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PROTECTION OF COPYRIGHT OWNERS' INTERESTS: QUEST OF CRIMINAL ENFORCEMENT AGAINST COPYRIGHT INFRINGEMENT IN MAINLAND TANZANIA

*Juma Laurian Athanas**

Abstract

This article explores both legal and institutional framework for the protection of copyright owners' interests in Mainland Tanzania with the focus on criminal enforcement against copyright infringement. Despite the existence of the Copyright and Neighbouring Rights Act, the Cybercrimes Act and other relevant copyright and criminal laws and institutions, copyright infringement still persists. This article addresses policy, legal and institutional challenges which demonstrate Tanzania's non-compliance to her international obligation on copyright protection and enforcement. It further highlights the necessity of making appropriate reforms to ensure sufficient protection of the interests of copyright owners through criminal enforcement against infringements in Mainland Tanzania.

Key words: *Copyright, copyright infringement and criminal enforcement*

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¹ The Copyright and Neighbouring Rights Act, Cap. 218 [R.E 2023].

1.0 INTRODUCTION

Copyright law plays a vital role in safeguarding the interests of creators and innovators by granting them exclusive economic and moral rights over their creations. In Mainland Tanzania, like many other jurisdictions globally, copyright law is indispensable with the promotion of creativity and ensuring that creators benefit from the fruits of their labour.² Despite the existence of copyright laws and relevant institutions, copyright infringement remains persistent in Mainland Tanzania. During this era of digitization, criminal enforcement against copyright infringement has immensely become difficult especially in respect of the infringement committed in the digital setting.

The persistence of copyright infringement is due to challenges within the laws and institutions. On the one hand, the legal framework creates difficulties for prosecutors to execute the standard of proof, as required by criminal law, to ensure entrance of conviction against copyright offenders. This framework also leaves some acts without being criminalized. Further, the legal framework is noted to encourage commission of acts of copyright infringement due to the lessened deterrence and the extent of benefit infringers earn from their wrong doings. On the other hand, the institutional framework is faced with various challenges affecting its sufficiency in criminal enforcement against copyright infringement. These challenges include; scarcity of copyright inspectors, absence of specialized investigators and prosecutors, absence of special unit and fund dedicated for copyright enforcement, limited powers of COSOTA,

technological challenges, and the absence of regular IP specific training within institutions.

Despite the significance of criminal enforcement against copyright infringement in Mainland Tanzania, existing literature focuses more on civil enforcement mechanisms. The few literature that touches on criminal enforcement, do not comprehensively discuss on the legal and institutional challenges facing criminal enforcement against copyright infringement. These literatures only highlights to the effect that, criminal enforcement is important and calls for improvement of the relevant frameworks, but do not sufficiently extend to revealing on what should be done and how. The appraisal of legal and institutional framework in this article reveals the extent Mainland Tanzania protects interests of copyright owners through criminal enforcement. It brings out what, and how should be done in the relevant legal and institutional framework to ensure sufficient protection of the interests of copyright owners through criminal enforcement. The article further seeks to show whether Mainland Tanzania, through the current legal and institutional framework, complies with her international legal obligation on copyright enforcement through criminal mechanisms.

This article begins with conceptual framework, followed by analysis of shortfalls within legal and institutional framework and the impacts thereto. It adopts five theories namely; John Lockean theory of labour, Personhood theory, Rational Choice theory, Deterrence theory and Victimology Theory. John Lockean theory of labour advocates for owners of IP to enjoy the fruits of their labour; Deterrent theory advocates for criminal procedures and penalties that deter offenders and general public from committing

crimes; the Rational Choice theory advocates for effective mechanisms to be adopted to discourage infringements through preventing infringers to benefit from their wrong doings; the Victimology theory advocates for compensation to victims for injuries or loss resulting from commission of offence; and the Personhood theory advocates for the protection of author's moral rights.

The article lastly offers the legal and institutional recommendations on how criminal enforcement against copyright infringement can be enhanced to ensure sufficient protection of copyright owners' interests in Mainland Tanzania.

2.0 CONCEPTUAL FRAMEWORK

The key terms to enable readers easily comprehend this article are defined under this part. These terms include; Intellectual Property (IP), Intellectual Property Rights (IPRs), copyright, copyright protection, copyright ownership, copyright infringement and copyright enforcement. IP refers to creations of human mind.³ It also entails the product of human intellect.⁴ Examples of IP include, literary and artistic works, inventions, distinctive signs or symbols, new varieties of plants, new integrated circuits, and distinctive industrial designs. IPRs denote rights or legal devices within which IP is protected.⁵ IPRs includes; Copyright that

³ Jajpura, L. Singh, B. and Nayak, R., "An Introduction to Intellectual Property Rights and their Importance in Indian Context", 3 *Journal of Intellectual Property Rights*, 2017, pp. 32-41, p. 32. See also W.R Cornish, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*, (2nd Ed), Sweet and Maxwell, London, 1989, pp. 1-24.

⁴ Ibid. See also Bainbridge, D.I., *Intellectual Property*, (6th Revised Edn.), Pearson Education Publishers, Harlow, 2007.

⁵ Hossain, A., "Basic Concept of Intellectual Property Rights (IPRs)", 9(1) *Bangladesh Journal of Bioethics*, 2018, pp. 24-28, pp. 24-5.

protects literary and artistic works, Trade/service marks protecting distinctive signs used in the course of trade, Patent protecting new inventions, Industrial designs protecting distinctive designs of objects, and Plant Breeders' Rights (PBRs) protecting new varieties of plants.

The Tanzania's copyright law defines copyright to mean sole legal right to print, publish, perform film or record a literally or artistic or musical work.⁶ According to Ekpa copyright refers to works that relates to literary and artistic creations.⁷ In the case of *Macmillan Aidan (T) Ltd v. Nyambari Nyangwine & 2 Others*⁸ the court defined copyright to mean “a bundle of exclusive rights that enable the creator to control the economic use of such works whereby he or she through such exclusive right may authorize or restrict, inter alia, reproduction of a work in copies, distribution of copies to the public, translation or adaptation of the work”. Generally, copyright refers to the bundle of rights granted to the author or authors, in respect of his or their creations, or to persons to whom the right or rights are transferred, the exercise of which by third party requires prior authorization from the respective author or authors, or owner or owners of the rights concerned.

The ownership of copyright (intangible asset) is separate from ownership of physical objects (tangible assets) in which the work

⁶ The Copyright and Neighbouring Rights Act, Cap. 218 [R.E 2023], s. 4.

⁷ Ekpa, 2014, pp. 4-14.

⁸ High Court-Commercial Division at Mwanza, Commercial Case No. 210 of 2010 (Unreported), p. 7.

is fixed.⁹ This position was affirmed in *Re Dickens*.¹⁰ This means, it is possible for a person to own a physical object like a book, but not the copyright embodied in that book. Initially, the owner of copyright is the author.¹¹ An author is a natural person who creates work capable of being protected under copyright law.¹² He is entitled to ownership of the exclusive rights attached to the work. In case of joint authorship, the ownership of copyright in the work created goes to joint authors.¹³

In the case of *Tanzania-China Friendship Textile Company Limited v. NIDA Textile Mills (T) Ltd*¹⁴ the court when defining copyright infringement stated that, “infringement of copyright arises or occurs where a party, not the owner thereof, exploits one of the rights without permission.” Generally, copyright infringement occurs when a person not being owner of the copyright in the work and without authorization, exploits or causes/aids/induces another person to exploit the exclusive rights granted to the owner or while having access to owners’ work substantially copies or causes/aids/induces another person to substantially copy the copyrighted work concerned or deals or causes/aids/induces another to deal with materials that infringe copyright and that such acts do not fall within the legally recognized limitations and exceptions.

⁹ Vaver, D., “Principles of Copyright: Cases and Materials”, pp. 11-4, available at <https://tind.wipo.int/record/28767/files/wipo_pub_844.pdf> (accessed 20 December 2023).

¹⁰ Ch. 267 (UK High Court & Court of Appeal).

¹¹ Cap. 218 [R.E 2023], s. 17(1).

¹² Id, s. 4.

¹³ Id, s. 17 (1).

¹⁴ The High Court-Sub-registry of Dar es Salaam, at Dar es Salaam, Civil Case No. 106 of 2020, (Unreported), p. 12.

