



Copyright and Related Rights in a Nutshell



**COPYRIGHT AND RELATED
RIGHTS IN A NUTSHELL**

**ARIPO Office
Harare, Zimbabwe
2022**

Copyright and Related Rights in a Nutshell

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The Director General
ARIPO Office
No. 11 Natal Road, Belgravia
P.O. Box 4228
HARARE
Zimbabwe.

Copyright and Related Rights in a Nutshell

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INTRODUCTION

BRIEF HISTORY OF COPYRIGHT

The birth of copyright can be traced as far back as the 15th Century when the first printer was invented by Johann Gutenberg in Europe. This invention propelled the printing and publishing of literary works. In 1710, the first Copyright law known as the Statute of Anne was enacted in England. This Act introduced for the first time the concept of the author of a work being the owner of its copyright and laid out fixed terms of protection¹. Following this Act, copyrighted works were required to be deposited at specific copyright libraries and registered at Stationers' Hall. There was no automatic protection for unpublished copyright works. Legislation based on the Statute of Anne gradually appeared in other countries, such as the Copyright Act of 1790 in the United States of America, but copyright legislation remained uncoordinated at an international level until the 19th Century.



The Statute of Anne is commonly accepted as the very first Copyright law that recognized the rights of authors

¹ <https://www.historyofinformation.com/detail.php?entryid=3389>

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The Berne Convention for the Protection of Literary and Artistic Works was introduced in 1886 as the first multilateral agreement on Copyright and Related Rights. Countries of the Berne Union were driven by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works, to provide mutual recognition of copyright between nation states, and to promote the development of minimum international standards for copyright protection. The Berne Convention overrides the need to register works separately in each individual country. Currently, the Union has 179 Contracting States, including 18 ARIPO Member States².

Some of the changes introduced by the Berne Convention included the extension of copyright protection to unpublished works and removal of the requirement for formalities. In countries of the Union this means that an individual owns the copyright of any work he/she produces as soon as it is expressed in some way, be it by writing it down, drawing, filming, performing, recording, etc. An organization or an individual may own the copyright if it is stipulated in the employment contract or institutional intellectual property policy.

While the adoption of the Berne Convention has had many benefits for the creators of original works, the

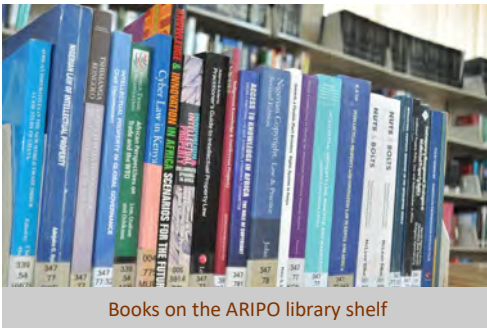
² Botswana, Eswatini, Ghana, The Gambia, Kenya, Lesotho, Liberia, Malawi, Mauritius, Mozambique, Namibia, São Tomé and Príncipe, Sudan, Rwanda, Tanzania, Uganda, Zambia, and Zimbabwe. Only three (3) countries namely: Sierra Leone, Seychelles and Somalia are not yet party to the Berne Convention.

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systems for protecting unpublished works remain fragmented internationally, with some States offering optional registration services within their own jurisdiction, while others do not offer any kind of registration at all. Since the Berne Convention removes any kind of formality for a copyrighted work to receive protection, in practice, without registration, and in case of disputes, it can be difficult to determine who is the rightful owner of a copyrighted work. The national copyright offices may not be willing to offer support in a dispute in another country. Further to get statistics of creative industries in a country can also be a challenge if there is no registration system of the authors, rights holders, and the works.

WHAT IS COPYRIGHT AND RELATED RIGHTS?

Copyright relates to literary and artistic creations, such as books, songs, films, music, choreography, paintings, architectural plans, sculptures, and technology-based works (such as com-



A depiction of a vinyl record playing

puter programs and electronic databases). A Copyright encompasses a bun-

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dle of exclusive legal rights concerned with the protection of literary and artistic works, often referred to just as “works”. A copyright work is a property, and the owner has exclusive right to use their protected works, just as they reserve the exclusive right to use their land, house, car, or shoes, *inter alia*.

Related rights (also known as neighbouring rights) are rights of performers, producers of sound recordings and broadcasting organizations. These are the rights given to the persons or legal entities who contribute to producing or making of the copyrighted work. They are also known as entrepreneurial rights. For example, if the broadcaster creates the work, protection shall be granted separately for both the content and the signal. On the other hand, if the broadcaster receives content from a third party the broadcaster’s rights shall not extend to the rights in the third parties’ works or subject matter protected by copyright and related rights that form part of a broadcast.

The aim of copyright includes promoting science, culture, and creative arts. It is the exclusive rights given to right holders to authorize or prohibit use of works, for a limited period. The Berne Convention provides for subsistence of copyright to be the life of the author plus fifty (50) years after the death of the author, while countries, such as Ghana, Mauritius, Sao Tome and Principe and the United States of America, the duration of copyright is life of author plus seventy (70) years after the death of the author.

WHAT RIGHTS ARE PROTECTED BY COPYRIGHT?

