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**A Comparative Analysis of Copyright Laws Governing Music Streaming in Zambia, Kenya, and the United States**



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## A Comparative Analysis of Copyright Laws Governing Music Streaming in Zambia, Kenya, and the United States

 <sup>1</sup>Tawila Anamela\*, <sup>2</sup>Chisomo Kalifungwa, <sup>3</sup>Chaponga Nguluwe, <sup>4</sup>Dr Mildred Chuunga Muhyila

<sup>1</sup>Lecturer, School of Law

ZCAS University

<https://orcid.org/0009-0000-3229-1031>

<sup>2</sup>Graduate student, School of law

ZCAS University

<sup>3,4</sup>Lecturer, School of Law

ZCAS University

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### Abstract

**Purpose:** To evaluate the adequacy of Zambia's domestic copyright law in protecting digital songs and their creators within the context of modern music streaming platforms.

**Methodology:** A qualitative desk research approach was employed, analyzing existing Zambian copyright legislation and comparing it to relevant laws in Kenya and the United States.

**Findings:** The study found that Zambia's copyright law is ill-equipped to protect digital songs and their creators in the digital age. The law does not explicitly address digital music streaming, leaving artists and copyright owners vulnerable to exploitation. Furthermore, the law's ambiguity regarding digital reproduction can hinder the effective enforcement of copyright rights.

**Unique contribution to theory, practice and policy:** This study contributes to the understanding of copyright protection challenges in developing countries, particularly in the context of digital music. Its findings and recommendations offer valuable insights for policymakers and legal professionals seeking to improve copyright frameworks in Africa.

**Keywords:** *Zambia, Copyright Law, Digital Music, Music Streaming, Copyright Infringement*

## 1.0 INTRODUCTION

In the modern music era, technological equipment has become so sophisticated that an artist no longer needs very expensive studios to record their music and does not need to print CDs to sell their music and make a profit. This newfound independence means that artists are keeping a larger chunk of ownership of their songs and that the streams from the music are now a mainstream way of achieving passive income that they need to sustain themselves while they prepare to travel and perform it<sup>1</sup>. This in turn would call for much more protection of digital songs as it is the main source of music consumption. Over the past 6 years, the musical landscape in Africa has grown abundantly; and the possibility of African artists getting millions of streams, which generate great income from all over the world, is more apparent than ever. Hence, for artists to receive a fair share of money from the work that they have made, the law must protect them in their respective jurisdictions.

Generally musical works and sound recordings receive automatic copyright protection, but there are certain criteria that need to be met in order for a work to qualify for copyright protection. Musical works and sound recordings were not always provided for by law because there was a time that only books had copyright protection. However, as the years passed by this started to change. Now the question in these modern times is whether songs in digital formats are adequately protected by virtue of how the world has swayed towards music streaming (which is digital) seeing as it has changed the music industry in various ways.

### 1.1 Statement of the Problem

Music streaming has become a crucial revenue stream for artists globally, yet Zambian musicians face significant challenges due to inadequate legal protections. While Zambia's Copyrights and Performance Rights Act safeguards traditional forms of media and performance, it fails to address digital music streaming or piracy, which limits artists' income and undermines their financial stability. The existing framework does not effectively manage the collection of royalties or provide standard rates for royalty splits, resulting in inconsistent payments to artists. This situation calls into question the adequacy of current copyright laws in Zambia and highlights the need for reform to ensure fair compensation and better protection for musicians in the digital age.

## 2. CHANGES IN THE FORM OF MUSICAL CONSUMPTION IN THE 21ST CENTURY

There has been a very dramatic transformation in the music industry as platforms such as Spotify, Pandora and Youtube have come to the field<sup>2</sup>. Changes from the old to the new music industry have taken place in different stages, and this is a testament to technological developments. At the

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<sup>1</sup> M Daniels, "Why independent Musicians are becoming the future of the music industry", July 10 2019, Forbes, <https://www.forbes.com/sites/melissamdaniels/2019/07/10/for-independent-musicians-going-your-own-way-is-finally-starting-to-pay-off/?sh=450fe16314f2>

<sup>2</sup> Ibid

end of the 20th century, songs were distributed in very different ways<sup>3</sup>. Gramophones were popular but CD's replaced them at the time. Years later it was MP3 players that became very popular to listen to music with. MP3 players played digital songs which seemed to be more convenient and there was a trend that started to ditch CD's<sup>4</sup>. Fast forward to the early 2010's and the current climate, streaming platforms such as Spotify, Deezer, Tidal and Apple Music seem to have taken the world by storm as the dominant form that artists use to distribute their music and for consumers to listen to music<sup>5</sup>.

