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Table of Contents

Appraising The Mainland Tanzanian Patents' Legal Framework from International Perspective: Substantive Norms and Feasible Conformity <i>Edward Gamaya Hoseah and Donatus Nicholas Nditi</i>	1
Protecting Author's Moral Rights: A Need for Revisiting The Copyright Law in Mainland Tanzania <i>Juma Laurean Athanas</i>	32
Produce Cess Taxation in Tanzania Mainland: The Case of Coffee Levies in Rungwe District Council <i>Martha Masanda</i>	65
Engagement Of Stakeholders In Corporate Social Responsibility in The Mining Sector: A Legal Analysis <i>Eliud Kitime</i>	91
Judicial Overreach: The Illegality of Non-Commercial, Private Loans in Mainland Tanzania's Courts <i>Baraka Francisco Kanyabubinya</i>	134
Analysis of The Facilitative Rationale in Data Subject Rights in Kenya <i>Josphat Idambira Ayamunda</i>	169

PROTECTING AUTHOR'S MORAL RIGHTS: A NEED FOR REVISITING THE COPYRIGHT LAW IN MAINLAND TANZANIA

*Juma Laurean Athanas**

Abstract

Copyright law protects economic and moral rights. The former enables right holders to earn economic gains while the latter aims at protecting author's personality, honor and identity. The Berne Convention for the Protection of Literary and Artistic Works sets the minimum term of protection for moral rights. However, the TRIPS agreement does not create an obligation to protect moral rights but requires member states to the World Trade Organization (WTO) to adhere to non-derogatory principle. Mainland Tanzania, being member to Berne Convention, provides the exact minimum term of protection provided under this Convention. This position challenges the sufficiency of protection of moral rights since the Mainland Tanzanian Copyright law protects moral rights for a specific period of time. Hence endangering protection of author's personality. This article reveals existing weakness on legal protection of author's moral rights in Mainland Tanzania. Lessons are drawn from Zanzibar, Uganda, Rwanda, EU and China.

Keywords: *Copyright, moral rights, term of protection, international minimum standards, Mainland Tanzania.*

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1. INTRODUCTION

This article assesses the Tanzanian copyright law on protection of author's moral rights. It also analyzes and discusses the international instruments on the protection of copyright, to which Tanzania is a part, like the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)¹ and Agreement on Trade-Related Aspects of Intellectual Property Rights

(TRIPS Agreement).² These instruments are analyzed to reveal the international minimum standards for the protection of moral rights. Countries, member states to international instruments are, by virtue of the Vienna Convention on the Law of Treaties,³ bound to comply in good faith with provisions of the respective treaty. This treaty provides that, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".⁴

Tanzania being a member to Berne Convention is under obligation of complying with article 6^{bis} that requires moral rights to be protected at least until the expiry of economic rights. Likewise, the spirit and wording of TRIPS agreement suggests limited protection of moral rights and does not prohibit member states to the World Trade Organization (WTO) from protecting moral rights as discussed in detail in this article. The Mainland Tanzanian copyright law provides for the exact minimum term of protection provided under the Berne Convention as it limits the duration for protection of moral rights. This article observes that despite

¹ The Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September 28, 1979.

² The agreement on Trade-Related Aspects of Intellectual Property Rights, adopted in 1994, entered into force on 1st January 1995.

³ Vienna Convention on the Law of Treaties, done at Vienna on 23 may 1969, Entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331.

⁴ Id, Art. 26.

complying with the international minimum standards, the position of copyright law in Mainland Tanzania endangers protection of author's moral rights. This law further does recognize only two rights protected under the umbrella of moral rights that is paternity and integrity rights. This is different from other jurisdictions like Zanzibar, Uganda, Rwanda, EU and China whose copyright laws recognizes unlimited term of protection for moral rights and expands the scope of rights protected under the umbrella of moral rights.

2. THE CONCEPT OF MORAL RIGHTS

Author's moral rights are not directly related to economic gains earned by owners of copyright.⁵ Unlike economic rights, moral rights aim at protecting the personality of the author(s) concerned.⁶ Moral rights cannot be transferred from the author to someone else since they specifically focus at protecting the personality of the author himself. On non-transferability of moral rights Josef Kohler argues that,

the writer can demand not only that no strange work be presented as his, but that his own work not be presented in a changed form. The author can make this demand even when he has given up his copyright. This demand is not so much an exercise of dominion over my own work, as it is of dominion over my being, over my personality which thus gives me the right to demand that no one shall share in my personality and have me say things which I have not said.⁷

⁵ Ashok, A., "Moral Rights-TRIPS and Beyond: The Indian Slant", 2013, p. 698. <https://www.researchgate.net/publication/272218599_Moral_Rights_-_TRIPS_and_Beyond_The_Indian_Slant.pdf> (Accessed on 21 December 2023).

⁶ Ibid.

⁷ Moore, A.D., "Personality-Based, Rule-Utilitarian, and Lockean Justifications of Intellectual Property", 2008, p. 108. <<https://faculty.washington.edu/moore2/PRLIP.pdf>> (Accessed on 27 January 2024).

However, like economic rights, moral rights are passed to heirs of the deceased author(s) through inheritance.⁸ The authors' moral rights are supported by the personhood theory justifying IPRs protection. As discussed in this article, personhood theory advocates for legal protection of moral rights to ensure protection of author's personality.⁹ These rights are categorized into four groups namely; the Integrity Rights, Paternity/attribution Rights, Divulgence Rights and Retraction/withdrawal rights.¹⁰ The integrity right entitles authors to prohibit any person from making any changes, modification or alterations whose impact may lead to damage of their reputation, honor or identity.¹¹ The paternity right entitles an author(s) to claim authorship or acknowledgment whenever his work is reproduced, published, communicated to the public or exhibited in the public.¹² Divulgence right entitles authors with a right to decide when, where and the manner their works can be disseminated to the public.¹³ Retraction right entails right of authors to publish or not to publish or to withdraw his copyrighted works from the public.¹⁴

⁸ WIPO, "Copyright and Related Rights, Module II", p. 15. <<https://www.wipo.int/export/sites/www/sme/en/docum.pdf>> (Accessed on 11 December 2023).

