Copyright in digital television broadcasting in Kenya: An analysis of the *Royal Media Services* case

*Cynthia Amutete**

Abstract

Kenyan superior courts missed an opportunity to discuss and authoritatively settle the law on the nature of copyright in broadcasts and the effect of the must carry rule in digital broadcasting through their decisions in the Royal Media Services case. The Supreme Court, in arriving at its decision, failed to be guided by Kenyan law on copyright in broadcasts and the must carry rule in three key areas. First, the Supreme Court relied on the Philippines' decision on the definition of a broadcasting organisation without considering the provisions of the Copyright Act (Chapter 130) and the Kenya Information and Communication Act (Chapter 411). Second, the Supreme Court relied on the doctrine of fair use as envisaged in the Philippines copyright regime, yet Section 26 of the Kenyan Copyright Act provides for fair dealing. Third, the Supreme Court relied on the public interest defence without discussing its basis and establishing its parameters, especially since public interest is not provided for in Copyright Act. The Supreme Court erred in determining that rebroadcasting of local broadcasts by subscription television licencees was not an infringement of copyright in broadcasts.

Introduction

In 2014, the *Royal Media Services*[1] case brought forth a myriad of issues concerning the digital migration process key among them being copyright protection

[1] *Royal Media Services Limited & 2 others v Attorney General & 8 others* (2013) eKLR, (DS Majanja J). *Royal Media Services Limited & 2 others v Attorney General & 8 others* (2014) eKLR (Coram: Nambuye, Maraga & Musinga JJA) *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (Coram: Mutunga, CJ & P; Rawal, DCJ & VP; Tunoi, Ibrahim, Ojwang, Wanjala, Njoki, SCJJ).

* The author is an Advocate of the High Court of Kenya. At the time of writing, she was a Graduate Assistant, Strathmore Law School.

of broadcasts in the digital broadcasting age. This article argues that the Supreme Court erred in determining that rebroadcasting of local broadcasts by subscription television licensees was not an infringement of copyright in broadcasts. In discussing this I shall analyse the decision of the superior courts in light of the Kenyan legal framework on copyright in broadcasts. This article is divided into two parts. Part I discusses the nature of copyright in broadcasts and its limitations. This provides a foundation for the subsequent analysis of the *Royal Media Services* case. Part II analyses the High Court's, Court of Appeal's and the Supreme Court's decisions on copyright in broadcasts.

Nature of copyright in broadcasts in Kenya

Broadcasts were recognised as eligible subject matter for copyright protection in the 1950s.[2] In 1961, copyright protection was recognised internationally in the 1961 Rome Convention.[3] Eligibility of broadcasts for copyright protection was informed by the recognition of the value of the communication itself distinct from the content.[4] Copyright protection of broadcasts recognises and protects the investment in and the value of communication. In Kenya, copyright in broadcasts was first protected in the Copyright Act of 1996.[5]

Broadcasts are identified as a subject matter for copyright protection under Article 14 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement); and Section 23 of the Kenyan Copyright Act.[6] Lionel Bently refers to a broadcast as a provision of a service, which involves communication.[7] Although 'transient, intangible and ephemeral', broadcasts are treated as works for the labour involved in their production.[8] A broadcast is an action as opposed to a thing. Copyright in this sense only protects the signals that are

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2 Copyright Act, 1956 (United Kingdom).

3 Articles 3 (f), 6, 13, 14 and 15, *Rome convention for the protection of performers, producers of phonograms and broadcasting organisations,* 26 October 1961. See also *European agreement on the protection of television broadcasts*, 22 June 1960, ETS No 034.

4 Bently L and Shermann B, *Intellectual property law,* 4ed, Oxford University Press, Oxford, 2009.

5 Sihanya B, 'Copyright laws in Kenya' 41(1) *International Review of Intellectual Property and Competition Law*, 2010, 933.

6 Section 22, *Copyright Act* (Chapter 130 of 2001). See also Section 46I, *Kenya Information and Communications Act* (Chapter 411A of 1998).

7 Bently L and Shermann B, *Intellectual property law*, 86. See also Cornish W, Llewelyn D and Aplin T, *Intellectual property: Patents, copyrights, trademarks & allied rights*, 8ed, Sweet & Maxwell, London, 2013, 569.

8 Galloway J and Colston C, *Modern intellectual property law*, 3ed, Routledge, London, 2010, 313.

transmitted and not the content.[9] The Copyright Act defines a broadcast as:

> [T]ransmission, by wire or wireless means, of sounds or images or both or the representations thereof, in such a manner as to cause such images or sounds to be received by the public and includes transmission by satellite.[10]

This definition contains two key elements. First, the definition covers a wide array of transmissions by including transmission by wire and wireless means. This covers cable transmission and wireless transmission such as satellite transmission. This definition also covers both analog and digital broadcasting. This is an attempt to make the definition neutral to cover any future developments. Second, for a transmission, either by wire or wireless, to be protected, it must be made for simultaneous reception by the public like the traditional broadcasting or to be aired at a time appointed by the broadcaster.[11] Therefore, broadcasts that cannot be lawfully received by the public are not eligible for copyright protection.[12] Additionally, transmissions between individuals are excluded from copyright protection.[13]

For encrypted broadcasts, the sounds and images are emitted in a way that results in a distorted image and sound using a normal television set. Therefore, the subscription broadcast providers such as satellite broadcasters charge fees to viewers who must subscribe to the service and get a decoder to recreate the normal image and sound. As much as these broadcasts are only available to the public with the authority of the person making the transmission, such transmission is also considered as making the broadcast available to the public.[14] A broadcast is only eligible for copyright once it has been broadcast and only if it does not infringe on the copyright of another broadcast.[15]

Authorship and ownership of copyright in broadcast

Section 31 of the Copyright Act provides that the first ownership of copyright vests in the author.[16] An author is the person who creates the work.[17]

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9 Galloway J and Colston C, *Modern intellectual property law*, 313.

