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Protecting music copyright owners in Southern Africa: Need for Regulatory Convergence

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Intellectual property, as an intangible form of property, is able to transcend borders and this is especially the case with music. To this end, the South African music is particularly consumed in Botswana, Lesotho, Mozambique, Swaziland and Zimbabwe and vice-versa because of shared languages in these countries. The question then becomes – to what extent are South African music copyright owners or holders protected beyond South African borders especially in the abovementioned countries. This research therefore seeks to compare copyright laws in South Africa and the countries mentioned above specifically focusing on the rights of copyright owners, limitations to such rights and remedies in cases of infringement. From the analysis of the laws in these countries, the research will then call for harmonisation of laws with the aim to protect copyright owners not only in South Africa but in Southern Africa under the auspices of Southern African Development Community (SADC).

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1 Introduction

South Africa has made strides in protecting the intellectual property rights (IPRs) of music copyright holders through the enactment of Copyright Act 98 of 1978 as amended. While the Act is fairly old and need revision to respond to 21st century challenges facing owners of copyright in music, it nevertheless has fairly protective clauses. Thus, the Copyright Act protects literary works, musical works, artistic works, and sound recordings among others.¹ It allows for the establishment of collecting societies, which are necessary for collection of royalties on behalf of the members,² and most importantly creates a procedure for settlement of royalty disputes. Today, South Africa is in the process of passing a revolutionary Copyright Bill, which shall ensure stronger protection of music copyright owners' moral and economic rights, and respond to the challenges on copyright as created by advancements in technology and internet.

On the other hand, intellectual property as an intangible form of property is able to transcend borders and this is especially the case with music. To this end, the South African music is particularly consumed in Botswana, Lesotho, Mozambique, Swaziland and Zimbabwe because of shared languages in these countries. The question then becomes – to what extent are South African music copyright owners or holders protected beyond South African borders especially in the abovementioned countries. This research therefore seeks to compare intellectual property laws in South Africa and the abovementioned countries specifically focusing on the rights of copyright owners, limitations on such rights and remedies in cases of infringement. From the analysis of the laws in these countries, the research will then call for harmonisation of laws with the aim to protect copyright owners not only in South Africa but in Southern Africa under the auspices of Southern African Development Community (SADC).

This research and its primary goal (harmonisation of copyrights) will be beneficial to copyright owners in Southern Africa. Often, and especially in South Africa, we tend to focus on harmonisation and enforcement of IPRs of South Africans with the Western world, forgetting that South African music is consumed in Southern Africa and not in Brussels. On the other hand, music from the above-mentioned countries is often produced in South Africa due to the fact that South African production companies are well established in comparison to those of its neighbours, and copyright holders in the countries in question are mostly

*BA Law, LL.B (Lesotho); LL.M (Essex); PhD (Bern). This work was supported by the MI/WTI SECO Project.

¹ See in particular, sections 6, 7, 8, 9A.

² Section 9A.

members of South African collecting societies Therefore, the call for harmonisation will not only benefit South African copyright owners but also authors and producers from the region.

Music entails literary works (the words), musical works, and sound recordings. These are therefore the kinds of copyright works that will be discussed in this paper. Audio-visuals will not be discussed here but will be discussed in the next series.

Whereas there are many facets of copyrights that are necessary for protection of music copyright holders and performers, this research focuses on the following core requirements: requirements for vesting of copyright; content of copyright; limitations to exclusive use of copyrights; copyright infringement; and remedies. The next series of this research will focus on royalties and collecting societies in the countries discussed herein.

2 Copyright Protection

2.1 Requirements for vesting of copyright in music

All the countries in discussion are parties to the 1886 Berne Convention for the Protection of Literary and Artistic Works with the oldest member being South Africa, which acceded to the Convention in 1928, followed by Zimbabwe in 1980, Lesotho in 1989, Swaziland in 1998 and Mozambique as recent as 2013.³ The Berne Convention is the international treaty that seeks to provide minimum standards for the protection of copyright, and it shall therefore be taken as a baseline against which the countries under discussion are assessed. The WIPO Copyright Treaty (WCT) will not be discussed despite the effect of internet and technology on protected works because only Botswana is a contracting party among the countries in discussion, and again given the controversy regarding the standards imposed by the WCT on developing countries.

The requirements for vesting of copyright protection under the Berne Convention are that the work must fall under Article 2, of which the works in discussion (musical works, sound recordings/phonograms and literary works) are covered. With regards to material fixation, the Berne Convention leaves it upon member states to prescribe whether or not the works shall be protected unless they have been fixed in some material form.⁴ Regarding the jurisdictional requirements, the Berne Convention mandates member states to grant protection to works authored by nationals or residents of any of the countries of the Union irrespective of whether or not such works are published.⁵ Non-national or residents of the members states of the Union can be granted protection on their works provided such works

³ Berne Convention Contracting Parties, available at: http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15, accessed 19 July 2016.

⁴ Berne Convention, Art 2.2.

⁵ Berne Convention, Art 3.1(a)

are first published in the country of the Union.⁶ This therefore indicates that publication is not a requirement for works authored by nationals or residents of member states of the Union whereas non-nationals or non-residents must have their work first published in the Union member state.

South Africa, Swaziland and Zimbabwe

The requirements for copyright protection in South Africa, Swaziland and Zimbabwe will be stated together as they are strikingly similar. For these three states, the following requirements must be satisfied in order for the work to be granted copyright protection:

Original works

Both states protect musical works, literary works and sound recordings; quality is not an issue, what is required is originality and the threshold is very low unlike under patent law where the work must reflect human ingenuity.⁷

Existence in material form

The work must exist in material form except for broadcasts or programme carrying signal.⁸ To this end, in order for music to ultimately get protection in South Africa, Swaziland and Zimbabwe, the musical works must exist in writing in a form of musical notations, the words must be written down to be protected as literary works, and the entire work (melody and words) must be recorded in order to get protection as sound recording.

Jurisdictional requirements: Qualified person or work first published

Further, the work must be authored by the qualified person, who can either be a South African citizen or resident or a person domiciled in South Africa,⁹ or a body corporate incorporated under South African laws.¹⁰ Otherwise, copyright can be conferred on works that are eligible for copyright and which are first published in South Africa.¹¹ Zimbabwe adopts the same jurisdictional requirements as South Africa but it extends the same protection that it gives to its citizens or residents to citizens or residents of the Berne Convention Union members.¹² In Swaziland, protection is given to persons who are British Commonwealth residents or citizens at the time of publishing the work;¹³ otherwise, the work itself must have

⁶ Art 3.1(b) provides that: authors who are not nationals of one of the countries of the Union, for their works first **published** in one of those countries, or simultaneously in a country outside the Union and in a country of the Union

⁷ Swaziland, s 3(1); Zimbabwe, s 10

⁸ South Africa Copyright Act, s 2; Swaziland Copyright Act, s 2; Zimbabwe s 10(2).

⁹ Copyright Act, s3(1)(a)

¹⁰ Copyright Act, s3(1)(b)

¹¹ Copyright Act, s4(1)(a)

¹² Zimbabwe Copyright Act, ss 9(2)(b), 10 & 11.

¹³ Swaziland Copyright Act, s3(1)(b)

first been published in the British Commonwealth territories.¹⁴ However, if the country from which the author comes does not offer protection or adequate protection to the works of British Commonwealth, the Minister may pass a Gazette limiting the application of this Act to such authors.¹⁵

Lesotho, Botswana and Mozambique

These countries are also grouped together given the similarities in their laws, and this is so as to avoid repetition. To this end, Lesotho, Botswana and Mozambique require literary works, sound recordings, musical works to meet the following requirements:

Originality

The work must be original for it to get protection, and the quality of the work does not determine whether the work will get protected or not.¹⁶ Interestingly, the work need not be complete for it to qualify for protection in Mozambique;¹⁷ thus, protection starts from the moment of creation.

Jurisdictional requirements: Qualified person or first publication of the work

The work must be authored by a qualified person, who can either be a national or resident of Lesotho, Botswana or Mozambique respectively.¹⁸ Otherwise, the work must first be published in Lesotho, Botswana or Mozambique respectively, and this means the work can first be published abroad and but it must also be published in Lesotho/Botswana/Mozambique within 30 days. Botswana and Mozambique also give recognition or protection to works that are protected by any international convention to which Botswana or Mozambique is a party respectively.¹⁹

¹⁴ Swaziland Copyright Act, s3(1)(a).

¹⁵ Swaziland Copyright Act, s23.

¹⁶ Lesotho Copyright Order, s3(1); Botswana Copyright Act, s 3(1). Note that Sound recordings are not listed on the examples but the list is non-exhaustive, therefore it can be read in as well. Also, despite not mentioned in the list of examples of literary works, sound recordings are referred to throughout the Act with section 35(4) specifically making reference to them; Mozambique Copyright Act, s 4(1). Similar to Botswana, there is no mention of sound recordings in the Mozambique Copyright Act and unlike Botswana, the list of examples of literary works is exhaustive and therefore it will be difficult to incorporate sound recordings.