## 2.1 The Revenue Made from Streaming by the Music Industry

In 2017, most of the revenue of the global music industry came from streaming.<sup>6</sup> For Sony Music, one of the biggest music groups in the world, the introduction of music streaming eventually increased their revenue<sup>7</sup>. In 2014, their total sales were about 4.9 billion dollars while in 2015 their revenue increased to 5.3 billion dollars; In 2016, the revenue grew to 6.1 billion dollars and the year 2017 subsequently saw an increase in revenue from 6.1 billion to 6.4 billion dollars<sup>8</sup>. By 2020 their revenue amounted to 8 billion dollars, which is an increase of about 97 percent in a space of seven years, all due to streaming. These statistics show that Sony Music grew exponentially after the "revolution" of selling music via streaming platforms.

Likewise, Warner Music Group, which is affiliated to big record labels such as Parlophone Records, Warner Music and Atlantic Records is an enormous music publishing group in the global music industry who have superstar artists such as Ed Sheeran from the and Bruno Mars and Cardi B on their roster<sup>9</sup>. Between 2014 and 2019, Warner Music Group's total revenue grew from 3 billion dollars to 4.4 billion dollars in the streaming era, which is an increase of 47.8 percent in their total revenue<sup>10</sup>.

Another example is the case of Universal Music Group, which is undoubtedly at the top of the totem pole of the global music industry. Universal Music Group brag contractual affiliations with musical superstars such as Justin Bieber, Eminem and The Weeknd<sup>11</sup> and they signed a licence agreement with Spotify (arguably the biggest streaming platform in the world) that will have the

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<sup>3</sup> Lozic, Josko. "The revenue recovery of the music industry as a result of revenue growth from streaming." *Economic and Social Development: Book of Proceedings* (2020): 203-214.

<sup>4</sup> Ibid

<sup>5</sup> E Priest, "Future Of Music Copyright Collectives In The Digital Streaming Age", 45 COLUM. J.L. & ARTS 1 (2021) 1

<sup>6</sup> Ibid

<sup>7</sup> Ibid pg 206

<sup>8</sup> Ibid

<sup>9</sup> Sanchez, L. (2020). "Warner Music Group Shows the Music Industry Can Be Profitable Again". Nasdaq. <https://www.nasdaq.com/articles/warner-music-group-shows-the-musicindustry-can-be-profitable-again-2020-08-12>. [04.11.2020.]

<sup>10</sup> Lozic, Josko. "The revenue recovery of the music industry as a result of revenue growth from streaming." *Economic and Social Development: Book of Proceedings* (2020): 203-214.

<sup>11</sup> Ibid

effect of creating value for musicians and will support music discovery experiences and “state of the art marketing campaigns”<sup>12</sup>. Universal Music Group’s financial indicators start from a period of 2012 to 2019, and in this 8-year period, there was an increase in revenue<sup>13</sup>. There was an increase from 4.5 billion dollars to 7 billion dollars in revenue from streaming in that period.<sup>14</sup> In addition, Universal Music Group’s parent company, Vivendi, stated that in Africa, global music consumers are expected to triple in a short space of time, and therefore, they are trying to push into the growing African Markets, which are using streaming platforms more often<sup>15</sup>. all the popular artists in Zambia such as Chef 187, Sampa Tha Great and Slap Dee to name a few, all release their music on streaming platforms; and this shows how relevant streaming is today on the African continent and in Zambia to be specific.

## 2.2 Challenges Caused by the Introduction of Streaming Services

Music streaming has increased the accessibility of music, but that accessibility has not always directly resulted in artists getting more money from their music as opposed to their labels. This has led to countries like the United States of America introducing The Music Modernization Bill, which was introduced in 2018, aimed at addressing some of the issues caused by music streaming<sup>16</sup>.

Another potential danger of the introduction of digital streaming for African countries, of which Zambia is a part of, is that exacerbated the piracy problem that was already existent on the continent, due to the increased access by virtue of the digitalisation of the musical creation.<sup>17</sup> Hence, resulting in the artists making less money from their music because of digital platforms<sup>18</sup> and the reduction in income steaming from their physical copies of music works.

This has resulted in the need to have a robust legislative and technological framework that effectively enforces the rights of artists and their ability to benefit from the digitalisation of their musical creations. For example, in the United States, the Music Modernization Act, which addressed problems to do with streaming and artist protection, provides for a Mechanical

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<sup>12</sup> Lozic, Josko. "The revenue recovery of the music industry as a result of revenue growth from streaming." *Economic and Social Development: Book of Proceedings* (2020): 203-214.

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Hale, K. (2020). “Universal Music Group’s \$3 Billion Tencent Deal Ushers In a Golden Vibes Era”. Forbes. <https://www.forbes.com/sites/korihale/2020/01/13/universal-musicgroups-3-billion-tencent-deal-ushers-in-a-golden-vibes-era/?sh=404862fc7d53>. [04.11.2020.]

