State a duty to establish a more equitable system for the commercialization of music and the distribution of revenue.[1] The foundation for safeguarding and promoting music in Kenya is rooted in constitutional provisions such as articles 11(1)-(3), 33(1) and 40, which recognize music as both a cultural expression and property.[2] Article 11 of the Constitution acknowledges culture as the foundation and cumulative civilization of the nation. This provision empowers the State to actively support and encourage various forms of national and cultural expression.[3] Additionally, it acknowledges the vital contribution of science and

[1] See articles 11, 33 (1)(b), 40(5), 10 and 41 of the Constitution of Kenya, 2010.

[2] See Chapter Four of the Bill of Rights: articles 11(1)-(3), 33(1) and 40 of the Constitution of Kenya, 2010

[3] Articles 11(2) and 11(3) of the Constitution of Kenya, 2010.

indigenous technologies to the nation's progress.[4] Furthermore, it upholds the IP rights of the people of Kenya.[5]

Article 11 of the Constitution of Kenya, 2010 provides:

11. Culture
(1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.
(2) The State shall—
(a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;
(b) recognise the role of science and indigenous technologies in the development of the nation; and
(c) promote the intellectual property rights of the people of Kenya.
(3) Parliament shall enact legislation to—
(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and
(b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

Chapter Four of the Bill of Rights protects music as a form of expression and property.[6] Article 33 (1)(b) of the Constitution of Kenya protects music as a form of artistic and creative expression. Article 40(5) of the Constitution of Kenya defines property to include rights and interests arising from IP, thus, extending the article 40 protections of property to music.

The right to property is protected in article 40 of the Constitution.

40. Protection of right to property

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
(a) of any description; and
(b) in any part of Kenya.
(2) Parliament shall not enact a law that permits the State or any person—
(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

[4] Ibid.

[5] Ibid.

[6] See articles 33 and 40 of the Constitution of Kenya, 2010.

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
    (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
    (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
        (i) requires prompt payment in full, of just compensation to the person; and
        (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

Articles 10 and 41 of the Constitution provide a rubric for assessing how the commercialization of music and distribution of revenue in Kenya should be conducted. The commercialization of music and distribution of revenue should be aligned with the national values and principles of governance such as equity, social justice and transparency.[7] These values and principles bind all State organs, State officers, public officers and all persons whenever they interpret the Constitution, any law or implement policy decisions.[8] Article 41(2) further provides for every worker's right to fair remuneration.

Consequently, the State's obligation to ensure the "equitable" remuneration of music artists for the commercialization of their music, flows from articles 11, 33, 40, 10 and 41 of the Constitution.[9]

[7] See article 10 of the Constitution of Kenya, 2010 on national values and principles of governance.

[8] Article 10(1) of the Constitution of Kenya, 2010.

[9] Ibid.

4.3. Legal Framework for ensuring equitable remuneration under the Copyright Act, 2001

As music artists seek to secure an equitable share of the revenue from the commercialization of their music, the role of Kenyan copyright law in ensuring "equitable" distribution has become a central concern.

Copyright law can intervene at two intervals in the contractual relationship between music artists and intermediaries: ex-ante and ex-post contract formation and negotiations.[10] This section offers insights into potential avenues for aligning Kenyan copyright law with the principles of an equitable copyright system in the commercialization of music and distribution of revenue, as discussed in chapter 2 of this thesis. Before proceeding with the discussion of these aspects, it is important to trace the development of copyright regulation in Kenya, highlighting aspects that significantly affect the distribution of revenue between music artists and intermediaries.

Copyright law in Kenya is mainly based on the Copyright Act, 2001 (as amended) (the Copyright Act).[11] Copyright protection in Kenya evolved from English common law and British statutes.[12] The Copyright Act contains aspects of the British Statute of Anne, 1709 which is credited with the birth of modern copyright legislation.[13] The Act is also a product of the "1842, 1911, and 1956 United Kingdom Copyright Acts", which operated in Kenya during the colonial period under the East Africa Order in Council, 1897.[14]

There have been various amendments to the Copyright Act since its enactment in 1966 that significantly affect the distribution of music revenue. The first amendment, in 1992, introduced the first form of CMO regulation by establishing the Competent Authority. The Competent

[10] S Dusollier 'EU Contractual Protection of Creator: Blind Spots and Shortcomings' (2017) 41 *Columbia Journal of Law & Arts* 435 at 437-438.

[11] The Copyright Regulations, 2020 and the Copyright (Collective Management) Regulations, 2020 are the subsidiary legislation of the Copyright Act, 2001. They regulate all matters concerning the application of the Copyright Act and the management of CMOs.

[12] M Ouma and B Sihanya 'Kenya' in D Kawooya, A Prabhala and T Schonwetter *Access to knowledge in Africa: The role of copyright* (2010).

[13] L Bently, U Suthersanen and P Torremans *Global copyright: three hundred years since the Statute of Anne, from 1709 to cyberspace* (2010); M Kretschmer 'Intellectual property in music: a historical analysis of rhetoric and institutional practices' (2000) 6(2) *Studies in Cultures, Organizations and Societies* 197 at 207.

[14] Ouma and Sihanya op cit note 12.

Authority had the jurisdiction to determine any dispute that arose from the application of the Copyright Act, including disputes between CMOs and users. The second was the 2001 amendment that introduced KECOBO and charged it with the overall administration of copyright and related rights in Kenya. It is worth noting that KECOBO only took over the role of CMO supervision in 2007.[15]

In 2012, a rather controversial amendment introduced the now-repealed section 30A.[16] Section 30A required producers of sound recordings and performers (related right holders) to exercise their remuneration rights through CMOs. The interpretation of this section by the courts explains the nature of collective management in Kenya as discussed in section 4.3.1. of the thesis. The provision was repealed in 2017, setting a different stance on the nature of collective management.

Numerous amendments to the Copyright Act were made in September 2019 by the Copyright (Amendment) Act, 2019 (the Amendment Act, the amendment, or the 2019 amendment).[17] The Amendment Act was a product of a two-year copyright revision process (2017-2019). The Amendment Act sought to: align the Copyright Act, 2001, with technological developments and the Constitution;[18] streamline collective management and ensure equitable distribution of music revenue;[19] domesticate the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 2013 (the

[15] See Sigei's replying Affidavit in *Republic v Kenya Copyright Board ex parte Music Copyright Society of Kenya,* High Court Miscellaneous Judicial Review Application Number 133 of 2011 as quoted in V Nzomo 'Rethinking the Regulation of Collective Management Organisations in Africa: Legislative Lessons from Kenya, South Africa and Nigeria' (2016) 1(1) *African Journal of Intellectual Property* 1 at 5.

[16] See the Statute Law (Miscellaneous Amendments) Act, 2012.

[17] See also the Bill tracker for the Copyright Amendment Bill, 2017 available at *http://kenyalaw.org/kl/index.php?id=6819*, accessed on 30 March 2020.

[18] Technological developments necessitated the introduction of the making available right (section 26(1)(e) of the Copyright Act, 2001) and Internet Service Provider (ISP) Liability (sections 35A, 35B, 35C and 35D of th7Copyright Act, 2001). The Constitution of Kenya, 2010 established the offices of Auditor-General (article 229), Inspector-General of Police (article 245), and the Director of Public Prosecutions (article 157) whose roles in the enforcement of copyright and related rights did not feature in the Copyright Act, 2001.

[19] See part VII of the Copyright Act, 2001.

Marrakesh Treaty);[20] and provide the resale royalty right.[21] Since this thesis is concerned with the distribution of music revenue in Kenya, it mainly discusses the amended sections that affect the music revenue distribution system. In this regard, the amendments predominantly sought to address the concerns about CMO operations in Kenya by increasing their transparency obligations.[22]

The most recent amendments to Kenya's copyright law were brought by the Copyright (Amendment) Act No. 14 of 2022, which came into effect on 22 April 2022.[23] This amendment established a minimum revenue-sharing standard for the ring-back tunes and allowed music artists to negotiate more favourable remuneration.[24] The amendment also established the National Rights Registry.[25]

4.3.1. Justice in the initial acquisition of rights

This section examines how justice can be achieved in the initial acquisition of rights within Kenya's music industry, focusing on both ex-ante and ex-post interventions that aim to ensure equitable remuneration and accountability. The ex-ante interventions address standards for equitable remuneration, including the recognition of the right to fair compensation and establishing clear forms and standards for remuneration. On the other hand, ex-post

[20] Kenya ratified the Marrakesh Treaty in 2017 and after the Treaty came into force in September 2017, Kenya was obligated to implement the treaty to enable the making of accessible format copies. See details on Kenya's ratification of the Marrakesh Treaty at *https://www.wipo.int/treaties/en/notifications/marrakesh/treaty_marrakesh_30.html*, accessed on 20 October 2022.

[21] Section 26D of the Copyright Act, 2001; See KECOBO 'What the Amendments to the Copyright Act Means' (2019) available at https://www.copyright.go.ke/media-gallery/news-and-updates/365-what-the-amendments-to-the-copyright-act-means.html, accessed on 29 Oct 2019; See also Parliament of Kenya *the Senate Copyright Bill Digest* (2018) available at *http://www.parliament.go.ke/sites/default/files/2018-11/Copyright%20Bill%20Digest%2C%202017%20NA%20Bill.pdf*, accessed on 20 October 2019.

[22] See the Copyright (Amendment) Act, 2019 and Part VII of the Copyright Act, 2001 on Collective Administration of Copyright.

[23] Copyright Amendment Act No. 14 of 2022.

[24] A ring-back tune is "subscription music or a tone which i[s] played by a telecommunication operator to the originator of a call", see definition in section 2 of the Copyright Act, 2001.

[25] See section 2 of the Copyright Act, 2001 on the definitions of "registry", "ring-back tune" and "telecommunication operator; section 30C in the Copyright Act, 2001, which regulates the distribution of the ring-back tune revenue; and sections 22B, 22C, 22D and 49(2) of the Copyright Act, 2001 which regulate the National Rights Registry.

interventions focus on ensuring accountability and transparency within collective management organizations (CMOs) in Kenya, their supervisory mechanisms, and the role of copyright owners in management. Additionally, this section explores various copyright contract mechanisms, such as the right of revocation, term limits for agreements, and standards for common remuneration. Lastly, it addresses the available dispute resolution mechanisms, including the Copyright Tribunal and the judicial system, to ensure that music artists and stakeholders have access to fair and effective legal remedies.

4.3.1.1. Ex-ante interventions: Standards for equitable remuneration

The following subsections explore ex-ante interventions focusing on the right to equitable remuneration for the commercialization of music and the form and standard of equitable remuneration as outlined in the Copyright Act.

4.3.1.1.1. The right of music artists to equitable remuneration for the commercialization of music

Music artists' right to claim remuneration for the commercialization of music is inferred from the provision of exclusive rights in the Copyright Act. Kenyan legislators seem to rely on this inference since there is no further assertion of the right to equitable remuneration. Perhaps it is because exclusive rights are more directly associated with the right to remuneration than "remuneration rights per se".[26] This assertion previously existed for "remuneration as such" in the repealed section 30A. The section regulated the remuneration of producers and performers of sound recordings under the compulsory licensing system for private copying when a sound recording was commercialized.

An explicit provision of the right to equitable remuneration in the Act is essential given the challenge of inequitable remuneration of music artists in Kenya. The provision would create

[26] "Remuneration rights per se" are granted by international treaties, either independently or as an alternative to exclusive rights. Examples include the right to equitable remuneration for broadcasting and communication to the public of commercial phonograms, as well as the resale right. Similarly, it includes the right to equitable remuneration for broadcasting and communication to the public of fixations of audiovisual performances, and the right to equitable remuneration for rental, see C Geiger and O Bulayenko 'Creating Statutory Remuneration Rights in Copyright Law: What Policy Options Under the International Legal Framework?' in A Metzger and H Grosse Ruse-Khan *Intellectual Property Ordering Beyond Borders* ed (2022) 408-461.

room for defining the right, its scope of application, the standard of equitableness expected in transfers, and the bounds of freedom of contract when implementing the right.

The elusive way that the Copyright Act provides for the right to equitable remuneration often leads to vague remuneration clauses, leading to constant remuneration disputes between music artists and intermediaries.[27] The Act does not specifically address the waiver of the right to remuneration, which allows intermediaries to propose remuneration waivers to music artists more easily during negotiations. Therefore, it provides extensive contractual freedom for music artists and intermediaries to determine the importance and substance of remuneration clauses.[28] They may decide whether to include how remuneration should be agreed upon or ordered, the method and period in which remuneration should be paid, and how remuneration disputes should be resolved.

4.3.1.1.2. Form and standard of equitable remuneration for music artists

The Copyright Act regulates the scope, duration and 'in writing requirements' impacting assignment and license validity.[29] The Act mandates that assignments and licenses specify exclusive rights, duration, and geographical area of application.[30] 'In writing requirements' differ by license or assignment type, impacting their revocation rules.[31] Non-exclusive licenses can be written, oral, or tacit, with varied revocation rules.[32] Oral and tacit non-

[27] See for example, *Phillip Njoroge Kimani v Liberty Africa Technologies and Safaricom Limited* Constitutional Petition 147 of 2019 [2021] eKLR; *Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd* Civil Case 154 of 2009 [2009] eKLR; *Alternative Media Limited v Safaricom Limited* Civil Case No 263 of 2004 [2005] eKLR; *Music Copyright Society of Kenya Ltd v Safaricom Limited and another* Civil Case 509 of 2009 [2010] eKLR; *John Boniface Maina v Safaricom Limited* Civil Suit 808 of 2010 [2013] eKLR; *Mercy Munee Kingoo & another v Safaricom Limited another* Petition 5 of 2016 [2016] eKLR; *Xpedia Management Limited & 4 others v Attorney General & 5 others* Petition 317 of 2015 [2016] eKLR.

[28] See discussion of the effects of extensive contractual freedom in regulating remuneration contracts at LE Kenner '*Can Legislative Reform Secure Rewards* for *Authors*? *Exploring Options* for the *New Zealand Copyright Act*' (2017) 48(4) *Victoria University of Wellington Law Review* 571 at 574; L Bently and B Sherman *Intellectual Property Law* (2014) 319.

[29] Section 33(2) and (4) of the Copyright Act, 2001.

[30] Section 33(2) of the Copyright Act, 2001.

[31] Section 33(4) of the Copyright Act, 2001.

[32] Section 33(4) of the Copyright Act, 2001.

exclusive licenses allow revocation at any time, while written ones follow contractual terms for revocation. [33]

Exclusive licenses and assignments must be in writing.[34] The 'in writing' requirement is meant to induce the parties to negotiate and agree on the conditions of the transfer.[35] It is also intended to serve evidentiary purposes during enforcement in courts when one party fails to comply with the conditions of the transfer.[36]

The 2019 amendment of the Copyright Act tightened the requirement for assignments to be in writing by requiring them to be lodged at KECOBO.[37] It, however, relaxed the rule for assignments of works outside Kenya by removing the previous requirement for a letter verification from KECOBO.[38] Other licenses are further incorporated into the purview of section 33 protections in the Copyright Act by introducing a provision that stipulates the duration of licenses where it is unspecified to be three (3) years.[39]

In Kenya, music is easily assigned and licensed to intermediaries subject to the requirement that assignments and exclusive licenses must be in writing.[40] Ultimately, the existence of a written contract could help music artists enforce the contract before courts, should intermediaries not comply with its terms. However, the 'in writing' requirement has been found to serve more evidentiary purposes than substantive purposes of ensuring that music artists and copyright owners are aware of the conditions of the assignment and licenses.[41] Due to the complexity of most assignments and licenses and the fact that some are not well-versed in the law or lack legal representation during the negotiation and conclusion of assignments and

[33] Ibid.

[34] Section 33(3) of the Copyright Act, 2001.

[35] Dusollier op cit note 10 at 437-438.

[36] Ibid.

[37] Section 33(3A) of the Copyright Act, 2001.

[38] Section 33(3) of the Repealed Copyright Act, 2001.

[39] Section 33(7) of the Copyright Act, 2001.

[40] Section 33(3) of the Copyright Act, 2001.

[41] Dusollier op cit note 10 at 438.

licenses, some music artists may not benefit from the "in-writing" requirement.[42] It is also difficult to determine the extent to which the 'in writing' requirement applies to remuneration clauses.

The Copyright Act acknowledges that assignments and exclusive licenses represent the most restrictive means of commercializing music for music artists. This is because they limit music artists' autonomy, control and opportunities for commercialization, often in favour of intermediaries who hold the exclusive rights to exploit the music. However, the Act fails to set time limits for these assignments and exclusive licenses. This means that intermediaries can hold rights for the commercial life of some music works. Apart from the 'in writing' requirement and requirements to include the exclusive rights to be transferred, the duration of the transfers, and the geographical area for their application, there is no further regulation on the standard and format of assignments and licenses or remuneration clauses.[43]

Additionally, the Act does not regulate waiver of the right to remuneration, making it easier for intermediaries to front remuneration waivers to music artists during negotiations. Therefore, the Act provides extensive contractual freedom for music artists and intermediaries to determine the importance and substance of remuneration clauses.[44] They may decide whether to include how remuneration should be agreed upon or ordered, the method and period in which remuneration should be paid, and how remuneration disputes should be resolved.

According to Kenya's jurisprudence, the standard of equitable remuneration is judged in terms of appropriateness and proportionality to the actual or potential economic value of the work and the contribution of each party.[45] The main contention in *Phillip Njoroge Kimani v Liberty*

[42] T Greenman 'The Balance between Copyright and the Freedom of Contract – an Israeli Perspective' (n.d.) available at *https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_11/wipo_ipr_ge_11_topic7.pdf*, accessed on 25 August 2023.

[43] Section 33(2) of the Copyright Act, 2001.

[44] See discussion of the effects of extensive contractual freedom in regulating remuneration contracts at Kenner op cit note 28 at 574; Bently and Sherman op cit note 28 at 319.

[45] See for example, *Phillip Njoroge Kimani v Liberty Africa Technologies and Safaricom Limited* Constitutional Petition 147 of 2019 [2021] eKLR; *Laban Juma Toto & another v Kenya Copyright Board & 13 others [2017] eKLR*; *Kisumu Bar Owners Association & another v Music Copyright Society of Kenya & 2 others [2017] eKLR* [2017] eKLR; *Mercy Munee Kingoo & another v Safaricom Limited another* Petition 5 of 2016 [2016] eKLR; *Xpedia Management Limited & 4 others v Attorney General & 5 others* Petition 317 of 2015 [2016] eKLR; *Republic v Kenya Copyright Board ex parte Music Copyright Society of Kenya*, High Court Miscellaneous Judicial Review Application Number 133 of 2011 (unreported); *John Boniface Maina v Safaricom Limited* Civil Suit 808 of 2010 [2013] eKLR; *Music Copyright Society of Kenya Ltd v Safaricom Limited and another* Civil Case 509 of

Africa Technologies and Safaricom Limited was that the respondents had conspired to keep secret the true value and earnings/revenue of the petitioner's musical works in use on the 'Skiza Tunes' platform.[46]

However, this standard is not explicitly defined in the Copyright Act. This may be viewed as intentional to allow music artists to interpret their exclusive rights and articulate the different ways in which inequitable remuneration manifests in their transactions with intermediaries. Nevertheless, the absence of a clear-cut standard of equitableness may contribute to music artists' hesitance to enforce their right to equitable remuneration.

Music artists tend to shy away from filing cases against intermediaries for fear that their actions may not succeed, and intermediaries may blacklist them for instituting legal action. Explicit provision of an equitableness standard may mitigate this challenge by enabling music artists to relate inequitable remuneration to the factors that contribute to the payment of appropriate and proportionate remuneration, especially when they negotiate for inequitable rates.

The standard of equitableness is essential for evaluating the equitableness of a form of remuneration, in terms of the extent to which lumpsum or periodic remuneration may be accepted as equitable in the music industry. Consequently, it is important to crystallize the standard of equitableness by explicitly providing for it and delineating the scope of its application to the other three components of an equitable revenue distribution system.

4.3.1.2. Ex-post interventions: Accountability and transparency obligations for intermediaries involved in the commercialization of music

4.3.1.2.1. Collective management of music in Kenya

Copyright law provides collective management where copyright owners may exercise their remuneration rights collectively through CMOs. The Copyright Act defines a CMO as "an organization approved and authorized by [KECOBO and tasked with] the negotiation for the

2009 [2010] eKLR; *Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd* Civil Case 154 of 2009 [2009] eKLR; *Alternative Media Limited v Safaricom Limited* Civil Case No 263 of 2004 [2005] eKLR.

[46] Petition 147 of 2019 [2021] eKLR.

collection and distribution of royalties and the granting of licenses in respect of the use of copyright works or related rights."[47]

Collective management through CMOs has become a standard practice in developed countries and most developing countries that recognize copyright.[48] Collective management offers solutions that serve the interests of copyright owners and users. It facilitates the trade-off between incentives and access by providing a mechanism for remunerating copyright owners and allowing legal access to works, which would be cumbersome through individual management.[49] For copyright owners, collective management reduces transaction costs associated with licensing, monitoring the use of works and related rights and collection of royalties.[50] It also increases copyright owners' bargaining power to negotiate with corporations, multinational users, and other intermediaries on a more balanced basis.[51]

For users, it solves the problem of fragmentation of rights by facilitating access to works that are owned by multiple persons or entities, as is the case for most music.[52] The role of CMOs and their primary functions are best summarized as monitoring the use of copyright owners' works, negotiating with prospective users and giving them licenses against appropriate

[47] Section 2(1) the Copyright Act, 2001.

[48] T Riis, OA Rognstad and J Schovsbo 'Collective Agreements for the Clearance of Copyrights–The Case of Collective Management and Extended Collective Licenses' in T Riis *User generated law: re-constructing intellectual property law in a knowledge society* (2016) 55-75 at 55- *56 Edward Elgar* (2016); A Katz 'Copyright Collectives: Good Solution but for Which Problem?' in RC Dreyfuss, H First and DL Zimmerman *Working Within the Boundaries of Intellectual Property Law* (2010) 395-430 at 395.

[49] Katz op cit note 48 at 395; Collective management was born out of the need for balancing the interests of copyright owners to enhance the legal use of their works through payment against the user's access rights. This was necessitated by the introduction of the public performance and broadcasting rights in the Berne Convention which made individual management cumbersome. See also S Nérisson 'Remaining Scopes for Collective Management of Copyright in the Online World' *Remuneration of Copyright Owners* (2017) 71-83 at 72.

[50] Ibid.

[51] D Gervais 'Collective Management of Copyright: Theory and Practice in the Digital Age' in D Gervais *Collective management of copyright and related rights* 3ed (2016); G Pessach 'Collective Administration of Copyright: Another View on Efficiency, Justice and Fairness Considerations' (2006) 2 *Din Udvarim - Haifa Law Review* 621.

[52] Fragmentation, also referred to as "anticommons" occurs "when too many people own pieces of one thing, nobody can use it" see definition in M Heller 'The tragedy of the anticommons: a concise introduction and lexicon' (2013) 76(1) *The modern law review* 6 at 6; D Gervais and A Maurushat 'Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management' (2003) 2(1) *Canadian Journal of Law and Technology* 15-33, F Parisi and B Depoorter 'The Market for Intellectual Property: The Case of Complementary Oligopoly' in WJ Gordon and R Watt *The Economics of Copyright* (2003) 162-167. See further SM Besen, SN Kirby and SC Salop 'An economic analysis of copyright collectives' (1992) *Virginia Law* 383 at 383-411.

remuneration on a basis of tariff and appropriate conditions, collecting remuneration and distributing it amongst copyright owners.[53]

CMOs administer the interests of national and foreign copyright owners in their national territory.[54] Kenyan CMOs usually obtain their mandate from national copyright owners through assignments and reciprocal agreements with CMOs in foreign countries on behalf of foreign copyright owners. CMOs belong to a network of international organizations which facilitate the cooperation of CMOs through reciprocal representation agreements.[55] Consequently, CMOs usually represent a world repertoire of the category of rights they manage.[56]

The possibility that CMOs may grant blanket licenses to users for the entire world repertoire they manage is recognized as one of the most important elements of a fully developed CMO system.[57] However, even where the system of reciprocal representation agreements is advanced, the repertoire of rights which a CMO has been explicitly authorized to manage is never an entire world repertoire.[58] This is because some countries lack appropriate organizations to conclude reciprocal representation agreements with, or some copyright owners withhold their works from the collective system; or the difficulty attributed to locating most unrepresented copyright owners whose works have a low commercial value.[59]

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[53] M Ficsor *Collective management of copyright and related rights* (2002); OR Ola *Operation and regulation of copyright collective administration in Nigeria: important lessons for Africa* LLM (University of South Africa) (2012).

[54] World Intellectual Property Organization (WIPO) *WIPO Good Practice Toolkit for CMOs (The Toolkit)* (2018).

[55] Examples of these international organizations include the International Federation of Reprographic Reproduction Organizations (IFRRO), the International Confederation of Societies of Authors and Composers (CISAC) and the International Bureau of Societies Administering the Rights of Mechanical Recordings Reproduction (BIEM). See D Gervais 'Collective Management of Copyright: Theory and Practice in the Digital Age' in D Gervais (ed*.) Collective Management of Copyright and Related Rights* (2016) 3-30.

[56] M Ficsor *Collective Management of Copyright and Related Rights* (2002).

[57] Ficsor op cit note 56 at 139-141.

[58] Ibid.

[59] Ibid; K Andersdotter et al. 'Background Paper on Extended Collective Licensing: by IFLA Copyright and Other Legal Matters Advisory Committee Network' (2018) available at *https://www.ifla.org/files/assets/clm/ecl_background_paper.pdf*, accessed on 20 July 2023.

The system of collective management would be undermined if CMOs were not allowed to grant blanket licenses or authorize the use of some works that do not belong to their repertoires (works where they have not been exclusively authorized to manage). [60] Provided that a CMO represents a sufficiently wide repertoire of works, they should be allowed to grant blanket licenses.

There are two legal techniques for ensuring the operation of blanket licenses: extended management and "business management without mandate". [61] In extended management, collective management is extended to rights which have not been entrusted to CMOs subject to some conditions dictated by the law.[62] The concept of "business management without mandate", as explained by Uchtenhagen, likens a non-CMO member to an absent tenant and a CMO to a neighbour who calls the police when they see someone breaking into the absent tenant's house.[63] Uchtenhagen argues that the operation of CMOs on this basis is only justified when non-members are treated in the same way as members and given their share of royalties after the deduction of administration costs.[64] Further, its applicability is hinged on the fact that the CMOs are unaware that a copyright owner opposes the use of their works. CMOs may thus be regarded as trustees for the royalties collected in their repertoire and can therefore act for all copyright owners, including non-members.[65]

"Business management without mandate" best explains the operation of blanket licenses under Kenya's collective management system since there is no provision for extended management. The collective management system is substantially voluntary, meaning that CMOs need to

[60] Ibid.

[61] Ficsor op cit note 56; U Uchtenhagen *Copyright Collective Management in Music* (2011) 56; D Oriakhogba 'Collective Management of Copyright in Nigeria: Should It Remain Voluntary, May It Be Mandatory or Extended?' (2019) Nigerian *Institute of Advanced Legal Studies* (NIALS) 1 at 6-7.

[62] Some of the conditions include, for example, the requirement that a CMO is that is sufficiently representative of a category of work/s and special protection of the interests of copyright owners who are not members of the CMO. See Ibid.

[63] Ibid.

[64] Ibid.

[65] See also holding in *Xpedia Management Limited & 4 others v Attorney General & 5 others* Petition 317 of 2015 [2016] eKLR.

acquire authorizations from copyright owners to administer their rights in most instances.[66] However, the utilization of blanket licenses by CMOs makes it inevitable for CMOs to work without some copyright owners' mandate.[67] Mandatory collective management is adopted where remuneration rights are granted under compulsory licenses.[68]

Blanket licenses give users access to an entire CMO's repertoire, without the obligation to confirm which works fall under the repertoire, at a tariff.[69] The annual tariff-setting process is an outcome of stakeholder negotiations (between users and CMOs) and state intervention (by KECOBO and the Attorney General).[70] KECOBO usually moderates the negotiations between users and CMOs. The negotiated rates are then approved and gazetted by the Attorney General.

Kenya adopts a "one CMO per set of rights rule".[71] Interestingly, during the 2017 MCSK-MPAKE registration and deregistration wrangles, two CMOs were in operation contrary to the rule.[72] The three music CMOs — Music Copyright Society of Kenya (MCSK), Kenya Association of Music Producers (KAMP) and Performers Rights Society of Kenya (PRiSK) — operate through a joint licensing system where users make one payment to access music in

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[66] Voluntary collective management also points to the fact that CMO members are at liberty to terminate CMO membership, assign the rights to another CMO or opt to manage the rights individually. See part VII of the Copyright Act, 2001 and Regulation 3(a) of the Copyright (Collective Management) Regulations, 2020. See also the holding in *Mercy Munee Kingoo & another v Safaricom Limited another* Petition 5 of 2016 [2016] eKLR which stated that collective management in Kenya is voluntary and CMOs can only collect and distribute royalties for their members. See further the description of voluntary collective management in M Ficsor 'Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the EU *'Acquis"* in D Gervais (ed.) *Collective Management of Copyright and Related Rights* 3 ed (2016) at 31-77.

[67] Oriakhogba op cit note 61 at 1-7; Uchtenhagen op cit note 61 at 56. See also Regulation 15 (c) of the Copyright (Collective Management) Regulations, 2020 which recognizes CMOs' practice of "business management without a mandate" by according non-CMO members the right to communicate to CMOs to exercise their rights.

[68] Section 30B (2) of the Copyright Act, 2001.

[69] Fragmentation, also referred to as "anticommons" occurs "when too many people own pieces of one thing, nobody can use it" see definition in M Heller 'The tragedy of the anticommons: a concise introduction and lexicon' (2013) 76(1) *The modern law review* 6 at 6; Gervais and Maurushat op cit note 52 at 15-33, Parisi and Depoorter op cit note 52. See further Besen, Kirby and Salop 'op cit note 52.

[70] See articles 10 and 40(5) of the Constitution of Kenya, 2010, section 46 of the Copyright Act, 2001 and Regulation 26 of the Copyright (Collective Management) Regulations, 2020.

[71] Section 46(5) of the Copyright Act, 2001.

[72] MCSK was later barred from conducting CMO businesses in 2017 by the decision in *Kisumu Bar Owners Association & another v Music Copyright Society of Kenya & 2 others [2017] eKLR* [2017] eKLR. MPAKE took over, was deregistered in 2019 and was replaced by MCSK ever since. However, MPAKE remains operational as it was licensed to collect blank tape levy as per section 46A of the Copyright Act, 2001. See I Rutenberg, M Ouma and P Munyi *Intellectual Property Law in Kenya* (2019) footnote 60.

their different repertoires.[73] In this system, royalty collection is joint but distribution is done by the respective CMOs. MCSK-KAMP-PRISK have a self-licensing system that enables music users to easily acquire the joint license by dialling a number and following the prompts.[74]

4.3.1.2.1.1. The nature of collective management of music in Kenya

An understanding of the overall nature of collective management is an essential component for creating transparent policies for the remuneration of non-CMO members.

The nature of collective management has been the subject of controversy in Kenya as evidenced by two 2016 decisions (*Xpedia Management Limited & 4 others v Attorney General & 5 others (Xpedia* case*)* and *Mercy Munee Kingoo & another v Safaricom Limited & another (Mercy Munene* case)) and the repeal of section 30A and the introduction of section 30B to the Copyright Act.[75] Arguably, the *Xpedia* and *Mercy Munene* cases represented Kenyan copyright owners' expression of their preference for an opt-out CMO system, based on the desire to utilize the opportunities for individual copyright management, as presented by digitization and the mismanagement and misappropriation of funds by CMOs.[76]

The cases sought, inter alia, an interpretation of the repealed section 30A of the Copyright Act, which required producers and performers of sound recordings to exercise their remuneration rights through CMOs.

The *Xpedia* case determined the constitutionality of the repealed section 30A, concerning whether the provision violated the freedom of association and right to property as guaranteed in articles 36 and 40 of the Constitution respectively. The petitioners were music aggregators and music artists. The court held that there were no violations of the alleged rights since the provision was meant to enhance the remuneration of copyright owners. Further, the nature of

[73] See the Joint Collection Tariff, Legal Notice No. 39 of 27 March 2020 which is operational between 01 January 2020 to 31 December 2022. The Proposed Tariff for 2022-2024 has been subjected to public participation but is yet to be gazetted.

[74] See MCSK directions on how to pay for the joint license available on their website at *https://mcsk.or.ke/how-to-pay/,* accessed on 20 November 2023.

[75] *Xpedia Management Limited & 4 others v Attorney General & 5 others* Petition 317 of 2015 [2016] eKLR and *Mercy Munee Kingoo & another v Safaricom Limited another* Petition 5 of 2016 [2016] eKLR.

[76] Ibid.

remuneration rights based on compulsory licenses necessitated mandatory collective management. They gave an example of Skiza Tunes (a ring-back tunes service offered by Safaricom) and stated that it would be impossible for copyright owners to go after every user for collection of royalties. This decision supports the argument that CMOs hold a position of trust and can therefore act for non-members in the repertoire they manage.[77]

The *Mercy Munene* case overturned the *Xpedia* case and declared section 30A unconstitutional. The petitioners were non-CMO members who had contracted the services of music aggregators to digitize their music on the *Skiza Tunes* platform. The petitioners received their royalties through the music aggregators before the enactment of section 30 A in 2012. They argued that Safaricom Limited's actions of remitting royalties from the *Skiza Tunes* platform to CMOs since 2015 infringed on their freedom of association.

The court noted that section 30A was brought in through the Statute Law (Miscellaneous Amendments) Act, 2012 and ordinarily such a law dealt with minor amendments to the statute and should not be subjected to public participation. However, section 30A altered the Copyright Act to a large extent and should have been subjected to public participation. The court also declared that mandatory collective management mandated by section 30A was unconstitutional for limiting the petitioners' rights to choose how their royalties should be paid.[78] Consequently, the court issued a permanent injunction restraining Safaricom Limited from remitting artists' royalties to CMOs. The orders were later clarified to the extent that the injunction did not apply to artists who still wished to receive their royalties through CMOs.[79] The *Mercy Munene* case led to the deletion of section 30A by the Statute Law (Miscellaneous Amendment) Act No. 11 of 2017.

In 2019, section 30B was introduced into the Copyright Act.[80] Section 30B is a reintroduction of the repealed section 30A, with some minor changes. It reintroduces the requirement to exercise remuneration rights based on compulsory licenses through CMOs and may be read as

[77] Oriakhogba op cit note 61.

[78] The court clarified the order on 14 July 2017, Chitembwe J restated his position in a recent application where he was called upon to interpret the orders in his 3 November 2016 ruling. See *Mercy Munee Kingoo & another v Safaricom Limited another* Petition 5 of 2016 [2016] eKLR.

[79] *Mercy Munee Kingoo & another v Safaricom Limited another* Petition 5 of 2016 [2016] eKLR.

[80] In October 2019, the Copyright Amendment Act No. 20 of 2019 came into effect introducing section 30B.

an affirmation of the *Xpedia decision* – summarized in this thesis as approving that CMOs are trustees for royalties collected on behalf of non-members, in some instances.[81] The change refers to the inclusion of the Kenya Revenue Authority or any other designated entity by the KECOBO into the royalty collection system.[82] Apart from the need to increase transparency in the collection of broadcasters' royalties, it is not quite evident what necessitated this change.[83]

4.3.1.2.1.2. Transparency and accountability of CMOs

Kenya adopts a dual system for enhancing corporate transparency and accountability by CMOs. This system is presented in the Companies Act, 2015, the Copyright Act, 2001 and its Regulations (the Copyright (Collective Management) Regulations, 2020 and the Copyright Regulations, 2020).

The system prescribed in the Companies Act is meant to enhance corporate transparency and accountability amongst CMOs. Corporate transparency refers to 'the widespread availability of relevant, reliable information about the periodic performance, financial position, investment opportunities, governance, value, and risk'.[84] The system is fourfold and based on the CMO's Memorandum of Understanding (MoU) and Articles of Association (AoA),[85] the six (6) statutory duties of CMO board officers,[86] the section 114(3) requirement for notice on AGMs

[81] Section 30B (2) of the Copyright Act, 2001; *Xpedia Management Limited & 4 others v Attorney General & 5 others* Petition 317 of 2015 [2016] eKLR.

[82] Section 30B (1) of the Copyright Act, 2001.

[83] L Ilado 'Broadcaster royalties in Kenya 'still a huge problem' *Music in Africa* 14 July 2021 available at *https://www.musicinafrica.net/magazine/broadcaster-royalties-kenya-still-huge-problem*, accessed on 30 October 2023.

[84] RM Bushman and AJ Smith 'Transparency, Financial Accounting Information and Corporate Governance' 2003 *FRBNY Economic Policy Review* 65 at 76; CB Ncube 'Transparency and accountability under the new company law' *Acta Juridica* (2010) 43 at 43.

[85] See section 46(4) of the Copyright Act, 2001; sections 13 of the Companies Act, 2015 and Regulation 3(1) of the Copyright (Collective Management) Regulations, 2020.

[86] Sections 142-148 of the Companies Act, 2015.

and other rights accorded to CMO members and the Companies Act provisions imposing on CMOs the duty to keep proper financial records.[87]

A CMO is a company limited by guarantee and incorporated under the Companies Act, 2015.[88] For registration, CMOs require a statement of guarantee, an MoU and an AoA.[89] The MoU defines a CMO's transparency and accountability duties related to external affairs, while the AoA defines these duties regarding internal affairs.[90]

The CMO board of officers has six main statutory duties around administrative functions. However, these duties are not exhaustive as common law, and equity rules stipulate a broader range of duties. The statutory duties include: -

1. to act within powers;[91]
2. to act in good faith and promote the success of the CMO;[92]
3. to exercise discretion in the manner stipulated in a CMO's documents;[93]
4. to exercise reasonable care, skill, and diligence as will be reasonably expected of a person carrying out the functions of a CMO board officer; [94]
5. to avoid conflict of interest in the commercialization of works that they become aware of while acting as CMO officers and disclosing such interest if it occurs;[95]

[87] Since CMOs are registered under the Companies Act, they have a duty to keep proper financial records as provided in sections 628, 629, 636 and 705 of the Companies Act, 2015.