⁹ Chang, C., "The Clash of Theories: Semiotic Democracy and Personality Theory in Intellectual Property Law", 9(2) International Journal of Law: "Law and World", 2023, pp. 16-7 at pp. 14-22.

¹⁰ Ashok, 2013, pp. 700-1

¹¹ Id, p. 700.

¹² Ibid.

¹³ Id, p. 701.

¹⁴ Ibid.

3. LEGAL PROTECTION OF MORAL RIGHTS

The protection of author's moral rights is reflected in the international, regional and domestic legal frameworks. The international and regional framework sets the minimum standards that requires member states to provide, in their national laws, no less standards. Below is the critical analysis of the legal frameworks relevant to protection of author's moral rights.

3.1 International legal framework

3.1.1 Berne convention

The Berne Convention for the Protection of Literary and Artistic Works (The Berne Convention) was adopted on 9th September 1886. This Convention passed through several revisions and amendments up to the last amendment on 28th September 1979. The Berne Convention is the first binding multilateral instrument on the protection of copyright. It was adopted as a response to the acts of copyright infringement which were experienced in various jurisdictions in the world.¹⁵ The United Republic of Tanzania became party to the Berne Convention on 25th July 1994 hence bound by its provisions.¹⁶ Based on the principle of dualism in public international law, Tanzania went further by domesticating

¹⁵ Deters, K.S., "Retroactivity and Reliance Rights under Article 18 of the Berne Copyright Convention" 24(5) *Vanderbilt Journal of Transnational Law*, 1991, pp. 971-1007 at pp. 972-3.

¹⁶ WIPO, "Berne Notification No. 156: Berne Convention for the Protection of Literary and Artistic Works, Accession by the United Republic of Tanzania", Geneva: WIPO, 1994, available at <https://www.bing.com/ck/a?!&&p=37011a29902a76052a841ff41c608a3aa9bf04d07cca00e34ec480e09011822ejmltdHM9MTc2Njk2NjQwMA&ptn=3&ver=2&hsh=4&fclid=2f33ea3d-548e-6df2-3d68-ffb555ce6ce4&psq=when+did+Tanzania+became+party+to+the+Berne+convention%3f+pdf> (accessed 29 December 2025).

Berne Convention through enactment of the Copyright and Neighbouring Rights Act.¹⁷ This Convention provides for international minimum standards on the protection of literary and artistic works to which all member states, when developing their legislative and administrative measures, should not be below.¹⁸

Moreover, the Berne Convention provides authors with exclusive rights, namely economic and moral rights, whose use by third parties requires authorization from the respective author.¹⁹ According to this Convention, the general term of copyright protection is the life of the author plus fifty years after author's death.²⁰ However, there are some works whose term of protection is provided to be below the aforementioned general term of protection.²¹ For instance, cinematograph works, anonymous and pseudonymous works are protected within fifty years from the date the work was lawfully made available to the public.²² The photographic and works of applied art are protected for the period of at least twenty five years from the date the respective work was made.²³

Specifically on moral rights, the Berne Convention provides to the effect that, moral rights should enjoy protection at least until the expiry of economic rights. This suggests and permits member

¹⁷ The Copyright and Neighbouring Rights Act, Cap. 218 [R.E 2023].

¹⁸ Schow, E., "Updating the Berne Convention for the Internet Age: Un-Blurring the Line Between United States and Foreign Copyrighted Works", 37(2) *Brigham Young University Journal of Public Law*, 2023, pp. 385-413, at pp. 388-9.

¹⁹ The Berne Convention for the Protection of Literary and Artistic Works, 188, .Arts. 6^{bis}, 8, 9, 11, 11^{bis}, 11^{ter} and 12,

²⁰ *Id*, Art. 7(1).

²¹ *Id*, Art. 7 (2), (3) and (4).

²² *Id*, Art. 7 (2), (3).

²³ *Id*, Art. 7 (4).

states to design their national laws in a way that limits the term of protection for moral rights. Tanzania being a member to this Convention, and considering the obligation under article 26 of the Vienna Convention on the Law of Treaties, enacted its copyright law that ensures compliance to the provisions of the Berne Convention on the protection of moral rights. However, it should be noted that, the minimum standard on term of protection for moral rights by the Berne Convention is questionable since, as discussed in this article, it is noted to be insufficient considering the nature of these rights. This is why some regional and national legal frameworks has gone beyond these minimum standards just to ensure sufficient protection of moral rights.

3.1.2 TRIPS agreement

The Agreement on Trade Related Aspects of Intellectual Property Rights (The TRIPS Agreement) is the comprehensive international instrument on the protection of intellectual property, copyright being inclusive.²⁴ The United States of America (USA) demand of strong intellectual property protection prompted the need of the discussion and negotiations on intellectual property and international trade.²⁵ As a result, the Ministerial meeting of GATT which was held in September 1986 in Punta Del Este in Uruguay decided to commence negotiations towards adoption of the TRIPS Agreement.²⁶

²⁴ Japan Patent Office, “Introduction to TRIPs Agreement”, p. 3. <https://www.jpo.go.jp/e/news/kokusai/developing/training/textbook/docuement/index/TRIPs_Agreement.pdf> (Accessed on 14 May 2024).

²⁵ Id, pp. 3 and 4.

²⁶ Id, p. 4.

The negotiations took long period of almost 8 years due to, *inter alia*, conflicting opinions between developed and developing countries.²⁷ One of notable conflicting opinions were on what could be the extent of IP protection. Developed countries opined for strong IP protection while developing and least developed countries advocated for relaxed IP protection the consideration being based on their level of development.²⁸ Despite the differing opinions noted above, in April 1994, during the Ministerial meeting held in Marrakesh in Morocco, the TRIPS Agreement was reached and entered into force on 1st January 1995.²⁹ This agreement binds all states that are members to the World Trade Organization (WTO). This means, Tanzania being a member to WTO is bound by the provisions of the TRIPS Agreement.