Copyright enforcement focuses at safeguarding the exclusive rights granted to copyright owners. It involves various measures necessary for preventing and dealing with infringement of the exclusive rights. These include, the provisional measures, civil procedures and remedies, criminal procedures and penalties and border measures. Criminal enforcement entails application of criminal procedures and penalties to ensure peoples' obedience to the law.

3.0 LEGAL AND INSTITUTIONAL FRAMEWORK

There are various laws that have a bearing on copyright protection and enforcement. They can be categorized into four major groups namely; international laws, regional laws, sub-regional and domestic laws. These laws focus at protecting the interests of copyright owners. However effective protection and promotion of the aforementioned interests depends on the sufficiency of the institutions responsible for enforcing the laws. These institutions are established and operates at international, regional, sub-regional and domestic levels. However, for the purpose of this article, only international and domestic legal and institutional framework is covered.

3.1 International level

The notable international legal instruments on protection, promotion and enforcement of copyright include; the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights (The TRIPS Agreement), the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT). Other legal instruments, though not

in IP *per se*, include; the Universal Declaration of Human Rights (UDHR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The Berne Convention was adopted on 9th September 1886. It is the first binding multilateral instrument on the protection of copyright. This convention was adopted as response to acts of copyright infringement experienced in various jurisdictions in the world.¹⁵ The United Republic of Tanzania became party to Berne Convention on 25th July 1994 hence bound by its provisions. This instrument provides for, among other things, protection of both economic and moral rights,¹⁶ and for the term of copyright protection.¹⁷ However, the Berne Convention throughout its provisions does not comprehensively provide for enforcement measures against copyright infringement. Failure, by this Convention, in providing for comprehensive enforcement mechanisms, inter alia, impacted on the insufficiency of criminal enforcement against copyright infringement within the Mainland Tanzania's Legal and institutional framework.

The TRIPS Agreement was adopted in April 1994 during Ministerial meeting held in Marrakesh in Morocco and entered into force on 1st January 1995.¹⁸ This agreement binds all states member to WTO including Tanzania. TRIPS Agreement

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. 972-3. (pp. 971-1007).

¹⁶ Id, Arts. 6^{bis}, 8, 9, 11, 11^{bis}, 11^{ter} and 12.

¹⁷ Id, Art. 7(1), 7 (2), (3) and (4).

¹⁸ Japan Patent Office, "Introduction to TRIPs Agreement", p. 3, available at <https://www.jpo.go.jp/e/news/kokusai/developing/training/textbook/document/index/TRIPs_Agreement.pdf> (accessed 14 May 2024), pp. 2, 4 and 5.

provides for protection of various IPRs including copyright.¹⁹ It requires member states to comply with articles 1 to 21 of the Berne Convention except article 6^{bis} that protects moral rights.²⁰ Part III of TRIPS Agreement provides for the enforcement of IPRs. This agreement requires member states to incorporate in their national laws enforcement procedures including expeditious remedies preventing acts of infringements and the remedies that constitute deterrence.²¹ TRIPS agreement further requires enforcement procedures not to be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.²² Among others, this agreement obligates member states to include, in their national laws, expeditious criminal procedures and penalties to be applied at least in cases of, inter alia, copyright piracy on a commercial scale.²³ The agreement goes further by providing that the remedies should include imprisonment and/or monetary fines sufficient to provide deterrence.²⁴

The above provisions portray how the TRIPS Agreement sets the minimum standards for criminal enforcement against copyright infringement. The test of these standards indicates that, the relevant legal and institutional framework in Mainland Tanzania is insufficient in ensuring protection of the interests of copyright owners through criminal enforcement. This is due to the fact that, the standards provided under the TRIPS Agreement are not sufficiently reflected in the current Mainland Tanzania's legal and

¹⁹ The Agreement on Trade Related Aspects of Intellectual Property Rights, adopted in 1994, entered into force on 1st January 1995, Part II.

²⁰ *Id.*, Art. 9(1).

²¹ *Id.*, Part III, Section 1, Art. 41(1).

²² *Id.*, Art. 41(2).

²³ *Id.*, Art. 61.

²⁴ *Ibid.*

institutional framework. Hence calling for appropriate legal and institutional actions to be taken to ensure compliance to the TRIPS Agreement minimum standards. The said compliance will ensure that, the interests of copyright owners are not jeopardized.

The WCT was adopted in 1996 following the WIPO Diplomatic Conference that was held in Geneva and entered into force on 6th March 2002.²⁵ It was adopted as response to the provisions of Berne Convention which were found not to be relevant to digital age. The WCT is a special agreement adopted under Article 20 of the Berne Convention and does not prejudice any obligations by any member provided in the Berne Convention and other copyright treaties.²⁶ Member states to WCT are bound by provisions of Berne Convention, (Paris Act of July 24 1971) from article 1 to 21 and the Appendix thereto.²⁷ The WCT was adopted same year with the WPPT and both became nicknamed as the WIPO internet treaties. Like the TRIPS Agreement, the WCT also protects only the form of expression of an idea and not an idea itself, or procedures, methods of operation or mathematical concepts.²⁸

Regarding enforcement of rights, the wording of WCT is similar to TRIPS Agreement however the focus being on digital infringement.²⁹ Despite its significance, Tanzania has neither

²⁵ Ficsor, M., “The WIPO Internet Treaties: The United States as the Driver: The United States as the Main Source of Obstruction-As Seen by an Anti-Revolutionary Central European”⁶⁽¹⁷⁾ *The John Marshall Review of Intellectual Property Law*, 2006, pp. 20-2. (17-39).

²⁶ The WIPO Copyright Treaty, adopted in 1996, entered into force on 6th March 2002, Art. 1(1)-(3).

²⁷ *Id.*, Art. 1(4).

²⁸ *Id.*, Art. 2.

²⁹ *Id.*, Art. 14.

signed nor ratified these important treaties on copyright protection in the digital setting. The non-signing and ratification of this treaty has increased the challenges on criminal enforcement against copyright infringement in Mainland Tanzania. For instance, the Copyright and Neighboring Rights Act and the Cybercrimes Act contains no comprehensive provisions on copyright infringement in the digital setting. This position, as discussed in this article, has negatively affected capacity of institutions in enforcing copyright infringement committed in the digital setting. Hence jeopardizing the interests of copyright owners concerned.

Also, as noted above, there are other relevant international instruments, though not on IP *per se*, that provide for the protection and promotion of IPRs including copyright. These instruments are the UDHR, and the ICESCR. These instruments contain provisions that require member states to ensure sufficient protection and enforcement of IPRs.³⁰ Member states including Tanzania is under international obligation of taking legislative and administrative measures to ensure IP protection, including copyright protection. These measures include incorporation of enforcement procedures and penalties in relevant national laws, to ensure prevention of infringements, and ensuring availability of deterrent remedies.

³⁰ The Universal Declaration of Human Rights, Art. 27(2) and 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, Art. 15(1) (c).

The key international institutions on protection and promotion of IP, including copyright are; the United Nations (UN), the World Intellectual Property Organization (WIPO), and the World Trade Organization (WTO). The UN is an international organization established under the Charter of the United Nations (the UN Charter).³¹ The UN Charter was officially adopted on 24th October 1945 at San Francisco, United States.³² This Charter contains provisions that directly protect human rights including Articles 1(3), 13(1) (b), 55(c), 56, 62(2), 68, and 76(c). The UN General Assembly (UNGA) has mandate of adopting, through resolutions, international conventions, treaties or covenants as the name may be. This entails that UDHR and ICESCR discussed above are products of UN. Additionally, UN is empowered to initiate negotiations among states concerned for creation of any new specialized agencies required for, inter alia, promotion of universal respect for, and observance of, human rights and fundamental freedoms for all without discrimination on any ground.³³ This power led to establishment of WIPO as a specialized agency responsible for promotion and protection of IPRs in the world.

WIPO is established under the Convention Establishing the World Intellectual Property Organization (the WIPO Convention).³⁴ This Convention was signed at Stockholm on July 14, 1967, entered into force on 26th April 1970 and was amended

³¹ The Charter of the United Nations, 1945, Preamble.