[88] See section 46(4) of the Copyright Act, 2001.

[89] Sections 13 of the Companies Act, 2015. See also Regulation 3(1) of the Copyright (Collective Management) Regulations, 2020.

[90] See for example the MCSK's MoU and AoA of 2019 available at https://mcsk.or.ke/wp-content/uploads/2019/08/MEMORANDUM-AND-RTICLES-OF-ASSOCIATION.pdf, accessed on 20 September 2023.

[91] Section 142 of the Companies Act, 2015.

[92] Section 143 of the Companies Act, 2015.

[93] Section 144 of the Companies Act, 2015.

[94] Section 145 of the Companies Act, 2015.

[95] Section 146 as read with section 140 of the Companies Act, 2015.

6. to refuse benefits from third parties if the benefit is linked to the fact that they are acting as a CMO's officer, and[96]

A breach of these duties would attract a civil penalty in common law and equity rules.[97]

Section 114 of the Companies Act requires CMOs to inform their members of proposed resolutions through written communication and notices for Annual General Meetings (AGMs). This requirement ensures that CMOs are transparent by affording their members an ample opportunity to participate in decision-making. Section 114 also provides obligations for CMOs to, inter alia, send proposed written resolutions and copies of their annual financial statements to members.

The Companies Act, 2015 imposes a duty on CMOs to keep proper financial records that explain the transactions of a CMO.[98] Regarding financial management, there are two clusters of duties imposed on CMOs. The first one is the duty to keep proper accounting records, and failure to do so is an offence.[99] A CMO and/or CMO officers may be charged with an offence for non-compliance with this duty. Upon conviction, a CMO may be liable to a fine not exceeding 2, 000 000/= KES. CMO officers may be liable to a similar fine or imprisonment for a maximum of two years or both.[100]

The second cluster of duties relates to financial statements. CMOs, through their officers, are required to ensure that their financial statements reflect an accurate and fair view of the CMOs'

[96] Section 147 of the Companies Act, 2015.

[97] Section 148 of the Companies Act, 2015.

[98] See the obligations of a company regarding accounting records and financial statements in Part XXV of the Companies Act, 2015. See particularly, sections 628, 629, 636 and 705 of the Companies Act, 2015.

[99] Part XXV and section 628 of the Companies Act, 2015.

[100] Part XXV and section 629 of the Companies Act, 2015.

state of affairs.[101] CMOs are also required to audit their annual financial statements.[102] Additionally, CMOs must file annual returns with the registrar of companies.[103]

For the system prescribed in the Copyright Act and its Regulations, the thesis discusses it under three major components: KECOBO's supervisory mandate over CMOs, CMO board composition and responsibilities and the involvement of right holders (CMO members and non-members) in CMOs' management.

- *KECOBO's supervisory mandate over CMOs*

KECOBO is the principal regulatory and supervisory authority for Kenya's copyright-related institutions.[104] It is vested with the powers to coordinate and oversee the implementation of copyright law, register copyright, license, and supervise CMOs' activities of collection and distribution of royalties and enforce copyright.[105]

The composition of KECOBO is prescribed in section 6 of the Copyright Act, 2001.[106] The composition of KECOBO was changed slightly by the 2019 Amendment to reflect the office of the Principal Secretary (PS).[107] The 2019 amendments also extensively regulated the office of the Executive Director since it is charged with the biggest responsibility in exerting KECOBO's supervisory mandate over CMOs.[108] In terms of qualification requirements, the

[101] Section 636 of the Companies Act, 2015.

[102] Section 709 of the Companies Act, 2015.

[103] Section 705 of the Companies Act, 2015.

[104] See sections 3 and 5 of the Copyright Act, 2001 on mandate of KECOBO.

[105] Sections 5 and 7 of the Copyright Act, 2001 regulating KECOBO's functions and powers.

[106] KECOBO consists of a chairperson; the Principal Secretary in the National Treasury or a designated representative; the Principal Secretary in the Information, Communications and the Digital Economy or a designated representative; the Principal Secretary in the Ministry of Youth Affairs Sports and the Arts or a designated representative; the Attorney-General or a representative; three (3) persons nominated by associations recognized by the Government as representing stakeholders in music, film and publishing respectively; and the Executive Director. See section 6(1) of the Copyright Act, 2001.

[107] See section 6(1) of the Copyright Act. The Copyright Act was amended to be in line with the creation of the offices of the Principal Secretary and the Inspector-General of Police, as created in article 155) of the Constitution of Kenya, 2010.

[108] Section 11(3) of the Copyright Act, 2001.

amendment increased the years of experience required to hold the office from a minimum of (3) three to (5) five years in dealing with copyright and related matters and managerial experience.[109] The amendment also defined the term limit of the office to be (4) four years with a possibility of reappointment for another term for four years.[110] The other amendments regarding the Executive Director are discussed together with other KECOBO supervisory duties below.

KECOBO's supervisory duties concerning CMO activities include the registration and deregistration of CMOs and authorizing the inspection and audit of CMOs.

- *Registration and deregistration of CMOs in Kenya and revenue distribution concerns*

The procedure for the registration and deregistration of CMOs is meant to enhance the transparency and accountability of CMOs by keeping CMOs on their toes regarding how they conduct their business, since the procedure is dependent on CMOs "functioning adequately" and/or in the "best interests of members".[111] This procedure has proven vital in ensuring equitable distribution of music royalties in Kenya. Before the 2019 amendment to the Copyright Act, 2001, CMO registration and deregistration wrangles were one of the primary reasons behind the inequitable remuneration of music artists.[112] Some of the major wrangles

[109] Section 11(2) of the Copyright Act, 2001.

[110] Section 11(4) of the Copyright Act, 2001.

[111] These two components reflect the other registration requirements in section 46(9) of the Copyright Act, 2001.

[112] For example, when MCSK was deregistered briefly in 2011 and 2017 when MPAKE was registered in place of MCSK.

occurred in 2011,[113] 2017-2018,[114] 2019[115] and 2021[116]. It is reported that the distribution of music royalties dived during these periods.[117]

A CMO must satisfy five conditions to be registered for operation. Firstly, it must be a company limited by guarantee and incorporated under the Companies Act, 2015.[118] Secondly, CMOs should undertake to operate as a non-profit making entity.[119] Thirdly, they should have rules and regulations that adequately protect the interests of their members.[120] Fourthly, have the collection and distribution of royalties as its main objectives, and fifthly, undertake to be

[113] MCSK was temporarily deregistered for spending KES 137 million out of the KES 185 million collected on administrative costs. See the notice for the deregistration in Gazette Notice 5093 of Kenya Gazette, 6 May 2011; VB Nzomo *Collective Management of Copyright and Related Rights in Kenya: Towards an Effective Legal Framework for Regulation of Collecting Societies* LLM (University of Nairobi) (2014) 13 quoting A Gakuru 'Copyright Board deregisters Music Copyright Society' (2011) *International Law Office Newsletter,* available at: *http://www.internationallawoffice.com/newsletters/detail.aspx?g=1b71adf4-9a96-427a-97edb702eea7fd62;* and Press Statement (For Newsroom Release) signed by Maurice Okoth, the then CEO of MCSK.

[114] In 2017 MCSK was deregistered and MPAKE was registered in its place. This was followed by a series of cases in 2017-2018: *Laban Juma Toto & another v Kenya Copyright Board & 13 others* [2017] eKLR; *Kisumu Bar Owners Association & another v Music Copyright Society of Kenya & 2 others* [2017] eKLR.

[115] In an unprecedented turn of events, KECOBO did not renew MPAKE's license for 2019 and licensed MCSK instead. However, MPAKE remains operational as it was licensed to collect blank tape levy. See Rutenberg, Ouma and Munyi op cit note 72 at footnote 60.

[116] KECOBO deregistered the three music CMOs (MCSK, KAMP and PRISK) over breach of administrative cost limits and diversion of royalties to an undeclared bank account. The CMOs reportedly distributed KES. 41 million (35.9%) instead of Kshs.79 million (70%) out of Kshs.114 m collected at the end of July 2021 in defiance of the KECOBO license conditions. Following the revocation of licenses, the collection of royalties was suspended for a period of three (3) months or until further advised. They also failed to meet the conditions stipulated in the provisional licenses set out by KECOBO earlier that year. See KECOBO 'KECOBO deregisters KAMP, PRISK & MCSK' (24 August 2021) available at *https://copyright.go.ke/med ia-center/news-updates/kecobo-deregisters-kamp-prisk-mcsk,* accessed on 21 September 2021. The decision to deregister the CMOs was set aside in *Kenya Copyright Board v Music Copyright Society of Kenya (MCSK) & 2 others; Attorney General & 2 others* (Interested Party) (Petition E276 of 2021) (Constitutional and Human Rights) (30 August 2021) (Ruling) [unreported], see press statements quoting the decision in KAMP, PriSK and MCSK *The Collective Management Organizations (KAMP-PRISK-MCSK) Statement on Quashing of KECOBO's Revocation Notice by the High Court* 31 August 2021 available at *http://mcsk.or.ke/wp-content/uploads/2021/08/KAMP-PRISK-MCSK-Press-Statement-.pdf,* accessed on 15 September 2023 and KAMP, PriSK and MCSK 'Royalty Collection and Distribution by KAMP-PRISK-MCSK' available at *https://mcsk.or.ke/wp-content/uploads/2021/09/KAMP-PRISK-MCSK-PUBLIC-NOTICE-.pdf,* accessed on 15 September 2023.

[117] This is because KECOBO registers one CMO per set of rights for the collection and distribution of royalties is usually suspended after deregistration, see section 46(5) of the Copyright Act, 2001 and the revenue distribution concerns of the regulation of registering and deregistering CMOs are discussed in footnote 115 above.

[118] Section 46(4)(a) of the Copyright Act, 2001.

[119] Section 46(4)(b) of the Copyright Act, 2001.

[120] Section 46(4)(c) of the Copyright Act, 2001.

regularly audited by external auditors.[121] If the CMO was previously operating, it must submit annual returns showing its corporate structure for the previous year and a full list of its members.[122] Finally, KECOBO is empowered to request any other document necessary for the registration.[123]

Given the importance of CMO business in Kenya's music industry, the Copyright (Collective Management) Regulations, 2020 introduced a requirement for public participation in the registration of CMOs.[124]

A CMO may be deregistered if any of the four conditions in section 46(9) of the Copyright Act are met. That is if a CMO is not functioning adequately, acting by its incorporation documents or the best interests of members, and (underline my emphasis) not complying with any provision in the Copyright Act. However, the 2019 amendments did not clarify how the deregistration conditions should be applied. The literal meaning of the word "and" may imply that a CMO should only be deregistered if it fails to comply with all the conditions. However, CMOs have been deregistered for failing to comply with only one condition. Perhaps, it is one of the areas that the Principal Secretary will clarify when he makes further regulations to implement the new changes in the Copyright Act.

The 2019 amendments introduced provisional licenses for CMOs.[125] The provisional licenses may now be issued to give CMOs a grace period of six months to comply with any registration requirements.[126] They are applicable when CMOs issue incomplete registration documents or cannot apply for registration due to administrative shortfalls.[127]

The 2019 amendments also aligned the deregistration process with the rights to a fair hearing and fair administrative action with the introduction of sections 46(10), 46(11), and 46(9).

[121] Sections 46(4)(d) and 46(4)(e) of the Copyright Act, 2001.

[122] See Regulations 4 and 5 of the Copyright (Collective Management) Regulations, 2020.

[123] Regulations 3(1)(f) of the Copyright (Collective Management) Regulations, 2020.

[124] The requirement and procedure for the public participation is provided in Regulation 11 of the Copyright (Collective Management) Regulations, 2020.

[125] Section 46(3A) of the Copyright Act, 2001.

[126] Ibid.

[127] Ibid.

Section 46(10) requires KECOBO to notify the CMO of the intention to deregister it in writing. This section gives CMOs facing deregistration an opportunity to make representations within twenty-one days of the notice. KECOBO is allowed to withdraw a CMO's registration after considering the written representations and deciding that the CMO does not work in the best interests of its members. It is argued that these provisions tend to appreciate the importance of allowing the continued existence of one CMO in the management of rights and that deregistration should be a matter of last resort; to avoid messy transitions like the one experienced when MPAKE took over the functions of MCSK between 2017 and 2018. Deregistration, therefore, is a matter of last resort. Additionally, CMO deregistration must be published in the "Gazette and two daily newspapers of national circulation".

- *Audit, inspection and control of CMOs*

The Copyright Act and its Regulations create obligations for CMOs to account for how they manage rights and act intra vires in rights management. These obligations are enforced through the supervision of KECOBO in exercising their audit, inspection and control duties and powers.

KECOBO, through the office of the Executive Director may authorize a person to inspect the books of account or records of a CMO.[128] KECOBO's powers to audit and inspect CMOs may be exercised when a petition for inspection has been made by not less than forty five percent (45%) of CMO members specifying a CMO's breach of the Copyright Act and its Regulations or any other law.[129] During the inspection, CMOs, CMOs' officers and employees should produce all the documents required for inspection within seven (7) days or the period set by

[128] The authorization should be made in writing. Section 46E (1) of the Copyright Act, 2001 and Regulations 7 and 8 of the Copyright (Collective Management) Regulations, 2020 provide KECOBO's power of audit and inspection and the validity of an appointment of an inspector.

[129] Examples of circumstances that trigger the exercise of the audit and inspection powers are in section 46E (6) of the Copyright Act, 200:

b) failure by a collective management organization to account for monies to at least twenty percent of its members;
c) failure by a collective management organization to offer an account of the exploitation of the copyright works assigned or licensed to it;
d) where a collective management organization has acted beyond its powers in administering the rights to which it is assigned or licensed;
e) where a collective management organization has altered its memorandum or other internal rules to exclude a section of its members in participating in its affairs or as to alter its core business;
f) where a collective management organization has persistently failed to adhere to its set administrative budget without a reasonable cause; or
g) where a collective management organisation has failed to comply with a request for information or records from its members or the Board.

the person inspecting.[130] If any matter arises from the inspection report, the Executive Director should give the CMO a reasonable opportunity to be heard before deciding.[131] After that, KECOBO may issue a decision requiring CMO compliance and other directions, as the Executive Director may deem fit.[132]

The addition of section 46G into the Copyright Act gives KECOBO the authority to send a representative to attend and advise CMO directors on matters affecting the interests of CMO members.[133]

The Copyright (Collective Management) Regulations, 2020 impose a 30:70 administration cost to royalties ratio on CMOs.[134] Through this provision, KECBO ensures that CMOs adhere to the administrative budget unless there is a reasonable cause to exceed it, while considering the renewal of CMO registration or deregistration.[135] CMOs account for the royalties they collect and distribute by submitting to KECOBO information on their total royalties' collections.[136] This information should be submitted annually within three months at the end of each financial

[130] Section 46E (2) of the Copyright Act, 2001.

[131] Section 46E (5) of the Copyright Act, 2001.

[132] Ibid. According to section 46F (1) of the Copyright Act, 2001 KECOBO may—
(a) recommend the suspension or removal of the employee who contributed to the failures of the CMO operation;
(b) issue directions to improve management of CMOs and their compliance with laws;
(c) direct the reconstitution of a CMO's Board of directors;
(d) require a CMO to come up with a plan to resolve its deficiencies;
(e) appoint a competent and suitably qualified chairperson for a CMO;
(f) place the CMO under statutory management;
(g) revoke a CMO's collection license;
(h) order a CM to convene a special general meeting;
(i) make any other order or administrative directive for the CMO to rectify its deficiencies.

[133] This section was introduced into the Copyright Act, 2001 by section 31 of the Copyright (Amendment) Act, 2019.

[134] Regulation 5(3)(e) of the Copyright (Collective Management) Regulations, 2020. See also section 46E(6)(f) of the Copyright Act, 2001 which provides that lack of adherence to the ratio constitutes a violation of the Regulations and can trigger an inspection authorized by the Executive Director.

[135] See conditions for registration and deregistration of CMOs discussed above in section 4.3.1.1. of this thesis.

[136] See section 46D of the Copyright Act, 2001 and Regulation 31(2) of the Copyright (Collective Management) Regulations, 2020.

year.[137] Royalty information is considered public information, and KECOBO is required to publish it by a notice in the Kenya Gazette.[138]

- *CMO board composition and responsibilities*

CMOs act through their Board of officers (the directors and chairpersons).[139] Ideally, the composition of the CMO board of officers should reflect the aspects of democratic governance. A democratic board structure, in this case, depicts a board that reflects the rights administered by a CMO. If a CMO manages music, the Board should be at least 50% of music copyright owners.[140]

The powers and duties of these officers are delegated to them through the CMOs' Articles of Association (AoA), provisions in the Companies Act, 2015 and rules of common law and equity.[141] These officers usually perform administrative and other functions to ensure good corporate governance. Examples of these functions are ensuring transparency and disclosure of financial and non-financial information, communicating with stakeholders on CMO information affecting them, and facilitating the collection and distribution of royalties.[142]

Further regulation of CMO boards, in 2019, was prompted by the history of unethical conduct of CMO officials in Kenya. Judging from the 2019 amendments, regulating the appointments, qualifications, tenure, power, and duties of CMO officials is expected to enhance transparency and equitable royalty distribution.[143] These officials can be held liable for connivance or wilful lack of due diligence in managing CMOs. The offences and penalties related to CMO management are discussed in section 4.3.4. of this thesis.

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[137] Ibid.

[138] Ibid.

[139] See section 46B of the Copyright Act, 2001.

[140] D Stopps *How to make a living from music* (2014) 53.

[141] Section 140 of the Companies Act, 2015.

[142] See the statutory duties of the CMO board discussed in section 4.3.1.1. of the thesis.

[143] Section 46B of the Copyright Act, 2001.

- *Involvement of copyright owners in CMOs' management*

Copyright owners are not directly involved in the collection and distribution of royalties. They should, however, be able to control CMOs' businesses since CMOs act on their behalf.

Copyright owners (CMO members and non-members) are involved in CMO management through eligibility for positions in any of the CMOs' decision-making, supervisory or advisory bodies, if they meet the qualifications set out in the Copyright Act and its Regulations. All copyright owners are eligible for some positions in KECOBO but only CMO members are eligible for the positions on the CMO board.[144]

Due to the requirement of public participation in the registration of CMOs and setting the joint collection tariff, all copyright owners are involved in these processes.[145] They also have access to royalty information, CMOs' financial statements and records and CMO deregistration since they are either published in the Kenya Gazette, a newspaper or publicly available through searches.[146] Even though CMOs' financial statements and records are publicly available, CMO members have an additional right to receive a copy of a CMO's annual financial statement and reports or require the circulation of these documents.[147]

CMO members can request CMO officers to call for meetings and suggest agendas that may be put to the vote in the meetings. In AGMs, the participation of CMO members is protected through a written notice of the meeting and the right to vote personally or through proxies.[148] CMO members also have a right to require and receive a copy of proposed written resolutions.[149]

[144] Copyright owners may hold an office in KECOBO by virtue of sections 6(1)(f) and 12 of the Copyright Act, 2001. See section 46B of the Copyright Act, 2001 for eligibility requirements to hold an office in CMO boards.

[145] Regulations 11 and 26 of the Copyright (Collective Management) Regulations, 2020.

[146] See sections 46D and 46(9) of the Copyright Act, 200; see also sections 628, 629, 636 and 705 of the Companies Act, 2015.

[147] Sections 114(3) (g) and (e) of the Companies Act, 2015.

[148] Section 114(3) of the Companies Act, 2015.

[149] Sections 114(3)(a) and (b) of the Companies Act, 2015.

The audit and inspection rights are reserved for CMO members.[150] On such a request, either the court or KECOBO's Executive Director may appoint and direct an inspector to assess the affairs of the CMO.[151]

Non-CMO members have only one right that is unique to them in Regulation 15(c) of the Copyright (Collective Management) Regulations, 2020. Regulation 15 (c) gives them the right to communicate with CMOs by electronic means to exercise members' rights.

Many artists in Kenya frequently struggle to effectively monitor the usage and commercial success of their music, as well as to evaluate its economic value. Usually, remuneration contracts are crafted by intermediaries to limit accountability and transparency obligations that require information disclosures for assessing the revenue generated from the commercialization of music. The asymmetry of power between music artists and intermediaries is thus exacerbated by the lack of adequate provisions to enhance information disclosures to music artists.

The 2019 amendments to the Copyright Act predominantly sought to address the concerns on CMO operations in Kenya by increasing their transparency obligations.[152] These provisions deal with the qualifications, tenure, and roles of CMO boards and directors.[153] They also expound on the supervisory role of KECOBO over CMOs on registration, deregistration, inspection, and control of CMOs. Two important CMO transparency and accountability clauses are the requirement for CMOs to submit to KECOBO "information on its total collections and royalties annually" and for royalty information to be publicly available through a notice in the Gazette.[154]

While the 2019 amendments to the Copyright are a commendable effort to reduce information asymmetries between music artists and CMOs, their implementation has been lacking.

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[150] Section 710 of the Companies Act, 2015 and section 46E (6) of the Copyright Act, 2001.

[151] Section 786(1) of the Companies Act, 2015.

[152] See the Copyright (Amendment) Act, 2019 and Part VII of the Copyright Act, 2001 on Collective Administration of Copyright.

[153] Section 46B of the Copyright Act, 2001.

[154] Section 46D of the Copyright Act, 2001

Persistent mismanagement by CMOs continues, despite these reforms.[155] This issue was highlighted when Kenya Copyright Board (KECOBO) revoked music CMOs' licenses in 2021, and MCSK's license in 2023 citing a lack of transparency, among other things.[156]

Another cause for concern is the gap in how copyright law regulates CMOs' transparency obligations to non-CMO members.[157] Although the collective management system in Kenya is substantially voluntary, it is inevitable for CMOs to work without some copyright owners' mandate due to the utilization of blanket licenses.[158] This practice is justified by the concept of "business management without a mandate" provided the non-members are treated equally with members in the collection and distribution of royalties.[159]

An application of the Rawlsian theory of distributive justice also requires non-members to be treated fairly, though not necessarily identically. The Rawlsian theory appreciates that equality sometimes demands different treatment to address imbalances in power or opportunity. In this case, the involvement of non-CMO members should help offset their disadvantaged position compared to CMO members, particularly in the collection and distribution of royalties.

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[155] On 24 August 2021, KECOBO deregistered MCSK, KAMP and PRiSK for breach of administrative cost limit and diversion of royalties into an undeclared account whose operations were not monitored by KECOBO. See KECOBO 'KECOBO DEREGISTERS KAMP, PRISK & MCSK' (24 August 2021) available at *https://copyright.go.ke/media-center/news-updates/kecobo-deregisters-kamp-prisk-mcsk,* accessed on 21 September 2021. The decision was later set aside, see MCSK press statement available at *http://mcsk.or.ke/wp-content/uploads/2021/08/KAMP-PRISK-MCSK-Press-Statement-*, accessed on 30 October 2021.

[156] See Kenya Copyright Board (KECOBO) *2023 Collective Management Licensing* [Press Release] 27 January 2023 available at *https://copyright.go.ke/media-center/news-updates/2023-collective-management-licensing*, accessed on 28 January 2023 and the Kenya Copyright Board (KECOBO) Kenya Copyright Board (KECOBO) deregisters KAMP, PRISK AND MCSK [Press release] 24 August 2021 available at *https://copyright.go.ke/sites/default/files/downloads/Press%20release%20CMOs%20deregistered.pdf*, accessed on 20 October 2023.

[157] The Copyright (Collective Management) Regulations, 2020 recognizes the CMO practice of "business management without a mandate" in Regulation 15(c). This Regulation allows non-members to communicate with CMOs for purposes of exercising their rights. However, the transparency obligation of CMOs to non-members remains unclear in the absence of regulations on how non-members may further be included in management of CMOs.

[158] This practice is recognized under the concept of "business management without a mandate" where CMOs are regarded as trustees when acting on behalf of non-members until they are aware that the non-member opposes the use of their works. The practice is only justified to the extent that non-members are treated in the same way as members and given their share of royalties after the deduction of administration costs, Uchtenhagen op cit note 61 at 56; Oriakhogba op cit note 61. Regulation 15(c) of the Copyright (Collective Management) Regulations, 2020, also allows non-members to communicate with CMOs for purposes of exercising their rights.

[159] Uchtenhagen op cit note 61 at 56 and Oriakhogba op cit note 61.

Coupled with the rampant misappropriation and mismanagement by CMOs, the system exposes music artists who are not CMO members to inequitable royalties.

The Copyright (Collective Management) Regulations, 2020 allow non-members to communicate with CMOs for purposes of exercising their rights. This thesis argues that this involvement is not proportional to allowing adequate participation of non-members. Non-members' participation in AGMs is not guaranteed whereas this is where most revenue distribution policies are decided. Transparency and accountability to non-CMO members is also limited in the absence of an obligation for CMOs to separate member and non-member accounts.[160] The Act and Regulations are also silent on how CMO distribution plans and time limits apply to non-members.[161] As it stands, CMOs and their members are, to a large extent, left to decide how they collect and distribute non-members' royalties and include them in the management.

Non-CMO intermediaries like MTT companies, rights aggregators, publishers, and record labels who are often highlighted in the music artists' plight of inequitable remuneration, seem to have been forgotten in the copyright amendment processes that sought to streamline revenue distribution in Kenya.[162] The manner in which the Copyright Act deals with accountability and transparency obligations suggests that CMOs are largely to blame for the challenge of inequitable remuneration of music artists. The 2022 amendment of the Copyright Act highlighted the role of MTT companies and music aggregators in the plight of inequitable distribution of ring-back tunes revenue by establishing a formula for sharing the revenue. Even then, the accountability and transparency of MTT companies and music aggregators were not defined in copyright law. Constant litigation by music artists proves that the minimum standards of corporate transparency provisions in the Companies Act, 2015 and KICA are not adequate for regulating non-CMO intermediaries and their licensees or sublicensees.[163]

The introduction of minimum standards of accountability and transparency obligations for all intermediaries in the Copyright Act, is required to supplement the system applied to CMOs and

[160] Regulation 20(b) of the Copyright (Collective Management) Regulations, 2020.

[161] See generally, the Copyright Act, 2001 and the Copyright (Collective Management) Regulations, 2020.

[162] See generally, Copyright Amendment Act No. 20 of 2019 and Copyright (Amendment) Act No. 14 of 2022.

[163] See sections 628, 636, 709, 705 of the Companies Act, 2015. See generally the licensing powers and duties of the CA as provided in the Kenya Information and Communication Act, 1988 (KICA).

bring other intermediaries into the ambit of copyright regulation. The current system for regulating information disclosures by non-CMO intermediaries is too generic to deal with the challenge of inequitable remuneration of music artists. The provisions fail to adequately regulate the regularity, type and level of remuneration-based information that could assist music artists in assessing the economic value of their music. While it is not practical to provide an exhaustive list of information submitted to music artists, there should be a general list of what the information should cover. For instance, music industry-specific information on all the modes of commercialization used and the revenue generated worldwide. It is important to note that the administrative burden to fulfil the accountability and transparency obligations should be proportionate to the revenue generated.

The registration of commercialization of works would enhance the accountability and transparency of intermediaries in the collection and distribution of revenue. Voluntary copyright registration in Kenya can be used as a stepping stone to enforce intermediaries' accountability and transparency obligations, in this regard.[164] This is because the registration of copyright makes the registration of commercialization of works less cumbersome.

4.3.1.3. Ex-post interventions: Copyright contract mechanisms for ensuring equitable remuneration of music artists

Section 4.3.1. of this thesis established that copyright law allows unduly expansive grants to intermediaries who are better positioned to predict the value of music compared to music artists. Like in other common law countries, these grants are invariably upheld.[165] To satisfy its distributive justice role, copyright must offset music artists' position as the weaker parties in these transactions.[166] While general contract law and equity doctrines may be applied to nullify inequitable remuneration contracts, they are not frequently used to protect music

[164] See section 22A, 22B and 22C of the Copyright Act, 2001.

[165] Kenner op cit note 28 at 574; Bently and Sherman op cit note 28 at 319.

[166] See the principles of an equitable copyright system in section 2.3.4. of this thesis.

artists.[167] When they are, they seem to be inconsistent with copyright because they are not designed for copyright law.[168]

Copyright law in Kenya is not distributive to the extent that it fails to provide any copyright contract mechanisms for the protection of music artists. The challenge of inequitable remuneration of music artists is exacerbated by the absence of copyright contract mechanisms and the lack of adequate accountability and transparency obligations for intermediaries.

4.3.1.3.1. Right of revocation for unknown uses: Safeguarding music artists against unforeseen exploitations

Kenyan copyright law lacks provisions allowing music artists to revoke agreements when their work is utilized beyond the initially specified terms in the contract. This omission fails to safeguard artists from unforeseen uses of their work that may conflict with their interests.

4.3.1.3.2. Term limit for agreements on future works: Ensuring fair reversion rights for music artists in Kenya

Music artists lack a reversion right based on assignment term limits. A reversion right is essential to balance music artists' and intermediaries' rights by ensuring that intermediaries hold the rights for the appropriate time required to invest and music artists get the opportunity to reassign or license their works to get more remuneration.

4.3.1.3.3. Right to further equitable participation: Enhancing music artists' interests in revenue sharing mechanisms

The Copyright Act lacks contract adjustment mechanisms for music artists to pursue additional appropriate and proportionate remuneration where remuneration is disproportionately low compared with the revenue derived from commercialization. An important point of concern here is establishing an equitable way of determining that a previously agreed remuneration is disproportionately low.

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[167] Dusollier op cit note 10 at 438-439.

[168] Ibid.

4.3.1.3.4. Right of revocation for non-use or insufficient commercialization

The Copyright Act fails to create an obligation for exclusive licensees to commercialize works in the most economically beneficial way. This leaves most music artists in long-term contracts without recourse when intermediaries hold onto work and do nothing or very little to generate revenue.[169] Therefore, a right of reversion or revocation is crucial in balancing the interests of music artists and intermediaries in Kenya.

4.3.1.3.5. Right of revocation for changed conviction

A gap in Kenyan copyright law arises from the absence of provisions allowing music artists to revoke agreements if their moral or artistic convictions no longer align with the use of their work.

4.3.1.3.6. Exclusivity period for buy-out agreements that grant exclusive licenses

The Copyright Act lacks a provision stipulating a maximum exclusivity period for buy-out agreements that grant exclusive licenses. Such a limitation would enable artists to regain control over their work and negotiate more favourable terms after the expiration of the exclusivity period.

4.3.1.4. Ex-post interventions: Common remuneration standards

The numerous cases on inequitable remuneration indicate that the customary way of remunerating music artists in the music industry is inequitable, highlighting a need for the development of industry-specific remuneration rules and standards.[170] This challenge is compounded by the lack of collective labour agreements which stems from the absence of a trade union to address the plight of music artists.

Policymakers are aware of the challenge of remunerating music artists in Kenya. They are constantly proposing new ways of streamlining music revenue distribution or cushioning music

[169] There are re-evaluation mechanisms for artworks in section 26D of the Copyright Act, 2001 which provides for artists' resale royalty right.

[170] Ibid.

artists from losses.[171] The most recent amendments to the copyright law, brought by the Copyright (Amendment) Act No. 14 of 2022, saw the introduction of section 30C. Section 30C creates a minimum revenue-sharing standard for the ring-back tunes and allows music artists to negotiate more favourable remuneration.[172] The net revenue share is prescribed at not less than 52% for the artist or copyright owner, 39.5% for telecommunication operators and 8.5% for premium rate service providers.[173] The Copyright Act also requires telecommunication operators to remit the net ring-back tunes revenue directly to the music artists or copyright owners.[174] In the past, the collection of this revenue through CMOs has been the subject of

[171] In the wake of the COVID-19 pandemic, the President of Kenya created a stimulus package (Work for Pay Fund) to cushion music artists from losses. The stimulus package was dubbed the 'Work For Pay' program on 11 March 2020, when the Minister of Sports Culture and Heritage implemented the presidential direct issued on 6 April 2020, authorizing the release of KES100 million from the Sports Fund. See Ministry of Sports, Culture and Heritage '100M for Artist, Musicians & Actors Stimulus Package' available at *https://sportsheritage.go.ke/stimulus-package/* accessed on 20 June 2022.

The Draft Intellectual Property Bill 2020 calls for merging the three IP bodies: KECOBO, Anti-counterfeit Authority (ACA), and the Kenyan Industrial Property Institute (KIPI), to form a single intellectual property body The proposed new office's revenue collection and distribution obligations will be set out when the final Bill is presented to the cabinet. In April 2021, the cabinet secretary for Industrialization, Trade and Enterprise reported that they had finalized the development of the draft Bill and were ready to present it to the cabinet for approval. No development has been noted on the Bill after 2021. The Draft Bill was developed by a recommendation by the Presidential Taskforce on Parastatal Reforms, see the Presidential Taskforce on Parastatal Reforms, 2013, available at *https://sentaokenya.org/?smd_process_download=1&download_id=24131*, accessed on 10 October 2021 and Daily Nation 'New steps to boost IP management in Kenya' 21 April 2021 available at *http://www.kipi.go.ke/images/docs/WIP%20DAY%202021%20SUPPLEMENT%20DAILY%20NATION.pdf*, accessed on 22 April 2021.

[172] A ring-back tune is "subscription music or a tone which i[s] played by a telecommunication operator to the originator of a call" Section 2 of the Copyright Act, 2001.

[173] Section 30C of the Copyright Act, 2001, regulates payment of ring-back tune revenue.

Section 2 of the Copyright Act, 2001 defines a "premium rate service provider (PRSP)" as "a person authorized by the Communications Authority of Kenya to provide content services which includes ring-back tunes and is delivered over electronic communications networks and services". PRSPs fit into the description of music aggregators in this thesis.

Section 2 of the Copyright Act, 2001 defines "telecommunication operator" per the meaning assigned to it in the Kenya Information and Communications Act, 1998. Section 2(1) of the Kenya Information and Communications Act, 1998 defines "telecommunication operator" as a telecommunication operator licensed under section 79, which only provides the requirements and procedure for the grant of licence. A "telecommunication operator" may be described as a person who operates a telecommunication service or system which conveys speech, music and other sounds, etc. This description is derived from the definitions of "telecommunication system" and "telecommunication service" in section 2(1) of the Kenya Information and Communications Act, 1998. Telecommunication operators fit into the description of MTTs and digital platforms in this thesis.

[174] Section 30C (3) of the Copyright Act, 2001.

legal controversies.[175] Kenya is yet to see the effect of section 30C on the remuneration of music artists. Nevertheless, section 30C shows a clear attempt at a balanced assessment of the interests of music artists and intermediaries in the distribution of ring-back tunes revenue, which has been at the center of controversies regarding the remuneration of music artists in Kenya.[176]

The introduction of a formula for the distribution of ring-back tunes revenue in section 30C may be considered approval for developing common remuneration standards in the music industry. The provision creates a minimum standard and allows music artists to negotiate more favourable remuneration. Ring-back tunes revenue should now be shared at not less than 52% for authors and copyright owners, 39.5% for MTT companies and 8.5% for music aggregators.[177]

Before the introduction of the formula for the distribution of ring-back tunes, the customary way of remunerating music artists and copyright owners for ring-back tunes dictated that the revenue was distributed monthly after the deduction of a tax of 16%.[178] The balance was mainly shared between three main groups of stakeholders: authors and copyright owners; MTT companies and their partners; and music aggregators. The authors' and copyright owners' 40% shares were received by music aggregators on their behalf and MTT companies and their

[175] See *Xpedia Management Limited & 4 others v Attorney General & 5 others* Petition 317 of 2015 [2016] eKLR and *Mercy Munee Kingoo & another v Safaricom Limited another* Petition 5 of 2016 [2016] eKLR.

[176] *Phillip Njoroge Kimani v Liberty Africa Technologies and Safaricom Limited* Constitutional Petition 147 of 2019 [2021] eKLR; *Cellulant Kenya Ltd v Music Copyright Society of Kenya Ltd* Civil Case 154 of 2009 [2009] eKLR; *Alternative Media Limited v Safaricom Limited* Civil Case No 263 of 2004 [2005] eKLR; *Music Copyright Society of Kenya Ltd v Safaricom Limited and another* Civil Case 509 of 2009 [2010] eKLR; *John Boniface Maina v Safaricom Limited* Civil Suit 808 of 2010 [2013] eKLR; *Mercy Munee Kingoo & another v Safaricom Limited another* Petition 5 of 2016 [2016] eKLR; *Xpedia Management Limited & 4 others v Attorney General & 5 others* Petition 317 of 2015 [2016] eKLR.

[177] See definition of PRSP in section 2 of the Copyright Act, 2001. PRSPs fit into the description of music aggregators in this thesis, see discussion in section 1.1. of this thesis.

[178] National Assembly Departmental Committee on Communication, Information and Innovation *Report on the Consideration of the Copyright (Amendment) Bill* (2021) available at *http://www.parliament.go.ke/sites/default/files/2022-02/REPORT%20ON%20THE%20CONSIDERATION%20OF%20THE%20COPYRIGHT%28AMENDMENT%29%20BILL%2C%202021.pdf*, accessed on 01 March 2022.

partners split the 60%.[179] It is reported that music artists' and copyright owners' share had increased over the years from 22% to 40%. by 2021.[180]

The introduction of the formula was resisted by Safaricom Limited, one of the major MTT companies in Kenya. Safaricom Limited argued that the determination of revenue share formulas should be left in the hands of the relevant stakeholders. They submitted that the formula fails to reflect commercial considerations that have a bearing on the commercial viability of ring-back tunes.[181] Safaricom warned that the formula would reduce investment in innovation on ring-back tunes.[182] They also pointed out that the proposed formula was targeted against MTT companies since other intermediaries involved in the commercialization of ring-back tunes are left out.[183]

In their submissions on the Copyright (Amendment) Bill, CODE-IP Trust argued that the formula should have been prescribed in regulations not an Act of parliament.[184] While the distinction between providing policy ideas to Acts and implementation details to subsidiary legislation may seem logical, it becomes counterintuitive in this context because the Copyright Act does not govern the establishment of common remuneration rules and standards for any copyright sector.