The TRIPS agreement provides for, among other IPRs, copyright protection. It recognizes other international IP instruments like the Berne Convention, Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty).³⁰ Regarding protection of moral rights, TRIPS agreement does not provide as an obligation to its member states to protect moral rights. This means, TRIPS Agreement does not create an obligation to the WTO member states of protecting moral rights.³¹ However, it requires member states not to derogate from their international obligations arising from other legal instruments like

²⁷ Ibid.

²⁸ Ibid.

²⁹ Id, pp. 2, 4 and 5.

³⁰ The agreement on Trade-Related Aspects of Intellectual Property Rights, 1994/5, Art. 2(2).

³¹ Id, Art. 9(1).

Berne Convention.³² This entails that, countries like Tanzania that are member states to both WTO and Berne Convention remains to be bound by article 6^{bis} of the Berne Convention regarding protection of moral rights. Despite such recognition of the non-derogation principle by the TRIPS agreement, the noted weaknesses of the Berne Convention on protection of moral rights remains intact. The Berne Convention's position on the term of protection for moral rights has shaped the position of moral rights protection in Mainland Tanzania as discussed in this article.

3.1.3 Other relevant international instruments

Apart from the above discussed international IP instruments, there are international human rights instruments that recognize and require member states to protect intellectual property rights (IPRs) within their jurisdictions. The protected IPRs include copyright within which moral rights are protected. These instruments include; the Universal Declaration of Human Rights (UDHR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).

(a) The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (the UDHR) is an international non-binding human rights instrument.³³ It was adopted on 10th December 1948 by the United Nations General

³² Ibid.

³³ UNIT II: Universal Declaration of Human Rights, Module 1: Background for adoption of UDHR, p.

1.<https://ugcmooes.inflibnet.ac.in/assets/uploads//239/7210/et/5_Background%2520for%2520adoption%2520of%2520UDHR200324080803031919.pdf> (Accessed 15 May 2024).

Assembly.³⁴ The adoption of the UDHR resulted from the need of realizing the protection of human rights reflected in the Charter of the United Nations.³⁵ The role played by the Economic and Social Council (ECOSOC) as well as the Commission on Human Rights and its subsidiaries cannot be disregarded when discussing on the adoption of the UDHR.³⁶

Despite being non-binding instrument, the UDHR has played a great role in the international protection of human rights. It is this declaration which laid the foundation for the adoption of the two binding international human rights instruments that is the ICESCR and the International Covenant on Civil and Political Rights (ICCPR). The UDHR incorporates economic, social, cultural, civil and political rights which are further categorized into four pillars. These pillars are; the pillar on personal rights and freedoms,³⁷ the pillar on rights of individuals in their relationships to groups of which they are part and external world,³⁸ the pillar on spiritual capacities, public freedoms and fundamental political rights,³⁹ and the pillar on economic, social and cultural rights.⁴⁰

Relevant to IP protection, UDHR provides that, “everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the

³⁴ Schabas, W.A., “Canada and the Adoption of the Universal Declaration of Human Rights”, 43 McGill Law Journal, 1998, pp.403-41, at p. 405.

³⁵ UNIT II: Universal Declaration of Human Rights, Module 1: Background for adoption of UDHR, p. 1.

³⁶ Id, p.2.

³⁷ The Universal Declaration of Human Rights, adopted on 10th December 1948 by the United Nations General Assembly, Arts. 3-11.

³⁸ Id, Arts. 12-7.

³⁹ Id, Arts. 18-22.

⁴⁰ Id, Arts. 22-7.

author.”⁴¹ This means that, the UDHR requires member states to be guided by this provision when developing or updating their national laws on IP protection, including copyright protection. The effective enforcement procedures are essential in ensuring sufficient copyright protection against acts of infringements. This provision is key in establishing the relevancy of the UDHR in the protection author’s moral rights. However, this instrument does not expressly provide anything regarding the term of protection for copyright including the term for protection of moral rights. Despite this gap, UDHR cannot be disregarded when discussing the protection of moral rights associated with literary and artistic works.

(b) *The International Covenant on Economic, Social and Cultural Rights*
The International Covenant on Economic, Social and Cultural Rights (the ICESCR),⁴² unlike the UDHR, is a binding international human rights instrument. It was adopted on 16 December 1966 and entered into force on 3rd January 1976. Before the adoption of the UDHR, there existed debates as to the nature of the instrument which was required to be adopted for the purpose of recognizing and promoting the protection of human rights.⁴³ Some proposed for adoption of a declaration (a soft law) while others suggested for adoption of a binding instrument so as

⁴¹ Id, Art. 27(2).

⁴² The International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

⁴³ United Nations Audiovisual Library of international Law, Universal Declaration of Human rights, p.1. <https://legal.un.org/avl/pdf/ha/udhr/udhr_ph_e.pdf> (Accessed 15 May 2024).

to impose obligation to member states.⁴⁴ Despite these debates, UDHR was adopted as a soft law playing the role of guidance to member states in human rights protection.

Regarding IP protection, the ICESCR provides for protection of IP to every person over his creations or innovations. This Convention provides that, “The state parties to the present covenant recognize the right of everyone... to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”⁴⁵ This provision reflects Article 27(2) of the UDHR, however binding. Member states, Tanzania being one of these states, is under international obligation of taking legislative and administrative measures to ensure protection of IP, including copyright protection within which moral rights are protected. These measures include incorporation of enforcement procedures in the national laws to ensure prevention of infringements and ensuring the availability of remedies which are deterrent to further infringements. The United Republic of Tanzania became party to the ICESCR on 11 June 1976.⁴⁶ The ICESCR, though also does not expressly provide for term of protection for moral rights, is significant as far as the discussion on the protection of copyright (moral rights) is concerned.