³² Tomova, N., “History and Structure of the United Nations”, 2014, p. 17. Available at <https://www.academia.edu/16995894/History_and_Structure_of_the_United_Nations> (accessed 8 February 2024).

³³ The Charter of the United Nations, Arts. 55 and 59.

³⁴ The Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967, and amended on September 28, 1979, Art. 1.

on September 28, 1979.³⁵ WIPO was established for purpose of, inter alia, promoting the protection of IP throughout the world through encouraging cooperation among states and in collaboration with international organizations including WTO whenever appropriate.³⁶ WIPO administers more than twenty treaties relevant to the protection of both industrial property and copyright. These includes; the Berne Convention and the Paris Convention for the Protection of Industrial Property (the Paris Convention). Since WIPO administers the Berne Convention, the Convention which is noted to contain no comprehensive provisions on criminal enforcement against copyright infringement, has contributed to the insufficiency of Mainland Tanzania's legal and institutional framework on criminal enforcement against copyright infringement.

WTO is an international organization regulating trade relations among member states. It is established under the Agreement establishing the World Trade Organization (the Marrakesh Agreement).³⁷ The Marrakesh Agreement was signed on 15 April 1994 in Marrakesh, Morocco and entered into force on 1st January 1995. WTO is responsible for facilitating the implementation, administration and operation, and furthering objectives of this Agreement and of the Multilateral Trade Agreements. The Agreement on Trade Related Aspects of Intellectual Property (the TRIPs Agreement) is among of the

³⁵ Bannerman, S., "Development and International Copyright: A History", 8 (1) *The WIPO Journal*, 2016, pp. 11-22, p. 12.

³⁶ The Convention Establishing the World Intellectual Property Organization, Art. 3(i).

³⁷ The Agreement establishing the World Trade Organization, signed on 15 April 1994 in Marrakesh, Morocco, Art. 1.

agreements which forms part to the Marrakesh Agreement.³⁸ This being the case, WTO is responsible for facilitating the implementation, administration, operation, and furthering the objectives of the TRIPS Agreement. Through performing this function, the WTO plays a great role in the protection and enforcement of IP against infringement. In case Tanzania complies with the provisions of the TRIPS Agreement, the agreement administered by the WTO, will ensure sufficient protection of the interests of copyright owners.

3.2 Domestic level

In Tanzania, protection, promotion and enforcement of copyright is reflected in the URT Constitution, principal and subsidiary legislation. The Copyright and Neighbouring Rights Act is the primary legislation on the protection and promotion of copyright owners' interests in Mainland Tanzania.³⁹ Zanzibar has a separate legal framework on copyright protection hence making the Zanzibar Copyright Act a primary legislation for the protection and promotion of copyright in Zanzibar.⁴⁰ Other national laws having bearing on copyright protection, promotion and criminal enforcement against copyright infringement in Mainland Tanzania include; the Films and Stage Plays Act,⁴¹ the National Arts Act,⁴² the Cybercrimes Act,⁴³ the Criminal Procedure Act,⁴⁴ the National Prosecutions Service Act,⁴⁵ the

³⁸ Id, Art. II (2).

³⁹ Cap. 218 [R.E 2023], Long title and s. 2.

⁴⁰ The Copyright Act, Act No. 14 of 2003.

⁴¹ The Films and Stage Plays Act, Cap. 230 [R.E 2023].

⁴² The National Arts Act, Cap. 204 [R.E 2023].

⁴³ The Cybercrimes Act, Cap 443 [R.E 2023].

⁴⁴ The Criminal Procedure Act, Cap. 20 [R.E 2023].

⁴⁵ The National Prosecutions Service Act, Cap. 430 [R.E 2023].

Police Force and Auxiliary Services Act,⁴⁶ the Extradition Act,⁴⁷ and the Mutual Assistance in Criminal Matters Act.⁴⁸

Additionally, there are Regulations made to operationalize provisions of aforementioned Acts of parliament. These include; The Copyright and Neighbouring Rights (Registration of Members and their Works) Regulations,⁴⁹ the Copyright and Neighbouring Rights (Collective Management Organizations) Regulations,⁵⁰ the Film and Stage Plays Regulations,⁵¹ Cybercrimes (General) Regulations,⁵² Copyright and Neighbouring Rights (Copyrighted Works-Communication to the Public) Regulations,⁵³ National Arts Council Regulations,⁵⁴ Copyright and Neighbouring Rights (Compounding of Offences) Regulations,⁵⁵ and the Police General Orders.⁵⁶ However this article covers only the URT Constitution, Copyright and Neighbouring Rights Act, the Cybercrimes Act, the Criminal Procedure Act, National Prosecutions Service Act and the Police Force and Auxiliary Services Act.

⁴⁶ The Police Force and Auxiliary Services Act, Cap. 322 [R.E 2023].

⁴⁷ The Extradition Act, Cap 368 [R.E 2023].

⁴⁸ The Mutual Assistance in Criminal Matters Act, Cap. 254 [R.E 2022].

⁴⁹ The Copyright and Neighbouring Rights (Registration of Members and their Works) Regulations, 2006 (GN. 6 of 2006).

⁵⁰ The Copyright and Neighbouring Rights (Collective Management Organizations) Regulations, 2023 (GN. 211 of 2023).

⁵¹ The Film and Stage Plays Regulations, 2020 (GN. 488 of 2020).

⁵² The Cybercrimes (General) Regulations, 2016 (GN. 224 of 2016).

⁵³ The Copyright and Neighbouring Rights (Copyrighted Works-Communication to the Public) Regulations, 2015 (GN. 29 of 2016).

⁵⁴ The National Arts Council Regulations, 2018 (GN. 43 of 2018).

⁵⁵ The Copyright and Neighbouring Rights (Compounding of Offences) Regulations, 2020 (GN. 621 of 2020).

⁵⁶ The Police General Orders, 2006.

The URT Constitution is the grund norm applicable in Tanzania from which both principal and subsidiary legislation derives their legitimacy.⁵⁷ This status proves supremacy of the URT Constitution. In the case of *Attorney General v. Lobay Akonaay and Joseph Lobay*,⁵⁸ the court held that laws enacted by the parliament must not be inconsistent with the Constitution. URT Constitution prohibits persons from depriving another of his property without fair and adequate compensation.⁵⁹ Likewise copyright owners are entitled to constitutional protection of their right to own IP as a property, including ownership of copyright. The URT Constitution also establishes the High Court and Court of Appeal, as courts of records in Tanzania, which are responsible for dispensing justice.⁶⁰

Moreover, the URT Constitution provides for appointment, by the President, of the Director of Public Prosecutions (DPP) whose powers include institution, prosecution and supervision of all criminal prosecutions in Tanzania.⁶¹ In exercising his powers, the DPP aims at ensuring dispensation of justice, prevention of misuse of procedures applied in dispensing justice and ensuring the public interests is upheld.⁶² The URT Constitution also requires the state authority and all of its agencies to direct their policies, including IP policies, and programs towards ensuring, inter alia, that human dignity is preserved and upheld in accordance with spirit of the UDHR.⁶³ As noted above, UDHR is

⁵⁷ The Constitution of United Republic of Tanzania, Cap. 2 [R.E 2008], Art. 64(5).

⁵⁸ [1995] TLR 80.

⁵⁹ Id, Art. 24 (2).

⁶⁰ Cap. 2 [R.E 2008], Arts. 107A, 108 (1) and 117 (1).

⁶¹ Id, Art. 59B (1) and (2).

⁶² Id, Art. 59B (4) (a), (b) and (c).

⁶³ Id, Art. 9 (f).

among international human rights instruments that protects copyright. More significantly, URT Constitution requires policies and programs by state authority and all its agencies to ensure that laws of the land, including Copyright and Neighbouring Rights Act and the Cybercrimes Act, are upheld and enforced.⁶⁴ Additionally, this Constitution makes it mandatory for victims of wrong doing to be awarded reasonable compensation for injuries sustained.⁶⁵ This illustrates that, the provisions of URT Constitution adds value to criminal enforcement against copyright infringement in Mainland Tanzania.

