

**AN OVERVIEW OF NAMIBIAN COPYRIGHT LAW  
AND IMPLEMENTATIONS ON HOW TO IMPROVE IT.**

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## **DECLARATION**

“I, Oscar Muyambo, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LL B is my own original work and that i have not used any other sources than those listed in the bibliography and quoted in the reference.”

Signature:

Date: 02 November 2011

## **SUPERVISOR’S CERTIFICATE**

I, Mr S, K. Amoo hereby certify that the research and writing of this dissertation was carried out under my supervision.

Signature:

Date: 02 November 2011



## ABSTRACT

Law is considered as a system of rules and guidelines, usually enforced through a set of institutions.<sup>1</sup> Based on this definition and the definition of the notion of copyright we can safely imply that copyright law is a body of rules and regulations protecting exclusive rights granted by a state to the creator of an original work or their assignee for a limited period of time in exchange for public disclosure of the work<sup>2</sup>. From another perspective copyright law is also an instrument used to curb copyright infringement and piracy. The same position is believed to be implemented in Namibia. This however leads one to ask whether such implementation is indeed effective to curb piracy? To answer such question, an in-depth research on the issue of copyright in Namibia should be considered and analyzed in coming up with the conclusion whether our copyright system is indeed sufficient to deal with the notion of copyright infringement.

A number of questions consequently have to be answered in such process such as: What constitutes copyright infringement in Namibia? ; Whose job is it to bring action against an infringer? ; What can be done to fully implement copyright protection in Namibia; why is our copyright system not as effective as it ought to be? ; And lastly what can we do to increase copyright protection and consequently curb piracy? (Is our copyright law the only way to curb copyright infringement or can other implements be enforced?)

In consideration of the broad scope and nature of the concept of copyright law, this research was narrowed down to mainly conventional aspects normally protected by the notion of copyright such as musical and literary works only.

Various aspects such as the concept of copyright law were considered and the various aspects that constitute a breach of copyright law (copyright infringement) were assessed in coming up with a conclusion whether the notion of copyright law should be strictly enforced in Namibia. A comparative assessment was therefore made regarding various jurisdictions namely; South African, Namibian and American so as to provide us with better understanding pertaining to the copyright notion and what has been done to curb what is considered to be a global dilemma: copyright infringement.

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<sup>1</sup> Hamilton, Michael S., and George W. Spiro (2008). *The Dynamics of Law*, 4th ed. Armonk, NY: M.E. Sharpe, Inc. ISBN 978-0-7656-2086-6. P 4.

<sup>2</sup> Davies, Gillian. (2002) *Copyright and the Public Interest*. London: Thomson, Sweet & Maxwell. P 7.



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First of all, I would like to thank my dissertation supervisor Mr. Amoo for his patience and understanding and to all my friends for making sure this given task did not fully stress me out. Lastly, I would like to thank my parents for forcing me to go to school, making all this possible, relevant and worth it.

# **CHAPTER 1**

## **INTRODUCTION**

### **AN OVERVIEW OF NAMIBIAN COPYRIGHT LAW AND IMPLEMENTATIONS ON HOW TO IMPROVE IT.**

#### **1.1 STATEMENT OF THE PROBLEM:**

The main purpose of the study is to ascertain how the notion copyright is upheld in Namibia, and not simply acknowledged as an instrument that merely exists by virtue of such acknowledgement. In addition it is also to analyze whether any improvements can be made to our current copyright law system in place. The issue of piracy pertaining to various aspects such as music and literature has become a norm in Namibia. According to reports<sup>3</sup> by the Namibia Society of Composers and Authors of Music (NASCAM), it is estimated that music artists are losing over 1,2 million Namibian dollars annually on music piracy alone<sup>4</sup>. In our schools and tertiary institutions, the photocopying of textbooks is an act that is highly encouraged, (considering the costs of such literature,) and therefore has become the custom over the years.

The dilemma of the problem is clear, even though in our country we claim to have various laws in force, can we safely allude that an author, inventor or artist can sleep peacefully at night without worrying that he is helpless if a situation arises where he is being deprived from the fruits of his labor? If the answer to this question is no, then we have to asses and review our copyright laws, the limits and the various loopholes in it. From thereon, a comparative analysis has to be made regarding other laws considered more versed in such topic and how they can better cover the loopholes prevalent in Namibia's copyright law system.

Due to the fact that the concept of copyright covers a very large scope, more emphasis shall be given to copyright law in relation to musical and literary works.

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<sup>3</sup> Elvis Mboya. (Thursday, 14 May 2009). 'Piracy costs musicians N\$1,2million annually – NASCAM'. *Informante on the web*. Retrieved June 20, 2011 from [http://www.informante.web.na/index2.php?option=com\\_content&do\\_pdf=1&id=4031](http://www.informante.web.na/index2.php?option=com_content&do_pdf=1&id=4031).

<sup>4</sup> *Ibid.*

## **1.2. RESEARCH METHODOLOGY:**

The methodology of this research paper is basically secondary research based on data and information compiled by various experts pertaining to that matter. A qualitative approach seeking out the relevant information emanating from various articles, books as well as desktop materials was used in outlining the copyright laws of Namibia as well as other jurisdictions, namely South Africa and the United States of America. Considering the broad scope pertaining to copyright, this research was limited to literature concerning copyright law, media law and intellectual property law and the scope of copyright infringement was narrowed down to musical and literary works.

## **1.3. HYPOTHESIS**

The research paper is based on the hypothesis that Namibia's copyright law system is a fairly young and weak system that cannot fully and efficiently bring about justice in relation to copyright infringement. Various reforms and suggestions emanating from copyright systems of other jurisdictions are thus necessary in aiding in the fight against copyright piracy and copyright infringement, consequently making our own copyright system as effective as it ought to be.

## **1.4. LITERATURE REVIEW:**

Various literature has been reviewed taking into consideration prominent authors of copyright and copyright law. Scholarly opinions were also taken into account. The following can be said to be the prominent literature assessed:

**Bibliography:** The main bibliographical sources to stem from various prominent copyright writers from the United States of America, Namibia and South Africa Respectively (since the countries apply the same/ similar laws). Prominent regard was therefore given to the following books/literature based on relevance.

### **1.4.1. Books**

Dean, H. in his book : '*Handbook of South African Copyright Law*'<sup>5</sup> outlines the concept of copyright law in South Africa. The relevance will be based on the comparative contrast between South African copyright law and Namibian copyright law as well as the provisions of numerous terms and concepts applicable to Namibian law. The same can be said regarding a book by Armstrong, C, entitled '*Access to Knowledge in Africa (The role of copyright)*'<sup>6</sup>. Other books were used mainly for definitive purposes in outlining the general context of copyright as well as its sources such as the books under the following references:

Davies, Gillian. (2002) '*Copyright and the public interest*'. London: Thomson, Sweet & Maxwell.

Deazley, R. (2006). '*Rethinking copyright: history, theory, language*'. Edward Elgar Publishing.

### **1.4.2. Articles:**

Enynna S Nwauche, "*The public interest in Namibian copyright law*", Namibia Law Journal, Volume 1, Issue 1, 2009. This author dealt with the notion of copyright law in Namibia extensively outlining the prevalent copyright provisions in Namibia as well as contrasts to other jurisdictions such as Botswana. This author also outlined how copyright laws existing in Namibia lacks provisions catering for the notion of public policy.

United States Congress. (October 6 2003.) *Copyright Law of the United States of America*. Microsoft Reader edition. This article outlines the copyright laws of the United States of America. The relevance is based on the comparative content which will be contrasted to Namibian copyright law. This article was also employed to outline various provisions not catered for in our Namibian copyright law system.

Other articles dealt with information on Namibian and South African Copyright Societies such as the societies' preambles, constitutions and other relevant articles pertaining to the *Namibian Society for Composers and Authors of Music (NASCAM)*; and the *Namibian Reproductive Rights Organisation (NAMRO)*. Other articles having relevant information pertaining to *Publishers' Association of South*

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<sup>5</sup> Dean, H. (1987) '*Handbook of South African Copyright Law*'. Durban. Juta.

<sup>6</sup> Armstrong C (2010) '*Access to Knowledge in Africa (The role of copyright)*'. Juta. Durban.

*Africa* (PASA) as well as information pertaining to the *Recording Industry of South Africa* (RiSA) were also used.

#### **1.4.3. Statutes:**

The following statutes were considered and discussed in detail due to their relevance to the research topic. The most prominent statutes dealing with the notion of copyright in Namibia are therefore as follows: Copyright and Neighbouring Rights Protection Act 6 of 1994; Patents, Designs, Trade Marks and Copyright Act 9 of 1916, as amended in South Africa to April 1978; and to a certain degree the Namibia Library and Information Services Act 4 of 2000.

With regard to South Africa, the Copyright Act 98 of 1978 was the main statute assessed and with regard to America (U.S.A.) the United States Code, specifically 'Title 17' was the main instrument reviewed.

#### **1.4.4. Cases:**

The following cases shall be discussed in detail and their relevance shall thus be outlined consequently related to the research topic. These cases shall be comparatively analyzed and projected so as to assess the legal standing in Namibia and compare to other jurisdictions such as South Africa. The prominent cases that deal with the concept of copyright in Namibia are thus the case of *Gemfarm Investments v Trans Hex Group* 2009 (2) NR 477 (HC) as well as the case of *S v Marume* 2007 (1) NR 12 (HC).

#### **1.4.5. International Law Treaties and Conventions:**

The following treaties were discussed in detail and their relevance was outlined consequently with regard to the research topic. These treaties were also regarded as part of the sources of copyright law and their relevance was outlined in relation to the Namibian copyright perspective. Some of the prominent treaties considered were as follows: Paris Convention for the Protection of Industrial Property, 1883; Convention Establishing the World Intellectual Property Organization 1967; Berne Convention for the Protection of Literary and Artistic Works, 1971 and lastly the WIPO Copyright Treaty of 1996.

#### **1.4.6. Internet Sources:**

Due to publications that are not readily available such as information pertaining other foreign countries, internet sources will thus be employed for such purposes. This shall therefore include various internet articles, opinions and websites based on the relevance of the information contained therein.

## **1.5. STRUCTURAL OUTLINE:**

Apart from this chapter, the main content of the research shall commence from Chapter 2. This chapter will outline and explain the general notion of copyright law, the sources and history of copyright law as well as its general scope and functions.

Chapter 3 will outline the concept of copyright infringement, its assumed causes, its effects and why such copyright infringement should be curbed. Chapter 4 will extensively deal with the concept of Copyright in Namibia which will therefore include an extensive analysis of Namibian copyright legislation, cases and institutions. From such analysis the efficiency shall be assessed there from.

Chapter 5 will deal with the concept of copyright and copyright infringement in South Africa, the legislation as well as related cases. From there a comparison can be deduced in relation to the Namibian concept of Copyright.

Chapter 6 will deal with the concept of copyright law in United States of America for comparative purposes. This will thus include the assessment of measures implemented to curb copyright infringement as well as the difficulties faced in implementing such copyright infringement laws.

Chapter 7 will outline the various contrasts between Namibia's copyright system with the ones of South Africa and the United States of America. From there various loopholes in the Namibian system will therefore be outlined from which new strategies can be suggested. Lastly the conclusion will be an overview of the whole dissertation and various recommendations will be highlighted.

## CHAPTER 2:

### 2.1 WHAT IS COPYRIGHT LAW (GENERAL CONTEXT):

#### 2.1.1 The concept of copyright

Before one can define the concept of copyright law, one has to understand the concept of copyright itself. According to *Davies and Gillian*<sup>7</sup>, a copyright is regarded as a set of exclusive rights granted by a state to the creator of an original work or their assignee for a limited period of time in exchange for public disclosure of the work.<sup>8</sup> This includes the right to copy, distribute and adapt the work.<sup>9</sup> Copyright owners thus have the exclusive statutory right to exercise control over copying and other exploitation of the works for a specific period of time, after which the work is said to enter the public domain<sup>10</sup>. In most instances copyright owners license or permanently transfer or assign their exclusive rights to others of which such uses require permission.<sup>11</sup>

Regarding the scope of copyright, it is believed that initially copyright law applied to only the copying of books however over time other derivative works were made subject to copyright thus making it cover a wide range of works, including maps, sheet music, dramatic works, paintings, photographs, architectural drawings, sound recordings, motion pictures and computer programs.<sup>12</sup>

#### 2.1.2. The notion of copyright law and its history

According to Armstrong<sup>13</sup>, copyright law is the branch of the law of intellectual property, which is mainly concerned with incorporeal things, which come into existence through the mental activity of a person, of which, once created, it has a separate existence from and outside the person who created them.<sup>14</sup>

To get a better understanding as to how to best define copyright law, a brief review has to be made regarding the development of the concept of copyright law, starting from the presumed foundations of

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<sup>7</sup> Davies, Gillian. (2002) *Copyright and the Public Interest*. London: Thomson, Sweet & Maxwell. P 7.

<sup>8</sup> Davies, Gillian. (2002) *Copyright and the Public Interest*. London: Thomson, Sweet & Maxwell. P 7.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Armstrong C (2010) *Access to Knowledge in Africa (The role of copyright)*. Juta. Durban. 11.

<sup>14</sup> *Ibid.*

such concept and its development as well as its influences.

### 2.1.2.1. Early British copyright law

In the 16th century, in England the printers, known as stationers, formed a collective organization, known as the Stationers' Company which was given the power to require all lawfully printed books to be entered into its register<sup>15</sup>. Only members of the Stationers' Company could enter books into the register.<sup>16</sup> This meant that the Stationers' Company achieved a dominant position over publishing in 17th century England<sup>17</sup>. It is believed that this monopoly came to an end in 1694, when the English Parliament did not renew the Stationers Company's power<sup>18</sup>. The newly established Parliament of Great Britain passed the first copyright statute, the Statute of Anne, full title "*an act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned*".<sup>19</sup>

Pertaining to the influence towards the development of copyright law, in April 1710, this statute is deemed to be the world's first copyright statute which granted publishers of a book legal protection of 14 years with the commencement of the statute<sup>20</sup>. It also granted 21 years of protection for any book already in print<sup>21</sup>.

Deazley<sup>22</sup> further adds how this statute played a crucial role in the development of copyright law, as it influenced such aspect in the following manner: firstly this statute was mainly concerned with the reading public, the continued production of useful literature, and the advancement and spread of education. The rationale of this approach was to encourage "learned men to compose and write useful books"<sup>23</sup>. To meet such a goal, the Statute guaranteed the finite right to print and reprint those works as well as established a practical bargain involving authors, the booksellers and the public<sup>24</sup>. Secondly, the Statute of Anne is believed to be a tool that ended an archaic system whereby only

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<sup>15</sup> MacQueen, Hector L; Charlotte Waelde and Graeme T Laurie (2007). *Contemporary Intellectual Property: Law and Policy*. Oxford University Press. pp. 34. Retrieved July 12, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Deazley, R. (2006). '*Rethinking copyright: history, theory, language*'. Edward Elgar Publishing. P 13-14. Retrieved July 12, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Deazley, R. (2006). '*Rethinking copyright: history, theory, language*'. Edward Elgar Publishing. P 13-14. Retrieved July 12, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*



literature that met the censorship standards administered by the booksellers could appear in print<sup>25</sup>, and thirdly the statute furthermore created a public domain for literature, as previously all literature belonged to the booksellers forever<sup>26</sup>.