⁴⁴ Ibid.

⁴⁵ The International Covenant on Economic, Social and Cultural Rights, Art. 15(1) (c).

⁴⁶ UN, “Human Rights Treaty Bodies”, New York: UN, available at <

3.2 Regional legal framework

3.2.1 *The ARIPO Model Law on Copyright and Related Rights*

The ARIPO Model Law on Copyright and Related Rights (the ARIPO Model Law) was released in October, 2019.⁴⁷ The ARIPO Model Law was made to guide ARIPO member states when updating their national laws on the protection of copyright and related rights.⁴⁸ This law is intended to ensure harmonized standards of protection offered by the national laws to copyright owners and owners of related rights.⁴⁹ The ARIPO Model Law provides for meaning of terms and phrases which are very significant to this study.⁵⁰ These includes, an author, artistic and literary works, works of joint authorship, musical works, fixation, distribution, copy, broadcasting, communication to public, infringement, computer and Internet Service Provider (ISPs).⁵¹

Furthermore, the ARIPO Model Law directs that the subject matter of protection should be original literary and artistic works.⁵² The originality referred is that of the form of expression to comply with fixation requirement.⁵³ This Model Law requires member states to include in their national laws the protection of both economic rights and moral rights.⁵⁴ It also requires member states

⁴⁷ How does the ARIPO Model Law Measure up to EIFL's Core Library Exceptions Checklist?", 2020, p.1.https://www.eifl.net/system/files/resources/202003/eifl_review_aripo_model_law_2019.pdf. (Accessed on 5 January 2024).

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ The ARIPO Model Law on Copyright and Related Rights, released on October, 2019, s. 2.

⁵¹ Ibid.

⁵² Id, s. 4.

⁵³ Id, s. 4(2) and (3).

⁵⁴ Id, ss. 7 and 10.

to recognize the rights of persons who assists in dissemination of artistic and literary works. These persons are performers, producers of phonograms and broadcasting organizations.⁵⁵

Specifically on moral rights, the ARIPO Model Law grants authors with the right to be identified by name as the author of the work; right to object to any distortion, mutilation or other modification of or derogatory action in relation to the said work which would be prejudicial to his honor or reputation; and not to have the author's name indicated on copies and in connection with any public use of the author's work, and the right to a pseudonym.⁵⁶ This law does not suggest time limitation for protection of moral rights. Unlike the Berne Convention, the ARIPO Model Law does not contain the provision which denote that protection of moral rights may end after the expiry of economic rights. Hence making ARIPO Model Law to be a good guide to ARIPO member states, like Tanzania, in developing and adjusting their national legislation regarding the term of protection for moral rights.

3.2.2 The Bangui agreement

The Bangui Agreement Instituting the African Intellectual Property Organization (the Bangui Agreement)⁵⁷ was adopted on 2nd March 1977 at Bangui, Central African Republic.⁵⁸ However, this agreement entered into force on 8th February 1982.⁵⁹ The adoption of TRIPS Agreement led to a cornerstone revision of

⁵⁵ Id, ss. 11-7.

⁵⁶ ARIPO Model Law, s. 10(1) (a)-(c).

⁵⁷ The Bangui Agreement Instituting an African Intellectual Property Organization, adopted on 2nd March 1977 at Bangui, Central African Republic.

⁵⁸ Ncube, C.B., *Intellectual Property Law in Africa, Harmonizing Administration and Policy*, 2nd Edn., Routledge, New York: 2023, p. 3.

⁵⁹ Id, p. 132.

Bangui Agreement in 1999 to ensure compliance with provisions of this comprehensive international IP instrument.⁶⁰ The Bangui Agreement was later amended in 2015.⁶¹ This agreement binds all member states which ratifies or accedes to it.⁶² The established African Intellectual Property Organization (the OAPI) is responsible for, *inter alia*, promotion and protection of literary and artistic works in the member states.⁶³ Though Tanzania is not member to OAPI, the Bangui agreement remains to be a significant benchmark for improving copyright law on the protection of moral rights in Mainland Tanzania.

This agreement provides for substantive and procedural aspects on promotion and protection of IPRs in OAPI member states, the French speaking African countries.⁶⁴ Unlike ARIPO protocols, the Bangui agreement is the comprehensive legal instrument within which IPRs are protected. This agreement contains annexes and each annex provides for the protection of one IPR. The IPRs contained in the Bangui Agreement are, patents (Annex I), utility models (Annex II), trademarks and service marks (Annex III), industrial designs (Annex IV), trade names (Annex V), geographical indications (Annex VI), literary and artistic property (Annex VII), protection against unfair competition (Annex VIII), layout designs (topographies) of integrated circuits (Annex IX), and plant variety protection (Annex X).⁶⁵ These annexes are integral part to the Bangui Agreement.⁶⁶

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² The Bangui Agreement, Art. 6(2).

⁶³ Id, Art. 2(1) (b).

⁶⁴ Id, Part I, Section III and Annexes.

⁶⁵ Id, Art. 6(1).

⁶⁶ Id, Art. 6(2).

Under the Bangui Agreement, literary and artistic works are protected without the requirement of formal registration.⁶⁷ The author of original work enjoys economic and moral rights enforceable against unauthorized exploitation by third parties.⁶⁸ Protection of these exclusive rights begins immediately after creation of the work.⁶⁹ Regarding the work created in employer-employee or commissioned relationships, the Bangui Agreement provides expressly that the first owner of the work is the author.⁷⁰ To expound on moral rights, the Bangui agreement contains provisions that protects moral rights.⁷¹ This agreement entitles authors with right to claim authorship of their works, in particular the right to have their names affixed to copies of their works and, wherever possible and in the usual manner, in relation to any public use of their works.⁷² The author also has the right to oppose any distortion, mutilation or other modification of his work or any other action derogatory to it where such action might be prejudicial to his honor or reputation.⁷³

Furthermore, being part to moral rights, the Bangui agreement grants authors with the exclusive right to disclose their works and determine the disclosure process and conditions thereto.⁷⁴ Additionally, authors are entitled to right to reconsider or of withdrawal, even after publication of the work and the right to

⁶⁷ Id, Art. 3(1) of Annex VII.