<sup>16</sup> Ibid

<sup>17</sup> U Uguru, and Moses C. Umobong. "Appraising the Impact of the Nigerian Copyright Act and Regulations in Combating Piracy in Nigeria." *Beijing Law Review* 13, no. 2 (2022): 247-264.

<sup>18</sup> Luis Aguiar, Joel Waldfoegel, *As streaming reaches flood stage, does it stimulate or depress music sales?*, International Journal of Industrial Organization, Volume 57, 2018, Pages 278-307, ISSN 0167-7187, <https://doi.org/10.1016/j.ijindorg.2017.06.004>. (<https://www.sciencedirect.com/science/article/pii/S016771871730175>)

Licensing Collective that distribute royalty payments after the digital data is collected. There was also a whole board that was created to deal with unclaimed royalties from digital platforms and there is an entity named Sound Exchange that tracks digital data and pays producers, mixers and engineers of a sound recording. Furthermore, the introduction of such legislation might also have a negative effect of online safety in the form of internet fraud<sup>19</sup> which might give the government a headache in dealing with.

### 3. ZAMBIAN COPYRIGHT LAWS AND COLLECTING SOCIETIES IN THE DIGITAL WORLD

The Copyright and Performance Rights Act provide protection for various works including musical works and sound recordings but there is not much mention of sound recordings and musical works that exist only in digital form on streaming platforms. That said, collecting societies have the role of administering copyright works for artists, but the question is whether these collecting societies have the power, and to what extent they protect songs in digital format on streaming platforms.

#### 3.1 The Administration of Digital Musical Works under The Copyright and Performance Rights Act

**The Copyright and Performance Rights Act**<sup>20</sup> as provided for in section 8 provides for copyright protection in musical works and sound recordings, which are of interest to us. **Section 8(3) of the Act**<sup>21</sup> states that Copyright will not subsist in a musical work until it is recorded in writing or in some other form. The focus in this research is whether Zambian Copyright Laws provide for the protection of songs that are digital and are uploaded to digital streaming platforms. This section points out that musical works must be “recorded in writing or in some other form”. The Act however, has not given us what types of other forms will be able to constitute a copyright and whether songs in digital formats are protected. The section also points out that copyright subsists in sound recording but still does not address digital sound recordings.

Due to the vagueness of the Act and the lack of explicit provision as to whether digital songs are protected and whether the creators of such digital songs will get protection, it may be reasonable to suggest that collecting societies may be able to protect these interests on behalf of artists. **Section 22 of the Copyright and performance Rights Act**<sup>22</sup> states that collecting societies may be authorised to represent copyright owners. Owners of copyrights may allow a collecting society to administer and negotiate collective copyright licence agreements on behalf of the owners of copyrights<sup>23</sup>. Some of these rights include performances in public areas such as clubs, bars, restaurants, cafe’s, television performances such as wireless broadcasting, rights to reproduce the

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<sup>19</sup> Ibid

<sup>20</sup> Chapter 406 of the laws of Zambia

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> G. M. Kanja, *Intellectual Property Law*, (UNZA Press 2006) pg 126

works for educational or scholarly works, for private use, sound recordings used in films and the like.<sup>24</sup> This means that they can take a copyright infringer to court by suing on behalf of the copyright owner without permission from the copyright owner if they have been granted an assignment as stated in the case of **Jonathan Cape Ltd v Consolidated Press Ltd**<sup>25</sup>. If the collecting society has a licence, they must sue an infringer with the permission of the copyright owner.<sup>26</sup> Despite having some backing from the law, collecting societies such as ZAMCOPS, have faced significant challenges in enforcing digital copyright infringements in Zambia due to lacunas in the law. Therefore, highlighting the need to learn lessons from jurisdictions that have successfully dealt with these challenges, such as the United States of America and Kenya.

#### **4. A COMPARATIVE ANALYSIS OF ZAMBIAN COPYRIGHT LAWS ON DIGITAL MUSIC WITH U.S. AND KENYAN LEGAL FRAMEWORKS**

##### **4.1 The American ‘Music Modernization Act’**

On October 11<sup>th</sup>, 2018, Donald Trump signed the Music Modernization Act.<sup>27</sup> This Act has provided a lot of protection for producers, songwriters, sound engineers and sound mixers. The Music Modernization Act provides copyright protection for artists and copyright owners who have their musical works on digital platforms. It provides for artists to effectively receive adequate royalty payments from performances in a digital streaming age and among other things, provides for licensing collectives to distribute unclaimed royalties effectively in the current digital streaming climate.