10 Section 2, *Copyright Act* (Chapter 130 of 2001).

11 Torremans P, *Holyoak & Torremans intellectual property law*, 6ed, Oxford University Press, Oxford, 2010, 201.

12 Torremans P, *Holyoak & Torremans intellectual property law*, 201.

13 Bently L and Shermann B, *Intellectual property law,* 87.

14 Bently L and Shermann B, *Intellectual property law,* 87.

15 Bently L and Shermann B, *Intellectual property law,* 87.

16 Section 31*, Copyright Act* (Chapter 130 of 2001).

17 Sihanya B, *Intellectual property and innovation law in Kenya and Africa: Transferring technology for sustainable development*, Sihanya Mentoring & Innovative Lawyering, Nairobi, 2016, 208.

Copyright in broadcasts vests on the author of the broadcast. An author of a broadcast is defined as the first broadcaster.[18] This has been interpreted to mean the first person who not only prepares but also transmits the broadcast to the public first.[19] In light of this definition, examples of first broadcasters in Kenya are NTV, Citizen TV, KBC, and KTN.[20] This is because they compose, package and are the first persons to transmit the broadcasts.[21]

Nature of the rights in copyright in broadcasts

Section 29 of the Copyright Act highlights the nature of copyright in broadcasts. It provides that copyright in a broadcast is the exclusive right to control the fixation; rebroadcasting; and communication to the public of the broadcast.[22] I discuss below the nature of each of the rights provided for in the aforementioned provisions.

First, rebroadcasting refers to the simultaneous or subsequent broadcasting by one or more broadcasting authorities of the broadcast of another broadcasting authority.[23] The key elements for the act of rebroadcasting are as follows. First there must be a transmission, by wire or wireless means, of the image or sound signals that have already been created and transmitted by another broadcaster.[24] Second, the rebroadcasting must be done by another broadcasting authority. This means that if the person rebroadcasting the work is not a broadcasting authority then the rebroadcasting is not prohibited under Section 29 of the Copyright Act. Examples of rebroadcasting include the retransmission by subscription television providers such as Go TV and Star Times of free-to-air broadcasting services (NTV, Citizen and KTN) that have already been broadcast by free-to-air broadcasters.

The second right is the right to control the communication of the broadcast to the public. Communication to the public has been referred to as the

18 Section 2, *Copyright Act* (Cap 130 of 2001). See also Bently L and Shermann B, *Intellectual property law*, 125.

19 Bently L and Shermann B, *Intellectual property law*, 125.

20 These are licensed broadcasters pursuant to Section 2, *Copyright Act* (Chapter 130 of 2001).

21 *Royal Media Services Limited & 2 others v Attorney General & 8 others* (2014) eKLR.

22 Section 29, *Copyright Act* (Chapter 130 of 2001).

23 Section 2, *Copyright Act* (Chapter 130 of 2001). See also Article 3, R*ome convention for the protection of performers, producers of phonograms and broadcasting organisations.*

24 Copeling A, 'Copyright in broadcasts in the Republic of South Africa' 5(1) *Comparative and International Law Journal of Southern Africa*, 1972, 1-29.

transmission of the work to the public.[25] It generally refers to the right to make the work available to the public which would include through electronic wire or wireless transmission.[26] In the context of broadcasts, this would occur in the form of retransmission of received broadcasts. For example, converting images into electronic signals and broadcasting them so that people can watch it on television is communication to the public.[27] The relaying of broadcasts by reception and immediate retransmission constitutes communication to the public.[28]

Limitation and exceptions of copyright in broadcasts in Kenya

There are statutory limitations and exceptions to copyright in broadcasts. These are justified on the grounds that they enhance innovation, democracy and facilitate the dissemination and creation of knowledge.[29] Therefore, certain acts in relation to broadcasts would be considered as infringement but for limitations and exceptions provided for in the law.

These limitations are provided for in sections 26 and 29 of the Copyright Act. They include the following. First, fair dealing in broadcasts. Dealing refers to making use of the broadcast.[30] The dealing must be fair. In order to establish fairness, one has to show that the dealing is for one of the purposes specified in Section 26 of the Copyright Act.[31] These purposes are; scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of the source.[32] The determination of fairness is a matter of degree and therefore varies in different circumstances.[33] Therefore, mere indication that the purpose falls among the specified categories is not sufficient. Other factors that may be taken into consideration in the determination of fairness include; whether the work has already been published, whether the amount of the work taken was substantial, the consequences of the use, among others.[34]

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25 Bently L and Shermann B, *Intellectual property*, 86-89.

26 Cornish W *et al*, *Intellectual property*, 486.

27 Torremans P, *Holyoak & Torremans intellectual property law*, 253-256.

28 *Sociedad General de Autores Editores de Espana (SGAE) v Rafael Hoteles* (2006), Court of Justice of the European Union.

29 Ouma M and Sihanya B, 'Kenya' in Armstrong C, De Beer J, Kawooya D, Prabhala A, Schonwetter T (eds) *Access to knowledge in Africa: The role of copyright*, University of Cape Town Press, 2010, 90. See also Netanel N, 'Copyright and a democratic civil society' 106 (2) *Yale Law Journal*, 1996, 291, 305.

30 Galloway and Colston, *Modern intellectual property law,* 313-315.

31 Sihanya B, *Intellectual property and innovation law in Kenya and Africa*. See also Ouma M and Sihanya B, 'Kenya'.

32 Section 26, *Copyright Act* (Chapter 130 of 2001).

33 *Hubbard v Vosper* (1972), Court of Appeal of England and Wales.