⁶⁸ Ibid.

⁶⁹ Id, Art. 3(2).

⁷⁰ Id, Art. 34.

⁷¹ Id, Art. 7(1)-(3).

⁷² Id, Art. 7(1) (i).

⁷³ Id, Art. 7(1) (iii).

⁷⁴ Id, Art. 7(2).

remain anonymous or to use a pseudonym.⁷⁵ More significantly, Bangui agreement provides that, moral rights are vested in the person of the author and that they are perpetual, inalienable, not subject to limitations of time and inalienable.⁷⁶ This entails that limiting the term of protection for moral rights prejudices author's personality. The position under the Bangui agreement aligns with the spirit of the personhood theory which justifies legal protection of moral rights associated to literary and artistic works.

3.3 Domestic legal framework

3.3.1 URT Constitution

The URT Constitution is the grund norm applicable in the United Republic of Tanzania (URT).⁷⁷ Both principal and subsidiary legislation derive their legitimacy from it. This status proves supremacy of the URT Constitution. In the case of *Attorney General v. Lobay Akonaay and Joseph Lobay*,⁷⁸ the court held that laws enacted by the parliament must not be inconsistent with the Constitution. Also, in the case of *Joran Lwebabura Bashange v. The Chairman of National Electoral Commission and Another*,⁷⁹ court stated that, “we have already held that impugned provisions are violative of the Constitution. . . . In this respect we do not have any other option but to hold in terms of Article 64(5) of the Constitution of URT in relation to the impugned provisions.”⁸⁰

⁷⁵ Id, Art. 7(1) (ii) and (3).

⁷⁶ Id, Art. 7(4).

⁷⁷ The Constitution of United Republic of Tanzania, Cap. 2 [R.E 2008], Art. 64(5). [1995] TLR 80.

⁷⁹ The High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 19 of 2021 (Unreported), p. 41.

⁸⁰ Ibid.

Furthermore, the court in *Attorney General v. Dickson Paul Sanga*,⁸¹ affirmed supremacy of the Constitution by stating that “apart from agreeing with the Solicitor General, it is our firm view that the Constitution which is the supreme law of the land frowns on the abuse or misuse of procedures in dispensing criminal justice....”⁸² Additionally, the court in *Rev. Christopher Mtikila v. Attorney General*,⁸³ was of the observation that breach of the Constitution is such a grave and serious matter.

The URT Constitution, under the Bill of Rights, recognizes the right of equal protection before the law.⁸⁴ It prohibits discrimination based on any ground such as nationality, tribe, political opinion, colour and religion.⁸⁵ Copyright owners are within the term “everyone” as used by the respective provisions of the URT Constitution. They are therefore entitled to equal protection before law without discrimination in respect to their exclusive rights.

Intellectual property, despite being intangible property, are like any other properties (tangible properties). They are capable of being owned by either an individual, jointly owned or be owned by legal persons.⁸⁶ Despite not mentioning IP throughout its provisions, URT Constitution guarantees protection of the right to own

⁸¹ The Court of Appeal of Tanzania, Civil Appeal No. 175 of 2020 (Unreported), pp. 68-9.

⁸² *Ibid.*

⁸³ [1995] TLR 31, p. 34.

⁸⁴ Cap. 2 [R.E 2008], Art. 13 (1).

⁸⁵ *Id.*, Art. 13 (5).

⁸⁶ Dhokare, S., “Intellectual Property Rights: Meaning, Nature, Scope, & Various Types”, 40(64) UGC Care Journal, 2020, pp. 58-68, at p. 60-1.

property.⁸⁷ This Constitution prohibits any person from depriving another of his property without fair and adequate compensation.⁸⁸ Likewise copyright owners are entitled to constitutional protection of their right to own IP as a property. The ownership of IP includes ownership of copyright within which moral rights are contained. The constitutional right to own property was discussed in the case of *Mariam Dawson Aswile v. Amani Aswile Mlimba and Others*.⁸⁹

This means that authors are entitled, by the URT Constitution, with indirect right to the protection of their moral rights that are associated with their creations. However, disregarding the nature of these rights, the Constitution is silent on the need of perpetuity and inalienable protection of author's moral rights. This has even affected the position of the primary law on copyright protection regarding the term of protection for moral rights. As a result, the Copyright and Neighbouring Rights Act provides for the exact minimum term of protection as provided under the Berne Convention without any addition which could assist in reflecting the nature of moral rights and the personhood theory. The position in Mainland Tanzania is different from other jurisdictions, as discussed below, whose copyright laws are outright set beyond international minimum standards on the term of protection for moral rights.

⁸⁷ Cap. 2 [R.E 2008], Art. 24 (1).

⁸⁸ Id, Art. 24 (2).

⁸⁹ The High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 18 of 2021 (Unreported), pp. 14-5.

3.3.2 *The Copyright and Neighbouring Rights Act*

As noted, in Mainland Tanzania, the Copyright and Neighbouring Rights Act⁹⁰ is the primary legislation in the protection of copyright, folklore, neighbouring rights and derivative rights.⁹¹ The objective of this law is to promote, among others, creation of literary and artistic works, to safeguard expressions of traditional culture and to further productive activities in the field of communicating to the public author's works, expression of folklore, other cultural productions and events of general interest.⁹² This law protects both moral and economic interests of authors and provides for just and reasonable conditions of lawful use of authors' work and regulates access to them.⁹³ Under moral rights, the copyright law entitles authors with the right to claim authorship of their works⁹⁴ and the right to object to and to seek relief in connection with any distribution, mutilation or other modification of, and any other derogatory action in relation to, his work, where the action would be or is prejudicial to his honour or reputation.⁹⁵ These provisions can be relied on and gives authors *locus standi* to take legal actions against any person who violate the rights protected therein. This legislation also protects lawful interest of performers, producers of phonograms and broadcasting organizations relating to their productions by granting them exclusive rights.⁹⁶

⁹⁰ The Copyright and Neighbouring Rights Act, Cap. 218 [R.E 2023].

