

Rwanda: The war between Copyright Law and Digital Society

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1. Introduction

Copyright is one of the intellectual property areas with a rapid growth both in regulatory terms and expansion of users. This growth is manifested in its all aspects from its creation, commercialization and protection. Behind this tremendous growth, there is technology because it connects the authors of different types of works with potential consumers of their works. By breaking the commercial boundaries of those works, the market was shifted from physical market to online markets where most if not all contents are available and can be accessed by anyone from every corner of the world.¹

Digitization of these works has proven to be of paramount importance for the authors as it enables them to sell their works on a broader market hence their sales increases. However, the advent of online selling did not come without adverse impacts: online piracy and infringement of copyrights. Such infringement occurs from the places that are far from the right holders' areas and jurisdiction within which the protection is nearly absent.

Since online piracy is the global challenge for copyrighted works and requires effective mechanisms to enforce protection and control the illegal use of such protected works, legislators in different jurisdictions established legal avenues with the aim of facilitating the enforcement of this right. The main remedies put in place include 1996 WIPO Copyright Treaties requiring State members to adopt Technological Protection Measures. The obligation concerning rights management information is enshrined under article of the said convention provides that: *“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 an infringement of any right covered by this Treaty or the Berne Convention. to remove or alter any electronic rights management information without authority; to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.* The same provision goes further and elaborates on the meaning of management information, to attribute a meaning to it, that, it entails information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and

¹ Copyright digitisation helped content owners to enjoy their right of “communication to the public” as right recognised under Art. 8 of WIPO 1996 copyright treaty.

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.”² Those technological protection measures (TPMs) aim at reducing the infringement of copyright by controlling the way in which the work are used.³

Having this copyright treaty and these technology protection measures has paved the way for effective enforcement of copyright within the member states. This is explained by domestic copyright laws drafted in analogue which were not effective enough to handle all issues arising from the digitization of contents. Therefore, different states begun to introduce the technology protection measures in their domestic intellectual property laws.

Despite all the above mentioned efforts, copyright protection remains a challenge for both enforcement bodies and copyright holders. Different studies show that enforcement policies and laws cannot have a long lasting effects to protect copyright.

For instance, in recent times France, South Korea, Taiwan, Sweden and New Zealand have all passed ‘graduated response’ policies into law, with the cooperation of Internet Service Providers (ISPs), these laws provide means to identify and ultimately sanction individuals repeatedly detected downloading copyrighted content.⁴ Through adoption of France’s HADOPI law, the content industry in France raised sales rate up to 25% and Sweden raised the sales rate to 36% and decreased internet traffic to 16% through their copyright reforms. However, this sales rate was notably decreased after 6 months.⁵

Nevertheless, the question is why those laws and policies don’t last for a long time to protect contents? To answer this question, it was argued that the deterrence effect of online copyright enforcement efforts is likely to be challenged by adaptive behavior on both the demand and the supply side.⁶

Under this article, we reflect on copyright laws and social norms in digital society from the copyright protection perspective and come up with recommendations on the proper copyright enforcement mechanisms in relation to digital world.

² *Ibid.* Art. 11.

³ See: AUB University Libraries, 2021, *Copyright and Permissions: Technical Protection Measures (TPM)*, Accessed on 2021/03/27 via <https://aub.edu.lb/libguides.com/c.php?g=688358&p=6032491>

⁴ See McKenzie, J. (2017). “Graduated response policies to digital piracy: Do they increase box office revenues of movies?”, p1–11.

⁵ See Aguiar, L.; Claussen, J.; Peukert, Ch.; (2018); *Catch Me if You Can: Effectiveness and Consequences of Online Copyright Enforcement*; p1;

⁶ *Ibid.*5

2. Copyright fundamentals

a. Copyright and Protected Works

Copyright is a legal term used to describe the legal rights that creators of original work have over their literary and artistic works.⁷ In other words, copyright is a bundle of rights (exclusive rights) that given to the author upon the created work.

The first copyright statute was enacted in 1709 in UK and is commonly known as the “*Queen Anne’s Statute*”. It was mainly adopted in order to protect the right of the author of a book to print copies of it. But throughout the time, the copyright area was vastly grown until it covers a variety of activities in respect of a variety of works.

As provided under article 2(1) of Berne convention, the work of authorship may cover “*books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.*”⁸ Computer program was also added to the list of work of authorship as provided under article 10 (1) of TRIPS Agreement.⁹

All the above mentioned works are recognised as original works. However, under the article 2(3) of the Berne Convention there are other categories of works that should be subject to the protection. They include the following: translations, adaptations, arrangements of music and other alterations of literary or artistic works. These kinds of works are the works are formed based on the already existing works (original works as stated in article 2 section 1) and the right resulting from those works are called related right or neighboring right instead of copyright.

b. Authorship and the ownership of copyright

Under the international legal framework, there is no convention that attempted to define the “**Author**” However, some domestic laws have attempted to define this important word. For instance, under Rwanda intellectual property Act, an author is defined as “natural person who created work”.¹⁰ It is

⁷ See WIPO, Copyright definition, <https://www.wipo.int/copyright/en>, accessed on 2021/03/31.