The biggest goal of the Music modernization Act was to amend **sections 114** and **sections 115** of the 1976 United States Copyright Act<sup>28</sup>. These Sections heavily address mechanical licences of digital songs. The Digital Performance Rights in Sound Recordings Act of 1995, which amended the Copyright Act of 1976, expanded the definition of phonorecords into the digital realm<sup>29</sup>. It defined it as “each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for a transmission receipt of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording”<sup>30</sup>. The Music Modernization Act then further expanded this definition while also providing for the definition of an “interactive stream”. An interactive stream is defined as a “means of digital transmission of a sound recording of a musical work in the form of a stream, where the performance of sound recording by means of such

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<sup>24</sup> Ibid

<sup>25</sup> [1954] ALL ER 253

<sup>26</sup> Ibi

<sup>27</sup> Public Law 115-262-Oct. 11, 2018

<sup>28</sup> Ibid pg 61

<sup>29</sup> Elton, Serona. "Mechanical Licensing Before and After the Music Modernization Act." *MEIEA Journal* 19, no. 1 (2019): 13-35.

<sup>30</sup> Ibid

transmission is not exempt under **section 114(d)(1)** and does not in itself, or as a result of a program in which it is include, qualify for statutory licensing under section 114(d). An interactive stream is a digital phonorecord delivery". These definitions are provided for in the Acts and show that streaming is adequately provided for in American Copyright Acts, but the Music Modernization Act in particular addresses streaming and defines it in depth.

#### 4.1.1 Music Licencing in The Music Modernization Act

Among other things, the Music Modernization Act provides that an entity who wants to get songs on their digital streaming platforms needs a licence to do so. **Section 102 of the Music Modernization Act**<sup>31</sup> amends section 115 of the American 1976 Copyright Act as it provides for blanket licensing for digital use and mechanical licensing. **Section 102(1)(i) of the Act** provides that an entity will need to be granted a compulsory licence in order to distribute digital songs. The next subparagraph states that permission must first be sought from the copyright owner of the digital record.

The Music Modernization Act provides for blanket mechanical licences for interactive downloads and streaming of musical works which means that in order for songs to be digitally downloaded in a digital store such as Spotify or just played by a device on that store legally, a licence must first be attained from that entity<sup>32</sup>. This created a different model for securing permission to have musical owner's music on digital streaming platforms<sup>33</sup>, and is only for distributing the songs to the public for private use<sup>34</sup>. This blanket licence is a compulsory licence that digital music platforms such as Spotify, Apple Music and Deezer must get in order to put music into their digital stores. A compulsory licence is basically authorisation that has been given by a copyright office to perform acts covered by the exclusive rights of the copyright without the permission of the copyright owner<sup>35</sup>. This licence in the United States is obtained via the Mechanical Licencing Collective in order to make and distribute interactive streams and limited downloads<sup>36</sup>. This amendment of section 115 changed the licensing scheme from a "work-by work" licensing system to a blanket licencing system (which is a system where a representative provides for use of a copyright to other parties) and is considered one of the best additions of the Act<sup>37</sup>. A digital music

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<sup>31</sup> Public Law 115-262-Oct. 11, 2018

<sup>32</sup>Chandler, Kaitlin. "The Times They Are a Changin': The Music Modernization Act and the Future of Music Copyright Law." *Tul. J. Tech. & Intell. Prop.* 21 (2019): 61

<sup>33</sup> Elton, Serona. "Mechanical Licensing Before and After the Music Modernization Act." *MEIEA Journal* 19, no. 1 (2019): 23

<sup>34</sup> 17 USC S. 115(a)(1)(A)(i) (2016)

<sup>35</sup> G. M. Kanja, *Intellectual Property Law*, (UNZA Press 2006) pg 1274

<sup>36</sup> Elton, Serona. "Mechanical Licensing Before and After the Music Modernization Act." *MEIEA Journal* 19, no. 1 (2019): 23

<sup>37</sup> Maria A. Pallente, *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, (Washington, DC: United States Copyright Office, February 2015), 112, <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace>.



store may be granted a licence if they submit a notice of licence to the mechanical licence collective as opposed to going directly to the copyright owner<sup>38</sup>

The Music Modernization Act clearly specifies the responsibilities of the digital music providers (Spotify, Apple Music, Deezer etc.), the copyright owners of the musical work, the record company (if an artist is not independent artist) and the Mechanical Licensing Collective<sup>39</sup>, but it is clear that the streaming of digital songs has been included and is protected by the Act.

#### **4.1.2 The Mechanical Licencing Collective And Data Allocation**

As stated previously, the Mechanical Licensing collective are responsible for giving out licensing to digital platforms. The MLC has the responsibility of getting the names of all the parties involved in a musical work in order to adequately pay out royalties, and in doing so they must reach out to all of the artists and get information as to what the ownership percentage of the musical work is, as well as contact information and confirmation of the publisher's addresses and tax ID's for payment purposes<sup>40</sup>. The Music Modernization Act in fact requires digital music providers, musical work copyright owners, the mechanical licensing collective and sound recording copyright owners to all contribute to the collection of the works in different ways which further shows that the Act has included all necessary parties<sup>41</sup>.