A copyright is not a single protection. Rather, it's a collection of rights and enables the owner of a copyrighted work to enjoy protection. Like other forms of property, you can buy, sell, transfer, license, and give away your copyrights, or portions thereof, of any work. While there are some exceptions and limitations on the rights as a copyright holder, such as fair dealing and fair use, these concepts are analogous, but not synonymous³.

Copyright protects two types of rights which are economic rights, and moral rights. The former allows right owners to derive financial reward from the use of their works by others subject to exceptions and limitations. Under the ARIPO Model Law on Copyright and Related Rights, the author or owner of copyright shall have the exclusive rights to carry out the following acts in relation to the work:

(a) **Reproduction**

A copyright owner is the only person who can reproduce or copy the work, such as by making copies of a book, photograph, or painting. Anyone who reproduces your work, or even a portion of the work, without your permission violates your copyright. The copyright owner can reproduce his/her work in any material form

³ Both concepts share the same fundamental idea of permitting uses which are considered fair, but these concepts differ in their approach as construed in statutes and interpreted by courts.

including electronic and digital form.

(b) Translation, Adaptation, Arrangement, or other Modification

A lot of creative works are derived from other works. The film industry provides many examples of this: movies are often adapted from short stories, books and plays, for instance streaming giant Netflix acquired the rights to “*The boy who harnessed the wind*”, a best-selling book published in 2009 by Malawian social entrepreneur, William Kamkwamba and the movie was released in 2019. This was made possible through a licence agreement; the filmmaker obtains permission to adapt a story from the copyright owner through the licence. However, both the film and the work upon which it was based are two freestanding copyright works.

(c) Distribution

The copyright holder has the right to distribute original or copy of the work to the public and sell its reproductions or copies. However, Section 7(2) of the ARIPO Model Law on Copyright and Related Rights provides that “the right of distribution does not apply to the original or a copy of the work that has already been subject to a sale or other transfer of ownership authorised by the owner of copyright”. This provision has an element of exhaustion of rights. Exhaustion of rights is whereby the IP owner has no control on a further sale of a good or service that he earlier put in the market.

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The right to exclude others in a good or service is limited by the doctrine of exhaustion⁴.

(d) Rental of the original or copy of the work to the public

The ARIPO Model Law defines rental rights “as the transfer of the possession or making available for use of the original or a copy of a work or phonogram or audio-visual work for a limited period for direct or indirect commercial purposes. In short rental rights are **rights to rent copies of work**. No person other than the owner of the copyright can rent the work unless they have a license to do so.

(e) Public Performance

If you create a work, such as a song, drama, or film, you have the exclusive right to perform that work in public or in different establishments such as restaurants, hotels, discos, public waiting lounges, cinemas among others. However, this right only controls public perfor-



A musical band in a public performance-Source Shutterstock

⁴ Jayashree Watal, *Intellectual Property Rights in WTO and developing Countries* (Oxford University Press) at 294

mances. So, if you sell digital copies of a film you have made, you cannot prevent others from watching it in private, though they must have your permission if they wish to display it in a public setting or platforms. For instance, renting a video and showing it in a public park or theatre without first getting permission from the copyright owners would thus constitute a breach of the public performance right in the case of a motion picture. A video shown on a home TV in front of friends and family, on the other hand, would not be regarded as a "public" performance and would not be prohibited under copyright law.

WHAT RIGHTS ARE PROTECTED BY RELATED RIGHTS?

Traditionally, related rights are granted to three categories of beneficiaries: performers; producers of sound recordings (also referred to as phonograms); and broadcasting organizations.

Performers have the right to prevent fixation (recording), broadcasting and communication to the public of their live performances without their consent, and to prevent reproduction of fixations of their performances under certain circumstances. On the other hand, producers of sound recordings have a right to authorize or prohibit the reproduction, importation and distribution of their sound recordings and copies. A typical example could be where a composer from Ghana composes a song and invites or grants permission for

another artist in Malawi to sing. The artist in Malawi becomes the performer and a music company such as Sony Music produces and publishes the song, as publisher and producer respectively. Finally, broadcasters play the song. In the given example, the chain of rights shall be compensated as per agreed terms.



The ARIPO Model Law on Copyright & Related Rights defines “performers”, “producers of an audiovisual work” and “producers of a sound recording” as follows:

“Performers” means singers, actors, musicians, dancers, variety and circus artists and other persons who sing, deliver, declaim, play, interpret or otherwise perform literary and artistic works or traditional cultural expressions or expressions of folklore; or the performance of a literary or artistic work that is created or first fixed during a performance.

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“Producers of an audio-visual work” means the natural person or legal entity that undertakes the initiative and responsibility for making the first fixation of the audio-visual work.

“Producers of a sound recording” means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds.

Additionally, some national laws grant performers moral rights, which may be exercised to prevent unauthorized use of their name and image. The Beijing Treaty extends protection to performers in relation to their audiovisual performances. The rights in respect to broadcasting and communication to the public may be in the form of equitable remuneration rather than a right to prevent.

Interestingly, the duration of protection of related rights under the Rome Convention is twenty (20) years from the end of the year in which the recording is made. In the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the WIPO Performances and Phonogram Treaty (WPPT), however, the rights of performers and producers of sound recordings are to be protected for fifty (50) years. The Beijing Treaty provides for a term of protection that begins fifty (50) years after fixation or performance.