⁸ See Art 10 (1), Berne Convention for the Protection of Literary and Artistic Works, 1979.

⁹ See Art 10 (1), TRIPS Agreement, 1994.

¹⁰ See Art 6 item 2, law n° 31/2009 of 26/10/2009 on the protection of intellectual Property.

important to note that a work can be authored by single person or by many authors and it is well-known as co-authorship.

Under the Berne Convention, it is clear that the right of authorship is entitled to the author of the work even after the transfer of economic right. Article 6 *bis* (1) of the Convention provides as follows: *“Independent of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”*

In addition to the provision of Berne Convention, the WPPT recognises the moral right of performers of claiming to be identified as the performer of his/her performance and it stipulates: *“Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.”*¹¹

The term of maintenance of the authorship right varies from country to country. However, the convention calls upon the member states to maintain this right after the death of author for at least until the expiry of the economic right and the right becomes exercisable by the person or by the institutions authorized by the legislation of the country where the protection is claimed.

In Rwanda, the authorship right or moral right has no limited period of time to be maintained. Article 216 of the above-mentioned IP law provides: *“the moral rights have no limitation in time. They are imprescriptibly inalienable apart from transmissible to the author's heirs after his death or conferred to third person by testamentary disposition.”*

Basically, the rationale behind copyright is to reward the investment of the author (time, money and intelligence) through giving him/her a monopoly right over his/her work for a fixed period of time. That is why economic right is recognised under different treaties.

Two types of right were recognised under Berne Convention and those are the right translation or adaptation and the right of reproduction. Article 8 of the same Convention provides as follows: *“authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their*

¹¹ See Art 5 of WIPO Performances and Phonograms Treaty (1996).

rights in the original works.” In the light of this article, the author is the only person who can translate or authorize the translation or adaptation of his/her work hence, any act contrary to that is unlawful.

Article 9 of the same convention also states that *“authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.”*

TRIPS Agreement also provides for rental right of computer programs and cinematographic works. It is provided under article 11 as follows: *“In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works.”*

Both moral right and economic right are also protected under Rwandan intellectual property act as well. It is provided under article 199 that *“Independently of his economic rights, and even where he is no longer the owner of the said rights, the author of a work shall have the right: 1° to claim the authorship, in particular to have his or her name indicated prominently on the copies and in connection with any public use of his work, as far as practicable; 2° to object to any distortion, mutilation or other modification of, or other derogatory action in relation to his work which would be prejudicial to his or her honor or reputation; 3° to not have or her name indicated on the copies or the right to use a pseudonym.”*

While article 200 provides that: *“Subject to limitations mentioned by the provisions of [the] Law, the author of the work [has] the exclusive right to carry out or to authorize the following acts in relation to the work [including] 1° reproduction of the work; 2° translation of the work; 3° adaptation, arrangement or other transformation of the work; 4° rental of the original or a copy of an audiovisual work, a work embodied in a phonogram or a computer program; 5° communication to the public of the work by communication to the public of the work by distribution of the original or a copy of the work to the public by sale or other transfer of ownership; 6° public performance of the work; 7° communication to the public of the work by broadcasting; 8° communication to the public of the work by wire or any other means.”¹²*

c. With all these efforts, why Copyright remain worthless in digital environment?

“This is a very profound moment historically. This isn’t just about a bunch of kids stealing music. It’s about an assault on everything that constitutes the cultural expression of our society. If we fail to protect and preserve our intellectual property system, the culture will

¹² Ibid. 10

atrophy. And corporations won't be the only ones hurt. Artists will have no incentive to create. The Worst case scenario: The country will end up in a sort of cultural Dark Ages.” **Richard Parsons, President, Time-Warner.**

It has been observed that the advent of internet and the increase of internet users has led to the dropping of passive consumption of traditional media. This enables the audience to actively participate, communicate, collaborate, and create a considerable amount of amateur content.¹³

In the beginning, the copyright protection measures aimed at protecting owners of content through restricting people to circumvent. But as technology keep advancing, copyright is becoming more worthless in the sense that the access to the works is limitless. As a matter of fact, due to the technology development, even young people are in a position to challenge the content in a way that circumvents with any possible legal redress.

While we are talking about online piracy, we can't forget to mention another big challenge of adaptive behavior on both the demand and the supply side which creates dilemma to the online copyright protection.

