

# The Efficiency of Copyright Law in the Digital Space in Kenya: A Case for the *Making Available Right* in Peer-to-Peer File Sharing

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## Abstract

*The emergence and use of new technologies such as Peer-to-Peer (P2P) file sharing has brought with it numerous controversies particularly for intellectual property. P2P technologies function by granting its users access to files stored on another P2P user's hard drive thus enabling them to download on-demand from users who have granted them such access. This aspect of the P2P networks (making files available for download), has been argued to be a violation of the exclusive rights granted by copyright. Consequently, a new right of making available was introduced via the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) to supplement the existing copyright regime thus making it more adaptable to the digital age. The lack of ratification of the WCT and the lack of recognition of this right in Kenya, points to an inefficiency of Kenyan copyright laws to prevent P2P sharing of protected works in Kenya.*

## I. Introduction

Copyright<sup>1</sup> has its origins in the Statute of Anne,<sup>2</sup> enacted in England in 1710 to vest rights in book authors, which developed in response to the printing press. This right has both international and national cognizance and grants authors the exclusive right to control distribution, communication to the public

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<sup>1</sup> The right to copy; specifically, a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other audio-visual works; and sound recordings) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.

<sup>2</sup> Copyright Act 1709 8 Anne c.21.

and reproduction of their copyright protected works.<sup>3</sup> Over the years,<sup>4</sup> the copyright regime has undergone changes to incorporate emerging trends, such that it now also covers photographs, motion pictures and sound recordings.<sup>5</sup> This development can be attributed to the digital revolution. Despite its benefits, digital revolution also creates a new conflict around the right to distribute material.<sup>6</sup> This paper explains the functioning of Peer-to-Peer (hereinafter P2P) technologies in order to give the reader a deeper understanding of the unique nature of the threat it potentially poses to copyright after which the paper discusses the changes that the copyright regime had to adopt to deal with these peculiarities. It makes reference to cases from the United States in seeking to explore the issues. Finally, the paper will explore the potential remedies for Kenya.

## II. The Challenge of New Media

Digital revolution refers to the change from content-specific distribution, provided by unique technologies, hardware, and methods to content independent distribution provided by a common infrastructure.<sup>7</sup> This has seen the development of multi-purpose means of communication leading to unrestricted and widespread communication. Whereas it was previously close to impossible to share video and even audio files, media that could communicate textual content was adapted to support a wider range of content. Further, the essence of the technological revolution is the major development in digital communication (electronic exchange of information) and computing produced by dramatic technological advances coupled with market liberalisation and globalisation to result in the digital revolution.<sup>8</sup> It is these phenomena that results in the widespread

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<sup>3</sup> [http://cyber.law.harvard.edu/copyrightforlibrarians/Module\\_4:\\_Rights,\\_Exceptions,\\_and\\_Limitations](http://cyber.law.harvard.edu/copyrightforlibrarians/Module_4:_Rights,_Exceptions,_and_Limitations) on 20 June 2015.

<sup>4</sup> When it was first established, it was as a result of the development of the printing press and copyright was aimed at protecting the authors of works developed through the printing press. With the development of technology and emergence of new printing media, the scope of works that was covered by copyright also widened. Current copyright laws cover architectural works, paintings, sculptures among others. Along with the scope of works, the time period for which protection was granted has also increased as copyright laws developed. See [http://cyber.law.harvard.edu/copyrightforlibrarians/Module\\_3:\\_The\\_Scope\\_of\\_Copyright\\_Law#What\\_Does\\_Copyright\\_Law\\_Protect](http://cyber.law.harvard.edu/copyrightforlibrarians/Module_3:_The_Scope_of_Copyright_Law#What_Does_Copyright_Law_Protect) on 20 June 2015.

<sup>5</sup> Menell PS, 'Envisioning copyright law's digital future' 46 *New York Law School Law Review* (2002), 64.

<sup>6</sup> Danay R, 'Copyright vs. free expression: The case of peer-to-peer file-sharing of music in the United Kingdom' 8 *Yale Journal of Law & Technology* 32 (2005), 2.

<sup>7</sup> Kung L, Kroll AM, Ripken B, Walker M, 'Impact of the digital revolution on the media and communications industry' 6 *Javnost: The Public* (1999), 30.

<sup>8</sup> Kaul V, 'The digital communication revolution' 2 *Online Journal of Communication and Media Technologies*

nature of the 21<sup>st</sup> century means of communication. The digital revolution has seen the emergence of even newer technologies such as peer-to-peer file sharing which have presented conflicts with the copyright regime.<sup>9</sup> Before delving into these conflicts and their possible solutions, it is important to gain an understanding of what P2P is.

P2P comprises of networks created by linking numerous individual computers, each with the capacity to create a digital copy of the shared file – an activity that many are engaging in on a global scale.<sup>10</sup> In the P2P system each of the peers (users) serves as both a provider and consumer of the shared resources. The information moves from user to user whenever the protocol is activated. This entire system is based on the voluntary collaboration of the peers in the system. Like many user generated content platforms, the information and resources will only be available where users willingly make it available. The users generate the torrents and grant access to other users of those torrents to facilitate communication within the network. The system also depends on the presence of a large number of peers who all operate as equals. The speed and efficiency of the system depends on the large number of peers making a file available thus making downloads much faster.<sup>11</sup>

On the technical side, the P2P infrastructure is supported by the existing telecommunications infrastructure of the web in order to facilitate the exchange of resources over the internet. The system also includes P2P applications that facilitate the resource exchange between peers. These come in the form of software which allows computers to communicate and their users (or peers) to search for, access, download and upload material stored in shared folders on the peer's hard drive.<sup>12</sup> For users to connect to the network, all that is required is an internet connection and file sharing software installed on their computers. Examples of these software applications include Bit torrent and Napster.

Napster, developed in 1999 by Shawn Fanning, was the first system and coined the term P2P. This first generation network<sup>13</sup> was the first P2P application

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(2012), 114-115.

<sup>9</sup> Benkler Y, *The wealth of networks: How social production transforms markets and freedom*, Yale University Press, Connecticut, 2006, 51.

<sup>10</sup> Danay R, 'Copyright vs. free expression', 2.