(a) Broadcasting and rebroadcasting of the work

Broadcasting is referred to as the transmission by wireless means for public reception of sounds or images or both or the representations thereof and includes transmission by satellite and transmission of encrypted signals where the means of decrypting are provided to the public by the broadcasting organisation or with its consent⁵.



Broadcasters' microphone and pair of headphones

On the other hand,

Rebroadcasting

is the simultaneous or deferred broadcasting in part or in whole by one broadcasting organization of the broadcasts of another broadcasting organization.

Recent developments of the internet has easily facilitated the broadcasting of creative contents through platforms such as Facebook, YouTube, Instagram, Netflix, Spotify, etc. In essence, signals which are distributed via wire or wireless means can be accessed by persons

⁵ Section 2 of the ARIPO Model Law (2019)

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with the necessary equipment like radio, television, computer devices, smart phones, iPad, etc. However, rightsholders should be remunerated by these platforms for the usage of their copyright. Normally, either the rightsholder or a collecting society or a right holder representative organization undertakes a licensing agreement for a fair and equitable remuneration.

(b) Public display of the work

Like public performances, public displays of your work are exclusively yours. So, if an art gallery wants to display your photographs, it must have your permission to do so. But, if you sell prints of your work, the buyers can display them in their homes since such displays are not public.

(c) Communication to the public of the work

Means the transmission to the public by any means of a work, a performance or a phonogram, or an individual fixation, or a broadcast in such a way that it can be perceived by persons outside the normal circle of a family and its closest social acquaintances at a place or places so distant from the place where the transmission originates.

(d) Making available of the work to the public

Authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the

public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Moral rights

Moral rights can be categorised into two, namely: the right to claim authorship of a work (sometimes called the right of paternity or the right of attribution); and the right to object to any distortion or modification of a work, or other derogatory action in relation to a work, which would be prejudicial to the author's honour or reputation (sometimes called the right of integrity). These rights allow authors and creators to take certain actions to preserve and protect their link with their work. The author or creator may be the owner of the economic rights, or those rights may be transferred to one or more copyright owners. Many countries do not allow the transfer of moral rights. However, in a testamentary disposition, normally in writing, the author can state to whom the moral rights should be given after their death, also by operation of the law. In some jurisdictions, like the United Kingdom, and Botswana, one can waive the moral rights usually in writing.

HOW TO CREATE A COPYRIGHT?

The process of creating copyright is simple. If you've ever written, drawn, or otherwise created anything, you already own copyright to your creation. This is because copyright is automatic by virtue of creation. Some jurisdictions require that one needs to meet two basic requirements, which are as follows:

(a) You create an original work

If the work is your own, you own copyrights to it immediately upon its creation. For example, if you write a comic book, you are the copyright holder to that comic book as soon as you write it. You don't need to register, sell, mail, or take any other actions to own copyrights for the work. Copyright law provides that your work is copyrighted as soon as you create it.

(b) You affix, attach, or place the creation in a medium

Contrary to other Intellectual Property rights such as Patent⁶, you cannot copyright an idea, and your original idea is not protected by copyright until you affix it in some tangible or physical medium. The medium can be almost anything, from handwritten words on paper to digitally created drawings or designs. If your idea is expressed in a tangible form or media, it's copyrighted.

⁶ Patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem

OTHER INTERNATIONAL INSTRUMENTS ON COPYRIGHT AND RELATED RIGHTS

(a) Rome Convention

The Rome Convention secures protection in performances for performers, in phonograms for producers of phonograms and in broadcasts for broadcasting organizations. The Rome Convention is based on the “national treatment” principle that all works originating from a Union country will receive at least the same level of protection from another Union country as the latter grants to works of its own nationals. This is in addition to the rights that are specifically granted by the Convention.

The minimum protection guaranteed by the Convention to performers is provided by “the possibility of preventing certain acts”. The restricted acts comprise broadcasting or communication to the public of a “live” performance; recording an unfixed performance; reproducing a fixation of the performance, provided that the original fixation was made without the consent of the performer, or the reproduction is made for purposes not permitted by the Convention or the performer⁷. Producers of phonograms have the right to authorize or prohibit the direct or indirect reproduction of their phonograms⁸. Broadcasting organizations have the right to authorize or prohibit: the simultaneous rebroadcasting of their broadcasts, the fixation of their broadcasts, the

⁷ Article 7

⁸ Article 10

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reproduction of unauthorized fixations of their broadcasts or reproduction of lawful fixations for illicit purposes and the communication to the public of their television broadcasts by means of receivers in places accessible to the public against payment. The later right does not extend to communication to the public of merely sound broadcasts, and that it is a matter for domestic legislation to determine the conditions under which such a right may be exercised. The Rome Convention does not protect against distribution by cable. Also, the Convention allows for limitations and exceptions to the protection and gives country discretion to interpret certain provisions according to its needs.

This treaty is of particular importance to African countries where there are various performers making a living out of both modern and traditional artistic performances and where fixation may be done involuntarily by tourists or other people who encounter such performers and their acts. The treaty is also very crucial in the modern era where involuntary recording of one's performances and the subsequent sharing of such works on several media platforms such as social media is rampant. It is also the era, where media is becoming big business and content is king. Therefore, African performers, producers and broadcasters must be adequately covered to enable them to compete effectively and benefit economically from their works.

(b) WIPO Copyright Treaty (WCT)

This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties. Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works⁹.