As noted, in Mainland Tanzania, the Copyright and Neighbouring Rights Act is the primary legislation in protection of copyright, folklore, neighbouring rights and derivative rights.⁶⁶ It protects moral and economic interests of authors related to their works. This law recognizes exclusive author's rights and provides for just and reasonable conditions of lawful use of authors' work and regulates access to them.⁶⁷ It further protects lawful interest of performers, producers of phonograms and broadcasting organizations relating to their productions by granting them exclusive rights.⁶⁸ As noted above, this law defines the term copyright.⁶⁹ This legislation grants copyright protection to owners of original literally and artistic works.⁷⁰ An original work is that which emanates from the author and not one copied from preexisting work.

⁶⁴ Id, Art. 9 (b).

⁶⁵ Id, Art. 107A (2) (c).

⁶⁶ Cap. 218 [R.E 2023], long title and s. 2.

⁶⁷ Id, s. 2(a).

⁶⁸ Id, s. 2(c).

⁶⁹ Id, s. 4.

⁷⁰ Id, s. 5(1).

The Copyright and Neighbouring Rights Act also creates the copyright offence by providing that any person who knowingly violates or causes to be violated rights of the copyright owner commits an offence.⁷¹ It also provides for the penalty in case of conviction.⁷² Additionally, the Copyright and Neighbouring Rights Act establishes the copyright office namely the Copyright Office of United Republic (COSOTA).⁷³ This office is responsible for the protection of copyright owners' interests and ensuring realization of objectives of the Copyright and Neighbouring Rights Act.⁷⁴ Additionally, the Copyright and Neighbouring Rights Act vests power to Copyright Administrator or any person so authorized to compound copyright offence.⁷⁵ However in compounding of offence, this law requires the Copyright Administrator or any person authorized by him not to order payment of amount exceeding twenty million shillings.⁷⁶

The Cybercrimes Act is a legislation that criminalizes offence related to computer systems and Information Communication Technologies (ICT).⁷⁷ It also provides for investigation, collection and use of electronic evidence and for other related matters.⁷⁸ This legislation defines IPRs to entail rights accrued or related to copyright, patent, trademark and any other related matters.⁷⁹ This law creates copyright offence by providing that persons who use

⁷¹ Id, s. 45(1).

⁷² Id, s. 45 (1) (a) and (b).

⁷³ Id, s. 50.

⁷⁴ Id, s. 51 (a).

⁷⁵ Id, s. 46 (1).

⁷⁶ Id, s. 46 (4).

⁷⁷ The Cybercrimes Act, Cap 443 [R.E 2023], long title.

⁷⁸ Ibid.

⁷⁹ Id, s.3.

computer system with intention to violate IPRs protected under any written law commits an offence.⁸⁰ The written laws referred includes the Copyright and Neighbouring Rights Act and other copyright laws. The Cybercrimes Act further provides for penalty in the form of fine, imprisonment, also compensation is provided as an additional remedy which the court may order.⁸¹

The Criminal Procedure Act (CPA) is a legislation, as opposed to the Civil Procedure Code, which provides for procedures followed in investigation of crimes, institution and conduct of criminal trials, appeals, revisions and for other related purposes.⁸² This law provides to the effect that, all offences committed contrary to written laws other than the penal code shall be inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Act except where that other law provides for procedures of handling offences arising therefrom.⁸³ This legislation further makes it mandatory that before invocation of criminal processes, complainant must exhaust the available remedies in civil and administrative domains.⁸⁴

The CPA empowers the police officers to conduct investigation and arrest the suspected offender.⁸⁵ It requires investigation to be completed before the charge thereto is filed in court except where offence committed is serious offence or offence triable by the

⁸⁰ Id, s. 24 (1).

⁸¹ Id, s. 24 (2).

⁸² The Criminal Procedure Act, Cap. 20 [R.E 2023], long title.

⁸³ Id, s. 4 (1) and (2).

⁸⁴ Id, s. 4 (3).

⁸⁵ Id, s. 11 (1).

High Court.⁸⁶ This law empowers court to dismiss charge and acquit the accused if no case is established necessitating accused to make a defense.⁸⁷ Furthermore, the court in addition to punishment may order the convicted person to pay compensation to any person for any material loss or personal injury resulting from the commission of the offence for which the accused person was charged and convicted.⁸⁸ These provisions indicate how relevant the CPA is in criminal enforcement against copyright infringement in Mainland Tanzania.

The National Prosecutions Service Act⁸⁹ provides for establishment of the National Prosecutions Service (NPS).⁹⁰ It also provides for organization, management, monitoring, supervision of prosecution and coordination of investigation with a view to promoting and enhancing dispensation of criminal justice, and to provide for related matters.⁹¹ This legislation applies to all criminal prosecutions and coordination of investigation of crimes in Mainland Tanzania including prosecution and investigation of copyright offence.⁹² This law establishes the NPS as an independent and autonomous service headed by the DPP assisted by the Deputy Director of Public Prosecutions (DDPP) both appointed by the President.⁹³ NPS is vested with power to, and is responsible for, instituting criminal proceedings in courts of law in Tanzania except for offences for

⁸⁶ Id, s. 134 (1).

⁸⁷ Id, s. 247.

⁸⁸ Id, s. 368 (1).

⁸⁹ The National Prosecutions Service Act, Cap. 430 [R.E 2023].

⁹⁰ Id, s.4 (1).

⁹¹ Id, long Title.

⁹² Id, s. 2.

⁹³ Id, s. 4 (1), (2) and (3).

which a specific institution is empowered to prosecute offences arising therefrom like under the PCCB Act. The DPP can, by instrument, delegate his functions and powers to DDPP, Regional Prosecution Officers and District Prosecution Officers, Law Officer, State Attorney or such other public officer. All these proves the role played by this law in criminal enforcement against copyright infringement.

The Police Force and Auxiliary Services Act is a legislation which provides for, among others, powers and duties of the Police Force (the PF).⁹⁴ This law establishes the PF of Tanzania headed by IGP and provides for its powers and functions.⁹⁵ It also specifically provide for powers and functions of members of the PF including the power of taking all steps necessary to prevent commission of offences and to detect and bring offenders to justice.⁹⁶ Additionally, police officers are responsible for apprehending any person legally authorized provided there are reasonable grounds.⁹⁷ This legislation also empowers police officers to search a building, vessel, carriage box, receptacle, or place⁹⁸ and seize anything related to offence.⁹⁹ All these indicates the significant nature of the Police Force and Auxiliary Services Act in criminal enforcement against copyright infringement in Mainland Tanzania.

⁹⁴ The Police Force and Auxiliary Services Act, Cap. 322 [R.E 2023], long title.

⁹⁵ *Id.*, ss. 3 and 5(1).

⁹⁶ *Id.*, s. 27 (3).

⁹⁷ *Ibid.*

⁹⁸ *Id.*, s. 35 (1).

⁹⁹ *Id.*, s. 35 (3).

At national level, the key institutions responsible for copyright enforcement in Tanzania include; COSOTA, the PF, NPS, and the Judiciary of Tanzania. This article however only briefly explains on COSOTA and the Judiciary to avoid repetitions regarding NPS and the PF. The said NPS and PF are discussed in other parts of this article. As pointed out earlier, COSOTA is established under the Copyright and Neighbouring Rights Act.¹⁰⁰ The Office is vested with various powers including the power to sensitize and train its members, institutions and general public on matters related to copyright protection.¹⁰¹

The COSOTA is, among others, responsible for promoting and protecting interests of copyright owners.¹⁰² The Office also collects and distributes royalties regarding rights for which no any Collective Management Organization operates.¹⁰³ Additionally, the copyright office deals with anti-piracy in Mainland Tanzania.¹⁰⁴ To exercise and perform its powers and functions respectively, COSOTA gets funds from fees payable under the establishing law, grants and bequests and such other money or assets as may be received from other sources like subsidy from government.¹⁰⁵

The URT Constitution establishes, inter alia, the judiciary of URT.¹⁰⁶ The judiciary is vested with judicial powers¹⁰⁷ and is the

¹⁰⁰ Cap. 218 [R.E 2023], s. 50.

¹⁰¹ Id, s. 52 (h).

¹⁰² Id, s. 51 (a)

¹⁰³ Id. s. 51 (d).

¹⁰⁴ Id, s. 51 (h).

¹⁰⁵ Id, s. 54 (a)-(c).

¹⁰⁶ Cap. 2 [R.E 2008], Art. 4(1).