#### 2.1.2.2. Common law copyright

According to Van Horn Melton<sup>27</sup>, the common law of copyright was developed by London booksellers who sought to defend their dominant position by seeking injunctions from the Court of Chancery for works by authors when the statutory copyright term provided for by the Statute of Anne began to expire in 1731<sup>28</sup>. This resulted in the lobbying of parliament by the booksellers in order to extend the copyright term provided by the Statute of Anne<sup>29</sup>. Eventually, in a case known as *Midwinter v. Hamilton* (1743–1748), the London booksellers turned to common law and starting a 30 year period known as the “battle of the booksellers”<sup>30</sup>. The London booksellers argued that the Statute of Anne only supplemented and supported a pre-existing common law copyright of which finally the *Donaldson v Beckett* case<sup>31</sup> eventually established that copyright was a “creature of statute”, and that the rights and responsibilities in copyright were determined by legislation<sup>32</sup>. This rationale was a consequence of votes against perpetual copyright by the lords who subsequently confirmed that the copyright term is the length of time a work is in copyright<sup>33</sup>. Regarding this case, they therefore opined that the copyright term did indeed expire according to statute, thus a large number of works and books first published in Britain were in the public domain, either because the copyright term granted by statute had expired, or because they had been published before the Statute of Anne was enacted in 1709<sup>34</sup>.

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<sup>25</sup> Deazley, R. (2006). *Rethinking copyright: history, theory, language*. Edward Elgar Publishing. P 13-14. Retrieved July 12, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>26</sup> *Ibid.*

<sup>27</sup> Van Horn Melton, J. (2001). *The rise of the public in Enlightenment Europe*. Cambridge University Press. pp. 139. Retrieved July 14, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Ronan, D. (2006). *Rethinking copyright: history, theory, language*. Edward Elgar Publishing. pp. 19. Retrieved July 14, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>31</sup> A case heard in 1774 by the British House of Lords about whether copyright is the natural law right of the author or the statutory grant of a limited monopoly.

<sup>32</sup> Marshall, L. (2006). *Bootlegging: romanticism and copyright in the music industry*. Sage. pp. 15. Retrieved July 14, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

This case is believed to have opened the market for cheap reprints of works from renowned authors of the time and at the same time broke the dominance of the London booksellers by allowing competition, which in turn led to the rise of booksellers and publishers<sup>35</sup>.

### 2.1.2. 3. Early French copyright law

In pre-revolutionary France, in order for publishers to be able to publish, all books needed to be approved by official censors and authors and publishers had to obtain a royal privilege<sup>36</sup>. Such royal privileges were considered exclusive and usually granted for six years, with the possibility of renewal<sup>37</sup>. Over time it was established that the owner of a royal privilege had the sole right to obtain a renewal indefinitely, thus for this reason royal privileges were awarded to the heirs of an author rather than the author's publisher by the Royal Council in 1761 which in turn sparked a national debate on the nature of literary property<sup>38</sup>. The ongoing debates led to a series of royal decrees to be reformed pertaining the royal privileges in 1777. The duration of privileges was set at a minimum duration of 10 years or the life of the author, whichever was longer. If an author obtained a privilege and did not transfer or sell it on, he could publish and sell copies of the book himself, and pass the privilege on to his heirs, who enjoyed an exclusive right into perpetuity<sup>39</sup>. In addition if the privilege was sold to a publisher, the exclusive right would only last the specified duration. The royal decrees prohibited the renewal of privileges and once the privilege had expired anyone could obtain a "permission simple" to print or sell copies of the work. Hence the public domain in books whose privilege had expired was expressly recognized.<sup>40</sup>

In 1793 a new law was passed giving authors, composers, and artists the exclusive right to sell and distribute their works, and the right was extended to their heirs and assigns for 10 years after the author's death. The National Assembly placed this law firmly on a natural right footing, calling the law the "Declaration of the rights of genius" and so evoking the famous "Declaration of the rights of man

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<sup>35</sup> Marshall, L. (2006). *Bootlegging: romanticism and copyright in the music industry*. Sage. pp. 15. Retrieved July 14, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>36</sup> Yu, P. (2007). *Intellectual Property and Information Wealth: Copyright and related rights*. Greenwood Publishing Group. pp 141-142. Retrieved July 14, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

and of the citizen” on condition that the author's rights were subject to the condition of depositing copies of the work with the national library ( *Bibliothèque Nationale*).<sup>41</sup>

#### 2.1.2.4. Early US copyright law

Yu<sup>42</sup> opines that due to the fact that the Statute of Anne did not apply to the American colonies, copyright law was not considered a priority, resulting in only three private copyright acts being passed in America prior to 1783<sup>43</sup>. However, in 1783 several authors' petitions persuaded the Continental Congress about the benefits of the protection and security of literary property which have the potential of greatly encouraging genius and useful discoveries, thus making such provisions an aspect worth promoting<sup>44</sup>.

The Continental Congress however, had no authority to issue copyright but instead it passed a resolution encouraging the States to secure to the authors or publishers of any new book not previously printed the copy right of such books for a certain time not less than fourteen years from the first publication and to secure to the said authors, if they survive the term first mentioned the copy right of such books for another term of time no less than fourteen year<sup>45</sup>. At the Constitutional Convention of 1787, it is submitted that proposals provided by James Madison<sup>46</sup> and Charles Pinckney<sup>47</sup> which allowed Congress the power to grant copyright for a limited time, contributed to the establishment of the “Copyright Clause” in the United States Constitution, which allows the granting of copyright and patents for a limited time to serve a utilitarian function, namely: to promote the progress of science and useful arts<sup>48</sup>. The first federal copyright act, the Copyright Act of 1790 granted copyright for a term of fourteen years from the time of recording the title thereof with a right of renewal for another fourteen years if the author survived to the end of the first term<sup>49</sup>.

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<sup>41</sup> Yu, P. (2007). *Intellectual Property and Information Wealth: Copyright and related rights*. Greenwood Publishing Group. pp 141-142. Retrieved July 14, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>42</sup> Yu, P. (2007). *Intellectual Property and Information Wealth: Copyright and related rights*. Greenwood Publishing Group. pp 141-142. Retrieved July 14, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Fourth President of the United States(1809–1817). Retrieved October 20, 2011 from [http://en.wikipedia.org/wiki/James\\_Madison](http://en.wikipedia.org/wiki/James_Madison)

<sup>47</sup> Early American statesman of South Carolina, Revolutionary War veteran, and delegate to the Constitutional Convention (1746 –1825). Retrieved October 20, 2011 from [http://en.wikipedia.org/wiki/Charles\\_Cotesworth\\_Pinckney](http://en.wikipedia.org/wiki/Charles_Cotesworth_Pinckney)

<sup>48</sup> Yu, P. (2007). *Intellectual Property and Information Wealth: Copyright and related rights*. Greenwood Publishing Group. pp 141-142. Retrieved July 14, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>49</sup> *Ibid.*

#### 2.1.2.5. Latin America

Latin American countries were believed to be among the first countries outside Europe to establish copyright law.<sup>50</sup> Latin American countries established national copyright laws following independence from the Spanish and Portuguese colonial powers, Brazil being one of the first countries to do so by adopting the French civil code as its copyright law<sup>51</sup>. Consequently, copyright law was also established in Mexico following a Spanish court order in 1820 and in 1832 Mexico passed its first copyright statute. After such occurrences, it is thus believed that by the 1850's, copyright statutes were established in over eight Latin American countries.<sup>52</sup>

#### 2.1.2.6. Africa, Asia, and the Pacific

Copyright law was introduced in African, Asian and Pacific countries in the late 19th Century by European colonial powers, especially Britain and France<sup>53</sup>. It is believed that the introduction of copyright laws in colonies occurred in the context of colonial powers' desire to civilize their colonies and to protect the commercial interest of the colonial powers<sup>54</sup>. After the 1884 Congress of Berlin European colonial powers imposed new laws and institutions in their colonies, including copyright laws<sup>55</sup>. The British Empire introduced copyright law in its African and Asian colonies through the Copyright Act of 1911<sup>56</sup>. Similarly, France applied its copyright law throughout its colonies of which the French National Institute for Intellectual Property (INPI) was the colonial intellectual property authority<sup>57</sup>.

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<sup>50</sup> Brazil being the fourth country in the world to establish national copyright laws in 1804, after the UK, France and the United States.

<sup>51</sup> Brazilian Penal Code.

<sup>52</sup> Deere, C. (2009). *The implementation game: the TRIPS agreement and the global politics of intellectual property reform in developing countries*. Oxford University Press. p. 35.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> Also known as the *Imperial Copyright Act of 1911*.

<sup>57</sup> Deere, C. (2009). *The implementation game: the TRIPS agreement and the global politics of intellectual property reform in developing countries*. Oxford University Press. p. 36.

## **2.2. SOURCES OF COPYRIGHT LAW (ORIGINS AND INTERNATIONAL SOURCES)**

### 2.2.1. Origins of copyright law

Various authors concur that the British Statute of Anne 1709<sup>58</sup>, was the first copyright statute. In the present day however, copyright laws are partially standardized through international and regional agreements such as the 'Berne Convention'<sup>59</sup> and the 'WIPO Copyright Treaty'<sup>60</sup>. It is believed that even though there are consistencies among nations' copyright laws, each jurisdiction has separate and distinct laws and regulations covering copyright. These national laws vary greatly between countries and copyrighted works are licensed on a territorial basis<sup>61</sup>.

### 2.2.2. Berne Convention for the Protection of Literary and Artistic Works

The *Berne Convention for the Protection of Literary and Artistic Works* is believed to have established a union for the protection of the rights of authors in their literary and artistic work upon completion at Paris on 4 May 1896<sup>62</sup>. Member States of the union agreed to a base level of intellectual property protections. Under the Berne Convention, copyright protection is regarded as automatic and the term of protection granted for literary works is "the life of the author and fifty years after his death."<sup>63</sup>

Authors of literary works are granted the exclusive right to authorize the following: reproduction of their works;<sup>64</sup> adaptations, arrangements and other alterations of their works<sup>65</sup>; cinematic adaptations<sup>66</sup>; broadcasting<sup>67</sup>; public communication by loudspeaker or any other analogous instrument of their works<sup>68</sup>; and public recitation of their works<sup>69</sup>.

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<sup>58</sup> Full title : "*An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned*".

<sup>59</sup> Berne Convention for the Protection of Literary and Artistic Works.

<sup>60</sup> World Intellectual Property Organisation .

<sup>61</sup> Deere, C. (2009). *The implementation game: the TRIPS agreement and the global politics of intellectual property reform in developing countries*. Oxford University Press. p. 25

<sup>62</sup> List of parties available at <http://www.wipo.int/treaties/ip/berne/index.html>.

<sup>63</sup> Article 1.

<sup>64</sup> Article 7(1).

<sup>65</sup> Article 9(1).

<sup>66</sup> Article 12(1).

<sup>67</sup> Article 14(1).

<sup>68</sup> Article 11(1).

<sup>69</sup> Article 11(1).

The Berne Convention is a treaty, making it an instrument of international law<sup>70</sup>. This treaty only applies to a member state when implemented domestically<sup>71</sup>. In the area of intellectual property, this convention is considered relevant as it reflects the base line of international intellectual property protection of which, currently one hundred and forty-eight countries are parties<sup>72</sup>.

### 2.2.3. Agreement on trade related Aspects of Intellectual Property (TRIPS)

The 'Agreement on Trade Related Aspects of Intellectual Property Rights' (TRIPS) is an international agreement introduced in 1994 at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), which is administered by the World Trade Organization (WTO) that sets down minimum standards for many forms of intellectual property (IP) regulation as applied to nationals of other WTO Members<sup>73</sup>.

The TRIPS agreement is believed to have introduced intellectual property law into the international trading system for the first time and is considered the most comprehensive international agreement on intellectual property to date<sup>74</sup>. Specifically, TRIPS contains requirements that nations' laws must meet for copyright rights including the rights of performers, producers of sound recordings and broadcasting organizations<sup>75</sup>. With regard to copyright, it must be granted automatically, and not based upon any "formality," such as registrations or systems of renewal of which the terms must extend to 50 years after the death of the author.<sup>76</sup> National exceptions to copyright are constrained by the Berne three-step test outlined in Article 13 of TRIPs which reads as follows:

*“Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.”*

In addition TRIPS requires that the intellectual property laws of each state may not offer any benefits to local citizens which are not available to citizens of other TRIPS signatories under the

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<sup>70</sup>Dugard, J. (2000) *International Law A South African Perspective*. Juta & Co. Durban. P 8.

<sup>71</sup> *Ibid.*

<sup>72</sup> <http://www.wipo.int/treaties/ip/berne/index.html>>. Accessed July 25, 2011.

<sup>73</sup> Archibugi, D. and Filippetti, A. (2010) *The globalization of intellectual property rights: Four learned lessons and four thesis*, Journal of Global Policy(1). P 137.

<sup>74</sup> *Ibid.*

<sup>75</sup> Art 11.

<sup>76</sup> Art. 12 and 14 respectively.

principle of national treatment<sup>77</sup>. To sum up, TRIPS also specifies enforcement procedures, remedies, and dispute resolution procedures as a measure to meet the objectives that contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations<sup>78</sup>.

#### 2.2.4. WIPO Copyright Treaty

The WIPO Copyright Treaty (WCT), adopted in Geneva on 20 December 1996, is looked upon as a re-negotiation of copyright law for a modern time<sup>79</sup>. According to this treaty, copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts<sup>80</sup>.

Building upon TRIPS, the WCT under Articles 11 and 12 contemplate the widespread digital distribution of copyrighted material. Article 11 deals with technological protection measures, providing that parties to the treaty provide legal protection to technological measures by including the following:

“Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law”.

Article 12 communicates a similar sentiment *vis-à-vis* rights management information by pointing out the following:

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal and infringement of any right covered by this Treaty or the Berne Convention:

- (i) To remove or alter any electronic rights management information without authority;
- (ii) To distribute, import for distribution, broadcast or communicate to the

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<sup>77</sup> Art 3 and 5 (with certain limited exceptions).

<sup>78</sup> Part III, Section 2 and 3 respectively.

<sup>79</sup> Starkoff, D. (2000) “*Copyright: Law and practice in a digital age*”. Honours Thesis: University of Queensland. P 25.

<sup>80</sup> Ibid.

public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

The Treaty goes on to talk about enforcement of these rights, stating in Article 14 as follows:

- (1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.
- (2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

There are also a series of Agreed Statements to the WCT which are viewed as aids to interpretation of the treaty<sup>81</sup>. Concerning Article 1(4), it was agreed that converting data into digital form is indeed a reproduction for the purposes of copyright law:

The reproduction right, as set out in Article 9 of the Berne Convention<sup>82</sup>, and the exceptions permitted there under, fully apply in the digital environment, in particular to the use of works in digital form. It is also understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of the same article.

It is also understood that the reference to “infringement of any right covered by this Treaty or the Berne Convention” includes both exclusive rights and rights of remuneration<sup>83</sup>. Lastly, it is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems

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<sup>81</sup> Starkoff, D. (2000) “*Copyright: Law and practice in a digital age*”. Honours Thesis: University of Queensland. P 27.

<sup>82</sup> Which basically deals with the *Right of Reproduction*, the *possible exceptions* as well as *Sound and visual recordings*.

<sup>83</sup> Starkoff, D. (2000) “*Copyright: Law and practice in a digital age*”. Honours Thesis: University of Queensland. P 29.



that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty<sup>84</sup>.

By viewing the definition, scope and origins of copyright, one will be in a better position to understand the concept of copyright law. This chapter therefore looked at the background of copyright and copyright law as well as their general applications which are implemented by either statutes, common law and international instruments such as treaties and conventions. These general applications also form part of Namibia's Copyright law and may be deemed as the initial origins. With regard to their applicability to Namibia in the modern day, such will be discussed in chapter 4 of the research paper as it is also necessary to provide an overview pertaining to the main reason for the establishment of copyright laws. The main reason in this research paper will therefore be the concept of copyright infringement which is equally as important to understand as the concept of copyright itself. This shall be dealt with in the following chapter (chapter 3) from which questions as to what constitutes copyright infringement and why it occurs shall be discussed.