¹⁷ Mozambique Copyright Law, s3(2)

¹⁸ Lesotho Copyright Order, s38(1)(a); Botswana Copyright Act, s 35(1); Mozambique Copyright Act, s 3(1).

¹⁹ Botswana Copyright Act, s35(2); Mozambique Copyright Act, s 3(1)(e).

Summary of the requirements for copyright protection

Berne Convention	South Africa	Zimbabwe	Swaziland	Lesotho	Botswana	Mozambique
Originality	Originality	Originality	Originality	Originality	Originality	Originality
Choice on material fixation	Material fixation	Material fixation	Material fixation	Material fixation not a requirement	Material fixation not a requirement	Material fixation not a requirement
Publication required for works not authored by nationals or residents of member states of a Union.	Publication required for works not authored by SA citizens or permanent residents	Publication required for works not authored by Zimbabwean citizens, residents or authors from designated countries	Publication required for works not authored by British Commonwealth citizens or residents	Publication is required for works not authored by Lesotho nationals or residents	Publication is required for works not authored by Botswana nationals or residents	Publication is required for works not authored by Mozambique nationals or residents
Qualified person: citizen or resident of members of the Union otherwise the work must first be published in the member state of the Union	Qualified person: citizen or permanent resident of South Africa; OR work eligible for copyright & first published in South Africa	Qualified person: citizen, resident, domicilii of Zimbabwe or designated country OR work to be first published in Zimbabwe or designated country	Qualified person: British Commonwealth citizen or resident OR work must be first published in the British Commonwealth territories	Qualified persons: citizens or residents of Lesotho OR work first published in Lesotho	Qualified persons: citizens or residents of Botswana OR work first published in Botswana Protects works that are protected by any international treaty to which Botswana is a party to.	Qualified person: citizens or residents of Mozambique OR work first published in Mozambique OR published abroad but issued in Mozambique Protects works that are protected by an international treaty to which Mozambique is party to.

2.2 Nature of copyright protection in literary, audio visual, musical works and sound recordings

This section discusses the nature of copyright protection that is given to copyright holders in the respective jurisdictions in respect of literary, musical works and sound recordings. The nature of copyright protection centres on the restricted acts; that is, those actions that only the owner of copyright can perform to the exclusion of everybody else who does not have authorisation.

Berne Convention

At the Berne Convention, the copyright owner in respect of literary and artistic works has the following exclusive rights:

- The right of **translation** throughout the term of protection.²⁰
- The right of **reproduction** in any manner or form.²¹ However, individual countries are given a right to determine limitations on this right although such limitation must not conflict with the normal exploitation of the work and does not unreasonable prejudice the legitimate interests of the holder of copyright.²²
- The right of **public performance** of their musical works by any means or process and the right of **communication to the public** of their musical works.²³
- The right to authorise **broadcasting, rebroadcasting** of their works and communication to the public by wire or any other means of wireless diffusion of signs, sounds or images.²⁴
- The right of authorizing **public recitation** and communication to the public.²⁵
- The right of **adaptations**, arrangements and other alterations of their works.²⁶

Therefore, the owner of copyright therefore has exclusive rights to do the above actions or to authorise performance of the rights referred to above.

South Africa, Swaziland and Zimbabwe

Owing to the similarities between South African and Zimbabwean copyright laws, these two countries will be grouped together to avoid repetition. In South Africa and Zimbabwe, the owner of copyright in respect of literary and musical works has exclusive rights to do or to authorise the following actions:

- Reproducing the work in any manner or form;²⁷
- Publishing the unpublished work;²⁸
- Performing the work in public;²⁹
- Broadcasting the work;³⁰

²⁰ Berne Convention, Art 8.

²¹ Berne Convention, Art 9(1).

²² Berne Convention, Art 9(2).

²³ Berne Convention, Art 11(1).

²⁴ Berne Convention, Art 11*bis*

²⁵ Berne Convention, Art 11*ter*.

²⁶ Berne Convention, Art 12.

²⁷ Swaziland, s 3(2)(a); Zimbabwe Copyright Act, s 17(a)

²⁸ Swaziland s 3(2); Zimbabwe Copyright Act, s 17(b)

²⁹ Swaziland, s 3(2); Zimbabwe Copyright Act, s 17 (e)

³⁰ Zimbabwe Copyright Act, s 17(d)

- Causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;³¹
- Making an adaptation of the work;³² and,
- Translating the work.³³
- With regard to sound recordings, the following are additional exclusive rights of the copyright owner:
 - o Making a record embodying the sound recording;³⁴
 - o Letting or exposing for hire by way of trade a reproduction of the sound recording;³⁵
 - o Exclusively to South Africa, the owner of copyright has the right of communication of sound recording to the public.³⁶
 - o Exclusively to Zimbabwe, the owner of copyright has a right of making the work available on a computer network,³⁷ and the right to import or export the work.

Lesotho, Botswana and Mozambique

Due to similarities, these three countries are grouped together as well and the differences will be highlighted. Therefore the owner of copyright has the exclusive rights to perform or authorize performance of the following acts:

- Reproduce the work;³⁸
 - Perform the work in public;³⁹
 - Broadcasting the work;⁴⁰
 - Distribution the work;⁴¹
 - Make a translation;⁴² and
 - Make an adaptation.⁴³
- Specifically for Botswana, the owner of copyright has the following additional rights:
 - Import copies of the work, Mozambique goes further to include exporting the work⁴⁴

³¹ Zimbabwe Copyright Act, s 17(f)

³² Zimbabwe Copyright Act

³³ Zimbabwe Copyright Act, ss 17(g) & 20(f); Copyright Act of South Africa, s 6(g).

³⁴ Swaziland Copyright Act, s 3(2)(d); Zimbabwe Copyright Act s 20(a)

³⁵ Zimbabwe Copyright Act, s 20(g)

³⁶ South Africa Copyright Act, s9(a) – (e).

³⁷ Zimbabwe Copyright Act s 19 (e)

³⁸ Mozambique Copyright Act, s 7(1)(a)

³⁹ Mozambique Copyright Act, s 7(1)(e)

⁴⁰ Mozambique, s 7(1)(g)

⁴¹ Lesotho Copyright Order, specifically refers to distribution by cable or any other means; Botswana Copyright Act refers to distribution by way of sale, rental or otherwise,; Mozambique s 7(1)(d)

⁴² Mozambique s 7(1)(b)

⁴³ Lesotho Copyright Order, s7(a) – (c); Mozambique s 7(1)(c)

- Public display;⁴⁵
- Communication to the public of the work.⁴⁶
- Make sound recordings available to the public by wire or wireless means to enable members of the public to access the work at the time and place individually chosen by them (making available).⁴⁷

Summary of nature of exclusive rights

Berne Convention	South Africa	Zimbabwe	Swaziland	Lesotho	Botswana	Mozambique
translation	translation	translation	Publishing the translation	translation	translation	translation
Reproduction	reproduction	reproduction	reproduction	reproduction	reproduction	reproduction
Musical works: Public performance & communication to the public	Public performance	Public performance	Public performance	Communication to the public by public performance	public performance	Public performance
Broadcasting, rebroadcasting and communication to the public	broadcasting	broadcasting		broadcasting	broadcasting	broadcasting
Public recitation & communication to the public						
adaptations	adaptations	adaptations		adaptations	adaptations	adaptations
	Causing the work to be transmitted in a diffusion service	Causing work to be transmitted in a cable programme service				
	Publishing unpublished work	Publishing unpublished work	Publish unpublished work			
	Sound recordings: Communication to the public Making a record of	Sound recordings: Making a	Making a		Sound recordings: Communication to the public	

⁴⁴ Mozambique s 7(1)(f).

⁴⁵ Mozambique s 7(1)€ which refers to presenting the work in public

⁴⁶ Botswana Copyright Act, s7(a) – (i)

⁴⁷ Botswana Copyright Act, s25(1) (f).

	sound recording	record of sound recording	record of his work		First public distribution by rental or lending	Sale, rental
	Letting or exposing for hire	Selling, letting or exposing for hire		Distribution by wire or any other means	Making available	
		Making the work available on a computer network			Importing	Importing and exporting
		Importing and exporting				

2.3 Limitations

States have an obligation to ensure that intellectual property rights holders are protected during the time that their monopoly rights are in existence; yet on the other hand, there is a duty to ensure that the public can access copyrighted work, without authorisation, for legitimate reasons. It is for this reason that there are exceptions against the exclusive rights of copyright holders in respect of copyrighted work. The breadth of exceptions undoubtedly encroaches on the exclusive rights of copyright holders such that the wider the exceptions, the lesser the protection for copyright holders. Basically, states that limit exclusive rights extensively become unattractive to copyright holders. The discussion below is centred on the exceptions allowed in the jurisdictions cover herein:

Berne Convention

The Berne Convention allows certain acts to be done by third parties without authorisation of the copyright holder. To this end, the following are the exceptions to the restricted acts:

- Quotations from the work which is already made available to the public lawfully is allowed, provided their making is compatible with fair practice and provided also that the source and name of the author is mentioned.⁴⁸
- Utilization of literary and artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice and provided that mention of the source and name of the author is made.⁴⁹

⁴⁸ Berne Convention, Art 10(1) and (3).