The formula acknowledges the importance of rebalancing the position of music artists vis-a-vis intermediaries in music revenue distribution. This formula was long overdue, given the amount of revenue generated from the commercialization of music and the constant litigation battles between music artists and intermediaries on the distribution of ring-back tunes revenue.[185] This thesis argues that regulating the rules for developing a revenue formula share

[179] MTT partners include technology partners, system maintenance and customer care, research and development, human capital, network use etc.

[180] Ibid.

[181] National Assembly Departmental Committee on Communication, Information and Innovation op cit note 178.

[182] Ibid.

[183] Ibid.

[184] See submission by CODE-IP Trust at Ibid.

[185] Around 1.2 billion KES is generated from the commercialization of Skiza tunes (Safaricom Ring-back tunes) annually. See National Assembly Departmental Committee on Communication, Information and Innovation op cit note 178.

for different sectors in the copyright industry would be a rather long-lasting solution than solely focussing on ring-back tunes. It is unclear how KECOBO arrived at the ring-back tunes revenue formula.

4.3.1.5. Ex-post interventions: Mechanisms for enforcing equitable remuneration rights for music artists under Kenyan law

The good practice toolkit for CMOs provides that an equitable royalty distribution system should have a defined and precise complaint and dispute resolution procedure.[186] The dispute resolution forums provided in the Copyright Act are the Copyright Tribunal, the High Court, the Court of Appeal, and the Supreme Court.

4.3.1.5.1. Copyright Tribunal

The Copyright Act establishes the Copyright Tribunal (the Tribunal) in section 48 to replace the Competent Authority. The Tribunal falls under the judiciary and is appointed by the Chief Justice.[187]

The Tribunal should have a minimum of three and a maximum of five members.[188] The chairperson should be appointed by the CS when any Tribunal matter arises.[189] The qualifications required to be appointed as the chairperson is at least seven years of experience as an advocate of the High Court of Kenya or a judicial officer.[190] The Act further provides that persons with pecuniary interests or whose employers or partners have pecuniary interests in a matter may not be appointed as members of the Tribunal.[191]

[186] WIPO op cit note 54.

[187] Section 48(1) of the Copyright Act, 2001.

[188] Section 48(2) of the Copyright Act, 2001.

[189] Ibid.

[190] Ibid.

[191] Section 48(3) of the Copyright Act, 2001.

On matters of jurisdiction, it has original jurisdiction over copyright registration disputes.[192] It also has appellate jurisdiction over decisions of KECOBO and CMOs that relate to refusal to grant certificates of registration or licenses or granting them on unreasonable terms.[193] The original and appellate jurisdiction of the Tribunal essentially implies that only CMOs and copyright users have *locus standi* to bring matters before the Tribunal. With CMOs appealing the decisions of KECOBO on certificates of registration and users appealing CMO decisions on licensing. This includes matters regarding the proposed music tariffs.[194]

The jurisdiction of the Tribunal is a rehash of the repealed section 48 (2). The only new addition includes the term 'jurisdiction' in the section and renumbering the provisions. The Tribunal still lacks jurisdiction to determine most disputes between music artists and intermediaries.[195]

The Tribunal should give a fair hearing by allowing the parties to present their cases in person or through representatives, and orally and in writing, before determining matters. Upon conclusion of the matter, the Tribunal may order the grant of a certificate of registration or license subject to payment.[196]

The 2019 amendments expanded the jurisdiction of the Copyright Tribunal, which previously operated as the Competent Authority, to cover disputes on copyright registration.[197] The scope of the jurisdiction on other matters was a rehash of the repealed section 48 which provided for the Competent Authority. Section 48(1) of the Copyright Act provides a broad mandate for the Tribunal. The Tribunal has jurisdiction "under this Act where any matter requires to be determined by such Tribunal". The Copyright Act is also instructive in the Tribunal's

[192] Section 48(4)(a) of the Copyright Act, 2001.

[193] Section 48 4(b) of the Copyright Act, 2001.

[194] See the Tribunal's decision in *Kenya Association of Hotel Keepers and Caterers (KAHC) and Pubs, Entertainment and Restaurants Association of Kenya (Perak) v KECOBO and 3 others* the Copyright Tribunal Appeal No. 1 of 2019 available at *https://copytribunal.files.wordpress.com/2020/04/competent-authority-final-kahc-perak-judgment-27-april-2020-9-am.pdf*, accessed on 20 January 2021.

[195] See section 48 of the Copyright Act, 2001.

[196] Section 48(6) of the Copyright Act, 2001.

[197] Section 48 of the Copyright Act, 2001.

jurisdiction over disputes regarding the registration of CMOs.[198] We have also seen the Tribunal entertaining matters on the determination of music tariffs.[199]

While the Tribunal's jurisdiction does extend to certain disputes, particularly those regarding copyright registration, licensing, and music tariffs, it is essential to emphasize that it does not specifically cover most direct disputes between individual music artists and intermediaries, except through the involvement of CMOs or other authorized bodies. This is because music artists often rely on CMOs to act on their behalf in such disputes, and they themselves do not typically have locus standi unless they are bringing a case related to decisions made by CMOs or KECOBO. The key issue is that a literal reading of the Act shows that music artists cannot independently initiate cases before the Tribunal. Instead, they must rely on CMOs or copyright users to bring such cases on their behalf. This procedural barrier underscores the Tribunal's limited jurisdiction, as it primarily addresses disputes involving CMOs and copyright users rather than offering a direct avenue for music artists to resolve revenue-related conflicts. Consequently, the Tribunal's role in resolving these disputes remains constrained, leaving artists dependent on intermediary organizations to access its adjudicatory functions.

Kenya lacks specialized dispute settlement mechanisms to resolve the tension between music artists and intermediaries in revenue distribution.

In Kenya, one of the major challenges in resolving remuneration-based inequity lies in music artists' reluctance to go to court to enforce contracts against intermediaries for fear of being backlisted. Effective enforcement of the right to equitable remuneration through voluntary ADR mechanisms can play a big role in mitigating this challenge. It is also expected that introducing new provisions would spark more disputes regarding the enforcement of the right to equitable remuneration.

Without prejudice to the already existing constitutional provisions that recommend resolving disputes using ADR mechanisms, the Copyright Act does not recommend ADR for the

[198] The tribunal has original jurisdiction over copyright registration disputes. It also has appellate jurisdiction over decisions of KECOBO and CMOs that relate to refusal to grant certificates of registration or licenses or granting them on unreasonable terms.

[199] See supra note 128.

resolution of revenue collection and distribution disputes.[200] ADR mechanisms do not deprive music artists of enforcing their rights in the Copyright Tribunal or courts.

The Copyright Act provides a broad mandate for the Tribunal, the Tribunal has jurisdiction "under this Act where any matter requires to be determined by such Tribunal". The Copyright Act is also instructive in the Tribunal's jurisdiction over disputes regarding the registration of CMOs.[201] The Tribunal also entertains matters related to on the determination of music tariffs.[202]

Despite its broad mandate, the Tribunal's jurisdiction remains limited in resolving most disputes involving the distribution of music revenue between music artists and intermediaries. This limitation is due to the lack of adequate provision for the right to equitable remuneration. If the Act explicitly provided for the right to equitable remuneration and its components, section 48(1) would allow the Tribunal to entertain all disputes concerning equitable remuneration of music artists. Additionally, the Tribunal lacks explicit jurisdiction to order Alternative Dispute Resolution (ADR), which places a heavy burden on its operations.

The Tribunal's limited jurisdiction stresses the need for the Copyright Act to provide for the right to equitable remuneration, thereby expanding the jurisdiction of the Tribunal over more matters on revenue distribution.[203] While it may be argued that revenue-related disputes beyond the Tribunal's jurisdiction can be taken to the courts, it is not quite ideal since these disputes are usually on some technical aspects of copyright law that might not be appreciated in a conventional commercial court.

The jurisdiction of the High Court is not qualified to the extent of the jurisdiction of the Tribunal. The High Court has unlimited original jurisdiction over copyright matters and can handle all revenue distribution disputes between music artists and intermediaries.[204] Before the

[200] Article 159 (2)(c) of the Constitution of Kenya, 2010.

[201] The tribunal has original jurisdiction over copyright registration disputes. It also has appellate jurisdiction over decisions of KECOBO and CMOs that relate to refusal to grant certificates of registration or licenses or giving them on unreasonable terms.

[202] See the Tribunal's decision in supra note 128.

[203] See section 48 of the Copyright Act, 2001.

[204] Article 165(3)(a) of the Constitution of Kenya, 2010.

2019 amendment, all revenue distribution disputes commenced in the High Court.[205] This was because of the delays in operationalizing the Competent Authority, and music artists did not understand the jurisdiction of the Competent Authority.[206] While the High Court has broader jurisdiction to handle revenue distribution disputes, the forum is not quite commendable as a court of the first instance.

Most judicial officers in Kenya lack specialized training in IP law. This creates a likelihood of inconsistent and erroneous jurisprudence on music revenue collection and distribution. There have been several instances where the courts have made erroneous determinations on applying intellectual property concepts.[207] On royalty collection and distribution, for example, the decision in *Mercy Munee Kingoo & another v Safaricom Limited & another*[208] was erroneous for failing to appreciate that CMOs may, in some instances, be required to collect royalties for non-members based on their position of trust and the nature of rights management for particular works.[209]

4.3.1.5.2. Judicial mechanisms

Under the High Court's unlimited original jurisdiction over copyright matters, music artists can commence proceedings in the High Court of Kenya over a wide range of matters on inequitable music royalty distribution.[210] However, their right to audience in the High Court is

[205] Now repealed section 48(1) of the Copyright Act, 2001.

[206] Ibid.

[207] *Faulu Kenya Deposit Taking Microfinance Limited v Safaricom Limited is considered unprecedented and erroneous since the court found a concept paper used to prepare a cash advance service to be used on a mobile telephone platform was not a copyrightable work* Civil Case 756 of 2012 [2012] eKLR. *Nonny Gathoni Njenga & Another v Catherine Masitsa & 2 Others another decision* Civil Case 490 of 2013 [2015] eKLR- *it is argued that the court erred in using generic similarity of the rival wedding shows as a basis for extending copyright protections to ideas as opposed to expressions in deciding on the copyright protection for reality television show.* See V Nzomo 'Establishing Copyright Infringement: High Court Ruling in Nonny Gathoni v Samantha's Bridal Wedding Show Case' (2015) *IP Kenya* available *at https://ipkenya.wordpress.com/2015/04/09/establishing-copyright-infringement-high-court-ruling-in-nonny-gathoni-v-samanthas-bridal-wedding-show-case/*, accessed on 30 March 2023.

[208] [2016] eKLR.

[209] The decisions in *David Kasika & 4 Others v Music Copyright Society of Kenya & Another* [2016] eKLR and *Xpedia Management Limited & 4 others v Attorney General & 5 others* [2016] eKLR are more instructive.

[210] Article 165(3)(a) of the Constitution of Kenya, 2010.

qualified to the extent of the Tribunal's jurisdiction. The High Court can only entertain copyright registration disputes, and disputes on grant of registration certificates, or licenses from KECOBO and CMOs as an appellate court.[211] Further, music artists may approach the High Court for determination over violations of rights and fundamental freedoms that occurred due to the application of copyright law.[212]

Before the 2019 amendment, all music royalty distribution disputes commenced in the High Court. It is argued that music artists did not understand the jurisdiction of the Competent Authority due to its broad mandate— jurisdiction over "any matter require[d] to be determined by [it]".[213] The Competent Authority was also not in operation for four (4) years after being constituted in 2009. The court called out the Competent Authority on this, and they explained the delay was caused by administrative and budgetary constraints.[214]

When aggrieved by the decision of the High Court, music artists may appeal to the Court of Appeal and the Supreme Court against a decision made in the Court of Appeal.[215]

4.3.2. Justice in the subsequent acquisition of rights

Another challenge in Kenyan copyright law is the insufficient regulation of transparency obligations for intermediaries, limiting music artists' audit rights. Current obligations do not compel contracting parties to disclose information about sub-licensees and third parties, hindering transparency and accountability.[216] In *Philip Njoroge Kimani v Liberty Africa Technologies Limited & another*, the court rejected a request for the 2nd respondent to disclose revenue statements on the performance of the petitioner's music on Skiza Tunes. The court held that sharing information from a separate contract with a non-party could harm the 2nd respondent's commercial interests and noted that section 6(1) of the Access to Information Act

[211] Section 48(4)(a) of the Copyright Act, 2001; article 165(3)(c) of the Constitution of Kenya, 2010.

[212] Article 165(3)(b) of the Constitution of Kenya, 2010.

[213] Now repealed, previous section 48(1) of the Copyright Act, 2001.

[214] See *Republic v Kenya Association of Music Producers (KAMP) & 3 others Ex- Parte Pubs, Entertainment and Restaurants Association of Kenya (PERAK)* Judicial Review Case 335 of 2013 [2013] eKLR at para 60.

[215] Articles 166 and 167(4) of the Constitution of Kenya, 2010.

[216] See the accountability and transparency obligations discussed in sections 4.3.1. of the thesis.

2016 restricts such disclosures. This case underscores the transparency gap in accessing sublicensee revenue data for music creators.[217]

4.3.3. Transitional justice when implementing reforms for distributive justice in copyright law

Section 23(2) of the Interpretation and General Provisions Act, CAP 2 Laws of Kenya, empowers the legislature to enact laws with retrospective effect provided the intention of the retrospective application is clearly expressed.[218]

The 2019 and 2022 amendments to the Copyright Act are a commendable effort to reform the law to address distributive justice concerns in the distribution of revenue. None of these amendments had a retrospective effect. This means that music artists will have to wait until their agreements expire for the new law to apply to them.[219] Therefore, the transitions fail the distributive justice test and historical injustices remain unaddressed areas within the current legal framework.

It is expected that the retrospective application of any amendment to enforce the right to equitable remuneration may be subjected to constitutional challenges. However, it is argued here the amendments will survive the challenges since the right to equitable remuneration is framed to avoid injustices by equitably balancing the rights of music artists and intermediaries. As per section 4.4.7. of the thesis, the retrospective effect should only apply to some essential components of the right to equitable remuneration.

[217] [2021] eKLR.

[218] See interpretation of this provision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011 [2012] eKLR; *Municipality of Mombasa v Nyali Limited* [1963] E.A. 371; *Orengo v Moi & 12 Others* (No. 3) (2008) 1 KLR EP 715.

[219] See for example section 30C (2) of the Copyright Act, 2001; Copyright Amendment Act No. 20 of 2019 and Copyright (Amendment) Act No. 14 of 2022.

4.3.4. Justice in reparations for violating the protection of music artists during the initial and subsequent acquisition of rights

One of the notable features of copyright law after the 2019 amendment is the introduction of comprehensive and extensive sanctions for revenue collection and distribution offences.

Section 38A of the Copyright Act provides offences for body corporates like CMOs and KECOBO administering the royalty distribution system. Officers of body corporates may also be held liable for these offences, since the Act defines a body corporate to include a corporation and its officers.[220] The connivance or consent of officers of CMOs and KECOBO in the commission of offences prescribed in the Copyright Act is an offence as per section 38A (2) of the Copyright Act. The officers may put up a defence by proving that the offence was committed without their knowledge, or that they exercised due diligence.[221]

Body corporates are liable for wilful failure to produce documents required for auditing a CMO.[222] If convicted, it attracts a fine not exceeding 200,000/= KES or imprisonment for a term not exceeding three months or both.[223]

Section 46(12) of the Copyright Act makes it an offence to collect royalties without a license from KECOBO. A body corporate found liable for this offence shall be liable on conviction to a fine not exceeding 500, 000/= KES or to imprisonment to a term not exceeding four years or both.[224]

Another gap or challenge in Kenyan copyright law lies in achieving justice in reparations for violations of the protection of music artists during the initial and subsequent acquisition of rights and in matters concerning transitional justice.[225]

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[220] Section 38A (1) as read with section 38A (3) of the Copyright Act, 2001.

[221] Section 38A (1) of the Copyright Act, 2001.

[222] Section 46E (2) and (3) of the Copyright Act, 2001.

[223] Section 46E (3) as read with section 46E (2) of the Copyright Act, 2001.

[224] Section 46(12) of the Copyright Act, 2001.

[225] See sections 4.3.1.- 4.3.4. of the thesis.

4.4. Companies Act: Legal framework governing music industry enterprises and their responsibilities in revenue distribution

The Companies Act, 2015 (Companies Act) regulates corporate intermediaries and intermediaries operating in the ICT sector. The Companies Act is administered under the Ministry of Industrialization, Trade, and Enterprise Development which controls policy formulation that affects corporate intermediaries.[226] The Companies Act, therefore, regulates the corporate transparency of CMOs, digital platforms, MTT companies and music aggregators registered as companies in Kenya.[227]

Like CMOs, corporate intermediaries have an obligation for companies to maintain company records that reflect an accurate and fair view of the status of their affairs.[228] Most of these company records are usually available to the public, subject to procedures for inspection and access. The availability for public inspection enables copyright owners to do background checks, know the companies they are transacting with, assess the viability of their commercial deals with the various intermediaries, and even follow up during the subsistence of commercialization agreements. Consequently, this reduces information asymmetries between this set of intermediaries and copyright owners in the commercialization of music to some extent.

4.5. Kenya Information and Communication Act, 1998 (KICA)

The Kenya Information and Communications Act, 1988 (KICA) regulates intermediaries operating in the ICT sector. Policy formulation in the information and communication (ICT) sector falls under the Ministry of ICT, Innovation, and Youth Affairs. KICA is the most instructive in regulating digital platforms, MTT companies and music aggregators in the

[226] This Ministry exercises its functions through the Cabinet Secretary (CS), Principal Secretary (PS) and Company Registrar. See Companies Act, 2015 generally.

[227] Most digital platform owners and CSPs qualify to be companies as per the definition of a company in s 3 of the Companies Act, 2015 — "a company formed and registered under this Act or an existing company".

[228] See sections 628 and 636 of the Companies Act, 2015. Company records include records of companies like documents lodged by the companies for registration, certificates of incorporation, register of members and directors, accounting records, and financial statements as per section 1007(2) of the Companies Act, 2015.

information communication sector. KICA requires these intermediaries to be licensed for operation.[229]

The CA, the regulatory authority of KICA, is tasked with licensing these intermediaries.[230] The licenses create an obligation to adhere to copyright and related rights in commercializing copyright content. These licenses are issued under the Unified Licensing Framework of 2008 (Framework) which allows licensees to provide any type of information and communication services based on one license.[231]

The CA ensures that ICT-related intermediaries comply with copyright obligations by proving that they are paying the required remuneration to music artists and other intermediaries.[232] Another way that the CA monitors compliance with the law is by setting compliance with the copyright licensing tariffs and the 40% local quota set in the National Music Policy as some of the requisites for licensing broadcasters.

4.6. Administration of Kenya's music industry

Section 4.6. of the thesis provides a summary of the administration of Kenya's music industry. It pulls together the role of ministries, departments and government offices discussed in section 4.3. of the thesis. It also introduces and discusses the roles of the Ministry of Youth Affairs,

[229] See definition of a telecommunications operator in footnote 130 (Section 2 of the Copyright (Amendment) Act, 2021 defines "telecommunication operator" as per the meaning assigned to it in the Kenya Information and Communications Act, 1998. Section 2(1) of the Kenya Information and Communications Act, 1998 defines "telecommunication operator" as a telecommunication operator licensed under section 79, which only provides the requirements and procedure for grant of licence. The thesis, therefore, uses the definitions of "telecommunication system" and "telecommunication service" in section 2(1) of the Kenya Information and Communications Act, 1998 to describe a telecommunication operator.) See sections 24 and 79 of KICA on the requirement for licensing.

[230] Section 3 of KICA.

[231] See note published by CA on licensing procedures available at https://www.ca.go.ke/industry/telecommunication/licensing-procedure/, accessed on 20 November 2020.

[232] See Notice published by the CA after the Copyright Amendment Act No. 20 of 2019entered into force, CA 'Adherence to Copyright Obligations by Licensed Service Providers' (2019) available at *https://ca.go.ke/wp-content/uploads/2019/11/Public-Notice-on-Adherrence-to-Copyright-Obligations-by-Licenses-Servie-Providers.pdf,* accessed on 25 July 2020.

Sports and the Arts and the Department of music acting through the Permanent Presidential Music Commission (PPMC), which were not mentioned before.

The administration of Kenya's music industry is scattered among different ministries, government bodies, and offices. The music industry mainly falls under the Ministry of Youth Affairs, Sports and the Arts.[233] Two other ministries (the Ministry of Information, Communications and the Digital Economy and the Ministry of Trade, Investment and Industry), the office of the Attorney General and Department of Justice, and the Department of Music offer supporting roles in the administration of the music industry.

The supporting roles of the Ministry of Trade, Investment and Industry are on the regulation and enforcement of matters relating to corporate transparency and accountability of corporate intermediaries.[234] These roles are exercised through the Cabinet Secretary (CS), Principal Secretary (PS) and the Company Registrar.

On the other hand, the Ministry of Ministry of Information, Communications and the Digital Economy, controls policy formulation that affects the operation of intermediaries that operate in the ICT sector.[235] The government offices and bodies that fall under this Ministry are the relevant CS and PS and the CA. Additionally, the Attorney General controls aspects of royalty collection like setting annual tariffs used by CMOs.[236]

Sections 4.6.1. and 4.6.2. below discuss the role of the Ministry of Youth Affairs, Sports and the Arts and the PPMC.

[233] See the role of the Ministry in section 4.6.1. of the thesis.

[234] Ibid.

[235] See section 4.6.2. of this thesis.

[236] See sections 3.5.2. and 4.3. of this thesis.

4.6.1. The Ministry of Youth Affairs, Sports and the Arts (the Ministry).

Kenya's music industry is mainly administered by the Ministry of Youth Affairs, Sports and the Arts (the Ministry).[237] The Ministry monitors research, development, policy formulation, and implementation in the music industry. It is argued that the positioning of the music industry under the Ministry suggests a rationale based on the preservation of Kenya's cultural heritage but a weaker concern for encouraging investment and trade in the music industry.

The Cabinet Secretary (CS) is the head of the Ministry and oversees all the functions of the Ministry. The CS plays a vital role in forming policies for the administration of the music industry in Kenya. The CS is also accountable for the institutions falling under the Ministry. In this regard, the CS works closely with the Principal Secretary (PS) of Culture and Heritage, who heads the department of music known as the PPMC.[238] A significant role that requires coordination of the CS and the PS is the approval of expenditure by the PPMC. Nevertheless, the CS has a larger mandate in music royalty collection and distribution as provided in the Copyright Act, 2001.

The CS's powers and duties regarding the collection and distribution of music royalties revolve around oversight of CMOs' and KECOBO's activities.[239] The CS approves collection tariffs for CMOs as per section 46A of the Copyright Act, 2001. The powers and duties of the CS are further delineated in section 49 of the Copyright Act, 2001 which empowers the CS to make regulations for better implementation of the Act and to enable KECOBO to discharge its functions effectively. The CS is yet to regulate the procedure for filing claims in the Copyright Tribunal.

Together, the CS and PPMC play complementary roles in the regulation, development, and oversight of the Kenyan music industry, with each bearing distinct responsibilities that support the effective collection, distribution, and promotion of local music and heritage.

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[237] See the Ministry of Youth Affairs, Sports and the Arts's website available at *https://www.president.go.ke/ministries-ke/ministry-of-youth-affairs-sports-and-the-arts/*, accessed on 4 February 2024.

[238] Article 155(2) of the Constitution of Kenya, 2010.

[239] See section 4.3.1 of the thesis for a detailed discussion on ex-post interventions, focusing on the accountability and transparency obligations of intermediaries in the commercialization of music.

4.6.2. The Permanent Presidential Music Commission (PPMC): role and responsibilities in regulating the Kenyan music industry

The department of music coordinates music activities in the country and is led by the Permanent Presidential Music Commission (PPMC). Established in 1988, through a presidential order, the PPMC was created to implement the recommendations of a task force that investigated the preservation and development of music and heritage in Kenya.[240] Thus far, the PPMC has been tasked with two prominent roles directly related to The collection and distribution of music royalties. The first role is the implementation of the National Music Policy, 2015, which includes enforcing the 40% local music quota required for radio and TV broadcasting. Initially, this task caused a lot of confusion amongst music artists, who assumed that the CA would oversee the quota's implementation since they license radio and TV broadcasting networks.

The second role of the PPMC is administering the 'Work for Pay' 2020 Fund, w a stimulus package launched by the former president to support music artists during the COVID-19 pandemic.[241] Initially, CMOs expected to distribute the fund, but the Ministry later announced that the PPMC would manage it instead. The Ministry faced criticism for issuing guidelines that excluded some music artists as beneficiaries if their work did not directly support government efforts in combating COVID 19.

4.7. Conclusion on the legal framework governing Kenya's music industry

The objective of this chapter was to analyse the legal framework governing relationships among music artists, intermediaries, and other stakeholders in Kenya's music industry. This involved evaluating the existing legal framework and identifying areas within Kenyan copyright law that may require reform to ensure a more equitable distribution of music revenue.

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[240] See Kenya Gazette Notice No. 2132 of April 1988 and PPMC website available at https://ppmc.go.ke/, accessed on 20 June 2022.

[241] See guidelines on the Work For Pay fund available at Permanent Presidential Music Commission (PPMC) *Stimulus Programme for Musicians* (n.d.) available at *https://www.ppmc.go.ke/index.php/page/work-for-pay#:~:text=The%20Ministry%20of%20Sports%2C%20Culture,Development%20Fund%20to%20avail%20Kshs,* accessed on 22 October 2022.

The chapter revealed several significant findings regarding Kenya's legislative framework for music commercialization and revenue distribution. Key gaps were identified, including the absence of ex-ante and ex-post protection mechanisms in the acquisition of rights, limited enforcement mechanisms for music artists under Kenyan law, and inadequate measures to rectify remuneration imbalances caused by intermediaries. Moreover, the implementation of reforms aimed at achieving distributive justice in copyright law remains challenging, with minimal repercussions for intermediaries who violate protections for music artists.

Additionally, the fragmented administration of the Kenyan music industry across various government bodies posed a considerable obstacle to effective regulation and management. Despite these challenges, ongoing efforts are essential to address these gaps and streamline industry administration, thereby ensuring fair treatment and equitable remuneration for music artists.

CHAPTER FIVE: GERMAN AND EUROPEAN UNION (EU) APPROACHES TO TACKLING THE CHALLENGE OF ESTABLISHING A MORE EQUITABLE DISTRIBUTION OF MUSIC REVENUE

5.1. Introduction to German and EU approaches to tackling the challenge of establishing a more equitable distribution of music revenue

This thesis has so far demonstrated that Kenya is failing to equitably balance the interests of music artists and intermediaries in the commercialization of music and distribution of revenue. This chapter uses the principles of an equitable copyright system, as discussed in chapter two, to explore German and EU approaches to tackling the challenge of establishing a more equitable distribution of music revenue between music artists and intermediaries.

5.2. German approach to tackling the challenge of establishing a more equitable distribution of music revenue

Germany is a relevant jurisdiction for Kenya to learn from for four main reasons. First, it pioneered the introduction of the most comprehensive copyright contract protections to ensure music artists are equitably remunerated.[1] Second, Germany adopts a strict supervisory approach for CMOs to enhance their accountability and transparency in the collection and distribution of royalties.[2] Since CMOs provide the most workable solution for music artists in Kenya to collectively exercise their right to equitable remuneration, Germany provides an appropriate model to learn from.[3]

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[1] M Kretschmer, E Derclaye, M Favale and R Watt *The Relationship between Copyright and Contract Law: A Review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy (SABIP)* (2010) at 7; O Alter 'Fairness towards Authors: Does It Necessarily Mean Caring for the Weak' (2018) 43 *Southern Illinois University Law Journal* 615 at 617; M Senftleben 'More Money for Creators and More Support for Copyright in Society- Fair Remuneration Rights in Germany and the Netherlands' (2018) 41 *Columbia Journal of Law & Arts* 413 at 413-433.

[2] Germany's approach of having a standalone legislation for collective management is also considered to be more systematic than the approach of providing CMO regulation alongside copyright legislation that is followed in most common law countries. See A Dietz 'Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe' (2001) *Journal of the Copyright Society of the USA* 897 at 899; B Atkinson and B Fitzgerald 'Collecting Societies Codes of Conduct' (2012) *BOP* 36 *Consulting in collaboration with Benedict Atkinson and Brian Fitzgerald* available at *https://assets.publishing.service.gov.uk/media/5a7e2f35e5274a2e8ab4662a/ipresearch-collecting-071212.pdf*, accessed on 10 January 2024; D Gervais *Collective Management of Copyright and Related Rights* 3 ed (2016).

[3] Dietz op cit note 2; Atkinson and Fitzgerald op cit note 2; Gervais op cit note 2.

Third, being a member of the EU , Germany provides a basis for discussing chapter 3 of the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (EU Directive), and how it has been implemented in Germany. Chapter 3 of the EU Directive provides for fair remuneration of music artists.[4]

It is also important to highlight the European context regarding authors' contract law due to the contentious nature of the EU's authority to legislate in this area. Historically, the EU's competence has been contested, particularly as it relates to harmonizing copyright laws across member states.[5] Until the adoption of the Digital Single Market (DSM) Directive 2019/790, there was no unified approach to authors' contract law, resulting in inconsistencies among member states' regulations.

The DSM Directive aimed to modernize copyright laws and address challenges posed by digitalization. However, it did not fully align with the recommendations from the expert opinion by Guibault and Salamanca, which called for more comprehensive protections for authors and performers.[6] Specifically, their recommendations for mandatory collective bargaining agreements and minimum statutory remuneration levels were not included in the Directive. Instead, the Directive focused on adopting a few relatively uncontroversial protective measures, such as ensuring transparency in contracts and establishing a framework for fair remuneration. These measures, while beneficial, fell short of the robust protections advocated by the study, highlighting the ongoing tension between achieving harmonization and addressing the diverse needs of various stakeholders within the creative sector.

Further, EU competence in regulating the activities of CMOs is not contested, as it is part of the exercise of rights, having an internal market impact on all member states. The development of EU law in this area has benefitted a lot from German Law, where the UrhWvG served as a model; on the other hand, all the case law of the CJEU on collective rights management is

[4] Articles18- 22 of the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (CDSM Directive) provides that fair remuneration entails the provision of appropriate and proportionate remuneration., contract adjustment mechanisms, transparency obligation, right of revocation and alternative dispute resolution mechanisms.

[5] A Ramalho *The competence of the European Union in copyright lawmaking: A normative perspective of EU powers for copyright harmonization (*2016).

[6] L Guibault and O Salamanca *Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works* (2016) European Commission 8, 156.

binding on Germany even if it originates from another member state; EU case law is therefore relevant to the interpretation of many German provisions, especially regarding CMO operations.

Finally, Germany, has been grappling with the challenge of inequitable remuneration of music artists.[7] Similar to Kenya, this challenge is largely described in the context of how music artists license and assign their rights to intermediaries.[8] Malevanny explains that deals between music artists and intermediaries involve a full transfer of rights for the duration of copyright.[9] However, there are exceptions where the transfers are relatively more equitable.[10] For example, in co-publishing and administration agreements, artists retain partial or full ownership of their rights.[11]

Malevanny notes that these agreements are only concluded when the artist has sufficient bargaining leverage, and most artist lack this bargaining power.[12] Another exception is the tape lease deal practised by independent record labels in Germany.[13] Tape lease deals are described as a hybrid of self-releasing and signing with a record label.[14] Here, the deals constitute

[7] T Neu 'The Fair Pay Revolution: German Copyright Law's International Reach' (2017) 26 *Michigan State International Law Review* 445 at 445-482; N Malevanny *Online Music Distribution-How Much Exclusivity Is Needed?: A Study of International, European, German and US Copyright Systems and Their Objectives* (2019) 78-86; A Lucas-Schloetter 'The remuneration of authors and performers in copyright contract law' in P Torremans *Research Handbook on Copyright Law* (2017) 254-272.

[8] See chapters 3 and 4 of the thesis for a discussion on the challenges of establishing an equitable revenue distribution system in Kenya.

[9] Malevanny op cit note 7 at 78-86. For additional context see Lucas-Schloetter (2017) op cit note 7 at 254-272 and M Senftleben 'More Money for Creators and More Support for Copyright in Society- Fair Remuneration Rights in Germany and the Netherlands' (2018) 41 *Columbia Journal of Law & Arts* 413 at 413-433.

[10] Malevanny op cit note 7 at 85-86. For additional context, see also Lucas-Schloetter (2017) op cit note 7 at 254-257; and Senftleben (2018) op cit note 9 at 413-433.

[11] Malevanny op cit note 7 at 78-80 and 85. For additional context, see also Lucas-Schloetter (2017) op cit note 7 at 254-257; and Senftleben (2018) op cit note 9 at 413-433.

[12] Malevanny op cit note 7 at 78-80 and 85-86. For additional context, see also Lucas-Schloetter (2017) op cit note 7 at 254-257; and Senftleben (2018) op cit note 9 at 413-433.

[13] Malevanny op cit note 7 at 83-86. For additional context, see also Lucas-Schloetter (2017) op cit note 7 at 254-257; and Senftleben (2018) op cit note 9 at 413-433.

[14] Malevanny op cit note 7 at 86. For additional context, see also Lucas-Schloetter (2017) op cit note 7 at 254-257; and Senftleben (2018) op cit note 9 at 413-433.

comprehensive exclusive licenses but with time limits.[15] During the subsistence of the deal the record labels are still able to extract more revenue compared to the performers' and recording artists' remuneration.[16] Typically, no transfers occur with regard to phonogram producers since these rights are vested in the record label.[17] The transfer of rights that are exclusively licensed to CMOs or another intermediary or contracting party is impossible.[18]

With this in mind, the thesis proceeds to discuss the German approach to addressing the challenge of inequitable remuneration of music artists. It provides an overview of music copyright protection in Germany, the major legislative changes, the German response to inequitable remuneration of music artists, and the practical and broader significance of the German approach.

5.2.1. An overview of music copyright protection in Germany

Germany is a civil law jurisdiction.[19] The constitutional basis for copyright protection flows from articles 14(1), 1 (1), and 2(1) of the Basic Law for the Federal Republic of Germany, 1949 which recognizes the right to property, human dignity, and personality rights respectively. Copyright law is defined in two main legislations: the *Urheberrechtsgesetz* (UrhG), 1965 (translates to the Act on Copyright and Related Rights in English) and the Urheberrechtswahrnehmungsgesetz, 2016 (UrhWahrnG) (translates to Act on the Management of Copyright and Related Rights by Collecting Societies in English).

[15] Malevanny op cit note 7 at 86. For additional context, see also Lucas-Schloetter (2017) op cit note 7 at 254-257; and Senftleben (2018) op cit note 9 at 413-433.

[16] Malevanny op cit note 7 at 83-86. For additional context, see also Lucas-Schloetter (2017) op cit note 7 at 254-257; and Senftleben (2018) op cit note 9 at 413-433.

[17] Malevanny op cit note 7 at 85-86. For additional context, see also Lucas-Schloetter (2017) op cit note 7 at 254-257; and Senftleben (2018) op cit note 9 at 413-433.

[18] Malevanny op cit note 7 at 79-80. For additional context, see also Lucas-Schloetter (2017) op cit note 7 at 254-257; and Senftleben (2018) op cit note 9 at 413-433.

[19] In Civil law jurisdictions, the courts heavily rely on statutes and codified laws when making decisions than judicial decisions and opinions. See R Grote 'Comparative Law and Teaching Law Through the Case Method in the Civil Law Tradition-A German Perspective' (2004) 82 *University of Detroit Mercy Law Review* 163 at 163; SAK Singh and G Bhardwaj 'Decoding Common Law and Civil Law: Origin, Goal and Legal Mechanism' (2019) 21(5) *Journal of the Gujarat Research Society* 44 at 45-46.

The "author's own intellectual creations" in literary works, musical works, and sound recordings qualify for copyright protection in Germany.[20] Copyright protection is automatic when a work satisfies the standards of protection provided in section 2 of the UrhG. However, works published as anonymous or pseudonymous should be registered to ensure the regular duration of copyright.[21]

Copyright comprises two sets of exclusive rights: economic and moral rights.[22] The exercise of economic rights is limited to the extent allowed in Part 1 Division 6 of the UrhG. The duration of copyright protection for all works is for the author's life and 70 years after the author's death.[23] The copyright for anonymous and pseudonymous works ends either 70 years after they are published or, if they were not published within this timeframe, 70 years after their creation.[24]

Recording artists and performers are granted rights in performances that can be fixed in sound recordings.[25] For the most part, performers are granted the same exclusive rights as authors.[26] The duration of these rights depends on whether the performance has been recorded on an audio medium or communicated to the public, or released.[27] When recorded on an audio medium or communicated to the public, the rights expire 70 years after the release of the recording or the

[20] Section 1 of the UrhG provides that protected works should fit into the categories of works in the literary, scientific and artistic domains. Section 2 (1) of the UrhG provides a non-exhaustive list of protected works where musical works and literary works are separate works. Sound recordings fit into the category of protected works in the UrhG since they incorporate musical and literary works. Section 2(2) of the UrhG states that only the author's own creations constitute works. The author is the creator of a work according to section 7 of the UrhG. See discussion of copyright law in Germany in European Parliamentary Research Service (EPRS) *Copyright Law in the EU: Salient features of copyright law across the EU Member States* (2018).

[21] Sections 66 and 138 of the UrhG.

[22] For economic rights of the author, see sections 16-24 of the UrhG. Moral rights of authors are provided in sections 12-14 of the UrhG.