Furthermore, via the Music Modernization Act<sup>42</sup>, The Mechanical Licensing Collective was has the duty to match different digital musical works with the correct data and this is done with the help of the International Standard Recording Code which has a technological identifier which allows it to match the sound recordings unique alphanumeric identifier by virtue of the sound recording being digitalized; Subsequently, the Collective oversees all the data by virtue of it being a centralised mechanical licensing entity<sup>43</sup>.

As seen in the Music Modernization Act, the purpose of the Mechanical Licencing Collective is to ensure that the music industry in the United States has internal checks and balances<sup>44</sup>. The Mechanical Licensing Collective is governed by a board of directors who have the duty to ensure that there is a committee that deals adequately with unclaimed royalties by paying them out to whoever is entitled to them<sup>45</sup>. It also has a system or database that identifies, locates and matches the owners of the sound recordings and musical works, which helps to organise the current digital

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<sup>38</sup> 17 USC S. 155(b)(2) and (d)(2)

<sup>39</sup> Elton, Serona. "Mechanical Licensing Before and After the Music Modernization Act." *MEIEA Journal* 19, no. 1 (2019): 23

<sup>40</sup> Elton, Serona. "Mechanical Licensing Before and After the Music Modernization Act." *MEIEA Journal* 19, no. 1 (2019): 24

<sup>41</sup> 17 USC S.115(d)(3) (E) (iv) and (a) (4)(B)(ii)

<sup>42</sup> Public Law 115-262-Oct. 11, 2018

<sup>43</sup> Chandler, Kaitlin. "The Times They Are a Changin': The Music Modernization Act and the Future of Music Copyright Law." *Tul. J. Tech. & Intell. Prop.* 21 (2019): 61

<sup>44</sup> *Ibid* pg 62

<sup>45</sup> *Ibid*

system by distributing royalties to the rightful owners<sup>46</sup>. Prior to this, identification of all the parties who were entitled to payment was very difficult, so this provision in the Music Modernization points out how aware congress were in that they saw a need and established the MLC for the current digital world for the artists.

#### 4.1.3 Royalties for Performance of Sound Recordings under The Music Modernization Act

As previously stated, the Music Modernization Act under Title 1<sup>47</sup> made serious changes to **section 114** as well as **section 115 of the 1976 Copyright Act** in the United States. An important provision that was included in the Act is the way royalties are calculated in this digital age with the involvement of The United States Copyright Board. The United States Copyright Board is the body that has the duty to establish the statutory royalty rates, and it was established in 2004 comprising of 3 judges appointed by the Librarian of Congress<sup>48</sup>. After streaming was introduced, the MMA changed the standard to a “willing/buyer standard” which means that the royalty rates will depend on the market value of a song. This is a progressive provision because music streaming has made songs very accessible, so the climate of demand seems to pay much more favourable royalties to the interested parties such as artists, producers and copyright owners. This standard provides a higher royalty rate for owners of copyrights and is more straightforward than the previous standard<sup>49</sup>.

#### 4.1.4 Title 3 of the Music Modernization Act

One of the most important inclusions in the Music Modernization Act is title 3 of the Act<sup>50</sup>. Title 3 of the Music Modernization Act addresses payment mechanisms for producers, mixers and engineers. Simply put, a producer is a person who creates the musical sounds in a musical work and may sometimes even write and arrange songs for artists. A mixer is a person who edits the sound recordings of a song in order for it to sound professional, while an engineer is a person who records another person or persons in a studio by using his/her technical expertise. In essence, in the music industry, these are fundamental roles which massively contribute to the creation of songs.

**The Music Modernization Act’s Section 114** included the **Allocation For Music Producers Act**<sup>51</sup> which is an Act that allows music producers, mixers and engineers to be compensated from collected royalties through Sound Exchange<sup>52</sup>. Sound Exchange is a non-profit licensing entity

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<sup>46</sup> Ibid

<sup>47</sup> Public Law 115-262-Oct. 11, 2018

<sup>48</sup> *Intercollegiate broad. Sys. v Copyright Royalty Board Bd.*, 684 F.3d 1332, 1335 (D.C. Cir.2012)

<sup>49</sup> Ibid pg 66

<sup>50</sup> Public Law 115-262-Oct. 11, 2018

<sup>51</sup> H.R. 881 115th Congress (2017-2018)

<sup>52</sup> Buiey Jr, Octavious A. "Copyright's Facelift: An Analysis of the New Look of Copyright Following the Music Modernization Act and the United States-Mexico-Canada Agreement." *U. Miami Inter-Am. L. Rev.* 51 (2020): 241.

that accepts payment of royalties and collects licensing fees for public performances of sound recordings and uniquely distinguishes between an artist and a producer<sup>53</sup>. Public performance rights were defined in the case of **Jennings v Stephens**<sup>54</sup> as “any performance of work at a place where the public is or can be present, or at a place not open to the public, but where a substantial number of persons outside the normal circle of the family and its closest social acquaintances are present”. In the facts of that case, a play was performed in front of 62 members of the dramatic society but it was held that this was outside the normal circle of the family and its closest social acquaintances, and therefore, public performance rights were infringed. That said, Sound Exchange allows producers, mixers and engineers to automatically receive payment when public performances occur outside the normal circle of the family.