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<sup>84</sup> Ibid.

**CHAPTER 3:**  
**COPYRIGHT INFRINGEMENT AND ITS EFFECTS**

**3.1. Concept of Copyright Infringement**

Copyright infringement, also regarded as theft or piracy, is perceived as the unauthorized or prohibited use of works under copyright, infringing the copyright holder's exclusive rights, such as the right to reproduce or perform the copyrighted work, or to make derivative works<sup>85</sup>. Article 12 of the 1886 'Berne Convention for the Protection of Literary and Artistic Works' uses the term "piracy" in relation to copyright infringement by considering it an act of unauthorized manufacturing and selling of works in copyright<sup>86</sup>. Relating to the term "theft" under copyright law, this notion is interpreted to simply mean an instance where a person exercises one of the exclusive rights of the copyright holder without authorization<sup>87</sup>.

In a broader sense, one can outline copyright infringement as any type of violation of rights held by a copyright holder.<sup>88</sup> This thus involves any use without the express consent of the copyright owner which may violate the following rights: the right to reproduce the work<sup>89</sup>; the right to derivative works<sup>90</sup>; the right to distribution<sup>91</sup>; the right to display publicly<sup>92</sup> and lastly the right to public performance of the work<sup>93</sup>

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<sup>85</sup> Rosen, R. (2008). "*Music and Copyright*". Oxford Oxfordshire: Oxford University Press. P11.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> <<http://www.clickandcopyright.com/copyright-resources/copyright-infringement.aspx>>

<sup>89</sup> The right to reproduce, copy, duplicate or transcribe the work in any fixed form. Copying and reselling thus constitutes such infringement. Retrieved July 25, 2011 from <http://www.clickandcopyright.com/copyright-resources/copyright-infringement.aspx>

<sup>90</sup> The right to modify and create a new work that is based upon an existing work. Retrieved July 25, 2011 from <http://www.clickandcopyright.com/copyright-resources/copyright-infringement.aspx>

<sup>91</sup> The right to distribute the work to the public by sale, rental, lease or lending. Retrieved July 25, 2011 from <http://www.clickandcopyright.com/copyright-resources/copyright-infringement.aspx>

<sup>92</sup> The right to show a copy of the work directly to the public by hanging up a copy of the work in a public place, displaying it on a website, putting it on film or transmitting it to the public in any other way. Retrieved July 25, 2011 from <http://www.clickandcopyright.com/copyright-resources/copyright-infringement.aspx>

<sup>93</sup> The right to recite, play, dance, act or show the work at a public place or to transmit it to the public. Retrieved July 25, 2011 from <http://www.clickandcopyright.com/copyright-resources/copyright-infringement.aspx>

### **3.2 Exceptions to copyright infringement**

Pertaining to the aforementioned, certain infringements of the aforementioned rights are considered not constitute copyright infringement. These exceptions are considered as the following:

Fair Use: This is considered as a doctrine originating from United States , which permits the limited reproduction of copyrighted materials without acquiring permission from the rights holders<sup>94</sup>. Examples of fair use include commentary, criticism, news reporting, research, teaching, library archiving and scholarship<sup>95</sup>. It provides for the legal, non-licensed citation or incorporation of copyrighted material in another author's work under a *four-factor balancing test* which involves the assessment of the following: The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit<sup>96</sup> ; the nature of the copyrighted work<sup>97</sup>; the amount and substantiality of the portion used in relation to the copyrighted work as a whole<sup>98</sup>; and the effect of the use upon the potential market for or value of the copyrighted work<sup>99</sup>. Based on the balancing test, it should thus be noted that the notion of "fair use," however, should therefore be determined on a case-by-case basis<sup>100</sup>.

Public Domain: This refers to works which are no longer covered by copyright law either due to expiry of copyright which varying on the jurisdictions, occurs 50 – 70 years after authors death, or due to the fact that the author has ceded his right to the public<sup>101</sup>.

Non-Copyrightable Works: Copyright infringement cannot occur when someone uses material that cannot be protected by copyright, such as facts or ideas. An exception however occurs if someone puts a bunch of facts in a creative manner which thus leads to the formation of a copyrightable instrument<sup>102</sup>.

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<sup>94</sup> Samuelson, P. (1995). "Copyright's fair use doctrine and digital data". *Publishing Research Quarterly* 11 (1). P 27.

<sup>95</sup> Ibid.

<sup>96</sup> Samuelson, P. (1995). "Copyright's fair use doctrine and digital data". *Publishing Research Quarterly* 11 (1). P 28.

<sup>97</sup> Ibid..

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> <<http://www.clickandcopyright.com/copyright-resources/copyright-infringement.aspx>>

<sup>102</sup> Ibid.

### **3.3. Causes of copyright infringement**

High cost of copyrighted materials. This may be considered as the main factor as to why people resort to piracy (in turn copyright infringement), especially when pirating costs next to nothing<sup>103</sup>.

Ease of piracy. Due to technological advancements and the internet, a person can access most of the information they need at the convenience of their own homes without physically having to look for the product<sup>104</sup>. This is common pertaining to the downloads of music and various software.<sup>105</sup> From a criminological point of view, this perspective is supported by the *routine activity theory* which mentions how crime is normal and depends on the opportunities available, thus if a target is not protected enough, and if the reward is worth it, crime will happen<sup>106</sup>. This theory thus outlines how crime just needs an opportunity and the fact that most crimes are petty theft and unreported to the police, this thus forms the premise of the theory<sup>107</sup>.

Convenience: Some people prefer getting something for almost next to nothing especially pertaining an object where they either only need to use it once for a specific purpose or where they only need a very small aspect from that object, e.g. where one needs an article from a book, but is compelled to buy the whole book, it is likely that if he can access the book by other means, he would without hesitation take that opportunity<sup>108</sup>.

Underperforming economy : sometimes people don not have any money, so even if reasonably priced, people will still be reluctant not to pay especially when such option exists<sup>109</sup>.

Availability / Unavailability of the title in a given market<sup>110</sup>. Some materials may not be available in retail but can be accessed via internet. This may include old materials that are no more in production or circulation. This thus makes it an incentive for people to attain the article in a manner seen as

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<sup>103</sup> 'The Technium' website. Retrieved June 30, 2011 from [http://www.kk.org/thetechnium/archives/2008/08/why\\_people\\_pira.php](http://www.kk.org/thetechnium/archives/2008/08/why_people_pira.php)

<sup>104</sup> 'The Technium' website. Retrieved June 30, 2011 from [http://www.kk.org/thetechnium/archives/2008/08/why\\_people\\_pira.php](http://www.kk.org/thetechnium/archives/2008/08/why_people_pira.php)

<sup>105</sup> *Ibid.*

<sup>106</sup> Clarke, R. V. and Felson, M. (Eds.) (1993). '*Routine Activity and Rational Choice. Advances in Criminological Theory*', Vol 5. New Brunswick, NJ: Transaction Books. P 12

<sup>107</sup> *Ibid.*

<sup>108</sup> 'The Technium' website. Retrieved June 30, 2011 from [http://www.kk.org/thetechnium/archives/2008/08/why\\_people\\_pira.php](http://www.kk.org/thetechnium/archives/2008/08/why_people_pira.php)

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

infringing copyright<sup>111</sup>.

Profit : this is considered as the darkest reason of all. This however may also be considered as partly the result of an underperforming economy to a certain degree<sup>112</sup>. In societies where job opportunities are very few, through desperation people can resort to “illegal” activities as a source of sustenance<sup>113</sup>. This form of business opportunity presents itself as it is relatively easy to start and operate as the costs of reproducing are very minimal<sup>114</sup>.

Poor legal enforcement systems pertaining copyright<sup>115</sup>. It is believed that people also pirate because the legal enforcement system is either poor or the punishments are not severe<sup>116</sup>. Where the law is supposed to be the main tool to deter such an illegal action, the fact that it is often poorly imposed makes it an inefficient instrument that pirates can capitalize on<sup>117</sup>.

### **3.4. Why copyright infringement should be curbed**

The reasons why copyright infringement should be curbed are considered quite obvious: Firstly they financially and morally hurt the manufacturers, dealers, retailers and everyone else involved in making and selling the product<sup>118</sup>. The main point of argument being that such acts mainly benefit people who are not willing to pay for honest effort, i.e. people who want things free of cost<sup>119</sup>. Secondly, copyright infringement imposes lesser incentives for people to work on and produce intellectual property materials<sup>120</sup>. Due to loss of revenue created by copyright infringement, it is also believed that many creative people are forced to stop their creative process as the creation of

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<sup>111</sup> ‘The Technium’ website. Retrieved June 30, 2011 from [http://www.kk.org/thetechnium/archives/2008/08/why\\_people\\_pira.php](http://www.kk.org/thetechnium/archives/2008/08/why_people_pira.php)

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> ‘The Technium’ website. Retrieved June 30, 2011 from [http://www.kk.org/thetechnium/archives/2008/08/why\\_people\\_pira.php](http://www.kk.org/thetechnium/archives/2008/08/why_people_pira.php)

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> ‘The Technium’ website. Retrieved June 30, 2011 from [http://www.kk.org/thetechnium/archives/2008/08/why\\_people\\_pira.php](http://www.kk.org/thetechnium/archives/2008/08/why_people_pira.php)

<sup>118</sup> Sassen, S. (February 08, 2005) ‘Piracy: The good, the bad and the ugly’. Hardware analysis website. Retrieved June 24, 2011 from <http://www.hardwareanalysis.com/content/article/1780/>.

<sup>119</sup> *Ibid.*

<sup>120</sup> Sassen, S. (February 08, 2005) ‘Piracy: The good, the bad and the ugly’. Hardware analysis website. Retrieved June 24, 2011 from <http://www.hardwareanalysis.com/content/article/1780/>.

intellectual property is quite costly as well<sup>121</sup>. Another reason why copyright infringement should be curbed is to protect ones Constitutional right to property whether corporeal or incorporeal<sup>122</sup>. Acts of piracy therefore clearly violate ones property, and in turn the owners right to such property as a consequence<sup>123</sup>. Lastly from a legal perspective it is important to curb piracy so as to instill confidence in the legal system especially with regard to law abiding citizens who make legitimate purchases but live with the fact that many people manage to enjoy the same content for free and illegally, without repercussions for their actions<sup>124</sup>.

By analyzing this chapter one will get a better understanding of the concept of copyright infringement, its effects and why it should be stopped. The aforementioned therefore plays a crucial part in enabling us to understand one of the main reasons behind the formulation of copyright law in general. Most of the aforementioned arguments in this chapter are also applicable to Namibia as Namibia is also a victim to copyright infringement and piracy and is also struggling to deal with such situation as outlined by Mboya<sup>125</sup>. Mboya also outlined in his article how piracy is considered a serious offence punishable by law in Namibia however the law enforcement is limited and numerous instances of piracy go unreported.<sup>126</sup> With regard to the following chapter, this current chapter provides general pointers that can be taken into consideration and implemented in Namibia so as to deal with copyright piracy issues. However in order to implement such into our current legal system it is firstly important to establish Namibia's current copyright position which will be dealt with in the following chapter.

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<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> Sassen, S. (February 08, 2005) '*Piracy: The good, the bad and the ugly*'. Hardware analysis website. Retrieved June 24, 2011 from <http://www.hardwareanalysis.com/content/article/1780/>.

<sup>124</sup> *Ibid.*

<sup>125</sup> Mboya, E. (Thursday, 14 May 2009). '*Piracy costs musicians N\$1,2million annually – NASCAM*'. *Informante on the web*. Retrieved June 20, 2011 from [http://www.informante.web.na/index2.php?option=com\\_content&do\\_pdf=1&id=4031](http://www.informante.web.na/index2.php?option=com_content&do_pdf=1&id=4031)

<sup>126</sup> *Ibid.*

## CHAPTER 4:

### **CONCEPT OF COPYRIGHT LAW AND COPYRIGHT INFRINGEMENT IN NAMIBIA**

Namibian copyright law, just like various other states is highly influenced by international law (Copyright treaties and conventions to be specific). These international laws are applicable to Namibia by virtue of Article 144 of its Constitution which states the following: *“Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia”*. Namibia is therefore a signatory to numerous international treaties relating to copyright and copyright law such as the Paris Convention for the Protection of Industrial Property of 1883; the Berne Convention for the Protection of Literary and Artistic Works of 1971 as well as the WIPO Copyright Treaty of 1996. Due to the fact that the prevalent treaties namely the Berne convention as well as the WIPO Copyright treaty have been outlined in chapter 2, no further elaboration is necessary regarding the provisions contained therein that were adopted by Namibia.

Various national legislations also exist that are related to the notion of copyright of which the prominent ones include: the ‘Copyright and Neighboring Rights Protection Act 6 of 1994’; the ‘Patents, Designs, Trade Marks and Copyright Act 9 of 1916’ ; the ‘Namibia Library and Information Services Act 4 of 2000’ as well as the ; ‘Draft on Information and communication technology policy for the Republic of Namibia’.

#### **4.1. Copyright and Neighboring Rights Protection Act 6 of 1994**

Nwauche<sup>127</sup> opines that out of all of Namibia’s copyright legislation, the most prominent one is the ‘Copyright and Neighbouring Rights Protection Act 6 of 1994’<sup>128</sup>. For this reason, elaboration shall be given to this piece of legislation.

The Copyright and Neighbouring Rights Protection Act 6 of 1994 caters mainly for the protection literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts

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<sup>127</sup> Nwauche, E. (2009). *“The public interest in Namibian Copyright Law”*. Namibia Law Journal, 1(1). P 60.

<sup>128</sup>

,programme-carrying signals , published editions and computer programs as outlined in Section 2 of the respective Act.

The exclusive rights of a copyright owner are set out in sections 7 to 14 of the Act, which list the rights accorded to each copyright work. Generally, they are exclusive rights, which enable a copyright owner to<sup>129</sup> : authorize the reproduction of the work in any manner or form; publish the work, if unpublished; perform the work in public; broadcast the work; cause the work to be included in a diffusion service ; make an adaptation of the work, and include the work in a cinematograph film or television work.<sup>130</sup>

Sections 15 to 24 contain detailed provisions of the exceptions regarding each of the works recognized by the Act. For literary and musical works, section 15(1) of the Act provides that copyright shall not be infringed by a fair dealing in the use of a literary or musical work. Such fair dealing thus involves the unauthorized use for the purpose of research or private study by, or the personal or private use of, the person using the work<sup>131</sup>; for the purpose of criticism or review of the work or of another work or for the purpose of reporting on a current event either in a newspaper, magazine or similar periodical<sup>132</sup> or by means of broadcasting or in a cinematograph film<sup>133</sup>.

Other exceptions in the Act include the use of the work for purposes of judicial proceedings. This was highlighted in the case of *Erica Beukes And Another v Daniël Petrus Botha And 3 Others*<sup>134</sup> whereby it was held that copyright is not infringed by virtue of Section 15(2) of the Copyright and Neighbouring Rights Protection Act, 1994 which reads as follows: “The copyright in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings.”

Section 15(8) of the Act outlines works not susceptible to copyright such as official text of any work of a legislative, administrative or legal nature, or an official translation thereof;<sup>135</sup> a speech of a political nature or a speech delivered in the course of judicial proceedings<sup>136</sup> and lastly publications or broadcasts of news of the day<sup>137</sup>.

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<sup>129</sup> Nwauche, E. (2009). “*The public interest in Namibian Copyright Law*”. Namibia Law Journal, 1(1). P 62.

<sup>130</sup> Nwauche, E. (2009). “*The public interest in Namibian Copyright Law*”. Namibia Law Journal, 1(1). P 63.

<sup>131</sup> Section 15(1)(a).

<sup>132</sup> Section 15(1)(b).