⁴⁹ Berne Convention, Art 10(2) and (3).

- For reporting current events.⁵⁰
- For sound recordings in particular, countries are given permission to determine special circumstances under which reproduction can be made without the holder's authorization.⁵¹
- Compulsory licensing for musical works but subject to equitable remuneration which shall be determined by the competent authority.⁵²

South Africa, Swaziland and Zimbabwe

Quotations

Third parties can quote from literary or musical works provided such quotation is compatible with fair practice, the extent of quotation does not exceed fair practice and sufficient acknowledgment is given.⁵³

Fair use or fair dealing

Third parties can perform the restricted acts in respect of copyrighted work without authorisation provided they do so for purposes of

- research or private study;⁵⁴
- private or personal use.⁵⁵
- criticism or review of the protected work in question.⁵⁶
- reporting current events.⁵⁷

However, it is expected that the source and name of the author be mentioned. The requirement to mention source and name of the author applies even to works that are lawfully in the public domain.⁵⁸ The above mentioned exceptions are generally termed fair use in South Africa.

Judicial proceedings

Works, including sound recordings, that are under copyright protection can be used without authorisation if they are used for purposes of judicial proceedings.⁵⁹

Illustrations for teaching purposes

⁵⁰ Berne Convention, Art 10bis.

⁵¹ Berne Convention, Art 9(2).

⁵² Berne Convention, Art 13(1).

⁵³ Zimbabwe Copyright Act, s 31.

⁵⁴ Zimbabwe s 24(1); Swaziland, s 4(1)(a)

⁵⁵ South African Copyright Act, s12(a); Zimbabwe s 42 provides that private recording of sound recording or musical work by a person for a private use of himself and his family shall not constitute an infringement and also section 41 which provides for recording for programmes for personal use.

⁵⁶ South African Copyright Act, s12(b); Zimbabwe s 29(1)(a); Swaziland s 4(1)(a)

⁵⁷ South African Copyright Act, s12(c); Zimbabwe s 29 (1)(b).

⁵⁸ South African Copyright Act, s12(3).

⁵⁹ South African Copyright Act, s12(2); Zimbabwe s 28.

Further, works can be used without authorisation if such works are used for illustration in any publication, broadcast or sound or visual record for teaching provided source and name of author is mentioned.⁶⁰

Reproductions by broadcasters or Ephemeral recordings

Any reproduction by broadcaster is not an infringement provided reproduced copies are destroyed six months after they were made, and this includes sound recordings.⁶¹ However, copies of exceptional documentary nature may not be destroyed.⁶²

Demonstrations by dealers

The copyright in a literary or musical work shall not be infringed by the use thereof in a bona fide demonstration of radio or television receivers or any type of recording equipment or playback equipment to a client by a dealer in such equipment. This exception equally applies to sound recordings.⁶³

Specifically for Zimbabwe, the following are additional exceptions:

Educational institutions

Educational institutions are allowed, without authorization, to make copies of passages of literary or musical works for purposes of instruction. However, such copying cannot exceed the prescribed limits; and, it is not allowed if there is a license scheme available to authorise such copying.⁶⁴ Interestingly, no act of copying shall be permitted under this section if it conflicts with a normal exploitation of the work concerned or prejudices the legitimate interests of the holder of copyright in the work.⁶⁵

Libraries are allowed to make copies of protected works for the library provided it is not reasonably possible to purchase a copy rather than reproducing it.⁶⁶

Public reading or recitation

A reading or recitation of a reasonable extract by one person is permitted provided sufficient acknowledgement is given.⁶⁷

Specifically for Swaziland, a compulsory license can be issued against the owner of copyright who refuses to republish or allow republication or to allow public performance of the work, and this can happen after the death of the author of literary or musical works.⁶⁸

⁶⁰ South African Copyright Act, s12(4); Zimbabwe Copyright Act, s 25(1)

⁶¹ South African Copyright Act, s12(5)

⁶² South African Copyright Act, s12(5)(b); Zimbabwe Copyright Act, s 37.

⁶³ South African Copyright Act, s12(12); Zimbabwe Copyright Act, s 39.

⁶⁴ Zimbabwe Copyright Act, s 25(6).

⁶⁵ Zimbabwe Copyright Act, s 25(7).

⁶⁶ Zimbabwe Copyright Act, s 26(1).

⁶⁷ Zimbabwe Copyright Act, s 32(a); Swaziland Copyright Act, s 4(1)(f)

Otherwise, Swaziland is an outlier with only three exceptions: compulsory license, public recitation and fair dealing. Fair dealing composes of private study, research, criticism or review or newspaper summary.

Lesotho, Botswana and Mozambique

Private use

Anyone can reproduce, translate, adapt, arrange or transform protected works without authorisation provided they do so for personal or private use.⁶⁹ Botswana and Mozambique refer to reproduction only and they not cover translation and adaptation.⁷⁰ Further, Botswana qualifies this exception (reproduction for personal use) in that reproduction does not extend to a whole or substantial part of musical works in the form of notation or where reproduction will conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author or other owner of the copyright.⁷¹ In Mozambique, this exception does not include graphic representation of musical works.⁷²

Reporting current events

Reproduction and broadcasting, for purposes of reporting current events, of short excerpts of a work seen or heard in such events.⁷³

Quotations subject to fair practice

Quoting from literary or musical works provided such quotation is compatible with fair practice, the extent of quotation does not exceed fair practice and sufficient acknowledgment is given.⁷⁴

Inclusion in another work

Quotation from protected work can be included in another work without permission provided the source and name of the author is cited and provided such inclusion complies with fair practice.⁷⁵

⁶⁸ Swaziland Copyright Act, s 6.

⁶⁹ Lesotho Copyright Order, s 9(a)(i).

⁷⁰ Mozambique, s 9(1).

⁷¹ Botswana Copyright Act, s13

⁷² Mozambique Copyright Act, s 9(2)(b).

⁷³ Botswana Copyright Act, s 18(b); Mozambique, s 14(b).

⁷⁴ Botswana Copyright Act, s 14; Mozambique, s 10.

⁷⁵ Lesotho Copyright Order, s 9(a)(ii).

Illustration for teaching

The three countries concerned grant an exception to the exclusive use of copyright work if such use is for illustration in publications, broadcasts, distribution by cable, sound or visual recordings for teaching purposes.⁷⁶ Interestingly, Botswana qualifies this exception and allows such use only if there is no collective license available to authorize such use.

Reproduction by public non-profit institutions

Reproduction of protected works which have already been made available to the public can be made by public institutions such as national museums, libraries, professional bodies, universities and schools provided that the number of copies made and used thereof is limited to the needs of the institution making copies.⁷⁷ Botswana allows this exception provided there is no collective license offered by a collective administration to authorize such copying. Further, unlike Lesotho, Botswana only allows a single copy to be made.

Ephemeral copies made by broadcasters

Just as is the case in South Africa, broadcasters in Lesotho are allowed to make temporary copies of protected works using their own facilities but such copies must be destroyed within a period of six months. However, if copies are of exceptional documentary nature, one copy can be preserved in official archives.⁷⁸

Specifically for Lesotho, the following exceptions are applicable:

Distribution by cable to recipients in one building or block of buildings

It is allowed that distribution of broadcast work can be made where the recipients are in one building or group of buildings none of which is separated from another building by street or public road. This exception caters for hotels or block of offices among others.⁷⁹

Compulsory License

Lesotho allows reproduction and publication, without the author's permission, of a particular edition subject to the license accorded by the Minister.⁸⁰

Further, Lesotho has a peculiar exception under which a license to one person for recording musical works gives everybody a license to record such work. Thus, the Copyright Order provides that where an author authorizes any person to record his musical works, and where such recording is made in Lesotho or imported into Lesotho, any other person can do a sound recording of such work without authorization of the author/owner.⁸¹ However, this recording is subject holder of copyright being notified and to payment of equitable remuneration which

⁷⁶ Lesotho Copyright Order, s 9(a)(iii); Botswana Copyright Act, s 15; Mozambique, s 11.

⁷⁷ Lesotho Copyright Order, s 9(f); Botswana Copyright Act, s 16.

⁷⁸ Lesotho Copyright Order, s 9(h); Mozambique, s 17.

⁷⁹ Lesotho Copyright Order, s 9(b);

⁸⁰ Lesotho Copyright Order, s 11.

⁸¹ Lesotho Copyright Order, s12.

shall be determined by the Minister through the Government Gazette. Despite the Order being passed in 1989, there is no Government Gazette determining remuneration to be paid.