[23] Section 64 of the UrhG.

[24] Section 66(1) of the UrhG.

[25] See Division 3 of the UrhG on the protection of performers. Section 73 defines a performer as "a person who performs, sings, acts or in another manner presents a work or an expression of popular art or who participates artistically in such a presentation."

[26] Sections 77 and 78 of the UrhG provide the exclusive rights of performers. The exercise of these exclusive rights is limited to the extent allowed by the limitations and exceptions in Part 1 Division 6 of the UrhG. For moral rights of performers, see sections 75 and 76 of the UrhG. See further discussion on the same in Malevanny op cit note 7 at 48-49.

[27] Section 82 of the UrhG.

first legal use of the communication to the public.[28] When the performance is not recorded on an audio medium, the rights expire 50 years after the release of the recording or the first legal use of the communication to the public.[29] Performers' rights "expire 50 years after the performance if a recording has not been released or [it is] not legally used for communication to the public within that period."[30]

The UrhG describes the rationale of copyright protection as protecting creators in their intellectual and personal relationships with the work and in respect of the use.[31] It also serves to ensure equitable remuneration for the use of the work.[32] The strong creators' protection is described to be a result of Germany's monistic interpretation of copyright protection and the existence of statutory provisions that strengthen music artists' bargaining powers.[33] A monistic interpretation of copyright exists where economic and moral rights are perceived as unified and treated equally. Due to the monistic approach followed in Germany, the duration applies to economic and moral rights. The monistic approach to copyright protection is contrasted with the dualistic approach followed in most common law countries like the UK and Kenya.[34] Countries that follow the dualistic approach prefer limited moral rights protection to economic rights.

5.2.2. Major legislative developments in German copyright law

Germany regulates music revenue distribution in two separate copyright legislation for individual management on the one hand and collective management on the other hand. The

[28] Ibid.

[29] Ibid.

[30] Ibid.

[31] Section 11 of the UrhG relates this rationale to authors only. However, since authors are defined as creators in section 7, the thesis prefers the use of creators to include music artists and depict the strong music artists' protections in the UrhG.

[32] Ibid.

[33] See sections 31, 31a, 32, 32a-32g, 34-42 of the UrhG for the authorial protections and sections 79a, 79b of the UrhG for performers' protections. See also K Darling 'Contracting about the future: Copyright and New Media' (2011) 10 *North Western Journal of Technology & Intellectual Prop*erty v at 499.

[34] Dietz op cit note 2 at 202-203.

thesis discusses the legislative developments concerning the revenue distribution system for individual management and collective management in sections 5.2.2.1. and 5.2.2.2 of this thesis.

5.2.2.1. The revenue distribution system for individual management: Historical context and reform of German copyright law

German copyright law was enacted in 1837 and initially provided for the protection of dramatic musical works.[35] Over the past five decades, the protection of authors, who are often at a disadvantage in bargaining powers during contractual agreements for music commercialization, has been a priority for reforming German copyright law. Even before the adoption of the UrhG in 1965, stakeholders in the German copyright industry — like authors' associations, media industries, and copyright experts — recognized the need to balance the contractual relationship between authors and intermediaries involved in the commercialization of works.[36] However, it took around three decades for Germany to initiate any plans for revising copyright law to address the concerns. The Federal Ministry of Justice spearheaded the revision process, which began in 1998.

Sections 31-36 of the UrhG which specifically address music artists' contract rights, have evolved significantly from their introduction in the 1965 law through key amendments like the 2002, 2017, and 2021 changes.

In 2000, the ministry commissioned copyright experts to draft an amendment bill following a public hearing that considered the opinions of various copyright stakeholders. The Federal Government presented the draft bill in 2001, which included three notable proposals that sparked a heated debate and faced opposition from both author associations and media industry associations. These proposals were the mandatory termination of copyright contracts after thirty years, a statutory right to equitable remuneration, and an obligation requiring users of works to establish common standards for determining the level of equitable remuneration due

[35] J Reinbothe 'Collective Rights Management in Germany' in D Gervais *Collective Management of Copyright and Related Rights* (2016) 3 ed 205-213.

[36] KM Gutsche 'Equitable Remuneration for Authors in Germany-How the Germany Copyright Act Secures Their Rewards' (2002) 50 *Journal of the Copyright Society of the USA* 257 at 257-259.

to authors. Ultimately, the first two proposals did not come to fruition, while the third was moderated to apply only to parties that concluding commercialization contracts with authors.

The Draft Bill passed the Lower Chamber of the Federal Parliament in January 2000. It passed the Upper Chamber of the Federal Parliament in March 2000, without comments. The Bill entered into force in July 2002 by enacting the Act on Strengthening the Contractual Position of Authors and Performers (the 2002 amendment).[37]

The main aim of the 2002 amendment was to enhance music artists' protection in their contractual relationships with intermediaries by introducing more mandatory copyright contract provisions.[38] The new provisions were meant to supplement the previously existing copyright contract protections for authors. The previously existing provisions included "the unwaivable right to additional remuneration when the agreed rate was grossly disproportionate to the income from the use of the work"; grant of uses relating exploitation rights for unknown types of use and the relevant obligations were invalid, and the right to revocation for non-use of a right or when authors changed their minds regarding the transfers.

Before the 2002 amendments, the UrhG protected authors by invalidating grants of rights of use for unknown types of works. The UrhG also provided an unwaivable right to additional remuneration when the agreed rate was grossly disproportionate to the revenue from the commercialization of the work. Further, the authors had a revocation right for non-exercise or because of changed conviction.

5.2.2.1.1. The three baskets of the UrhG (2003-2017)

Between 2003-2017, there were several other amendments to the UrhG to align it with changes brought about by digitization and the operation of copyright in the information society. These reforms can be grouped into three categories commonly referred to as "baskets". The first basket implemented the EU Directive 2001/29 on Copyright and Related Rights in the Information Society (InfoSoc Directive) via the Law of 10 September 2003 on the Regulation

[37] Act on Strengthening the Contractual Position of Authors and Performers is available at *https://www.urheberrecht.org/law/normen/urhg/2002-03-22/text/*, accessed on 10 September 2023.

[38] See section 11 of the UrhG that provides the main foundation for copyright protection in Germany is to ensure the protection of the author and that the author receives equitable remuneration; see further article14(1) of the German Constitution on protection of the right to property.

of Copyright in the Information Society.[39] It amended the UrhG provisions on limitations, exceptions, and digital rights management. On March 22, 2006, the German Federal Government presented a proposal to further reform the UrhG (the second basket).[40]

The second basket was implemented via the Second Act on Copyright Law in the Information Society, approved on 21 September 2007, and entered into force in January 2008. This Act introduced more limitations and exceptions to copyright protection to allow science, research, and education. It also included provisions for the regulation of copyright contracts by introducing section 31a into the UrhG, which provides contracts concerning unknown types of exploitation methods.

During the approval of the second basket, the Second Chamber of the German legislator expressed the need to start working on a third basket.[41] This indicates a continuous effort to adapt and refine copyright law in response to the evolving landscape of digital content and its implications for various sectors.

The third basket was implemented by the Act to Align Copyright Law with the Current Demands of the Knowledge-based Society (Urheberrechts-Wissensgesellschafts-Gesetz-UrhWissG), which was approved on 30 June 2017 and entered into force on 1 March 2018. This legislation introduced sections 60a-60h into the UrhG, offering further clarification on limitations and exceptions of copyright to allow for more uses in research and education. This clarification was presented by splitting the structure of section 60 to regulate different users and different uses for research and education in separate sub-sections.

Additionally, the third basket introduced a new limitation and exception to allow for text and data mining for purposes of scientific research.[42] This development reflects a growing recognition of the importance of enabling innovative research practices while balancing copyright protections in a knowledge-based society.

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[39] B Lindner and T Shapiro *Copyright in the Information Society: A Guide to National Implementation of the European Directive* 2 ed (2019).

[40] S Ernst and DM Häusermann 'Teaching Exceptions in European Copyright Law-Important Policy Questions Remain' (2006) *Berkman Center Research Publication* 2006-10 1 at 4.

[41] Stm 'Update "Second Basket" German Copyright Law' (n.d.) available at *https://www.stm-assoc.org/2007_10_01_German_Copyright_Law_Update_Second_Basket.pdf,* accessed on 18 September 2023.

[42] Section 60d of the UrhG.

5.2.2.1.2. The 2017 amendments to copyright contract law: Enhancing protections for music artists

In 2017, the UrhG was amended further to reinforce the copyright contract law protections for authors and professional artists (music artists).[43] The 2017 amendments sought to further protect music artists from inequitable remuneration resulting from buy-out contracts (grants of exclusive licenses against a flat rate remuneration).[44]

The 2017 amendment introduced section 79 (2a) of the UrhG which clarified that large parts of the protective mechanisms for authors are also applicable to performers.[45] Section 79 (2a) of the UrhG ensures the application of sections 31, 32 to 32b, 32d to 40, 41, 42 and 43 to performers. Therefore, the thesis refers to music artists when discussing these provisions and only differentiates authors from performers and recording artists in discussions on other sections.

The 2017 amendment introduced sections 32d and 32e that require information disclosures from music artists' contracting parties and third parties in the license chain. The information disclosures relate to the extent of commercialization, the use of the work, and the revenue and benefits derived from the commercialization. It is argued that these sections were introduced to enable music artists to assess the additional payment they require from licensees and sublicensees when extending the exclusivity of an exclusive license five years after its grant. The right to information and accountability ensures that authors are kept in the loop of the amount of revenue earned from the commercialization of their works.

[43] In December 2016, the German Bundestag adopted the "Copyright Act for improved enforcement of claims, which authors and professional artists have in case of adequate payment and regulations of issues concerning publisher shares" (Deutscher Bundestag: Beschlussempfehlung Und Bericht [BT] 18/10637) which entered into force on 01 March 2017.

[44] Ibid, Malevanny op cit note 7 at 97; N Reber 'The "further fair participation" provision in Art. 32 a (2) German Copyright Act–Claims against a third-party exploiter of a work' (2016) 11(5) *Journal of Intellectual Property Law & Practice* 382 at 382-385.

[45] When section 79a of the UrhG was introduced in 2016, the amendment clarified that section 32 on the right to equitable remuneration was applicable to performers. See the "Copyright Act for improved enforcement of claims, which authors and professional artists have in case of adequate payment and regulations of issues concerning publisher shares" (Deutscher Bundestag: Beschlussempfehlung Und Bericht [BT] 18/10637) which entered into force on 01 March 2017 and Malevanny op cit note 7 at 90-97; Reber (2016) op cit note 44 at 382-385.

Sections 36b and 36c brought in a contract adjustment mechanism for music artists when there is a breach of common remuneration standards.[46] Following this, author associations can claim injunctive reliefs against the individuals or companies in breach on behalf of their members.[47] Additionally, the amendment introduced a ten-year statutory expiration period for exclusive licenses, which was made to consider a fixed payment.[48] Section 40a of the UrhG gives music artists the right to commercialize their music in other ways if they have transferred copyright through an exclusive license in exchange for a fixed remuneration.[49]

5.2.2.1.3. The 2021 amendments: Enhancing protections for music artists

The Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes, 2021 (Act to Adapt Copyright Law to the Requirements of the Digital Single Market), came into force on 7 June 2021. This Act was used to implement Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (EU Directive).[50] The EU Directive contains a framework with "measures to adapt exceptions and limitations to the digital and cross-border environment", "measures to improve licensing practices and ensure wider access to content" and "measures to achieve a well-functioning marketplace for copyright".[51] This thesis is only concerned with the latter as far as it provides for the equitable remuneration of music artists in articles 18-22.[52]

[46] The contract adjustment mechanism is stipulated in section 36c of the UrhG.

[47] See section 36b of the UrhG.

[48] Section 40a of the UrhG.

[49] Section 40a is discussed further in section 5.1.3.6. of the thesis.

[50] S Von Lewinski 'The Implementation of the Digital Single Market Directive of 2019 in Germany' *Revue Internationale du Droit D'auteur* 57 at 93-97 available at *https://la-rida.com/sites/default/files/2022-05/271-CEVA.pdf,* accessed on 01 March 2022.

[51] (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (EU Directive).

[52] Ibid.

Since Germany's existing copyright framework already had a novel system for protection of music artists, the 2021 amendments did not make substantial changes to the UrhG but reinforced the framework's relevance in a digital context.[53]

5.2.2.1.4. Summary of the evolution of sections 31-36 of the UrhG

The evolution of sections 31-36 of the UrhG highlights Germany's progressive approach to safeguarding music artists' rights, adapting to digital advances, and responding to changing market conditions. This summary provides initial insights into which measures have proven effective, and which have not, with more detailed discussion available in sections 5.2.3 and 5.2.6 of this thesis.

Section 31: Scope and Grant of Exploitation Rights

In 1965, section 31 originally outlined the grant of exploitation rights, providing a basic framework for authors to license their works for commercial use.

In the 2002 amendment, this section was modified to better protect authors from unfair contract terms, specifically addressing "unknown types of exploitation."[54] The addition prevented intermediaries from claiming rights in new media formats that were not explicitly covered in the original agreement.

In 2017, the provision was further clarified to include performers alongside authors, reflecting an expanded view of creative labour protection in the digital age.[55]

[53] Ibid, Lacourt A and Valais, S 'Fair remuneration for audiovisual authors and performers in licensing agreements - National case studies' (2023) European Audiovisual Observatory 7-13.

[54] Act on Strengthening the Contractual Position of Authors and Performers is available at *https://www.urheberrecht.org/law/normen/urhg/2002-03-22/text/*, accessed on 10 September 2023.

[55] Deutscher Bundestag: Beschlussempfehlung Und Bericht [BT] 18/10637).

Section 32: Equitable remuneration

Section 32 was introduced in the 2002 amendment to ensure authors receive equitable remuneration for their works.[56] The amendment aimed to address "buy-out" contracts, where authors received a flat fee without consideration for future revenue potential.

In 2017, section 32 was amended to introduce more detailed requirements for transparency, mandating that licensors disclose information about the use and revenue generated by the work.[57] The right to fair remuneration was extended to performers, with mechanisms allowing authors to renegotiate compensation if initial terms were deemed unfair.[58]

Section 32a: Additional remuneration for disproportionate revenue (best seller provision)

Section 32a was introduced in the 2002 amendment providing authors with a right to additional remuneration if the revenue from their work far exceeded the originally agreed compensation.[59] This "bestseller" provision allows authors to benefit from unexpected commercial success.

In 2017, section 32a was expanded to apply to performers specifically, recognizing that the flat-rate remuneration common in the industry often failed to reflect the full value of successful works overtime.[60]

The 2021 update to the UrhG aimed to lower the threshold for authors' claims for contract adjustment.[61] The previous version stipulated a "conspicuous disproportion" in remuneration, whereas the updated wording aligns with the Directive's more lenient requirement of "disproportionately low remuneration." Additionally, if the right of use is transferred or further rights are granted to a third party, that party becomes directly liable to the author for further participation.

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[56] Act on Strengthening the Contractual Position of Authors and Performers is available at *https://www.urheberrecht.org/law/normen/urhg/2002-03-22/text/*, accessed on 10 September 2023.

[57] Deutscher Bundestag: Beschlussempfehlung Und Bericht [BT] 18/10637).

[58] Ibid.

[59] Act on Strengthening the Contractual Position of Authors and Performers is available at *https://www.urheberrecht.org/law/normen/urhg/2002-03-22/text/*, accessed on 10 September 2023.

[60] Deutscher Bundestag: Beschlussempfehlung Und Bericht [BT] 18/10637).

[61] Lacourt and Valais (2023) op cit note 53 at 7-9 quoting the Explanatory Memorandum to the Act to Adapt Copyright Law to the Requirements of the Digital Single Market) available at https://dip.bundestag.de/drucksache/entwurf-eines-gesetzes-zur-anpassung-des-urheberrechts-an-dieerfordernisse/251322, p. 80, accessed on 27 October 2024.

Section 32b: Contract termination for lack of use

This section, introduced in 2017, allows authors and performers to terminate contracts if their works were not exploited within a reasonable timeframe.[62] The 2017 amendment aimed to prevent works from being indefinitely shelved, enabling authors and performers to regain rights for alternative commercialization.[63]

Section 32c: separate equitable remuneration for new type of exploitation

Under Section 32c, an author has the right to receive additional equitable remuneration if the other party utilizes a new type of exploitation of the author's work that was agreed upon but not known at the time the contract was signed. As of June 7, 2021, this provision also applies to contracts that were established prior to that date.[64]

Section 32d: transparency obligations

The amendments in 2017 changed transparency obligations from being fulfilled only upon request to requiring annual reporting and made compulsory under section 32b of the UrhG.[65]

Section 33: Contractual adjustments and injunctive relief

Section 33 was progressively adapted in 2002 and 2017 to allow authors to seek adjustments to unfair contractual terms.[66] In 2017, it introduced injunctive relief through associations, enabling collective action against companies violating remuneration standards, providing authors and performers with stronger enforcement mechanisms.[67]

Section 34: Limitation of rights for transfer of exploitation rights

The original provision of section 34 established that rights transfers needed to be explicitly documented. The amendments made in 2002 and 2017 aimed to clarify ambiguous contractual

[62] Ibid.

[63] Ibid.

[64] Act to Adapt Copyright Law to the Requirements of the Digital Single Market); Lacourt and Valais (2023) op cit note 53 at 10.

[65] Deutscher Bundestag: Beschlussempfehlung Und Bericht [BT] 18/10637).

[66] Act on Strengthening the Contractual Position of Authors and Performers is available at *https://www.urheberrecht.org/law/normen/urhg/2002-03-22/text/*, accessed on 10 September 2023; Deutscher Bundestag: Beschlussempfehlung Und Bericht [BT] 18/10637).

[67] Bundestag: Beschlussempfehlung Und Bericht [BT] 18/10637).

by requiring detailed descriptions of any rights transfers, ensuring authors and performers had greater control over specific use cases of their work and discouraging blanket transfer clauses.[68]

Section 35: Reversion right

The introduction of section 35 in 2002 established a reversion right that allowed authors to reclaim rights if certain contractual terms, such as fair remuneration or active exploitation, were not met.[69] This change acknowledged authors' need to secure rights in the face of non-compliance from intermediaries.

To counteract buy-out contracts' impact on fair compensation, the 2017 amendment allowed authors to reclaim rights more easily if intermediary actions or market changes warranted it.[70]

Section 36: Common Standards and Collective Bargaining

In 2002, section 36 was adapted to promote the establishment of fair remuneration standards, enabling authors to participate in collective negotiations.[71]

The 2017 amendment expanded the section to include additional mechanisms for determining fair compensation, especially for music artists.[72] Authors' associations were given greater leverage in negotiations, aiming to set industry-wide standards that aligned with evolving digital market needs

These provisions and amendments are discussed in more detail below in section 5.2.3 of the thesis in relation to the principles of an equitable revenue distribution system as established in chapter 2.3.4. of this thesis.

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[68] Act on Strengthening the Contractual Position of Authors and Performers is available at *https://www.urheberrecht.org/law/normen/urhg/2002-03-22/text/*, accessed on 10 September 2023; Deutscher Bundestag: Beschlussempfehlung Und Bericht [BT] 18/10637).

[69] Act on Strengthening the Contractual Position of Authors and Performers is available at *https://www.urheberrecht.org/law/normen/urhg/2002-03-22/text/*, accessed on 10 September 2023.

[70] Bundestag: Beschlussempfehlung Und Bericht [BT] 18/10637).

[71] Act on Strengthening the Contractual Position of Authors and Performers is available at *https://www.urheberrecht.org/law/normen/urhg/2002-03-22/text/*, accessed on 10 September 2023.

[72] Act on Strengthening the Contractual Position of Authors and Performers is available at *https://www.urheberrecht.org/law/normen/urhg/2002-03-22/text/*, accessed on 10 September 2023.

5.2.2.2. The revenue distribution system for collective management

On 4 July 1933, the first German law specifically dealing with collective management was enacted, focusing on "management by agents of rights on public performance of musical works with or without text".[73] The main objective of the 1933 law was to create a legally authorized CMO with a monopoly over the management of music performance rights.[74] Two provisions in the 1933 law were controversial. They required a legal monopoly of CMOs and CMOs to seek authorization for operation from the infamous nazi Ministry for Public Enlightenment and Propaganda.[75] Following the enactment of this law, the then existing CMOs for music rights (Gesellschaft zur Verwertung musikalischer Aufführungsrechte (the then GEMA) and GDT) merged to form the State-authorised society for management of musical authors (Staatlich genehmigte Gesellschaft zur Verwertung musikalischer Urheberrechte) (STAGMA)).

After World War II, in 1945, STAGMA changed its name to Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA) and resumed operation on approval by the British administration.[76] The controversial provisions in the 1933 law were rendered inapplicable after 1945 following the decision in the GEMA case.[77]

There was another standalone but more comprehensive collective management regulation in 1965. The Copyright Administration Act (Urheberrechtswahrnehmungsgesetz (UrhWG)). The UrhWG elaborated on the function and nature of CMOs in Germany.[78] The UrhWG expanded the economic and cultural functions of CMOs. It entrusted CMOs with the management of the new rights that were the subject of mandatory collective management after the amendment of the UrhG in 1965. These rights include the right to equitable remuneration, the resale royalty right, remuneration rights for renting and lending, private copying and mechanical licensing.[79]

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[73] Reinbothe op cit note 35 at 208.

[74] Ibid.

[75] The Ministry is infamous for the way it controlled the music and arts industries, see Malevanny op cit note 7 at 207. See additional context in Reinbothe op cit note 35 at 208.

[76] During the aftermath of World War II, Germany was divided into zones of occupation, each administered by different Allied powers. STAGMA operated in the British zone first, see Reinbothe op cit note 35 at 208.

[77] GH Case I ZR 143/52, Judgment of November 30, 1954, 15 BGHZ 338—GEMA.

[78] Reinbothe op cit note 35 at 209-213.

[79] See sections 26, 27, 53 and 61 of the UrhG.

Regarding the nature of CMOs, the UrhWG appreciated that German CMOs functioned as monopolies and sought to reinforce CMOs' position as trustees for music artists. This was achieved through extensive regulation, borrowing from the German Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen (GWB)) and the USA Sherman Act to prevent abuse of powers by CMOs.[80]

The 1st of June 2016 marked the beginning of the CMO regulation era currently in place. The Act on the Management of Copyright and Related Rights by Collecting Societies (Verwertungsgesellschaftengesetz (VGG)). The VGG was adopted to implement the Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (EU CMO Directive), into German law.

Judging from the 139 sections it contains, the VGG is five times more comprehensive than the UrhWG.[81] Nevertheless, the VGG was guided by the experience in implementing the UrhWG and incorporated most of the key concepts from the UrhWG.[82]

The definition of a CMO in section 2 of the VGG mirrors the definition in the EU CMO Directive. A CMO is defined as "an organization authorized by law or contractual arrangement … [to manage] copyright and related rights on behalf of more than one right holder, irrespective of whether it is acting on its name or behalf of another."[83]

There are three specific features to note in the regulation of collective management in Germany. First, is the authorization requirement in section 77 of the VGG. CMOs should be licensed for operation by the Das Deutsche Patent- und Markenamt (DPMA) (German Patent and Trade Mark Office). CMOs managing these rights in EU countries and CMOs in contracting parties of the European Economic Area are bound by the authorization requirement in section 77 of the VGG.[84]

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[80] Reinbothe op cit note 35 at 209-213; Malevanny op cit note 7 at 207.

[81] Malevanny op cit note 7 at 208. See additional context in Reinbothe op cit note 35 at 213-240 and Dietz op cit note 2 at 897-916.

[82] Ibid.

[83] Section 2(1) of the VGG. See also article 3(a) of the EU CMO Directive.

[84] See procedure for applying for the authorization in section 78 of the VGG.

Second, the VGG regulates all institutions involved in the collection and distribution of royalties. In addition to regulating CMOs, it also regulates Dependent Management Entities (DMEs) and Independent Management Entities (IMEs). DMEs are organizations that carry out the activities of a CMO and are partly controlled by CMOs.[85] DMEs are regulated by all the provisions in the VGG that apply to CMOs. IMEs are profit-making organizations that carry out duties like CMO duties. IMEs, however, work independently from CMOs and carry out duties similar to CMO duties[86]. Unlike DMEs, IMEs are not bound by all the provisions in the VGG that apply to CMOs. The only provisions in the VGG that apply to IMEs regulate them to conduct negotiations in good faith for the copyright owners they represent[87] and the obligation to provide financial information to copyright owners.[88]

Third, unlike most EU member states, Germany does not have a legal monopoly on collective management in Germany.[89] Hence, several CMOs may manage the same set of rights. Nevertheless, in practice, CMOs in Germany tend to be applying the "one CMO per set of rights rule".[90] GEMA represents composers, music publishers and lyricists while GVL represents producers and performers. A potential competitor of GEMA, C3S, has announced plans to seek authorization to operate as a CMO.[91]

GEMA and GVL receive authorization to collectively administer rights through exclusive licenses.[92] This means that music artists cannot transfer these rights to intermediaries and other contracting parties once they choose to exercise their remuneration rights collectively.[93] When

[85] See definition of DMEs in section 3 of the VGG.

[86] See definition of IMEs in section 4 of the VGG.

[87] See section 4 as read with section 36 of the VGG.

[88] See sections 54, 55 and 56 of the VGG.

[89] The "management by agents of rights on public performance of musical works with or without text", 1933 that required a legal monopoly for CMOs in Germany was rendered inapplicable in 1945; see Reinbothe op cit note 35 at 213-240.

[90] Malevanny op cit note 7 at 208 and Reinbothe op cit note 35 at 213-240.

[91] Malevanny op cit note 7 at 209 and C3S 'Aktueller Stand' (n.d.) available at *https://www.c3s.cc/ueber-c3s/konzept/aktueller-stand/,* accessed on 25 October 2024.

[92] Ibid at 209.

[93] Ibid at 208-209.

music artists dispose of their rights a second time, it only gives rise to an internal liability between the music artists and the other licensees. In the past, it was assumed that the second exclusive license gave the licensees (usually publishers or record labels) a right to receive royalties from GEMA or GVL. The second license usually refers to GEMA's or GVL's distribution rules.

This practice is dying off after the DPMA decision in *Musikverlegeranteil*, which held, inter alia, that the internal liability of an author to a publisher cannot sustain a publisher's claim for royalties from GEMA.[94] GEMA is thus required to obtain approval from the author before splitting royalties amongst authors and publishers.[95] Authors are, however, allowed to assign their royalty rights to publishers by registering a GEMA cession (GEMA-Zession).[96]

Tariff setting is an outcome of negotiations between CMOs and users' associations and the intervention of the arbitration board in the VGG or the courts.[97]

In terms of international regulation, collective management in Germany is regulated by the EU Directives on collective management and EU case law on collective management.[98]

The collective management of rights – as provided in the VGG also underwent a revision on 31 May 2021 in the context of the transposition of the EU Directive.[99] The law requires CMOs to establish collective agreements with user associations on reasonable terms for the rights they manage, except in cases where it would be unreasonable, such as when the user association's

[94] Ibid, *Musikverlegeranteil* KG GRUR-RR 2017, 94.

[95] Malevanny op cit note 7 at 71-99 and 208-209. See Reinbothe op cit note 35 at 213-240 for additional context.

[96] Ibid.

[97] Sections 35, 36, 38 and 39 of the VGG. See further, RM Vučković 'Remunerations for Authors and Other Creators in Collective Management of Copyright and Related Rights' (2016) 66(1) *Zbornik Pravnog fakulteta u Zagrebu* 35 at 35-60.

[98] Malevanny op cit note 7 at 193; Directive 2014/26 EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

[99] Lacourt and Valais (2023) op cit note 53 at 7-9.

membership is too small.[100] The update of the VGG in 2021 also addresses extended collective licensing.[101]

- *EU case law on collective management*

Several norms codified in the Directive 2014/26 EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market are the result of EU case law, much of which originated in Germany.[102] The norms established in this directive, such as transparency in licensing agreements and the facilitation of multi-territorial licensing, were shaped by the principles emerging from cases like *GEMA v YouTube* cases which illustrates the evolution of platform liability within EU copyright law, a topic that has been heavily influenced by German legal precedents.[103] This case underscored the responsibilities of online platforms when it comes to user-generated content, highlighting the need for a balance between protecting copyright holders' rights and fostering the digital economy. Most recently the *LEA v Jamendo SA* case, decided by the Court of Justice of the European Union (CJEU) on March 21, 2024, confirmed that Independent Management Entities (IMEs) can provide their copyright management services in the EU alongside CMOs, promoting a more liberalized market for copyright management.[104]

5.2.3. Individual Management: German response to the plight of inequitable remuneration of music artists

The German response to the plight of inequitable remuneration of music artists is discussed below, as guided by the principles developed in chapter 2 of the thesis. It is twofold based on Germany's regulatory system for individual and collective management of copyright. Sections 6.2.3.1.-6.2.3.4. deal with the system for individual management while section 6.2.3.5. deals with the collective management system.

[100] Section 35 of the VGG; Ibid.

[101] Article 2 of the Act on the Adaptation of Copyright Law to the Requirements of the Digital Single Market.

[102] See for example *GEMA v YouTube,* Hamburg District Court, Case No. 308 O 27/09 (2012).

[103] Ibid.

[104] Case C-10/22 *Liberi Autori ed Editori (LEA) v Jamendo SA.*

5.2.3.1. Justice in the initial acquisition of rights

5.2.3.1.1. Ex-ante interventions: Standards for equitable remuneration

5.2.3.1.1.1. The right of music artists to equitable remuneration for the commercialization of music

Explicit provisions of the right to equitable remuneration of music artists are laid down in sections 32 and 79(2a) of the UrhG. While section 32 of the UrhG only refers to authors, the 2016 amendment that introduced section 79 (2a) clarified that section 32 is also applicable to performers.[105]

The right to equitable remuneration is only applicable in the individual administration of exclusive rights.[106] It does not apply to rights granted to CMOs and those that are subject to collective bargaining agreements. This is because music artists are guaranteed adequate negotiating power and thus equitable remuneration in such agreements.[107]

Section 32 of the UrhG does not apply to producers of sound recordings. It is argued that their protection is unnecessary since in most cases record labels who act as intermediaries in the creative production of sound recordings are also authors.[108]

The right to equitable remuneration is established in three main ways: providing a secure claim to equitable remuneration, a definition of equitable remuneration and prohibition of circumvention of the right to equitable remuneration.

Section 32(1) of the UrhG entitles music artists to a secure claim to equitable remuneration in three ways. First, it establishes the right to remuneration when music artists assign or license their music or give permission for their use. Music artists are "entitled to the contractually

[105] When section 79a of the UrhG was introduced in 2016, the amendment clarified that section 32 on the right to equitable remuneration was applicable to performers. See the "Copyright Act for improved enforcement of claims, which authors and professional artists have in case of adequate payment and regulations of issues concerning publisher shares" (Deutscher Bundestag: Beschlussempfehlung Und Bericht [BT] 18/10637) which entered into force on 01 March 2017 and Malevanny op cit note 7 at 90-97.

[106] Section 32(4) of the UrhG; Malevanny op cit note 7 at 90. For additional context of the provision, see Neu op cit note 7 at 445-482.

[107] Malevanny op cit note 7 at 93. For additional context, see Lacourt and Valais (2023) op cit note 53 at 7-13.

[108] Ibid 93-94.

agreed remuneration for the granting of rights of use and permission to use the work".[109] Second, the UrhG creates a presumption that an equitable remuneration was agreed upon in case the amount of remuneration has not been determined.[110] Third, it creates a right to contractual amendment when remuneration is agreed upon but is inequitable.[111] This right gives music artists a chance to renegotiate their remuneration with contracting partners but not third parties.[112] The right is applicable throughout the term of the contract. However, Gutsche notes that this right can only be asserted once during the term of the contract since the court refers to the date when the license was concluded in reviewing the equity of a remuneration.[113]

Section 32(2) of the UrhG sets the standard of equity that is expected of remuneration. Remuneration is deemed to be equitable when made according to a joint remuneration agreement or "corresponds to, [at the time of the agreement], what is customary and fair in business relations, given the nature and extent of the possibility of use granted, in particular the duration, frequency, extent and time of use, and considering all circumstances."[114] Although the UrhG allows for flat rate remuneration, it is difficult to put this provision in place since the flat rates must still ensure the equitable remuneration of the music artist, as justified by sector-specific rules.[115]

Joint remuneration agreements may be concluded between music artists' associations and users' associations or individual users, provided the associations are representative, independent, and authorized to set common remuneration standards.[116] The presumption of

[109] Section 32(1) of the UrhG.

[110] Section 32(1) of the UrhG; see the further interpretation of the provision in Gutsche op cit note 36 at 261.

[111] Ibid.

[112] Ibid.

[113] Gutsche op cit note 36 at 262. For additional context, see Lacourt and Valais (2023) op cit note 53 at 7-13 and Malevanny op cit note 7 at 90-94.

[114] Sections 32(2), 36, 36a of the UrhG; Malevanny op cit note 7 at 92; RM Hilty and A Peukert 'Equitable Remuneration" in Copyright Law: The Amended German Copyright Act as a Trap for the Entertainment Industry in the U.S.' (2004) 22 *Cardozo Arts & Entertainment Law Journal* 401 at 429-430.

[115] Flat remuneration is also referred to as the lump sum payments offered in buy-out agreements. See section 32(2) of the UrhG; Lacourt and Valais (2023) op cit note 53 at 9; Malevanny op cit note 7 at 92; Hilty and Peukert op cit note 114; Von Lewinski op cit note 50.

[116] Sections 36 and 36a of the UrhG and Malevanny op cit note 7 at 9; Lacourt and Valais (2023) op cit note 53 at 7-9.

equity regarding joint remuneration agreements applies even when the contracting parties are "outsiders" — the music artists and their contracting parties are not members of associations that developed the common remuneration standards.[117]

Remuneration is customary if it "corresponds to the remuneration that nearly all market participants pay for a comparable transfer of rights over a relevant period".[118] Customary remuneration practices are only decisive to the extent that they are equitable.[119] In some cases, the inequitable remuneration of music artists has become a common practice. Therefore, in the interests of distributive justice, the court has the discretionary power to review customary remuneration practices. The review may also occur on application by a music artist. Here, the music artist would bear the burden of proving that the customary remuneration practice is inequitable.[120] In reviewing the equity of customary remuneration practices, the court considers the following criteria: duration, frequency, scope and time of exploitation, and expected remuneration.[121] The court may also be guided by tariffs and royalty distribution rules set by CMOs and common remuneration standards in other related industries or sectors.[122]

The UrhG invalidates all contractual provisions and agreements that may be used to circumvent the equitable remuneration of music artists.[123] However, this provision does not hinder music artists from validly waiving their right to remuneration.[124]

The prohibition of circumvention of the right to equitable remuneration in section 32 of the UrhG is further strengthened in section 32b of the UrhG. Section 32b provides for the

[117] Malevanny op cit note 7 at 91; Gutsche op cit note 36 at 262; Hilty and Peukert (2004) op cit note 114 at 427-429.

[118] Malevanny op cit note 7 at 92 and Hilty and Peukert op cit note 114 at 429-430.

[119] Malevanny op cit note 7 at 93; Gutsche op cit note 36 at 263.; Hilty and Peukert (2004) op cit note 114 at 430.The regulation of joint remuneration agreements in the UrhG is discussed in detail in section 5.2.3. of the thesis.

[120] Malevanny op cit note 7 at 95-96.

[121] Malevanny op cit note 7 at 92 and Hilty and Peukert op cit note 88 at 431.

[122] Malevanny op cit note 7 at 93 and Gutsche op cit note 36 at 263.

[123] Section 32(3) of the UrhG.

[124] Ibid and Malevanny op cit note 7 at 93.

compulsory application of music artists' protections in sections 32, 32, 32a, 32d to 32f and 38 (4) of the UrhG.

With digitization, the commercialization of music is mostly multi-territorial and thus a breeding ground for choice of law disputes. Due to the strict copyright contract protections for music artists in the UrhG, intermediaries may exploit choice of law contractual provisions to bypass the strict copyright contract protections afforded to music artists under the UrhG. Section 32b of the UrhG cushions German music artists, stateless music artists, refugees, and music artists whose works have been significantly exploited in Germany, by bringing them into the ambit of the UrhG copyright contract protections.[125] Section 32b applies in the absence of a contractual provision on choice of law or when works have been significantly exploited in Germany.[126] Although research proves that the mandatory music artists' protections in the UrhG may be applied to licensing contracts governed by non-German law, the extent of their application remains unclear.[127]

To escape the application of this provision, a music artist needs to relocate from Germany or have a contractual provision ousting the application of German copyright law.[128] The application of the rule on compulsory application in section 32b is "limited to the territory of the Federal Republic of Germany".[129] When applying the rule in transfers granting "worldwide rights", the court must consider the equitableness of the revenue generated from the commercialization of the work in Germany. The court may only consider revenue generated from the commercialization of the work in other countries to ensure that the total revenue earned (in Germany and other countries) does not invalidate the claim for inequitable remuneration.[130]

[125] See discussion of the principle of reciprocity with reference to sections 32, 32a and 32b are not applicable to foreign nationals, see Neu op cit note 7; Gutsche op cit note 36 at 270.

[126] See further Neu op cit note 7 and Gutsche op cit note 36 at 270.

[127] Ibid.

[128] Ibid.

[129] Gutsche op cit note 36 at 270.

[130] Neu op cit note 7 at 456.

A conclusion that can be made from section 32 and the language of the UrhG is the importance of agreeing on the standard of remuneration in a license. That is, either joint remuneration, collective bargaining, or collective management since all these have a bearing on the scope of rights applicable to music artists' protections in their contractual relationships.

Section 32 of the UrhG is largely inapplicable to music artists since most of them exercise their remuneration rights through Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA) (Translates to German society for musical performing and mechanical reproduction rights in English). However, in the past years, there has been an increase in the pull to individual management through joint ventures with CMOs. This may bring more music artists to the protection of section 32 of the UrhG.