34 Galloway and Colston, *Modern intellectual property law*, 313-315.

Second, the broadcasting of a work where the broadcast is intended to be used for purposes of systematic instructional activities. This also encompasses the use of reproduction of broadcasts in registered schools and universities.[35] Third, any use made of a broadcast for the purpose of a judicial proceeding or of any report of any such proceeding.[36]

Is the 'must carry' rule an exception to copyright?

The 'must carry' rule is established in the Kenya Information and Communications Act (KICA)[37] and the Kenya Information and Communication Broadcasting Regulations (KICA Broadcasting Regulations).[38] The KICA provides that the licensing of signal distribution licensees and subscription television licensees is subject to conditions such as to provide a certain minimum number of Kenyan broadcasting services.[39] Another condition is the must carry rule provided in Section 14(2) of the KICA Broadcasting Regulations which provides that the commission may require subscription licensees to provide a 'prescribed minimum number of Kenyan Broadcasting channels'.[40] The rationale for the must carry rule is to facilitate public access to information through television programmes.

The 'must-carry' rule originated in the US in the early 1990s at the advent of cable television,[41] to ensure that channels of general interest would be transmitted.[42] At the advent of cable television, there was a legitimate fear that due to the limited broadcasting space, a cable operator with absolute freedom in determining what channels to carry could decide to exclude channels crucial for social and political debate (such as public TV channels) in favor of purely commercial ones.[43] This could deprive a large part of the public of the ability to partake in the vital exchange (or at least consumption) of information and ideas.[44] In *Turner*

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35 Article 14, *Agreement on trade-related aspects of intellectual property rights*, 15 April 1994.

36 Section 26, *Copyright Act* (Chapter 130 of 2001).

37 *Kenya Information and Communications Act* (Cap 411A).

38 *Kenya Information and Communications (Broadcasting) Regulations* (2009).

39 *Kenya Information and Communications Act* (Cap 411A). See also *Kenya Information and Communications (Broadcasting) Regulations* (2009).

40 Section 14 (2), *Kenya Information and Communication (Broadcasting) Regulations* (2009).

41 Hazlett T, 'Digitizing "must carry" under Turner Broadcasting v FCC' 8 *Supreme Court Economic Review*, 2000, 2.

42 US Copyrights Office, *A review of the copyright licensing regimes covering retransmission of broadcast signals*, 1 August 1997.

43 Cate F, 'Cable television and the compulsory copyright license' *Indiana University Digital Repository, Maurer Law*, 1990, 193 – <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1749&context=facpub>on 21 March 2020.

44 *Quincy Cable TV, Inc* v *FCC (1985)*, United States Court of Appeals, District of Columbia Circuit.

v FCC it was stated that the carriage of these stations was necessary to provide a 'fair, efficient, and equitable distribution of broadcast services.'[45] This was especially to facilitate the broadcasting of local broadcasts as they are 'an important source of local news and public affairs programming, which are vital to having "an informed electorate"'.[46] The Supreme Court asserted that the rules furthered three important, interrelated Government interests. These are: first, the preservation of the benefits of free, over-the-air local broadcast television; second, the promotion of widespread dissemination of information from a multiplicity of sources; and, third, the advancement of fair competition in the market for television programming.

The application of the must carry rule can be based on different models. For example, the US adopted the retransmission consent model, where the networks had an obligation to carry local broadcasts but the broadcasters could choose between being carried as a matter of right or through a retransmission agreement.[47] Retransmission agreements were mainly in cases involving commercial broadcasters who negotiate for copyright payments for the carriage of their programming (retransmission).[48] In many European countries, the must carry obligation is imposed if the respective networks are the principal means of receiving radio and television channels for a significant number of the consumers.[49] Whether the must carry rule is a limitation to copyright is subject to the model adopted by a State.

The 'must offer' rule

The KICA Broadcasting Regulations (2009) do not give a detailed clear framework on the model that is adopted.50 Sections 14 and 16 of the Regula-

See also *National Association 18 of Broadcasters* v *Quincy Cable TV, Inc* (1986), United States Court of Appeals, District of Columbia Circuit and *Century Communications Corp v* FCC (1987), United States Court of Appeals, District of Columbia Circuit.

45 *Turner Broadcasting System, Inc v FCC (1994), The Supreme Court of the United States.*

46 *Turner Broadcasting System, Inc v FCC (1994), The Supreme Court of the United States.*

47 Brown J, 'Digital must-carry & (and) the case for public television' 15(1) *Cornell Journal of Law and Public Policy*, 2005, 81. See also Section 4, *Cable Television Consumer Protection and Competition* (Act of 1992, United States of America): Cable operators are required to carry at least three local commercial stations if they have twelve or fewer usable activated channels on their cable system.

48 Brown J, 'Digital must-carry & (and) the case for public television', 81.

49 Van Eijk N and Sloot B, 'Must-carry regulation: A must or a burden?' Amsterdam Law School Legal Studies Research, Paper No 2013-02, 2012 -< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200796> on 29 February 2020.

50 Maina W, 'Supreme confusion: How authority, court muddled the copyright law' Daily Nation, 23 January 2015 - <https://www.nation.co.ke/oped/Opinion/How-authority-court-muddled-the-copyright-law/-/440808/2600262/-/ktw5uqz/-/index.html> on 21 March 2020.

tions do not impose a 'must offer' obligation on the free-to-air broadcaster.[51] A must offer obligation arises where the broadcasters are under an obligation to provide their broadcasts for rebroadcasting/retransmission. They can neither stop operators from retransmitting nor make retransmission conditional upon any consent or payment.[52] In this context, copyright in the broadcasts is infringed as the broadcasters do not authorize the retransmission/rebroadcasting of their channels. To this extent, the must offer obligation is seen as a limitation/defence to copyright infringement. In Kenya, there is no statutory basis for must offer obligation. There only exists a must carry obligation which is solely on the carrying network. It is up to the carrying network to obtain the broadcasts from broadcasters through retransmission arrangements. Therefore, the must carry rule in Kenya does not limit copyright.[53] Further, there is no provision in the Copyright Act to the effect that the must carry rule is a limitation to copyright. Hence the treatment of the must carry rule as a limitation to copyright in Kenya has no legal basis. Despite its justification to facilitate public access to information through television broadcasts, the must carry rule is not recognised as a limitation to copyright in the Kenyan legal framework.