Importation for personal use

Botswana and Mozambique allow importation for private use. Thus, any person is allowed to import protected work without authorization provided the work is for personal use.⁸²

Temporary reproduction

This exception is applicable in Botswana only. It allows those situations where work is to be transmitted through an intermediary, which unavoidably has to make a copy of the work to be transmitted. This form of copying or reproduction is an exception to the restricted right of copying because it is an accessory to the transmission of the work. The content that is sent is technically copied, sent through internet service providers (ISPs) or routers and then deleted immediately with the resultant effect that no copies of the content are stored.⁸³

These last two exceptions are only applicable to Mozambique:

Reproduction for judicial purposes

It is allowed that for reproduction of protected work can be made for judicial purposes.⁸⁴

Public performance for official or religious purposes

Public performance of a work for official or religious purposes provided the work is publicly disclosed and is not restricted.⁸⁵

Summary of exceptions to exclusive rights

Berne Convention	South Africa	Zimbabwe	Swaziland	Lesotho	Botswana	Mozambique
Quotation from the work already available in public subject to fair practice	Quotations from protected work subject to fair practice	Quotations from protected work subject to fair practice		Quotations from protected work subject to fair practice	Quotations from protected work subject to fair practice	Quotations from protected work subject to fair practice
Illustration	Illustration	Illustration		Illustration	Short	Illustration

⁸² Botswana Copyright Act, s 20; Mozambique, s 20.

⁸³ Botswana Copyright Act, s 19.

⁸⁴ Mozambique Copyright Act, s 13.

⁸⁵ Mozambique Copyright Act, s19.

for teaching subject to fair practice	for teaching	for teaching Educational institutions to make copies provided there is no license scheme Libraries can reproduce if it is not reasonably possible for them to purchase		for teaching Reproduction by public or non-profit organizations of work made available to the public	quotation for teaching provided there is no license scheme Reproduction by public or non-profit organizations of work made available to the public	for teaching purposes
Reporting current events	Fair use: Reporting current news Research or private study Private or personal use Criticism or review Judicial review	Fair dealing: Reporting current news Research or private study Private recording of musical works Criticism or review Judicial review	Fair dealing: Reporting current news Research or private study Criticism or review	Reporting current events Private use: adaptation/reproduction/translation	Reporting current events Personal use: reproduction/importation	Reporting current events Personal use: reproduction/importation Judicial review
Compulsory licensing subject to equitable remuneration			Compulsory license after the death of the author subject to terms to be determined by High Court	compulsory license subject to remuneration license one, license all		
	Ephemeral recordings by broadcasters	Ephemeral recordings by broadcasters		Ephemeral recordings by broadcasters	Ephemeral recordings by broadcasters	Ephemeral recordings by broadcasters
	Demonstration by dealers	Demonstration by dealers				
				Inclusion in another work		

		public reading or recitations	public reading or recitation			
				Distribution to recipients in the same building		

2.4 Copyright infringement

The Berne Convention

The Berne Convention creates a locus standing regarding the person that can lodge infringement proceedings. Specifically, the Convention requires that in order for the author or holder of copyright to be protected and to enforce his rights under the convention, a person whose name or pseudonym appears on the work shall be entitled to enforce the rights unless the contrary can be proven.⁸⁶

With regard to infringement, the Convention does not spell out acts that amount to infringement but it is easily deduced that any performance of exclusive right of copyright holder amounts to an act of infringement where such is performed by a third party without authorization and also without any justification (exceptions) in accordance with the Convention.

South Africa, Swaziland and Zimbabwe

The South African Copyright specifically makes it an act of infringement for any person who performs or causes any one to perform the restricted acts without authorization of the copyright holder.⁸⁷ The acts of infringement for South Africa, Swaziland and Zimbabwe are therefore the following:

- Reproducing the work in any manner or form;⁸⁸
- Publishing the unpublished work;⁸⁹
- Performing the work in public;⁹⁰
- Broadcasting the work;⁹¹

⁸⁶ Berne Convention, Art 15(1).

⁸⁷ South African Copyright Act, s23(1).

⁸⁸ Swaziland, s 3(2)(a); Zimbabwe Copyright Act, s 17(a)

⁸⁹ Swaziland s 3(2); Zimbabwe Copyright Act, s 17(b)

⁹⁰ Swaziland, s 3(2); Zimbabwe Copyright Act, s 17 (e)

⁹¹ Zimbabwe Copyright Act, s 17(d)

- Causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;⁹²
- Making an adaptation of the work;⁹³ and,
- Translating the work.⁹⁴
- With regard to sound recordings, the following are additional acts of infringement:
 - o Making a record embodying the sound recording;⁹⁵
 - o Letting or exposing for hire by way of trade a reproduction of the sound recording;⁹⁶
 - o Exclusively to South Africa, communication of sound recording to the public.⁹⁷
 - o Exclusively to Zimbabwe, making the work available on a computer network.⁹⁸

In addition to the above, the Act specifically provides the following acts, if performed without the authorization of the copyright holders, as amounting to infringement. However, these require knowledge on the part of the infringing person that his actions constituted an infringement:

- Importing any copyrighted work into South Africa/Zimbabwe/Swaziland for any purpose other than for private or domestic use.⁹⁹ Zimbabwe further adds an act of exporting work from Zimbabwe¹⁰⁰
- Selling or letting or exposes for sale or letting or distributing any protected work in South Africa.¹⁰¹
- Allows a place of public entertainment to be used for performance of literary or musical works where the performance constitutes an infringement provided.¹⁰²
- Making or selling or importing a device that will be used to produce infringing copies.¹⁰³ This is specific to Zimbabwe.

⁹² Zimbabwe Copyright Act, s 17(f)

⁹³ Zimbabwe Copyright Act

⁹⁴ Zimbabwe Copyright Act, s 17(g) read with s 2; Copyright Act of South Africa, s (6)(f) read with s 1(a)(iii).

⁹⁵ Swaziland, s 3(2)(d); Zimbabwe Copyright Act s 20(a)

⁹⁶ Zimbabwe Copyright Act, s 20(g)

⁹⁷ South Africa Copyright Act, s9(a) – (e).

⁹⁸ Zimbabwe Copyright Act s 19 (e)

⁹⁹ South African Copyright Act, s23(2); Zimbabwe Copyright Act, s51(2)(a)(ii); Swaziland, s 4(2)(a) & (b);

Swaziland Copyright Act s 4(2)(d)...

¹⁰⁰ Zimbabwe Copyright Act, s51(2)(a)(ii).

¹⁰¹ South African Copyright Act, s23(2)(b) & (c); Zimbabwe Copyright Act, s 51(2)(a)(iii) & (iv)

¹⁰² South African Copyright Act, s23(3); Zimbabwe Copyright Act, s51(4); Swaziland, s 4(3)..

- Transmitting the work by public computer where such transmission is likely to cause copies to be made from that transmission.¹⁰⁴ This applies to Zimbabwe.
- Specifically for Swaziland, exhibiting the work in public by way of trade.¹⁰⁵

Lesotho, Botswana and Mozambique

Similar to the Berne Convention, Lesotho, Botswana and Mozambique do not spell out acts of infringement safe to prescribe that any person who contravenes any rights conferred in the Copyright Order commits an offence.¹⁰⁶ Consequently, it is deduced that any performance by the third party, without authorization by the copyright holder, of the restricted acts constitute an infringement. It is important to note that performance of restricted acts is referred to as the crime of usurpation in Mozambique.¹⁰⁷ In summary, the acts of infringement in Lesotho, Botswana and usurpation in Mozambique would be as follows:

- Reproducing the work;¹⁰⁸
- Perform the work in public;¹⁰⁹
- Broadcasting the work;¹¹⁰
- Distributing the work;¹¹¹
- Making a translation;¹¹² and
- Making an adaptation.¹¹³

The acts below are specific to Botswana, and to some extent to Mozambique

- Import copies of the work, Mozambique goes further to include exporting the work¹¹⁴
- Public display;¹¹⁵
- Communication to the public of the work.¹¹⁶

¹⁰³ Zimbabwe Copyright Act, s51(2)(b)

¹⁰⁴ Zimbabwe Copyright Act, s51(3).

¹⁰⁵ Swaziland Copyright Act, s 4(2)(c).

¹⁰⁶ Lesotho Copyright Order, s36.

¹⁰⁷ Mozambique Copyright Act, s 61.

¹⁰⁸ Mozambique Copyright Act, s 7(1)(a)

¹⁰⁹ Mozambique Copyright Act, s 7(1)(e)

¹¹⁰ Mozambique, s 7(1)(g)

¹¹¹ Lesotho Copyright Order, specifically refers to distribution by cable or any other means; Botswana Copyright Act refers to distribution by way of sale, rental or otherwise,; Mozambique s 7(1)(d)

¹¹² Mozambique s 7(1)(b)

¹¹³ Lesotho Copyright Order, s7(a) – (c); Mozambique s 7(1)(c)

¹¹⁴ Mozambique s 7(1)(f).

¹¹⁵ Mozambique s 7(1)(e) which refers to presenting the work in public

¹¹⁶ Botswana Copyright Act, s7(a) – (i)

- Making sound recordings available to the public by wire or wireless means to enable members of the public to access the work at the time and place individually chosen by them (making available).¹¹⁷
- Manufacturing or importing for sale or letting anti-circumvention device.¹¹⁸
- The removal or alteration of any electronic rights management information without authority.¹¹⁹
- Importation for distribution, communicating to the public, broadcasting, without authorization, of any copyrighted work with the knowledge or reason to know that electronic rights management information has been removed.¹²⁰
- Fraudulently using the work as being one's own.¹²¹ This specifically applies to Mozambique and it is referred to as the crime of infringement.