<sup>133</sup> Section 15(1)(c).

<sup>134</sup> Case No. (P) I 111/2004.

<sup>135</sup> Sec 15(8)(a).

<sup>136</sup> Sec 15(8)(b)

<sup>137</sup> Sec 15(8)(c)



These exceptions often apply in different terms to the other works recognized for copyright<sup>138</sup>. What applies to all the reproduction exceptions under the Act are the provisions of section 16, which require that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright<sup>139</sup>.

## **4.2. Judicial and administrative decisions**

### **4.2.1. S v Marume 2007 (1) NR 12 (HC).**

This case is one of the few cases in Namibia that highlighted the notion of copyright law as well as what amounts to copyright infringement. This case shall thus be fully illustrated as follows:

#### Facts

The accused was convicted in the magistrates' court, Gobabis, on two counts under the Copyright and Neighbouring Rights Protection Act 6 of 1994 (the Copyright Act). Both charges were of selling, letting or exposing for sale or hire an article that constitutes an infringement of a copyright from which the accused was considered guilty of contravening s 29(2)(b) read with ss 1, 29(1), 29(3), 29(4) & 33 of the Copyright and Neighbouring Rights Protection Act No 6 of 1994.<sup>140</sup>

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<sup>138</sup> Nwauche, E. (2009). *"The public interest in Namibian Copyright Law"*. Namibia Law Journal, 1(1). P 65.

<sup>139</sup> Nwauche, E. (2009). *"The public interest in Namibian Copyright Law"*. Namibia Law Journal, 1(1). P 65.

<sup>140</sup> Section 29 outlines infringement as follows :

(1) Copyright shall be infringed by a person who, without the licence of the owner of the copyright, does or causes any other person to do, in Namibia, any act which the owner has the exclusive right to do or to authorise.

(2) Without derogating from the generality of subsection (1), copyright in a work shall be infringed by a person who, without the licence of the owner of the copyright -

(a) imports into Namibia an article for a purpose other than for his or her private and domestic use;

(b) sells, lets or by way of trade offers or exposes for sale or hire in Namibia an article;

(c) distributes in Namibia an article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected; or

(d) acquires in Namibia an article relating to a computer program,

If to such person's knowledge the making of that article constituted an infringement of that copyright or would have constituted such an infringement had that article been made in Namibia.

(3) Subject to subsection (4), the copyright in literary or musical work shall be infringed by a person who permits a place of public entertainment to be used for a performance in public of the work, where the performance constitutes an infringement of the copyright in the work.

The court a quo rejected the accused's defence of ignorance of the law as not being a defence in law and consequently convicted the accused on both counts. He was sentenced to a fine of N\$2 000 or six months' imprisonment on the first count and to a fine of N\$4 000 or 12 months' imprisonment on the second count. The matter then went for review to the high court.

### Legal issues

Upon review, the honourable high court Judge Van Niekerk J directed the following query to the magistrate:

- 1) Was the offence with which the accused should have been charged not a contravention of s 33(1)(a)(ii)<sup>141</sup> and not contravention of s 29(1) or 29(2)(b)) of Act 6 of 1994?
- 2) What reasons did the magistrate provide for his conclusion that there was no improper duplication of convictions on counts 1 and 2?
- 3) Did the State prove that the DVDs were articles which were infringing copies of a work in which copyrights exists?
- 4) Did the State prove that the accused knew that the DVDs he sold or exposed for sale were infringing copies of a work in which copyright exists
- 5) Did the State prove that the accused had knowledge of unlawfulness, i.e. that he knew that he was transgressing the law or that he foresaw the possibility that he was transgressing the law but reconciled himself to the possibility?

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(4) Subsection (3) shall not apply in a case where the person permitting the place of public entertainment to be so used was not aware and had no reasonable grounds for suspecting that the performance would constitute an infringement of the copyright.

<sup>141</sup> Section 33 (1) (a) outlines the offences and penalties, and proceedings in respect of dealings which infringe copyright as follows:

- (1) A person who, at a time when copyright subsists in a work -
  - (a) without the authority of the owner of the copyright -
    - (i) makes for sale or hire;
    - (ii) sells or lets or by way of trade offers or exposes for sale or hire;
    - (iii) by way of trade exhibits in public;
    - (iv) imports into Namibia for a purpose other than for his or her private or domestic use;
    - (v) distributes for purposes of trade; or
    - (vi) distributes for any other purpose, to such an extent that the owner of the copyright is prejudicially affected, any article which he or she knows to be an infringing copy of the work; or

6) Was negligence sufficient to constitute the offence of contravening s 33 or is intention required?

### Rationale

Van Niekerk J came to the conclusion that the State had not proved its case and that the convictions and sentence should be set aside. In the light of the abovementioned legal issues, he therefore confined this judgment to the first and third question on which he elaborated the following :

In dealing with the first question, Van Niekerk J , upon observing the two sections (Section 29 and 33 respectively) the judge opined that s 29(2)(b)<sup>142</sup> does not create a criminal offence. According to him, there is no other provision in the Act which criminalises a contravention of s 29(2)(b). He further went on to mention how the charge should have alleged a contravention of s 33(1)(a)(ii) read with s 1 (the definition section), ss 29(1) and (2), ss 32(1), (2), (3), (4), (5), (6), (7) and (8) (the sections dealing with onus of proof and evidentiary presumptions) and s 33(3)(a) (the penalty clause) of the Act. In addition, he propounded how s 33(1)(a)<sup>143</sup> does not refer to a 'licence' but merely refers to 'authority'.

The honourable judge, then went on to the third question posed. In his remark, an essential element of the offence created by s 33(1)(a)(ii) is that the articles in question must be infringing copies of a work in which copyright exists. In his view, the State led no evidence whatsoever on the nature or description of the DVDs. One does not even know of what they were supposed to be copies. There is no evidence of what the original work is, who the owner of the copyright is and that they were infringing copies. The only evidence was a bald statement that the accused was selling fake DVDs under the Copyright Act. The state had omitted in elaborating the meaning of 'fake', and it was of the view that they were not genuine and how the alleged copyright was infringed.

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<sup>142</sup> “*Copyright in a work shall be infringed by a person who, without the licence of the owner of the copyright- sells, lets or by way of trade offers or exposes for sale or hire in Namibia an article*”.

<sup>143</sup> A person commits an offence in respect of dealings which infringe copyright: when at a time when copyright subsists in a work- without the authority of the owner of the copyright-

- (i) *makes for sale or hire;*
- (ii) *sells or lets or by way of trade offers or exposes for sale or hire;*
- (iii) *by way of trade exhibits in public;*
- (iv) *imports into Namibia for a purpose other than for his or her private or domestic use;*
- (v) *distributes for purposes of trade; or*
- (vi) *distributes for any other purpose, to such an extent that the owner of the copyright is prejudicially affected, any article which he or she knows to be an infringing copy of the work; or*

In his conclusion the judge pointed out how the State did not prove its case and that the accused should not even have been placed on his defence and told, as he was, that he had a case to answer. He should have been discharged at the close of the State's case. In the result it is clear that the convictions and sentences on both counts 1 and 2 must be set aside.

After assessing the abovementioned case (*S v Marume*), it is clear there are various factors that have to be considered before convicting a copyright infringer, and most of the burden lays on the State to establish undisputed evidence pertaining such copyright infringement. The state therefore has to establish firstly whether a copyright exists pertaining the infringed item, the original work and the owner of such work. From thereon, authority of use must be established and the intention of the work has to be considered. All these requirements may potentially impart a very heavy burden on the State and may potentially hinder it from upholding the course of justice. In Namibia for instance where most prominent academic literature used in schools and tertiary institutions stem from South Africa, it will become a very strenuous task convicting anyone who makes numerous copies of books without a license for retail purposes since the original copyright has to be established. Furthermore, it is the duty of the owner of the infringed copyright who has to furnish such proof of copyright, the original work as well as its ownership, which also proves to be difficult as in most cases the owners are not even aware that such infringement is taking place and may not be motivated to cooperate as they are situated far away. This then poses a demoralizing problem pertaining to our copyright enforcement system. It is therefore evident that reform is necessary to guarantee more efficient justice regarding such scenario. Even though s 33(1)(a)<sup>144</sup> of the Copyright and Neighbouring Rights Protection Act No 6 of 1994 criminalises the infringement of copyright, the lack of evidence or the strenuous burden in providing such evidence with regard to establishing copyright often renders such provision of the Act fruitless, as in most cases the State is not in a position to furnish such required evidence.

#### **4.3. Institutions that deal with copyright in Namibia**

There are currently two collective management organizations in existence in Namibia, namely NASCAM and NAMRRO<sup>145</sup>.

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<sup>144</sup> See footnote 142.

<sup>145</sup> Nwauche, E. (2009). "*The public interest in Namibian Copyright Law*". Namibia Law Journal, 1(1). P 70.

#### 4.3.1. Namibia Society of Composers and Authors of Music (NASCAM)

NASCAM was established in 1994 with technical, material and financial support from WIPO, CISAC and SAMRO (RSA) and mainly deals with collective management of musical works only<sup>146</sup>. It has an estimated membership of 1500 and one of its main aims is to distribute royalties to both local and sister organisation members.<sup>147</sup> Despite that, NASCAM is immensely involved with the enforcement activities such as the combating of piracy as well as informing artists/musicians about their copyrights<sup>148</sup>. They do this in collaboration with other law enforcement agencies such as the Namibian police, customs and excise as well as immigration<sup>149</sup>. Most of these operations are considered to be carried out with financial and logistic support from UNESCO.<sup>150</sup>

#### 4.3.2. Namibia Reproduction Rights Organisation (NAMRRO)

A second collective management organisation was established at the beginning of 2006 and launched by the Hon. Minister of Information and Broadcasting on 18 September 2006 in Windhoek<sup>151</sup>. The main aim of NAMRO is to ensure the provision of collective management services to the rights holders in literary, artistic and dramatic works.<sup>152</sup> NAMRRO thus acts as a middle-man between the copyright owners in their copyright works and the use of those works, especially when the users wish to exploit the works in question for any purpose that requires the copyright owner's prior consent.<sup>153</sup>

NAMRO works hand in hand with the Ministry of Information and Communication Technology which is considered the legal custodian of Namibia's Copyright and Neighbouring Rights Protection Act, Act 6 of 1994.<sup>154</sup> The Copyright Office (a branch of the ministry) thus has responsibility of granting legal protection to creators through development and enforcement of national Copyright law.<sup>155</sup> This law creates conducive environment for creation of software, music, literature and other works, by ensuring

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<sup>146</sup> NASCAM Website. Retrieved June 22, 2011 from <http://www.nascam.org>.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> Elvis Mboya. (Thursday, 14 May 2009). 'Piracy costs musicians N\$1,2million annually – NASCAM'. *Informante on the web*. Retrieved June 20, 2011 from [http://www.informante.web.na/index2.php?option=com\\_content&do\\_pdf=1&id=4031](http://www.informante.web.na/index2.php?option=com_content&do_pdf=1&id=4031)

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> Nwauche, E. (2009). "The public interest in Namibian Copyright Law". *Namibia Law Journal*, 1(1). P 70.

<sup>152</sup> *Ibid.*

<sup>153</sup> Ministry of Information and Communication Technology Website. Retrieved June 27, 2011 from <http://209.88.21.36/opencms/opencms/grnnet/MIB/Organization/Directorates/audiovisual/cmo.html>.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

that the creator will be able to reap the benefits of their work.<sup>156</sup> Currently, the copyright office is at an advanced stage of amending the Act to accommodate new developments, resulting from new technological changes and to ensure that Namibia complies with international conventions and treaties.<sup>157</sup>

#### **4.4. Difficulties in enforcement of copyright law in Namibia**

##### 4.4.1. Copyright: a neglected branch of our law

The words of Maritz J in the Namibian case of *Gemfarm Investments (Pty) Ltd v Trans Hex Group Ltd & Another*<sup>158</sup> describe the current status of legislative sources governing intellectual property rights in the country. In tracing the applicable Namibian legislation, Maritz J made the following statement:

*“All the exceptions raised in this action concern the application or interpretation of probably the most neglected area of statutory regulation in Namibia: patent legislation. In a world increasingly driven by globalised economies and markets; in an age where more technological advances have been made in a single century than in all the centuries which have preceded it combined; at a time when commerce and industries are increasingly based on and benefiting from the power of knowledge converted into ideas, inventions and technologies for the benefit of humankind and its environment, it should be a serious legislative concern that our statutory laws designed to record, preserve and protect those ideas, inventions and technologies are marooned in outdated, vague and patently inadequate enactments passed by colonial authorities in this country about a century ago”.*

In the words of Amoo<sup>159</sup>, although Maritz J’s observation refers specifically to patent law in Namibia, the same may apply to intellectual property (copyright) legislation sui generis. In his opinion, intellectual property law or copyright law as well, is an extremely complex area of law, requiring

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<sup>156</sup> Ministry of Information and Communication Technology Website. Retrieved June 27, 2011 from <http://209.88.21.36/opencms/opencms/grnnet/MIB/Organization/Directorates/audiovisual/cmo.html>.

<sup>157</sup> *Ibid.*

<sup>158</sup> Case No. PI 445/2005

<sup>159</sup> Amoo, S., & Harring, S. (2010) ‘*Intellectual Property under the Namibian Constitution*’. P 304. Retrieved 20 June, 2011 from [http://www.kas.de/upload/auslandshomepages/namibia/constitution\\_2010/amoo\\_harring.pdf](http://www.kas.de/upload/auslandshomepages/namibia/constitution_2010/amoo_harring.pdf).

highly specialised and educated administration, and necessitating the existence of a highly trained subspecialty of law , that of patent and copyright lawyers<sup>160</sup>. He opines that because Namibia has a strong legal profession and a highly regarded judiciary, this is not impossible. On the other hand it is a very expensive regulatory regime as training staff in this capacity is not an inexpensive matter<sup>161</sup>. Amoo also predicts potential conflicts between international law under the TRIPS Agreement and Namibian law that may ultimately come before the Namibian courts<sup>162</sup>. The extent to which the Constitution protects various intellectual property rights, particularly foreign rights, when in conflict with the various rights of Namibian citizens is also an unresolved grey area that needs to be rapidly assessed<sup>163</sup>.

#### 4.4.2. Copyright vs. Public Policy

According to Nwauche<sup>164</sup>, the issue of public policy makes it difficult to draw the line between fair use and copyright infringement. In her opinion, it is because of this that such copyright policies difficult to impose<sup>165</sup>. According to her, if one compares the Namibian Act with other African copyright legislation, the nature and extent of their respective exceptions are brought into sharp relief especially pertaining to the teaching exception with regard to the use of works for teaching<sup>166</sup>.

She further adds how the teaching exception in the Namibian Act seems narrow, and not carefully calibrated, thus making it is grossly inadequate to benefit learners as it appears that teachers in Namibia cannot employ copyright works for teaching in a classroom<sup>167</sup>. In addition, the exceptions do not support the production of course packs for students. Apart from the teaching exception, there are no other exceptions that support educational establishments in their quest for access to information<sup>168</sup>. In her example, students and other learners may need to make copies of articles and other materials from their school library. These photocopies are often the only way that students can access some of the materials but then again, there are no library exceptions allowing the libraries to make copies of works

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<sup>160</sup> Amoo,S, & Haring, S. (2010) ‘*Intellectual Property under the Namibian Constitution*’. P 304. Retrieved 20 June, 2011 from [http://www.kas.de/upload/auslandshomepages/namibia/constitution\\_2010/amoo\\_haring.pdf](http://www.kas.de/upload/auslandshomepages/namibia/constitution_2010/amoo_haring.pdf).