<sup>11</sup> See generally Ramaswamy L and Liu L, 'Free riding: a new challenge to peer-to-peer file sharing systems' <http://cobweb.cs.uga.edu/~laks/papers/free-riding.pdf> on 20 June 2015.

<sup>12</sup> Larusson HK, 'Uncertainty in the scope of copyright: The case of illegal file-sharing in the UK' 31 *European Intellectual Property Review* (2009), 124.

<sup>13</sup> Pr'etre B, 'Attacks on peer-to-peer networks', Unpublished Thesis, Swiss Federal Institute of Technology (ETH) Zurich, 2005, 4.

to really catch on. Illegal sharing of copyrighted material by users was claimed to be the main driver behind its success and ultimate downfall.<sup>14</sup> The system relied on a central server which controlled the functionality of the entire system. This server indexed all the files each user had and when a client queried Napster for a file, the central server would answer with a list of all indexed clients who already possessed the file. After its demise, other systems emerged which made structural adjustments to the system, doing away with the central systems.<sup>15</sup>

Newer P2P networks rely on the individual processor speed of each peer and establishes users as a network of nodes which interconnect each other.<sup>16</sup> Simply put, these are virtual networks that link different computers over the internet to facilitate data transfer among the network participants. Each computer user, known as a peer in this network, has a unique address (Internet Protocol (IP) address) which identifies their device and facilitates communication within the network.<sup>17</sup> To begin the download process, a downloader, known as a seed, must have a complete file of the resource being shared. This initial seeder creates a torrent file and uploads this file on the web.<sup>18</sup> This file has a torrent extension containing information about the uploaded file, its name, size, that enables its identification. Downloaders request this file from the network and are then connected to other downloaders (peers). As each new piece of the file is received by a peer, the peer becomes a source (of that piece) for the other peers, relieving the original seed from having to send that piece to every peer requiring a copy.<sup>19</sup> The pieces of a file are usually downloaded randomly and later rearranged into the correct order upon completion of the download. The file bits will be shared to peers on the network until all the peers have the sum of all parts of the file.<sup>20</sup>

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<sup>14</sup> Edwards L, Role and responsibility of internet intermediaries in the field of copyright and related rights [http://www.wipo.int/export/sites/www/copyright/en/doc/role\\_and\\_responsibility\\_of\\_the\\_internet\\_intermediariesfinal.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediariesfinal.pdf) on 24 June 2015.

<sup>15</sup> Hisanari HT, 'Post-Napster: Peer-to-peer file sharing systems current and future issues on secondary liability under copyright laws in the United States and Japan', 22 *Loyola of Los Angeles Entertainment Law Review* (2001), 49.

<sup>16</sup> Lambrick J, 'Piracy, file sharing and legal fig leaves' 4 *Journal of International Commercial Law and Technology* (2009), 185.

<sup>17</sup> Acorn J, 'Forensics of bit torrent', Unpublished MSc Thesis, Department of Mathematics, Royal Holloway University of London, 15 January 2008, 6.

<sup>18</sup> Acorn J, 'Forensics of Bit torrent', 9.

<sup>19</sup> Lee J and Kim J, 'Modelling of a copyright protection system for the bit torrent environment', in Tai-hoon K, Stoica A, Wai-chi F, Vasilakos T, Villalba JG, Arnett PK, Khan KM, Byeong-Ho K (eds), *Computer applications for security, control and system engineering*, Springer, Heidelberg, 2012, 48.

<sup>20</sup> See generally Mundinger J, Weber R and Weiss G, 'Optimal scheduling of peer-to-peer file dissemination' [http://www.statslab.cam.ac.uk/~rrw1/research/MunWebWei06JoS\\_final.pdf](http://www.statslab.cam.ac.uk/~rrw1/research/MunWebWei06JoS_final.pdf) on 24 June 2015.



Within the network there are trackers which act as dedicated servers and are the main linkages between the peers in the network. When a request is made for a file, the tracker sends the requesting peer a list of IP addresses of peers that have the content available.<sup>21</sup> When this is done, P2P communication commences. The tracker then connects all available peers who are associated with the particular file being downloaded. Once a channel between the peer and a seeder or leecher is opened, the peer asks the seeder or leecher for a piece of the file that the peer requires. If the piece is available, the peer receives it from the seeder or the leecher.<sup>22</sup> The downloader therefore downloads bits and pieces of the requested file from the peers they are connected to. Seeders refer to users with the complete file being shared on the network while leechers are those peers who are still downloading the file.<sup>23</sup>

P2P file sharing technology which is the focus of this article is not the only form of file sharing currently in use by internet users. However, it has proven to be the most popular means of file sharing today. A study in 2009 revealed that it accounted for 40%-70% of internet traffic by volume.<sup>24</sup> Other file sharing methods include Rapidshare, MegaUpload and 4shared. These provide users with a downloadable link to files which have been uploaded to their websites.

### III. The Challenge to Copyright Laws

Initially, copyright as granted by the Statute of Anne granted a 21 year period of protection to works already in existence and a 14 year protection period to new works after which the copyright re-vested in the author for a further 14 years if they were still alive.<sup>25</sup> The aim of this law, at the time, was to vest rights in authors to prevent the manual copying of their works. The proliferation of digital technology has dramatically changed the interactions between human beings and altered the basic structure of information distribution from what was present in the *analogue world*.<sup>26</sup> Digital technology has resulted in the current state

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<sup>21</sup> <http://www.doc.ic.ac.uk/~vlt/DS/P2P.pdf> on 24 June 2015.

<sup>22</sup> <http://www.doc.ic.ac.uk/~vlt/DS/P2P.pdf> on 24 June 2015.

<sup>23</sup> <http://www.doc.ic.ac.uk/~vlt/DS/P2P.pdf> on 24 June 2015.

<sup>24</sup> Jungjae L and Jongweon K, Piracy tracking system of the Bit torrent, 7 *International Journal of Security and Its Applications* (2013), 192.

<sup>25</sup> <http://digital-law-online.info/patry/patry2.html> on 24 June 2015.

<sup>26</sup> Dutta S and Bilbao-Osorio B (eds), The global information technology report: living in a hyper-connected world, INSEAD and World Economic Forum, Geneva, 2012, 53-54.

of communication; characterised by instantaneous and globalised scale of communication.