Article 20 of the Berne Convention provides: “The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention or contain other provisions not contrary to this Convention.” The Treaty clearly provides for limitations and exceptions in observance of the three-step test. “Contracting Parties may, in their national legislation, provide for limitations or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to

⁹ Article 1 also known as a safeguard clause

rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author¹⁰.”

WCT mentions two subject matters to be protected by copyright that is computer programs, whatever the mode or form of their expression; and compilations of data or other material (“databases”), in any form, which, by reason of the selection or arrangement of their contents, constitute intellectual creations. Where a database does not constitute such a creation, it is outside the scope of protection under the Treaty. The treaty also extends to owners of works the rights to distribution, rental, and communication to the public.

(c) WIPO Performances and Phonogram Treaty (WPPT)

The WPPT provides for a safeguard provision — “Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (herein after the “Rome Convention”). Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection. This Treaty shall

¹⁰ Article 10

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not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties¹¹”.

The Treaty is of special importance in the digital environment where economic exploitations and gains have increased. The world is now a connected digital market, yet creators do not benefit as they are expected to because of increased incidents of infringement through illegal copying and downloading’s of their works, among others. The Treaty grants performers and producers, moral rights and economic rights in their performances fixed in phonograms, sound recording: the right of reproduction; the right of distribution; the right of rental; the right of making available; the right of broadcasting (except in the case of rebroadcasting); the right of communication to the public (except where the performance is a broadcast performance); and the right of fixation.

The Treaty also addresses technological protection measures (TPM) in that “Contracting states shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law¹²”.

¹¹ Article 1

¹² Article 18

(d) Beijing Treaty

The Beijing Treaty is an instrument for the protection of audio-visual performances, granting performers moral rights and four kinds of economic rights for their performances fixed in audio-visual fixations, such as motion pictures: the right of reproduction; the right of distribution; the right of rental; and the right of making available. As for unfixed (live) performances, the Treaty grants performers three kinds of economic rights: the right of broadcasting (except in the case of rebroadcasting); the right of communication to the public (except where the performance is a broadcast performance); and the right of fixation.

Limitations and exceptions regarding the protection of performers can be provided in national legislation, in connection with the protection of copyright in literary and artistic works observing the three-step test: to certain special cases which do not conflict with a normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer¹³.

(e) Marrakesh Treaty

The Marrakesh Treaty is a gift to the blind, visually impaired or otherwise print disabled. Some of key benefits that can be derived from ratification or accession to the Marrakesh Treaty are that:

¹³ Article 13

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- (a) The Treaty addresses access to published works in compliance with the United Nations Human Rights Declaration on the Rights of Disabled Persons, which clearly links copyright and human rights;
- (b) It provides the minimum flexibilities in copyright laws needed to ensure full and equal access to information by persons who are blind, visually impaired and print disabled;
- (c) The Treaty offers an opportunity for works to be converted into accessible formats without need for authorization by the author or copyright owner of a published work. The elimination of the need for authorization gives an opportunity for works to be made available in accessible format copies as quickly as possible;
- (d) The Treaty, through its cross-border exchange provision, provides opportunities for cost saving. Authorized entities may pool resources together and convert published works into accessible formats and exchange such works for access by beneficiary persons;
- (e) Entities such as libraries may be able to borrow from each other for purposes of serving beneficiary persons.

The Treaty leaves for contracting parties enough room to implement its provisions considering its own legal systems and practices including determination of fair

practices, dealings or uses provided they comply with the three step test obligations under the treaty. By ratifying the treaty, African states will ensure easier access to knowledge by this group of citizens.

Exceptions and Limitations

Exceptions and limitations enable third parties to access information and ensure re-use of copyrighted content of all types in a variety of educational environment and across borders while recognizing the legitimate interest of the right holder. The exceptions and limitations are very important to Africa. For instance, the United Nation Educational Scientific and Cultural Organization (UNESCO) report on School and Teaching Resources in Sub-Saharan Africa, published by the UNESCO Institute of Statistics in 2011 clearly indicated that the supply of reading and mathematics textbooks for pupils in public primary schools is woefully inadequate. This suggests that some children must share textbooks or do not have access to textbooks. In three out of ten countries, there are two or more pupils per reading book, while mathematics textbooks are largely unavailable.

According to the World Blind Union over 285 million populations are blind and more than 90% of the world books are not in accessible format creating book famine. Of the million or so books published each year in the world, less than five (5%) per cent are made available in formats accessible to visual impaired persons.

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This situation may be similar for persons with other disabilities. According to the analysis of data obtained from the 49 countries including nineteen (19) Sub-Saharan Africa¹⁴ on Education and Disability, persons with disabilities are less likely to ever attend school, more likely to be out of school and that they tend to have fewer years of education than persons without disabilities. They are less likely to complete primary or secondary education and are less likely to possess basic literacy skills.

ARIPO has undertaken a comparative analysis of exceptions and limitations provisions in the existing copyright laws of ARIPO Member States and Ethiopia (observer state). The purpose of the study was to identify the scope of exceptions and limitations within the different jurisdictions. The analysis indicated that the copyright laws of ARIPO Member and Observer States make provisions for the following exceptions and limitations: the reproductions for private use, quotations, education and research institutions, library and archives, computer programs, recognition, and moral rights. The ARIPO Model Law also provides for exceptions and limitations.