<sup>161</sup> Amoo,S, & Haring, S. (2010) ‘*Intellectual Property under the Namibian Constitution*’. P 305. Retrieved 20 June, 2011 from [http://www.kas.de/upload/auslandshomepages/namibia/constitution\\_2010/amoo\\_haring.pdf](http://www.kas.de/upload/auslandshomepages/namibia/constitution_2010/amoo_haring.pdf).

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> Nwauche, E. (2009). “*The public interest in Namibian Copyright Law*”. Namibia Law Journal, 1(1). P 75.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> Nwauche, E. (2009). “*The public interest in Namibian Copyright Law*”. Namibia Law Journal, 1(1). P 76.

<sup>168</sup> *Ibid.*

in the Namibian Act<sup>169</sup>.

Considering Nwauche's point of view, the issue will definitely spark a major debate as there is clearly a conflict of interests; that of the basic right to education versus copyrights and rights of the author. In reality school institutions even though may outline copyright infringement, however encourage the photocopying of text books and other academic materials. In some instances they even assist the learners in the process for a minimal fee. Should these institutions therefore be held liable for their actions, which were done in good faith to uphold the Namibian aspiration of the provision of good education? At the same time, one should also ask whether the concept of copyright should be undermined under the "lesser evil" premise? This in turn poses a matter of assessment and a matter of difficulty that our copyright law makers need to review.

Reflecting upon this chapter one can find numerous loopholes as well as the difficulties in maintaining an efficient copyright system through our copyright law. Numerous issues have to be addressed starting from the way criminal sanctions pertaining to infringement of copyright should be imposed, all the way to ultimately reforming the whole copyright system as a whole. However if such is to be achieved via the instrumentality of our law, it is therefore necessary to compare other legal systems that uphold the same notion of copyright and adopt their principles in filling out our loopholes. One of the first points of comparison will therefore be the South African legal system pertaining to copyright, for this system is considered more advanced and at the same time very similar to ours.

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<sup>169</sup> Nwauche, E. (2009). "*The public interest in Namibian Copyright Law*". Namibia Law Journal, 1(1). P 76.



## CHAPTER 5:

### 5.1. CONCEPT OF COPYRIGHT LAW IN SOUTH AFRICA

#### 5.1.1. Brief Background

Initially, after the creation of the Union of South Africa in 1910, the copyright laws of the four formerly-independent provinces continued unchanged<sup>170</sup>. In 1916 Parliament enacted the Patents, Designs, Trade Marks and Copyright Act, 1916, which repealed the various provincial laws and incorporated the British Imperial Copyright Act 1911 into South African law.<sup>171</sup> In 1928, along with the other British dominions, South Africa became a party to the Berne Convention in its own right.<sup>172</sup>

After South Africa became a republic in 1961, parliament enacted its own copyright law, separate from that of the United Kingdom, in the Copyright Act, 1965.<sup>173</sup> Nonetheless, this act was largely based on the British Copyright Act 1956. In 1978 it was replaced by the Copyright Act of 1978, which (as amended) remains in force.<sup>174</sup>

#### 5.1.2. Scope of copyright in South Africa

Copyright in South Africa, like in most other countries, differs from other forms of intellectual property in that it is not a right that needs to be registered. Such copyright therefore vests in the author of a work once the work is created in a material form<sup>175</sup>. Over the years, certain classes of copyright have been developed, to describe works eligible for copyright protection. In general, any original work made by a qualified person is eligible for copyright protection. “Originality” thus refers to the fact that the author must have created the work through the application of the author's own creativity and labor whereas the term “qualified person” refers to any national or resident of South Africa or a Berne Convention country<sup>176</sup>. In addition, the work that is to enjoy copyright protection must have been reduced to a material form<sup>177</sup>.

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<sup>170</sup> ICommons Website. Retrieved 22 June, 2011 from <http://archive.icommons.org/articles/south-african-copyright-a-brief-history>.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> ICommons Website. Retrieved 22 June, 2011 from <http://archive.icommons.org/articles/south-african-copyright-a-brief-history>.

<sup>174</sup> *Ibid.*

<sup>175</sup> International Development Research Center (Archives) Website. Retrieved 12 July, 2011 from [http://web.idrc.ca/en/ev-157973-201-1-DO\\_TOPIC.html](http://web.idrc.ca/en/ev-157973-201-1-DO_TOPIC.html).

<sup>176</sup> International Development Research Center (Archives) Website. Retrieved 12 July, 2011 from <http://web.idrc.ca/en/ev->

In accordance with Section 2 of the Copyright Act<sup>178</sup>, the original works eligible for copyright protection in South Africa include literary works (eg. novels, poems, textbooks, letters, reports, lectures, speeches); musical works; artistic works (eg. paintings, sculptures, drawings, photographs); cinematograph films; sound recordings ; broadcasts (electromagnetic transmissions intended for reception by the public); programme-carrying signals (a programme signal which passes through a satellite); published editions of books (usually the first print of a literary or musical work) and lastly computer programs (instructions directing the operation of a computer).

### **5.1.3. Exclusive rights protected**

The South African Copyright Act 98 of 1978 vests exclusive rights to authorise specific acts in respect of a work with its copyright-holder. In the absence of a valid exception to the rights, or permission from the copyright-holder, the exercise of the exclusive rights by anyone other than the rights-holder qualifies as copyright infringement<sup>179</sup>. Just like Namibia, the exclusive rights pertaining to literary or musical works include: reproduction, publishing, performing, broadcasting, transmitting and making adaptations of the work.<sup>180</sup>

### **5.1.4. Exceptions to authorship of Copyrighted works in terms of the South African Copyright Act.**

The author is usually regarded as the first owner of the work. However, there are exceptions to this. Some of these exceptions include: literary or artistic works made by an author when employed by a newspaper, magazine or the like. In this case, authorship vests in the publisher. However, authorship vests in the author for the unused sections<sup>181</sup>. Another exception would be if someone commissions and pays for the taking of a photograph, painting or drawing of a portrait<sup>182</sup>. The same applies if someone commissions and pays for the making of a film or sound recording<sup>183</sup>. In an instance where the work was created in the course of an author's employment, the authorship vests in the employer, therefore amounting to an exception<sup>184</sup>.

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157973-201-1-DO\_TOPIC.html.

<sup>177</sup> *Ibid.*

<sup>178</sup> Copyright Act 98 of 1978.

<sup>179</sup> Smit & Van Wyk Website. Retrieved 5 July, 2011 from <http://www.svw.co.za/copyright.html>.

<sup>180</sup> *Ibid.*

<sup>181</sup> Smit & Van Wyk Website. Retrieved 5 July, 2011 from <http://www.svw.co.za/copyright.html>.

<sup>182</sup> *Ibid.*

<sup>183</sup> Smit & Van Wyk Website. Retrieved 5 July, 2011 from <http://www.svw.co.za/copyright.html>.

<sup>184</sup> International Development Research Center (Archives) Website. Retrieved 12 July, 2011 from <http://web.idrc.ca/en/ev->

### **5.1.5. Duration of Copyright in terms of the South African Copyright Act (Section 3).**

The duration of copyright in South Africa depends on the type of work that has been created. Generally, the term of copyright is 50 years, however the terms vary depending on the type of work.<sup>185</sup> Pertaining literary, musical or artistic works, copyright exists for the life of the author plus fifty years following death, calculated from the end of the year the author died in or 50 years from the date of first publication, performance in public, offering for sale of records thereof or the broadcasting thereof, whichever is earlier.<sup>186</sup> With regard to films and photographs on the other hand, copyright exists fifty years from the end of the year in which the work is made publicly available, or the end of the year in which the work is first published, whichever is longer, or fifty years from the end of the year in which the work is made.<sup>187</sup> A similar position applies to sound recordings, broadcasts and published editions whose copyrights exist fifty years from the end of the year in which publication or broadcast is made.<sup>188</sup>

### **5.1.6. Transfer of copyright**

Much like other property, copyright can be transferred by assignment, testamentary disposition or by operation of law.<sup>189</sup> Copyright can also be licensed to a licensee for royalties. It is important to note that an assignment and an exclusive license (which precludes anyone else, including the author from using the creation) must be in writing and signed by the assignor to be valid.<sup>190</sup> On the other hand a non-exclusive license may be written or oral, or inferred from the conduct of the parties.<sup>191</sup>

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[157973-201-1-DO\\_TOPIC.html](#).

<sup>185</sup> International Development Research Center (Archives) Website. Retrieved 12 July, 2011 from [http://web.idrc.ca/en/ev-157973-201-1-DO\\_TOPIC.html](http://web.idrc.ca/en/ev-157973-201-1-DO_TOPIC.html).

<sup>186</sup> *Ibid.*

<sup>187</sup> International Development Research Center (Archives) Website. Retrieved 12 July, 2011 from [http://web.idrc.ca/en/ev-157973-201-1-DO\\_TOPIC.html](http://web.idrc.ca/en/ev-157973-201-1-DO_TOPIC.html).

<sup>188</sup> *Ibid.*

<sup>189</sup> Schonwetter, T; Ncube, C & Chetty, P. (August 2009) '*African Copyright and Access to Knowledge (ACA2K) Project: The role of copyright*'. Shuttleworth Foundation & UCT Press. Cape Town. Juta & Co. P 245. Retrieved 20 July 2011 from <http://link.wits.ac.za/papers/ACA2K-2010-Access%20to%20knowledge%20in%20Africa.pdf>

<sup>190</sup> Schonwetter, T; Ncube, C & Chetty, P. (August 2009) '*African Copyright and Access to Knowledge (ACA2K) Project: The role of copyright*'. Shuttleworth Foundation & UCT Press. Cape Town. Juta & Co. P 245. Retrieved 20 July 2011 from <http://link.wits.ac.za/papers/ACA2K-2010-Access%20to%20knowledge%20in%20Africa.pdf>

<sup>191</sup> *Ibid.*

### **5.1.7. Parallel importation**

According to Dean<sup>192</sup>, parallel importation refers to a copyright-protected product placed on the market in one country, which is subsequently imported into a second country, without the permission of the copyright-holder in the second country, to compete with the copyright-holder or licensees in that second country<sup>193</sup>. These imported or ‘grey goods’ are often cheaper than the authorised goods. Section 28 of the Copyright Act 98 of 1978 provides that the owner of any published work or the exclusive licensee of a published work who has the licensed right to import such work into South Africa may request the Commissioner of Customs and Excise to declare any other importation of the work prohibited.<sup>194</sup>

### **5.1.8. Exceptions to copyright infringement**

#### **5.1.8.1. Libraries and archives**

The current Copyright Act Regulations contain specific provisions for libraries and archives. Section 3 of the Copyright Regulations stipulates that a library or archives depot (or any of its employees acting within the scope of their employment) may reproduce a work and distribute a copy if the actions meet three conditions.<sup>195</sup> Firstly the reproduction or distribution should be made for non-commercial purposes.<sup>196</sup> Secondly the collections of the library or archive depot should be open to the public or available to researchers<sup>197</sup> and thirdly the reproduction of the work should incorporate a copyright warning<sup>198</sup>.

The library/archive reproduction rights in Section 3 of the Regulations are, in many cases, subject to the provisions of Section 2, which require that the reproduction must be of a ‘reasonable portion’ of the work and must ‘not conflict with the normal exploitation of the work’<sup>199</sup>.

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<sup>192</sup> Dean, O.H. (1983) ‘Parallel importation infringement of copyright’ 100 *SALJ* . P258.

<sup>193</sup> *Ibid*

<sup>194</sup> *Ibid*.

<sup>195</sup> Schonwetter, T; Ncube, C & Chetty, P. (August 2009) ‘*African Copyright and Access to Knowledge (ACA2K) Project: The role of copyright*’. Shuttleworth Foundation & UCT Press. Cape Town. Juta & Co. P 240. Retrieved 20 July 2011 from <http://link.wits.ac.za/papers/ACA2K-2010-Access%20to%20knowledge%20in%20Africa.pdf>

<sup>196</sup> *Ibid*.

<sup>197</sup> *Ibid*.

<sup>198</sup> *Ibid*.

<sup>199</sup> Schonwetter, T; Ncube, C & Chetty, P. (August 2009) ‘*African Copyright and Access to Knowledge (ACA2K) Project: The role of copyright*’. Shuttleworth Foundation & UCT Press. Cape Town. Juta & Co. P 240. Retrieved 20 July 2011 from <http://link.wits.ac.za/papers/ACA2K-2010-Access%20to%20knowledge%20in%20Africa.pdf>

### 5.1.8.2. Educational Purposes

According to Pienaar<sup>200</sup>, when trying to make use of copyright-protected material without the permission of the rights-holder, learners and researchers alike will most likely invoke the general ‘fair dealing’ provision contained in Section 12(1) of the Act.<sup>201</sup> Section 12(1)(a) stipulates that ‘copyright shall not be infringed by any fair dealing with a literary or musical work for the purposes of research or private study by, or the personal or private use of, the person using the work’<sup>202</sup>. Section 12(4) of the Act provides that a work may be used ‘to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching, provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work’. Section 12(11) of the Act deals with translation and states that translation of works for the purposes of educational use is allowed.<sup>203</sup>

The Copyright Regulations linked to Section 13 of the Act also contain specific exceptions for educational purposes<sup>204</sup>. The Regulations permit the making of multiple copies for classroom use, not exceeding one copy per pupil per course. Furthermore, Regulation 8 allows the making of a single copy by or for a teacher for the purpose of research, teaching or preparation for teaching in a class.<sup>205</sup>

### 5.1.8.3. Media freedom and freedom of expression

Section 12(1)(b) of the Act allows ‘fair dealing’ reproduction for review and criticism of literary and musical works and is applied to other works: artistic works, cinematograph films, sound recordings, broadcasts, published editions and computer programs<sup>206</sup>. Section 12(8)(a) provides that ‘*no copyright shall subsist in speeches of a political nature*’. Section 12(6)(a) provides that ‘copyright in a lecture, address or other work of a similar nature which is delivered in public shall not be infringed by reproducing it in the press or by broadcasting it, if such reproduction or broadcast is for an informatory purpose’. Section 12(3) permits quotation of literary and musical works and the provisions of Section

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<sup>200</sup> Pienaar, D.J. (1988) ‘*Statutory defences against actions for infringement of copyright*’. LLM thesis. University of South Africa. P 95.

<sup>201</sup> Pienaar, D.J. (1988) ‘*Statutory defences against actions for infringement of copyright*’. LLM thesis. University of South Africa. P 95.

<sup>202</sup> *Ibid.*

<sup>203</sup> Pienaar, D.J. (1988) ‘*Statutory defences against actions for infringement of copyright*’. LLM thesis. University of South Africa. P 96.

<sup>204</sup> *Ibid.*

<sup>205</sup> International Development Research Center (Archives) Website. Retrieved 12 July, 2011 from [http://web.idrc.ca/en/ev-157973-201-1-DO\\_TOPIC.html](http://web.idrc.ca/en/ev-157973-201-1-DO_TOPIC.html).

<sup>206</sup> Schonwetter, T; Ncube, C & Chetty, P. (August 2009) ‘*African Copyright and Access to Knowledge (ACA2K) Project: The role of copyright*’. Shuttleworth Foundation & UCT Press. Cape Town. Juta & Co. P 243. Retrieved 20 July 2011 from <http://link.wits.ac.za/papers/ACA2K-2010-Access%20to%20knowledge%20in%20Africa.pdf>

12(3) are applied to other works such as cinematograph films, sound recordings, broadcasts and computer programs.