In Kenya, the laws governing various aspects of the country's legal framework were adopted from colonial laws via the East African Order-in-Council of 1897 which made English common law, doctrines of equity and statutes of general application in force in England as of the reception date applicable in Kenya.<sup>27</sup> Copyright law developed from these and the 1842,<sup>28</sup> 1911<sup>29</sup> and 1956<sup>30</sup> UK Copyright Acts. In the late 1960s, African states promptly began to enact and reform their copyright laws.<sup>31</sup> *Kenyan-bred*<sup>32</sup> copyright laws begun with the Copyright Act, 1966,<sup>33</sup> after which the laws underwent numerous changes leading up to the 1995 amendments that saw the first attempt to adapt the laws to the changes in technology.<sup>34</sup> Under the 1995 amendments, the definition of broadcast was adapted to include wired, wireless and satellite transmission; the meaning of copy was also redefined to mean 'a reproduction of a work in any form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium by computer technology or other electronic means.'<sup>35</sup> A major push for these changes came from pressure or their wish to comply with the provisions of the World Trade Organization's (WTO) Trade Related Aspects of Intellectual Property (TRIPs) Agreement.<sup>36</sup>

Under Kenya's copyright laws, an author is granted rights to exclusively control the copying, sale, distribution, communication to the public and reproduction of their work as well as the right to authorise others to do any of these acts.<sup>37</sup> The Copyright Act provides that;

<sup>27</sup> 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, Cape Town, 2010, 86.

<sup>28</sup> *Copyright Act* 1842 (United Kingdom) (1 & 2 Geo V c 46).

<sup>29</sup> *Copyright Act* 1911 (United Kingdom) (5 – 6 Vic c 45).

<sup>30</sup> *Copyright Act* 1911 (United Kingdom) (4 & 5 Eliz 2 c 27).

<sup>31</sup> Ouma M and Sihanya B, 'Kenya', 86.

<sup>32</sup> Emphasis is placed on this term because it is not strictly speaking a purely Kenyan law. Though the law makers sought to enact a Kenyan copyright law, the resulting laws still largely reflected the earlier British laws that were in operation in Kenya. The relevance of this term will become evident later in this article in the discussion on parliament's reservations with regard to international treaties, a discussion that lies at the heart of this article.

<sup>33</sup> Act No. 3 of 1966.

<sup>34</sup> Section 2, *Copyright (Amendment) Act* (Act No. 9 of 1995).

<sup>35</sup> Section 2, *Copyright (Amendment) Act* (Act No. 9 of 1995).

<sup>36</sup> Sihanya B, 'Copyright law in Kenya' 41 *International Review of Intellectual Property and Competition Law*, (2010), 939.

<sup>37</sup> Aplin T and Davis J, *Intellectual property law text, cases and materials*, 2ed, Oxford University Press, Oxford, 2013, 161.

‘Copyright in a literary, musical or artistic work or audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts, namely the reproduction in any material form of the original work or its translation or adaptation, the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement, and the communication to the public and the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognisably derived from the original...’<sup>38</sup>

Of particular importance are the rights to distribute, reproduce and the right to communicate to the public which are claimed to be infringed upon by the use of P2P file sharing technologies on the internet. In this case, P2P technologies should only be deemed unlawful when the use of these systems allow P2P users to deal with copyrighted material in a manner that is exclusively reserved for the copyright holder. American courts have considered the question of the scope of the exclusive rights and whether these exclusive rights in copyright can prevent use of copyrighted works via digital technologies. The decisions rendered by the US courts have persuasive precedent in Kenya with the Kenyan Supreme Court noting at paragraph 100 of the ruling in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*<sup>39</sup> that international jurisprudence is pivotal in growing Kenya’s jurisprudence.

There has been a lack of consensus in the US court decisions regarding the interpretation of the right to distribute with courts interpreting the scope of this right in two ways. Some courts are of the view that the right is violated when copyright protected work is downloaded by a user on the P2P network. The second interpretation of the scope of the right to distribute takes the view that the mere act of making the work available for others to access and download is a violation of the right to distribute. In *A&M Records Inc v Napster Inc*,<sup>40</sup> the United States Court of Appeal for the Ninth Circuit found that Napster users who uploaded a link for other users to download material violated the copyright holder’s right to distribute the work. The implication of this was that a violation occurred by the fact of the P2P user making files available for other users to download or where users downloaded the available material.<sup>41</sup> Though lacking a statutory definition, the Court sought to equate the right to distribute with the right to publish. These two rights were equated due to the use of the word

<sup>38</sup> Section 26(1), *Copyright Act*, (Act No. 12 of 2001).

<sup>39</sup> [2013] eKLR.

<sup>40</sup> 239 F.3d 1004, 1014 (9th Cir. 2001).

<sup>41</sup> *Motown Record Co. LP v. DePietro* No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007); See also *Warner Brothers Records Inc. v. Payne* No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007).

distribute in the US copyright law.<sup>42</sup> By interpreting the right to distribute in light of the right to publish, the court determined the right to distribute to mean a copyright owner's 'right to control the first public distribution of an authorised copy of his work which requires either 'the distribution of copies... of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending,' or alternatively, '...offering to distribute copies... to a group of persons for purposes of further distribution.'<sup>43</sup>

Violation of the right by merely making the copyrighted work available was later departed from. In *Re Napster*,<sup>44</sup> the United States District Court in California held that distribution required there to be an actual distribution of a copy of the work. This holding would mean that to assert the right, copyright holders would have to go an extra mile to prove that the end user did in fact download the material made available to them by other users.<sup>45</sup> In another instance, the Court noted that completion of all steps necessary for distribution did not mean that there was a violation of the right.<sup>46</sup> This finding further cemented the requirement of proof of actual distribution of the copies made available for the right to be infringed. This interpretation is further strengthened by scholarly opinion on the matter which concurred with the latter finding of the Court. David Nimmer, a distinguished copyright law scholar and contributor to the 1978 Report of the National Commission on New Technological Uses of Copyright Works (CONTU) observes that the right to distribute is apparently not infringed on by a mere offer to distribute to members of the public.<sup>47</sup> This assertion was relied on in *Atlantic Recording Corp v Howell*<sup>48</sup> by the United States District Court in Arizona. Based on his argument, the use of P2P technology allowing access to copyrighted works via computer drives therefore does not violate the right to distribute. Evidence has to be adduced of actual downloading by those who gained access to the works for one to assert that the right was infringed upon. Paul Goldstein also opines that the right to distribute is violated only when it is proven that an actual transfer took place.<sup>49</sup>

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<sup>42</sup> § 101, *Copyright Act* (United States).