Private Copying Remuneration

The private copy levy system falls under the exceptions and limitations. A private copy is usually defined as any

¹⁴ Benin, Burkina Faso, Cameroon, Congo, Ethiopia, Gambia, Ghana, Kenya, Liberia, Madagascar, Malawi, Mali, Mozambique, South Africa, South Sudan, Togo, Uganda, United Republic of Tanzania and Zambia

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copy for non-commercial purposes made by a natural person for his/her own personal use¹⁵. Some jurisdictions call it private copy levy while others refer to it as blank tape levy. The private copy levy is a fee chargeable to the manufacturer or importer of a device able to copy copyrighted works. Such media include CD, DVD, External HDD, MP3, PC, set-top-box, smartphone, and tablet. The private copying remuneration allows individuals to make legal copies.

The Private Copying Global Study 2020 undertaken by the International Confederation of Societies of Authors and Composers (CISAC), classifies countries into four categories, i.e., those countries with a private copy exception, those with private copy exemption but without remuneration system, those with private copy remuneration system with no collection and distribution mechanisms and those with private copy remuneration system, and functioning collection and distribution mechanisms. In Africa, countries with private copy include Algeria, Burkina Faso, Cape Verde, Ghana, Malawi, Senegal, and Tunisia.

For literature on private copy you may access the “IFRRO-WIPO survey on copyright levies” <https://www.wipo.int/publications/en/details.jsp?id=4192&plang=EN>, the “CISAC private copying global study” <https://www.cisac.org/Newsroom/news-releases/new-private-copying-global-study-shows-potential-better-remuneration> and https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2017.pdf.

¹⁵ https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2017.pdf.

Public Lending Rights

The public lending right (PLR) is the legal right that authors must receive royalties for the free lending out of their books by the public and libraries. So far there are approximately thirty-five (35) countries across the world with the PLR. For more information on PLR visit www.internationalauthors.org/wp-content/uploads/2018/10/PLRI-Introductory-guide-Sept-2018.pdf.

Resale Rights

The resale right is provided in the Berne Convention Article 14(*ter*) (1)¹⁶. The “resale right” also known as “*droit de suite*” states that authors of a work of art shall enjoy “the inalienable right to an interest in any sale of the work after the first transfer by the author of the work”. The resale right is subject to reciprocity and to the extent permitted by the country where this protection is claimed. Protection of the resale right varies from one country to another and depends upon the nationality of the author or his/her place of residence¹⁷.

CISAC asserts that in 2012, the visual arts sector contributed 1.2 million jobs and 127 billion euros, and it was ranked in the top positions of the European Cultural Industries. Although the authors of visual works contribute to the high economic value in the cultural

¹⁶ (1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work. (2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed. (3) The procedure for collection and the amounts shall be matters for determination by national legislation.

¹⁷ SCCR31/5.

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economy, they receive very little in return or nothing at all¹⁸. More than 80 countries recognize the resale right and artists have been able to benefit greatly from the advent of resale right which has helped to encourage creativity in the visual arts¹⁹.

Four jurisdictions have provisions on resale rights in their copyright laws²⁰. Even though the provisions are provided in the laws of the countries, they are yet to be implemented because the countries are yet to put in place implementing regulations and institutions to administer the rights.

The ARIPO Model Law has included provisions on Artist Resale Right (*droit de suite*) that the authors of original works of art shall have inalienable right to a share of proceeds of any sale or subsequent sale of the work²¹.

¹⁸ www.cisac.org/Newsroom/Society-News/.

¹⁹ SCCR31/5.

²⁰ Malawi Section 31 Copyright Act 2016, Uganda Section 12 Copyright and Neighbouring Rights Act 2006, Sao Tome and Principe Article 54 Decree-Law no. 02/2017 Copyright and Related Rights Code and Zanzibar Section 7 The Copyright Act 2003.

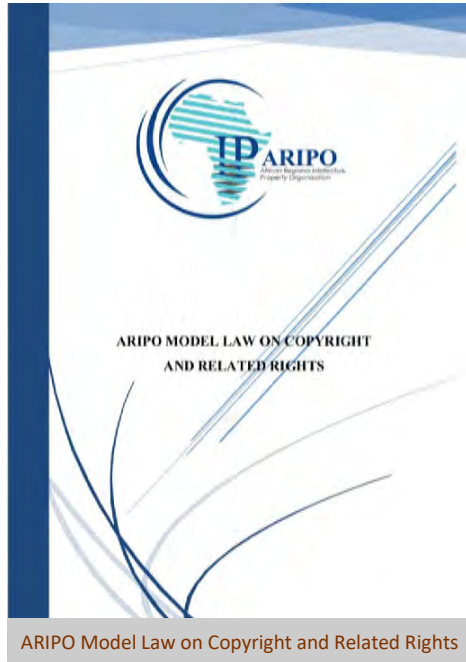
²¹ The ARIPO model law stipulates country laws to pay the resale right at a rate of X percent net sale price on the commercial resale of an artwork and the seller, the art professional, the seller's agent and the buyer shall be jointly and severally liable to pay the resale royalty. Provision has also been made that no resale royalty will be paid on certain circumstances such as if it concerns the resale of a building, or a drawing, plan or model of a building; if it is an auction for charitable purposes; if the works of fine art produced are of identical copies, or; if it concerns a manuscript of a literary, dramatic or musical work. The procedure for the exercise of the resale right shall be determined by regulations and national treatment is also applicable. The Model Law sets a guide on calculations of the resale royalty rights: Up to the equivalent of USD 50 000 will attract a royalty of 4%, Between the equivalent of USD 50 000.01 and USD 200 000 will attract a royalty of 3% Between the equivalent of USD 200 000.01 and 350 000 will attract a royalty of 1%, Between the equivalent of USD 350 000.01 and USD500 000 will attract a royalty of 0.5%, In excess of the Equivalent of USD 500 000, will attract a royalty of 0.25 %”.