Summary of acts of infringement

Berne Convention	South Africa	Zimbabwe	Swaziland	Lesotho	Botswana	Mozambique
Acts of infringement not spelled. Deduced that performance of exclusive acts under the Conventions amount to infringement	Performance of exclusive acts under the Act	Performance of exclusive acts under the Act	Performance of exclusive acts under the Act	Acts of infringement not spelled. Deduced that performance of exclusive acts under the Order amount to infringement	Acts of infringement not spelled. Deduced that performance of exclusive acts under the Act amount to infringement	performance of restricted acts – crime of usurpation
	The acts below require knowledge from infringer					Infringement is considered a crime as it entails fraud since the infringer masquerades protected
	Importing for purposes other than private or personal use	Other than for private use, imports or exports from Zimbabwe	Importing for sale or hire			
	Selling, letting	Exhibits or	Selling or			

¹¹⁷ Botswana Copyright Act, s25(1) (f).

¹¹⁸ Botswana Copyright Act, s33(1)(a).

¹¹⁹ Botswana Copyright Act, s33(1)(c).

¹²⁰ Botswana Copyright Act, s33(1)(d).

¹²¹ Mozambique Copyright Act, s 62.

	or distributing	distributes it in public in the course of business	hiring or distributing or exposes for selling or hiring			work as his own.
	Allowing a place of public entertainment to be used for performance of protected work without authorisation	Allowing public place to be used for performance of infringing work	Allowing public place to be used for performance of infringing work			
		Transmitting a work by computer where such transmission is likely to cause copies to be made				
		Selling or making a device to be used for making infringing copies			Importation, selling, manufacturing or letting of anti-circumvention device	
					Broadcasting or communication to the public works with the knowledge that electronic rights management information (ERMI) has been removed	
					Alteration or removal of ERMI	

2.5 Remedies

The Berne Convention

The Berne Convention provides that the infringing copies shall be seized in accordance with the law of the country where the work is protected, and this protection extends to reproductions coming from the country where the work is not protected.¹²²

South Africa, Swaziland and Zimbabwe

- Interdict¹²³
- Damages are an available remedy provided the infringing person was aware of the subsistence of copyright protection at the time of infringement.¹²⁴
- Zimbabwe further allows for additional damages for purposes of deterring infringement.¹²⁵
- Delivery of infringing copies or plates used or intended to be used.¹²⁶
- For South Africa, reasonable royalty calculated which would have been payable by the licensee for the concerned work. But this remedy is in lieu of damages,¹²⁷ unlike in Zimbabwe where it is a standalone remedy.
- Rendering of account – this is available in Swaziland and Zimbabwe.¹²⁸
Right of possession and use of infringing copies or article used to produce infringing copies is a remedy available in Swaziland and Zimbabwe¹²⁹
- Attachment is available in Zimbabwe.

Botswana, Lesotho and Mozambique

Botswana and Lesotho have the same remedies available to the owner of copyright and mostly use the same language. The remedies in both countries are as follows:

- Interdict for imminent infringement or actual infringement.¹³⁰
- Damages suffered as a consequences of infringement.¹³¹ A claim on the profits made can also be made.¹³²
- Exemplary damages where infringement affects reputation of author.¹³³
- In Lesotho, forfeiture of infringing objects is to be done to the state;¹³⁴ however, Botswana refers to impounding of infringing copies.¹³⁵ Mozambique provides

¹²² Berne Convention, Art 16.

¹²³ Copyright Act of South Africa, s 24(1); Zimbabwe Copyright Act, s 52(2).

¹²⁴ South Africa Copyright Act, s23(2); Zimbabwe Copyright Act, s55(4).and are paid by way of reasonable royalty that could have been paid under license or assignment, Zimbabwe Copyright Act, s55(1)..

¹²⁵ Zimbabwe Copyright Act, s55(3).

¹²⁶ South Africa Copyright Act, s24(1);

¹²⁶ Zimbabwe Copyright Act, s52(2).

¹²⁷ South Africa Copyright Act, s23(1A).

¹²⁸ Zimbabwe Copyright Act, s 52(2).

¹²⁹ Zimbabwe Copyright Act, s58; Swaziland Copyright Act, s9.

¹³⁰ Lesotho Copyright Order, s36(1)(a); Botswana Copyright Act , s30(1)(a); Mozambique, s 69(1)..

¹³¹ Mozambique Copyright Act, s66(1).

¹³² Lesotho Copyright Order, s36(1)(b); Botswana Copyright Act, s30(1)(c).

¹³³ Lesotho Copyright Order, s36(2); Botswana Copyright Act, s30(1)(d).

confiscation and destruction of infringing copies.¹³⁶ Ownership of confiscated copies vests in the party that applied for confiscation.¹³⁷

- Specifically for Lesotho, plaintiff may also request the court to order forfeiture of all infringing objects and the court may determine how such can be disposed off.¹³⁸ On the other hand, Botswana provides that such infringing copies shall be destroyed unless the owner of copyright decides otherwise.¹³⁹

In the case of Lesotho, it is not clear how the plaintiff can request forfeiture of infringing objects when the forfeiture is to be made to the state.

Summary of remedies

Berne Convention	South Africa	Zimbabwe	Swaziland	Lesotho	Botswana	Mozambique
	interdict	interdict	interdict	interdict	interdict	interdict
	Damages provided the infringer knew of the existence of copyright protection	Damages by way of reasonable royalty provided the infringer knew of the existence of copyright protection Additional damages: deterrence	damages	Damages Exemplary damages for moral rights	damages	damages
	Royalties in lieu of damages					
Seizure of infringing copies	Delivery of infringing copies	Delivery of infringing copies		Forfeiture of infringing copies to the state	Impounding of infringing copies	Confiscation and destruction of infringing copies and equipment used to produce infringing copies
		Right of	Right of			Ownership of

¹³⁴ Lesotho Copyright Order, s36(3).

¹³⁵ Botswana Copyright Act, s30(1)(b)

¹³⁶ Mozambique Copyrights Act, s70.

¹³⁷ Mozambique Copyright Act, s71.

¹³⁸ Lesotho Copyright Order, s36(4).

¹³⁹ Botswana Copyright Act, s30(2)

		possession and use of infringing copies	possession and use of infringing copies			confiscated copies vests in the person who applied for confiscation
		attachment				
		Rendering of account	Rendering of account			

3 Need for Regulatory Convergence

3.1 Requirements for vesting of copyright

Looking at the requirements above for the individual countries as against those of the Berne Convention, the following can be said:

The countries in discussion have converged in as far as the requirements of originality, and the type of works that qualify for protection (literary works, musical works and sound recordings) are concerned. With regard to the requirement of material fixation, South Africa, Swaziland and Zimbabwe exercised an option under Article 2 of the Berne Convention and thus require the work to exist in material form. Consequently, any work to be accorded protection in South Africa, Swaziland and Zimbabwe must be reduced to material form. To this end, works that are published in Botswana, Lesotho and Mozambique may not get protection in South Africa, Swaziland and Zimbabwe if the authors did not reduce the works to material form. As seen in the case of *Green v Broadcasting Corporation of New Zealand*¹⁴⁰ where a TV presenter brought a claim of copyright infringement on his talent show titled ‘Opportunity Knocks’ which aired in the British television, the claim failed because no script was ever produced among others. The claim was brought against New Zealand Broadcasting Corporation which presented a similar talent show under the same title.

It follows therefore that while works that qualify for copyright protection in South Africa, Swaziland and Zimbabwe undoubtedly qualify for protection in Lesotho, Botswana and Mozambique, the converse is not true because of the requirement of material fixation. In actual fact, during the fact-finding visit to Lesotho on the status of copyright protection, the Lesotho musicians indicated that they are not aware of any requirements that they should satisfy in order to get copyright protection in Lesotho let alone in the neighbouring South Africa where Lesotho music is produced or first published. They further attested that their music does not exist in any material form except the sound recordings. One will remember that Article 5(2) of the Berne Convention provides that protection and the means of redress are to be subjected to the laws of the country where protection is claimed. [Article 5 makes a distinction between protection in the country of origin and abroad (in the Union). Thus, in the country of origin, protection is on the basis of national laws while in the Union member abroad, protection is on the basis of minimum standards of the Convention plus domestic laws of the country where protection is sought]. Accordingly, South African laws or

¹⁴⁰ [1989] 2 All ER 1056

Zimbabwean laws will be invoked before South African courts or Zimbabwean courts respectively in order to determine if a particular work meets the requirements necessary for it to be a work worthy of copyright protection. In turn, the aggrieved party from Botswana or Lesotho or Mozambique cannot successfully claim that a country seeking a work to be in material form has breached its international obligations under the Berne Convention because the fork in the road situation is allowed by the Berne Convention. It follows that the Berne Convention itself is a source of inconsistencies in the requirements for copyright protection by giving countries an option on whether to require the work to be in material form or not. The fork in road provision is not desirable in the era of internet and interconnected economies; rather, it is important for countries to obtain regulatory convergence so that authors are able to claim protection wherever the work is infringed. Of course one appreciates that a treaty should still leave space for countries to legislate taking into account their individual socio-economic needs.¹⁴¹ However, I contend that the requirements for copyright protection should be the same because they define the subject matter to be protected as is the case with patent laws – flexibilities can be allowed in other substantive provisions especially to suit developing countries but they are definitely not ideal for requirements that define copyright protection.