¹⁰⁷ Id, Art. 4(2).

authority with final decision in dispensation of justice in Tanzania.¹⁰⁸ This was also affirmed in *Mary Barnaba Mushi v. Attorney General*.¹⁰⁹ Within the judiciary, there are courts established to achieve aforementioned responsibility of dispensing justice. These courts are required to observe, among other principles, non-delay of dispensation of justice and awarding reasonable compensation to victims of wrong doings committed by other persons.¹¹⁰ The URT Constitution further requires all courts to be independent when lawfully exercising their powers of dispensing justice in Tanzania.¹¹¹ The role played by courts of law cannot be disregarded in respect of criminal enforcement against copyright infringement. This calls for measures to be taken to address both legal and institutional challenges facing the judiciary of Tanzania in dispensing criminal justice in copyright infringement cases.

4.0 LEGAL SHORTFALLS

4.1 Construction of the copyright offence

In criminal law, there is a principle of *nullum crimen sine lege*. This principle was acknowledged by Judge E.I. Laltaika in the case of *Salima Said v. Republic*¹¹² who stated that, “At the outset, I am inclined to concur with Mr. Taratibu's assertion that the appellant was convicted of an offence that, in fact, does not exist within the

¹⁰⁸ Id, Art. 107A (1).

¹⁰⁹ The High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 14 of 2022 (Unreported), pp. 9 and 16.

¹¹⁰ Id, Art. 107A (2) (b) and (c).

¹¹¹ Id, Art. 107B.

¹¹² In the High Court of Tanzania, Mtwara District Registry at Mtwara, Criminal Appeal No. 35 of 2021 (Unreported).

provisions of the Penal Code [Cap. 16 R.E. 2019]”.¹¹³ This principle simply means, a person cannot criminally be liable for an act not so criminalized by the law. It is noted that, section 45(1) of the Copyright and Neighbouring Rights Act defines copyright offence by providing that, any person who knowingly violates, or causes to be violated, the rights protected under the Act commits an offence. Additionally, section 24(1) of the Cybercrimes Act also provides for IP offence, copyright being inclusive, by providing that a person using a computer system with intent to violate IPRs protected under any written law commits an offence. This means that, only the acts falling within the scope of the definition of the copyright offence, as provided in these laws, can make the actor concerned criminally liable.

The wording of these laws suggests a mandatory requirement of proving both *actus reus* and *mens rea* before the accused persons are convicted and later sentenced for infringing copyright. Considering the standard of proof in criminal cases, that is proof beyond reasonable doubt, it has been found to be difficult to prove mental element of accused persons in copyright offence. This is different from the position in Zanzibar where the Copyright Act recognizes criminal liability based on proof of *actus reus* and gross negligence.¹¹⁴ This entails that, Zanzibar incorporates relaxed proof of copyright offence, through its Copyright Act, that lessens the standard of proof hence supporting prosecution of copyright offence. Also, the copyright laws of Nigeria and Malawi do not put *mens rea* as an element of the copyright offence.¹¹⁵

¹¹³ Id, p. 7.

¹¹⁴ The Copyright Act of Zanzibar, s. 35(1).

¹¹⁵ The Copyright Act of Nigerian, s. 44 and the Copyright Act of Malawi, s.113.

Furthermore, the wording of provisions under Cap. 218 and Cap. 443 creates loopholes as some acts are not considered crimes hence leading to delay or failure of prosecution. These includes the absence of legal recognition and criminalisation of infringement by possession. Also, presumed copyright infringement is neither recognized nor criminalized under the above mentioned laws. Unlike in Mainland Tanzania, copyright laws in Malawi and Nigeria expressly criminalizes possession of three or more infringing copies other than for private or domestic use (presumed infringement).¹¹⁶ Additionally, copyright laws in Malawi and Nigeria criminalizes the act of possessing any machinery, plate, matrix or other device intended to be used to produce infringing copies.¹¹⁷ Furthermore, Cap. 218 and Cap. 443 are insufficient in dealing with infringements committed in the digital setting. This is different from positions in the Zanzibar and Rwandese copyright laws, laws in these countries at least comprehensively criminalizes circumvention of technological protection measures (TPMs) and falsification of rights management information (RMIs) and the associated infringing acts.¹¹⁸

4.2 Penalty for copyright infringement

The provisions, in respect of the penalty, in the Copyright and Neighbouring Rights Act and the Cybercrimes Act poses challenges to the sufficiency of criminal enforcement against copyright infringement in Mainland Tanzania. The minimum fine

¹¹⁶ The Copyright Act of Malawi, s. 113(4) and the Copyright Act of Nigeria, ss. 36(d), 44 (1) (c) and 44 (2) (c) and (d).

¹¹⁷ *Ibid.*

¹¹⁸ The Copyright Act of Zanzibar, s. 36 and the Law N° 31/2009 of 26/10/2009 on the Protection of Intellectual Property, Arts. 269 and 270.

provided by the law is lower especially when the required *per centum* of the value of pirated copyright material does not exceed such minimum fine. Also the use of the phrases “not less than” and “not exceeding” gives discretionary power to the court to just order exact minimum fine and lower penalty respectively regardless of the gravity of infringement. As a result, giant infringers are left making profits. Giant infringers are not deterred from committing further infringements as they consider their infringing acts to be business and the fines as operational costs thereto.

Unlike the position in Mainland Tanzania, in Zanzibar the copyright law requires courts to impose the amount of fine based on the profits which offender might have made from copyright infringement.¹¹⁹ Hence preventing perpetrators to benefit from their infringing acts and therefore discouraging them from engaging in copyright infringement. Also in Nigeria the Copyright Act, instead of using the phrase “not exceeding” when imposing penalty, uses phrase “at least” for both fine and imprisonment.¹²⁰ The phrase “at least” entails “at the minimum” or “not less than”. The legal positions in Zanzibar and Nigeria prevents copyright infringers to earn or benefit from their infringing acts.

Furthermore, the relevant laws in Mainland Tanzania when providing for the penalty uses the conjunction “or” which entails alternatives.¹²¹ The use of this conjunction is found to lessen the severity of the penalty. This is because, the fine or imprisonment alone is found not to deter commission of further offence

¹¹⁹ The Copyright Act of Zanzibar, s. 35(2).

¹²⁰ The Copyright Act of Nigeria s. 44 (1), (2), (4), (7) and (8).

¹²¹ Cap. 218 [R.E 2023], s. 45 (1) Cap. 443 [R.E 2023], s. 24(2).

compared to the penalty that combines fine and imprisonment. The position in Mainland Tanzania is different from Malawi. The copyright law in Malawi requires courts to impose a penalty of both fine and imprisonment.¹²² This law uses the conjunction “and” when providing for the penalty in respect of copyright infringement.¹²³

Additionally, under the copyright law of Mainland Tanzania, the scope of punishment is narrow. This is because the law does not cover, among others, penalty for continuing infringements. The penalty for continuing infringement discourages infringers from continuing with infringement hence preventing victims from suffering irreparable loss. The position in Mainland Tanzania differs from Malawi. In Malawi, the Copyright Act requires courts to impose, in addition to the normal fine, a separate fine calculated on daily basis during the days in which the alleged infringement continues.¹²⁴

Moreover, Cap. 218, Cap. 443 and Cap. 20 grants discretionary powers to courts regarding orders for compensation to victims of copyright infringement.¹²⁵ This is based on the use of the word “may” that according to the Interpretation of Laws Act, word “may” when used in conferring power implies that the power so conferred may be exercised or not, at discretion.¹²⁶ The use of the word “may” by these laws conflicts with the provisions of the

¹²² The Copyright Act of Malawi, 2016, s. 113.

¹²³ *Ibid.*

¹²⁴ The Copyright Act of Malawi, 2016, s. 113 (1).

¹²⁵ Cap. 218 [R.E 2023], s. 45 (1) (b), Cap. 443 [R.E 2023], s. 24(2) (b) and Cap. 20 [R.E 2023], s. 368.

¹²⁶ Cap. 1 [R.E 2023], s. 53(1).