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The Model Law shows flexibility on implementing the resale rights and countries can take it as a foundation to improve on their systems.

THE ARIPO MODEL LAW

The ARIPO Model Law on Copyright and Related Rights 2019 was published in October 2019²². The Model Law is a guide that can be used to harmonise Member States laws to ensure effective and adequate administration of the copyright systems across the ARIPO region. It is also in line with the Berne Convention and other relevant international treaties. Moreover, the ARIPO Model Law is a minimum standard guide on what Member States may take on board in their legislations. This means they can go beyond what the Model Law has provided.



²² <https://www.aripo.org/wp-content/uploads/2019/10/ARIPO-Model-Law-on-Copyright-and-Related-Rights.pdf>.

VOLUNTARY REGISTRATION OF COPYRIGHT

Prior to the establishment of the Berne Convention (1886), each country had its own rules for the recognition and protection of copyright works. Article 5(2) of the Berne Convention provides the principle of formality-free protection. Simply put, the creator/s of an original work do not have to register that work to own the copyright to it. As soon as you create your work, you are the copyright owner.

Voluntary registration can be referred to as an act by the author or right holder or his authorized representative of submitting his/her application for registration of his/her copyright and related rights.

Voluntary registration creates a rebuttable presumption of the facts registered and/or serves as prima facie evidence of the authorship or ownership. This shows that registration can be an important means to certify authorship of a work, ownership of copyright subsisting in the work and/or the fact and date of publication of a work. Other benefits of voluntary registration include:

- (a) The authors and rights holders will be known, this can facilitate commercialization of their works leading to them being incentivized hence create more works and explore new markets, thereby increasing their income;
- (b) The voluntary registration certificates can be

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- used to negotiate with users and other third parties in the chain of commerce;
- (c) One can apply to financial institutions for collaterals using the document of ownership observing the terms and conditions of financial institutions;
 - (d) Facilitate legal access to creative content;
 - (e) Provide valuable important records and information on creativity, data and statistics that may be used for economic, cultural and social development;
 - (f) To help know when a work comes into the public domain;
 - (g) Leverage the bargaining power of the owners and rights holders;
 - (h) Will contribute to create a conducive environment to ensure respect for the copyrighted works;
 - (i) Facilitate efficient distribution of royalties to the right holders through efficient management and administration of rights;
 - (j) Facilitate to reduce instances where owners and/or rights holders cannot be found;
 - (k) Automated voluntary registration system helps to address double registration, gives data and statistics of creative industries; and
 - (l) Facilitates enforcement of rights for example,

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in certain countries, registration gives registrants the right to claim statutory damages or the right to start notice-and-takedown procedures.

ARIPO being a regional organization, is contributing to the shaping of the Copyright landscape in Africa. ARIPO sees the need to nurture, promote and protect copyright and related rights, as these rights have a competitive advantage in Africa. Copyright is vital to the growth of intellectual property (IP) and has enormous cultural, economic, and social benefits for the communities.

The Kampala Protocol on Voluntary Registration of Copyright and Related Rights shall govern the contracting states in the voluntary registration and notification of copyright and related rights.

The objectives of the Kampala Protocol are to:

- (a) establish, manage, facilitate and coordinate a system for voluntary registration and notification of copyright and related rights;
- (b) uphold common principles regarding voluntary registration and notification of copyright and related rights;
- (c) provide copyright holders means of presumption to authorship or ownership of rights; and
- (d) (d) to ensure that creative industries contrib-

ute to the socio-economic development of countries.

The regional voluntary registration system will enable effective and efficient coordination between the National IP Offices and ARIPO. It will create and maintain the regional database that will provide statistics of copyright and related rights thus contributing to harnessing the copyright ecosystem. It will also facilitate the formalization of the creative industries.

ARIPO Member States namely, Botswana, Ghana, the Gambia, Kenya, Liberia, Mauritius, Namibia, Rwanda, Sierra Leone, Sudan, Uganda, and Zambia, have voluntary copyright registration and notification systems in place while Zimbabwe offers what is known as a recordation system. Each country has its own regulatory and institutional framework including procedures, practices, and guidelines. The national copyright offices implement the registration systems. It is important to note that Sudan²³, Ghana²⁴, The Gambia²⁵, Kenya²⁶, Liberia, and Zambia²⁷ have specific provisions for registration of copyright and related rights. Countries such as Namibia have registration provided for administratively²⁸.

The voluntary registration system has proven to be very useful for the monetization of copyright works. The rea-

²³ Section 38 of the Copyright and Neighbouring Rights (Protection) and Literal and Artistic Works Act 2013 of Sudan.