The new section 114 that the Music Modernization Act has put into effect, designates Sound Exchange as the main entity that distributes royalties on sound recordings and to distribute the respective percentages of those royalties to a producer, sound engineer or mixer who was part of the creative process of that sound recording<sup>55</sup>. The Act is in fact the first piece of legislation that recognizes producers, engineers and mixers as part of the sound recording process<sup>56</sup>. As has been stated earlier, by virtue of the world being more digital, which has increased access to song consumption as well as the ease at which songs may be recorded<sup>57</sup>, it only makes sense to introduce such an Act because producers nowadays seem to have the possibility to gain a large following off their work<sup>58</sup>.

In summary, it is clear to see the problems that artists in the music industry may run into after the digital music scene came into effect but the American Congress contemplated many of those issues and acted swiftly by addressing potential issues regarding how streaming would affect song creators through the Music Modernization Act. The recognition of music streaming in the Act, the licensing that ensures that creators are protected and digital music stores are held accountable, the recognition of important parties to a musical work such as producers, mixers and engineers and royalty payments that track digital songs are also pivotal inclusions that the Act provides. In totality, there is much to praise about the legislation. However, by virtue of the extra committees and the personnel who are needed in order to accurately collect data and pay out royalties effectively, it is clear to see that putting all of these provisions in place would be expensive, which is a downside to this Act.

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<sup>53</sup> Chandler, Kaitlin. "The Times They Are a Changin': The Music Modernization Act and the Future of Music Copyright Law." *Tul. J. Tech. & Intell. Prop.* 21 (2019): 65

<sup>54</sup> [1936] ch 569

<sup>55</sup> Buiey Jr, Octavious A. "Copyright's Facelift: An Analysis of the New Look of Copyright Following the Music Modernization Act and the United States-Mexico-Canada Agreement." *U. Miami Inter-Am. L. Rev.* 51 (2020): 241.

<sup>56</sup> *ibid*

<sup>57</sup> McCabe, Jordan. "Beyond the music: an artist's road to release." PhD diss., 2019

<sup>58</sup> *ibid*

## 4.2 Copyright Law in Kenya Addressing Music Streaming

By virtue of music streaming being a recent phenomenon and most African countries being developing countries that are not always up to pace with global standards, it is more likely than not that most countries have not taken the recent development of introducing digital music streaming into their laws like the United States has done with the Music Modernization Act. However, even if digital streaming has not been explicitly provided for in legislation, the question that needs to be asked is whether the laws have been worded in a manner that is able to accommodate music streaming. Considering this question, the **Kenyan Copyright Act**<sup>59</sup> will be looked at in order to see whether digital formats of music are provided for.

**Section 26 of the Kenyan Copyright Act**<sup>60</sup> provides that copyright in a literary, musical artistic or audio-visual work shall be the “exclusive right to control acts in Kenya such as reproduction in any material form of the original work, translation and adaptation of the work and the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement”. Furthermore, **section 26(i)(c)** states that there is copyright “in the making available of a whole work or a substantial part either in its original form or in any form recognizably derived from the original”. The words “any form recognizable” is of much importance in this section.

### 4.2.1 Rules of Interpretation In Interpreting The Inclusiveness Of Digital Musical Works In The Kenyan Copyright Act

Each year there are many statutes that are passed by the government and these laws are supposed to be explicit and clear, but this is not always the case<sup>61</sup>. So in order to understand these statutes effectively, they may need to be interpreted. As stated earlier, digital music streaming is a new development which has come up in the last seven or so years. That said, there has been a new development which may need interpretation.

Using the literal rule of interpretation, as highlighted in the case of **R v Judge of the city of London Court**<sup>62</sup>, section 26(i)(e) of the Kenyan Copyright Act it stated that there is copyright in a whole work or a substantial part of a work derived from an original in any form recognizably derived from it. The words “any form recognizably derived from the original” seems to give a pass that songs that have been created in digital form are included in copyright. That section gives leeway to include any form recognizable and therefore, if a digital song is recognizable to the original song that was not digital, it will be protected by copyright.