URT Constitution.¹²⁷ This is because the URT Constitution requires courts to award reasonable compensation to victims of wrong doings.¹²⁸ It uses the word “shall” and according to the Interpretation of Laws Act, word “shall” is imperative and when used implies the function conferred or thing referred to is mandatory, hence must to be performed.¹²⁹

This was also observed in the case of *Enerico Kakala v. Mohamed Mussa (Administrator of Estate of the late Ahmed Zaboro Ahmed)*¹³⁰ when the court stated that, “It is insisted, under section 53(2) of the Interpretation of Laws Act (Cap 1 R.E.2002) that when the word “shall” is used in any written law, in conferring a function, such word shall be interpreted to mean the function must be performed”.¹³¹ This discretionary powers creates a room for courts not to order for compensation hence leaving victims uncompensated for the economic and moral injuries or suffering sustained. This position also conflicts with John Lockean Labor Theory and the Victimology theory of punishment.

4.3 Insufficient protection of moral rights

The Copyright and Neighbouring rights Act while providing for the duration of copyright protection uses the phrase “the economic and moral rights shall be protected during/for”.¹³² This phrase means that even the duration for protection of moral

¹²⁷ Cap. 2 [R.E 2008], Art. 107A (2) (c).

¹²⁸ Ibid.

¹²⁹ Cap. 1 [R.E 2023], s. 53 (2).

¹³⁰ In the Court of Appeal of Tanzania, Civil Application No. 40 of 2011 (Unreported).

¹³¹ Id, p. 6.

¹³² Cap. 218 [R.E 2023], 16 (1)-(5).

rights is limited.¹³³ This law therefore does not recognize the peculiar nature of moral rights as opposed to economic rights. This argument is based on the personhood theory which advocates for unlimited protection of moral rights since these rights protect author's personality, honor or reputation. It is noted that when moral rights are violated, regardless of expiry of term of protection, authors, their heirs, relatives and associates are likely to suffer from personality or reputational injury. Also, 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. Also the *locus standi* to sue or complain expires, meaning that neither civil nor criminal enforcement mechanisms may successfully be initiated against the alleged infringers of moral rights.

5.0 INSTITUTIONAL SHORTFALLS

5.1 Inspections related to copyright infringements

Despite the significant nature of conducting inspections in criminal enforcement against copyright infringement, neither the Copyright and Neighbouring Rights Act nor other copyright protection related laws provide for appointment of sufficient personnel for that purpose. It is remarked here that, there are no officers specifically dealing in inspections aimed at preventing infringement and identifying copyright infringers.¹³⁴ As a result due to, *inter alia*, absence of sufficient number of inspectors, inspection is done rarely.¹³⁵ Hence contributing to continued

¹³³ *Ibid.*

¹³⁴ Officials from COSOTA, Interview by author, (20 March 2024 and 8 July 2024, COSOTA, Dar es Salaam).

¹³⁵ *Ibid.*

copyright infringement in Mainland Tanzania. It should be noted that, effective conduct of these inspections requires specialized personnel with sufficient knowledge in copyright law. Additionally, to achieve desired results these inspections needs to be conducted often and widely.

Unlike in Mainland Tanzania, copyright law in Nigeria and Malawi expressly empowers the Nigerian Copyright Commission (NCC) and the Copyright office of Malawi to appoint copyright officers and inspectors respectively for the purpose of ensuring effective Copyright enforcement.¹³⁶ These officers are, *inter alia*, empowered to enter, inspect and examine at any reasonable time any building or premises which is reasonably suspected to be used for infringing copyright.¹³⁷ Also copyright officers in Nigeria are vested with power to arrest a suspected copyright infringer. Furthermore the copyright law in Nigeria and Malawi defines to be an offence to obstruct, hinder, prevent, or assault copyright officers when performing their duties including the duty of arresting.¹³⁸

More significantly, the Nigerian Copyright Act vests copyright officers with similar powers, rights and privileges exercised and enjoyed by police officers relating to investigation and prosecution of criminal matters.¹³⁹ Similar provisions are reflected in the Copyright Act of Kenya.¹⁴⁰ Further lesson can be drawn from the Tanzania Medicines and Medical Devices Act (TMDA

¹³⁶ The Copyright Act of Nigeria, s. 86 (1) and the Copyright Act of Malawi, s. 94(1).

¹³⁷ *Id.*, s. 86(2) (a) and *Id.*, s. 95.

¹³⁸ *Id.*, s. 86(3) (a) and (d) and *Id.*, s. 96(5).

¹³⁹ *Id.*, s. 86(4).

¹⁴⁰ The Copyright Act of Kenya, s. 42

Act). This law expressly vests the Tanzania Medicines and Medical Devices Authority with power to appoint inspectors and authorize any officers appointed under any written laws whose functions relate to the functions of the Authority to perform specific functions as inspectors under the TMDA Act.¹⁴¹ Also this law expressly provides for powers of the appointed and authorized inspectors.¹⁴² However this is not the case with copyright laws in Mainland Tanzania where COSOTA has no power to appoint copyright inspectors. This shortfall contributes to the insufficiency of criminal enforcement against copyright infringement hence jeopardizing the interests of copyright owners in Mainland Tanzania.

5.2 Investigations on copyright offence

In Tanzania, police officers are key agencies in conducting criminal investigation. According to Hall, police officers are front line in law enforcement¹⁴³ whereas Bohlander in his writing argues that police officers are investigative agents of prosecution.¹⁴⁴ Criminal investigation refers to an investigation which police officers or other person have duty to conduct with view to it being ascertained whether a person should be charged with an offence.¹⁴⁵ Investigation of crimes, including copyright offences, focuses at knowing truth and collecting all necessary

¹⁴¹ Tanzania Medicines and Medical Devices Act, Cap 219 [R.E 2023], s. 105 (1) (a) and (b).

¹⁴² Id, s. 106 (1) and (2).

¹⁴³ Hall, D.E., 2009, p. 287.

¹⁴⁴ Bohlander, M., *Principles of German Criminal Procedure* (2nd Revised Edn.), New York, Hart Publishing, 2021, p. 65.

¹⁴⁵ Curzon, L.B. and Richards, P.H., *The Longman Dictionary of Law* (7th Revised Edn.), England, Pearson Education Limited, 2007, p. 156

evidence related to the offence.¹⁴⁶ However, In Mainland Tanzania, there are no specialized investigators with sufficient knowledge in copyright related matters to effectively investigate reported infringement allegations and collecting all necessary and relevant evidence to support prosecution.¹⁴⁷

The Copyright and Neighbouring Rights Act, Criminal Procedure Act, Police Force and Auxiliary Services Act, the Police General Orders and other relevant copyright and criminal laws do not require such existence of specialized investigators. In the case of *David Peter @ Semboi and Sebastian Justinian @ John v. the Republic*¹⁴⁸ prosecutors failed to prove case beyond reasonable doubt, in respect of unauthorized distribution of copyrighted works, due to insufficient evidence collected by respective investigators. The significant shortfall related to this case transpired during investigation.

Regarding powers to investigate the Copyright Act of Nigeria vests copyright officers, appointed by the NCC, with similar powers, rights and privileges exercised by police officers relating to criminal investigation.¹⁴⁹ This means, NCC, as opposed to COSOTA, is empowered to conduct investigation related to commission of copyright offence as police officers do. A lesson can also be learned from the PCCB Act which empowers the

¹⁴⁶ De Silva, K.B.N., *et. al*, “Criminal Investigation: A Brief Review of Importance of Biological Evidence”, 2(8) *European Scholar Journal*, 2021, p. 9 (pp. 8-12).

¹⁴⁷ SP, Interview by the author, (17 July 2024, Central Police Station-RCO Office, Dar es Salaam).

¹⁴⁸ In the High Court of United Republic of Tanzania, In the District Registry of Bukoba at Bukoba, Criminal Appeal No. 45 of 2022 (Unreported).