5.2.3.1.1.2. Form and standard of equitable remuneration

The UrhG prohibits assignments other than for inheritance purposes, where a music artist assigns copyright to an executor or ownership is transferred to heirs as part of an estate.[131] A music artist may, however, grant an exclusive or non-exclusive right of use to facilitate the commercialization of music.[132]

Section 31 of the Urgh requires licenses to specify the geographical scope and duration of the right being transferred. Generally, licenses must specify the type of use to be transferred in a license. However, if the license does not define the scope of the transfer by failing to specify the nature of the transfer (as either exclusive or non-exclusive) or the type of right transferred, the rights remain with the music artist according to the "purpose-of-transfer theory (Zweckübertragungstheorie)" stipulated in section 31(5) of the UrhG. This theory protects music artists by reading into the intention of transferring the rights to use, based on the paramount importance of the music artists' interests, and ensuring the music artists' equitable remuneration.[133]

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[131] See sections 28 and 31 of the UrhG. See further, an interpretation of section 31 of the UrhG in S Dusollier 'EU Contractual Protection of Creator: Blind Spots and Shortcomings' (2017) 41 *Columbia Journal of the Law & Arts* 435 at 438.

[132] Sections 29(2) and 31 of the UrhG.

[133] Section 31(5) of the UrhG.

Further, when the scope of the transfer is unclear, section 37 of the UrhG creates a presumption that music artists retain some rights. These rights include the right to consent to the commercialization of an adaptation of a work, a reproduction in video and audio recording mechanisms or the right to use a work in a communication to the public.[134]

Before the second basket of copyright revision in Germany, the transfer of rights to unknown types of uses was prohibited in Germany.[135] Sections 31a, 32c and 79b of the UrhG were introduced to allow such transfers. Contracts transferring rights to unknown types of uses must be in writing unless the music artist grants unremunerated rights of use.[136]

5.2.3.1.2. Ex-post interventions: Strengthening accountability and transparency obligations for intermediaries involved in the commercialization of music

Sections 32d and 32e set out the accountability and transparency obligations for music artists' contracting parties in individual management of rights. The right to information in these provisions creates an obligation for licensees and some sub-licensees in the license chain to keep music artists in the know of the commercialization of their music.

Contracting parties are required to provide, information about the extent of the use of the work, and the revenue and benefits derived therefrom.[137] This information should be provided, at least once a year, after the use of the work commences and for the duration of the use.[138] Further, the information should be based on what is generally available in the ordinary course of business.

These accountability and transparency obligations do not apply if a music artist has made secondary contributions to the work unless they prove that the information is needed for the

[134] Section 37 of the UrhG.

[135] The second basket of copyright revision in Germany entered into force on 1 January 2008.

[136] Section 31a (1) of the UrhG.

[137] Section 32d (1) of the UrhG.

[138] Ibid.

amendment of a contract according to sections 32a (1) and (2) of the UrhG.[139] The obligations do not also apply when the effort in providing the information is disproportionate to the remuneration claimed.[140]

Regarding the accountability and transparency obligations of third parties in the license chain, the UrhG requires contracting parties to provide the names and addresses of sub-licensees, at the music artist's request.[141] Music artists may also request information disclosures on the revenue generated from sublicensees. This right of information is only applicable to sublicensees who are economically essential in determining the commercialization processes or from whose profit/benefit the music artist receives disproportionate remuneration.[142]

Additionally, music artists can only request information from sublicensees when contracting parties fail to meet their accountability and transparency obligations as per section 32d of the UrhG. The request should be supported by clear indications of verifiable facts that the conditions in sections 32d and 32e have been met.

The obligation to provide information and be accountable to music artists can only be waived if remuneration is determined by a joint remuneration agreement or collective agreement.[143] The UrhG presumes that joint remuneration agreements and collective agreements guarantee music artists a degree of transparency comparable to the one in the UrhG.[144]

A point worth noting is that sections 32d and 32e do not explicitly allow music artists to inspect the accuracy of the information provided.[145]

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[139] Secondary contributions are those that have "little influence on the overall impression created by a work or the nature of a product or service, for example because it does not belong to the typical content of a work, product or service". See section 32d of the UrhG.

[140] Ibid.

[141] Ibid, section 32e of the UrhG.

[142] Ibid.

[143] Sections 32d (3) and 32e (3) of the UrhG.

[144] Ibid.

[145] L Bently, U Suthersanen and P Torremans *Global copyright: three hundred years since the Statute of Anne, from 1709 to cyberspace* (2010).

5.2.3.1.3. Ex-post interventions: Copyright Contract Mechanisms

The UrhG contains seven (7) main forms of copyright contract mechanisms for enhancing the equitable remuneration of music artists:

1. contract adjustment,[146]
2. right of revocation for unknown types of uses,[147]
3. 5-year term limit for agreements on future works,
4. right to further equitable participation,[148]
5. right of revocation for non-use or insufficient commercialization,[149]
6. right of revocation for changed conviction,[150] and
7. 10-year exclusivity period for buy-out agreements that grant exclusive licenses[151].

5.2.3.1.3.1. Right of revocation for unknown types of uses: Safeguarding Music Artists Against Unforeseen Exploitations

Music artists are granted a right to a separate equitable remuneration where their licensees commence a new type of use of a work.[152] This right is enforced through a revocation right for music artists and a prohibition against waiving this right in advance. If a work is part of a collection of other works, a music artist must exercise the right to revocation in good faith.[153] This allows music artists to renegotiate the contract terms and agree on equitable remuneration after the "intended commencement of the new type of use".[154] The prohibition protects music artists from signing away their rights before the new use occurs.[155]

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[146] Section 32 of the UrhG.

[147] Sections 31a and 32c of the UrhG.

[148] Sections 32a and 79a (2) of the UrhG.

[149] Section 41 of the UrhG.

[150] Section 42 of the UrhG.

[151] Section 40a of the UrhG.

[152] Sections 31a, 32c and 79b of the UrhG.

[153] Section 31a (3) UrhG.

[154] Sections 31a (1) and 32c (1), (2) of the UrhG.

[155] Section 31a (4) UrhG.

The right to revocation in section 31a of the UrhG expires 3 months after the contracting parties send to the music artists a notification of the intended commencement of the new type of use of the work. The right also expires upon the music artist's death. The revocation right does not apply when parties have agreed to a separate equitable remuneration, according to section 32c (1) of the UrhG, or when remuneration is based on joint remuneration agreements.[156]

5.2.3.1.3.2. Term limit for agreements on future works: Ensuring fair reversion rights for music artists in Kenya

Section 40 of the UrhG allows the transfer of future works. Transfers for future works should be made in writing and may be terminated by either party 5 years after completing the work.[157] The UrhG sets a maximum notice period of 6 months for termination and allows parties to agree on a shorter notice period. Music artists are restricted from waiving their right to termination in advance. A termination under section 40 of the UrhG has the effect of invalidating transfers of rights to unknown modes of exploitation for works that have not been supplied on the date of termination.

5.2.3.1.3.3. Right to further equitable participation: Enhancing music artists' interests in revenue sharing mechanisms

Music artists' right to further participation in the benefits of the commercialization of works is provided in sections 32a and 79a (2) of the UrhG.[158] It supplements the standard of equitableness required in section 32 of the UrhG, to address the 'value gap' for successful works.

Section 32a of the UrhG operates as a success or bestseller clause. It allows music artists to participate in the future success of their work if the initially agreed remuneration becomes conspicuously disproportionate to the revenue generated from the commercialization of the work, considering the contractual relationships in the license chain. The licensees and

[156] Section 31a and 32c of the UrhG.

[157] Section 40 of the UrhG.

[158] Pursuant to section 79a (2) of the UrhG ensures that regulations on authors' right to further participation are applied to performers. Therefore, the thesis refers to music artists when discussing provisions in section 32a which only refer to authors.

sublicensees shall be obliged, at the music artists' request, "to consent to a modification of the agreement which grants the [music artist] further equitable participation appropriate to the circumstances."[159] Despite the wording in section 32a(2) which requires the intermediaries or their contractual partners to consent, the courts have held that music artists are entitled to combine the consent request with a claim for additional payment or even a claim for additional payment alone.[160] This has been instrumental in enhancing enforcement by allowing music artists to skip an intermediate step during enforcement.

The UrhG recognizes that the remuneration of music artists may be determined by a multiplicity of persons in the license chain apart from the initial licensee. As such, music artists have a direct liability claim against such sublicensees for equitable remuneration. Nevertheless, the application of direct liability is determined by the contractual agreements between the initial licensee and the sublicensees. This provision aims to protect sublicensees from having to pay twice for the same use in situations where a music artist receives inequitable remuneration while the initial licensee is receiving equitable remuneration from sublicensees. [161] Consequently, regarding sublicensees, section 32a (2) protects music artists and licensees who are receiving inequitable remuneration from sublicensees.[162]

Music artists may not waive the right to contract adjustment in section 32a of the UrhG. This does not stop the Creative Commons practice of "granting to all an unremunerated non-exclusive right of use."[163]

The benchmark of equitableness in section 32(2) of the UrhG is used to determine equitable remuneration here. This means that common remuneration standards and collective bargaining deals will displace the right provided in section 32a if they provide for further equitable participation when an author's remuneration becomes conspicuously disproportionate.

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[159] Section 32a (2) of the UrhG; Gutsche op cit note 36 at 267.

[160] BGH (Federal Court of Justice) I ZR 222/14, *Geburtstagskarawane* (2016) GRUR 2016, 1291, 1293 paras 20; L Schwope 'Efficacy of the 'Best-Seller Clause' in Article 20 DSM Directive—game changer or just a bone thrown at authors? A German perspective' (2022) 17(2) *Journal of Intellectual Property Law & Practice* 92 at 92-96.

[161] Ibid.

[162] Ibid.

[163] Section 32 (2a) (2) of the UrhG.

Section 32a replaced the repealed section 36 of the UrhG after the 2002 amendment.[164] This section brought about two changes. First, it changed the threshold for disproportionality from "gross" to "conspicuously".[165] Second, the foreseeability of the work to become successful was no longer a determining factor for an author to claim additional remuneration.[166]

Gutsche applies the literal meaning of "conspicuously" and argues that its usage in the provision suggests that an ordinary disparity between the remuneration agreed and the revenue accrued from the commercialization of the work does not entitle an author to exercise the rights under section 32a of the UrhG.[167] This position is countered by Dietz, who states that smaller disparities may at times be conspicuously disproportionate and entitle authors to exercise the right of further participation. [168] Gutsche further posits that the court must consider the total revenue earned by the intermediaries from the commercialization of the work together with other non-monetary benefits, not just the profits.[169]

Performers are granted further protective mechanisms for equitable participation in section 79a of the UrhG. Featured and non-featured performers have a right against producers to claim an additional 20% of the revenue generated by the producer if they transfer their rights subject to a one-off payment.[170] This right is only effective from the 50th year of the performer's rights protection term.[171] Featured performers are further protected by a prohibition of deductions

[164] See M Senftleben 'Copyright, Creators and society's Need for autonomous Art' in R Giblin and K Weatherall *What if We Could Reimagine Copyright* (2017) 61. See further discussion on the 2002 amendment in section 5.2.2.1. of the thesis.

[165] Ibid, section 32a of the UrhG.

[166] Ibid.

[167] Gutsche op cit note 36 at 264; see the further interpretation of section 32a (1) in Senftleben op cit note 164.

[168] Dietz op cit note 2.

[169] Gutsche op cit note 36 at 265.

[170] Section 79a of the UrhG is based on articles 3(2a) - (2e) of the Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, which were introduced in Germany in 2011. The provisions extended the protection term of performers' rights from 50-70 years. See a discussion of this in Malevanny op cit note 7 at 90-97.

[171] Ibid.

since their share of additional revenue is calculated without deducting the expenses incurred by producers.[172]

The criteria for determining "conspicuously disproportionate" referred to in section 32a of the UrhG, were developed in *Das Boot (the Boat) case*.[173] Jost Vocano, a cinematographer, invoked section 32 to seek equitable remuneration for his contribution to the making of *Das Boot (the Boat) film*.[174] Vocano sought contractual adjustment of remuneration contracts, concluded between 1980 and 1981, that entitled him to a lumpsum payment.[175] The claims for contractual adjustment were based on the global success of *Das Boot* in DVD and video sales.[176] The film was also nominated for an Academy Award. Vocano sought access to user licenses and related agreements to enable him to calculate the amount of additional remuneration he was entitled to. [177]

The Higher Regional Court of Munich (trial court) granted Vocano the right to information since he had a *prima facie* claim to equitable remuneration after 28 March 2002. [178] Additionally, because Vocano was a co-author, thus entitled to demand information on the commercialization of *Das Boot*.[179] The film company appealed the decision.[180] The Munich Court of Appeal found that the trial court erred in holding that the film company owed Vocano a duty of information. The court noted that the right to information was only available to Vocano for commercialization that occurred after 28 March 2002. Further, there was

[172] Ibid.

[173] *Das Boot (The Boat)* BGH (Federal Court of Justice), Sept. 22, 2011), 2012 GRUR 496. A discussion of the case in English can be found in Bently et al op cit note 145; Lacourt and Valais op cit note 53 at 87-88.

[174] Ibid. B Clark 'Sink or swim - BGH decides "Das Boot" fairness compensation claim' (2012) *IP Kitten* 19 March 2012 available at *https://ipkitten.blogspot.com/2012/03/sink-or-swim-bgh-decides-das-boot.html*, accessed on 23 September 2023.

[175] Ibid.

[176] Ibid.

[177] Ibid.

[178] Ibid, see also section 132(3) of the UrhG providing the transitional period and application of the amendments made on 28 March 2002.

[179] Ibid.

[180] Ibid.

insufficient evidence to support the claim for conspicuously disproportionate remuneration and ordered that the matter be taken back to the trial court to reassess the evidence.

Vocano appealed this decision to the Federal Court of Justice (Bundesgerichtshof (BGH)). The Federal Court of Justice faulted the decision of the Munich Court of Appeal for interpreting section 32a of the UrhG as referring to severely disproportionate. The Federal Court of Justice countered the position of the Munich Court of Appeal on the effect of section 132(3) of the UrhG and the application of the right to information. It held that Vocano could apply the right to information for commercialization that occurred before and after 28 March 2002. The BGH referred the matter back to the Higher Regional Court of Munich. In the final determination of the matter, Vocano was awarded additional remuneration of € 205,000 from the film producer and € 89,000 from the film's sublicensee.[181]

The *Marcus Orff* case interpreted section 32a (2) of the UrhG. Specifically, what contribution to work is considered marginal for an author or performer to be exempt from a claim to additional remuneration as per section 32a (2). "Marcus Orff, a German dubbing actor… lent his voice to John Depp (playing Jack Sparrow) in the German version of Pirates of the Caribbean".[182] Marcus argued that the remuneration of around €18,000 that he had previously received was not equitable, judging from the success of the Pirates of the Caribbean in Germany. Marcus pointed out the revenue received from the sale of merchandise, DVD sales, and licensing to TV stations. The trial court found that Marcus's contribution to making the film was not substantial and ordered that he was not entitled to additional remuneration. This decision was overturned in the BGH. The BGH found that a "dubbing actor" may be regarded as a co-author and held that Marcus was entitled to additional remuneration since his previous remuneration was disproportionate to the work's success. The BGH guided what constitutes as disproportionate. It was held that remuneration of half of what would be considered reasonable payment is disproportionate. Accordingly, Marcuss was awarded additional remuneration of € 67, 314.

[181] See Bently et al op cit note 145.

[182] *Marcus Orff* BGH (Federal Court of Justice), case reference I ZR 145/11, 10 May 2012--Fluch der Karibik (Pirates of the Caribbean), 2012 GRUR 1248, discussed in Bently et al op cit note 145 and Clark op cit note 174.

5.2.3.1.3.4. Right of revocation for non-use or insufficient commercialization: section 41 of the UrhG

Section 41 of the UrhG provides music artists with the right to revoke a right of use if their contractual parties fail to adequately commercialize a work, thereby impairing their right to receive equitable remuneration. This creates a general duty for contractual parties to commercialize works transferred to them. To exercise this right, a music artist must send a notification to the intermediary and give them an extension to comply with the obligation to sufficiently commercialize a work.

It is imperative at this juncture to discuss the rules for the application of the right to revocation for non-use/limited use. Firstly, the issue of notification and an extension to the music artist's contractual party is not compulsory when it would prejudice a music artist's overriding interests.[183] Secondly, the right does not apply to collective agreements and joint remuneration agreements.[184] Thirdly, the right terminates when the revocation becomes effective.[185] Finally, the music artist must compensate the intermediary if the right to revocation is wrongly applied.[186]

Performers are given some special termination rights in case of insufficient commercialization by producers of the audio medium.[187] These termination rights are only effective on the 50th year of the protection of related rights of performers.[188] The rights also encompass a prohibition of deductions when paying performers.

[183] Section 41 of the UrhG.

[184] Ibid.

[185] Ibid.

[186] Ibid.

[187] Section 79(3) of the UrhG.

[188] Section 79a (1) of the UrhG is based on articles 3(2a) -(2e) of the Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, which were introduced in Germany in 2011. The provisions extended the protection term of performers' rights from 50-70 years. See a discussion of this in Malevanny op cit note 7 at 90-97.

5.2.3.1.3.5. Right of revocation for changed conviction

The right of revocation for a changed conviction is an enabling provision for music artists or their successors to rescind transfers of rights to use, except buy-outs, whenever they receive inequitable royalties.[189]

A music artist or their successors may apply the right to revocation for a changed conviction.[190] The right may be applied by the music artist's successors if the music artist would have been entitled to exercise the right before his death, the music artist was prevented from exercising the right and/or provided for the right in a testamentary disposition.[191]

The music artist or their successor must adequately compensate the holder of the rights in use (the holder) when they choose to exercise this right.[192] Adequate compensation amounts to the costs incurred by the holder until the revocation. The revocation is only complete within 3 months of the holder informing the music artist or the successor of the incurred costs and after the holder receives adequate compensation.[193] The holder is not divested of all the rights upon revocation; they retain the right to use under reasonable conditions.[194]

5.2.3.1.3.6. 10-year exclusivity period for buy-out agreements that grant exclusive licenses

After ten years, exclusive licenses become non-exclusive licenses for the remainder of the license's time. Nevertheless, the contracting parties can renegotiate the license after five years and extend the term beyond ten years. Section 40a of the UrhG does not apply collective agreements to authors who make minor contributions to the work and where the work would be used as a trademark or design. Otherwise, section 40a is an overriding mandatory provision.

Intermediaries may apply creative tactics like splitting remuneration from an exclusive license with the predominant amount constituting a lump sum and the lesser amount constituting

[189] Section 42 of the UrhG.

[190] Section 42(1) of the UrhG.

[191] Ibid.

[192] Section 42(3) of the UrhG.

[193] Section 42(3) of the UrhG.

[194] Section 42(4) of the UrhG.

royalties. Though no case has been decided on this matter, the court may perceive this as circumvention to ensure that such licenses fall under section 40a.

It is unclear how section 40a of the UrhG treats sublicensees after the expiry of the 10 years. This calls for a practice direction by the courts or subsidiary legislation. A more equitable practice would be for sublicensees to be treated the same way as the initial exclusive licensees and have the right to claim compensation or reduce this compensation from the licensing fees.

5.2.3.1.4. Ex-post interventions: Common remuneration standards

The establishment of ex post common remuneration standards under section 36 of the UrhG aims to enhance equitable compensation for music artists and other copyright creators through collaborative frameworks. By promoting joint remuneration agreements, the law encourages stakeholders in various copyright industries to collectively determine remuneration standards that address the financial disparities faced by individual and freelance artists in their dealings with intermediaries. Although these agreements are non-binding and rely on self-regulation by associations, they serve as essential tools for fostering transparency and accountability within the industry. The discussions surrounding the application of these agreements to external parties further highlight the complexity of balancing individual rights and collective interests, emphasizing the need for a structured approach to dispute resolution through arbitration boards. This section explores the significance of these agreements and the mechanisms in place to support equitable remuneration for music artists in the evolving landscape of copyright law.

5.2.3.1.4.1. Joint remuneration agreements

The regulation of joint remuneration agreements was introduced to encourage stakeholders in the different copyright industries to determine equitable remuneration standards according to section 32 of the UrhG.[195]

Joint remuneration agreements on common remuneration standards are developed by the self-regulation of stakeholders' associations.[196] These associations' draft guidelines for equitable

[195] Schwope op cit note 160 at 92-96.

[196] Section 36 of the UrhG.

remuneration that are meant to protect individual and freelance music artists by strengthening their financial positions vis-a-vis intermediaries and their other contractual parties. Joint remuneration agreements are contrasted with collective bargaining agreements. Unlike collective bargaining agreements, joint remuneration agreements are not legally binding.[197]

There are two schools of thought on applying joint remuneration agreements to "outsiders".[198] The first school is based on the strict interpretation of the right to freedom of association. Proponents of this school of thought argue they should not be applied to outsiders since they were not concerned in the negotiation of the agreement. The second school of thought, which seems more convincing to the researcher, is based on the interpretation that joint remuneration agreements are part of the "common remuneration standards" referred to in section 32(2) of the UrhG. Consequently, joint remuneration agreements are binding to outsiders since they create common remuneration standards.

Notably, section 36d (2) of the UrhG gives music artists' associations the right to seek injunctions when users do not fulfil their accountability and transparency obligations, as per sections 32d and 32e of the UrhG. The effect and purpose of this injunctive relief are discussed in more detail in section 6.3.2. of the thesis.

Even though section 36 of the UrhG creates an opportunity for stakeholders in the copyright industry to improve their financial relationships with authors, few agreements have been signed. Joint remuneration agreements exist in the fictional works and audio-visual industries. The agreement in the fictional works industries was made between associations representing fictional work authors and publishers. The agreement sets the minimum rate of remuneration that is considered equitable under section 32 of the UrhG. It provides the percentages of remuneration that the sale of a particular number of works would attract the terms of the advance payments made to the author. It stipulates the rightful use of new modes of exploitation of fictional works.

The agreement in the audio-visual industries was made between directors in the audio-visual sector and the broadcasting industries. This agreement resulted from a court order that obliged

[197] Gutsche op cit note 36 at 268.

[198] "Outsiders" here refers to copyright owners who are not CMO members of the associations that negotiated these agreements but work in the industry that is the subject of the joint remuneration agreements Malevanny op cit note 7 at 91.

the German Director's Guild (BVR) to negotiate with broadcasters for common rules of equitable remuneration as per section 32 of the UrhG.

5.2.3.1.4.2. Arbitration board for resolution of joint remuneration agreement disputes

The arbitration board is the recommended forum of the first instance for adjudicating disputes on joint remuneration agreements when negotiations fail between associations representative of authors and intermediaries in a specific industry.[199] The disputes may be submitted to the arbitration board through mutual agreement of the associations or unilaterally through application by one of the associations.[200] The arbitration board then submits a settlement proposal that is deemed accepted by both parties if it is not objected to within six weeks of being rendered.[201] The court may still use the rejected settlement proposal as a benchmark for "equitableness" as contemplated in section 32 of the UrhG.[202]

Parties may mutually agree to submit joint remuneration agreement disputes to the arbitration board. The parties are required to determine the appointment of the members of the board provided the composition reflects an equal number of assessors from both sides and an impartial chairperson.[203] If they disagree, they may request a regional court to determine the composition of the arbitration board.[204]

[199] Section 36a (1) as read with section 36(3) of the UrhG; See interpretation of section 36a of the UrhG in ibid.

[200] Section 36(3) of the UrhG; Malevanny op cit note 7 at 91.

[201] Section 36(4) of the UrhG; Malevanny op cit note 7 at 91.

[202] Ibid at 92; Hilty and Peukert op cit note 114 at 429-430.

[203] Section 36a (2) of the UrhG.

[204] Section 36a (3) of the UrhG; see section 1062-1065 of the Code of Civil Procedure (*Zivilprozessordnung*) as the enabling provision for a regional court to act in the matter; see further section 36a (4)-(8) on the procedure for arbitration proceedings in disputes on joint remuneration agreements.

5.2.3.1.5. Ex-post interventions: Mechanisms for enforcing equitable remuneration rights for music artists under German law

Music artists may be represented by their associations in disputes concerning their remuneration.[205] The UrhG encourages mediation and out-of-court dispute settlement in two main ways: by regulating the establishment of arbitration boards for the resolution of joint remuneration agreements and by directing different stakeholders to utilize ADR mechanisms.[206]

The arbitration board, which is set up by the stakeholders' association, is the recommended forum of the first instance for adjudicating disputes on joint remuneration agreements when negotiations fail between associations representative of authors and intermediaries in a specific industry.[207] The disputes may be submitted to the arbitration board through mutual agreement of the associations or unilaterally through application by one of the associations.[208] The arbitration board then submits a settlement proposal that is deemed accepted by both parties if it is not objected to within six weeks of being rendered.[209] The court may still use the rejected settlement proposal as a benchmark for "equitableness" as contemplated in section 32 of the UrhG.[210]

Parties may mutually agree to submit joint remuneration agreement disputes to the arbitration board. The parties are required to determine the appointment of the members of the board provided the composition reflects an equal number of assessors from both sides and an

[205] Section 32g of the UrhG. Section 32 of the UrhG should be read with the Legal Services Act (Rechtsdienstleistungsgesetz) and rules of procedure.

[206] Section 36 and 36a of the UrhG.

[207] Section 36a (1) as read with section 36(3) of the UrhG; See interpretation of section 36a of the UrhG in Malevanny op cit note 5 at 91.

[208] Section 36(3) of the UrhG; Malevanny op cit note 7 at 91.

[209] Section 36(4) of the UrhG; Malevanny op cit note 7 at 91.

[210] Malevanny op cit note 7 at 91; Hilty and Peukert op cit note 114 at 429-430.

impartial chairperson.[211] If they disagree, they may request a regional court to determine the composition of the arbitration board.[212]

Section 32f of the UrhG encourages the stakeholders in copyright industries to utilize mediation and out-of-court dispute resolution. The provision also restricts a waiver of the right to institute ADR procedures if it is to the detriment of the music artist.[213]

The arbitration board in the VGG has jurisdiction to determine disputes between CMOs and users, usually regarding tariffs.[214] The arbitration board is integrated as part of the DPMA but functions as an autonomous body.[215] The decisions of the arbitration board are only binding if the parties to the dispute accept the settlement proposal.[216] If not, the decision has the effect of a court-appointed expert opinion in a civil court.

Tariff disputes can only be brought before the court after being presented to the arbitration board.[217] The higher regional court with jurisdiction over the place where the arbitration board seats shall decide, as the court of first instance, when the CMOs or users reject the settlement proposal presented by the arbitration board.[218]

Regarding dispute settlement in the courts, section 104 provides that recourse to the courts is allowed in respect of all legal disputes concerning the application of the UrhG.[219] Generally, civil courts have the jurisdiction to determine copyright disputes. Specialized district and small

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[211] Section 36a (2) of the UrhG

[212] Section 36a (3) of the UrhG; see section 1062-1065 of the Code of Civil Procedure (*Zivilprozessordnung*) as the enabling provision for a regional court to act in the matter; see further section 36a (4)-(8) on the procedure for arbitration proceedings in disputes on joint remuneration agreements.

[213] Section 32f (2) of the UrhG.

[214] Sections 92 and 95 of the VGG; Vučković op cit note 77 at 35-60.

[215] German Patent and Trademark Office 'The Arbitration Board under the Act on Collective Management Organisations' (n.d.) available at *https://www.dpma.de/english/our_office/about_us/further_duties/cmos_copyright/arbitration_board_under_the_cmo_act/index.html*, accessed on 12 April 2022.

[216] Ibid.

[217] Sections 128 and 92(1) of the VGG.

[218] Section 129 of the VGG.

[219] See also section 105 of the UrhG on courts for copyright litigation.

claims courts are first instance courts that determine questions of facts and law. If aggrieved by the decision of specialized district and small claims courts, a litigant may appeal to the district courts or courts of appeal, then to the specialized chamber of the high courts of appeal or the BGH (the Federal Court of Justice) for appeals from the district courts or courts of appeal.

5.2.3.2. Justice in subsequent acquisition of rights

A notable strength in German Copyright law lies in the accountability and transparency obligations imposed on third parties within the license chain. Under the UrhG, contracting parties are mandated to furnish, upon the music artist's request, the names and addresses of sub-licensees. Moreover, music artists possess the right to seek information disclosures on the revenue generated from sublicensees. This information request, however, is limited to economically essential sublicensees crucial in determining commercialization processes or those from whose profit the music artist receives disproportionate remuneration. Importantly, this right is exercisable only when contracting parties fail to fulfil their accountability and transparency obligations, as outlined in section 32d of the UrhG. In such cases, music artists can make requests supported by clear indications of verifiable facts demonstrating compliance with the conditions outlined in sections 32d and 32e.

5.2.3.3. Transitional justice when implementing reforms for distributive justice in copyright law

The legislative amendments in Germany aimed at enhancing the protection of music artists under the UrhG introduced a complex interplay of transitional justice and distributive justice within the realm of copyright law. The amendments required the retrospective application of the right to equitable remuneration to a small extent.[220] Overall, the application of the reforms on music artists' protections in the UrhG is considered to be less radical for intermediaries and other contractual parties.[221] Intermediaries and other contractual parties who were compliant

[220] See discussions in sections 5.2.2. and 5.2.3. of the thesis. See also Part 6 of the VGG contains transitional provisions on the application of the legislation, section 133 of the UrhG and Part 5 Division 2 of the transitional provisions in the UrhG.

[221]Kenner op cit note 28 at 571-598.

with the protections were unaffected.[222] When the provisions applied, they did not confiscate the intermediaries' or contractual parties' ability to commercialize the work.[223] The provisions only required the intermediaries and contractual parties to provide additional remuneration on equitable terms.[224]

Generally, the legislature is empowered to make civil laws with retrospective application provided the laws are within the constitutional limits of retroactive legislation.[225] The legislature is also required to consider the effect of the retrospective application on existing investments as per the concept of 'pseudo-retroactivity'.[226]

5.2.3.4. Justice in reparations for violating the protection of music artists during the initial and subsequent acquisition of rights

German copyright law for individual management is designed to actively contribute to ensuring fairness and justice in situations where the rights of music artists are violated. This protection is extended not only during the initial acquisition of rights but also in subsequent transactions. Additionally, the law addresses issues related to transitional justice, which typically involves addressing past injustices or violations and establishing a fair and just framework for moving forward in the context of copyright matters. Overall, the legal framework in Germany is structured to safeguard the rights and interests of music artists throughout various stages and aspects of copyright acquisition and justice proceedings.

[222] Ibid.

[223] Ibid.

[224] Ibid.

[225] See articles 20(3) and 103(2) of the Basic Law for the Federal Republic of Germany, 1949 which provide the principles of legitimate expectation and the right to a fair trial including a prohibition of retroactive criminal laws. See also BVerfG, Order of the First Senate of 17 December 2013 - 1 BvL 5/08 -, paras. 1-134, available at *http://www.bverfg.de/e/ls20131217_1bvl000508en.html*, accessed on 20 April 2022.

[226] L Hancher, K Talus and M Wüstenberg 'Retrospective application of legal rules in the European Union: recent practice in the energy sector' (2021) 39(1) *Journal of Energy & Natural Resources Law* 65 at 65-81.

5.2.4. Collective Management: German response to the plight of inequitable remuneration of music artists

Germany's system for enhancing the transparency and accountability of CMOs is defined in the VGG. The system can be described by five major components:

1. Das Deutsche Patent- und Markenamt DPMA's, the German Patent and Trade Mark Office supervisory mandate over CMOs,
2. CMOs' obligation to manage,
3. right holders' involvement in CMOs' management,
4. distribution plans and time limits,
5. limits on administration costs, and
6. information disclosures by CMOs

5.2.4.1. DPMA's supervisory mandate over CMOs

The DPMA is the supervisory authority for CMOs in Germany.[227] The DPMA is required to exercise its powers and duties in the public interest.[228]

The scope of the DPMA's supervisory authority may be summarized as ensuring that CMOs fulfil their statutory requirements and obligations under the VGG.[229] The DPMA may take all necessary measures to ensure CMOs are compliant with the VGG.[230]

The DPMA is charged with the registration and deregistration of CMOs.[231] The DPMA also has an extensive right to information from CMOs, to allow for audits and inspection.[232] CMOs are required to submit the following information to the DPMA:

1. "the statute and any changes thereto,

[227] Section 75(1) of the VGG.

[228] Section 75(2) of the VGG.

[229] Sections 75 and 76 of the VGG.

[230] Section 85 of the VGG.

[231] Sections 77-86 of the VGG.

[232] Section 88 of the VGG; German Patent and Trade Mark Office 'Tasks' (n.d.) available at *https://www.dpma.de/english/our_office/about_us/further_duties/cmos_copyright/aufsichtnachdemvgg/aufgaben/index.html* accessed on 12 October 2022.

2. the tariffs, standard rates of remuneration, standard license agreements and any changes thereto,
3. the inclusive contracts and any changes thereto,
4. the representation agreements and any changes thereto,
5. the resolutions of the general assembly of members, of the supervisory board, of the administrative board, of the supervisory body, of the body in which the entitled persons who are not members are entitled to vote pursuant to section 20 (2) no. 4 and of all the committees of these bodies,
6. the investment guidelines and any changes thereto, as well as the certification issued by the auditor or the auditing firm pursuant to section 25 (3),
7. the financial statements, the management report, the audit report and the annual transparency report and 8. the decisions taken in court or administrative proceedings to which the collecting society is a party, in so far as the supervisory authority requires them."[233]

5.2.4.2. CMOs' obligation to manage rights equitably

Section 9 of the VGG obliges CMOs to manage rights, in their fields of activity, on behalf of their members.[234] CMOs' obligation to manage should not be conflated with the right to manage all their members' rights.[235] The CMO members have the freedom to choose the scope of the rights they license to CMOs.[236] Further, the section requires CMOs to manage copyright and related rights on equitable conditions.[237]

The principle of equitable conditions requires CMOs to operate in line with the objective standards for collective management: which are best summarized as acting in the best interests

[233] Ibid.

[234] Ibid at 204-205.

[235] Malevanny op cit note 7; Reinbothe op cit note 35 at 213-240.

[236] Ibid.

[237] Section 9(2) of the VGG.

of right holders. It is considered to provide a leeway for applying the prohibition for CMOs not to apply rules that are unnecessary for collective management.[238]

The requirement for offering collective management on equitable conditions is deemed to have been fulfilled by CMOs when right holders yield a similar benefit to the one CMOs get in managing the rights.[239] Malevanny argues that the principle of equitable conditions for management may be derived from the methods of distributing revenue to copyright owners.[240] When CMOs have access to precise usage of works, scientific distribution is considered more equitable than general distribution.[241] The principle on equitable conditions also seems to provide another avenue, apart from formal withdrawal, for the withdrawal of CMO membership.[242] The effect of such CMO membership withdrawals on endangering CMO business through fragmentation of repertoires is unascertainable at the moment.[243]

5.2.4.3. Right holders' role in CMO governance

Right holders are involved in management through their power to control the appointment, dismissal, and remuneration of members of the DPMA, the CMO administrative board and other persons authorized to act on behalf of CMOs.[244] This power is exercised during the annual general assembly.[245]

Section 20 of the VGG ensures the participation of right holders who are not CMO members in CMO management. The provision entitles non-CMO members to participate in collective

[238] Malevanny op cit note 7 at 210 and Reinbothe op cit note 35 at 213-240. See also article 4 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (EU CMO Directive).

[239] Malevanny op cit note 7 at 210 and Reinbothe op cit note 35 at 213-240.

[240] Ibid.

[241] Malevanny op cit note 7 at 210 and Reinbothe op cit note 35 at 213-240.

[242] Malevanny op cit note 7 at 210 and Reinbothe op cit note 35 at 213-240.

[243] Malevanny op cit note 7 at 210 and Reinbothe op cit note 35 at 213-240

[244] Sections 18 and 19 of the VGG.

[245] Ibid.

management through elected delegates. The delegates should be elected every four years from amongst the non-members. The regulation of the number, composition, and procedure of election of the delegates is left to CMOs. The delegates participate in CMOs' general assemblies on behalf of non-CMO members. They are entitled to vote in person, by proxy, or through electronic communication in the general assembly.[246] They may vote on matters concerning seven things: CMOs' distribution plans,[247] CMOs' use of non-distributable revenue,[248] investment policies that affect the collected revenue,[249] "the conclusion, content and termination of representation agreements,"[250] CMOs' obligations regarding collective management and the scope of CMOs' activities,[251] tariffs, and conditions for copyright owners to grant non-commercial rights of use.[252]

The delegates are also allowed to give advisory opinions on matters they cannot vote on.[253]

5.2.4.4. Distribution plans and time limits in collective management

Section 27 of the VGG requires CMOs to establish distribution plans that exclude any arbitrary distribution procedures. Standards of preventing arbitrary distribution procedures are usually laid in the principle of non-discrimination of right holders, ensuring individual distribution as much as possible and the protection of music artists against other derivative right holders.[254]

GEMA's distribution plans, for instance, are largely in line with the section 27 requirements for favouring authors over publishers.[255] GEMA's current distribution ratio of authors to

[246] Section 20(3) as read with section 19(3) of the VGG.

[247] Section 17 as read with section 27 of the VGG.

[248] Section 17 as read with section 30 of the VGG.

[249] Section 17 as read with section 25 of the VGG.

[250] Section 17 as read with section 44 of the VGG.

[251] Section 17 as read with section 9 of the VGG.

[252] Section 17 of the VGG.

[253] Section 20(5) of the VGG.

[254] Malevanny op cit note 7 at 211.