Section 12(1)(c) provides that copyright shall not be infringed by any 'fair dealing' with a literary or musical work for the purpose of reporting current events in a newspaper, magazine or similar periodical; or by means of broadcasting or in a cinematograph film. The provisions of Section 12(1)(c) are applied to other works: artistic works, cinematograph films, sound recordings, broadcasts, published editions and computer programs<sup>207</sup>. Section 19 provides that copyright in programme carrying signals shall not be infringed by the distribution of short excerpts of the programme so carried that consist of reports of current events; or as are compatible with fair practice and to the extent justified by the informatory purpose of such excerpts.<sup>208</sup>

#### 5.1.8.4. Other relevant exceptions and limitations

The following are some of the other exceptions to copyright infringement as provided for in the Copyright Act which can have relevance to learning materials access such as uses related to judicial proceedings;<sup>209</sup> uses relating to official texts of a legislative, administrative or legal nature and political and legal speeches;<sup>210</sup> and back-up copies of computer programs.<sup>211</sup>

## **5.2. Other Legislation related to copyright in South Africa**

### *5.2.1. Electronic Communications and Transactions Act 25 of 2002*

The South African Electronic Communications and Transactions Act 25 of 2002 may have the effect of overriding certain copyright exceptions and limitations, including the fair dealing provisions, contained in the Copyright Act, and may attach criminal liability for use of a work that is legitimated by the Copyright Act<sup>212</sup>.

Section 86(3) of the ECT Act states that:

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<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> Section 12(2) of the Copyright Act 98 of 1978.

<sup>210</sup> Section 12(8)(a) of the Copyright Act.

<sup>211</sup> Section 19B(2) of the Copyright Act.

<sup>212</sup> Schonwetter, T; Ncube, C & Chetty, P. (August 2009) 'African Copyright and Access to Knowledge (ACA2K) Project: The role of copyright'. Shuttleworth Foundation & UCT Press. Cape Town. Juta & Co. P 243. Retrieved 20 July 2011 from <http://link.wits.ac.za/papers/ACA2K-2010-Access%20to%20knowledge%20in%20Africa.pdf>

*“a person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilise such item to contravene this section, is guilty of an offence”.*

#### 5.2.2. Counterfeit Goods Act 37 of 1997

This Act introduced measures against the trade in counterfeit goods so as to further protect owners of copyright (as well as owners of trademarks and other marks) against the unlawful application, to goods, of the subject matter of their respective intellectual property rights and against the release of such goods (‘counterfeit goods’) into the channels of commerce. Section 2(1) outlines a wide range of activities that constitute offences if conducted in relation to trade in counterfeit goods, including possession, production, selling, hiring, bartering, exchanging, exhibiting, distributing or importing/exporting<sup>213</sup>.

#### 5.2.3. South African Library for the Blind Act 91 of 1998

In view of the responsibilities of the South African Library for the Blind, as stipulated in Section 4(1) of the South African Library for the Blind Act 91 of 1998, the Library for the Blind is an important promoter of access to knowledge for sensory-disabled people and caters for the production of documents for blind people in Braille and audio formats.<sup>214</sup>

### **5.3. Judicial and administrative decisions**

Despite the many reported cases on copyright in South Africa, it is however believed that there is a dearth of case law on copyright infringement especially pertaining the copyright infringement of literary and educational works<sup>215</sup>. A few cases however exist pertaining the issue and some of them outline the following:

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<sup>213</sup> *Ibid.*

<sup>214</sup> Schonwetter, T; Ncube, C & Chetty, P. (August 2009) ‘*African Copyright and Access to Knowledge (ACA2K) Project: The role of copyright*’. Shuttleworth Foundation & UCT Press. Cape Town. Juta & Co. P 244. Retrieved 20 July 2011 from <http://link.wits.ac.za/papers/ACA2K-2010-Access%20to%20knowledge%20in%20Africa.pdf>.

<sup>215</sup> Wafawarowa, B. (2002) *Legislation, law enforcement and education: copyright protection in developing region*. Bellagio Publishing Network (BPN) Newsletter 30. Retrieved 22 July, 2011 from <http://www.bellagiopublishingnetwork.com/newsletter30/wafawarowa.htm>

In the case of *Frank & Hirsch v Roopanand Brothers (Pty) Ltd*<sup>216</sup>, which dealt with copyright infringement caused by the parallel importation of blank audio cassettes, the court held that such importation amounted to indirect copyright infringement, because the production of those cassettes in South Africa would have amounted to direct copyright infringement<sup>217</sup>. This case therefore founded that importing learning materials would be considered indirect copyright infringement if the production of those books in South Africa (by the importer or other person) would have been direct copyright infringement.<sup>218</sup>

Other scenarios, though not reported in the law reports have been gleaned from interviews and publications.<sup>219</sup> An instance involved a ‘pirate photocopying shop’ operating in Empangeni, KwaZulu-Natal in 2001 that was engaged in large-scale infringing reproduction of copyright-protected works. A group of publishers pooled financial resources and worked together to obtain evidence, lay criminal charges and meet with the prosecutor assigned to the case. A conviction was obtained, with the infringer being sentenced to three years’ imprisonment or a fine of ZAR30 000 (of which only half was payable).<sup>220</sup>

Another publicised incident occurred in 2003 in the Western Cape. This matter did not result in criminal prosecution or a civil claim for damages. Like the case discussed above, the facts outlined here are gleaned from publication and interviews.<sup>221</sup> The Dramatic, Artistic and Literary Rights Organisation (DALRO) requested a police raid of two shipping containers located near tertiary education institutions from which a large-scale illegal photocopying business was being run. Infringing copies, master copies and the copying equipment were confiscated by the police. However, neither criminal nor civil action was taken thereafter.<sup>222</sup>

### **5.5. Implementation of copyright law in South Africa as well as its efficiency.**

It is believed in South Africa that the dearth of case law regarding copyright is due to a general lack of confidence in the courts<sup>223</sup>. It has been suggested instead that there are several difficulties that copy

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<sup>216</sup> *Frank & Hirsch (Pty) Ltd v Roopanand Brothers (Pty) Ltd* 1993 (4) SA 279 (A); 457 JOC (A).

<sup>217</sup> Schonwetter, T; Ncube, C & Chetty, P. (August 2009) ‘*African Copyright and Access to Knowledge (ACA2K) Project: The role of copyright*’. Shuttleworth Foundation & UCT Press. Cape Town. Juta & Co. P 245. Retrieved 20 July 2011 from <http://link.wits.ac.za/papers/ACA2K-2010-Access%20to%20knowledge%20in%20Africa.pdf>

<sup>218</sup> *Ibid.*

<sup>219</sup> Gray, E. and Seeber, M. (2004) ‘*PICC report on intellectual property rights in the print industries sector*’. P 57. Retrieved 20 July, 2011 from [http://www.publishsa.co.za/docs/Intellectual\\_Copyright\\_Report.pdf](http://www.publishsa.co.za/docs/Intellectual_Copyright_Report.pdf).

<sup>220</sup> *Ibid.*

<sup>221</sup> *Id.* P 56.

<sup>222</sup> *Ibid.*

<sup>223</sup> Wafawarowa, B. (2002) *Legislation, law enforcement and education: copyright protection in developing region*. Bellagio



right holders encounter in pursuing remedies for infringement.<sup>224</sup> For one, the complexity of copyright and evidence laws makes it difficult for rights-holders to litigate. In addition, infringement remedies are considered inadequate, in that fines imposed after convictions have historically been low and proving civil damages is considered an almost insurmountable task due to the lack of statistical data.<sup>225</sup>

Moreover, the views and attitudes of police, customs officials and prosecutors, who feel that copyright infringement especially pertaining to learning materials (as opposed to entertainment products such as videos and music) is not a serious offence, mean that rights-holders do not have meaningful support in pursuing criminal copyright infringement.<sup>226</sup> Some educational institutions take a similar view and are thus unwilling to assist rights-holders to enforce their rights. It appears, therefore, that many copyright infringement matters related to learning materials are disposed of by settlement or the abandonment of claims by rights-holders. The resultant lack of case law means that there are no authoritative judicial findings in relation to copyright in learning materials.<sup>227</sup> The educational exceptions provided for in the regulations present a few challenges. First, it is unclear what constitutes a 'reasonable portion'.<sup>228</sup> As a result, students would often be unsure of how much they could lawfully photocopy<sup>229</sup>. Furthermore, copies may not be made for purposes other than classroom use. This, of course, prevents productive distance learning, where learners are not in possession of the original copy in order to exercise the right granted under the regulations.<sup>230</sup>

According to Wafawarowa<sup>231</sup>, with regard to literary works (text books) in South Africa, it is estimated that approximately 40-50% of the potential R400-million market is lost to piracy and illegal photocopying. This photocopying is carried out by students in a number of educational institutions,

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Publishing Network (BPN) Newsletter 30. Retrieved 22 July, 2011  
from <http://www.bellagiopublishingnetwork.com/newsletter30/wafawarowa.htm> .

<sup>224</sup> Schonwetter, T; Ncube, C & Chetty, P. (August 2009) '*African Copyright and Access to Knowledge (ACA2K) Project: The role of copyright*'. Shuttleworth Foundation & UCT Press. Cape Town. Juta & Co. P 248. Retrieved 20 July 2011 from <http://link.wits.ac.za/papers/ACA2K-2010-Access%20to%20knowledge%20in%20Africa.pdf>

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.*

<sup>228</sup> Schonwetter, T; Ncube, C & Chetty, P. (August 2009) '*African Copyright and Access to Knowledge (ACA2K) Project: The role of copyright*'. Shuttleworth Foundation & UCT Press. Cape Town. Juta & Co. P 249. Retrieved 20 July 2011 from <http://link.wits.ac.za/papers/ACA2K-2010-Access%20to%20knowledge%20in%20Africa.pdf>

<sup>229</sup> *Ibid.*

<sup>230</sup> Schonwetter, T; Ncube, C & Chetty, P. (August 2009) '*African Copyright and Access to Knowledge (ACA2K) Project*'. Shuttleworth Foundation. Cape Town. P 250.

<sup>231</sup> Wafawarowa, B. (2002) *Legislation, law enforcement and education: copyright protection in developing region*. Bellagio Publishing Network (BPN) Newsletter 30. Retrieved 22 July, 2011  
from <http://www.bellagiopublishingnetwork.com/newsletter30/wafawarowa.htm>.

illegal course packs that are distributed by the authorities of educational institutions, and illegal copy shops that copy books and sell them to educational institutions and individual students<sup>232</sup>.

Wafawarowa further adds how in such a situation, where piracy and illegal photocopying threaten the existence of a whole industry, and where the activities of pirates are carried out with so much impunity and across borders, the roles of legislation and law enforcement are critical.<sup>233</sup> He therefore believes that the provisions of TRIPS are adequate to deal with the South African situation as its provisions are made for effective action against any form of infringement of intellectual property rights, including expeditious remedies to prevent further infringement.<sup>234</sup> TRIPS requires the procedures of enforcement to be fair and equitable and to avoid complicated and costly procedures which allow unreasonable time limits or unwarranted delays. However considering the South African scenario, it is such delays, especially on the part of law enforcement that have made it virtually impossible to secure evidence on infringements.<sup>235</sup>

Where infringement is happening across borders, TRIPS provides for special border provisions and procedures. Wafawarowa therefore believes that if TRIPS provisions on criminal procedures and civil procedures are followed, they can serve as reasonable deterrents against infringement and can make it more worthwhile for individual companies to institute civil and criminal action against offenders.<sup>236</sup> It was hoped that South Africa was going to comply with the provisions of the TRIPS agreement as scheduled in 2000. It is however unfortunate that in the present day, the South African copyright law falls far short of these provisions because the question of fair dealing has not been adequately defined, provisions for punitive measures and civil damages have not been set out and the law as it stands now is too cumbersome for any successful prosecution to be launched.<sup>237</sup>

Reflecting upon this chapter, one will find that it is not only the Namibian copyright law system that is facing difficulty in bringing about justice especially pertaining the infringement of literary works, but also South Africa. These loopholes therefore encourage one to look for a filling from other law enforcement systems emanating from other jurisdictions that were able to devise a scheme in dealing

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<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*

<sup>234</sup> Wafawarowa, B. (2002) *Legislation, law enforcement and education: copyright protection in developing region*. Bellagio Publishing Network (BPN) Newsletter 30. Retrieved 22 July, 2011 from <http://www.bellagiopublishingnetwork.com/newsletter30/wafawarowa.htm>.

<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.*

<sup>237</sup> Wafawarowa, B. (2002) *Legislation, law enforcement and education: copyright protection in developing region*. Bellagio Publishing Network (BPN) Newsletter 30. Retrieved 22 July, 2011 from <http://www.bellagiopublishingnetwork.com/newsletter30/wafawarowa.htm>.

with such problems. Such jurisdiction (or legal system) shall therefore be that of the United States of America that is considered to contain one of the earliest and most renowned legal system regarding copyright law as well as copyright enforcement. The next chapter shall therefore look at this renowned copyright legal system for purposes of comparisons as well as for purposes of dealing with the loopholes prevalent in both the Namibian and South African copyright systems pertaining musical and literary works.

**CHAPTER 6:**  
**CONCEPT OF COPYRIGHT IN THE UNITED STATES OF AMERICA**

**6.1. Copyright law of the United States**

The copyright law of the United States governs the legally enforceable rights of creative and artistic works and is considered as part of federal law authorized by the U.S. Constitution<sup>238</sup>. The power to enact copyright law is granted in Article I, Section 8, Clause 8, also known as the *Copyright Clause*, which states how the congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. This clause is therefore believed to form the basis for U.S. copyright law and patent law, and includes the limited terms (or durations) allowed for copyrights and patents, as well as the items they may protect<sup>239</sup>.

In the U.S., registrations of claims of copyright, recordation of copyright transfers, and other administrative aspects of copyright are the responsibility of the United States Copyright Office which is also an arm of the Library of Congress<sup>240</sup>. It is therefore believed that the main aim of U.S. copyright law is to attempt to reach an optimal balance between the potential conflicting public interests of encouraging creativity by giving exclusive property rights in creations as well as giving the public the freest possible access to works of authorship and the ideas they encompass.<sup>241</sup>

**6.1.1. Works subject to copyright law**

The United States copyright law protects "original works of authorship," including literary, dramatic, musical, artistic, and certain other intellectual works such as pantomimes, choreographic works, audiovisual works, sound recordings, architectural works and compilations<sup>242</sup>. This protection is available to both published and unpublished works. Similar to the copyright laws of Namibia and South Africa, U.S. copyright law does not protect an idea, but however it protects the expression of an

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<sup>238</sup> Yu, P. (2007). *Intellectual Property and Information Wealth: Copyright and related rights*. Greenwood Publishing Group. P 142. Retrieved July 14, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> Yu, P. (2007). *Intellectual Property and Information Wealth: Copyright and related rights*. Greenwood Publishing Group. P 142. Retrieved July 14, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

idea.<sup>243</sup> The distinction between "idea" and "expression" is a fundamental part of U.S. law, but is considered not always clear. Apart from ideas, U.S. copyright law also considers facts as not to be copyrightable due to their synonymous nature pertaining ideas or discoveries, however compilations of facts are protected under § 103 of the Copyright Act<sup>244</sup> which allows for the protection of compilations, provided there is a creative or original act involved in such a compilation.<sup>245</sup> The protection is limited only to the selection and arrangement, not to the facts themselves, which may be freely copied<sup>246</sup>.

Pertaining to works by the federal government, Section 17 of the United States Code<sup>247</sup> under § 105 withholds copyright from most publications produced by the United States Government, and its agents or employees while in their employment fall in the public domain in some sense.<sup>248</sup> The logic behind this is derived from the case of *State of Georgia v Harrison Co*<sup>249</sup>, where it was mentioned: "the citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process". For this reason, edicts of government such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy.<sup>250</sup>

### 6.1.2. Rights Protected

There are five basic rights protected by U.S. copyright, guaranteeing the owner of copyright the exclusive rights to reproduce the work in copies or phonorecords, prepare derivative works based upon the work, distribute copies or phonorecords of the work, publicly perform the work and lastly to publicly display the work.<sup>251</sup> Just as in Namibia, any violation of any of the exclusive rights of the

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<sup>243</sup> *Ibid.*

<sup>244</sup> Copyright Act of 1976.