⁹¹ *Id.*, Long title.

⁹² *Id.*, s. 2.

⁹³ *Id.*, s. 2(a).

⁹⁴ *Id.*, s. 11(a).

⁹⁵ *Id.*, s. 11(b).

⁹⁶ *Id.*, s. 2(c).

However, despite the above legal basis for protection of moral rights, the Copyright and Neighbouring Rights Act provides for time limitation on the protection of moral rights.⁹⁷ The general term of copyright protection is the life of the author plus fifty years after author's death.⁹⁸ However, there some categories of works whose copyright is protected for a term less than the aforesaid general term of copyright protection. These include: anonymous and pseudonymous works whose term of protection is fifty years from the date the work was lawfully made available to the public.⁹⁹ Also, works of applied art are protected for the period of twenty five years from the date the respective work was made.¹⁰⁰ This law while providing for the duration of copyright protection uses the phrase "the economic and moral rights shall be protected during/for" which means even the duration for protection of moral rights is limited. This shows that, the Copyright and Neighbouring Rights Act does not recognize the peculiar nature of moral rights as opposed to economic rights. This is due to the fact that, from personhood theory, moral rights protect author's personality, identity, honor or reputation. When moral rights are violated, regardless of expiry of term of protection, authors, their heirs, relatives and associates are likely to suffer from personality and/or reputational injury.

It should be noted that, in copyright like other IPRs, when the term of protection expires, works concerned fall into public domain free for any member of the public to exploit the rights attached thereto.

⁹⁷ Id, s.16.

⁹⁸ Id, s. 16(1).

⁹⁹ Id, s. 16(3).

¹⁰⁰ Id, s. 16(5).

Also, *locus standi* to sue or complain expires, meaning that neither civil nor criminal enforcement mechanisms may successfully be initiated against any purported infringer. Considering the nature of injury suffered by authors, their relatives and associates due to violation of moral rights, it becomes unfair to let moral rights fall into public domain and bar the affected persons from taking legal actions against infringers.

4. LEGAL SHORTFALLS IN MAINLAND TANZANIA

4.1 Limited term of protection

Based on the principle of non-absolutism (balancing of interests), Intellectual property law often offers limited term of protection for the exclusive rights that are granted to authors or right owners. However, there are some IPRs whose term of protection is indefinite provided the legal requirement for their protection remains intact. These IPRs are Trademarks and trade secrets. Other IPRs like Copyright, patents and plant breeders' rights are protected for a specific period of time. The expiry of term of protection makes the work and the associated rights fall into public domain free for use by any member of the public without obtaining prior consent from the right owner.

Regarding the term of protection for moral rights, the critical interpretation of the wording of the Berne Convention and TRIPS agreement, as noted above, denotes that member states are permitted to limit the term of protection for moral rights. This position has affected the position of copyright law in Mainland Tanzania regarding term of protection for moral rights. As noted above, the Tanzanian Copyright and Neighbouring Rights Act uses the same limited term of protection for both economic and moral

rights. Hence endangering the protection of authors' personality, their relatives and associates as the case may be.

4.2 Reflection of personhood theory

The personhood theory was developed by Georg Wilhelm Friedrich Hegel in the 19th century supported by other theorists like Immanuel Kant.¹⁰¹ This theory is sometimes called 'personality theory'. Hegel bases his arguments on conceptions of will, freedom and personhood.¹⁰² Further, Hegel observes that "personality is the first, still wholly abstract, determination of the absolute and infinite will." He adds, "Personhood is developed primarily through possession, ownership, and exchange of property...."¹⁰³ According to this theory, creative work is embodiment of the creator's personality. Hegel emphasizes on the protection of one's property within which his personality is embodied. He observes that "the purely negative, but most basic, means of furthering the science and arts is to protect those who work in them against theft and provide them with security for their property."¹⁰⁴

The theory further suggests that author's thoughts are expressed in creative work hence necessitating protection of work for ensuring protection of author's personhood.¹⁰⁵ This argument appears to be

¹⁰¹ Priya, K., "Intellectual Property and Hegelian Justification", 1 NUJS Law Review, 2008, pp. 359-65, at p. 361.

¹⁰² Ibid.

¹⁰³ Wilson, M.B., "Personhood and Property in Hegel's Conception of Freedom", 2019, p. 91.

<[https://www.researchgate.net/publication/333023256_Personhood_and_Property_in_Hegel %27S_Conception_of_Freedom](https://www.researchgate.net/publication/333023256_Personhood_and_Property_in_Hegel%27S_Conception_of_Freedom)> (Accessed on 20 January 2024).

¹⁰⁴ Moore, A.D., 2008, pp. 109-10.

¹⁰⁵ Mwaipopo, R. A., "Intellectual Property Rights and the Regulation of Access to and Benefit Sharing of Genetic Resources in Mainland Tanzania" Ph. D Thesis, University of Dar es Salaam, 2008, p. 69.

in line with Locke's argument that "every man has a property in his own person." Additionally, proponents of this theory argue that, the glance of creator's personal trait is featured in the work he creates which might not be featured in other creators' works. However, despite the significance of this theory, the primary law on copyright protection in Mainland Tanzania does limit the term of protection for moral rights. Hence jeopardizing personality, identity, honor and reputation of authors, relatives and associates, as the case may be, leading to non-reflection of personhood theory within the Copyright law of Mainland Tanzania.