²⁴ Section 39 of the Copyright Act 2005 of Ghana (Act 690).

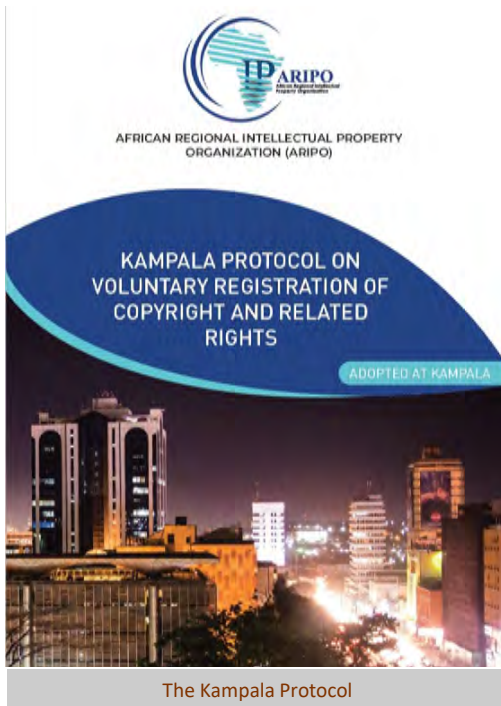
²⁵ Section 49 of the Copyright Act 2014 of the Gambia.

²⁶ Section 22A Copyright Act 2001 of Kenya.

²⁷ Section 39 of the Copyright and Performance Act of 1994 (as amended in 2010) of Zambia.

²⁸ ARIPO Feasibility Study 2017.

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son for this is that the registration of a creative work gives the right holder a competitive edge as highlighted above. It also serves as *prima facie* evidence before the court of law in case there is any dispute. Additionally, the information contained in national registries is not only valuable in legal and economic relations but may also serve the public interest by providing a source of

national statistics on creativity and culture.

The registration of copyrighted work is simple. One needs to follow the requirements of the jurisdiction in which he/she wants to register. As for the regional voluntary registration system, the implementing regulations to the Kampala Protocol will ensure that the requirements and the procedures are clear and understandable.

COLLECTIVE MANAGEMENT ORGANIZATIONS

Collective management is the exercise of managing and licensing copyright and related rights by entities known as Collective Management Organizations or Collecting Societies acting in the interest of and on behalf of the owners of rights.

The strategic role played by Collective Management Organizations (CMOs) in the last two decades cannot be overemphasized. CMOs have become the nerve centres of copyright licensing in every country. Their expertise and knowledge of copyright law and management have proven essential to make copyright systems work for creators in both the traditional way and in the digital age. Collective management of copyright and related rights is one option within the copyright system that is usually managed by CMOs which are not-for-profit organizations that are mandated to act and administer the rights on behalf of their members.

Managing copyright and related rights individually may not always be realistic. An author, performer, or producer, for instance, cannot contact every single radio or TV station, university, photocopying shops, to negotiate licenses and remuneration for the use of their works. On the other hand, it is not practical for a radio station to seek specific permission from every author, performer, and producer for the use of their copyright works. CMOs facilitate rights clearance in the interest of both parties and collect royalties for rights holders.

Below are some of the functions or responsibilities of a CMO:

(a) To implement the enabling legislation

To be able to establish a collective management system, there is need for the national law to provide for the establishment of collective management organisations and stipulate their functions. Most national copyright laws recognise collective management of rights. In that way, a CMO will have legal backing to deal with operational challenges it may be faced with including refusal to pay royalties by users of works of their members. Currently, there are twenty (23) established CMOs across 14 ARIPO Member States. These CMOs have been established through relevant provisions in the copyright legislations of these Member States. For example, Section 49 of Ghana Copyright Act, 2005, Sections 46-47 Kenya Copyright Act, 2001, amended 2019, Section 22-24 Zambia Copyright and Performance Rights Act, No 44 of 1994, Amendment No. 25 of 2010, respectively.

(b) Negotiate license fees and tariffs for usage of copyrighted works

CMOs are better placed to negotiate licensing agreements effectively and collectively on behalf of their members. The CMO is also charged with the responsibility to develop and publish tariff guidelines, for example the principles and methodologies used to come up with different tariffs that the CMO uses, how the collected roy-

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alties from different usage are distributed, how the CMO intends to utilise its social and cultural funds and the administrative cost that may be derived from the collected royalties and other sources of income.

(c) Grant licences in return for appropriate remuneration

Upon right holders assigning their rights to the CMO, licenses for specific usage of rights will be granted to the user of copyright managed by the CMO.

(d) Monitors the use to ensure the conditions upon which the license was granted are adhered to

As stated earlier, it is unrealistic for an individual rightsholder to monitor the use of her/his works by broadcasting organizations and it will also not be realistic for a user, such as a broadcasting organization to seek permission from each rightsholder for the legal use of their works. The CMO as mandated can cooperate with the national communication regulators to be able to monitor the broadcasting organizations. CMOs can cooperate with the Copyright Office and other stakeholders like enforcement agencies for protection of their member's rights. Some CMOs are involved in enforcement activities, such as to conduct raids, seize equipment used to pirate works, destroy infringing materials and to monitor the unauthorised usage and abuse of copyright works.