Analysis of court decisions on copyright in the *Royal Media Services* case

The digital migration process kicked off in 2006. Kenya, a member of the International Telecommunication Union, was under an obligation to facilitate the analog digital transition pursuant to the Final Acts of RRC-06 Conference commonly referred to as Geneva Agreement of 2006 (Ge06).[54] Consequently, the Task Force on the Migration from Analogue to Digital Broadcasting recommended the licensing of signal distributors to provide signal distribution services

51 Oira H, 'Using "must carry" cloak to violate TV firms' copyright' Daily Nation, 31 January 2015 – <https://www.nation.co.ke/oped/opinion/Communications-Authority-Digital-Licences-Must-Carry-Rule/440808-2608846-format-xhtml-n0clbi/index.html> on 21 March 2020.

52 Two channels of public TV, one regional television programme service transmitted by Telewizja Polska S.A. (public TV broadcaster) and leading private programme services such as TVN and Polsat that on the day the new law entered into force were broadcast by analog terrestrial diffusion (currently 7 channels in total).

53 Maina W, 'Supreme confusion: How authority, court muddled the copyright law' Daily Nation, 23 January 2015 - <https://www.nation.co.ke/oped/Opinion/How-authority-court-muddled-the-copyright-law/-/440808/2600262/-/ktw5uqz/-/index.html> on 21 March 2020.

54 GE06 Agreement of 2006. See also Ministry of Information and Communication, *National information and communications technology (ICT) policy*, January 2006, 16.

as a common carrier to broadcasting licensees upon their request on an equitable, reasonable, non-preferential and non-discriminatory basis.[55] The Communications Authority of Kenya (CAK)[56] granted the Broadcasting Signal Distribution (BSD) licences to Pan African Network Group (Kenya), a Chinese-owned company, and Signet, a Kenyan Government-owned company. The petitioners in the *Royal Media Services* case, were aggrieved by the decision not to grant them a BSD licence. They were also aggrieved by a direction from the CAK requiring them to provide their broadcasts to subscription television providers for transmission pursuant to the must carry rule. They instituted a suit seeking judicial remedies against the decision and directive by the CAK on three key legal issues.

The first issue was the foreign ownership of frequencies which are considered a national resource. The petitioners argued that it was not good practice for the Government and foreigners to have a large stake in media ownership, as this might be a threat to democracy and suppress freedom of expression of the local media.[57] The second issue was whether the subscription services infringed on local broadcasters copyright in broadcasts by rebroadcasting their free-to-air channels;[58] and whether the must carry rule is a limitation to copyright in broadcasts.[59] Third was whether the digital migration regulation affected media freedom. The focus of this article is limited to the second issue. Below is an analysis of the decision of the courts on the intellectual property issues raised.

The High Court decision

The intellectual property question brought before the High Court[60] in Nairobi was whether the respondents[61] had breached and/or violated the petitioners' intellectual property rights by requiring the retransmission of the petitioners'

55 Ministry of Information and Technology, *Report of the Taskforce on Migration from Analogue to Digital Broadcasting in Kenya*, 2007, 31.

56 Then the Communication Commission of Kenya (CCK).

57 PANG, a Chinese company and Signet, a subsidiary of Kenya Broadcasting Corporation own the largest number of frequencies that is 120 and 54 respectively out of 211 available frequencies.

58 Torremans P, *Holyoak & Torremans intellectual property law,* 253-256.

59 Media Council of Kenya, *Digital combat: An assessment of media coverage of digital migration process and debate in Kenya*, August 2015. See also Section 26, *Copyright Act* (Chapter 130 of 2001).

60 *Royal Media Services Ltd & 2 others v Attorney General & 8 others* (2014) eKLR.

61 The Ministry of Information Communication and Technology, Communication Commission of Kenya (CCK, now Communications Authority of Kenya (CA)), Signet Kenya Ltd (Signal Distributor), Star Times Media LTD (Subscription Broadcasting Service Provider) , Pan African Network Group Kenya Ltd (Signal Distributor) and GOTV Kenya LTD (Subscription Broadcasting Service Provider).

broadcasts.[62] Justice David Majanja dismissed the issue stating that the petitioners had not proven the infringement of copyright.[63] This decision however, was arrived at on technical grounds. The learned judge stated that the petitioners had not yet issued a demand notice to stop the violation neither had they made a complaint to the then Communication Commission of Kenya.[64] This argument was informed by the fact that Signet had been carrying the local broadcasters' signal since 2009.

Secondly, Justice Majanja stated that a constitutional petition was not the appropriate mode to move the court in cases of intellectual property rights infringement. This is because the Copyright Act provides for mechanisms to seek redress for copyright infringement.[65] In this case, copyright infringement is actionable under Section 35(4) of the Copyright Act. Hence instead of bringing the suit as a constitutional petition in a constitutional court, it should have been brought as a copyright infringement issue in a commercial court.