The first paradigm of this dilemma is p2p file sharing. Peer-to-peer networks provide architecture for stable, cheap, and global sharing of any digitized information, be it music, movies, software, writings or other data. The end-to-end or peer-to-peer architecture makes it possible for thousands of terabytes to rush through p2p networks every month without anybody having to invest in and provide for a centralized server.¹⁴

During this covid-19 pandemic particularly, people all over the world are struggling with covid-19 protective measures (quarantines among others) imposed by their governments. This unusual situation resulted the big consumption of copyrighted works in order to fight against boring quarantine moments. However, many of these copyright consumers are not able to pay the due price of those works thus, they play other way around to infringe copyright through this p2p file sharing.

The second dilemma is about the system of cyber-lockers and linking sites which give the access to the unlicensed content. Cyber-lockers are online services that allow Internet users to upload and store large files while linking websites play a crucial role in the unlawful sharing of copyright protected content by acting as platforms for uploaders and final consumers. Linking sites also show third-party ads to final consumers.¹⁵

¹³ Jessica A. W., (2010), 'The Darknet: A Digital Copyright Revolution', *The Richmond Journal of Law & Technology*, vol. 16, no. 4, pp 2-4.

¹⁴ Alexander P., (2005), A Bipolar Copyright System for the Digital-Network Environment, *Hastings Communications and Entertainment Law Journal*, vol.28, no. 1, pp 4-5.

¹⁵ Aguiar, L.; Claussen, J.; Peukert, Ch.; *Catch Me if You Can*; pp

Consequently, both peer to peer sharing and cyber-lockers raise tension to the right holders where they want to maintain the control over their works because they fear that they will not be able to gain from these works. While consumers want to keep benefiting from cheap and relevant contents hence, it intensifies the conflict between them.

3. Legal solution for online copyright infringement

Intellectual property right (including copyright) is constitutionally acceptable in many countries including Rwanda. In most jurisdictions, it is protected under the framework of the protection of right to property. To justify it, legislators and policymakers assert that is done in order to give a monopoly right to the author as incentives to his or her work with aim to promote science and creative art. But the problem is that copyright laws have to deal with both right holders and public right of free expression. The enforcement bodies are challenged to strike a balance between these two issues at stake and prior to undertaking a given decision.

As the case for Rwanda, it is member of Berne Convention and WIPO Copyright Treaty and was not left behind in this war of fighting against piracy since the Rwandese legislators endeavored to adopt the technological protection measures in both IP policy and IP law. It is provided under IP law that: *“For the purposes of protecting technical measures for copyrights and related rights, it is not permitted to: 1° circumvent effective technical measures of work protection; or 2° produce, import, distribute, sell, rent, advertise for sale or rental, or possess devices, products, components or services for commercial purposes that are promoted, advertised or marketed for the purpose of circumventing effective technical measures of work protection;”*¹⁶

Under IP policy, it is emphasized that: *“The Rwanda IP Law prohibits circumventing TPMs or to produce, import, distribute, sell, rent, advertise for sale or rental, or possess devices, products, components or services for commercial purposes that are promoted, advertised or marketed for the purpose of circumventing TPMs.”* However, they reserved the balance during the enforcement of these technological protective measures and the policy ensures that: *“..... These provisions will have to be enforced in a balanced manner taking into account the policy objectives related to access to technology, technological learning and skills upgrading and access to IP-Based essential products.”*¹⁷

4. Conclusion

In light of the above observations, it would not be wrong to assert that the efforts deployed by Rwanda as the state and the international community to protect the rights arising from and related to copyrights

¹⁶ See Art. 269, intellectual property law in Rwanda.

¹⁷ See Ministry of trade and industry, (2009), *Rwanda Intellectual Property Policy*, pp17

through the enactment of laws both on international and domestic levels, the modern course of business and globalization which facilitated the transmission of artistic works through the internet has proved to jeopardize and increase the vulnerability of the copyrights and weakened the accountability that is normally put in place by the laws.

5. Recommendations

The author is of the view that the first recommendation should go to the States and international bodies such as WIPO, ARIPO and other relevant policies and law-making levels, to work more closely to adopt a more defined approach that is capable of meeting the challenges that are posed by the increasing and developing technology.

Secondly, the states are called to reinforce their judicial cooperation in protecting intellectual property rights, more specifically copyrights. This would be achieved by deploying efforts in sharpening knowledge of the judicial actors who are in position of establishing landmark cases.

Lastly, the copyright protection skills need to be instilled into other actors, such as regulators and other decision making public officials particularly in developing and least developed countries. It is important to note that, in most jurisdictions (Rwanda among others), intellectual property concepts are only emerging even among legal practitioners.

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