<sup>245</sup> Yu, P. (2007). *Intellectual Property and Information Wealth: Copyright and related rights*. Greenwood Publishing Group. P 142. Retrieved July 14, 2011, from [http://en.wikipedia.org/wiki/History\\_of\\_copyright](http://en.wikipedia.org/wiki/History_of_copyright).

<sup>246</sup> The Supreme Court decision in *Feist v. Rural* further made clear the requirements that a compilation be original in its composition, in denying protection to telephone "white pages". The *Feist* court rejected what was known as the "sweat of the brow" doctrine, in ruling that no matter how much work was necessary to create a compilation, a non-selective collection of facts ordered in a non-creative way is not subject to copyright protection.

<sup>247</sup> The Code of Laws of the United States of America. Considered a compilation and codification of the general and permanent federal laws of the United States.

<sup>248</sup> Vaidhyanathan, S. (2001) *Copyrights and Copywrongs: the rise of intellectual property and how it threatens creativity.* New York University Press. New York. P 14

<sup>249</sup> 548 F Supp 110, 114 (ND Ga 1982))

<sup>250</sup> Vaidhyanathan, S. (2001) *Copyrights and Copywrongs: the rise of intellectual property and how it threatens creativity.* New York University Press. New York. P 18.

<sup>251</sup> *Ibid.*

copyright holder is said to be a copyright infringement.<sup>252</sup>

### 6.1.3. Owner of copyright

U.S. Copyright law acknowledges that the author of a work is the initial owner of the copyright in it, and may exploit the work himself or transfer some or all the rights conferred by the copyright to others.<sup>253</sup> Exceptions and special cases in determining the author are also acknowledged such as the exception dealing with works for hire.<sup>254</sup> If a work is made "for hire" within the meaning of the Copyright Act of 1976, the employer or commissioning party, who paid for the work and took the economic risk of it, is deemed the author for copyright purposes and is the initial owner of the copyright.<sup>255</sup>

### 6.1.4. Registration of copyright

Registration of copyright is one of the main implementations of the U.S copyright law.<sup>256</sup> This thus refers to the act of registering the work with the United States Copyright Office, which is an office of the Library of Congress.<sup>257</sup> As the United States has joined the Berne Convention, registration is no longer necessary to provide copyright protection. However, registration is still necessary to obtain statutory damages in case of infringement.<sup>258</sup> The Copyright Act of 1976 under subsection 407 provides that the owner of copyright in a published or unpublished work may, at any time during the copyright, register the work with the Copyright Office. The purpose of the registration provisions is to create as comprehensive a record of U.S. copyright claims as is possible.<sup>259</sup> To register, the registrant must complete an application form and send it, along with the filing fee and copies or phonorecords of the work, to the Copyright Office.<sup>260</sup>

### 6.1.5. Duration of copyright

Works created in or after 1978 are extended copyright protection for a term defined in title 17 of the

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<sup>252</sup> Ibid.

<sup>253</sup> 18 U.S.C. § 713

<sup>254</sup> 17 U.S.C. § 106

<sup>255</sup> *Copyright Laws of the United States*. Retrieved June 27, 2011 from

[http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

<sup>256</sup> Standler, R. (28 October 2009) *Music Copyright Law in the USA* . P 13. Retrieved July 20, 2011 from <http://www.rbs2.com/copyrm.pdf>.

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> Standler, R. (28 October 2009) *Music Copyright Law in the USA* . P 13. Retrieved July 20, 2011 from <http://www.rbs2.com/copyrm.pdf>.

<sup>260</sup> Ibid.

United States Code under § 302. With the passage of the Sonny Bono Copyright Term Extension Act, these works are granted copyright protection for a term ending 70 years after the death of the author. If the work was a work for hire (e.g., those created by a corporation) then copyright persists for 120 years after creation or 95 years after publication.<sup>261</sup> The § 302 term also applies to works created before 1978 that were not yet published or registered prior to 1978, with the exception that such copyrights would not expire before 2003.<sup>262</sup> Prior to 1978, works had to be published or registered to receive copyright protection. Upon the effective date of the 1976 Act (January 1, 1978) this requirement was removed and these works received protection despite having not been published or registered.<sup>263</sup>

Works published or registered before 1978 currently have a maximum copyright duration of 95 years from the date of publication, if copyright was renewed during the 28th year following publication. The date of death of the author is not a factor in the copyright term of such works.<sup>264</sup>

#### 6.1.6. Limitations on copyright and defenses

US copyright law includes numerous defenses, exceptions, and limitations. These are believed to protect both the boundary with the free expression guarantees of the First Amendment and establish carve-outs to address specific situations.<sup>265</sup> Title 17 of the United States Code outlines the various exceptions with regard to what does not constitute copyright infringement for example works that are not original works of authorship fixed in any tangible medium of expression are not subject to copyright.<sup>266</sup> Another exception is that of fair use outlined under subsection 107 of the same title. Subsection 109 limits the rights of copyright holders to control the distribution and display of copies of their works. This means that owner of a particular copy is entitled to sell or otherwise dispose of the possession of that copy and to display the copy publicly to viewers present at the place where the copy is located.<sup>267</sup> In addition Section 504(c)(2) of the Copyright Act of 1976 protects educational institutions, libraries, archives, and public broadcasters, by permitting the court to limit statutory damages to only \$200 if they reasonably believed their infringement was a fair use under 17

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<sup>261</sup> Yu, P. (2007). *Intellectual Property and Information Wealth: Copyright and related rights*. Greenwood Publishing Group. P 146. Retrieved July 15, 2011, from [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> *Copyright Laws of the United States*. Retrieved June 27, 2011 from [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

<sup>266</sup> Title 17 USC §102

<sup>267</sup> *Copyright Laws of the United States*. Retrieved June 27, 2011 from [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

U.S.C. § 107.<sup>268</sup>

§ 108 and § 110-122 of title 17 of the United States Code include specific exemptions for types of works and particular entities, such as libraries<sup>269</sup>, public broadcasters<sup>270</sup>, braille<sup>271</sup>, software backup copies<sup>272</sup>, cover licenses permitting sound recording covers<sup>273</sup> and jukebox compulsory licenses.<sup>274</sup>

#### 6.1.8. Provisions for the handicapped

A special program administered by the National Library Service for the Blind and Physically Handicapped (NLS) contains a statutory provision for reproduction of material for the blind or other persons with disabilities by permitting the reproduction of copyright works in braille, audio, electronic, web-braille, or other necessary formats.<sup>275</sup>

#### 6.1.9. Infringement

Infringement is defined in title 17 of the United States Code § 501, which requires the establishment of three main things, namely a protected work, proof that the protected work was copied by the defendant and lastly that such copying amounted to an infringement. If a work is not protectable it cannot be infringed upon, thus anything that is not "fixed in a tangible medium of expression" is not protectable.<sup>276</sup>

### **6.2. Measures implemented to curb copyright infringement in the U.S.**

#### **6.2.1. Who and how to claim copyright infringement**

A copyright owner whose exclusive rights have been infringed is entitled to pursue relief himself. The Federal Bureau of Investigation (FBI) investigates cases of criminal infringement however only on cases where a complaint is received from the copyright holder.<sup>277</sup> In addition to pursuing relief, U.S law requires a copyright holder to establish ownership of a valid copyright and the copying of

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<sup>268</sup> *Ibid.*

<sup>269</sup> (§ 108),

<sup>270</sup> (§ 110 and § 118),

<sup>271</sup> (§ 121)

<sup>272</sup> (§ 117)

<sup>273</sup> (§ 115),

<sup>274</sup> (§ 116).

<sup>275</sup> *Copyright Laws of the United States*. Retrieved June 27, 2011 from

[http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

<sup>276</sup> Vaidhyanathan, S. (2001) "*Copyrights and Copywrongs: the rise of intellectual property and how it threatens creativity.*" New York University Press. New York. P12.

<sup>277</sup> *Id.* p 94.



constituent elements of the work that are original.<sup>278</sup> Assuming the plaintiff proves ownership of a valid copyright, the holder must then establish both actual copying and improper appropriation of the work. The burden lies with the plaintiff to establish these three elements (ownership, infringement and proof of infringement) in what is known as the prima facie case for infringement. A plaintiff establishes ownership by providing an original work of authorship that is fixed in a tangible medium.<sup>279</sup>

Though registration is not required for copyright itself, in most cases it is considered a jurisdictional requirement to bring the suit.<sup>280</sup> Registration is also useful because it gives rise to the presumption of a valid copyright, and eliminates the innocent infringement defense, at the same time allowing the plaintiff to elect statutory damages, and to be eligible for a possible award of attorney fees.<sup>281</sup>

A plaintiff establishes actual copying with direct or indirect evidence. Direct evidence is satisfied either by a defendant's admission to copying or the testimony of witnesses who observed the defendant in the act. More commonly, a plaintiff relies on circumstantial or indirect evidence. A court will infer copying by a showing of a striking similarity between the copyrighted work and the alleged copy, along with a showing of both access and use of that access. It should also be noted that even the U.S. government, its agencies and officials, and corporations owned or controlled by it, are subject to suit for copyright infringement.<sup>282</sup>

## **6.2.2. Relief with regard to copyright infringement in the US.**

### 6.2.2.1. Civil remedies

A copyright holder must file a lawsuit in federal court to pursue his or her remedies. These remedies fall into two general categories, namely injunctions and damages. Regarding injunctions the Copyright Act of 1976 under subsection 502 authorizes courts to grant both preliminary and permanent injunctions against copyright infringement and against violations of the author's rights of attribution and integrity in works of visual art.<sup>283</sup> There are also provisions for impounding allegedly infringing

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<sup>278</sup> *Copyright Laws of the United States*. Retrieved June 27, 2011 from [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

<sup>279</sup> *Ibid.*

<sup>280</sup> Yu, P. (2007). *Intellectual Property and Information Wealth: Copyright and related rights*. Greenwood Publishing Group. P 150. Retrieved July 15, 2011, from [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

<sup>281</sup> *Ibid.*

<sup>282</sup> Yu, P. (2007). *Intellectual Property and Information Wealth: Copyright and related rights*. Greenwood Publishing Group. P 150. Retrieved July 15, 2011, from [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

<sup>282</sup> *Ibid.*

<sup>283</sup> *Copyright Laws of the United States*. Retrieved June 27, 2011 from [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

copies, phonorecords, and other materials used to infringe, and for their ultimate destruction upon a final judgment of infringement. With regard to damages and/or profits, subsection 504 of the 1976 Act gives the copyright owner a choice of recovering either their actual damages and any additional profits of the defendant or statutory damages.<sup>284</sup>

#### 6.2.2.2. Equitable relief

One form of equitable relief that is available in copyright cases is a seizure order.<sup>285</sup> At any time during the lawsuit, the court may order the impoundment of any and all copies of the infringing products. The seizure order may include materials used to produce such copies, such as master tapes, film negatives, printing plates, etc. Items that are impounded during the course of the lawsuit can, if the plaintiff wins, be ordered destroyed as part of the final decree.<sup>286</sup>

#### 6.2.2.3. Monetary damages

United States law permits both equitable (injunction) and monetary damages. The copyright owner may recover the profits he or she would have earned had the infringement not occurred (actual damages) and any profits the infringer might have made as a result of the infringement but that are not already considered in calculating actual damages.<sup>287</sup> To recover actual damages, the plaintiff or, more often, a suitable expert witness, must prove to the court that, in the absence of the infringement, the copyright owner would have been able to make additional sales, perhaps been able to charge higher prices on all sales of the infringed work, and that this would have resulted in profits given the owner's cost structure.<sup>288</sup> In some cases, the copyright owner may not have commercially exploited the infringed work, but the infringer may have profited from it. In these circumstances, the copyright owner can recover those profits.<sup>289</sup>

#### 6.2.2.4. Statutory damages

These are considered available as an alternative to actual damages and profits and is sometimes

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<sup>284</sup> *Copyright Laws of the United States*. Retrieved June 27, 2011 from [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

<sup>285</sup> Standler, R. (28 October 2009) *Music Copyright Law in the USA*. P 18. Retrieved July 20, 2011 from <http://www.rbs2.com/copyrm.pdf>.

<sup>286</sup> *Ibid*.

<sup>287</sup> 17 U.S.C. § 502.

<sup>288</sup> Standler, R. (28 October 2009) *Music Copyright Law in the USA*. P 19. Retrieved July 20, 2011 from <http://www.rbs2.com/copyrm.pdf>.

<sup>289</sup> Title 17, U.S.C. Sections 503 & 505.

preferable if actual damages and profits are either too small, or too difficult to prove, or both.<sup>290</sup>

Statutory damages are calculated per work infringed ranging from a few hundred dollars to hundreds of thousands<sup>291</sup>. Statutory damages range from \$750 per work to \$150,000 per work. In cases of “innocent infringement”, the range is \$200 to \$150,000 per work. In particular, if the work carries a copyright notice, the infringer cannot claim innocence. In case of willful infringement, the range is \$750 to \$300,000 per work. At the end of the case however, such damages are considered mutually exclusive in that only either statutory or monetary damages can be awarded and not both.<sup>292</sup>

#### 6.2.2.5. Attorney’s fees

The Copyright Act of 1976, under § 505 permits courts, in their discretion, to award costs against either party and to award reasonable attorney fees to the prevailing party.<sup>293</sup> The court may (but is not required to) award to the prevailing party reasonable attorney’s fees, however, attorney’s fees award is not available against the government.<sup>294</sup>

#### 6.2.2.6. Criminal penalties

In addition to the civil remedies, the Copyright Act provides for criminal prosecution in some cases of willful copyright infringement.<sup>295</sup> There are also criminal sanctions for fraudulent copyright notice, fraudulent removal of copyright notice, and false representations in applications for copyright registration.<sup>296</sup> The Digital Millennium Copyright Act imposes criminal sanctions for certain acts of circumvention and interference with copyright management information.<sup>297</sup> Criminal penalties for copyright infringement include a fine of not more than \$500,000 or imprisonment for not more than five years for the first offense and a fine of not more than \$1 million and imprisonment for not more than 10 years, or both, for repeated offenses. It should be noted however that non-profit libraries, archives, education institutions and public broadcasting entities are exempt from criminal

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<sup>290</sup> Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code. Retrieved July 22, 2011 from <http://www.copyright.gov/title17/92chap5.html#504>.

<sup>291</sup> *Ibid.*

<sup>292</sup> *Ibid.*

<sup>293</sup> Yu, P. (2007). *‘Intellectual Property and Information Wealth: Copyright and related rights’*. Greenwood Publishing Group. P 151. Retrieved July 15, 2011, from [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

<sup>294</sup> *Lowry’s Reports, Inc. v. Legg Mason Inc.*, 271 F. Supp. 2d 737 (D. Md. 2003).

<sup>295</sup> *Copyright Laws of the United States*. Retrieved June 27, 2011 from [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

prosecution<sup>298</sup>.

Reflecting upon the general concept of the copyright laws of the United States of America, it is evident and clear to see that the copyright system is more advanced and more developed as compared to that of Namibia and South Africa. Title 17 of the United States Code has adequately codified numerous copyright laws, terms and definitions, thus making it easier to litigate upon such matters.<sup>299</sup> Such codification also makes it convenient and more probable to institute a successful action against the infringer, consequently making this system more efficient.