Another important aspect is eligibility criteria which can either be based on nationality of the author or place of publication of the work. There is divergence between some of these countries and the Berne Convention. Specifically, the Berne Convention require automatic and immediate protection of works authored by the nationals of the Berne Convention Union members.¹⁴² On the contrary, all the countries under discussion except Zimbabwe require that works published abroad, irrespective of whether authored by the national of the Berne Convention Union member state or not, must be published in these respective jurisdictions within 30 days of them being published abroad. Only Zimbabwe adopts the Berne Convention core principle of assimilation of nationals of the Berne Convention Union members. Accordingly, works that are authored by the nationals of, or published in the, Union member state immediately qualify for protection in Zimbabwe without a need for such works to be also published in Zimbabwe within 30 days of publication abroad. Only works that are published by non-nationals of Union members are subjected to the requirement to be published in Zimbabwe within 30 days and this is in line with the Berne Convention.¹⁴³ Mozambique uses an uncommon term ‘works first published abroad but issued in Mozambique,’ and this could mean that for as long as the work is legally available in Mozambique, it will be accorded protection despite the fact that it was not published in Mozambique within 30 days of it being published abroad. This construction, although still not adhering to the Berne Convention assimilation principle, is at least better than of South Africa, Lesotho and Swaziland because it gives protection to works that are legally available

¹⁴¹ Arthur Buck, “Copyright, Harmonization and Revision: ‘International Convention on Copyright Law’” 1981 *International Business Lawyer* 9, 476

¹⁴² Guide to the Berne Convention, p9.

¹⁴³ Article 3 of the Berne Convention.

in Mozambique. Therefore, it gives protection to authors who may not have regarded Mozambique as a market in which they can publish their work within 30 days in order to get protection, and surely this is the kind of protection that authors need because the publication requirement that is demanded by South Africa, Swaziland and Lesotho is too tedious.

In as much as Zimbabwe has been hailed herein for having adopted the principle of assimilation, there is however a unique provision in both the Zimbabwean and South African copyright laws. Thus, the provision requires work must satisfy the requirements stipulated under section 10 of the Zimbabwean Copyright Act. This is against the spirit of the Berne Convention which requires Union members to grant one another automatic protection. Specifically, the formulation found under section 11 and 12 of the Zimbabwean Copyright Act dealing with copyright by virtue of nationality/residence and copyright by virtue of country of first publication respectively is as follows:

“A work that is eligible in terms of section ten shall qualify for copyright protection if....any one of its authors was –

(a) a citizen of Zimbabwe or a designated country.”¹⁴⁴

“A work that is eligible in terms of section ten shall qualify for copyright protection if it is first published in Zimbabwe or in a designated country.”¹⁴⁵

Looking at this formulation, both South Africa and Zimbabwe disregard Union members for as long as the work does not meet the requirements as stipulated in the South African or Zimbabwean laws. On the other hand, Botswana and Mozambique recognize works that are protected by any international treaty to which Botswana and Mozambique respectively are parties to. The resultant effect of Botswana/Mozambique formulation is that as long as the work meets the requirements for copyright protection under any treaty that Botswana or Mozambique respectively are contracting parties to, such works will be given protection irrespective of the national requirements in Botswana or Mozambique. This means that Botswana would give South African or Zimbabwean music recognition and protection simply by virtue of being members to the Berne Convention, or TRIPS or SADC auspices yet South Africa or Zimbabwe would not be able to give recognition and protection to Botswana's works if the requirements in the Zimbabwean/South African Copyright Act are not met. It is on the basis of lack of mutual recognition that Swaziland would retaliate against a country which does not recognize its work by doing the same (non-recognition),¹⁴⁶ which is unwarranted.

On the face of it, the Botswana and Mozambican formulations that recognize works under any international treaty irrespective of national requirements seem to be reasonable constructions. But, on a closer look these formulations may pose double standards within

¹⁴⁴ Sec 11(1) of Zimbabwe Copyright Act dealing with copyright by virtue of author's nationality or residence

¹⁴⁵ Sec 12(1) of Zimbabwe Copyright Act which deals with copyright by virtue of country of origin.

¹⁴⁶ Swaziland Copyright Act, s 23.

national systems. Specifically, it would be very unfair to South African nationals and residents if they have to reduce their works to material form in order to be accorded protection in South Africa thereby incurring additional costs on material fixation yet on the other hand Botswana's works can be given the same protection in South Africa without being reduced to material form. Consequently, the costs associated with reducing the works to material form can give Botswana's works a competitive advantage over South African works.

On the basis of the above, and given that copyrights transcend borders as a result of internet and technology which then warrants mutual recognition and protection of works, it would be advisable for countries to harmonize the requirements for granting copyright protection. The fork in the road provisions of the Berne Convention are not working to the advantage of copyright holders because of different standards that the Convention has created in different countries.

3.2 Nature of copyright protection

Under the Berne Convention, the holder of copyright has an exclusive rights to do or authorise the following actions:

3.2.1 Translation

The holder of copyright has an exclusive right to translate or to authorise a translation of his protected work throughout the term of protection.¹⁴⁷ This exclusive right is replicated in all the countries in discussion except Swaziland although in South Africa and Zimbabwe it is a regarded as a form of adaptation.¹⁴⁸ Swaziland does not refer to an exclusive right to translate the work; rather, the Act refers to an exclusive right to publish a translation of the work.¹⁴⁹ This means that even if the work were to be translated by a third party, publication of such translation vests in the copyright owner of the original work unless the holder of copyright has authorised publication of the translation. It follows therefore that copyright holders from Botswana, Lesotho, Mozambique, South Africa and Zimbabwe will not be in a position to claim protection of their right of translation in Swaziland – it is only the right to publish the translated work that they can claim.

3.2.2 Reproduction

The Berne Convention grants copyright holders an exclusive right to reproduce or authorise the reproduction of their work in any manner or form.¹⁵⁰ Similar to translations, this right is replicated in all the countries under discussion, and this is good for copyright holders in Southern Africa. Indeed, reproduction is the most common form of infringement all over the

¹⁴⁷ Berne Convention, Art 8.

¹⁴⁸ Copyright Act of South Africa, s 1(a)(iii); Zimbabwe Copyright Act, s 2.

¹⁴⁹ Swaziland Copyright Act, s3(2)(a).

¹⁵⁰ Berne Convention, Art 9(1).

world, and it is imperative for all countries to only restrict this right to the copyright holders subject to exceptions that will be discussed further below. Of course, there is massive reproduction of music going on in all these countries concerned, which mostly go unabated to the frustration of the copyright owners. The laws in these countries have not put in place mechanisms to limit reproduction or to get royalties from such reproduction in the form of copying levies on all devices which enable copying.

3.2.3 Adaptations, arrangements and other alterations.¹⁵¹

Similar to the Berne Convention, all the countries except Swaziland grant a right to authorise adaptations or transformation of their works. It is possible that Swaziland may interpret the right to authorise translations as also encompassing adaptations as it is done in South Africa and Zimbabwe¹⁵² This right is particularly important especially in the music industry in the wake of Disk Jockeys (DJs) because often DJs adapt the already existing songs. Further, musicians also transform one another's song resulting into a particular song having several versions for example, songs such as *Forever Young*, *Tumelo ke Thebe* (a gospel song in South Africa). Interestingly, in the conversation with musicians in Lesotho, I was informed that a well-known musician by the name of Puseletso Seema has had other musicians adapting her songs without her permission. Despite the exclusive right of copyright holders to authorize adaptations existing in the Copyright Order of Lesotho, Seema could not get assistance to stop the infringing musicians from adapting her music and this was primarily due to lack of knowledge of the subject of copyright in the Lesotho justice system. It follows that with South African music largely consumed in Lesotho and the DJs adapting it, it may be difficult for South African copyright holders to claim protection in Lesotho. The same challenge is existing in Mozambique given that copyright is relatively a new field of practice, and the judicial system is not equipped with dealing with these issues.

3.2.4 Publishing an unpublished work

The Berne Convention takes for granted that an author of the work has a right to publish his unpublished work yet this might not always be the case. Consequently, South Africa, Zimbabwe and Swaziland make specific reference to the exclusive right of authors to publish their unpublished work. On the other hand, the countries that follow the Berne Convention closely (Botswana, Lesotho and Mozambique) do not specify this right, thereby leaving it to the courts to fill this lacuna, which might not be successfully filled given the under-developed jurisprudence in this field in the countries in discussion especially in Lesotho and

¹⁵¹ Berne Convention, Art 12.