Consequently, Justice Majanja's judgment failed to develop any substantial jurisprudence on the issues of copyright in broadcasts. However, the judge made two important points. First, he stated that the relationship between the petitioners (broadcasters and content providers - intellectual property owners) and the BSD licensees was contractual. This statement shows that the judge acknowledged the contractual nature of retransmission arrangements which involves consent.[66] Secondly, the judge pointed out that the content was transmitted digitally without interference by the signal distributor and therefore the carriage of the petitioner's signals by the respondents did not amount to an infringement. However, this determination was in error because the offence of rebroadcasting does not require alteration or interference with the broadcasts.[67]

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62 Citizen TV, Kenya Television Network and NTV; *Royal Media Services Ltd & 2 others v Attorney General & 8 others* (2013) eKLR.

63 *Royal Media Services Ltd & 2 others v Attorney General & 8 others* (2013) eKLR, para 131. See also Sihanya B, *Intellectual property law in Kenya and Africa,* 226.

64 *Royal Media Services Ltd & 2 others v Attorney General & 8 others* (2013) eKLR, para 133.

65 Section 135, *Copyright Act* (Chapter 130 of 2001). See also *Sanitam Services (EA) Ltd v Tamia Ltd and others* (2012) eKLR. See Sections 109, 110 and 118, *Industrial Property Act* (Act No 3 of 2001).

66 Brown J, 'Digital must-carry & (and) the case for public television', 74-108.

67 Bently and Shermann, *Intellectual property,* 86-89. See also Cornish *et al, Intellectual property.* Please see part 1 of this article above.

Court of Appeal's decision

The local broadcasters aggrieved by the High Court's decision appealed to the Court of Appeal (CoA).[68] The appeal was based on several grounds.[69] The relevant ground for this article was that Justice Majanja erred in law in holding that the respondents had not violated the intellectual property rights of the appellants.[70] The Court of Appeal attempted to analyse the intellectual property issues raised.

Justice Nambuye stated that, based on Article 40(5) of the Constitution of Kenya 2010, the State has a duty to protect property, including intellectual property. Though the judge did not refer to the Copyright Act, it is implied that she was referring to copyright in broadcasts.[71] The learned judge relying on regulations 14(2)(b) and 29 of the KICA Broadcasting Regulations,[72] stated that no licensee has the authority to broadcast any information from any person without that person's consent because that is considered private property. In light of this, the judge stated that the directive by the Communications Authority (CA) to the respondent to carry the appellants' signal amounted to an interference with their intellectual property.[73] There are three main shortcomings with Justice Nambuye's argument. Firstly, the judge's reliance on Section 14(2)(b) to impose an obligation to obtain consent was inaccurate because Section 14(2)(b) does not provide for rebroadcasting consent. It only provides for consent that broadcasters would need to acquire from the sources of information before broadcasting. Secondly, the judge's reliance on Regulation 29 of the KICA was erroneous as the issue in question was not broadcasting but rebroadcasting, therefore Regulation 29 of the KICA is not the appropriate provision for the issue in question.[74] Thirdly, Justice Nambuye's decision was based on a very generic rule, the right to property without a specific reference to intellectual property, especially copyright. It did not address the specific complexities of the alleged copyright infringement issues.

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68 *Royal Media Services Limited & 2 others v Attorney General & 8 others* (2014) eKLR.

69 Which are beyond the scope of this article.

70 Media Council of Kenya, *Digital combat: An assessment of media coverage of digital migration process and debate in Kenya*, 13.

71 Article 40, *Constitution of Kenya* (2010). See also, Wekesa M, 'An overview of the intellectual property rights (IPRS) regime in Kenya' in Wekesa M and Sihanya B (eds), *Intellectual property rights in Kenya*, Konrad Adenauer Stiftung, Nairobi, 2009, 1-11.

72 Legal Notice 187 of 31 December 2009 on *Kenya Information and Communications (Broadcasting) Regulations*.

73 Section 14 2 (b), *Kenya Information and Communications (Broadcasting) Regulations* (2009). Legal Notice no. 187 of 2009.

74 This is discussed further under the analysis of the Supreme Court's decision.

Justice David Maraga, then CoA judge, concurred with Justice Nambuye and held that the CA requiring broadcasting signal distributors (PANG Networks and Signet), and subscription broadcasting licensees (Star Times and Go TV) to air free-to-air channels (NTV, Citizen and KTN) without the petitioners' consent amounted to infringement of copyright.[75] Justice Maraga stated that the requirement was based on misunderstanding of the Regulations 14(2)(b) and 16(2)(a). Regulation 16(2) (a) provides that the BSD licensee may be required to distribute on its digital platform free-to-air and subscription broadcasting services and related data on behalf of other licensed broadcasters.[76] According to Justice Maraga, this requirement was to ensure that the broadcasting system meets the needs of Kenyans through effective local ownership and control of the Kenyan broadcasting system. These provisions also aim to promote the airing of local content so that we do not have only foreign programmes being aired to the Kenyan viewers.[77] However, according to Justice Maraga, these requirements do not authorise rebroadcasting without that broadcaster's consent.[78] Justice Maraga captured the spirit of the must carry rule as embodied in sections 14(2)(b) and 16(2) of the KICA Regulations. His position was that the must carry rule is not an automatic limitation to copyright as the provisions do not embody a must offer obligation.[79] The provisions do not confer on the broadcasters an automatic obligation to offer their broadcasts for rebroadcasting. This means that subscription television licensees and the BSD licensees have to obtain consent irrespective of the Regulations. This would have required PANG, Signet, Star Times and Go TV to seek consent from Citizen TV, NTV and KTN before rebroadcasting their broadcasts.[80]

75 Sihanya B, *Intellectual property law in Kenya and Africa*, 229. See also Section 15, *Copyright Act* (Chapter 130 of 2001): Doing an act which is controlled by the copyright without the copyright owner's consent.

76 Section 29, *Kenya Information and Communications (Broadcasting) Regulations* (2009).

77 See also Paragraph 4.4 and 4.10, *National Information Communication Technology Policy*, 2006.

78 *Royal Media Services Limited & 2 others v Attorney General & 8 others* (2014) eKLR, para 64.