<sup>43</sup> *Harper & Row Publishers Inc. v. Nation Enterprises* 471 U.S. 539 (1985).

<sup>44</sup> Copyright Litigation, 377 F. Supp. 2d 796, 803-04 (N.D. Cal. 2005).

<sup>45</sup> *Atlantic Recording Corp. v. Brennan* 534 F. Supp. 2d 278, 282 (D. Conn. 2008).

<sup>46</sup> *London-Sire Records Inc. v. Doe* 542 F. Supp. 2d 153 (D. Mass. 2008); *Atlantic Recording Corp. v. Howell* 554 F. Supp. 2d 976 (D. Ariz. 2008).

<sup>47</sup> Nimmer MB, and Nimmer D, *Nimmer on copyright: A treatise on the law of literary, musical and artistic property, and the protection of ideas*, Matthew Bender, New York, 1978.

<sup>48</sup> 554 F. Supp. 2d 976 (D. Ariz. 2008).

<sup>49</sup> Goldstein P, *Goldstein on copyright*, 3ed, Aspen Publishers, New York, 2005, § 7.5.1.

Another exclusive right connected to P2P activities is the author's right to communicate the work to the public. The right is contained in Berne Convention for the Protection of Literary and Artistic Works<sup>50</sup> (hereinafter the Berne Convention) and the World Intellectual Property Organization Copyright Treaty<sup>51</sup> (hereinafter WCT). Neither the Berne Convention nor the WCT define the scope of the right to communicate to the public. The Berne Convention simply providing that,

'Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing any communication to the public of the performance of their works that Authors of literary and artistic works shall enjoy the exclusive right of authorizing the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images.'<sup>52</sup>

The WCT provides that,

'authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.'<sup>53</sup>

Kenyan copyright laws and courts have neither defined nor determined the scope of this right. Therefore, reference has to be made to other jurisdictions, whose decisions form persuasive precedent in Kenya for a definition of the scope of the right. The Judicature Act at Section 3<sup>54</sup> lists the sources of law in Kenya, among them is common law. The UK courts<sup>55</sup> have considered the scope of the right though not in relation to cases involving P2P. By making reference to the judgments of the European Court of Justice (hereinafter ECJ), which are considered good law in the UK, the court determined that the right is not violated when one provides links to users which can be used to access and download copyright protected material. Such an act according to the ECJ does

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<sup>50</sup> Article 11, 11<sup>bis</sup> and 11<sup>ter</sup>, *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 UNTS 221.

<sup>51</sup> Article 8, *World Intellectual Property Organization Copyright Treaty*, 20 December 1996, 36 ILM 65(1997).

<sup>52</sup> Article 11, *Berne Convention for the Protection of Literary and Artistic Works*.

<sup>53</sup> Article 8, *World Intellectual Property Organization Copyright Treaty*.

<sup>54</sup> 3 (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with -

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date.

<sup>55</sup> See generally Aplin T, 'Reproduction' and 'Communication to the Public' Rights in EU Copyright Law: *FAPL v QC Leisure*.



not amount to communication to the public as contemplated in Article 3(1) of the EU Directive.<sup>56</sup> This right is violated when a communication to the public is made to an audience beyond that which the copyright holder authorised.

The last right connected to P2P activities is the author's right to reproduce the work. This right is said to be violated where any communication of copyrighted works via electronic means that results in another copy being created on the device of the recipient of the communication occurs.<sup>57</sup> In *Capitol Records LLC v ReDigi Inc.*,<sup>58</sup> the United States District Court for the Southern District of New York held that when a user downloads a digital music file to their hard disk, the file is reproduced on a new phonorecord within the meaning of the Copyright Act. Like the right to distribute, the right can only be successfully asserted if the plaintiff is able to prove that a copy of their work was created on the recipient user's computer. If such evidence is absent, then the right to reproduce contained in the Copyright Act cannot be claimed to have been violated.<sup>59</sup>

#### **IV. The Adaptation of the Copyright Regime: The Right to Make Available**

This challenge that the digital revolution presents to the copyright regime led to the enactment of the WCT<sup>60</sup> as a supplement to the Berne Convention.<sup>61</sup> The WCT entered into force globally on 6 March 2002<sup>62</sup> while the Berne Convention entered into force globally on 5 December 1887. The aim of the WCT was to make the Berne Convention more adaptable to and prevent infringement of copyright in the digital environment.<sup>63</sup> This was done by introducing a new right: the making available right at Article 8 of the WCT. This is the exclusive right of the right holder to make a work available, that is, to offer copies of the work to the public who can then decide whether to access or copy the work via the in-

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<sup>56</sup> Council Directive 2001/29/EC of 22 May 2001 Official Journal (L167) 10.

<sup>57</sup> WIPO-Standing Committee on Copyright and Related Rights (SCCR), *Study on copyright limitations and exceptions for the visually impaired*, 20 February 2007, at 52.

<sup>58</sup> No. 12 CIV. 95 RJS, 2013.

<sup>59</sup> *Capitol Records LLC v. ReDigi Inc.* No. 12 CIV. 95 RJS, 2013.

<sup>60</sup> Sheinblatt JS, 'The WIPO Copyright Treaty' 13 *Berkeley Technology Law Journal* (1998), 535.

<sup>61</sup> 11850 UNTS 828.

<sup>62</sup> World Intellectual Property Organization, *The advantages of adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, [http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/advantages\\_wct\\_wppt.pdf](http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/advantages_wct_wppt.pdf) on 8 March 2015.

<sup>63</sup> Sheinblatt JS, 'The WIPO Copyright Treaty' 535.

ternet and other similar networks.<sup>64</sup> The right allows authors to control dealings with their works via the internet.<sup>65</sup> The right, also viewed as a subset of the right to communicate to the public, is aimed at protecting rights holders' interests on the internet.<sup>66</sup> Whether this is a new exclusive right in copyright introduced by the WCT or a mere clarification of the content of the already existing exclusive rights is a question that many would want answers to.<sup>67</sup> Professor Ginsburg concludes that because the Berne Convention neither included nor precluded digital technologies from the scope of the exclusive rights, the incorporation of the making available right in the WCT is a clarification of the scope of the right to communicate to the public.<sup>68</sup> Consequently, countries were free to interpret the right to either include or exclude the making available right. However, on becoming a WCT member, all states would be under the obligation to adopt the right.