4.3 Compliance to international minimum standards

As noted above international IP instruments sets out the minimum standards which member states need to comply with. Looking at the wording of Berne Convention and TRIPS agreement, it is clear that Tanzania complies with minimum standards set therein on the protection of author's moral rights. However, the extent of moral right protection under the Tanzanian copyright law is not sufficient taking into account the peculiar nature of these rights. To justify this insufficiency, the regional legal framework on copyright protection provides and requires member states not to limit the term of protection for moral rights. This is reflected under the ARIPO Model Law and Bangui Agreement as discussed above in this article. This therefore entails that the weaknesses of international community in setting the international minimum standards for protection of moral rights has resulted into Mainland Tanzania being seen to have complied with the minimum standards but with insufficient protection. Although Tanzania is not legally bound by the ARIPO Model Law (soft law) and Bangui agreement (not member to OAPI) but ought to have learned and

adjusted her relevant copyright law to ensure sufficient protection of moral rights.

3. EXPERIENCE FROM OTHER JURISDICTIONS

3.1 Zanzibar

The United Republic of Tanzania comprises of Mainland Tanzania and Zanzibar. The URT Constitution provides for union matters that needs to be adhered to.¹⁰⁶ This means that any matter not included in the list of union matters is a non-union matter. The laws regulating union matters apply to both Mainland Tanzania and Zanzibar. Intellectual property (IP) is not among the 22 union matters listed in the first schedule to the URT Constitution. This is the reason why Mainland Tanzania and Zanzibar have separate legal and institutional framework on IP protection. As noted above, the primary law on copyright protection in Mainland Tanzania is the Copyright and Neighbouring Rights Act.¹⁰⁷ The institution responsible for promotion and protection of copyright in Mainland Tanzania is the Copyright office of United Republic (COSOTA).¹⁰⁸ In Zanzibar, the primary legislation for promotion and protection of copyright is the Copyright Act.¹⁰⁹ The responsible institution for promotion and protection of copyright in Zanzibar is the Copyright Society of Zanzibar (COSOZA).¹¹⁰

Like the Copyright and Neighbouring Rights Act in Mainland Tanzania, the Copyright Act of Zanzibar provides for protection of moral rights of authors of literary and artistic creations. This law

¹⁰⁶ Cap. 2 [R.E 2008], First Schedule.

¹⁰⁷ Cap. 218 [R.E 2023].

¹⁰⁸ Id, ss. 50 and 51.

¹⁰⁹ Act No. 14 of 2003.

¹¹⁰ Id, section 38.

provides that, independently of economic rights authors are entitled to the right to have his name indicated prominently on the copies and in connection with any public use of his work, as far as practicable; to not have his name indicated on the copies and in connection with any public use of his work, and the right to use a pseudonym; and the right 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 honor or reputation.¹¹¹ Also this law while providing for the term of protection, as opposed to the copyright law in Mainland Tanzania,¹¹² mentions only economic rights.¹¹³ This means that, use of the term “independently” and the non-mentioning of moral rights when providing for the term of copyright protection, the copyright law of Zanzibar recognizes the peculiar nature of moral rights and suggests for unlimited term of protection for moral rights. Hence letting the personhood theory reflected in the copyright law of Zanzibar.

3.2 Uganda

The Republic of Uganda is one of the three founding member states to the East African Community (EAC). The other two countries are the United Republic of Tanzania and the Republic of Kenya. Based on the principle of states sovereignty every country has its own laws regulating various matters within the respective jurisdictions. This being the case, the republic of Uganda has its own laws on the protection of IPRs including copyright. The

¹¹¹ Id, s. 8(1) (a)-(c).

¹¹² Cap. 218 [R.E 2023], s. 16.

¹¹³ Act No. 14 of 2003, s. 18.

primary legislation for the promotion and protection of copyright in Uganda is the Copyright and Neighbouring Rights Act.¹¹⁴

Regarding the protection of moral rights, the Copyright and Neighbouring Rights Act of Uganda provides authors of literary and artistic works with the right to claim authorship of the work, except where the work is included incidentally or accidentally in reporting current events by means of media or other means; the right to have the author's name or pseudonym mentioned or acknowledged each time the work is used or whenever an act is done in relation to the work, except where it is not practicable to do so; and the right to object to, and seek relief in connection with any distortion, mutilation, alteration or modification of the work.¹¹⁵ This law further entitles authors with the right to withdraw the work from circulation if it no longer reflects author's convictions or intellectual concepts.¹¹⁶

It should be noted here that, the Copyright and Neighbouring Rights Act of Uganda does not limit the term of protection for moral rights. This legislation provides that, moral rights of an author exist in perpetuity whether the economic rights are still protected or not and that moral rights are enforceable by the author or after death his or her successors.¹¹⁷ This means, protection of moral rights in Uganda is not limited in time like how the economic rights are. This signifies how the copyright law of Uganda accommodates the reflection of the personhood theory and observes the convincing minimum standards recognized by

¹¹⁴ Act No. 19 of 2006.

¹¹⁵ *Id.*, s. 10(1) (a)-(c).

¹¹⁶ *Id.*, s. 10(2).

¹¹⁷ *Id.*, s. 13(8).

the regional IP legal frameworks. It is therefore time for Tanzania to learn how some of its fellow member states to the EAC treats the protection of author's moral rights within their respective jurisdictions.

3.3 Rwanda

The Republic of Rwanda is among countries that joined the EAC in the latter years since its establishment in 1999. Unlike other member states to EAC, Rwanda has consolidated the protection of copyright and industrial property into a single law that is, Law N° 31/2009 of 26/10/2009 on the Protection of Intellectual Property. This law provides for protection of copyright, patents, utility models, industrial designs, layout-designs of integrated circuits, distinctive signs (trade/service marks), and Geographical Indications (GIs).

The protection of copyright referred above includes protection of authors' moral rights. According to the aforementioned IP law of Rwanda, an author, independently of economic rights, is entitled to the right to claim the authorship; 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; and to not have his or her names indicated on the copies or the right to use a pseudonym.¹¹⁸ This law is clear on unlimited term of protection for moral rights. It provides that, moral rights have no limitation in time.¹¹⁹ It further provides that, moral rights are inalienable and are capable of being transmitted to author's heirs after his death or conferred to third person by

¹¹⁸ Law N° 31/2009 of 26/10/2009 on the Protection of Intellectual Property, Art. 199.