[255] Ibid.

publishers for mechanical rights is 60:40 and 66.67: 33.33 for performing rights. Interestingly, the DPMA opines that an arbitrary distribution procedure could still amount to a 50:50 split between authors and publishers. Consequently, the determination of the equity of a distribution procedure is not solely dependent on the outcome.[256]

Section 28 of the VGG sets time limits for the distribution of revenue by CMOs. The maximum statutory time limit for distribution is nine months at the end of each financial year when the revenue is collected.[257] A CMO may deviate from this statutory time limit upon providing objective reasons like non-CMO members who cannot be identified or located.[258] There is an additional obligation placed on CMOs to keep separate accounts of the revenue collected for these non-CMO members.[259]

5.2.4.5. Limit on administration costs in collective management

The VGG provides that the administration costs claimed by CMOs should be determined based on objective criteria.[260] Section 31(2) guides the criteria by stating that the administration costs should not exceed "justified and documented management fees".

5.2.4.6. Information disclosures by CMOs: Transparency and reporting obligations

CMOs must report information to the copyright owners at the end of every financial year for transparency and accountability purposes.[261] CMOs should ensure the credibility of the

[256] Ibid. See also the DPMA decision in *Musikverlegeranteil* KG GRUR-RR 2017, 94.

[257] Section 28(2) of the VGG.

[258] Section 28(3) of the VGG.

[259] Section 28(4) of the VGG.

[260] Section 31(2) of the VGG.

[261] Ibid and section 47 of the VGG.

information they provide and commit to protecting confidential information.[262] CMOs can charge copyright owners for costs associated with the reporting obligation.[263]

CMOs should report the revenue collected for the commercialization of works they manage.[264] This includes all information that may have a bearing on the revenue collected.[265] For example, expected revenue, information on commercialization agreements concluded between the CMOs and users, and resolutions adopted by the General Assembly on rights management.[266]

Chapter 6 of the VGG implements EU members' transparency and reporting obligations in the EU CMO Directive. It further defines the information requirements for accounting and transparency reports, and the obligations that CMOs owe to the public, right holders, and other stakeholders concerning information disclosures.

Sections 57 and 58 of the VGG provide what should be included in financial statements and management reports. Eight months (8) after following the financial year, all CMOs, including those that do not operate as corporations, are required to avail audited financial statements, management reports, and audited transparency reports.[267] Financial reports include "a balance sheet, profit and loss account, cash-flow statement and an annex, and a management report under the provisions applicable to large corporations set out in the Commercial Code".[268] Transparency reports are quite comprehensive as they contain a variety of information, such as: financial statements, report of activities carried out by a CMO, information on rejected license applications by users, legal and organizational structure of the CMO, information on the CMOs, total amount of remuneration paid to copyright owners by the CMO, and financial information.[269]

[262] Section 55(2) of the VGG.

[263] Section 55(3) of the VGG.

[264] Section 47 of the VGG.

[265] Ibid.

[266] Ibid.

[267] Sections 57 and 58 of the VGG.

[268] Section 57 of the VGG.

[269] Annex to section 58(1) of the VGG.

5.2.5. Implementation of the EU Approach for Equitable Remuneration of Music Artists in Germany

On 7 June 2019, Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (the EU Directive) entered into force amending Directives 96/9/EC and 2001/29/EC. The main objectives of articles 18-22 of the EU Directive can be described as guaranteeing standards for minimum harmonization of the principle of appropriate and proportionate remuneration for music artists and providing the right of revocation when work is not sufficiently commercialized.[270] According to the Directive, EU members protect their music artists in their dealings with intermediaries when they regulate for:

1. appropriate and proportionate remuneration,[271]
2. ensure that music artists have a right to access information required to assess the revenue earned from the commercialization of their works,[272] and
3. put in place mechanisms to address unfair contracts, like contract adjustment mechanisms, alternative dispute procedures, and rights of revocation.[273]

"Articles 18-22 do not provide for a maximal harmonisation"; member states like Germany could, therefore, choose to retain their existing music artists' protections or strengthen them.[274]

The Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes, 2021 (Act to Adapt Copyright Law to the Requirements of the Digital Single Market), came into force on 7 June 2021. Although there was no real need to modify German law for the protection of music artists, the German legislators used the EU Directive to clarify some issues in the German approach.[275]

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[270] European Copyright Society (ECS) 'Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market' (2020) 11 *Journal of Intellectual Property, Information Technology and E-Commerce Law*133 para 1.

[271] Article 18 of the EU Directive.

[272] Article 19 of the EU Directive.

[273] Articles 20-22 of the EU Directive.

[274] European Copyright Society (ECS) 'Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market' (2020) 11 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 133 para 1.

[275] Von Lewinski op cit note 50.

5.2.5.1. Justice in the initial acquisition of rights

This subsection explores ex-ante and ex-post interventions designed to ensure fairness in the acquisition of rights and the distribution of remuneration for music artists. These interventions draw from standards set by the EU Directive and their implementation in German copyright law (UrhG), addressing both the determination of equitable remuneration and accountability mechanisms. The subsections below discuss the various provisions and their impact on the rights of music artists.

5.2.5.1.1. Ex-ante interventions: Standards for equitable remuneration

The following subsection explores ex-ante interventions, particularly the form and standard of equitable remuneration as outlined in the EU Directive, focusing on article 18 and its implementation within member states, including Germany. These standards aim to provide a balanced and proportionate compensation framework that reflects the value of the artists' contributions, the commercial potential of their works, and the surrounding market practices.

5.2.5.1.1.1. Form and standard of equitable remuneration: article 18 of the EU Directive

The standard of equitable remuneration prescribed in the EU Directive is "appropriate and proportionate" to the actual usage or value of a work.[276] Recital 73 of the EU Directive provides that this standard is linked to the "actual or potential economic value of the licensed or transferred rights", the music artists' "contribution to the overall work and other circumstances, such as market practices or the actual exploitation of the work".

Article 18(2) of the EU Directive requires member states to take into account the principle of contractual freedom and equitable balance of rights and interests.

Collective bargaining agreements and grants of unwaivable remuneration rights are some techniques that may be applied to regulations to ensure appropriate and proportionate

[276] Article 18 of the EU Directive; ECS op cit note 274; O Mullooly 'DSM Directive and fair remuneration for authors and performers' *Arthur Cox* 18 June 2020 available at *https://www.arthurcox.com/knowledge/dsm-directive-and-fair-remuneration-for-authors-and-performers/,* accessed on 19 June 2021.

remuneration of music artists.[277] These mechanisms exist in the German approach discussed in section 6.2.3. of the thesis.

Copyright scholarship shows that proportionate remuneration rarely refers to lump-sum payments offered in buy-out agreements.[278] In its comment on the EU Directive, the European Copyright Society (ECS) advised that lump sum payments should only be accepted under strict and limited conditions.[279]

It is notable that article 18(1) of the EU Directive is not transposed explicitly by German legislator.[280] The existing sections 11, 32 and 36 already set the standard as "equitable remuneration. The German legislator used article 18 to clarify that lump sum payments must guarantee the music artist's equitable remuneration and be justified by industry specificities.[281]

5.2.5.1.2. Ex-post interventions: Strengthening accountability and transparency for intermediaries involved in the commercialization of music (article 19 of the EU Directive)

Article 19 of the EU Directive sets transparency obligations to allow music artists to assess the economic value of their work.[282] Music artists have a right to receive "up to date, relevant and comprehensive information" on the commercialization of their works.[283] The provision does not contain an exhaustive list of what should be contained in the information. Nevertheless, the provision gives examples of relevant information that should enable music artists to assess the economic value of their work: all modes of commercialization, all relevant revenue generated worldwide and the remuneration due to music artists.[284] This information should be received

[277] Ibid.

[278] Ibid.

[279] ECS op cit note 274.

[280] Lacourt and Valais (2023) op cit note 53 at 7-10.

[281] Section 32(2) of the UrhG; see discussion of this provision in section 6.2.3.1. of the thesis. See also section 18 of the EU Directive.

[282] See discussion of this provision in ECS op cit note 244 and Mullooly op cit note 276.

[283] Article 19 of the EU Directive.

[284] Ibid, Recital 75 of the EU Directive, ECS op cit note 274 and Mullooly op cit note 276.

from contractual parties and their successors in title, at least once a year, taking into account the industry specificities.[285]

The information should also be provided in a manner comprehensible to music artists.[286] Most importantly, member states may place a proportionality on the transparency obligation to balance the rights and interests of music artists and their contracting parties, in article 19(3) of the EU Directive. Like the German approach in the UrhG, the EU Directive exempts CMOs and collective bargaining agreements from transparency obligations.[287]

Sections 32d and 32e of the UrhG already contained the transparency obligation to contracting parties in the licensing chain.[288] In comparison to article 19 of the EU Directive, the transparency obligations in the UrhG are broader, since it provides the right to accountability by contracting parties in addition to the right to information.[289] The legislators modified the UrhG to change the right to information from being request-based to obligation-based, regarding its application to contractual parties.[290] The request is only required when music artists need the names and addresses of sublicensees or require information from sublicensees.[291]

The transparency obligations of the sublicensees in section 32e (1) were also modified to ensure that the obligation was lifted when the music artists' contractual parties have fulfilled their transparency obligations, within three (3) months of the due date, and the information is sufficient to reflect the sublicensees' use of the work.[292]

The UrhG was slightly amended to reflect the proportionality principle in article 19(3) of the EU Directive. Section 32e (1) of the UrhG qualifies the third parties that are bound by the

[285] Ibid.

[286] Ibid.

[287] Article 19 (5) of the EU Directive.

[288] See the discussion in section 6.2.3.3. of the thesis.

[289] Bently et al op cit note 145.

[290] Section 32d (1a) of the UrhG.

[291] Ibid. Von Lewinski op cit note 50.

[292] Section 32e (1) of the UrhG; Von Lewinski (n.d.) and discussion in section 5.2.3.1.2. of the thesis.

obligations relating to information disclosures to music artists. These include third parties who are economically essential to determine the commercialization of the work in the licence chain or those whose profits benefit music artists disproportionately.[293]

The German legislators went beyond the requirements of the EU Directive to also introduce a right that enables music artists' associations to seek injunctions against users who are not compliant with the transparency obligation.[294] The injunctive relief in section 36d (2) of the UrhG was introduced to deal with users, particularly streaming platforms, who disregarded their accountability and transparency obligations. Section 36d (2) acknowledges the difficulties of proving negative facts, like the failure to adhere to the accountability and transparency obligations, in proving the conditions for injunctions.[295] Thus, the UrhG requires that the conditions are met through the presentation of "clear indications based on verifiable facts".[296]

5.2.5.1.3. Ex-post interventions: Copyright Contract Mechanisms (articles 20 and 22 of the EU Directive)

This subsection explores two copyright contract mechanisms outlined in the EU Directive: the right to further equitable participation and the right of revocation for non-use or insufficient commercialization. These mechanisms empower music artists with legal remedies to rectify situations where the initial contract terms lead to unfair remuneration or where their works are under-exploited. The subsequent sections will delve into these mechanisms in detail, highlighting how articles 20 and 22 of the EU Directive seek to promote fairness and equity in copyright contracts for music artists.

5.2.5.1.3.1. Right to Further Equitable Participation: article 20 of the EU Directive

Article 20 of the EU Directive provides a mechanism for music artists to seek "additional and appropriate" equitable remuneration. Additional and appropriate remuneration is sought when remuneration is "disproportionately low compared to the relevant revenues derived from the

[293] Ibid. See also section 32a (2) of the UrhG.

[294] Section 36d of the UrhG. See discussion in sections 5.2.3. and 5.2.4. of the thesis.

[295] Ibid.

[296] Ibid.

subsequent [commercialization of the work].[297] The EU Directive sees this mechanism as an opportunity to renegotiate more equitable terms since it does not guide what constitutes disproportionately low.[298]

The EU Directive considers contract adjustment mechanisms to be broader than a bestseller clause that is only applicable to allow music artists to participate in the future success of their works.[299] Contract adjustment mechanisms apply to all matters that result in inequitable royalties.

In implementing article 20 of the EU Directive, the UrhG improved music artists' protection by reducing the threshold for applying the contract adjustment mechanism from strikingly disproportionate to disproportionately low.[300]

5.2.5.1.3.2. Right of revocation for non-use or insufficient commercialization (article 22 of the EU Directive)

Article 22 requires EU member states to give music artists the right of revocation for non-use or partial exploitation that fails to meet the customary standards for the commercialization of the work. The EU Directive notes that revocation may have some negative implications for licensees and allows the use of optional mechanisms like contract adjustment instead.

The UrhG was slightly modified in 2021 to extend the application of the right to revocation to be applicable in changing the nature of licenses as opposed to just cancelling a license.[301] The right previously existed for licences only. After the amendment, music artists can now revoke an exclusive license to become a non-exclusive one.[302]

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[297] Recital 78 of the EU Directive.

[298] Mullooly op cit note 276.

[299] ECS op cit note 274.

[300] Ibid.

[301] Section 41(5) of the UrhG.

[302] See the discussion in section 5.2.3. of the thesis.

5.2.5.1.4. Ex-post interventions: Common Remuneration Standards (section 36 of the UrhG)

The German Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes, 2021 (Act to Adapt Copyright Law to the Requirements of the Digital Single Market), did not introduce any alterations specifically related to common remuneration standards. Despite the comprehensive nature of the update, the legislators opted to maintain the existing framework for common remuneration standards without introducing substantive changes. This decision reflects a conscious choice to preserve the prevailing system governing remuneration for music artists, suggesting that the pre-existing provisions in the German copyright law adequately addressed the concerns related to remuneration, and no immediate modifications were deemed necessary.

5.2.5.1.5. Ex-post interventions: Mechanisms for enforcing equitable remuneration rights for music artists under EU Law (article 21 of the EU Directive)

Article 21 of the EU Directive requires member states to provide ADR procedures for matters on the transparency and contract adjustment prescribed in articles 19 and 20 of the EU Directive. Further, associations representing authors may initiate these ADR procedures on behalf of their members.[303]

Before the 2021 amendment, the UrhG was broadly in line with the ADR procedure requirement.[304] Section 32g of the UrhG was slightly amended to provide that music artists' associations may represent music artists when enforcing their right to equitable remuneration as provided in sections 32-32f of the UrhG.[305]

5.2.5.2. Justice in the subsequent acquisition of rights

The amendment to the UrhG, under the Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes, 2021 (Act to Adapt Copyright Law to the Requirements of the Digital Single Market), maintained the established framework for justice

[303] Article 21 of the EU Directive.

[304] See discussion in section 5.2.2.1. of the thesis.

[305] Ibid.

in the subsequent acquisition of rights without specific alterations. This decision, within the comprehensive scope of the update, underscores a deliberate choice by legislators to uphold the existing system governing the accountability and transparency obligations imposed on third parties within the license chain.

5.2.5.3. Transitional justice when implementing reforms for distributive justice in copyright law: articles 18-22 of the EU Directive

One challenging issue with the EU Directive is the question of whether the EU intended articles 18-22 to apply to already existing contracts.[306] Article 26(1) of the EU Directive states that the Directive shall apply in member states on or after 7 June 2021. Article 26(2) provides that the Directive shall not prejudice "any acts concluded, or rights acquired before 7 June 2021".

The ECS cautions member states from interpreting section 26(2) as exempting all existing contracts from the application of articles 18-22 of the EU Directive.[307] Such an interpretation would undermine the whole scheme for the protection of music artists, by encouraging the continued existence of inequitable whole duration contracts.[308] The ECS relied on the CJEU's interpretation in *Flos SpA v Semeraro Casa e Famiglia SpA* case to support their position.[309] The sections in the decision that point to retroactivity as it relates to the principle of legitimate expectation may be summarized as: a blanket exemption to all contracts would be inappropriate if it fails to equitably balance the rights and interests of all stakeholders involved.[310]

[306] ECS op cit note 274.

[307] Ibid.

[308] Ibid.

[309] Ibid. C-168/09, EU:C:2011:29.

[310] Ibid.

The ECS stresses the importance of applying the standard in this holding to each obligation in articles 18-22 of the EU Directive.[311] They advise that article 18 should apply to existing contracts since it only provides the standard required for the equitableness of remuneration.[312]

The ECS advises that the ADR procedures and transparency mechanisms in articles 19 and 21 do not affect acquired rights.[313] These provisions should, therefore, apply to existing contracts.[314] The contract adjustment mechanism, should also be applied to existing contracts since it is meant to enforce the transparency mechanism.[315] However, contract adjustments cannot require payment of remuneration that was accrued before the Directive was operational.[316]

The revocation right, adequately balances music artists' and their contractual parties' rights and interests.[317] This is because it is applicable "after a reasonable time has elapsed" and where there is "a lack of exploitation.[318] Thus, it should also apply to existing contracts.

5.2.5.4. Justice in reparations for violating the protection of music artists during the initial and subsequent acquisition of rights.

In comparison to the robust provisions of German copyright law for individual and collective management, the EU Directive appears to be less comprehensive. While the German legal framework actively contributes to ensuring the equitable remuneration of music artists, covering violations during both initial and subsequent rights acquisition and reforms to enhance distributive justice, the EU Directive may not provide an equally strong safeguard. This

[311] Ibid.

[312] Ibid.

[313] Ibid, sections 19 and 21 of the EU Directive.

[314] Ibid.

[315] Ibid.

[316] Article 26(2) of the EU Directive.

[317] Article 22 of the EU Directive and recital 80 of the EU Directive.

[318] Ibid.

distinction underscores the nuanced differences in the strength and scope of copyright protection between German law and the EU Directive.

5.2.6. Conclusion on the practical and broader significance of the German and EU approaches to the equitable remuneration for music artists

The objective of this chapter was to explore the German and EU approaches to establishing a more equitable distribution of music revenue between music artists and intermediaries under copyright law. This examination reveals both the strengths and challenges of the German model, which serves as a valuable reference for reform in other jurisdictions, including Kenya.

There were five major findings in this chapter. First, the German approach to equitable remuneration of music artists, as provided by the UrhG and outlined earlier in this chapter, presents both practical implications and broader significance for Kenya. Despite its regulatory strength, the approach may pose challenges when extrapolated to diverse contexts, particularly in administratively and bureaucratically demanding environments such as developing countries like Kenya. In the Kenyan context, the German approach, while potentially burdensome, remains relevant as it serves as a valuable model for protecting music artists, who often occupy a disadvantaged position in the value chain. The recommendation is not outright duplication but rather adaptation of pertinent mechanisms to the Kenyan setting.

The commendable aspects of the German approach, such as the incorporation of best-seller clauses, empower music artists to enforce their rights within the licensing chain, leading to increased legal actions against intermediaries.[319] Most collective bargaining and joint remuneration agreements appear to be taking guidance from the UrhG and focusing on best-seller clauses.[320] Some fundamental challenges of applying the best-seller clauses taint the German approach. These clauses are ex-post mechanisms that require the music artists to sue. Being the weaker parties than the intermediaries they are enforcing these clauses against, music artists are hesitant to risk legal enforcement for fear of being blacklisted.[321]

[319] Schwope op cit note 160*;* Reber (2016) op cit note 44 at 382-385; Kenner op cit note 28.

[320] Ibid.

[321] Schwope op cit note 160 at 92-96*;* Kenner op cit note 28.

Second, there is a prevailing view in German scholarship is that an equitable split of revenue between music artists and intermediaries should be as close as possible to 50:50.[322] Since CMO distribution plans and rules can give guidance on equitable remuneration, GEMA's 60:40 royalty split between authors and publishers for mechanical rights could be a benchmark for equitable remuneration. Nevertheless, German scholarship states that section 32 of the UrhG has had little practical significance for performers and recording artists in their transactions with record labels.[323] The revenue split is usually far removed from the 50:50 split.[324] Despite this glaring inequity, there are no cases since performers and recording artists fear being blacklisted by intermediaries and they also bear the burden of proof when they institute legal proceedings for inequitable remuneration.[325]

Third, the voluntary nature of section 36 of the UrhG has hindered the establishment of common remuneration standards, resulting in legal uncertainty and a lack of clarity regarding equitable remuneration.[326] The German legislators' expectations that prescribing common remuneration standards would enhance legal certainty and transparency, by involving major stakeholders in the development of the framework, remain largely unfulfilled.[327] The main reason for this is that section 36 of the UrhG is couched in voluntary terms and most intermediaries are reluctant to negotiate common remuneration standards. Common remuneration standards have not been adopted in the music industry, they only exist for fictional works and audio-visual industries.[328] Nevertheless, some standard contracts and rules exist for music publishing but lack the force and authority of common remuneration standards.

[322] Section 32 of the UrhG; Malevanny op cit note 7 at 95.

[323] Malevanny op cit note 7 at 94-95; Neu op cit note 7 at 454 quoting Jörg Wimmers & Tibor Rode, *Der Angestellte Softwareprogrammierer und die Neuen Urheberrechtlichen Vergütungsansprüche*, 19 COMPUTER & RECHT 399, 400 (2003).

[324] Ibid.

[325] Ibid.

[326] Schwope op cit note 160 at 92-96.

[327] Ibid.

[328] Ibid.

Given this situation, courts are forced to import remuneration standards of other sectors to the music industry when making decisions.[329]

The lack of clarity in defining "representative, independent, and empowered" associations for joint remuneration agreements results in diverse agreements with varying provisions, complicating matters for music artists seeking equitable remuneration.[330] Additionally, the discretion granted to courts in determining what constitutes equitable remuneration may lead to legal uncertainty.[331]

Fourth, the absence of collective bargaining agreements for many music artists exacerbates their challenges, particularly those without union representation. The existing collective bargaining agreements in the music industry are limited to performance rights in public broadcasting services.[332] It is thus difficult for them to keep up with boilerplate tactics used by intermediaries to circumvent the application of legislative interventions in the UrhG.[333] Lump-sum payments in buy-out agreements, identified as a key issue, prompts a call for ex-ante provisions to mitigate inequitable remuneration.[334]

While the German approach aligns with principles of wealth redistribution and economic efficiencies, critics argue that it may lead to inefficient employment levels and contradict the legislative intention of lowering originator risk.[335] The reliance on qualitative concepts like "fairness" introduces uncertainty, as the criteria for considering remuneration as inequitable or conspicuously disproportionate remain ambiguous.

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[329] Senftleben op cit note 9 at 416; MA Forere'Reforming the Right to Remuneration in the South African Copyright Amendment Bill' (2021) *PIJIP Working Paper* No. 67.

[330] Section 36 of the UrhG.

[331] C Jansen 'Economic Effects of the New German Copyright Contract Law' (2002) at 31.

[332] There is also a collective bargaining agreement for music performers for rights related to performance in theatres. Malevanny op cit note 7 at 93 and 99.

[333] Ibid.

[334] Minimum levels of remunerations have been prescribed in Israel and Greece in the book publishing sector. See the Law for Protection of Literature and Authors in Israel prescribing the amount due to an author in percentage of the price of the books grouping them according to the period of the books being commercialized. See Y Nahmias 'The Cost of Coercion: Is There a Place for 'Hard' Interventions in Copyright Law?' (2020) 17(2) *Northwestern Journal of Technology and Intellectual Property* 155 at 176. Greece imposes a minimum royalty for books sales using percentage of sales. See articles 33-37 of the Greece Copyright Act, 1993.

[335] Jansen op cit note 331 at 32.

Finally, critiques of the German model highlight the potential inefficiencies it creates in employment levels and its failure to reduce risk for originators, as well as the reliance on ambiguous concepts like "fairness," leading to uncertainty in legal interpretations.

Jansen argues that the German approach is based on wealth redistribution and leads to economic efficiencies. The collective remuneration schemes prescribed in sections 32 and 36 of the UrhG lead to inefficient employment levels.[336] The interventions in the UrhG for the protection of music artists go against the legislative intention to lower originator risk by shifting risk to intermediaries and rising transaction costs.[337]

The UrhG recommends that collectively negotiated remuneration (through joint, collective bargaining, and CMOs) be used as a benchmark for equitable remuneration. Collectively negotiated remuneration, therefore, applies as a "de facto remuneration floor".[338] If the floor rate happens to be higher than the rate that would be agreed upon under other conditions, this would mean that the intermediary forfeits the transaction or spends more money to acquire the rights.[339]

Critiques of the German model highlight the potential inefficiencies it creates in employment levels and its failure to reduce risk for originators, as well as the reliance on ambiguous concepts like "fairness," leading to uncertainty in legal interpretations.[340]

The German approach offers a robust framework for equitable remuneration but is not without its challenges. The Study on the Remuneration of authors and performers for the use of their works and the fixations of their performances (2016) concluded that ex-ante measures are more effective than ex-post measures.[341] Key strengths of the German approach like the incorporation of best-seller clauses and a focus on collective bargaining, provide important lessons for other jurisdictions. However, adapting this model to Kenya would require careful

[336] Ibid.

[337] Ibid.

[338] Y Nahmias 'The Cost of Coercion: Is There a Place for 'Hard' Interventions in Copyright Law?' (2020) 17(2) *Northwestern Journal of Technology and Intellectual Property*155 at 174.

[339] Ibid at 174 and 200.

[340] Kenner op cit note 28 at 571-598.

[341] L Guibault and O Salamanca *Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works* (2016) European Commission 8, 156.

consideration of local legal, cultural, and economic conditions to ensure music artists can secure equitable remuneration while effectively managing their relationships with intermediaries.

CHAPTER SIX: SOUTH AFRICAN APPROACH TO ACHIEVING A MORE EQUITABLE DISTRIBUTION OF MUSIC REVENUE AND EVALUATING REFORM OPTIONS FOR KENYA FROM THE GERMAN, EU, AND SOUTH AFRICAN APPROACHES

6.1. Introduction to the South African approach to achieving a more equitable distribution of music revenue and evaluating reform options for Kenya from the German, EU and South African approaches

Having considered the German and EU approaches in the previous chapter, this chapter brings the discussion a little closer to home by sharing the experiences from South Africa. It then proceeds to evaluate reform options by drawing insights from German and the EU approaches, alongside the approach taken by South Africa.

6.2. South African approach to achieving a more equitable distribution of music revenue

South Africa and Kenya share the status of being Commonwealth countries, which provides a common starting point for comparison. Additionally, South Africa's status as one of Africa's largest economies with a thriving music industry in Africa offers valuable insights into dynamics that influence music revenue distribution policies.[1] Like Kenya, South Africa has been grappling with the challenge of inequitable remuneration of music artists. In 2011, the

[1] World Bank *Regional Economic Outlook for Sub-Saharan Africa, World Bank* (2018) 137-9, 142 available at *pubdocs.worldbank.org/en/575011512062621151/Global-Economic-Prospects-Jan-2018-Sub-Saharan-Africa-analysis.pdf*, accessed on 11 January 2024.

In 2016 Africa collected €61.3M with South Africa contributing €32.6M constituting more than half of the collections, see International Confederation of Societies of Authors and Composers (CISAC) *Global Collections Report 2016 for 2015 Data* (2016) 56 available at *http://www.cisac.org/Cisac-University/Library/Royalty-Reports/Global-Collections-Report-2016*, accessed on 30 April 2023. South Africa has the highest number of internet servers of any non-Organization for Economic Cooperation and Development (OECD) country, a fact that enables its music industry in this digital age. In 1981, Anglo-American Corporation controlled assets bigger than the economies of the nine countries closest to South Africa. See MJ Murray *South Africa: time of agony, time of destiny; the upsurge of popular protest* (1987) 366-7 cited in AW Marx *Lessons of Struggle: South African Internal Opposition, 1960–1990* (1992); in addition see Network Wizards, Internet Survey available at www.nw.com, accessed on 30 April 2023 cited in M Castells *End of Millennium: The information age: Economy, society, and culture* 2ed (2010) 124; P Carmody 'Between globalisation and (post) apartheid: the political economy of restructuring in South Africa' (2002) 28(2) *Journal of Southern African Studies* 255 at 256.

Copyright Review Commission (CRC) carried out an extensive inquiry into the challenge of inequitable distribution of music revenue in South Africa.[2] The inquiry prompted the copyright revision process that is still ongoing.[3]

South Africa's music industry is replete with the recurring phenomenon of famous music artists, like Simon 'Mahlatini' Nkabine, Solomon Linda and Brenda Fassie dying poor.[4] Apart from the poor music artists, the challenge is also characterized by the mismanagement of CMOs.[5] The challenge of inequitable remuneration of music artists in South Africa is best described as an outcome of the shortcomings of copyright in balancing the rights and interests of music artists against those of intermediaries and other contracting parties.[6]

The SA Copyright Act allows for extensive contractual freedom where remuneration matters are primarily left to music artists and intermediaries or other contractual parties.[7] Remuneration contract negotiations are usually a powerful product of the vulnerability and ignorance of music artists, which leads to expansive grants to intermediaries in perpetuity and hinders music artists from extracting equitable remuneration for the commercialization of their music.[8]

The challenge of inequitable remuneration dates to pre-democratic South Africa.[9] In 1992, the Deputy Minister of Trade and Industry sought an advisory opinion on the reintroduction of

[2] See Republic of South Africa Department of Trade and Industry (DTI) *Copyright Review Commission Report* (2011).

[3] Copyright Amendment Bill, 2017 [B13F-2017].

[4] DTI op cit note 2 at 10-12.

[5] The Copyright Review Commission (CRC) was formed, in 2010, after the liquidation of the South African Recording Rights Association Ltd (SARRAL). South African Music Association (SAMRO) was also found guilty of misappropriation of royalties. See DTI op cit note 2; *Shapiro v South African Recording Rights Association Limited (SARRAL)* Unreported Case No. 14698/04 (2009) and MA Forere 'Reforming the Right to Remuneration in the South African Copyright Amendment Bill' (2021) *PIJIP Working Paper* No. 67 (2021).

[6] In 1998, the MITT found that the challenge is caused by, inter alia, outdated copyright legislation, copyright infringement, low levels of local content, unfair contracts, lack of adequate music and entrepreneurship education, and inadequate funding, see DTI op cit note 2.

[7] Forere op cit note 5.

[8] Ibid, DTI op cit note 2.

[9] Ibid.

needletime royalties for music artists.[10] The reintroduction was meant to address the recurring phenomenon of famous music artists, like Simon 'Mahlatini' Nkabine, dying poor.[11] In 1998, the Minister of Arts and Culture, Science and Technology established the Music Industry Task Team (MITT) to investigate the problems of the industry.[12] These events led to the amendment of the SA Copyright Act and the Performers Protection Act in 2002.[13] Little had been done to address these challenges by 2010 which led to the establishment of the CRC after the liquidation of the South African Recording Rights Association Ltd (SARRAL), following an order of the South Gauteng High Court.[14] The CRC assessed the challenge further.[15]

This section discusses South Africa's response to the challenge of inequitable remuneration. It provides an overview of music copyright protection in South Africa and major legislative developments. It then discusses the SA Copyright Act approach and the Copyright Amendment Bill (CAB) approach.

6.2.1. An overview of music copyright protection in South Africa

The constitutional basis for copyright protection in South Africa flows from section 25 of the Constitution, 1996, which protects property.[16] The regulatory framework for music protection in South Africa is mainly found in the South African Copyright Act, 1978 (the SA Copyright Act), the Copyright Regulations 1978 (as amended by GN 1375 in GG 9807 of June 28, 1985), and the Collecting Societies Regulations, 2006 (the CS Regulations).

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[10] Section 40 of the SA Copyright Act. Standing Committee on the Copyright Act 'Report on the Needle Time and Blank Tape Levy' (1993), as cited in DTI op cit note 2 at 10-12.

[11] DTI op cit note 2 at 10-12.

[12] Ibid.

[13] The Copyright Amendment Act 9 of 2002, reintroduced needle time rights into the copyright regime.

[14] DTI op cit note 2.

[15] See discussion in section 6.2.2. of the thesis.

[16] Although section 25 of the Constitution, 1996, does not explicitly mention IP or copyright, it protects the right to property which encompasses both tangible and intangible assets. However, copyright is not precisely considered as property in the same way tangible assets are. Rather, it is a set of exclusive rights granted to the copyright owner, distinguishing it from traditional notions of property. For further discussion on IP as property see, SL Carter 'Does it matter whether intellectual property is property' (1992) 68 *Chicago-Kent Law Review* 715 at 715-724 and OA Rognstad *Property aspects of intellectual property* (2018) generally.

There are four requirements for the subsistence of copyright in South Africa. First, the subject matter must be a work that fits into either of the nine categories of works provided in the SA Copyright Act.[17] For music, the subject matter of this thesis qualifies for protection as a literary works, musical compositions, published editions and sound recordings.[18] Second, the works must be original, that is not copied, and be products of a substantial degree of labour or skill in their creation.[19] Third, the works must be reduced into a material form, and fourth, be created by a qualified person or be first published in South Africa.[20] There are no formalities for the grant of copyright in South Africa.

Copyright grants two sets of exclusive rights: economic and moral rights. The exclusive economic rights are different for literary and musical on the one hand and sound recordings on the other hand.[21] These exclusive rights are limited to the extent permissible by the limitations and exceptions in section 12 of the SA Copyright Act, 1978. Moral rights are granted to the author of literary and musical works.[22]

Copyright lasts for the lifetime of an author and fifty years from the end of the year of the author's death or fifty years after the publication, performance in public, broadcasting, and offer for sale if these acts had not been done before the author's death.[23]

Although there is a mention of performers' and recording artists' rights in the SA Copyright Act concerning the public performance right in relation to sound recordings, more detailed

[17] Section 2 of the SA Copyright Act extends protection to nine categories of works: literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, programme carrying signals, published editions and computer programs.

[18] Section 2 of the SA Copyright Act.

[19] *Haupt v Brewer* [2006] ZASCA 40 para 35.

[20] A qualified person is a South African citizen or a citizen of a country that is a member of the Berne Convention, see sections 3(1) and 37 of the SA Copyright Act and the Copyright Regulations, 1978, as amended. If the author is not a qualified person, the court will consider whether the work was first published in South Africa, see section 4 of the SA Copyright Act.

[21] The exclusive rights are different for literary and musical works on the one hand and sound recordings on the other hand. For the exclusive rights attached to literary and musical works, see section 6 (a)-(g) of the SA Copyright Act. For the exclusive rights of sound recordings see section 9 of the SA Copyright Act.

[22] Section 20 of the SA Copyright Act.

[23] Section 3(2) of the SA Copyright Act.

protection is provided in the Performers Protection Act, 1967.[24] A performer is defined as "an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise performs, literary or artistic works".[25] Performers are granted economic rights that are limited to the extent permissible in section 8 of the Performers Protection Act, 1967.[26] The protection lasts for 50 years from the end of the calendar year in which the performance took place or was incorporated in a phonogram.[27]

The three CMOs tasked with managing the music rights that are central to the discussion in this thesis include: the Southern African Music Rights Organisation (SAMRO), the South African Music Performance Rights Association (SAMPRA) and the Independent Music Performance Rights Association (IMPRA).[28] These CMOs collect and distribute royalties for the commercialization of music. SAMRO manages the public performance rights attached to literary and musical works.[29] SAMPRA and IMPRA administer needletime rights for members of the Recording industry of South Africa (RiSA) and independent producers and performers, respectively.[30]

The recognized functions of CMOs in South Africa are issuing licenses, collecting royalties, distributing royalties, negotiating royalty rates, and performing any other functions prescribed

[24] Section 9A of the SA Copyright Act.

[25] Section 1 of the Performers Protection Act, 1967.

[26] Section 5 of the Performers Protection Act, 1967 provides economic rights.

[27] A phonogram is defined as "any exclusively aural fixation of sounds of a performance or of other sounds". See sections 1 and 7 of the Performers Protection Act, 1967 for the definition of a phonogram and the duration of performers' protection, respectively.

[28] There are six CMOs in South Africa charged with the management of music, sound recordings and performers' rights. SAMRO and CAPASSO manage music rights. The other four CMOs manage needle time rights the South African Music Performance Rights Association (SAMPRA), Independent Music Performance Rights Association (IMPRA), Association of Independent Record Companies (AIRCO) and Recording Industry of South Africa (RiSA) manage sound recording rights.

[29] See Southern African Music Rights Organisation (SAMRO) website available at *https://www.samro.org.za/*, accessed on 20 November 2023.

[30] See South African Music Performance Rights Association's (SAMPRA's) website available at *https://www.sampra.org.za/*, accessed on 20 August 2020 and Independent Music Performance Rights Association (IMPRA's) website available at *https://www.impra.co.za/*, accessed on 20 November 2023.

in the SA Copyright Act.[31] They also enter into reciprocal agreements with CMOs in foreign countries to enable the collection of royalties for their members in those countries.[32]

Generally, CMOs should adhere to the codes of good governance established in the KING IV Report on Corporate Governance for South Africa, 2016.[33] The CS regulations set out rules for establishing and operating collecting societies in South Africa.[34] The CS regulations and the Companies Act are silent on the legal form required for the operation of CMOs. CMOs usually operate as non-profit organizations unless the law requires them to operate as limited liability companies like in Kenya or any other form.[35] Most CMOs in South Africa exist as non-profit companies or private companies.[36] CMOs in South Africa are bound by provisions in the Companies Act, 2008 relating to the formation and conduct of companies.[37]

The Companies Act, 2008 does not regulate licensing and tariff setting procedures by CMOs. This leaves non-needletime CMOs unregulated in this regard. Nevertheless, the legal basis for licensing contracts and tariffs set by non-needletime CMOs may be drawn from section 22 of the SA Copyright Act, which regulates the transfer of copyright by licenses and assignments. The Copyright Tribunal regulates licensing and tariff-setting procedures by non-needletime CMOs as per Chapter 3 of the SA Copyright Act.

[31] Proposed section 22C in the Bill.

[32] Ibid.

[33] KING IV Report on Corporate Governance for South Africa 2016 (Institute of Directors Southern Africa, 2016).

[34] Section 9A and section 5(3) of the Performers Protection Act, 1967.

[35] DO Oriakhogba 'Regulation of Collective Management Organizations in South Africa' (2019) *WTO.org Colloquium papers* 171 available at https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2019/chapter_12_2019_e.pdf, accessed on 20 October 2020.

[36] Oriakhogba op cit note 35 at 176. The structure of CMOs is important due to the implications it has on members. For instance, non-profit companies may have voting and non-voting members and are not allowed to make a presumption on membership. Further, non-profit companies are required to maintain a membership register while private companies are required to keep a register of securities.