By virtue of Article 2(5) of the Constitution of Kenya, 2010 (hereinafter the Constitution), which provides that: 'The general rules of international law shall form part of the law of Kenya.' and Article 2(6) which provides that: 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.' This means that international law is made applicable in Kenya. Kenya acceded to the Berne Convention on 11 March 1993 and signed the WCT on 20 December 1996 effectively becoming a WCT member with the obligation to adopt the making available right. Leading Kenyan copyright scholars have noted the lack of express provision of this right within the Kenyan context and note its potential inclusion in forthcoming amendments to copyright statutes.<sup>69</sup> What then are the consequences of Kenya's current state of legal framework with regards to the making available right and copyright enforcement? Being a WCT member, Kenya has an obligation to adopt the making available right. This duty is fulfilled upon the ratification of the WCT and incorporation of the right into the jurisdiction, steps that Kenya is yet to take. This means that this right is yet to be recognised in Kenya. In any case, despite this absence, there is possible recourse if the scope of exclusive rights is to be interpreted as suggested by Pro-

<sup>64</sup> Sydnor II TD, 'The making-available right under U.S. Law' 16 *Progress & Freedom Foundation on Point Paper* (2009), 1.

<sup>65</sup> 'The WIPO Treaties: 'Making available' right' *International Federation of the Phonographic Industry*, March 2003 <http://www.ifpi.org/content/library/wipo-treaties-making-available-right.pdf> on 3 March 2015.

<sup>66</sup> 'Arezzo E: Hyperlinks and making available right in the European Union: What future for the internet after Svensson?' 4 March 2014 <http://ssrn.com/abstract=2404250> on 11 October 2015.

<sup>67</sup> Ginsburg JC, 'The (new?) right of making available to the public', 04-78 *Columbia Public Law & Legal Theory Working Paper Group* (2004) 3.

<sup>68</sup> Ginsburg JC, 'The (new?) right of making available to the public', 12.

<sup>69</sup> Ouma M, Sihanya B, 'Kenya', 90.

fessor Ginsburg i.e. that countries are free to interpret the rights to either include or exclude the making available right.

Supposing Kenyan courts adopted a narrow interpretation of the exclusive rights, rights holders would need to prove that a P2P user actually distributed, reproduced or communicated their work to the public. In the absence of such evidence, their rights cannot be said to have been infringed upon. The courts may, however, adopt the wider interpretation of the scope of these rights and infer the making available right into the scope of the exclusive rights. While this worked in the American context, the same cannot apply in Kenya. This is because of the express lack of recognition of this right, evidenced by lack of ratification of the WCT, a situation that Kenyan copyright scholars such as Ben Sihanya and Marisella Ouma have recognised. In addition to this, there is a lack of existence of the special circumstances that permitted the US courts to infer the making available right in *A&M Records Inc v Napster Inc*.<sup>70</sup> Due to the statutory wording of the US copyright laws, the right to distribute was equated to the right to publish whose definition included ‘an offer to distribute’<sup>71</sup> which was taken to refer to the act of making available. In the Kenyan context, there are no special circumstances to aid the court and support a wider interpretation of the scope of the exclusive rights in Kenya.

Is the adoption of the making available right the saving grace of copyright in a continuously digitalising world? The answer to this question must be in the negative. The effect of having the making available right is that rights holders will be able to assert their rights easily and more effectively in the digital environment without the need to prove that the defendant’s conduct amounted to a distribution, reproduction or communication to the public. The earlier decision of the court in *A&M Records Inc v Napster Inc*,<sup>72</sup> would therefore apply thus allowing users to reap the commercial benefits of copyright. In *Capitol Records Inc BMG LLC UMG v Thomas Rasset*,<sup>73</sup> though the plaintiff was unable to prove that another user of the KaZaa P2P network had actually downloaded the copyright protected work, damages were awarded to the plaintiff in a case where the court had required the right holder to prove an actual violation of their rights even beyond the mere act of making their work available. It is however unclear whether the these damages were exclusively a penalty for the defendant having impermissibly

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<sup>70</sup> 239 F.3d 1004, 1014 (9th Cir. 2001).

<sup>71</sup> § 101, *Copyright Act* (United States).

<sup>72</sup> 239 F.3d 1004, 1014 (9th Cir. 2001).

<sup>73</sup> 579 F. Supp. 2d 1210 (D. Minn. 2008).

downloaded the protected work herself or whether it also included a penalty for the defendant's claim relating to their right to distribute.

In Kenya, cases involving online infringement of copyright are already emerging. Through petition No. 600 of 2014, Bernsoft Interactive & two others have filed a petition stating inter alia:

Among the exclusive rights granted to the Copyright owners under the Copyright Act are the exclusive rights to reproduce the Copyrighted Recordings and to distribute the Copyrighted Recordings to the public. The Copyright owners are informed and believe that the 4th to 10th have allowed and continue to allow online media distribution websites and systems to download the Copyrighted Recordings and to allow the distribution of the Copyrighted Recordings to the public, and/or to make the Copyrighted Recordings available for distribution to others.<sup>74</sup>

With these cases already beginning to emerge in Kenya, it is important to resolve this issue before the courts are approached to resolve this issue.

## V. The Need for Regulation

Currently, the exclusive rights granted by copyright in the Kenyan jurisdiction would be insufficient to prevent the use of P2P technologies in relation to protected works. Such restrictions, where the making available right is absent in the jurisdiction, would be an overreach on the part of copyright law, not to mention an infringement of the right to freedom of expression of P2P users. Because the scope of the rights discussed above are not sufficient to prevent online dealings with copyrighted materials, it will be a difficult and costly task for copyright owners to prove that a copyright violation did in fact take place online.<sup>75</sup> To determine that an infringement has occurred, a right holder would need a forensic analyst to prove that the P2P user did in fact download the copyrighted material. Additionally, it is usually inefficient to go after infringers who mainly consist of common citizens who may not be able to pay the awards.<sup>76</sup> Furthermore, the alternative potential defendants – Internet Service Providers (ISPs) – are in most cases protected by safe harbour provisions which exempt them from liability where they lack actual knowledge of infringements occurring on their networks.<sup>77</sup>

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<sup>74</sup> *Bernsoft Interactive & 2 Others v. Communications Authority of Kenya & 9 Others* (Petition No. 600 of 2014).