¹¹⁹ *Id.*, Art. 216.

testamentary disposition.¹²⁰ Like the copyright law of Uganda, copyright law in Rwanda sufficiently accommodates the personhood theory hence ensuring sufficient protection of authors' moral rights and personality.

3.4 European Union (EU)

The protection of moral rights in the countries forming part to the EU varies.¹²¹ The reason for this variation is based on the fact that, there is still no legal harmonization among all EU countries on the protection of moral rights.¹²² Some countries like France provides for extensive protection of moral rights beyond the minimum standard provided under Berne Convention while most Nordic countries provides for exact minimum standard set under the Berne Convention.¹²³ In France, the Intellectual Property Code grants authors with the right to respect for his name, his authorship and his work.¹²⁴ The wording of this Code incorporates the four rights protected under the umbrella of moral rights that is; Integrity Rights, Paternity/attribution Rights, Divulcation Rights and Retraction/withdrawal rights. With regard to the term of protection, the Code provides that moral rights are perpetual, inalienable and imprescriptible.¹²⁵ This means, in France moral rights are protected for unlimited period of time hence reflecting the personhood theory on the protection of moral rights. Tanzania

¹²⁰ Ibid.

¹²¹ Hutukka, P., "Copyright Law in the European Union, the United States and China", 54 *International Review of Intellectual Property and Competition Law*, 2023, pp. 1044-80, at p. 1053.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ The Intellectual Property Code, 2003, Art. L121-1.

¹²⁵ Ibid.

can draw lessons from the legal positions among countries in the EU, like France, to improve her copyright law in protecting author's moral rights and personality.

3.5 China

The legal protection of copyright in the People's Republic of China (PRC) lagged behind compared to other IPRs like patents and trade/service marks. The first copyright law in China was enacted in 1990 and passed through several revisions up to 2020. This law provides for the protection of both economic and moral rights for works that are eligible for protection.¹²⁶ The moral rights recognized under the Chinese copyright law are four namely; the right of publication that is the right to decide whether or not to make the work known to the public, the right of attribution that is the right to claim authorship and to have the author's name mentioned in connection with the work, the right of alteration that is the right to alter or authorize others to alter works and the right of integrity that is the right to protect one's work against distortion and modification.¹²⁷ Regarding the term of protection for moral rights, Copyright law of China grants authors with unlimited term of protection for the right of authorship, right to modification/authorize modification and the right to integrity.¹²⁸ This entails that, China is also a jurisdiction to learn from in improving the protection of author's moral rights in Mainland Tanzania.

¹²⁶ Hutukka, P., 2003, p. 1064.

¹²⁷ The Copyright Law of the PRC, 2020, Art. 10 (1)-(4).

¹²⁸ *Id.*, Art. 22.

4. IMPACTS ASSOCIATED WITH THE CURRENT POSITION ON MORAL RIGHTS

The discussed shortfalls of the copyright law in Mainland Tanzania affects the *locus standi* to sue for violation of moral rights especially when the term of protection expires. Since moral rights ensures protection of author's personality, limiting the term of protection, like how it is to economic rights, prevents authors or their legal representatives from taking legal actions, under copyright law, against such violations due to lack of legal basis. Hence leading to continued jeopardy of author's personality. It should be noted that, the economic sufferings resulting from the expiration of the term of protection of economic rights can be replaced by earnings from other sources which is not the case on moral rights.

As noted above, the expiration of the term of protection for moral rights causes the works and rights thereto to fall into public domain free for any person to exploit. The referred free exploitation affects not only authors' personality but extends to causing injury to author's heirs, relatives and associates in business. Additionally, the limited scope of the rights protected under the umbrella of moral rights prevents authors or their legal representatives from taking legal actions, even before the discussed expiry of moral rights protection, against infringers for lack of legal basis regarding such rights which copyright law, of Mainland Tanzania, does not recognize.

5. CONCLUSION AND RECOMMENDATIONS

This article concludes that; the protection of author's moral rights is not sufficiently guaranteed under the copyright law of Mainland Tanzania. As noted above, this insufficiency is evidenced under the

Copyright and Neighbouring Rights Act which, like the economic rights, limits the term of protection for moral rights. This law when providing for duration of copyright protection do not separate between economic and moral rights instead it uses the phrase “the economic and moral rights shall be protected during/for”.

Furthermore, the Copyright and Neighbouring Rights Act of Mainland Tanzania provides for only two rights that are protected under the umbrella of moral rights. These rights are; the paternity rights and integrity rights. The integrity right entitles authors to prohibit any person from making any changes, modification or alterations whose impact may lead to damage of their reputation, honor or identity. Paternity right entitles authors to claim authorship or acknowledgment whenever work is reproduced, published, communicated to the public or exhibited in the public. This law disregards other rights which needs to be protected under the umbrella of moral rights that is divulgation right which entitles authors with a right to decide when, where and the manner their works can be disseminated to the public and the retraction right that entails the right of authors to publish or not to publish or to withdraw his copyrighted works from the public.

This article therefore recommends for amendment of the Copyright and Neighbouring Rights Act of Mainland Tanzania. This law should be amended by separating the term of protection for moral and economic rights. The focus of this amendment should be to accommodate the perpetual, inalienable and imprescriptible protection of moral rights. Additionally, this law should be amended to add other rights that needs to be protected under the umbrella of moral rights to expand the scope of moral rights protection. To realize this, Mainland Tanzania can learn

from regional legal frameworks and from other jurisdictions like Zanzibar, Uganda, Rwanda, EU and China whose copyright laws are noted to sufficiently protect author's moral rights. Lastly, this article recommends for the revision of the Berne Convention and the TRIPS Agreement. Revision of these international instruments should focus on providing for international minimum standards which indicate moral rights to be inalienable and protected in perpetuity whether the economic rights are still protected or not.