With regard to registration that is carried out at the U.S. Copyright Office, even though it is optional, it puts the copyright owner in a stronger legal position when the composition is plagiarized. If the copyright is registered before the copyright is infringed, then the registration is regarded as prima facie evidence of the validity of the copyright in litigation for copyright infringement.<sup>300</sup> Where copyright was registered before five years after the date of first publication, the defendant in copyright infringement litigation has the burden of proving invalidity of copyright.<sup>301</sup> The fact that numerous codified remedies are also prevalent in cases of copyright infringement, copyright owners are therefore encouraged to file lawsuits as they have the benefit that upon furnishing proof of ownership as well as the infringement, attorney's fees are normally awarded<sup>302</sup>. Another concept that encourages owners to seek litigation is that when plaintiff is seeking statutory damages, the copyright owner is entitled to money from the infringer, without the plaintiff needing to show financial loss from the infringement.<sup>303</sup> These are all provisions that maybe the Namibian copyright system should adopt so as to strengthen its own copyright law enforcement and in turn better protect copyright holders therein.

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<sup>298</sup> 17 U.S.C. § 505.

<sup>299</sup> Standler, R. (28 October 2009) *Music Copyright Law in the USA*. P 18. Retrieved July 20, 2011 from <http://www.rbs2.com/copyrm.pdf>.

<sup>300</sup> *Ibid.*

<sup>301</sup> 17 U.S.C. § 410(c).

<sup>302</sup> 17 USC §§ 412.

<sup>303</sup> 17 USC §§ 412,

## CHAPTER 7:

### WHAT IS THE NEXT STEP FOR NAMIBIA REGARDING COPYRIGHT PROTECTION?

#### 7.1. Recommendations in curbing copyright infringement.

Various subjective views regarding how copyright infringement can be curbed exist. To some, copyright infringement is a concept that cannot be stopped, taking into account technological advancements and the issue of digitization<sup>304</sup>. Globalization makes access to everything much easier especially via the internet that is becoming more and more readily available in Namibia, courtesy of the competitive nature of such service providers.

#### Implementation of stricter and more efficient legal provisions and copyright institutions

Some people propose that copyright infringement laws should be more strictly enforced, and in turn harsher punishments should be imposed as a result<sup>305</sup>. Government should find ways of efficiently implementing a system that is ready and able to tackle the copyright issue, even if it means adopting another legal principles applied to countries that are well versed in such subject matter such as the U.S. This however is not as easy to implement as it is suggested, taking into consideration how Namibia firstly is a developing country that may prefer to tackle more imminent problems that it is faced with, rather than worry about copyright. The lack of resources or the unwillingness to channel such resources into copyright and copyright institutions may thus be such hurdle that will shun such suggestion. Other reasons to avoid such implementation may also lie in the fact that Namibia has a very small population that is not renowned for its innovative abilities as compared to other aspects such as its mining and fishing abilities. The fact that copyright is not such a lucrative branch of law gives our parliamentarians and law makers less incentive to initiate such actions.

Furthermore our public would rather march the streets to petition better laws regarding a murder case rather than the duplication of numerous CDs without the consent of the owner.

To some extent one can also argue that the innovative people in our country that are highly concerned about copyright protection are only a handful as in most cases, most instances involving piracy involve the copying of literature and music of foreign renowned authors and musicians and not the Namibian copyright holders themselves. For the innovative bunch hailing from Namibia, in most cases their

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<sup>304</sup> Standler, R. (28 October 2009) *Music Copyright Law in the USA*. P 3. Retrieved July 20, 2011 from <http://www.rbs2.com/copyrm.pdf>.

<sup>305</sup> Elvis Mboya. (Thursday, 14 May 2009). 'Piracy costs musicians N\$1,2million annually – NASCAM'. *Informante on the web*. Retrieved June 20, 2011 from [http://www.informante.web.na/index2.php?option=com\\_content&do\\_pdf=1&id=4031](http://www.informante.web.na/index2.php?option=com_content&do_pdf=1&id=4031).

interests often clash with the interests of the poor majority of the population that look at piracy as a normal day to day way of life regarding the attainment of entertainment and educational needs.

### Implementation of a system that promotes intellectual innovation

It is perceived, that if government comes up with an institution that is willing to remunerate or pay for an intellectual work and adopt such works as part of its initiative, then more innovators would be encouraged to continue with their work. A good example would be as follows: if an author compiles a book that is very informative in an academic way and such a book is likely to be used by a considerable amount of learners, then the government can attain a license from the author or pay for such copyright in order to adopt such work as its own. That way the government can ‘publicize’ such work making such materials freely accessible to learners who can now be able to photocopy at will without having to potentially face any legal repercussions. Reviewing this approach, all parties will be more likely to be satisfied as the author is paid for the sweat of his labor, the government is also satisfied that its learners get access to good quality text books therefore enhancing the quality of their education and the learners have access to cheap academic materials without any legal consequences emanating from them.

This type of approach may be considered as a feasible means of curbing copyright whilst at the same time promoting innovations that are beneficial to the government which in turn will be beneficial to the people at large. This form of “copyright nationalization” will thus in turn help to solve the public policy dilemma faced between copyright holders and the public at large in a win-win manner.

### **7.2. The way forward for Namibia**

So far in relation to the *S v Marume*<sup>306</sup> case, it can be noted that our Namibian law has made the concept of copyright infringement both a criminal offense as well as a civil matter. It is however unfortunate that our courts have dealt with very little civil matters pertaining copyright that are not even publicised. This may be attributed by the fact that either our local authors do not know how to enforce their copyrights or that they gave up on the legal system which does not deal with such issues favorably. The fact that civil matters pertaining to copyright are only carried out in the High Court of

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<sup>306</sup> 2007 (1) NR 12 (HC).

Namibia, make it a costly affair that potentially discourages civil actions from being carried out.<sup>307</sup> The *S v Marume*<sup>308</sup> case established the difficulty in charging one with copyright infringement, reason being that the onus of proving that copyright was infringed lies in the state which also incurs the burden of not only proving whose copyright has been infringed but also how such is infringed. This is thus an indicator reflecting the inefficiency of our copyright mechanisms when sanctioning such copyright infringement criminally. Our collective management organizations such as NASCAM and NAMRO that claim to implement enforcement of copyright pertaining authors and musicians have done a very poor job in bringing forth successful cases, in particular civil cases where the artist got reimbursed his claimed damages.

There is yet to be a founding civil case dealing with copyright in Namibia that should also be highly publicized. In most instances we hear and see on television how various raids are carried out and how the copyright infringement perpetrators are held in police custody, but then we are not informed how the perpetrators are latter released and all charges get dropped due to the inefficient system prevalent in dealing with such matter. Our legal system as well even though regarded as highly impartial is indeed sluggish in dealing with criminal as well as civil proceedings in general. This is thus a marker that needs consideration and review.

From an objective point of view, if more cases are brought forth pertaining copyright infringement, then one can suppose that this will provide us with better understanding regarding Namibia's position regarding copyright law and any other issue related to copyright infringement. This in turn will implement guidelines as to how organizations such as NASCAM and NAMRO can better implement copyright law pertaining copyright infringement issues. In addition this may also help balance the objectives of copyright law bearing in mind public policy principles.

In addition public awareness issues should be enforced regarding copyright and outlined clearly and thoroughly<sup>309</sup>. People should know their copyrights, at the same time they should be properly advised as to how to implement their copyrights successfully. Risks of infringement should be outlined and our prosecution should be properly equipped with the necessary knowledge as to how to bring forth a

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<sup>307</sup> Unesco World Anti Piracy Observatory report Namibia. (January 2009). Retrieved October 14, 2011 from [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/namibia\\_cp\\_en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/namibia_cp_en.pdf).

<sup>308</sup> Unesco World Anti Piracy Observatory report Namibia. (January 2009). Retrieved October 14, 2011 from [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/namibia\\_cp\\_en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/namibia_cp_en.pdf).

<sup>309</sup> *Ibid.*

copyright violation case<sup>310</sup>. Only after all these implementations are considered, then one can safely allude that Namibia is in the right direction in playing a part to curb copyright infringement and at the same time implementing a practical system pertaining copyright law.

## CONCLUSION

From the aforementioned it is clear that currently the Namibian as well as the South African copyright systems are in a weak position to combat piracy and copyright infringement especially regarding literary and musical works. The American copyright system however seems to be better equipped to tackle such issue in a better way legally. It must be noted however, that the reasons for such advancement in copyright law may be attributed to the fact that America is one of the most developed nations in the world and aspects such as innovation are always considered a very crucial component in its development unlike Namibia<sup>311</sup>. Adequate resources and sufficient years of development of such copyright laws make the U.S. a laudable template of comparison. Although the issue of piracy is prevalent everywhere (including the U.S.) , the main difference between the three contrasted jurisdictions is that the U.S. is in a better position to favorably award and deal with a prima facie proven instance of infringement.<sup>312</sup>

Hopefully, Namibia in the near future will adopt and imitate the American copyright system if such resources permit. Our copyright law should therefore not be lenient and allow acts of piracy to carry on without a fight. The foundation of law is based upon the principles aimed at protecting the innocent, preserving public trust and to uphold the law. If this aspect of law is shunned upon then we cannot claim that copyright law in Namibia does exist for an inefficient legal system is as good as no legal system at all.

Hopefully, in the near future more cases (whether ex parte or not) pertaining to copyright law will surface aside from mere legislation policies that our courts cannot properly implement upon and the numerous reforms and promised suggestions will be brought to life. In the mean time however, all we can do is hope.

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<sup>310</sup> *Ibid.*

<sup>311</sup> *Copyright Laws of the United States*. Retrieved June 27, 2011 from [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

<sup>312</sup> *Ibid.*



## REFERENCES

### Books

- Archibugi, D. and Filippetti, A. (2010) *The globalization of intellectual property rights: Four learned lessons and four thesis*, Journal of Global Policy, 1.
- Armstrong C (2010) *Access to Knowledge in Africa (The role of copyright)*. Juta. Durban.
- Clarke, R. V. and Felson, M. (Eds.) (1993). *Routine Activity and Rational Choice. Advances in Criminological Theory*, Vol 5. New Brunswick, NJ: Transaction Books.
- Davies, Gillian. (2002) *Copyright and the public interest*. London: Thomson, Sweet & Maxwell.
- Deazley, R. (2006). *Rethinking copyright: history, theory, language*. Edward Elgar Publishing.
- Deere, C. (2009). *The implementation game: the TRIPS agreement and the global politics of intellectual property reform in developing countries*. Oxford University Press.
- Dugard, J. (2000) *International Law A South African Perspective*. Juta & Co. Durban.
- Hamilton, Michael S., and George W. Spiro (2008). *The Dynamics of Law*, 4th ed. Armonk, NY: M.E. Sharpe, Inc.
- Rimmer, M (2007). *Digital copyright and the consumer revolution: hands off my iPod*. Edward Elgar Publishing.
- Rosen, R. (2008). *Music and Copyright*. Oxford, Oxfordshire: Oxford University Press.
- Vaidhyanathan, S. (2001) *Copyrights and Copywrongs: the rise of intellectual property and how it threatens creativity.* New York University Press. New York.

### Articles

- Amoo,S and Haring, S. (2010) *Intellectual Property under the Namibian Constitution*. Retrieved June 30, 2011 from [http://www.kas.de/upload/auslandshomepages/namibia/constitution\\_2010/amoo\\_haring.pdf](http://www.kas.de/upload/auslandshomepages/namibia/constitution_2010/amoo_haring.pdf)
- Dean , O.H. (1983) *Parallel importation infringement of copyright* 100 SALJ .

Elvis Mboya. (Thursday, 14 May 2009). '*Piracy costs musicians N\$1,2million annually – NASCAM*'. *Informante on the web*. Retrieved June 20, 2011 from [http://www.informante.web.na/index2.php?option=com\\_content&do\\_pdf=1&id=4031](http://www.informante.web.na/index2.php?option=com_content&do_pdf=1&id=4031).

Nwauche, E. (2009). "*The public interest in Namibian Copyright Law*". Namibia Law Journal, 1(1).  
Samuelson, P. (1995). "*Copyright's fair use doctrine and digital data*". *Publishing Research Quarterly* 11 (1).

Pienaar, D.J. (1988) '*Statutory defences against actions for infringement of copyright*'. LLM thesis. University of South Africa.

Sassen, S. (February 08, 2005) '*Piracy: The good, the bad and the ugly*'. Hardware analysis website. Retrieved July 20, 2011 from <http://www.hardwareanalysis.com/content/article/1780/>.

Schonwetter, T; Ncube, C & Chetty, P. (August 2009) '*African Copyright and Access to Knowledge (ACA2K) Project: The role of copyright*'. Shuttleworth Foundation & UCT Press. Cape Town. Juta & Co. P 244. Retrieved 20 July 2011 from <http://link.wits.ac.za/papers/ACA2K-2010-Access%20to%20knowledge%20in%20Africa.pdf>.

Standler, R. (28 October 2009) *Music Copyright Law in the USA*. P 3. Retrieved July 20, 2011 from <http://www.rbs2.com/copyrm.pdf>.

Starkoff, D. (2000) "*Copyright: Law and practice in a digital age*". Honours Thesis: University of Queensland.

Unesco World Anti Piracy Observatory report Namibia. (January 2009). Retrieved October 14, 2011 from [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/namibia\\_cp\\_en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/namibia_cp_en.pdf).

Yu, P. (2007). '*Intellectual Property and Information Wealth: Copyright and related rights*'. Greenwood Publishing Group. P 151. Retrieved July 15, 2011, from [http://en.wikipedia.org/wiki/Copyright\\_law\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Copyright_law_of_the_United_States).

### **Table of cases**

Donaldson v Beckett (1774)

Frank & Hirsch (Pty) Ltd v Roopanand Brothers (Pty) Ltd 1993 (4) SA 279 (A); 457 JOC (A).

Gemfarm Investments (Pty) Ltd v Trans Hex Group Ltd & Another Case No. PI 445/2005

Midwinter v. Hamilton (1743–1748)

S v Marume 2007 (1) NR 12 (HC).

State of Georgia v Harrison Co 548 F Supp 110, 114 (ND Ga 1982))

## **Statutes**

Copyright and Neighboring Rights Protection Act 6 of 1994.

Draft on Information and communication technology policy for the Republic of Namibia

Namibia Library and Information Services Act 4 of 2000

Patents, Designs, Trade Marks and Copyright Act 9 of 1916, as amended in South Africa to April 1978.

Patents and Designs Proclamation 17 of 1923.

The Namibian Constitution of 1990

## **International treaties**

Agreement on trade related Aspects of Intellectual Property (TRIPS)

Banjul Protocol on Marks within the Framework of the African Regional Industrial Property Organization, 1993

Berne Convention for the Protection of Literary and Artistic Works, 1971

Hague Agreement concerning the International Deposits of Industrial Designs of 1925

Harare Protocol on Patents and Industrial Designs within the Framework of the African WIPO Copyright Treaty, 1996

WIPO Performances and Phonograms Treaty, 1996

## **Websites**

<<http://209.88.21.36/opencms/opencms/grnnet/MIB/Organization/Directorates/audiovisual/cmo.html>>

<<http://archive.icommons.org/articles/south-african-copyright-a-brief-history>>

<<http://www.clickandcopyright.com/copyright-resources/copyright-infringement.aspx>>

<<http://www.copyright.gov/title17/92chap5.html#504>>

<<http://www.hardwareanalysis.com/content/article/1780/>>

<[http://www.informante.web.na/index2.php?option=com\\_content&do\\_pdf=1&id=4031](http://www.informante.web.na/index2.php?option=com_content&do_pdf=1&id=4031)>

<[http://www.kk.org/thetechnium/archives/2008/08/why\\_people\\_pira.php](http://www.kk.org/thetechnium/archives/2008/08/why_people_pira.php)>

<[http://www.kk.org/thetechnium/archives/2008/08/why\\_people\\_pira.php](http://www.kk.org/thetechnium/archives/2008/08/why_people_pira.php)>

<<http://www.nascam.org>>

<<http://www.wipo.int/treaties/ip/berne/index.html>>.