<sup>75</sup> Menell PS, 'In search of copyright's lost ark' 219.

<sup>76</sup> 'Copy-wrong! Unpacking the \$1.92m downloading verdict' <http://blogs.wsj.com/law/2009/06/27/copy-wrong-unpacking-the-192m-downloading-verdict> on 1 November 2015.

<sup>77</sup> Peguera M, 'Internet service providers' liability in Spain: Recent case law and future perspectives' 1

In ensuring the effective protection of rights holders, there needs to be clarity on the scope of these rights within copyright legislation and in the court's interpretation. This aids copyright holders in their efforts to enforce their rights where violations occur in the digital space and aids in the regulation of P2P systems which can be put to legitimate use. While there has been debate on the effects of P2P on intellectual property, there is conflicting evidence regarding the effect of P2P on the sales in the music industry. On the one hand, it has been argued that file sharing has had catastrophic effects on the entertainment industry with the music industry claiming to be most affected. Studies on this issue have, however, produced conflicting statistics. Oberholzer and Strumpf, for example, concluded that file-sharing had 'an effect on sales which is statistically indistinguishable from zero'.<sup>78</sup> A Japanese study from the same year found 'very little evidence' that file-sharing had negative effect on record sales.<sup>79</sup> On the other hand, BPI's Digital Music Nation report in 2010 claims that illegal file sharing cost the UK music industry £219 million in 2010.<sup>80</sup> Despite this report, it is impossible to prove causation between P2P file sharing and the decline of music sales particularly because it is impossible to predict consumer behaviour and conclude that if the files were not available for free illegal download, they would translate into sales. This decline in revenue could be as a result of many factors including economic recession that has been experienced over the last decade.<sup>81</sup>

Although there is contention on the effect of P2P file sharing technologies on sales of copyrighted material,<sup>82</sup> it is agreed that P2P systems have a multiplicity of uses. It has been argued that P2P can act as a tool for enhancing the exercise of freedom of speech and free expression. This view is yet to receive global acceptance.<sup>83</sup> Consequently, those advocating for freedom of expression have continued to raise their increasing concerns over how regulatory and legal trends might be limiting freedom of expression 'at the very time that the Internet has become more widely recognised as a major medium for fostering global

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*Journal of Intellectual Property, Information Technology and Electronic Commerce Law* (2010), 161.

<sup>78</sup> Oberholzer F and Strumpf K, 'The effect of file sharing on record sales an empirical analysis' *University of North Carolina*, March 2004 [http://www.unc.edu/~cigar/papers/FileSharing\\_March2004.pdf](http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf) on 30 May 2015.

<sup>79</sup> Tastuo T 'Does file-sharing reduce CD sales? A case for Japan' *Hitosubashi University Institute of Innovation Research* December 2004 <http://www.iir.hit-u.ac.jp/iir-w3/file/WP05-08tanaka.pdf> on 30 May 2015

<sup>80</sup> Duboff A, 'BPI digital music nation – pirate wars' 23 *Entertainment Law Review* (2011), 85.

<sup>81</sup> Danay R, 'Copyright vs. free expression', 54.

<sup>82</sup> Benkler, *The wealth of networks*, 51.

<sup>83</sup> UNESCO, *Freedom of connection – freedom of expression: The changing legal and regulatory ecology shaping the internet*, 19 August 2010, at 11.



communication.<sup>84</sup> Aside from the freedom of expression argument, advocates for P2P technologies argue that its other uses far outweigh any potential damages it may have on intellectual property in copyright.<sup>85</sup>

P2P technologies can also be used as a tool for free and paid content distribution.<sup>86</sup> The current trend has been for content developers to share their open-source software to all internet users.<sup>87</sup> P2P has proven to be an invaluable resource in this case as it allows users to rapidly share the content and to a much larger population than was previously possible. Different software such as Linux operating systems are publicly available at no cost. When these are made available via torrents, users are able to download the software from a variety of peers connected to the P2P network. Developers of paid software are now using P2P torrent facilities to reach a much larger market for their goods. These software, including updates, are made publicly available for download but the software developers go a step further and input payment options for users in order to gain access to the software.<sup>88</sup>

## VI. The Way Forward

In light of the benefits that P2P presents for communication, it is vital for these systems to be effectively regulated so as to allow them to exist together with copyright. The options available to Kenya include: introduction of the making available right via an amendment of copyright legislation or ratification of the WCT, introducing a non-commercial use levy and shrinkage of safe harbour provisions for ISPs. These are among some of the global methods used since the conventional take down orders issued by courts to prevent P2P usage have over the years proven to be inefficient.<sup>89</sup> This is largely due to the portability of

<sup>84</sup> UNESCO, *Freedom of connection – freedom of expression: The changing legal and regulatory ecology shaping the internet*, 19 August 2010, 6.

<sup>85</sup> Douglas G, Copyright and peer-to-peer music file sharing: The Napster case and the argument against legislative reform, 11 *Murdoch University Electronic Journal of Law* (2004), 16.

<sup>86</sup> <http://www.cs.rutgers.edu/~rmartin/teaching/fall08/cs552/position-papers/016-01.pdf> on 30 November 2015.

<sup>87</sup> Johnson EM, McGuire D and Willey DN, 'The evolution of the peer-to-peer file sharing industry and the security risks for users' Proceedings of the 41st Hawaii International Conference on System Sciences (2008), 3.

<sup>88</sup> <http://www.cs.rutgers.edu/~rmartin/teaching/fall08/cs552/position-papers/023-01.pdf> on 30 November 2015.