¹⁵² South Africa Copyright Act, s 1(a)(iii); Zimbabwe Copyright Act, s 2.

Mozambique. Of course, artists or authors mostly have to sign agreements in order for publishing houses to publish their music.

3.2.5 Causing the work to be transmitted in a diffusion service or cable programme service

This exclusive right exist in South Africa and Zimbabwe. South Africa on the other hand defines the right to transmit work in a diffusion service as entailing the following:

- Telecommunication of transmissions consisting of sounds, imagines, signals or signs
- Such telecommunication must be taking place on wires or material substance
- The telecommunication must be intended to be received by certain members of the public

Nevertheless, transmission in a diffusion service refers to the work that is transmitted during the cause of a service that is being given to subscribers or defined group od persons. An example would be transmission of music on hold to users of telecommunications subscribers¹⁵³ or music played in the hotel rooms for guests. The practice of hold on music is particularly prevalent in these countries under discussion. To the extent that South African music is popular in Botswana, Lesotho, Mozambique and Swaziland, it goes without saying that South African music copyright holders lose considerable revenue since there is no provision regulating transmission of work in diffusion services or cable programme service, and this also affects copyright holders of the countries concerned. As an example, the South African Music Performance Rights Association has the following tariffs for entities that play hold on music:¹⁵⁴

Number of external lines per switchboard	Annual license fee per switchboard
1 – 5 lines	R 1 860.84
6 – 16 lines	R 2 508.09
Each additional line	R43.14

It follows that countries that do not provide for this particular right cause copyright owners to lose considerable revenue.

¹⁵³ Simon Gilchrist and Fiona Nott “Austalia” in Dennis Campbell *Copyright Infringement Comparative Law Yearbook of International Business* (Kluwer: 1997), 11.

¹⁵⁴ https://www.sampra.org.za/pdf/tariff/Tariff_012.pdf

3.2.6 Communication to the public and /or making available

The broad right of communication to the public is provided for by South Africa and Botswana only although South Africa only limits it to sound recordings. Nevertheless, the right of communication to the public can take many forms, and the ones covered by the Berne Convention are public recitations, public performance and broadcasting and as well as rebroadcasting. Of course, the WIPO Copyright Treaty covers news forms of communication to the public known as making available rights especially of the sound recordings which are occasioned by internet and technology of which the countries under discussion, except Botswana, do not extent to.

a) Public performance and communication to the public

The Berne Convention grants a right to copyright holders to authorise public performance of their musical works by any means or process and the right to authorise communication to the public of their musical works. All the countries in question except Swaziland grant the copyright holders a right to authorise the performance of their works in public. With regard to the right to communicate the performance of musical works to the public, there is no country that provides for this right except Lesotho. Even so, Lesotho restricts communication to the public to public performance yet there are many ways in which communication to the public can take place. It is not clear why this oversight occurred except that it may be attributed to the challenges in drafting. Nevertheless, this is among the most important source of revenue because copyright holders are able to get performance royalties from hotels, restaurants and pubs, festivals and related events, fitness centres, shops and store, buses and taxis, and many others. However, copyright owners lose revenue from public performance because there are no collecting societies in countries such as Lesotho, Swaziland and Mozambique, and it makes it difficult for individuals to be issuing licences or to be collecting revenue from those who play their music publicly.

b) Broadcasting and rebroadcasting of their works

The Berne Convention grants copyright holders exclusive rights to authorise broadcasting and rebroadcasting of their works and communication to the public.¹⁵⁵ Except for Swaziland, all the countries under discussion grant copyright owners an exclusive right to authorise broadcasting of their protected works; however, none of them grant a right to authorise rebroadcasting and communication to the public and this is a major oversight since a lot of revenue is lost in rebroadcasting.

As much as the five countries grant exclusive rights to authorise broadcasting of protected works, copyright holders in many of these countries are not even aware of this right. To this end, the Lesotho and Mozambican copyright holders and even radio stations are not aware that this exclusive right vests solely in the copyright owners – radio stations simply broadcast any music they come across. The other side of this coin is that while copyright holders would

¹⁵⁵ Berne Convention, Art 11bis

collect significant revenue from broadcasting and rebroadcasting of their music (needletime royalties), it has been found that most music copyright holders are desperate to have their music played for free in the local radio stations for promotional purposes such that they even get at loggerheads with radio stations or presenters that favour certain music over theirs. In South Africa for instance, there is a practice of record companies paying bribes to radio stations to have their music played thus making it difficult for individual or start-up artists to have their music played – an illegal practice known as payola.¹⁵⁶ This illegal practice which often is found in commercial radio stations seems to have crept into public radio or television stations such as SABC and interestingly even popular artists such as Arthur Mafokate, the owner of 999 Music Label, was implicated in this desperate tactic to have his music aired on SABC.¹⁵⁷

*c) Public recitation and communication to the public.*¹⁵⁸

Public recitation often applies to poems or musical-dramatic works, and none of the countries under discussion provide for this right except that it is an act of infringement in Swaziland and Zimbabwe.

d) Making available

The making available right comes with the WIPO Copyright Treaty and it is meant to respond to streaming sites which make the protected works available to the public during the time and place of their choice. Examples can be made to YouTube, NetFlix and others. Only Botswana and Zimbabwe provide for this rights – making available and understandably so for Botswana because Botswana is a party to the WIPO Copyright Treaty. Internet has shaped distribution channels such that conventional sale of hard copies has declined significantly since music is largely consumed in these platforms such as YouTube. I have come across music belonging to artists from Mozambique, Lesotho and South Africa on the internet and mostly these artists do not have an idea how their music became available on YouTube and thus how to take it down or demand royalties, and it therefore becomes vital for these countries to make a provision for ‘making available rights’. The making available rights are much more pronounced in the EU where the European Court of Justice has had to preside over many cases on this restricted act.¹⁵⁹

¹⁵⁶ Poliswa Plaatjie, “More speak out on radio play-for-pay,” available at: <http://www.dispatchlive.co.za/news/2017/01/14/speak-radio-play-pay/>. Accessed 3 February 2017.

¹⁵⁷ “SA kwaito artist, Arthur Mafokate, implicated in payola scandal” available at: <http://musicinafrica.net/fr/taxonomy/term/8822>, accessed 3 February 2017.

¹⁵⁸ Berne Convention, Art 11ter.

¹⁵⁹ For general discussion of this rights, see Trevor Cook “The Restricted Right of Making available and Communication to the Public in the European Union” (2015) 60 *Journal of Intellectual Property Rights*, 60-66.

3.2.7 Distribution rights

Except for Swaziland, all the states covered herein protect distribution rights, specifically through sale, letting or hiring, exposing for sale or for letting. Lesotho refers to distribution by wire or wireless means. Nevertheless, distribution sale are a lifeline for copyright holders as they are a main source of revenue or income and it is vital that this right be reserved for copyright holders. In practice however, the prevalent phenomenon in these countries is that sales or letting are often done by third parties without authorisation and mostly not selling the original copies. The sad story was told by copyright holders in Lesotho who indicated that because of cheap copies of their music being sold in the streets often for R10 (\$.76) per CD, they (copyright holders) also decided to tap into that illegal sale of their music by selling the infringing copies for R10 instead of the normal price ranging between R60 – R90 (\$4.60 – \$7) for originals. Of course, this brings the whole debate of legalizing music piracy.¹⁶⁰ In Mozambique, copyright holders indicated that sometimes they see copies of their music being sold on the market even before their music is officially released. This experience goes without saying that it is of utmost importance that protection and enforcement of distribution rights should be strengthened if music industry were to survive in Southern Africa.

3.2.8 Exporting or Importing

In many cases, copyrighted works are exported or imported without authorization of the copyright owners, and sometimes are exported to countries that have no respect for copyright protection. Consequently, once the work reaches a jurisdiction that has minimal protection of copyright, there is a danger that copyright in such works will be infringed without any recourse especially because only the laws of the country where protection is sought apply. For instance, looking at the nature of rights created or protected as well as actions that amount to infringement in these jurisdictions in discussion, copyright holders may be reluctant to have their works exported to Lesotho, Swaziland and Mozambique. Therefore, it is important that exportation or importation of protected work be done with the consent of the copyright owner. To this end, South Africa, Lesotho and Swaziland do not grant this right to copyright holders thereby making them vulnerable to having their works exported or imported without their permission. Botswana only creates the exclusive right of importing to the exclusion of exporting while Zimbabwe and Mozambique offer protection against both importing and exporting without copyright owner's authorisation.

¹⁶⁰ Volker Grassmuck "A Proposal for Legalizing Small-Scale Physical Copyright Piracy: Book Publishing, Video Films and Music in Developing Countries" (2013), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245342, accessed on 2 March 2017.

It is worth mentioning however that different countries approach the issue of parallel importation differently with some countries allowing it while others such as Botswana, Zimbabwe and Mozambique do not allow it. Often countries that allow parallel importation would do so under the doctrine of exhaustion of rights doctrine. The benefits of allowing parallel importation are largely that often goods become cheaper yet the downside is infringement of copyrights in the jurisdictions where there is little protection.