79 Maina W, 'Supreme confusion: How authority, court muddled the copyright law' Daily Nation, 23 January 2015 –<https://www.nation.co.ke/oped/Opinion/How-authority-court-muddled-the-copyright-law/-/440808/2600262/-/ktw5uqz/-/index.html> on 21 March 2020. See also Oira H, 'Using "must carry" cloak to violate TV firms' copyright' Daily Nation, 31 January 2015 –<https://www.nation.co.ke/oped/opinion/Communications-Authority-Digital-Licences-Must-Carry-Rule/440808-2608846-format-xhtml-n0clbi/index.html> 21 March 2020.

80 Bently and Shermann, *Intellectual property law,* 269.

Supreme Court decision

The Ministry of Information and Communication and the CA were aggrieved by the decision of the Court of Appeal. They appealed to the Supreme Court81 on the grounds that the Court of Appeal erred in law in holding the respondents liable for copyright infringement, among other grounds that are beyond the scope of this article.[82] The Supreme Court determined that there was no infringement, based on three arguments. Firstly, the Supreme Court stated that there was no copyright infringement as the act of carrying the signals was not rebroadcasting and therefore it was not prohibited. The Supreme Court acknowledged the nature and the scope of copyright in broadcasts to include the right to control rebroadcasting of broadcasts.[83] Pursuant to Section 29 of the Copyright Act, rebroadcasting amounts to infringement of copyright in broadcasts. The Supreme Court defined rebroadcasting as 'the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.'[84] The Supreme Court further relied on *ABS-CBN Broadcasting Corporation v Philippine Multi-Media System, Inc. & 6 Others*,[85] and the Working Paper prepared by the Secretariat of the World Intellectual Property Organisation's Standing Committee on Copyright and Related Rights, which defines broadcasting organisations as 'entities that take the financial and editorial responsibility for the selection and arrangement of, and investment in, the transmitted content.'[86] In light of this definition, the Supreme Court held that the BSD licensees, PANG Network and Signet, and the subscription broadcast services, Go TV and Star Times, were not broadcasting organisations. This is because they do not take 'financial and editorial responsibility for the selection and arrangement of, and investment in, the transmitted content.' Therefore, they cannot be liable for in-

81 *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR.

82 *Communications Commission of Kenya & 5 others* v *Royal Media Services Limited & 5 others* (2014) eKLR.

83 Section 29, *Copyright Act* (Chapter 130 of 2001).

84 Article 3(g), *Rome convention for the protection of performers, producers of phonograms and broadcasting organisations*. Section 2, *Copyright Act* (Chapter 130 of 2001) which refers to broadcasting authorities rather than broadcasting organization. As seen later in this section a broadcasting authority and broadcasting organization refer to broadcasters. There is no difference between them. See also *ABS-CBN Broadcasting Corporation v Philippine Multi-Media System, Inc & 6 others* (2009), Supreme Court of the Philippines.

85 *ABS-CBN Broadcasting Corporation v Philippine Multi-Media System, Inc. & 6 others* (2009), Supreme Court of the Philippines.

86 Secretariat, 'Protection of broadcasting organisations: Terms and concepts', WIPO Standing Committee on Copyright and Related Rights, SCCR/8/INF/1, 4-8 November 2002, 12 -< https://www.wipo.int/edocs/mdocs/copyright/en/sccr_8/sccr_8_inf_1.pdf> on 21 March 2020. See also *ABS-CBN Broadcasting Corporation v Philippine Multi-Media System, Inc. & 6 others* (2009), Supreme Court of the Philippines, at paras. 239-243.

fringement by rebroadcasting.[87] Additionally, the Supreme Court stated that the content was delivered digitally without any interference from the signal distributors and therefore does not amount to copyright infringement.[88]

Secondly, the Supreme Court was persuaded by the *ABS-CBN Broadcasting Corporation v Philippine Multi-Media System*,[89] in finding that the must carry rule was a valid limitation to copyright in broadcasts. The Supreme Court noted that copyright in broadcasts has limitations and that the must carry rule fell under the limitations provided for by the statute. The Supreme Court focused on two exceptions and limitations, the doctrine of fair dealing and public interest. The Supreme Court stated that the must carry obligation fell squarely within the limitation of fair dealing.[90]

Thirdly, the Supreme Court argued that the must carry rule is a justified limitation to copyright in broadcasts on the ground of public interest.[91] Guided by the Philippine Supreme Court, Kenya's Supreme Court argued that the must carry rule was in place to facilitate public access to information. It is an essential limitation as it furthers and enables citizens to exercise one of their fundamental civil and political rights of access to information.[92] The Supreme Court argued that this is in the public interest and therefore justifies the must carry rule.

This article argues that the Supreme Court erred in making the determinations above especially by relying on the Philippines decision without noting the flaws in the decision and the differences between the laws applicable in Philippines and in Kenya.[93] I shall analyse the Supreme Court's decision critically, based on three key aspects. First, the Supreme Court erred in its determination that there was no rebroadcasting because the BSD licensees and the subscription

87 *ABS-CBN Broadcasting Corporation v Philippine Multi-Media System, Inc. & 6 Others* (2009), Supreme Court of the Philippines, at paras 239-243.

88 See above where Judge Majanja also arrived at this erroneous conclusion.

89 *ABS-CBN Broadcasting Corporation v Philippine Multi-Media System, Inc & 6 others* (2009), Supreme Court of the Philippines. See also *Turner Broadcasting System, Inc v FCC* (1994), Supreme Court of the United States.

90 *ABS-CBN Broadcasting Corporation v Philippine Multi-Media System, Inc. & 6 others* (2009), Supreme Court of the Philippines, at paras 244 – 252.