Moreover, if we opt to use the mischief rule of interpretation which interprets statutes in a way that determines what the purpose of the enactment was or what the gap in the law was, this section would also be interpreted to include digital songs because the Kenyan Copyright Act amended its

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<sup>59</sup> No.12 of 2001

<sup>60</sup> No.12 of 2001

<sup>61</sup> Martin, Jacqueline, *The English Legal System 8<sup>th</sup> edn.* (London: Hodder Education) 80

<sup>62</sup> [1892] 1 QB 273, 290

laws on copyright for the obvious reason that parliament recognized the developments of more than one form of music and therefore, digital music would be included. In the case of **Smith v Hughes**<sup>63</sup> an Act named the Street Offences Act was passed and stated that “it shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution”. The Court subsequently considered appeals against conviction of this provision by six different women. In each case the woman was technically not “in the street” as the Act stated. One was on the balcony and the others had been at the windows of ground floor rooms with the windows either closed or half open and they were attracting the attention of these men by various ways. They argued that they were not guilty because they were not in the street but it was held that the aim of the Act was to clean up the streets and enable people to walk along the streets without being solicited by common prostitutes. That said, the Kenyan Copyright Act clearly provided that section due to realisation that there may be different forms besides physical forms of works.

#### 4.2.2 Rules of Language When Interpreting the Kenyan Copyright Act

In addition, **section 28 of the Kenyan Copyright Act**<sup>64</sup> provides for the nature of copyright in sound recordings. s.28(1)(b) states that copyright in sound recordings allows the control of distributing copies to the public by way of sale, rental, lease, hire, loan or any similar arrangement. The phrase “similar arrangement” however must be interpreted. As stated earlier, the copy may be in any form, which includes digital songs but the issue is whether the term “any similar arrangements” include protection of digital songs on streaming platforms. In this situation, rules of language may be used to interpret these words. Rules of language are part of statutory interpretation and are used by looking at other words in the Act to see if they affect the word or phrase in issue<sup>65</sup>. An example of rules of language is the *Ejusdem Generis rule*, which states that where there is a list of words followed by general words, then the general words are limited to the same kind of items as the specific words<sup>66</sup>.

#### 4.2.3 Payment of Royalties In The Kenyan Act

To add on, **section 30 B of the Kenyan Copyright Act**<sup>67</sup> provides for the payment of royalties. **Section 30(B)(1)** in particular states that “subject to section 28 and 30 of the Act, the Kenyan Revenue Authority or any designated entity by the Board shall collect royalties on behalf of collective management organisations licence to represent performers and owners of sound recordings”. Sections 30(B)(3) also states that the level of royalties payable shall be agreed between the collective management organisation representative of performers and producers of sound recordings and the organisation representative of manufacturers and importers of audio recording equipment”. This points out that the payments to creators and owners of the copyrights

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<sup>63</sup> Ibid

<sup>64</sup> No. 12 of 2001

<sup>65</sup> Martin, Jacqueline, *The English Legal System 8<sup>th</sup> ed.* (London: Hodder Education) 85

<sup>66</sup> Ibid pg 86

<sup>67</sup> No.12 of 2001

have been given importance in this Act. The royalty payments are not as sophisticated as the American System under the Music Modernization Act with the use of Sound Exchange, but there is still an inclusion that protects.

Another important provision in this Act is in **section 35(c)**<sup>68</sup> that provides for the roles of internet service providers. This section gives internet service providers a duty to protect parties from infringement if required. The section provides that an internet service provider may be required to provide information to investigate agencies when there is suspicion that people are engaging in infringement of content while using their internet<sup>69</sup>. This points out that this legislation has recognized that infringement can occur with the use of the internet, and this may involve digital songs which are normally shared without permission of the Copyright owner on the internet. This Act seems to be able to include digital streaming under its protection.

In summary, the Kenyan Copyright Act is flexible as it can accommodate new developments such as digital streaming by virtue of how the Act is worded and because the Kenyan Copyright Act was amended in 2001, despite there being no explicit mention of digital wording, it seems like parliament was able to foresee changes in the forms of copyright for things such as musical works.

From the foregoing, the Music Modernization Act led the way by explicitly providing for digital music streaming and for protecting artists, producers, engineers and mixers and by providing ways to efficiently pay out interested parties in musical works in a world that is musically digital, and by assigning a rotation of judges to settle dispute for performance rates. The Kenyan Act on the other hand is an example for Zambia and other African countries in the sense that the flexibility of their Copyright Act was able to accommodate protection for digital songs that were put on streaming platforms. The Zambian Copyright Act however, is not as flexible as the Kenyan Act in accommodating music streaming because it protects physical works for the most part. Furthermore, it does not explicitly protect digital songs or protect producers, mixers and engineers who may be taken advantage of by virtue of how easy it is to remotely create songs and how accessible those songs are.

Moreover, in the Zambian Copyright Act, collecting societies, which are meant to pay out royalties have not been given legal mandates to collect information and data as well as pay out royalties in a specific way, while the Music Modernization Act mandates the Mechanical Licensing Collective to collect and pay out royalties in a particular way.

This shows that current Zambian Act currently does not prioritise the protection of music on streaming platforms or give room to protect it, and without there being focus on it, many unethical practices such as the use of songs digitally without the consent of the creators of those digital songs may not be held accountable for.