¹⁴⁹ The Copyright Act of Nigeria, s. 86(4)

PCCB to investigate any alleged or suspected corruption offence in Tanzania.¹⁵⁰

5.3 Prosecution of copyright infringement cases

Bohlander argues that prosecution is the main actor in accusation in any criminal proceedings.¹⁵¹ Successful prosecution greatly depends on effective investigation because standard of proof in criminal cases is proof beyond reasonable doubt. However, a prosecutor needs to be a person with sufficient knowledge about the case to be prosecuted. Such knowledge enables the prosecutor to make critical assessment of evidences collected, advise accordingly regarding case files received from investigative agencies and efficiently conduct prosecution. To cement on this point Hall argues, failure to detect and successfully prosecute criminals is perceived as a failure of government.¹⁵² Despite all these, there are no IP/copyright specialized prosecutors within NPS and PF. Most of the existing prosecutors lacks sufficient knowledge/skills necessary for efficient and timely conduct of prosecution of IP/copyright offence.¹⁵³ Only few state attorneys have attended IP training in, among other countries, United States (US) with insignificant impact on criminal enforcement against copyright infringement compared to the demand.¹⁵⁴

¹⁵⁰ The Prevention and Combating of Corruption Bureau Act, Cap. 329 [R.E 2023], s. 7 (e) and (f).

¹⁵¹ Bohlander, M., 2021, p. 56.

¹⁵² Hall, D.E., 2009, p. 286.

¹⁵³ Senior State Attorney, Interview by the author, (23 April 2024, NPS Headquarters, Dodoma); and SP, Interview by the author, (17 July 2024, Central Police Station-RCO Office, Dar es Salaam).

¹⁵⁴ Senior State Attorney, Interview by the author (6 May 2024, NPS Headquarter, Dodoma)

On this point, Scheb II and his colleague argue that “prosecutors are central to the administration of criminal justice. It is the prosecutors who determine whether to bring charges against suspected criminals. They have enormous discretion, not only in determining whether to prosecute but also in determining what charges to file.”¹⁵⁵ This entails that it is important to enhance prosecution of uncommon offences like copyright offence to ensure sufficient criminal enforcement thereto. This can effectively be achieved by, *inter alia*, ensuring availability of special and sufficient personnel for conducting prosecution of copyright offence.

Unlike in Mainland Tanzania, the copyright officers appointed by NCC in Nigeria are vested with similar powers, rights and privileges exercised by police officers relating to criminal prosecution.¹⁵⁶ Also, the Nigerian Copyright Act expressly provides prosecution of copyright offence to be one of the powers of NCC.¹⁵⁷ Also in Kenya, the Copyright Act requires the Director of Public Prosecution to appoint prosecutors for the purpose of prosecuting cases arising from the violation of the provisions of the Copyright Act.¹⁵⁸ A lesson can further be drawn from PCCB Act which empowers the PCCB to prosecute corruption offence though subject to directions of the DPP.¹⁵⁹ Also prosecution of corruption offence is one of the means through which PCCB achieves its objectives.¹⁶⁰

¹⁵⁵ Scheb II, J. M., and Scheb, J.M., 2011, p. 29.

¹⁵⁶ The Copyright Act of Nigeria, s. 86(4).

¹⁵⁷ *Id.*, s. 78(2) (a).

¹⁵⁸ The Copyright Act of Kenya, s. 43.

¹⁵⁹ The Prevention and Combating of Corruption Bureau Act, Cap. 329 [R.E 2023], s. 7 (e).

¹⁶⁰ *Id.*, s. 4(2) (e).

5.4 Multiplicity of enforcement institutions

The relevant institutions depend on each other in the completion of criminal enforcement against copyright infringement. For instance, COSOTA having no criminal investigation powers reports copyright infringement allegations to PF for investigation and collection of evidences.¹⁶¹ The NPS also depends on submission of investigation file from the PF from which prosecution can be instituted in courts of law. Likewise, the courts wait to be moved by prosecutors through institution of criminal proceedings. This entails that failure of one or more institutions to effectively perform its or their responsibilities may lead to failure of criminal justice. Hence jeopardizing the interests of copyright owners in mainland Tanzania.

5.5 Budgetary issues

The performance of functions related to protection and criminal enforcement against copyright infringement by relevant institutions calls for finance. Despite this fact, neither COSOTA nor other relevant institutions responsible for criminal enforcement against copyright infringement have special funds designated for copyright enforcement.¹⁶² This is due to fact that neither Copyright and Neighbouring Rights Act nor other relevant laws provides for establishment of specialized fund for financing copyright enforcement. The discussed inspections, investigations, prosecutions, training, and establishment of special

¹⁶¹ State Attorney, Interview by the author, (16 July 2024 NPS Zonal Office, Dar es Salaam); and SP, Interview by the author, (17 July 2024, Central Police Station-RCO Office, Dar es Salaam).

¹⁶² Senior State Attorney, Interview by the author, (23 April 2024, NPS Headquarters, Dodoma); SP, Interview by the author, (17 July 2024, Central Police Station-RCO Office, Dar es Salaam) and official from COSOTA, Interview by author, (20 March 2024, COSOTA, Dar es Salaam).

IP unit demands sound budget for their effective and efficient execution. That being the case, the absence of special fund affects the sufficiency of criminal enforcement against copyright infringement in Mainland Tanzania. This is unlike in Nigeria and Malawi where copyright laws establish special fund used for, *inter alia*, enforcement of copyright.¹⁶³

5.6 Technological impact on copyright enforcement

On the one hand, digitization plays great role in connecting the world.¹⁶⁴ It also contributes to socio-economic development. On the other hand, digitization has introduced new challenges in criminal enforcement against copyright infringement.¹⁶⁵ These challenges include simplified means of copyright infringement, hitches in identifying infringers and tracing them, jurisdictional challenges, remedial challenges, conceptual challenges and challenges on control of information stream.¹⁶⁶ In Mainland Tanzania, technologies within institutions responsible for criminal enforcement against, *inter alia*, copyright infringement is low compared to technology used by infringers.¹⁶⁷ The existing low technology is contributed by budgetary constraints facing these institutions taking into account the fact that modern technologies are expensive. As a result, enforcers face challenges especially in identifying alleged infringers and collecting all relevant evidences to support criminal prosecution. This affects the sufficiency of

¹⁶³ The Copyright Act of Nigeria, ss. 78 (1) (a), 91(1) and 92(a) and (c), and the Copyright Act of Malawi, s. 98 and 99.

¹⁶⁴ Nwogu, M.I.O., 2015, pp. 122-3.

¹⁶⁵ Senior State attorney, Interview by author, (23 April 2024, NPS Headquarter, Cybercrimes section, Dodoma).

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.* Also Police officers, Interview by the author, (16 April 2024, PF Regional Office, Arusha); Police Officers, Interview by author, (26 September 2024, PF Regional Office, Dar es Salaam).

criminal enforcement against copyright infringement. Hence jeopardizing the interests of copyright owners in Mainland Tanzania.

5.7 IP units within institutions

In Tanzania, no units are established specifically for IP/copyright enforcement within relevant criminal enforcement institutions.¹⁶⁸ The absence of special IP Unit negatively affects the capacity of these institutions in ensuring sufficient protection of the interests of copyright owners through criminal enforcement. This is due to minimal attention paid in improving institutional capacity in enforcing uncommon offence like IP/copyright offence. It is different from how the situation is in common offences and in offences for which specific departments or units are established.¹⁶⁹ It should also be noted that, absence of a specific court or tribunal for trial of IP/copyright offence contribute or may lead to delay in completion of trial hence delaying justice. It may also lead to unfair decisions especially where cases are presided by magistrate/judge not knowledgeable enough in IP law or where investigation is not conducted by specialized personnel.¹⁷⁰ A lesson can be drawn from Zambia where within Police Service there is “the Intellectual Property Unit” whose

¹⁶⁸ Senior State Attorney, Interview by the author, (23 April 2024, NPS Headquarters, Dodoma); SP, Interview by the author, (17 July 2024, Central Police Station-RCO Office, Dar es Salaam); and Judge (Rtd), Robert V. Makaramba (7 June 2024, TLS-CLE Seminar on “How to Process Intellectual Property Cases: Copyright and Trademark Infringement”).

¹⁶⁹ Ibid.