91 *ABS-CBN Broadcasting Corporation v Philippine Multi-Media System, Inc. & 6 others* (2009), Supreme Court of the Philippines, at para 252. See also Communications *Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR.

92 Article 11, 35 and 46, *Constitution of Kenya* (2010). See also *ABS-CBN Broadcasting Corporation v Philippine Multi-Media System, Inc & 6 others* (2009), Supreme Court of the Philippines.

93 Maina W, 'Supreme confusion: How authority, court muddled the copyright law' Daily Nation, 23 January 2015 –<https://www.nation.co.ke/oped/Opinion/How-authority-court-muddled-the-copyright-law/-/440808/2600262/-/ktw5uqz/-/index.html> on 21 March 2020.

broadcasting service providers were not broadcasting authorities in accordance with Section 2 of the Copyright Act. The Supreme Court stated that since the aforementioned institutions did not take the financial and editorial responsibility for the selection and arrangement of, and investment in, the transmitted content, then they are not broadcasting organisations.[94]

The Supreme Court failed to fully appreciate the Working Paper definition (which they relied on) of a broadcasting organisation.[95] According to the Working paper, 'broadcasting organisation', does not have a succinct definition. However, it usually refers to the beneficiary of protection and are organisations which provide broadcasting services to the general public over wireless waves.[96] The Working paper noted that broadcasting organisations usually take the financial and editorial responsibility for the selection and arrangement of, and investment in, the transmitted content.[97] However, taking financial and editorial responsibility is not the exclusive element that determines what a broadcasting organisation is. As indicated in the working paper, technological developments have led to the emergence of new programme-transmitting methods and consequently new entities, for example, programme and signal distributors.[98] Whether such organisations should be regarded as broadcasting organisations is still subject to discussion. However, there was a consensus to extend protection to cable distribution.[99] In some states, such organisations are protected as broadcasting organisations because of the organisational, technical and economic investment which is necessary for their production. Kenya is an example of such a country. The Copyright Act defines broadcasting authority as 'the Kenya Broadcasting Corporation established by the Kenya Broadcasting Corporation Act (Cap 221), or any other broadcaster authorized by or under any written law.'[100]

This provision leads us to the KICA that provides for the licensing of broadcasting organisations. First, Section 2 of the KICA defines broadcaster as,

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94 Secretariat, 'Protection of broadcasting organisations: Terms and concepts'.

95 These working papers are authoritative interpretive tools *(travaux préparatoires*) for provisions relating to copyright in broadcasts since they are prepared by WIPO standing committees tasked with among other things preparing recommendations for harmonisation of copyright and related rights. The Committee is currently working on limitations and exceptions of copyright in broadcasts and the definition of broadcasting organisations.

96 Article 3, R*ome convention for the protection of performers, producers of phonograms and broadcasting organisations*. See also Secretariat, 'Protection of broadcasting organisations: Terms and concepts'.

97 Secretariat, 'Protection of broadcasting organisations: Terms and concepts'.

98 Ogawa M, '*Broadcasters' rights: Competing rationales in the global digital age*' PhD Thesis, University of Queensland, Brisbane, 2007, 11-19 –< https://espace.library.uq.edu.au/view/UQ:159945> on 21 March 2020.

99 Secretariat, 'Protection of broadcasting organisations: Terms and concepts'.

100 Section 2, *Copyright Act* (Chapter 130 of 2001).

> [a]ny legal or natural person who composes or packages or distributes television or radio programme services for reception by the public or sections of the public or subscribers to such a service, irrespective of technology used.[101]

From the aforementioned definition, a broadcasting authority in Kenya is not limited to one who takes financial and editorial responsibility of the transmitted content. It also includes those who distribute programmes. These include the BSD licensees and the subscription television service providers. Second, sections 46B and 46C of the KICA provides that the licensing of broadcasting services includes free-to-air and subscription services.[102] Therefore, in Kenya these organisations are treated as broadcasting organisations despite the fact they may not be financially or editorially responsible for the content aired.

The Supreme Court relied heavily on *ABS-CBN Broadcasting Corporation v Philippine Multi-Media System*, without construing the Working Paper as a whole and without taking into consideration the position in our local statutes.[103] In light of this, the Supreme Court should have arrived at the fact that there was rebroadcasting, which, unless it was authorised or fell under the limitations and exceptions, was an infringement to copyright in broadcasts.[104]

Second, the Supreme Court erred in the categorisation of the must carry rule as part of fair dealing. Fair dealing is permissible in relation to specific purposes highlighted in the Copyright Act.[105] It is only for those purposes that dealing is considered fair.[106] There are two steps involved in deciding if some particular use of copyrighted material is fair dealing. First, one must use the material for specific purposes provided for in the law. Secondly, the use must be fair.[107] The must carry rule is not even remotely implied from the aforementioned purposes. Therefore, the Supreme Court treating fair dealing defence and the must carry rule as mutually inclusive is extremely erroneous.[108] Must carry

101 Section 2, *Kenya Information and Communications Act* (Chapter 411A of 1998).

102 Section 46 B and C, *Kenya Information and Communications Act* (Chapter 411A of 1998).

103 Maina W, 'Supreme confusion: How authority, court muddled the copyright law' Daily Nation, 23 January 2015 <https://www.nation.co.ke/oped/Opinion/How-authority-court-muddled-the-copyright-law/-/440808/2600262/-/ktw5uqz/-/index.html> on 21 March 2020.