[37] See sections 8 and 10 of the Companies Act, 2008 and Schedule 1 to the Companies Act, 2008.

6.2.2. Major legislative developments in South African copyright law

Copyright law was instituted after creating the Union of South Africa in around 1910. The 1910 Act was amended after enacting the Patents, Designs, Trademarks, and Copyright Act in 1916. Schedule III of the 1916 amendment incorporated the British Imperial Copyright Act, 1911.[38] After gaining independence, South Africa passed the now-repealed Copyright Act 63 of 1965.[39] The Copyright Act, 1965 contained the first regulation on collective management in South Africa. Chapter 4 of the Copyright Act, 1965 created the Copyright Tribunal, which was tasked with, among other things, granting compulsory licenses where CMOs refused or failed to do so. It is reported that this regulation of CMOs was only applied once, in 1969, to dramatic works.[40] The 1965 Act was repealed and replaced by the 1978 SA Copyright Act (as amended), which is currently in place.

CMOs in South Africa were largely unregulated until 2002, when the Copyright Amendment Act, No. 9 of 2002, was enacted. The 2002 amendment introduced a definition of 'collecting society' in the SA Copyright Act as a "collecting society established under [the SA Copyright Act]".[41] The definition of collecting societies and licensing schemes in section 1 of the Act provides the functions of collecting societies in South Africa as granting licenses against tariffs. The amendment also reintroduced needletime rights into the copyright regime.[42]

Needletime rights refer to the license fees paid by music users, including broadcasters, retailers, nightclubs, and restaurants, for the public performance of recorded music.[43] These fees benefit

[38] Act 9 of 1916.

[39] O Dean 'Sound recordings in South Africa: the Cinderella of the copyright family' (1993) 310 *De Rebus* 913 at 913-917.

[40] *Johannesburg Operatic and Dramatic Society v Music Theatre International* (1969) 2 Patent Journal, 223; JH Spirer 'In re Johannesburg Operatic and Dramatic Society v Music Theatre International: Boycott of the South African Stage' (1970) 20 *CLS* 140-153; JR Steyn 'Copyright tribunal's first case' (1969) *De Rebus* 69.

[41] Section 1 of the SA Copyright Act, as amended by the Copyright Amendment Act, No 9 of 2002.

[42] Introduced by Copyright Amendment Act, No. 9 of 2002 in section 9A of the SA Copyright Act for owners of copyright in sound recordings and sections 5(4) and (5) of the Performers Protection Act for performers whose performances were fixed in the sound recording

[43] O Dean *Handbook of South African copyright law* (2015) 57, 191-194; A Myburgh et al. *Copyright Reform or Reframe?: A Critical Analysis of the Copyright Amendment Bill B13D of 2017 and the Performers' Protection Amendment Bill B24D of 2016* (2023) 6, 44-46, 50-57, 149-153, 159; T Wagenaar and F Marx 'Needletime: the long and winding road' (2012) 33(2) *Obiter* 297 at 298-299.

copyright owners of sound recordings, such as producers, record labels, and recording artists.[44] Needletime rights grant sound recording owners exclusive rights, including the right to broadcast, transmit sound recordings via diffusion services, and communicate them to the public.[45] These rights, along with mechanical rights, ensure that owners are compensated when their recordings are publicly performed.[46]

Historically, needletime rights existed in South Africa before the adoption of the Copyright Act of 1965. However, it is believed that the South African Broadcasting Corporation (SABC), through the National Association of Broadcasters, lobboed for their removal to evade royalty payment for the broadcast of sound recordings.[47] The South African government supported this stance, citing the British Imperial Copyright Act of 1911—which did not provide for needletime rights—as the rationale for their exclusion from the 1965 legislation. Nevertheless, needletime rights were reinstated through subsequent amendments to the Copyright Act, starting in 2002, restoring rights to performers and sound recording owners.

Further, the 2002 amendment introduced section 39(cA), which empowers the Minister of Finance to regulate the funding, composition, and functions of CMOs related to needletime rights. CMOs were dealing with rights other than needletime rights, such as mechanical and performing rights of music's musical and literary components, which were regulated under Chapter 3 of the SA Copyright Act. Chapter 3 of the SA Copyright Act brought CMOs under the ambit of the Copyright Tribunal.

In 2006, South Africa passed the CS regulations. The scope of operation of the CS regulations is limited to needletime rights as contemplated in sections 9A and 39(cA) of the SA Copyright Act.[48] Accordingly, the CS regulations provide for establishing and operating needletime CMOs in South Africa. The importance of bringing all other music rights CMOs into the ambit of the CS regulations is noted in the preamble.

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[44] Ibid.

[45] Sections 2 and 3 of the Copyright Amendment Act, No. 9 of 2002 repealed the former section 9 of the SA Copyright Act.

[46] Ibid.

[47] T Wagenaar and F Marx 'Needletime: the long and winding road' (2012) 33(2) *Obiter* 297 at 309-314; NAB Submission on the Copyright Amendment Bill and the Performers Protection Amendment Bill (2001).

[48] Regulation 2 of the CS Regulations, 2006 as read with sections 9A and 39(A) of the SA Copyright Act.

On the scope of operation of the CS regulations regarding non-needletime CMOs, *Shapiro v South African Recording Rights Association Limited (SARRAL)* further held that non-needletime CMOs may operate without accreditation from the registrar.[49] However, this does not stop the registrar from regulating royalty collection and distribution by non-needletime CMOs by applying enabling provisions in the Companies Act that require CMOs to operate according to their MoUs and AoAs.[50] Non-needletime CMOs are regulated by their MoUs and AoAs and the Companies Act. These CMOs are free to structure the governing boards as they wish. It is notable that even in the absence of regulation on their structure, non-needletime CMOs are structuring their governing boards per the CS regulations.[51]

The Copyright Review Commission (CRC) was formed in 2010, after the liquidation of the South African Recording Rights Association Ltd (SARRAL), following an order of the South Gauteng High Court.[52] The CRC assessed the collective management of literary and musical works, sound recordings, and published editions. One major cause of concern was that record companies and producers were not adequately protected despite the introduction of needletime rights in 2002. In 2011, the CRC recommended an overhaul of copyright law to ensure, amongst other things, good governance, and transparency by CMOs in the collection and distribution of royalties, strengthening the position of music artists, expanding copyright limitations and exceptions for education purposes and the blind, visually impaired or otherwise print disabled and updating the law to conform to changes brought about by digitization.[53]

The process of reforming copyright was initiated when the Draft Copyright Amendment Bill (CAB) was published in 2015.[54] The Draft CAB was depicted as an archetypal "curate's egg"

[49] Unreported Case No. 14698/04 (2009).

[50] Oriakhogba op cit note 35.

[51] See clause 16(1) of CAPASSO's MoU, for instance, that provides that a governing board shall have a minimum of 8 directors constitute governing board shall be constituted of a minimum of 8 directors: the independent chairman/nonexecutive director, the chief executive officer, and 3 members each of SAMRO and the National Organisation of Reproduction Rights (NORM)

[52] DTI op cit note 2.

[53] Ibid at 53.

[54] See the Draft Copyright Amendment Bill, 2015.

for being thoroughly bad but portrayed as partly good.[55] It was commendable for seeking to address some of the issues that render the SA Copyright Act out of date and ineffective.[56] The Draft CAB contained provisions on music royalty collection and distribution by CMOs; it broadened the limitations and exceptions to copyright to allow more use for educational purposes and access to visually impaired or print-disabled persons.[57]

It was criticized for language, craftsmanship, and the use of foreign concepts and terminologies. These concerns were addressed in May 2017 when the Draft CAB was revised and introduced to the National Assembly.[58] The revision removed provisions on "craft works" and "phonograms" that already existed in similar provisions on artworks and sound recordings in the SA Copyright Act.[59] The 2017 revision adopted a different definition for "orphan works" and "reproduction" and limited the resale royalty right to artistic works. It also deleted the proposed regulation for a local content quota for the broadcasting industry since it conflicted with the national treatment principle, making it unconstitutional and in contravention of international obligations. Furthermore, it is worth noting that this issue is not inherently relevant to the Copyright Act.

The passage of the CAB through parliament has been marked by controversy since its introduction in 2017. The CAB was further amended in November 2018 to incorporate proposals from committees in the Department of Trade, Industry and Competition and it became the CAB [B13B-2017| 16 Nov 2018]. On 5 December 2018, the CAB [B13B-2017| 16 Nov 2018] was passed by the National Assembly and transmitted to the National Council of Provinces (NCOP) for concurrence.

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[55] D Owen 'DTI dishes up a hopeless curate's egg: intellectual property' (2015) 15(8) *Without Prejudice* 46 at 46-49.

[56] Ibid; L Daniels 'Conference looks at Public Interest in South Africa's Draft Copyright Bill' *Intellectual Property Watch* 13 August 2015 available at *https://www.ip-watch.org/2015/08/13/conference-looks-at-public-interest-in-south-africas-draft-copyright-bill/*, accessed on 20 August 2023; Republic of South Africa 'Trade and Industry hosts consultative conference on Copyright Amendment Bill, 27 Aug' 20 August 2015 available at *https://www.gov.za/speeches/dti-hosts-conference-copyright-law-changes-2015-08-20-20-aug-2015-0000*, accessed on 20 August 2022.

[57] Draft Copyright Amendment Bill, 2015.

[58] Copyright Amendment Bill, 2017 [B13-2017| 16 May 2017].

[59] Owen op cit note 55 at 46-49.

During 2019-2020, the CAB was with the President for 15 months awaiting his assent and being signed into law. The CAB was referred to the National Assembly on 13 June 2020 due to the President's reservations on its constitutionality.[60] The President stated that the CAB suffers from incorrect tagging as a section 75 Bill instead of a section 76 Bill, since it seeks to regulate cultural and trade matters. Following this reservation, the parliamentary joint tagging mechanism tagged it as a section 76 Bill.

The thesis discusses the other constitutionality reservations to the extent that they deal with equitable remuneration of music artists. There were also concerns that the proposed retrospective application of section 6A (7) of the CAB was arbitrary. Additionally, section 6A(7)(b) seeks to confer discretionary powers to the Minister and constitutes an impermissible delegation of legislative authority. For this reason, the president had reservations that the CAB failed to comply with the international treaties that it sought to align itself with.[61] This thesis discusses the provisions in the CAB that seek to address the equitable revenue distribution concerns in the music industry.[62]

Between August 2020 to May 2021, the CAB was discussed in the National Assembly by the Portfolio Committees on Trade, Industry and Competition and Sports, Art and Culture. On 30 May 2021, the National Assembly rescinded its previous decision to pass the CAB and referred it back to the Portfolio Committees on Trade, Industry and Competition. Between August 2021 and June 2022, the CAB underwent extensive public participation resulting to the Copyright Amendment Bill [B13D-2017| 9 June 2022]. In August 2023, the Select Committee on Trade and Industry, Economic Development, Small Business, Tourism, Employment and Labour at the National Council of Provinces (Select Committee) voted to amend the Bill by incorporating the term "equitable remuneration" wherever royalties are mentioned, particularly in sections pertaining to the distribution of royalties in literary, musical, and audiovisual works. CAB [B13E-2017| 1 August 2023] incorporating additional amendments proposed by the Select

[60] See President, Republic of South Africa *Referral of the Copyright Amendment Bill [B13B-2017] and the Performers Protection Amendment Bill [B24-2016] to the National Assembly* 16 June 2020, available at *https://libguides.wits.ac.za/ld.php?content_id=55785870,* accessed on 10 November 2020.

[61] These treaties include the WIPO Copyright Treaty (WCT), the WIPO Performance and Phonograms Treaty (WPPT), and the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are blind, visually impaired or otherwise print disabled. See Ibid.

[62] C Jooste 'A Diamond in the Rough – Technology and the Copyright Amendment Act' 19 August 2015 *http://blogs.sun.ac.za/iplaw/2015/08/19/a-diamond-in-the-rough-technology-and-the-copyright-amendment-act/*

Committee to define the acceptable standard of royalties as equitable. On 5 September, CAB [B13F-2017| 5 September 2023] hereinafter referred to as the CAB, was drafted. On 26 September 2023, the CAB was passed by the NCOP and returned to the National Assembly for concurrence.

The CAB was passed by the National Assembly on 29 February 2024 and, as of October 15, 2024, was awaiting presidential assent. However, on that date, the president referred the CAB to the Constitutional Court to review its constitutionality.[63] This action is in line with section 79 of the South African Constitution, which empowers the president to make a referral to the Constitutional Court when the president decides that a bill referred to parliament has not fully accommodated his reservations. We now await the release of the referral documents to gain insight into the specific reasons behind the President's decision to defer the CAB to the Constitutional Court.

6.2.3. SA Copyright Act approach

This section discusses the SA Copyright Act approach as guided by the 4 components of an equitable revenue distribution system as established in section 2.3.4. of the thesis.

6.2.3.1. Justice in the initial acquisition of rights

This subsection discusses justice in the initial acquisition of rights, specifically focusing on standards for equitable remuneration within the South African copyright framework. It examines ex-ante interventions, including the right to equitable remuneration for music artists and the governing forms and standards. It also addresses ex-post interventions, such as accountability and transparency obligations, copyright contract mechanisms, common remuneration standards, and dispute resolution processes. Consequently, it provides insights into how South African copyright law promotes equity for music artists in their contractual relationships and the commercialization of their music.

[63] South African Government 'President Cyril Ramaphosa refers the Copyright Amendment Bill and Performers' Protection Amendment Bill to Constitutional Court' 15 October 2024, available at *https://www.gov.za/news/media-statements/president-cyril-ramaphosa-refers-copyright-amendment-bill-and-performers%E2%80%99*, accessed on 15 October 2024.

6.2.3.1.1. **Ex-ante interventions: Standards for equitable remuneration**

This section on ex-ante interventions outlines the standards for equitable remuneration for music artists in South Africa, focusing on their rights and the forms and standards of remuneration established within the existing copyright framework.

6.2.3.1.1.1. The right of music artists to equitable remuneration for the commercialization of music

There is no explicit provision of the right to equitable remuneration of music artists in the SA Copyright law. South African legislators rely on the inference of this right as drawn from the provision of economic rights of music artists.[64]

6.2.3.1.1.2. Form and standard of equitable remuneration

In South Africa, music is easily transferred, subject to a few requirements.[65] Music may be transferred by assignment, testamentary freedom, or operation of the law.[66] Since the SA regime for the protection of music artists exists in two main legislation, the rules for literary works, musical compositions, published editions and sound recordings are contained in the SA Copyright Act, while the rules for performances are in the Performers' Protection Act, 1967.[67]

The SA Copyright Act has a few rules on the transfers of copyright works. Section 22(2) of the SA Copyright Act provides that a transfer of music is limited to the rights the copyright owner has control over.[68] The SA Copyright Act allows for the transfer of existing and future works.[69]

[64] Sections 6 and 9 of the SA Copyright Act and section 5 of the Performers Protection Act, 1967.

[65] See sections 22(1) of the SA Copyright Act and section 13 of the Performers' Protection Act, 1967.

[66] Section 22(1) of the SA Copyright Act.

[67] SA Copyright Act and the Performers' Protection Act, 1967.

[68] Section 22(2) of the SA Copyright Act.

[69] Section 22(5) of the SA Copyright Act.

Transfers are binding to any successor in the title except a purchaser in good faith and without notice.[70]

Assignments and exclusive licenses must be in writing.[71] Non-exclusive licenses may be written, oral, or inferred by conduct; and may be revoked according to the initial license or a further contract.[72]

Section 22(8) of the SA Copyright Act requires a licensee to obtain consent from the original licensor before issuing a sublicense.

The Performers' Protection Act, 1967 does not have any rules restricting the transfer of performers' works. Section 13 allows performers to enter contracts for the use of performances.

The form of remuneration for music artists is not regulated in the SA Copyright Act and the Performers Protection Act. Thus, lump-sum and periodical remuneration for music artists are acceptable in South Africa.

The two legislations (the SA Copyright Act and the Performers Protection Act, 1967) do not provide the standard required for remuneration. Remuneration is negotiated between music artists and contracting parties. If there is no agreement regarding remuneration, the matter can be taken to the Copyright Tribunal for determination.[73]

6.2.3.1.2. **Ex-post interventions: Strengthening accountability and transparency obligations for intermediaries involved in the commercialization of music**

SA copyright law regulates the accountability and transparency obligations for just one set of intermediaries, CMOs.[74] This may be explained by the fact that most music artists in South

[70] Section 22(7) of the SA Copyright Act.

[71] Section 22(3) of the SA Copyright Act.

[72] Section 22(4) of the SA Copyright Act.

[73] Forere op cit note 5.

[74] CS Regulations, 2006.

Africa exercise their remuneration rights collectively.[75] Notably though, most of the provisions requiring good governance and transparency of CMOs, only apply to needle-time CMOs. [76]

SA Copyright law lacks provisions that require other intermediaries and third parties in the licensing chain to provide information disclosures or be accountable to music artists, regarding the commercialization of their music.

The thesis discusses the system for ensuring the transparency and accountability of CMOs, in South Africa, under three major components: the registrar's supervisory mandate over CMOs, the requirement for representative CMOs and distribution plans and time limits.

6.2.3.1.2.1. Registrar's supervisory mandate over CMOs

The Registrar is empowered to approve and withdraw accreditation of needletime CMOs.[77] The requirements for accreditation of a CMO include enabling adequate and efficient royalty distribution, being compliant with the Broad-Based Black Economic Empowerment Act, 2013 (Act No. 46 of 2013), the Companies Act, 2008, and other legislation.[78] Adopted a constitution that contains all the requirements for accreditation.

The Registrar has audit and inspection powers to assess CMOs' compliance with the copyright law.[79] For this reason, the Registrar has an extensive right to request and receive information, financial records and other records from CMOs.[80] Needle-time CMOs must inform and update the Registrar of any changes and documents that may affect collective management.[81] For example, they must register their AoAs and MoAs with the Registrar, and reciprocal

[75] Forere op cit note 5 at 9-10.

[76] Regulations 4(3) and 4(4) of the CS Regulations; DO Oriakhogba (2019).

[77] Ibid.

[78] DO Oriakhogba 'Regulation of Collective Management Organizations in South Africa' (2019) *WTO.org* available at *https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2019/chapter_12_2019_e.pdf,* accessed on 20 October 2020.

[79] Ibid.

[80] Ibid.

[81] Ibid.

agreements with foreign CMOs.[82] Needletime CMOs must also furnish updated lists of members' audited financial statements.[83]

If a CMO is not compliant, the Registrar has the power to withdraw the CMO's accreditation according to the rules stipulated in regulation 4 of the CS Regulations, 2006.

6.2.3.1.2.2. Requirement for representative CMOs

CMOs should be representative of the group of rights holders they administer rights for.[84] CMO members have a right to participate in CMO management.[85]

The SA Copyright Act and the CS regulations are silent on how non-CMO members are involved in CMO management. A general industry practice by CMOs in South Africa is to trace non-members and then request them to become members of the CMOs and distribute their respective royalties.[86] It is worth noting that membership is not a prerequisite for royalty distribution to non-members. These CMOs treat non-members the same way they do members in the distribution and deduct administration costs before remitting the royalties to non-members. The process of tracing and distribution to non-members is limited to three years. Suppose the royalties remain unclaimed after three years. In that case, the royalties collected from non-member music commercialisation are considered part of the CMOs' income and distributed to members according to a CMO's distribution rules.[87] While the 3-year grace period for unclaimed music royalties seems justified, for the benefit of enhanced transparency by CMOs, there is a need for regulation of the minimum period for CMOs to retain unclaimed royalties and how much royalties should be used.[88]

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[82] Ibid.

[83] Ibid.

[84] Regulation 5 of the CS Regulations, 2006.

[85] Ibid.

[86] DO Oriakhogba op cit note 78 at 179.

[87] Ibid.

[88] DTI op cit note 2 at 80.

6.2.3.1.2.3. Distribution plans and time limits in collective management

CMOs are required to distribute royalties at least once a year.[89] The distribution should be made according to the distribution plans and reflect as nearly as possible the actual usage of the works.[90]

The capping of administration costs incurred by CMOs is paramount to enhancing transparency and accountability.[91] The CRC reported that SAMRO retains the highest administration costs, which is 30% of the royalties collected.[92] The report, however, noted that the 30% is contrary to international best practice, which requires administration costs to range between 10% and 24% of the royalties collected.[93] The CRC, therefore, recommended that the administration cost to royalties ratio be 20:80.[94] The CS regulations were amended, capping the administration costs for needletime CMOs at 20% of the royalties collected.[95] The 20% cap on administration costs only applies to needletime CMOs, leaving non-needletime CMOs unregulated on administration costs.[96]

6.2.3.1.3. **Ex-post interventions: Copyright Contract Mechanisms**

The only copyright contract mechanism for the protection of music artists exists for assigned copyright works that were created before 1965.[97] Copyright of such works reverts to the

[89] Regulation 8 of the CS Regulations.

[90] Ibid.

[91] The DTI Presentation to the Subcommittee: Trade and Industry Regulation of Collecting Societies 28 March 2018 ppt. 21 available at *https://pmg.org.za/committee-meeting/26093*/, accessed on 20 September 2023.

[92] Ibid, DTI op cit note 2 at 72.

[93] Ibid.

[94] Ibid.

[95] Regulation 6(2) of the CS Regulations.

[96] Regulation 6 of the CS Regulations.

[97] See the Patents, Designs, Trademarks and Copyright Act, 1916 and the Copyright Act, 1965.

author's heirs 25 years after the death of the author.[98] This reversion right existed between 1961 and 1965 and is no longer available in the SA Copyright Act.[99]

6.2.3.1.4. Ex-post interventions: Common Remuneration Standards

SA copyright law does not prescribe any rules for the development or acknowledgement of common remuneration rules or standards for music artists.

6.2.3.1.5. Ex-post interventions: Mechanisms for enforcing equitable remuneration of music artists in SA

SA copyright law does not recommend ADR for the resolution of revenue collection and distribution disputes.

The Copyright Tribunal has the jurisdiction to hear and determine disputes between CMOs, licensors, and licensees.[100] CMOs and persons that require licenses for the use of works may therefore approach the Tribunal to resolve such disputes.

Appeals against decisions of the Tribunal are heard in the High Court.[101] When aggrieved by the decision of the High Court, music artists may appeal to the Supreme Court of Appeal and then to the Constitutional Court according to their appellate jurisdiction.[102]

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[98] Ibid.

[99] Anton Mostert Chair of Intellectual Property (CIP) 'Awakening the Lion in the Jungle' 31 May 2019 available at *https://blogs.sun.ac.za/iplaw/2019/05/31/awakening-the-lion-in-the-jungle/*, accessed on 25 August 2020; South African Research Chair, Intellectual Property 'Discussing Reversion Rights at the CC Global Summit 2020: the history of South Africa's provisions' 23 October 2020 available at *http://www.ipchair.uct.ac.za/HistoryofReversionRightsinSA*, accessed on 20 April 2021.

[100] Section 30 of the SA Copyright Act.

[101] Section 36 of the SA Copyright Act and article 169 of the Constitution of the Republic of South Africa, 1996.

[102] Articles 167 and 168 of the Constitution of the Republic of South Africa, 1996.

6.2.3.2. Justice in the subsequent acquisition of rights

Both Kenya and South Africa face a common challenge in their copyright laws, particularly concerning transparency and accountability in the remuneration of music artists. In both jurisdictions, there is a deficiency in regulations addressing transparency obligations for intermediaries, resulting in a limitation of music artists' audit rights. The existing obligations do not sufficiently compel contracting parties to disclose information about sub-licensees and third parties. This lack of transparency hinders the ability of music artists to fully exercise their audit rights, leading to a shortfall in accountability within the music industry in both Kenya and South Africa.

6.2.3.3. Transitional justice when implementing reforms for distributive justice in copyright law

In both Kenya and South Africa, a shared limitation exists in the retrospective effect of copyright law amendments. None of the amendments possesses retrospective applicability. Consequently, music artists in both countries are compelled to wait until the expiration of their existing agreements for the new legal provisions to become applicable. This shared characteristic indicates a deficiency in the distributive justice test, as the transition provisions fail to address the immediate concerns of music artists, delaying the application of beneficial legal changes until the conclusion of their current agreements.

The retrospective application of the right to equitable remuneration is discussed in chapter 6.3.4. of this thesis, that highlights the CAB approach.

6.2.3.4. Justice in reparations for violating the protection of music artists during the initial and subsequent acquisition of rights

Both Kenya and South Africa also share a common challenge in their copyright laws in the realm of achieving justice for violations of the protection of music artists. This challenge extends to both the initial and subsequent acquisition of rights, as well as transitional justice matters. In both jurisdictions, there is a gap or challenge in providing effective reparations for music artists who experience infringements on their rights during these critical stages. This

shared deficiency highlights a similar limitation in addressing the comprehensive protection and reparative justice needed for music artists in both Kenya and South Africa.

6.2.4. Copyright Amendment Bill (CAB) approach to enhancing the equitable remuneration of music artists in South Africa

This section discusses the proposed amendments to the SA Copyright Act that are meant to enhance the equitable remuneration of music artists, as guided by the four principles of an equitable revenue distribution system.[103] This is done to identify and discuss any proposed improvements to the approach outlined in the SA Copyright Act approach.

6.2.4.1. Justice in the initial acquisition of rights

This subsection examines the proposed interventions in the Copyright Amendment Bill (CAB) aimed at ensuring justice in the initial acquisition of rights and equitable remuneration for music artists. These measures include the establishment of explicit rights to equitable remuneration and standardized remuneration frameworks, as well as accountability mechanisms to address historical inequities. The subsections that follow detail the various provisions of the CAB and their potential impact on the rights of music artists in South Africa.

6.2.4.1.1. Ex-ante interventions: Standards for equitable remuneration

6.2.4.1.1.1. *The right to equitable remuneration*

The proposed sections 6A, 8A and 9A of the CAB will explicitly establish the right to equitable remuneration, ensuring that music artists who assign or license their rights for the commercialization of music are entitled to equitable remuneration. However, it is worth noting that the proposed sections 6A (2)(b) and 9A (1)(a) allow some contractual flexibility in clarifying the scope of application of this right to equitable remuneration for literary and musical works and sound recordings, respectively.

[103] The principles were established in section 2.3.4. of the thesis.

Moreover, when considering the proposed sections 8A on audiovisual works, alongside the contract override provision in proposed section 39B, it suggests that the right to equitable remuneration cannot be altered by contract, rendering any contractual term attempting to do so unenforceable.[104] Proposed section 8A is thus unwaivable even when performers would wish to negotiate for alternate forms of remuneration.

6.2.4.1.1.2. Form and standard of equitable remuneration

The CAB prescribes 'equitable' as the standard of remuneration for music artists.[105] In the CAB, the form of equitable remuneration for literary and musical works is described through the definition of the term 'royalty' as the gross profit derived from the exploitation of such works by the copyright owner or an authorized person.[106] However, for performers of audiovisual works, it is not clear how royalty rates will be determinable.[107] Instead, it appears to be defined as a share of the license fee paid by a user of the audiovisual work to the copyright owner, similar to needletime rights as provided in proposed section 9A.

Proposed sections 6A (4) and 8A (4) also regulates what should be included in remuneration clauses for literary and musical works and performances.[108] The remuneration agreement or clause must include the following:

- First, the rights and obligations of the music artist.
- Second, the music artist's share of remuneration agreed on, or ordered by the Tribunal.
- Third, the method and period within which the remuneration should be received, and
- Fourth, the dispute resolution mechanism.[109]

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[104] See further Forere op cit note 5.

[105] See clauses 5, 9 and 11 of the CAB, which propose the introduction of sections 6A, 8A and 9A into the Copyright Act, 1978.

[106] Clause 5 of the CAB proposes introduction section 6A into the Copyright Act, 1978.

[107] See clauses 9 and 11 of the CAB, which propose the introduction of sections 8A and 9A into the Copyright Act, 1978.

[108] Clauses 9 and 11 of the CAB.

[109] See clauses 5 and 9 of the CAB, which propose the introduction of sections 6A (3) (a), 6A (5), 8A (2)(a) and 8(A)(4) into the Copyright Act, 1978.

The CAB does not allow lump-sum remuneration for authors of literary and musical works.[110]

6.2.4.1.2. Ex-post interventions: Accountability and transparency obligations for intermediaries involved in the commercialization of music

The Copyright Review Commission, 2011 identified inaccurate reporting on music usage by broadcasters as a significant obstacle to ensuring equitable remuneration for music artists.[111] In response, the CAB proposes the introduction of sections 8A (6), 9A (4), and 22C(4) into the Copyright Act, 1978. These amendments will mandate reporting obligations for the use of sound recordings and audiovisual works, coupled with criminal penalties for non-compliance.[112] These measures aim to enforce accountability among third parties in disclosing information about sub-licensees and other entities not directly contracting with music artists.

If a juristic person is found guilty, these proposed provisions prescribe minimum fines calculated as a percentage of turnover (at least 10%). Myburgh, A et al (2023), however, argue that these high penalties, although intended to promote transparent reporting, are considered disproportionate and that alternative penalties should be considered.

The CAB proposes an accountability and transparency burden on the user of sound recordings. Users of sound recordings and performances fixed in audiovisual works are required to keep records of usage and submit them to music artists for assessment of remuneration.[113] This provision is in response to the CRC report which found that CMOs' lack of access to music log sheets usually kept by broadcasters and other users constitutes one of the reasons for inequitable music royalty distribution.[114] Notably, the CAB does not propose further changes regarding accountability and transparency for other intermediaries and third parties in the licensing chain, aside from CMOs and third parties utilizing sound recordings and performances fixed in audiovisual works.

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[110] See clauses 5, 9 and 11 of the CAB.

[111] DTI op cit note 2 at 77.

[112] Clauses 9, 11, and 27 of the CAB.

[113] See clause 11 of the CAB, which proposes the introduction of section 9A(1)(b) into the Copyright Act, 1978

[114] DTI op cit note 2 at 77.

The accountability and transparency obligations for CMOs are strengthened in the CAB.[115] The CAB seeks to bring non-needletime CMOs into the CS Regulations issued under the SA Copyright Act.[116] Apart from accreditation of needletime CMOs, the CAB proposes that the CIPC, through the Registrar, should assume all responsibilities for the administration of all CMOs in South Africa. Further, the accreditation should be valid for five years and requires CMOs to apply for renewal after that.[117] The CIPC may cancel or suspend the accreditation. One point to note, here, is that there would be no consequences for the non-accreditation of CMOs.

Notably, none of the provisions expound on the involvement of right holders who are not CMO members in the management. The proposed section 22D may guide how CMOs may deal with non-CMO members, but the provision can only apply to members.[118]

The proposed section 22D seeks to bring CMOs under the control of copyright owners by creating mandatory obligations of CMOs to copyright owners.[119] These obligations include the collection and distribution of royalties according to CMOs' constitutive documents, providing full and detailed information to copyright owners on the activities of the CMO, and distributing royalties in proportion to their actual use.[120]

The maximum period for retention of the royalties by CMOs is 3 years after collection. Oriakhogba argues that this period is contrary to the one year recommended by the CRC in its 2011 report.[121] He further contends that the three-year period fails to conform to the obligation of CMOs, as companies, to file annual returns with the CIPC. If a Collecting Management Organization (CMO) fails to distribute royalties within three years of collection, it raises concerns about timely remuneration for music artists. Such delays can impact artists, authors,

[115] See clause 27 of the CAB, which proposes introduction of sections 22D, 22E and 22F into the Copyright Act, 1978.

[116] Clause 27 of the CAB, which proposes introduction of section 22B into the Copyright Act, 1978.

[117] Ibid.

[118] See clause 25 of the CAB, which proposes the introduction of section 22D into the Copyright Act, 1978.

[119] Ibid.

[120] Ibid.

[121] Oriakhogba op cit note 35 at 184.

and other rightsholders who rely on these payments for their livelihoods. Ensuring efficient management and timely distribution of royalties by CMOs is crucial for maintaining a fair and sustainable ecosystem for creative works. In that case, they will be required to invest the royalties in an interest-bearing account with a similar interest rate or higher than the savings of the account of a financial institution. CMOs will also be required to pay these amounts to copyright owners upon demand.

Section 22D adequately regulates how CMOs are required to deal with undistributed royalties but fails to adequately regulate how CMOs are required to deal with the right of non-members.[122]

Section 22E empowers the CIPC to request returns and reports from CMOs. This provision ensures that the operation of CMOs ensure transparent and efficient royalty distribution.

The CAB also seeks to regulate the procedure for suspension and cancellation of CMO accreditation and protect the interests of copyright owners during a CMO's suspension and after the cancellation of accreditation before another CMO is accredited.[123] Despite regulating the procedure for approval and withdrawal of accreditation of CMOs, the Bill fails to prescribe consequences for CMOs that operate without accreditation.

The proposed section 22F provides that the CIPC may issue a compliance notice as per section 171 of the Companies Act or apply to the Copyright Tribunal to institute an inquiry into the affairs of a CMO. The CIPC may apply to the Copyright Tribunal for an order to suspend the CMO's accreditation pending an inquiry.[124] After the conclusion of the inquiry, the CIPC has the discretion to determine how to deal with a CMO if the CMO is found in contravention of any rules on transparent and efficient royalty collection and distribution or acting in a way that is detrimental to copyright owners.[125] The CIPC may apply for an order to cancel the CMO's accreditation.[126]

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[122] Ibid.

[123] See clause 27 of the CAB, which proposes the introduction of section 22F into the Copyright Act, 1978.

[124] Ibid.

[125] Ibid.

[126] Ibid.

Section 22F (5) of the Bill seeks to introduce a provision that protects the interests of copyright owners during the suspension or cancellation of their CMOs. The provision puts the CIPC in charge of the functions of the CMO during the period of a CMO's suspension or after the cancellation of a CMO's accreditation.

6.2.4.1.3. Ex-post interventions: Strengthening accountability and transparency in copyright contracts

The CAB seeks to introduce a reversion right to establish term limits for assignments of music. The proposed amendments aim to protect music artists after 25 years.

Reversion right for assignments

Solomon Linda originally recorded "Mbube" in 1939. The song gained significant popularity, particularly in the United States, where it was re-recorded by various artists, including the Tokens, who released it as "The Lion Sleeps Tonight" in 1961.[127] Linda's original rights to the song were exploited without appropriate compensation, and he died in poverty in 1962.[128] The case raised critical questions about the ownership of music rights and the exploitation of artists.[129] After Linda's death, his estate sought to reclaim royalties and establish rightful ownership over the song, leading to a protracted legal battle. [130]This situation underscores the disparities in the treatment of artists in South Africa and the historical context of copyright law that often-favoured producers and intermediaries over creators.

In light of cases like Solomon Linda's, the CAB seeks to introduce reversion rights through proposed amendments to section 22(3) of the Copyright Act. These rights allow creators to reclaim ownership of their works after a certain period, specifically after 25 years, if their works have not been adequately commercialized. This legislative move aims to protect artists from

[127] O Dean *Copyright in the Courts: The Return of the Lion* (2006) WIPO Magazine, Issue 2/2006. Available at *https://www.wipo.int/wipo_magazine/en/2006/02/article_0006.html*, accessed on 11 October 2024; O Dean 'Awakening the lion in the jungle' (2019) 19(7) *Without Prejudice* 30 at 30-32.

[128] Ibid.

[129] Ibid.

[130] Ibid.

the exploitation that Linda experienced and to ensure that they can reclaim their rights when their works are not being used effectively.

6.2.4.1.4. Ex-post interventions: Common remuneration standards

The CAB aims to enhance regulatory oversight through proposed amendments to section 39 of the Copyright Act. Specifically, the CAB suggests the introduction of section 39(cG), which broadens the Minister's authority to establish compulsory and standard contractual terms to be incorporated into agreements governed by the Copyright Act. These regulations are particularly relevant to the newly proposed statutory rights to royalties outlined in sections 6A and 8A. Notably, there is an omission in reference to these powers concerning sound recordings.

Proposed section 39(cG) could serve as a framework for establishing common remuneration standards for music artists within the music industry.

6.2.4.1.5. Ex post intervention: Mechanisms for enforcing equitable remuneration rights for music artists under the Copyright Amendment Bill (CAB*)*

Proposed section 29A(2)(a) of the CAB, seeks to widen the jurisdiction of the Tribunal to entertain all matters that pertain to the application of the SA Copyright Act.[131] Most importantly, the proposed section 29A(2)(e) explicitly establishes the Tribunal's jurisdiction to settle disputes regarding payment of equitable remuneration. The CAB also prescribes the proceedings in the copyright tribunal.[132] It provides that tribunal hearings must be conducted in public unless there are conditions to justify the hearing in a private court, like confidential information.[133] The proceedings are conducted informally, in an inquisitorial manner, expeditiously, and according to the rules of natural justice.[134] The Anton Mostert Chair for Intellectual Property criticizes proposed section 29E provision that recommends inquisitorial

[131] See clause 33 of the CAB.

[132] See clause 27 of the CAB, which proposes the introduction of section 29E into the Copyright Act, 1978.

[133] Ibid.

[134] Ibid.

proceedings.[135] They argue that inquisitorial proceedings are alien to South Africa and inappropriate for adjudicating disputes with conflicting evidence.[136]

6.2.4.2. Justice in the subsequent acquisition of rights

The CAB approach for enhancing justice in subsequent acquisition of rights is through the mandatory reporting obligations for the use of sound recordings and performances fixed in audiovisual works, coupled with criminal penalties for non-compliance, as discussed in section 6.2.4.1. of this thesis.

6.2.4.3. Transitional justice during reforms for distributive justice in copyright law

The proposal for retrospective application regarding equitable remuneration or share of royalties in proposed sections 6A and 8A was initially suggested but later withdrawn following the President's rejection of the CAB in 2020.[137] Forere argues that the primary concern with retrospective application was its blanket application, regardless of whether authors were previously equitably remunerated.[138] Under retrospective application, music artists who received equitable remuneration through lump sum payments would have been able to pursue intermediaries and other contractual parties for ongoing periodic remuneration.[139] Forere advocates for the application of retrospective application with reference to certain conditions

[135] The Anton Mostert Chair of Intellectual Property Law 'Written comments on the Copyright Amendment Bill 2017' (2018) 63 available at *https://blogs.sun.ac.za/iplaw/files/2018/07/Written-comments-on-the-Copyright-Amendment-Bill-2018-final.pdf*, accessed on 20 October 2023.