¹⁷⁰ State Attorneys, Interview by author (22 April 2024, NPS Regional Office, Dodoma); and Officials from the High Court of Tanzania, Commercial Division, Interview by the author, (8 July 2024, Sabasaba Grounds, Dar es Salaam).

achievement has led to Zambia being internationally recognized as a good example in IP enforcement.¹⁷¹

5.8 Enforcers' altitude on copyright enforcement

Most police officers consider IP/copyright infringements to attract civil actions as opposed to criminal measures. This was partly evidenced by the fact that even the copies of laws creating copyright offence is hardly found in the police stations.¹⁷² Also victims of copyright infringement are often directed by police officers to file civil cases. These officers normally say 'IP/copyright cases are civil ones'. This indicates that many copyright infringement cases are not filed as criminal cases due to this bar victims of copyright infringement encounters at the level of reporting their complaints. Also advocates mostly prefer and advises their clients to enforce their copyright through civil cases in which compensation is one of primary remedies awarded by the court. But because civil litigation is expensive, some victims abandon their claims or allegations against possible convicts of copyright offence. Hence encouraging further commission of copyright infringement in Mainland Tanzania.

5.9 Capacity building within the institutions

It is noted that, IP law is offered as an optional course or just a module within courses in colleges and Universities.¹⁷³ This has resulted into few students opting for IP law. This entails that

¹⁷¹ Zambia Police, available at <<https://www.zambiapolice.gov.zm/index.php/2012-11-23-08-17-17/directorates/criminal-investigations/financial-investigation-and-interpol/intellectual-property-unit&ved>> (accessed 9 June 2024).

¹⁷² SP, Interview by the author, (17 July 2024, Central Police Station-RCO Office, Dar es Salaam).

¹⁷³ Academicians, Interview by Author, (9 September 2024, UDSOL, Dar es Salaam, 23 April 2024, UDOM-SoL, Dodoma and 7 June 2024, Mzumbe University, Morogoro).

there are few lawyers having sufficient knowledge in IP law and associated skills especially on criminal enforcement against copyright infringement. This further suggests that, relevant institutions like Judiciary, PF and NPS has few lawyers with sufficient knowledge and skills in IP for effective criminal enforcement against copyright infringement. Despite the aforesaid shortfall, very rarely IP specific training are conducted to enhance IP understanding among lawyers and other personnel within institutions.¹⁷⁴ Hence affecting the sufficiency of criminal enforcement against copyright infringement in Mainland Tanzania. The importance of capacity buildings to prosecutors and other relevant law enforcers was emphasized by Levira in her thesis.¹⁷⁵ She argues that, “wildlife legislation requires wildlife officials to act as prosecutors without compelling them to undergo legal training, which poses a practical problem because these officials are not conversant with the rules of evidence and criminal procedure and often fail to perform their duties properly.”¹⁷⁶

6.0 IMPACTS ASSOCIATED WITH THE CURRENT LEGAL AND INSTITUTIONAL FRAMEWORK

The impacts associated with current legal and institutional framework on criminal enforcement against copyright infringement in Tanzania include; failure in prevention of infringements due to lack of special inspectors/officers

¹⁷⁴ Judge (Rtd.), Robert V. Makaramba (7 June 2024, TLS-CLE Seminar on “How to Process Intellectual Property Cases: Copyright and Trademark Infringement”); SP, Interview by the author, (17 July 2024, Central Police Station-RCO Office, Dar es Salaam); Senior State Attorney, Interview by the author, (23 April 2024, NPS Headquarters, Dodoma).

¹⁷⁵ Levira, 2012, p. 18.

¹⁷⁶ Ibid.

designated for the conduct of regular inspections aimed at ensuring compliance to copyright laws. Another impact is delay and/or failure in completion of investigation and collection of sufficient and relevant evidence. As noted, this impact is contributed by the absence of investigators specialized and with sufficient knowledge and skills in investigating IP/copyright offence. Delay and/or failure of prosecution is another impact caused by insufficient prosecutors specialized and with sufficient knowledge and skills in prosecuting IP/copyright offence.

Moreover, the persistence of copyright infringement contributes to the copyright owners' substandard livelihood because of the economic loss they suffer from infringements of copyright. Also, continued insufficient of copyright enforcement discourages creativity, domestic investments and flow of FDI's. Additionally, because infringers are not captured by the tax system there has been noted minimal copyright-industry's contribution to the Government revenue. Lastly, violation of human rights and non-compliance to the international standards by Tanzania form part to the impacts of the current legal and institutional framework on criminal enforcement against copyright infringement in Mainland Tanzania.

7.0 CONCLUSION AND RECOMMENDATIONS

7.1 Conclusion

This article concludes that the legal and institutional framework on criminal enforcement against copyright infringement is not sufficient to ensure protection of copyright owners' interests in Mainland Tanzania. The findings demonstrate that the relevant legal and institutional framework is tainted with challenges that negatively affect its sufficiency in ensuring protection of the

interests of copyright owners. These challenges inform the responsible personnel and authorities on the necessary policy, legal and institutional measures which needs to be taken to ensure sufficient copyright protection in Mainland Tanzania. It is evidenced from the findings that, the legal positions in Zanzibar, also from some selected commonwealth countries, from PCCB and TMDA are good, from which Mainland Tanzania can draw lessons. It is also the conclusion of this article that, to honor her international obligation on criminal enforcement against copyright infringement, Mainland Tanzania is required to ensure sufficient reflection, in its legal and institutional framework, of the theories discussed in this article.

7.2 Recommendations

This article recommends for amendment of relevant laws from which legal and institutional challenges have been identified. The Copyright and Neighbouring Rights Act for instance should be amended by, inter alia, adding the phrase “or with gross negligence” immediately after the word “knowingly” under section 45 (1). This is recommended in order to widen the scope of criminal liability for copyright infringement and lessen the standard of proof on part of prosecution. Also, this Act should be amended by deleting discretionary powers of court in ordering payment of compensation to victims of copyright infringement and deleting the use of technical terms like “or” and “not exceeding” to maintain severity of penalties. Also, the use of the phrase “not less than” in the penalty should be accompanied with legal guidance on the calculation of the extent of fine and imprisonment in order to prevent infringers from making profit from their infringing acts. Furthermore, this law should be amended by deleting time limitation in respect of moral rights protection.

Moreover, Copyright and Neighbouring Rights Act should be amended by introducing new sections providing for powers of COSOTA to appoint copyright inspectors as well as COSOTA's power to investigate and prosecute copyright offence. Also introducing new sections that comprehensively criminalizes digital copyright infringements, possession of infringing copies and devices or equipment used or intended to be used to commit copyright infringement as well as possession of certain number of copies of same work or related subject matter (presumed infringement). When effecting these amendments within the Copyright and Neighbouring Rights Act, Mainland Tanzania can draw lessons from other commonwealth jurisdictions, Zanzibar as well as from domestic institutions like PCCB and TMDA.

Also, the Cybercrimes Act should be amended under section 24 (1) by adding criminal liability upon proof of gross negligence in the construction of IP offence, and deleting the phrase "as the court may deem just" under section 24 (2) (b) to remove discretionary powers of court in awarding reasonable compensation to victims of IP infringement, including copyright owners. Amendment of Cybercrimes Act should involve introduction of new sections comprehensively criminalizing circumvention of TPMs and falsification of RMI and related acts.

Additionally, the amendment of the Cybercrimes Act should include interpretation of the phrases "Technological Protection Measures", "Rights Management Information" and the terms "reproduction", "distribution" and "importation" of protected works in digital setting to avoid existence of contradicting interpretations when digital copyright infringement is the subject matter.

Moreover, it is recommended that the Criminal Procedure Act should be amended by deleting the term “may” to avoid the discretionary power by the court in ordering compensation to victims of wrong doings. Further, the Police Force and Auxiliary Services Act by should be amended by adding new sections or subsections establishing a special fund for enforcement of IP/copyright crimes. Additionally, the Police General Orders (PGO) needs to be amended by introducing new Order establishing a specific Unit on enforcement of IP within the PF which may be named as “the IP Unit”.

This article also recommends for the strengthening of the institutional cooperation and coordination among law enforcing agencies. Also the recommended specific IP units should be established and operationalized to achieve the expectations. Capacity building within institutions is also highly recommended. Further, this article recommends for effective use of the recommended copyright inspectors. Lastly, this article recommends for adoption of the IP Policy, awareness raising and inclusion of IP course in the academic curriculum to supplement the legal and institutional efforts on criminal enforcement against copyright infringement in Mainland Tanzania. It is lastly argued that, sufficient consideration of these recommendations will ultimately assist Tanzania in complying with her international legal obligation on protection, promotion and criminal enforcement of copyright against infringement. Hence ensuring sufficient protection of copyright owners' interests in Mainland Tanzania.