104 Section 29, *Copyright Act* (Chapter 130 of 2001).

105 Sihanya, *Intellectual property and innovation law in Kenya and Africa*, 226.

106 Ouma M and Sihanya B, 'Kenya'. Please see Part I of this article.

107 Ouma M and Sihanya B, 'Kenya'.

108 Maina W, 'Supreme confusion: How authority, court muddled the copyright law' Daily Nation, 23 January 2015 <https://www.nation.co.ke/oped/Opinion/How-authority-court-muddled-the-copyright-law/-/440808/2600262/-/ktw5uqz/-/index.html> on 21 March 2020. See also Oira H, 'Using "must carry" cloak to violate TV firms' copyright' Daily Nation, 31 January 2015 –< https://www.nation.co.ke/oped/opinion/Communications-Authority-Digital-Licences-Must-Car-

is an obligation that a broadcast regulator imposes on a cable or satellite station to carry the signal of a free-to-air broadcaster in order to enhance the reach of the free-to-air TV or local station. In itself, it does not amount to a limitation to copyright unless it is accompanied with a must offer obligation.[109] Fair dealing is the right to use another person's copyrighted material in certain narrowly defined circumstances. There is no nexus between the must carry rule and fair dealing as provided in the statute.

The Supreme Court in its judgment noted that the fair dealing doctrine is narrow compared to fair use. It also noted that the Kenyan copyright regime provides for fair dealing. Despite that, the Supreme Court relied on the Philippines decision without recognising the fact that the Philippines copyright regime provides for fair use as a limitation and not fair dealing. Fair use is inherently wide and flexible. Section 184(1)(h) of the IP Code of that country provides:

> The use made of a work by or under the direction or control of the Government, the National Library or by educational, scientific or professional institutions where such use is in the public interest and is compatible with fair use shall not constitute infringement of copyright.[110]

This makes the fair use in the Philippines regime extremely flexible and can accommodate rebroadcasting to facilitate public access of information as a matter of public interest. This is much wider compared to the fair dealing doctrine provided in Section 26 the Copyright Act.[111]

Third, the Supreme Court erred in arguing that the must carry rule is a limitation to copyright as it serves the purpose of public interest. Public interest is still a problematic rubric, and is not well established in relevant African statutes, case law, or the relevant literature.[112] Though not statutory,[113] an infringement can be justified on the basis that the use is necessary in the public interest.[114] In the UK, the defence of public interest has mainly been with reference to the publication of private and confidential information. In *Lion Laboratories v Evans* and *Hyde*

ry-Rule/440808-2608846-format-xhtml-n0clbi/index.html> on 21 March 2020.

109 Hazlett T, 'Digitizing "must carry" under Turner Broadcasting v FCC', 2. See also US Copyrights Office, *A review of the copyright licensing regimes covering retransmission of broadcast signals*, 1 August 1997.

110 Section 107 of the US Title Code.

111 *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR, para 244.

112 Sihanya, *Intellectual property and innovation law in Kenya and Africa,* 233.

113 Except in the case of reproduction in Section 26, *Copyright Act* (Chapter 130 of 2001).

114 Bently and Shermann, *Intellectual property law*, 219. See also *Lion Laboratories* v *Evans* (1985), United Kingdom Queen Bench. *Hyde Park Residence v Yelland* (2000), United Kingdom Court of Appeal. *Ashdown* v *Telegraph* (2001), The United Kingdom Court of Appeal.

Park Residence v Yelland, the courts upheld the defence of public interest but argued that the defence is only to be applied in extremely rare cases.[115] The courts' argument that the must carry rule is justified as a defence for copyright infringement on the grounds of public interest is quite problematic. First, the court again relied on Philippines' Supreme Court decision which justified the must carry rule on the basis of public interest. This is especially because Philippines' IP Code, unlike our Copyright Act, provides for public interest as a defence. Our copyright regime does not embody the defence of public interest.[116] In order to rely on public interest, the Supreme Court should have given a succinct explanation of establishing public interest as a defence in copyright and establish parameters of the defence.[117] The Supreme Court did not. It merely stated that the must carry rule is justified on grounds of public interest to access information.[118] In light of the fact that the must carry obligation in itself is not a limitation to copyright, the Supreme Court did not seem to say anything with reference to public interest as a defence to copyright infringement. The Supreme Court rationalised the must carry rule but not as a defence to copyright infringement.

Conclusion

The Superior Courts missed an opportunity to discuss the nature of copyright in broadcasts and the effect of the must carry rule in light of digital broadcasting. In arriving at its decision, the Supreme Court failed to be guided by Kenyan law on copyright in broadcasts and the must carry rule in the following three areas. First, the Supreme Court relied on Philippines' decision on the definition of a broadcasting organisation without considering the provisions in the Copyright Act and the KICA.[119] Second, the Supreme Court relied on the doctrine of fair use as envisaged in the Philippines' copyright regime yet Section 26 of the Copyright Act provides for fair dealing. Third, the Supreme Court relied on the public interest defence without discussing its basis and establishing its parameters, especially since public interest is not provided for in the Copyright Act.

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[115] *Hyde Park Residence v Yelland* (2000), United Kingdom Court of Appeal.

[116] Sections 26 and 29, *Copyright Act* (Cap 130 of 2001).

[117] *Lion Laboratories v Evans* (1985). *Hyde Park Residence v Yelland* (2000).

[118] *Lion Laboratories v Evans* (1985). *Hyde Park Residence v Yelland* (2000), at paras. 251 and 252.

[119] Section 2, *Copyright Act* (Cap 130 of 2001) and Section 2, *Kenya information and Communication Act* (1998).

Consequently, we have a Supreme Court decision that is binding on the other courts despite its deficiencies. The decision creates confusion on the applicability of fair dealing and fair use despite the clarity in Section 26 of the Copyright Act. Further, the Supreme Court has expounded the defence of public interest in a case of copyright infringement without proper parameters as to its scope. This opens up the framework on public interest defence to speculation and subjectivity, and poses a challenge to the determination of similar issues in future cases of copyright in broadcast. However, the Supreme Court's rationalisation of the must carry rule can be used to inform a retransmission model that takes into consideration and balances public access to information and copyright in broadcasts.