[136] Ibid.

[137] CAB [B13B-2017| 16 November 2018]; President, Republic of South Africa *Referral of the Copyright Amendment Bill [B13B-2017] and the Performers Protection Amendment Bill [B24-2016] to the National Assembly* 16 June 2020, available at *https://libguides.wits.ac.za/ld.php?content_id=55785870*, accessed on 10 November 2020.

[138] Forere op cit note 5.

[139] Ibid.

such as amending existing contracts to align with reforms, specifying rights and obligations, payment methods and periods, and adherence to prescribed dispute resolution mechanisms.[140]

This thesis argues that retrospective application empowers music artists to enforce their right to remuneration moving forward.[141] In essence, while retrospective application of the CAB would have posed challenges regarding its broad coverage, it would have also offered music artists the chance to seek equitable remuneration for their past commercialization of music and ensure compliance with updated regulations moving forward.

6.2.4.4. Justice in reparations for violations during the initial and subsequent acquisition of rights

Clause 36 of the CAB seeks to introduce a contract override clause into section 39B of the Copyright Act, 1978. Proposed section 39B will safeguard the rights of music artists, ensuring that their protections cannot be altered or restricted by agreements with intermediaries. Any contractual terms seeking to waive a right or protection under the Copyright Act, 1978 will be deemed unenforceable. However, the proposed section will not prohibit or interfere with open licenses or voluntary dedications of a work to the public domain.

Consequently, proposed section 39B and the CAB approach represent a more progressive stance in addressing the challenge of ensuring that music artists are equitably remunerated compared to the existing SA Copyright Act. This progressiveness is evident in the CAB's approach to enhancing justice during the initial acquisition of rights, subsequent acquisition of rights and transitional justice when implementing distributive justice in copyright law.[142]

[140] Ibid.

[141] See the principles of an equitable copyright system as discussed in section 2.3.4. of this thesis.

[142] See sections 6.2.4.1-6.2.4.4. of this thesis.

6.2.5. Conclusion on the practical and broader significance of the South African approach to equitable remuneration for music artists

The objective of Section 6.2 was to explore South African approaches to achieving a more equitable distribution of music revenue between music artists and intermediaries under copyright law. This section identified both the strengths and weaknesses of the South African model, particularly in light of proposed revisions in the Copyright Amendment Bill (CAB).

The analysis revealed several shortcomings in the South African approach, particularly in how it addresses the remuneration of music artists. While the CAB, proposes revisions aimed at improving equity, it also presents its own deficiencies, as discussed in section 6.2.4. of the thesis.

By critically examining the South African framework, the thesis draws valuable lessons that can inform the pursuit of equitable regulation in Kenya. Understanding the failures of the South African model allows for a more nuanced advocacy for reforms in Kenya's copyright law, ensuring that the lessons learned contribute to creating a fairer distribution of music revenue for artists.

6.3. Evaluating reform options for Kenya

This section offers a conclusion of the chapter by consolidating the lessons from Germany, the German implementation of the EU approach and the South African approach, to evaluate reform options for Kenya.

The German and South African approaches, though different in many respects to the Kenyan system, have not translated to the equitable revenue distribution system envisioned by the four principles developed in the thesis.[143] Nevertheless, the lessons achieved in implementing these approaches offer a good starting point for Kenya to learn from for the equitable protection of music artists.

Generally, the German approach contains most elements of an equitable revenue distribution system, as prescribed by principles of an equitable revenue distribution system. The main challenge in Germany is in the implementation of the provisions for protecting music artists.

[143] See discussion in chapters 5 and 6 of the thesis.

Constant amendments to copyright law also show Germany's commitment to the protection of music artists.

The South African approach is lacking in most respects, but the CAB approach seeks to address some of these shortcomings. The Kenyan approach is also lacking in terms of the four principles.

6.3.1. Justice during the initial acquisition of rights

In light of the lessons learned from the German implementation of EU standards and the South African approach, this section evaluates key reforms that Kenya can adopt to enhance justice in the initial acquisition of rights for music artists, ensuring they receive equitable remuneration for their creative contributions.

6.3.1.1. Ex-ante interventions: Standards for equitable remuneration

6.3.1.1.1. The right of music artists to equitable remuneration for the commercialization of music

Kenya should learn from the German, EU and the South African CAB approach, on the importance of protecting music artists through the explicit provision of the right to equitable remuneration for music artists who assign or license their rights for the commercialization of their music.

6.3.1.1.2. Form and standard of equitable remuneration for music artists

Kenya should regulate the form of remuneration that is equitable, i.e. when and how periodic vs lumpsum remuneration should be considered equitable. Although lump sum remunerations are mostly inequitable, they should be allowed with some restrictions according to industry specificities. The German approach appreciates this in section 32(2) of the UrhG and allows lump sum payments that conform to the standards of equitable remuneration in the UrhG. The CAB takes away the option of lump sum payments for literary and musical works.[144]

[144] Section 6A of the CAB.

The UrhG also provides for valid waiver of remuneration rights, therefore, reflecting some aspect of contractual freedom in balancing the rights of music artists and intermediaries.

Unlike the South African approach, the German approach has a standard for equitable remuneration. The German approach in section 32(2) of the UrhG implements the standard of "appropriate and proportionate" recommended in the EU Directive.[145] This standard is commendable for balancing the rights and interests of music artists and intermediaries.[146] Remuneration should correspond to "what is customary and fair in business relations, given the nature and extent of the possibility of use granted, in particular the duration, frequency, extent and time of use, and considering all circumstances", at the time of the agreement.[147]

6.3.1.2. Ex-post interventions: Accountability and transparency obligations

Apart from the equitable inclusion of right holders who are not CMO members in the management of CMOs, to enhance the transparency and accountability of CMOs, the Kenyan approach to regulating CMOs is quite comprehensive. The Kenyan system is, however, lacking in regulating the transparency and accountability of other intermediaries and third parties in the license chain.

These two issues are adequately regulated in German legislation (UrhG and VGG). Sections 32d and 32e of the UrhG should be adopted in Kenya to regulate the accountability and transparency of other intermediaries and third parties. Section 20 of the VGG should also be adopted to ensure the participation of right holders who are not CMO members in CMO management.

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[145] Article 18 of the EU Directive; European Copyright Society (ECS) 'Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market' (2020) 11 *Journal of Intellectual Property, Information Technology and E-Commerce Law*133 para 1; O Mullooly 'DSM Directive and fair remuneration for authors and performers' *Arthur Cox* 18 June 2020 available at *https://www.arthurcox.com/knowledge/dsm-directive-and-fair-remuneration-for-authors-and-performers/,* accessed on 19 June 2021.

[146] Forere op cit note 5.

[147] Sections 32(2), 36, 36a of the UrhG; N Malevanny *Online Music Distribution-How Much Exclusivity Is Needed?: A Study of International, European, German and US Copyright Systems and Their Objectives* (2019) 92; RM Hilty and A Peukert 'Equitable Remuneration" in Copyright Law: The Amended German Copyright Act as a Trap for the Entertainment Industry in the U.S.' (2004) 22 *Cardozo Arts & Entertainment Law Journal* 401 at 429-430. Joint remuneration agreements are discussed in detail in section 5.2.3. of the thesis.

Like Kenya, the South African approach is lacking in both aspects.

6.3.1.3. Ex-post interventions: Copyright contract mechanisms for ensuring equitable remuneration of music artists

Germany has several copyright contract mechanisms for the protection of music artists:

1. contract adjustment,[148]
2. right of revocation for unknown types of uses,[149]
3. 5-year term limit for agreements on future works,
4. right to further equitable participation,[150]
5. right of revocation for non-use or insufficient commercialization,[151]
6. right of revocation for changed conviction,[152] and
7. 10-year exclusivity period for buy-out agreements that grant exclusive licenses[153].

South Africa seems more concerned with reversion rights for assignments and non-use. The mechanisms in the UrhG are broader and address more situations of music artists' vulnerability.

Kretschmer recommends reversion rights after 10 years based on scholarship that shows that the commercialization of works generates more revenue in the first 10 years.[154] On this basis, the German approach of providing a 10-year exclusivity period for buy-out agreements that grant exclusive licenses is equitable. The South African CAB approach which recommends an automatic reversion of rights after 25 years of assignment, seems more equitable for providing a longer period to ensure intermediaries benefit from their investment.

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[148] section 32 of the UrhG.

[149] Sections 31a and 32c of the UrhG.

[150] Sections 32a and 79a (2) of the UrhG.

[151] Section 41 of the UrhG.

[152] Section 42 of the UrhG.

[153] Section 40a of the UrhG.

[154] Forere op cit note 5, M Kretschmer 'Copyright Term Reversion and the 'Use-It-Or-Lose-It' Principle' (2012) *International Journal of Music Business Research* 2227 at 2227-5789.

For non-use/ limited use, the German approach is more equitable to intermediaries for allowing renegotiation through a right to revocation, as opposed to an automatic reversion of rights as suggested in the SA CAB approach.

The other copyright contract provisions in the UrhG should be adopted in Kenya to reflect the different ways that the challenge of inequitable remuneration manifests and how it should be dealt with.

6.3.1.4. Ex-post interventions: Common remuneration standards

The SA approach does not provide for common remuneration standards.

Even though there are no common remuneration standards for the music industry in Germany. The regulations on the joint remuneration agreements in section 36 of the UrhG are commendable for incentivizing self-regulation in the music industry, especially after the recent 2021 amendments to the Kenya Copyright Act that can be read as an approval for the development of common remuneration standards in the music industry.[155]

Kenya may learn from the shortcomings of applying joint remuneration agreements in Germany. Joint remuneration agreements should be mandatory for every copyright industry. There should be clear rules for the music artists' and intermediary associations allowed to negotiate these agreements. The Copyright Act should also stipulate that the agreements are binding to non-members of these associations to the extent that they reflect common remuneration standards; the court may apply that in deciding on the "equitableness" of royalties.

To mitigate the challenge of music artists' and users' associations reluctance to develop these rules, the law may require that the Minister of Sports, Culture, and Heritage should be empowered to develop these rules in consultation with the various stakeholders. These common remuneration standards should be prescribed in a way that they are minimum standards that can be reviewed periodically or when circumstances call for review.[156]

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[155] See discussion in section 5.6. of the thesis.

[156] AB Makulilo 'Re-balancing artists' rights in cell phone ringtones? An analysis of Tanzanian copyright' (2013) 8(6) *Journal of Intellectual Property Law & Practice* 474 at 474-479.

Taking guidance from section 36a of the UrhG, there should be ADR mechanisms for resolving disputes on joint remuneration agreements before the disputes are referred to court.

6.3.1.5. Ex-post interventions: Mechanisms for enforcing equitable remuneration rights for music artists

Learning from the experiences in Germany and the EU approach, specialized dispute settlement mechanisms to resolve the tension between music artists and intermediaries in revenue distribution are an important component in the protection of music artists.

Specialized dispute settlement mechanisms are encouraged through provisions that encourage ADR or give copyright tribunals and specialized arbitration boards the jurisdiction to determine remuneration matters.

Consequently, the Kenyan Copyright Act should encourage ADR for remuneration dispute settlement. It should also expand the jurisdiction of the copyright tribunal to cover all issues dealing with the remuneration of music artists.

6.3.2. Justice in the subsequent acquisition of rights

The German approach, with its emphasis on accountability and transparency for third parties within the licensing chain, provides a robust model for Kenya. The structured provisions under the UrhG offer a clear framework for music artists to obtain necessary information, promoting fairness and justice in licensing agreements. However, the applicability of this approach to Kenya would depend on the adaptability of its legal system and enforcement capacity.

The South African approach, while sharing challenges with Kenya in terms of transparency and accountability, may not offer a direct solution. The deficiencies in regulations might not align with Kenya's legal landscape, potentially requiring significant modifications for effective implementation. Kenya may need to consider the shortcomings and strengths of the South African approach carefully.

The CAB approach, as indicated, overlooks justice issues in the subsequent acquisition of rights. This deficiency may limit its applicability to Kenya, especially if the country aims to

address issues related to justice in the value chain for the commercialization of music.[157] Kenya might need a more comprehensive framework that accounts for justice concerns throughout the entire value chain, similar to the German model.

In conclusion, the German approach, with its robust accountability and transparency provisions, appears to align better with Kenya's needs. However, careful adaptation is necessary to ensure its effectiveness within the Kenyan legal context. The South African approach and the CAB model may require substantial adjustments to address Kenya's unique challenges in the equitable remuneration of music artists.

6.3.3. Transitional justice during reforms for distributive justice in copyright law

The EU approach appreciates the importance of transitional justice in enhancing the equitable remuneration of music artists. The EU Directive provides that transparency obligations and dispute resolution mechanisms are the most important in enhancing transitional justice for music artists and intermediaries.[158] Mainly because they do not affect already existing contracts in a way that inequitably takes away from intermediaries. Therefore, Kenya should consider the retrospective application of these provisions when reforming copyright law.

6.3.4. Justice in reparations for violating the protection of music artists during the initial and subsequent acquisition of rights

The framework for reparative justice for music artists in Kenya should integrate insights gained from both the German and South African approaches.

[157] See value chain in section 2.2. of the thesis.

[158] Article 27 of the EU Directive, Forere op cit note 5.

6.4. Conclusion to the South African approach to achieving a more equitable distribution of music revenue and evaluating reform options for Kenya from the German, EU and South African approaches

This chapter aimed to highlight the experiences of Germany and South Africa in regulating the equitable remuneration of music artists and to evaluate reform options for Kenya. It focused on assessing the effectiveness of the existing legal frameworks in both countries and identifying best practices that could be adapted for Kenya.

The analysis revealed that Germany possesses a more equitable and comprehensive system for protecting music artists compared to South Africa. The German framework offers more robust mechanisms for remuneration, while South Africa's system has notable shortcomings. The chapter further evaluated potential reform options for Kenya by incorporating lessons learned from both countries.

In conclusion, the insights gained from the experiences of Germany and South Africa underscore the need for Kenya to adopt a more effective approach to equitable remuneration in its music industry. By learning from Germany's comprehensive protection mechanisms and addressing South Africa's shortcomings, Kenya can implement reforms that enhance the equitable distribution of music revenue for artists.

CHAPTER SEVEN: CONCLUSIONS AND RECOMMENDATIONS

Chapter seven collates the major arguments made in the thesis, drawing conclusions, and offering recommendations for legislative changes aimed at enhancing the equitable distribution of music revenue in Kenya. This thesis is titled *Regulation of Equitable Remuneration for Music Artists in Kenya.* A key objective of the thesis was to address the main research question: How can Kenya achieve a more equitable distribution of music revenue between music artists and intermediaries under copyright law, taking into account how music is commercialized, existing legal structures, and incorporating principles from the Rawlsian theory of justice and legislative interventions designed to protect music artists?

The thesis proposes an approach that balances stakeholder interests, integrates distributive justice and legislative interventions aimed at protecting music artists. This approach ensures equity across the different phases of music commercialization and revenue distribution, including the acquisition of rights, transitional periods during reform implementation, and reparations for violations to safeguard the rights of music artists. Ultimately, this approach aims to foster a more equitable distribution of music revenue. The foundation of this approach rests on four key principles as outlined in chapters two and four through six:

1. **Justice in the initial acquisition of rights**: ensuring equity when music rights are first obtained.
2. **Justice in the subsequent acquisition of rights**: maintaining equity during subsequent rights acquisitions.
3. **Transitional justice** during reforms for distributive justice in copyright law: addressing distributive justice within copyright law reforms.
4. **Justice in reparations** for violations during the initial and subsequent acquisition of rights: providing redress for violations of protections to safeguard music artists during initial and subsequent rights acquisition processes.

7.1. Summary

The research in this thesis was undertaken by way of desktop research. In response to the research question, this thesis focused on two primary objectives:

1. To examine and analyze the dynamics of music artists and intermediaries in the commercialization of music and distribution of music revenue in Kenya.
2. To develop a framework for conceptualizing the "equitable" distribution of music revenue between music artists and intermediaries within the context of Kenyan copyright law.

Six subsidiary objectives informed the research:

1. To provide a framework for conceptualizing what constitutes "equitable" distribution of music revenue, under copyright law, according to the Rawlsian theory of justice and legislative interventions designed to protect music artists.
2. To contextualize the dynamics of the relationships among music artists, intermediaries, and other stakeholders across the value chain of Kenya's music industry.
3. To analyse the legal framework governing the relationships among music artists, intermediaries, and other stakeholders across the value chain of Kenya's music industry. This involved evaluating the existing legal framework and identifying areas within Kenyan copyright law that may require reform to establish a more equitable distribution of music revenue between music artists and intermediaries.
4. To explore the German and EU approaches to tackling the challenge of establishing a more equitable distribution of music revenue between music artists and intermediaries under copyright law.
5. To explore solutions inspired by the South African, German and EU approaches that could assist Kenya in establishing a more equitable distribution of music revenue between music artists and intermediaries under copyright law.
6. To offer recommendations to Kenya for establishing a more equitable distribution of music revenue between music artists and intermediaries within the framework of copyright law.

Chapter two addressed the first subsidiary objective by discussing the purpose of copyright through the lenses of distributive justice and legislative interventions designed to protect music artists, laying the foundation for conceptualizing an "equitable" copyright system in the context of the commercialization of music and distribution of revenue. Within this context, the thesis defined "equitable" as the balancing of music artist and intermediary interests in the

commercialization and revenue distribution processes. It advocated for State intervention in their contractual relationships based on four guiding principles:

I. **Justice in the initial acquisition of rights**, using ex-ante and ex-post copyright contract safeguards to address remuneration injustices related to authorship, ownership rules, the commercialization of music, and revenue distribution, as discussed in section 2.3.4.1.
II. **Justice in the subsequent acquisition of rights**, achieved through ex-post mechanisms to address imbalances caused by intermediaries and third parties not directly contracting with music artists, as discussed in section 2.3.4.2.
III. **Transitional justice** during reforms for distributive justice in copyright law, overcoming remuneration injustices during copyright reforms, potentially including retrospective application of ex-ante and ex-post-copyright contract safeguards, as discussed in section 2.3.4.3.
IV. **Justice in reparations** for violations during the initial and subsequent acquisition of rights, addressing past and ongoing remuneration injustices through ex-ante and ex-post copyright contract safeguards, as discussed in section 2.3.4.4.

Chapter three discussed the second subsidiary objective by exploring the dynamics of the relationship between music artists, intermediaries and other stakeholders in the value chain. It was evident that despite the possibilities created by the digital environment for music artists to commercialize music independently, the role of intermediaries remains significant in the Kenyan music industry.

The chapter provided essential insights into the revenue distribution challenges within Kenya's music industry, particularly highlighting their disproportionate impact on music artists in the country, as detailed in sections 3.2. through section 3.5. The challenges are rooted in various factors including limited entrepreneurial capacity and legal expertise by music artists, disparities in bargaining power during contract negotiation and execution with intermediaries and lack of accountability and transparency by intermediaries.

Chapter four addressed the third subsidiary objective, discussing Kenya’s approach to balancing the interests of music artists and in the commercialization of music and distribution of revenue. It analysed the legal framework governing the relationships among music artists, intermediaries and other stakeholders in the value chain. This analysis was based on the principles of an equitable copyright system, examining the legal framework and the intricate

dynamics of the relationship between music artists and intermediaries. The thesis identified several gaps and challenges within the Copyright Act that collectively contribute to the challenge of inequitable remuneration of music artists in Kenya. The gaps and challenges are discussed in sections 4.3. and include:

I. **Justice in the initial acquisition of rights**

   Ex-ante protection mechanisms: the Copyright Act lacks ex-ante interventions providing for the right to equitable remuneration and setting standards for equitable remuneration.

   Ex-post protection mechanisms: the existing accountability and transparency obligations for intermediaries are poorly enforced. In addition, the Copyright Act does not provide for contract adjustment mechanisms like reversion or revocation that would enable music artists to rectify remuneration imbalances. Moreover, the Act lacks established standards for equitable remuneration. In terms of dispute resolution, the Copyright Tribunal's jurisdiction is limited when it comes to resolving most revenue distribution disputes between music artists and intermediaries. Furthermore, the Tribunal lacks the explicit authority to order Alternative Dispute Resolution (ADR) for disputing parties, placing a heavy burden on its operations.

II. **Justice in subsequent acquisition of rights:** the Copyright Act fails to appreciate remuneration imbalances caused by intermediaries and third parties not directly contracting with music artists.

III. **Transitional justice** when implementing reforms for distributive justice in copyright law: addressing past and ongoing remuneration injustices through the existing ex-ante and ex-protections in Kenyan copyright law has proven to be challenging despite the copyright reforms.

IV. **Justice in reparations for violating the protection of music artists during the initial and subsequent acquisition of rights**: there are few to no repercussions for intermediaries who violate the Act’s ex-ante and ex-post mechanisms for the protection of music artists.

The thesis also highlighted a significant challenge: the scattered administration of the Kenyan music industry across multiple government bodies and offices, such as the Ministry of Youth Affairs, Sports and the Arts, the Ministry of Information, Communications and the Digital Economy, the Ministry of Investments, Trade and Industry, the office of the Attorney General and Department of Justice, and the Department of Music. This decentralization poses difficulties in effectively regulating and managing the industry.

These findings highlighted the urgent need to reform Kenya's copyright framework to ensure that music artists who assign or license their rights for the commercialization of music are entitled to equitable remuneration.

Chapter five explored the German and EU approaches to regulating the interface between music artists and intermediaries during the commercialization and distribution of revenue within the framework of copyright law. The German model has commendable aspects like best-seller clauses, empowering music artists in the licensing chain. However, challenges arise when applied in diverse contexts like Kenya, given administrative complexities. The German model provides valuable insights for Kenya and other jurisdictions, as detailed in section 5.2.6., serving as a guiding framework for equitable remuneration, albeit requiring adaptation to specific contexts.

Chapter six discussed South Africa’s approach to addressing the challenge of establishing a more equitable revenue distribution system between music artists and intermediaries within the framework of copyright law in section 6.2. It also explored solutions to better align Kenya with equitable music revenue distribution in section 6.3. Drawing from examples in Germany, EU and South Africa, the chapter proposed a better revenue distribution framework for Kenya. These recommendations are further highlighted in section 7.2. of this thesis.

Section 7.2. of the thesis proposes legislative changes to align Kenya’s copyright law with distributive justice and interventions designed to protect music artists. By doing so, it contributes to the overarching goal of achieving a more equitable distribution of music revenue between music artists and intermediaries. Section 7.3. offers a summative conclusion to the thesis.

7.2. Recommendations

Equitable remuneration for music artists requires limiting contractual freedom and balancing the interests of music artists and intermediaries. This involves addressing special circumstances and crafting appropriate regulatory language. As a result, the thesis offers recommendations through commentary and model language provisions to bridge the regulatory gaps and challenges within the Copyright Act.

7.2.1. Justice in the initial acquisition of rights

7.2.1.1. Ex-ante interventions: Standards for equitable remuneration

7.2.1.1.1. The right of music artists to equitable remuneration for the commercialization of music

The Copyright Act should include a provision granting music artists the right to receive equitable remuneration when they commercialize their music. This provision should define remuneration as the agreed percentage of gross profit generated from the commercialization of a work and specify exceptions to its application, for example, where the right to equitable remuneration does not apply, such as to works created during employment, works with copyright conferred to specific entities, or works subject to an open license.

It should also introduce the possibility for music artists to waive the right to equitable remuneration under certain conditions. These include requirements that the waiver is clearly and prominently displayed and specifications on the purposes for which the waiver may be applied.

In cases where an agreement on remuneration cannot be reached, and there is no valid waiver, either party should have the option to seek intervention from the Copyright Tribunal to determine equitable remuneration.

Sections 32 and 79(2a) of the UrhG, as well as sections 6A, 8A, and 9A of South Africa's CAB [B13F-2017| September 2023], along with article 18(1) of the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and

2001/29/EC (EU Directive), serve as clear examples highlighting the significance of explicitly providing for the right to equitable remuneration. It is upon this foundation that the model provisions for the right to equitable remuneration have been formulated.

The thesis proposes that section 33(1A) be inserted into the Copyright Act, 2001.

> **33(1A). Right to equitable remuneration for music artists**
>
> Music artists are entitled to receive equitable remuneration when they assign or license their works.
> 'Remuneration' means the agreed percentage of gross profit made from the commercialization of a work.
> The right to equitable remuneration does not apply to:
>
> a. a work created in the course of employment as contemplated in section 31(1)(b) of the Copyright Act, 2001.
> b. a work where copyright is conferred to the State or a prescribed local or international organization.
> c. a work which is subject to an open license.
>
> Music artists may waive the right to equitable remuneration provided:
>
> (a) the waiver is clear and prominently displayed; and
> (b) The waiver is in lieu of equitable once-off remuneration. Equitableness in this section shall be determined by the circumstances provided in the standard of equitable remuneration established in section 33(1B).
>
> Where remuneration cannot be agreed upon and is not validly waived, either party may refer to the Copyright Tribunal for an order determining equitable remuneration.

7.2.1.1.2. Form and standard of equitable remuneration

Equitable remuneration should be defined as appropriate and proportionate, with provisions for buyouts in exceptional cases. The criteria for determining equity should be elaborated as follows:

> Define equitable remuneration and specify the factors influencing its determination, with a focus on proportionality to the economic value of the transferred or licensed works. Consider the music artists' contribution and industry standards in Kenya and globally and establish equitable amounts or ranges by the Minister or through collective bargaining.
>
> Outline the procedures for determining and documenting music artists' share of royalties, requiring a written agreement between the author and the copyright owner or

their respective Collective Management Organizations (CMOs). The agreement should detail the parties' rights and obligations, the agreed or Tribunal-ordered remuneration, payment methods, payment schedules, and a dispute resolution mechanism.

33(1B). Form and standard of equitable remuneration for music artists

(1) Equitable remuneration means appropriate - which includes buy outs in exceptional circumstances - and proportionate remuneration in the form of a percentage of gross revenue earned from the exploitation of works or performance. Equitableness is determined based on the totality of the circumstances, which may include:
    d. The actual or potential economic value of the transferred or licensed works, taking into account the author's contribution to the overall work.
    e. The actual exploitation of the work or performance and the amount normally paid in the particular industry in Kenya and globally.
    f. The amounts or ranges determined as equitable by the Minister or through collective bargaining.

(2) Music artists' share of royalties shall be determined by a written agreement in the prescribed manner and form between the author and the copyright owner or their respective CMOs. The agreement must include:
    (a) The rights and obligations of the party;
    (b) The remuneration agreed upon or ordered by the Tribunal;
    (c) The method and period during which the remuneration agreed upon must be paid; and
    (d) A dispute resolution mechanism.

7.2.1.2. Ex-post interventions: Accountability and transparency obligations

The thesis proposes the inclusion of accountability and transparency obligations for all intermediaries. These obligations are designed to provide music artists with essential information and ensure their fair treatment. Key points include:

The proposed provision should ensure that anyone exercising exclusive rights under the Copyright Act guarantees that music artists receive regular, current, and comprehensive information regarding the commercialization of their works and performances. This information should encompass details about the utilization of their works, the generated revenue, and the owed remuneration. The provision should recognize that, in some instances, the administrative burden of providing this information may be disproportionate to the revenue generated, necessitating a scaled-down level of information. However, this obligation does not

apply when the author's or performer's contribution is deemed insubstantial in the context of the overall work or performance. When agreements are subject to collective bargaining agreements, the transparency rules specified in those agreements take precedence. This provision should also ensure that collective bargaining agreements at least meet the minimum standards required.

The proposed provision will address the involvement of copyright owners who are not members of Collective Management Organizations (CMOs), by introducing the concept of elected delegates representing non-CMO members in CMOs' general assemblies. These delegates are empowered to vote on matters affecting the collective management of copyrights. Their participation ensures that non-members have a voice and influence in the decision-making processes of CMOs. While the idea of elected delegates for non-CMO members has the potential to increase inclusivity and representation within collective management, its practicality depends on various factors. It would require active participation and engagement from non-CMO members, as well as effective regulation and oversight by the CMOs. Additionally, ensuring fair and transparent election processes would be crucial to the success of this system.

33(1C). Accountability and transparency obligations for all intermediaries

(1) Any person who exercises exclusive rights guaranteed in the Copyright Act must ensure that:
    (a) Music artists shall have the right to receive regularly, at least once a year, and taking into account the specificities of each sector, up-to-date, relevant and comprehensive information on the commercialization of their works and performances from parties to whom they have licensed or transferred their rights. The information is regarding the modes of exploitation, all revenue generated, and remuneration due.
    (b) Where the administrative burden resulting from the above obligation would be disproportionate to the revenue generated by the commercialization of the work or the performance, the obligation is limited to the types and level of information reasonably expected in such cases. The obligation shall not apply when the contribution of the author or performer is not significant, having regard to the overall work or performance.
    (c) For agreements subject to or based on collective bargaining agreements, transparency rules of the collective bargaining agreements will be applicable instead of this section, provided that the rules in this section provide a minimum standard.

(2) Copyright owners who are not CMO members should participate in collective management through elected delegates. The delegates should be elected every four years from amongst the non-members. The regulation of the number, composition, and procedure of election of the delegates is left to CMOs. The delegates should participate in CMOs' general assemblies on behalf of non-CMO members. They are entitled to vote in person, by proxy, or through electronic communication in the general assembly.[1] They may vote on matters concerning:
    (a) CMOs' distribution plans,[2]
    (b) CMOs' use of non-distributable revenue,[3]
    (c) investment policies that affect the collected revenue,[4]
    (d) "the conclusion, content and termination of representation agreements,"[5]
    (e) CMOs' obligations regarding collective management and the scope of CMOs' activities,[6]
    (f) Tariffs,
    (g) Conditions for copyright owners to grant non-commercial rights of use.[7]

7.2.1.3. Ex-post interventions: Copyright contract mechanisms

The following copyright contract mechanisms should be adopted from the German Urheberrechtsgesetz (UrhG). These provisions should allow for adjustments to copyright contracts to ensure that music artists receive appropriate and proportionate remuneration, particularly in cases where the original terms have become inequitable.

[1] Section 20(3) as read with section 19(3) of the VGG.

[2] Section 17 as read with section 27 of the VGG.

[3] Section 17 as read with section 30 of the VGG.

[4] Section 17 as read with section 25 of the VGG.

[5] Section 17 as read with section 44 of the VGG.

[6] Section 17 as read with section 9 of the VGG.

[7] Section 17 of the VGG.

7.2.1.3.1. Right of revocation for unknown types of uses

Music artists should have the right to revoke their agreement when their work is used in ways not initially specified in the contract. This protects artists from unforeseen uses of their work that might not align with their interests.

7.2.1.3.2. 5-Year term limit for agreements on future works

Contracts for works that have not yet been created should have a maximum term limit of 5 years. This ensures that artists can renegotiate agreements if the circumstances change, or the work becomes more valuable.

7.2.1.3.3. Right to further equitable participation

This provision shall ensure that music artists have the right to additional remuneration when the value of their work increases significantly due to unforeseen circumstances or greater success.

7.2.1.3.4. Right of revocation for non-use or insufficient commercialization

Artists should be able to revoke agreements if their work remains unused or insufficiently commercialized by the licensee, protecting their right to have their work actively promoted and distributed.

7.2.1.3.5. Right of revocation for changed conviction

If a music artist's moral or artistic convictions are no longer in alignment with the use of their work, they should have the right to revoke the agreement.

7.2.1.3.6. 10-Year exclusivity period for buy-out agreements that grant exclusive licenses

Buy-out agreements that grant exclusive licenses should have a maximum exclusivity period of 10 years. This ensures that artists regain control over their work and the ability to negotiate more favourable terms once the exclusivity period ends.

33(1E). Copyright contract mechanisms

(1) The following copyright contract mechanisms should be adopted from the German UrhG
   (a) contract adjustment,[8]
   (b) right of revocation for unknown types of uses,[9]
   (c) 5-year term limit for agreements on future works,
   (d) right to further equitable participation,[10]
   (e) right of revocation for non-use or insufficient commercialization,[11]
   (f) right of revocation for changed conviction,[12] and
   (g) 10-year exclusivity period for buy-out agreements that grant exclusive licenses

7.2.1.4. Ex-post interventions: Common remuneration standards

The Minister of Youth Affairs, Sports and the Arts should develop common remuneration standards in consultation with various industry stakeholders. These standards will serve as the minimum benchmarks for remuneration in the music industry.

7.2.1.4.1. Periodic review of common remuneration standards

These common remuneration standards should be subject to periodic review or adjustment when circumstances warrant. This ensures that the standards remain up-to-date and reflective of industry changes.

[8] section 32 of the UrhG.

[9] Sections 31a and 32c of the UrhG.

[10] Sections 32a and 79a (2) of the UrhG.

[11] Section 41 of the UrhG.

[12] Section 42 of the UrhG.

33(1F). Common remuneration standards

(1) The Minister of Sports, Culture, and Heritage should develop common remuneration standards rules in consultation with the various industry stakeholders.
(2) These are minimum standards that can be reviewed periodically or when circumstances call for a review.[13]
(3) Disputes regarding the common remuneration standards should first be heard in the copyright tribunal

7.2.1.5. Ex-post interventions: Mechanisms for enforcing the right to equitable remuneration for music artists

In the event of disputes related to the common remuneration standards, the Copyright Tribunal should be the initial forum for addressing these matters.

33(1G). Remuneration dispute settlement mechanisms

(1) The dispute resolution mechanisms are included in the sample provisions in sections 7.2.1-7.2.3. of this thesis.

7.2.2. Justice in the subsequent acquisition of rights

The thesis proposes implementing ex-post mechanisms that hold music artists' contracting parties accountable for disclosing information about sub-licensees and third parties who are not direct contracting parties of the music artists. Simultaneously, the thesis suggests implementing measures to ensure transparency and accountability among these third parties. These requirements should be incorporated into the ex-post interventions: Accountability and transparency obligations, discussed above in chapters 2, 6 and 7 of this thesis.

7.2.3. Transitional justice when implementing reforms for distributive justice in copyright law.

7.2.3.1. Ex post: Retrospective application of the right to equitable remuneration

[13] AB Makulilo 'Re-balancing artists' rights in cell phone ringtones? An analysis of Tanzanian copyright' (2013) 8(6) *Journal of Intellectual Property Law & Practice* 474 at 474-479.

7.2.3.1.1. Application of accountability and transparency provisions

The accountability and transparency provisions outlined in the proposed amendments should apply to licenses and assignments, whether concluded before or after the commencement of these amendments. For agreements concluded before the amendment's commencement, the involved parties must bring their remuneration contracts in line with the new provisions within one year of the amendment's commencement.

7.2.3.1.2. No renegotiation of existing contracts

The retrospective application of these provisions does not grant music artists the right to renegotiate or alter the terms of their existing remuneration contracts. Instead, its primary purpose is to enforce the right to access information, which is a fundamental aspect of the right to equitable remuneration.

33(1H). Retrospective application of the right to equitable remuneration

(1) The accountability and transparency provisions shall apply to licenses and assignments concluded before and after the commencement of these amendments. For agreements concluded before this amendment, parties shall bring the remuneration contracts within the framework, within a year of the commencement of the amendment.

7.2.4. Justice in reparations for violating the protection of music artists during the initial and subsequent acquisition of rights[14]

All recommendations in this thesis aim to address reparative justice for music artists. The proposed provisions in sections 7.2.1-7.2.3 aim to safeguard the rights of music artists who have too often been overlooked during the initial and subsequent acquisition of rights.

[14] These issues were adapted from Robert Nozick's description of social justice in property rights. Nozick's and Rawls' description of social justice are similar to a large extent. Their views differ as regards state involvement in subsequent acquisition of rights. See R Nozick *Anarchy, state, and utopia* (1974) 151-152 and 174-178 and A Chander and A Chander 'Is Nozick Kicking Rawls's Ass-Intellectual Property and Social Justice' (2006) 40 *University of California Davis Law Review* 563 at 567-568.

7.3. Concluding remarks on regulation of equitable remuneration for music artists in Kenya

This thesis illuminates the profound imbalance within Kenya's music industry, where intermediaries wield disproportionate power, leaving music artists inadequately remunerated. Through a comprehensive analysis of the copyright framework, it becomes evident that it inadequately upholds the principles of distributive justice and legislative interventions aimed at protecting music artists, ultimately failing to safeguard the interests of music artists who assign or license their rights to intermediaries for the commercialization of music.

To address this pressing issue, the thesis proposes a robust framework for equitable revenue distribution, drawing inspiration from successful models in Germany, the EU and South Africa. This framework is guided by four key principles: justice in the initial acquisition of rights, justice in the subsequent acquisition of rights, transitional justice during reforms for distributive justice in copyright law, and justice in reparations for violations during the initial and subsequent acquisition of rights.

This thesis contributes to the discourse on copyright reform by not only highlighting the inadequacies of the current system but also proposing actionable solutions tailored to the Kenyan context. It emphasizes the need for enhanced accountability and transparency from intermediaries, alongside the establishment of common remuneration standards that can adapt to the evolving nature of the music industry.

Moreover, the framework provides a pathway for future research, particularly in exploring the impact of international copyright standards on local practices and the role of collective management organizations in fostering more equitable revenue distribution for music artists. By addressing these cross-cutting issues, the thesis aims to inspire further inquiry into equitable remuneration mechanisms and the ongoing challenges that music artists face within the broader copyright landscape.

In conclusion, while the intricacies of regulating copyright in a rapidly evolving industry present significant challenges, this thesis underscores the urgent need for reform. Legislative interventions must be carefully crafted to avoid unintended consequences, yet they are essential to ensure that music artists receive fair compensation for their creative contributions, thereby fostering a more just and sustainable music industry in Kenya.

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