<sup>89</sup> "Site Blocking" to reduce online copyright infringement: A review of sections 17 and 18 of the Digital Economy Act' *Ofcom*, 27 May 2010 <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf> on 18 December 2015.

domain names as has been the practice among many of the file sharing sites. Government efforts to block user access has also been ineffective since a change of domain names will grant users access to the material that the government intended to restrict access to.<sup>90</sup>

Copyright law is an adaptable body of law. Since its foundation, it has adapted to deal with or attempt to deal with the challenges presented by new technologies that enable human expression.<sup>91</sup> Such adaptations are seen in the drafting of the WCT to supplement the Berne Convention, the adoption of the May 22, 2001 European Directive.<sup>92</sup> From this, it is clear that the earlier provisions of copyright laws were insufficient to deal with the emerging difficulties presented by the use of the internet.<sup>93</sup> Such legislative changes point out a need for reform of the current Kenyan Act to adopt the global changes and to keep at par with the rest of the world. Further, making a case for the need for this reform are IP scholars such as Ben Sihanya who has noted the need for the Kenyan Copyright Act to capture changes in technology.<sup>94</sup> Furthermore, the notable lack of the making available right in the Copyright Act<sup>95</sup> needs to be rectified so as to guide the interpretation of the act in order to avoid any ambiguities and uncertainties. It has been noted that the enforcement of the exclusive rights would be difficult where statute requires proof of actual download of the work, a task that is difficult for the rights holder to prove.<sup>96</sup> This has possibly led to violation of these exclusive rights, such violation occurring when the defendant has made the work available. The incorporation of the making available right therefore automatically deals with the questions presented earlier regarding the ability of the scope of copyright's exclusive rights in preventing the dealings of P2P.

The copyright legislation needs to incorporate the making available right via amendment of the existing Copyright Act or by ratification of the WCT. However, before this can be done, an inquiry needs to be conducted to determine the reasons behind the lack of ratification of the WCT 20 years after Kenya

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<sup>90</sup> "Site Blocking' to reduce online copyright infringement: A review of sections 17 and 18 of the Digital Economy Act' *Ofcom*, 27 May 2010 <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf> on 18 December 2015.

<sup>91</sup> <http://www.case.edu/affil/sce/authorship/Joyce-part1.pdf> on 20 October 2015.

<sup>92</sup> Council Directive 2001/29/EC of 22 May 2001 Official Journal (L167) 10.

<sup>93</sup> Wong MWS, 'The exclusive rights of 'distribution', 'Communication to the public' & 'making available' under the WIPO Copyright Treaty: Lessons for other jurisdictions from the Hong Kong Bit torrent case' 13 March 2008 <http://ssrn.com/abstract=1118809> on 18 December 2015.

<sup>94</sup> Sihanya B, Copyright law in Kenya, 932.

<sup>95</sup> Ouma M and Sihanya B, 'Kenya' 90.

<sup>96</sup> Sterk D, 'P2P file-sharing and the making available war', 495-496.

had signed onto it. This has been noted as one of the many issues leading to the inefficiency of the Copyright Act and one of the root causes for continued piracy in the Kenyan context.<sup>97</sup> Though the reasons for the lack of ratification are not clear, the parliamentary discussion following the second reading of the Copyright Bill 2000 on 20 November 2001 revealed some of the concerns that parliamentarians had with respect to international agreements seeking to place obligations on developing countries.<sup>98</sup> Some concerns included the fact that the proposed Bill had objectives that were international in character as opposed to a national outlook. Some also believed that they were more inclined towards agreements that conferred tangible benefits to the country. It was also preferred that the nation not bind itself to agreements that would prevent the undertaking of activities that while beneficial to the country were contrary to international obligations. These international obligations were also viewed as a spread of hegemony and neo imperialism of ideas. The fact that Kenya consumed a lot of external copyright material as opposed to Kenyan works consumed abroad was seen as a motivation for developed nations to seek to protect their interests through international agreements which universalised the rights of these developed nations. The benefit to Kenya and other local jurisdictions was therefore only incidental.<sup>99</sup>

As much as these fears, which point to some of the reasons behind the lack of ratification of the WCT, are rightly founded, the truth remains that with globalisation Kenya cannot afford to isolate herself by adopting policies and laws that from an international perspective are seen as archaic even when those laws serve to greatly protect her citizens. Such a position serves not only to isolate the nation, but also acts as a barrier to trade with other countries. This struggle to develop *Kenyan-bred* laws in most cases is futile where the laws in question, as is the case with intellectual property laws, borrow from norms that are developed from international standards. Additionally, where Kenya adopts weak laws that do not sufficiently protect all persons, this will discourage works from being introduced and/or registered in Kenya. With the need to make the laws context specific, Parliament ought to be alive to the fact that with globalisation, societal structures are changing at such a fast pace leading to increased interactions between persons who previously could only do so with great difficulty.<sup>100</sup> This means that Kenya's

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<sup>97</sup> <http://www.iipa.com/rbc/2003/2003SPEC301KENYA.pdf> on 3 January 2016.

<sup>98</sup> Kenya National Assembly Official Record (Hansard) 20 Nov 2001, 3195.

<sup>99</sup> Kenya National Assembly Official Record (Hansard) 20 Nov 2001, 3192.

<sup>100</sup> Dahlman C, 'Technology, globalization, and international competitiveness: Challenges for developing countries', 30-31. [http://www.un.org/esa/sustdev/publications/industrial\\_development/1\\_2.pdf](http://www.un.org/esa/sustdev/publications/industrial_development/1_2.pdf) on 3 January 2016.

intellectual property laws can only differ so much from the internationally agreed norms without all together losing their purpose.

Nevertheless, before the process of ratification of the WCT can be undertaken, it is important to address these concerns which may still be impeding the process towards making our Copyright Act WCT-compliant. Once the WCT is ratified, Kenya will be under the obligation to recognise the making available right as a means to make copyright laws more effective in the digital space.<sup>101</sup> In so doing, the treaty will form part of the laws of Kenya and thereby allow rights holders to rely on its provisions to protect their interests where P2P networks are concerned.

Alternatively, P2P networks can continue to operate subject to the payment of a levy imposed for the use of the software.<sup>102</sup> This approach mirrors the Canadian Levy imposed for the importation and manufacture of compact disks that would be used for private copying of copyright protected works, a method that has also been used in Kenya. This is evident with Kenya's recently proposed amendment to the Copyright Act through Statute Law (Miscellaneous Amendments) (No. 2) Bill, 2015.<sup>103</sup> The Bill proposes to amend Section 30(8) of the Act in order to provide for structured compensation of performers and producers of sound recordings for private copying or works in line with the international norms and practices. A similar strategy can be adopted with respect to P2P on-line technologies.