(e) Collect and distribute the royalty's payable for usage

The survival of a CMO mainly depends on the transparent royalty collections and distribution. CMOs are required to ensure that royalties collected are adequately distributed to their members per usage.

(f) Provide services

Provides services in the interest of right holders and users to facilitate legal access to copyright works.

Further literature on CMOs, may be accessed at <https://www.aripo.org/copyright-publications/> and <https://www.wipo.int/publications/en/series/index.jsp?id=180>.

COPYRIGHT VIOLATIONS

In some cases, copyright infringement can lead to criminal charges. Criminal copyright acts arise when the ingredients of a crime are present such as the infringer acting wilfully, knowingly, or unknowingly, negligently, *inter alia* and the infringement -

- (a) occurs for the purposes of private financial gain or commercial advantage,
- (b) consists of one or more infringing copies made within specific days that have a retail value of an agreed amount, or
- (c) is an infringement of a work intended for commercial release, and is made available over a computer network accessible by members of the public.

It's also a criminal copyright violation anytime someone fraudulently makes or removes a copyright notice. For example, let's say your friend gives you a manuscript she wrote. You read it, decide you like it, and start selling digital copies on Amazon. You are not the copyright owner, and because you are wilfully violating the writer's copyrights and trying to make a financial gain from your actions, you've committed a criminal act of copyright infringement.



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Furthermore, if you sell the book with a notice that you are the copyright owner, yet you are not, then you have committed an additional offense because you have fraudulently claimed copyright ownership.

Unlike a civil case, where the copyright owner can file a case, in a criminal case you, as the copyright owner, cannot choose to file a criminal case but rather be the complainant by reporting the suspected crime to the law enforcement agency who then decides if criminal charges are warranted or not. If they are, they will file a criminal case. In that case, the complainant may be asked to serve as a witness.

Section 54 of the ARIPO Model Law on Copyright and Related Rights 2019 provides that “a person whose rights have been infringed online, may request, by way of a takedown notice, that an Internet Service Provider removes or disables access to the infringing content”. The communication method can either be in writing, physical or electronic. Generally, if one suspects a copyright infringement has taken place, he/she can contact the local enforcement authorities like the police, customs, the copyright office, regulators or even the collective management organization that one belongs to and file a complaint. If you believe the crime has taken place online, you can file a complaint with the appropriate authority in your country.

Finally, rightsholders may or can utilize Technological Protection Measures (TPMs) or other means such as anti

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-piracy device. The latter is mostly issued by the copyright office or revenue authority in a prescribed format for the protection of their works. The former (TPM) is aimed to reduce infringement of copyright by controlling the way in which a work is used. TPM uses different types of technology to control access to digital copyrighted content, or to prevent users from copying or sharing it. For example, watermark, passcodes, etc²⁹.

²⁹ Section 2 ARIPO Model Law, 2019 defines Technological Protection Measures as: “any technology, device or component that, in the normal course of operation, is designed to prevent or restrict access to or acts, in respect of works or objects of related rights, which are not authorized by the right holder.

COPYRIGHT INFRINGEMENT REMEDIES

Copyright infringement is when someone violates the rights of a copyright owner. For example, if you write a book, you have the right to control who sells copies of that book. If someone starts selling copies without your permission, that is copyright infringement. Hence, the



The Justice Scale

copyright owner is exposed to several remedies to seek redress. They include the following:

(a) Injunctions

The injunction can be temporary or permanent injunction. If someone is violating your copyrights, you can ask a court to issue an injunction. An injunction is a court order that stops someone from acting. In the case of copyright infringements, the injunction typically orders the infringer to cease any action that violates your copyrights. For example, if you find that a local store is selling copies of your books or CDs without your permission, you can ask a court to issue an injunction that orders them to stop selling the books.

(b) Actual Damages

Sometimes called compensatory damages, actual damages in a copyright infringement case are what you, as the copyright owner, lost because of the infringing activity. For example, if you lose sales of CDs because of the infringer's activity, the money you would have made from the lost sales is the actual damages in your case.

(c) Profits

If infringers profit from their activity, the right holder of the infringed work are entitled to receive the profits made by the infringer, but you can only receive profits in excess of your actual damages. For example, in jurisdictions such as the United States of America (USA), if you lost \$10,000 in sales because of the infringement, but the infringer made \$14,000 in profits, you may be entitled to the \$4,000 in profits as well as the \$10,000 in sales³⁰.

(d) Negotiations

Negotiations can be very useful in resolving disputes about infringement of copyright. These can be very informal and involve exchange of correspondence or telephone calls. Negotiations may also take place between professional agents appointed to represent the parties or may even be a more formal negotiation meeting. Negotiations are usually confidential. The costs involved may

³⁰ <https://www.law.cornell.edu/uscode/text/17/504>

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relate to the time of the parties negotiating, the costs of correspondence and travel expenses. Thus, it is always prudent for parties to try and resolve their dispute by using a more informal dispute resolution mechanism before resorting to court action.

ARIPO OFFICE



11 Natal Road, Belgravia
P.O. Box 4228, Harare, Zimbabwe



(+263) (242) 794 054, 794 065/6/8



(+263) (0) 731 559 987, 731 020 609



(+263) (242) 794 072/3



mail@aripo.org



www.aripo.org



[@ariposocial](https://twitter.com/ariposocial)



African Regional Intellectual
Property Organization