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<sup>68</sup> ibid

<sup>69</sup> Ibid

## **5. RECOMMENDATIONS**

### **5.1 Amendment of section 8 of the Copyright and Performance Rights Act**

This paper recommends that section 8 of The Copyright and Performance Rights Act be amended in order to explicitly include digital formats under musical works or sound recordings or implicitly accommodate digital music streaming. This may be done by pointing out that a sound recording or a musical work that is in any form may be protected in order to make the Act flexible for the current digital world and for the foreseeable future . This will allow disputes that arise out of digital songs to be adjudicated simply and for artists and copyright owners to have protection for their creations. As digital music is very common in these modern times, if good laws are put into place to protect digital music then there is an opportunity for locals and foreign investors to pump money into the music industry which will subsequently grow the music industry and afford artists many more opportunities

### **5.2 Amendment of Section 17(2) (b) of the Copyright and Performance Rights Act**

Section 17 states that the owner of a Copyright in a work has the exclusive right to reproduce a musical work in “any material form” which alludes that he cannot reproduce a musical work that is not in a physical form because it is not protected. The current digital world consumes songs that are not in digital form and therefore this provision does not leave room to accommodate digital songs. That said, this paper proposes that the term “material form” be replaced with “any form” as seen in the Kenyan Copyright Act of 2001.

### **5.3 Amendment of the Copyright and Performance Rights Act to Give Legal Mandates To Collecting Societies To Track Digital Songs**

This paper proposes that collective societies that are authorised to represent copyright must be given legal mandates by the law to create committees that are dedicated to collecting royalties and to have requisite technology that will be used to digitally track songs and attach that data to parties who are owed royalties. In addition, there is a need for collecting societies to develop a system that will be able to automatically pay out royalties frequently as opposed to just once a year in order for artists to be making money constantly. Furthermore, this paper recommends collecting societies to be mandated to work hand in hand with companies that are privy to technology in order for them to administer digital copyright much more easily as seen in the American Music Modernization Act.

### **5.4 Assignment of Main Collective Societies Backed by The Government in The Copyright Act**

This paper proposes that there is a need for the government to assign a large entity that collects music as the main entity for the country and support that entity. However, that main entity must be a non-government organisation and should be run by people who are in the music industry and have an idea of what is going on in the industry at all times. It is important for that entity to be a non-governmental organisation because it might be easier to receive funding from locals and

foreign investors who perhaps do not trust the government due to fear of corruption and the lack of transparency that the government may give off.

### **5.5 Performance Rate Disputes Dealt Resolved the Registrar of PACRA Or by Specific Judges**

This essay proposes that the registrar of PACRA resolves disputes relating to royalties on the performance of sound recordings. If this does not work, specific judges may be chosen to adjudicate on these matters. These specific judges must be very privy to copyright laws as well as the music industry in order to dissect the issues easily and for disputes between digital platforms and artists and copyright owners to be fairly adjudicated. The American Music Modernization Act took this approach because since many artists are using digital streaming platforms, there is a high likelihood that disputes will arise.

### **5.6 Amendment of The Copyright and Performance Rights Act to Explicitly Protect Producers, Mixers and Engineers.**

This paper recommends that all creators who were involved in a sound recording or musical work that is on a digital platform, must be protected and explicitly recognized by the law. Producers, mixers and engineers in particular must be protected by copyright laws aside from writers and performers of the songs due to the important role they play in the creation of songs and how easy it is to release songs in this era of digital music. This was well provided for in the Music Modernization Act.

### **5.7 Automatic Royalties Rates for Parties Involved in a Musical Creation.**

This paper recommends that where producers, mixers and engineers have not signed contracts agreeing on the amount of royalties, there must be a provision that determines what the royalty splits will be for each party. The law must provide for it and it must be created by a statutory instrument through the respective minister so that the provision may be amended according to the changes and the demands in the music industry.

### **5.8 Amendment of The Copyright and Performance Rights Act To include Protection from Internet Service Providers**

Internet Service Providers must protect artists and copyright owners by being able to block access to customers whenever there is a threat to a musical work or a sound recording that is being shared on the internet digitally without the consent of the copyright owners and the artists. This protection was well demonstrated in Kenya in section 35 of the Kenyan Copyright Act.

## **6. CONCLUSION**

The Purpose of this research was to shed light on the degree to which the Copyright Laws in Zambia do not adequately protect digital songs that are on digital streaming platforms as well as the inadequate protection of parties involved in the making of musical works and sound recordings. Furthermore, this dissertation was written to further point out how the law does not give as many mandates to collecting societies as they could to enable them to protect artists in this digital age



and for royalties to be effectively paid out to parties entitled to them. This dissertation also sought to provide alternatives in dealing with these issues. In doing so, this paper is now drawn to a conclusion.

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