The Canadian method was adopted in recognition of the fact that it would be difficult if not impossible for rights holders to go after individual infringers of copyright who made copies of works onto compact discs from the comfort of their homes.<sup>104</sup> The solution was therefore to impose a levy on every disc that was purchased and the levies turned over to the Collective Management Societies to distribute to its members. In using the same model, it is proposed that a levy be imposed on commercial suppliers of P2P software and services, on ISPs, computer hardware manufacturers, manufacturers of consumer electronic devices capable of being used to copy, store, perform, or transmit digital files,

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<sup>101</sup> McGarrow AJ, 'The "making available" theory and the future of p2p networks: Does merely making files available for further distribution constitute copyright infringement, and is it time for congress to act in accordance with this technology?' 88 *University of Detroit Mercy Law Review* (2011), 167.

<sup>102</sup> Netanel NW, 'Impose a non-commercial use levy to allow free peer-to-peer file sharing' 17 *Harvard Journal of Law & Technology* (2003), 35.

<sup>103</sup> Kenya Gazette Supplement, National Assembly Bills, 2015, No. 58, 18 September 2015.

<sup>104</sup> Hagen GR and Engfield N, 'Canadian copyright reform: P2P sharing, making available and the three-step test' 3 *University of Ottawa Law and Technology Journal*, (2006), 9.

and manufacturers of storage media.<sup>105</sup> This levy should further be imposed on any new and emerging technologies. The levy allows rights holders to reap the benefits of their creations while at the same time balancing the rights of users<sup>106</sup> by allowing unhindered non-commercial use of P2P to copy, distribute, stream and make derivatives of protected works without the consent of the copyright holder.<sup>107</sup> To qualify as a non-commercial use, the user should not be selling copies, access, or engaging in advertising in connection with the copyright-protected work or any modification of the work.<sup>108</sup>

Such amounts to be levied would then be determined by statute, by the Kenya Copyright Board (KECOBO) or other relevant agencies and the distribution of the levy done by the relevant collective management societies for the particular works. This is a more workable and practical approach to reaping benefits from use of protected works via P2P networks as opposed to every right holder seeking to solely enforce their rights by pursuing sole infringers and or website owners and companies that facilitate P2P. Despite the ability of the levy system to solve the conflict between copyright and digital technologies, this system is not perfect and presents some challenges. In Canada, it is noted that there is a distribution problem which results in larger represented artists benefitting more than new and independent artists.<sup>109</sup> This problem needs to be resolved to ensure that all rights holders will be able to benefit from the levy system on P2P.

Finally, another alternative would be shrinking safe harbour provisions for ISPs. The concept of safe harbour originated in the United States where the ISPs could pay statutory damages exceeding the actual loss suffered by the rights holder.<sup>110</sup> This concept reduces the liability of ISPs in relation to certain specific acts as contained in the statutes. This protection is not automatic and is granted only when the ISPs have fulfilled certain conditions set for such protections to be afforded within their jurisdiction.<sup>111</sup> In Kenya, a proposed legal framework for ISP liability<sup>112</sup> was published by KECOBO on 23 September 2015 inviting public

<sup>105</sup> Netanel NW, 'Impose a non-commercial use levy to allow free peer-to-peer file sharing', 43.

<sup>106</sup> Hagen GR and Engfield N, 'Canadian copyright reform' 35-36.

<sup>107</sup> Institute for Information Law, *Legalizing File-Sharing: An Idea Whose Time Has Come – Or Gone?* *Information Influx Conference 2-4 July 2014*, 1 October 2014, 4-6.

<sup>108</sup> Netanel NW, 'Impose a non-commercial use levy to allow free peer-to-peer file sharing', 43

<sup>109</sup> [https://cippic.ca/en/FAQ/file\\_sharing#faq\\_is-file-sharing-legal](https://cippic.ca/en/FAQ/file_sharing#faq_is-file-sharing-legal) on 18 December 2015.

<sup>110</sup> 'Response to Online Copyright Infringement Discussion Paper' *Copyright Agency*, September 2014, <http://copyright.com.au/wp-content/uploads/2015/05/Online-infringement-submission-2014-09-01.pdf> on 18 December 2015.

<sup>111</sup> [https://pirateparty.org.au/media/documents/Revising+the+Scope+of+the+Copyright+Safe+Harbour+Scheme\\_Original\\_Unredacted.pdf](https://pirateparty.org.au/media/documents/Revising+the+Scope+of+the+Copyright+Safe+Harbour+Scheme_Original_Unredacted.pdf) on 18 December 2015.

<sup>112</sup> <http://www.copyright.go.ke/media-gallery/news-and-updates/257-proposed-amendments-to-the->



comments on the same. These amendments seek to block access to international sites that allow free access to local Kenyan music.<sup>113</sup> The challenge, as noted by the KECOBO legal council is the lack of legal muscle of the copyright authority to enforce the obligations on ISPs.<sup>114</sup> In shrinking safe harbour provisions, ISPs effectively take a copyright policing role and thereby engage in deterrence as opposed to enforcement tactics.<sup>115</sup>

## VII. Conclusion

In conclusion, the potential problem for copyright presented by P2P technologies needs to be addressed while still at its early stages in Kenya. With the 2011 Kenya ICT Board Monitoring and Evaluation Survey results revealing that P2P was among one of the top uses of internet in Kenya among 15 – 24 year-olds, and that there are about 10.2 million internet users in Kenya, these numbers are highly likely to increase with the plans to increase internet penetration throughout the country. Coupled with the fact that the survey also reveals that entertainment forms part of the top five uses of the internet for persons aged between 15 – 34 years it is safe to assume that P2P use in Kenya is a ticking time bomb for the copyright regime.

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copyright-act.html on 18 December 2015.

<sup>113</sup> Kenya Copyright Board, *CopyrightNews*, issue 18, 2015, 10.

<sup>114</sup> Kenya Copyright Board, *CopyrightNews*, issue 18, 2015, 10.

<sup>115</sup> <https://www.eff.org/deeplinks/2012/08/tpp-creates-liabilities-isps-and-put-your-rights-risk> on 18 December 2015.