3.3 Limitations

The Berne Convention allows the following acts to be done without authorization from the copyright owner:

3.3.1 Quotations

The Convention allows quoting from works that are already available in the public domain provided that such quotation is done in accordance with fair practice and further that the source and name of the author is mentioned.

Except Swaziland, all the countries under discussion replicate this provision as provided for by the Berne Convention. If Swaziland had effective mechanisms for the enforcement of intellectual property, it could have been difficult for anyone to use refer to protected works through quotations. Thus, copyright owners would be happy with Swaziland while the consumer of copyright protected works would be prejudiced significantly. Further, this would even stifle creative as new works are usually inspired by previous works.

3.3.2 Illustration for teaching purposes

Literary works can be used for purposes of illustration in teaching. This limitation is mostly important to educational institutions because without it, teaching and learning would be difficult if not impossible. In the same vein, Lesotho, Mozambique, South Africa and Zimbabwe permit utilization of protected works without authorization if such works are used for illustration in any publication, broadcast or sound or visual record for teaching provided source and name of author is mentioned. However, Zimbabwe and Botswana restrict educational institutional from copying without authorisation if there is a collective license authorising such copying. In so doing, Botswana and Zimbabwe safeguard the interests of copyright owners in that educational institutions still have to negotiate some payment in order to reproduce the work, and usually the tariff paid by the educational institutions is low.

Swaziland does not grant this exception and the same concern raised in 3.2.1 above applies here.

3.3.3 Reporting current events

The Berne Convention allows third parties to perform the restricted acts for purposes of reporting current events. Reporting news or current events about copyrighted works involves reproducing such works and communicating it to the public, both rights which are exclusively exercised by the copyright owners. Almost every news reporting includes protected work; and this means without this limitation, the budget of the news reporting agencies will be depleted while the public would be denied access to information. To this end, all the countries under discussion allow copyright protected works to be used without authorization for purposes of reporting current events or news. This means that literary works, musical works and sound recordings can be used if the purpose is to report current events involving the music concerned, and this is why this limitation refers to “works seen or heard at such events”.

3.3.4 Research or private study

This exception is important primarily for those studying music as they need to copy, adapt and perform other restricted acts for purposes of studying. This exception is available in South Africa, Swaziland and Zimbabwe. On the other hand, Botswana, Lesotho and Mozambique do not make a provision for research or private study. However, it can be argued that research or private study can be covered by private or personal use exception; in fact, private study can be classified as a subset of private or personal use.

3.3.5 Private or Personal Use

This exception is important especially in developing countries where most people do not have iPods or iTunes and mostly relying on traditional CDs. For a person who likes music, this means CDs can fill the house yet through this exception, one is also to copy CDs into a USB memory sticks and play it even in the car. This exception is available in all the countries under discussion. Further, people can import sound recordings if they do so for personal use. However, importation for personal use is only allowed in Zimbabwe, Botswana and Mozambique.

3.3.6 Criticism

This exception is also available in all these jurisdictions – it allows third parties to use protected works without authorization for purposes of review or criticism. In the United States, this would be known as parody. To this end, there are many parody songs that serve to critique original songs such as *Shape of You*, *I knew You were Trouble*, *Call me Maybe* and others. Of course there are limits on the use of protected works in parody, and given that copyright jurisprudence is undeveloped in these countries, it becomes difficult to discuss the issues of the right balance between protecting copyrighted works and the right to freedom of

expression in the form of criticism. Only in South Africa has a case involving parody been decided by the highest court in the land and it related to trademarks not necessarily copyright.¹⁶¹

3.3.7 Judicial Review

Litigation involving copyright in music would be difficult without this exception, for it would mean that parties have to get authorization from the copyright owner in order to use copyright protected songs in court. This means that in Lesotho, Botswana and Swaziland where there is no provision of judicial review exception, litigation involving protected music would be cumbersome.

3.3.8 Compulsory licensing subject to payment of royalties

There are many instances where protected works have to be used to advance further creativity yet rights holders are not always willing to give consent to their works being used. Consequently, their works are used without their permission but because their creativity is respected, they are paid royalties even in such instances. The Berne Convention creates compulsory licensing limitation to the holder's exclusive rights albeit in respect of musical works only. Except for Lesotho and Swaziland, all the four countries under discussion do not provide for compulsory license. This may be a setback to creativity where the owner of protected work is not willing to grant license to secondary creators. Having said that however, compulsory licensing in the music industry is a painful license in countries where it is provided for such as the United States. For instance, it is argued to usurp the original author's right to derivative works and the ability to determine or negotiate the terms under which his work can be further exploited. With these challenges in mind, it might be to the benefit of copyright holders in these countries that there is no provision for compulsory licensing, and its provision in Lesotho and Swaziland is particularly worrying because South African music makes the big part of music that is aired in the radio stations in Lesotho and Swaziland.

3.3.9 Ephemeral recordings by broadcasters

Except for Swaziland, all the countries make it an exception for broadcasters to make temporary copies of protected works, which must then be destroyed within six months of their recording unless they are of exceptional nature. This exception only applies to broadcasters especially in relation to live broadcasts as they cannot get permissions to use music during live broadcast. Reference to broadcasting under copyright law normally refers to radio and television and this is where the ephemeral recordings exception applies yet the internet has broad with it new forms of broadcasting – webcasting, which are not regarded as broadcasting to enjoy ephemeral recordings exception. It follows that laws have to be

¹⁶¹ Laugh it Off v South African Breweries

reformed in these countries to allow multiple copying needed for webcasting as opposed to a single copy that broadcasters are allowed to make and maintain for six months.¹⁶²

Balancing the rights of the copyright holders and the interest (access to the protected works) of the public is at the heart of the copyright law. A country that has generous limitations on copyrighted work is often shunned by the right holders while the one with very strict limitations is regarded as being friendly to the right holders. From the point of view of copyright holders, the following countries offer more protection

3.4 Copyright Infringement

3.4.1 Traditional or primary acts of infringement

Adaptations, translations, reproduction, public performance and broadcasting are the common acts of infringement among all the countries under discussion. The exception is with Swaziland which only provides for reproduction as an act of infringement among the common acts. The above-mentioned acts of infringement are also provided for by the Berne Convention.

3.4.2 Publishing an unpublished work

Given that the Berne Convention is fairly old and technology has brought with it ways in which copyright can be infringed,¹⁶³ countries have introduced new acts of infringement in their respective laws. Specifically South Africa and Zimbabwe have introduced transmission of protected work in a diffusion service as an act of infringement. In addition, the two countries have introduced the right to publish an unpublished work, and they are joined by Swaziland on this act of infringement. Although it may be seen as an inherent right for all authors but it is important that it is clearly spelled out in the law because it caters for situations such as that of employer-employee relationship where the employer may want to publish the work instead of reserving that right to the author.

3.4.3 Communication to the public and/or making available

Sound recordings seem to have attracted attention for all the countries discussed herein. To this end, South Africa makes it an act of infringement to communicate sound recordings to the public and this is a very important prohibition given the effect of broadcasting by wireless means, internet and technology – online streaming. This is a huge setback for copyright

¹⁶² Alexander Davie & Christine Soares 'The Music Online Competition Act of 2001: Moderate Change or Radical Reform' 2001 Duke L & Tech. Review 31, 4.

¹⁶³ Of course, the deficits of the Berne Convention are addressed by the WIPO Copyright Treaty which many African countries have not acceded to except for Botswana.

owners in Zimbabwe, Lesotho, Botswana, Swaziland and Mozambique as communication to the public is not an act of infringement. In addition, communication to the public goes together with making available and only Botswana and Zimbabwe have making available as an act of infringement yet streaming sites such as Spotify, Netflix, YouTube have played a major role in making the works available to the public and mostly without the copyright owner's authorisation. Today, infringement happens online and it is important that both communication to the public and making available are provided for as acts of infringement. As indicated above, except for Botswana, the countries in discussion are not parties to the Copyright Treaty, which mainly deals with the effects of internet and technology on protected works, and perhaps this explains why copyright infringement in the countries under discussion is still limited to the traditional acts of infringement as provided for in the Berne Convention. As far as Lesotho is concerned, perhaps the distribution right or prohibition can be interpreted as a restricted form of making available, which then needs to be revisited to cater for a broad concept of making available.

3.4.4 Importing or Exporting

Another act of infringement introduced by Zimbabwe, Botswana and Mozambique is importing and exporting of sound recordings although Botswana prohibits importation only. Often pirated works are made in one country and exported to other countries and this is common in Southern Africa. Whether original or pirated works, it is of utmost important to reserve to right to import or export to copyright owners as this gives the copyright owner to decide the jurisdictions in which his/her work can be consumed based on the degree of protection. Looking at the deficiencies in copyright laws of Lesotho and Swaziland for instance, sound recordings copyright owners in South Africa, Zimbabwe and Botswana may not want their works to be exported to Lesotho.

3.4.5 Selling, renting or hiring

The selling, renting, hiring or exposing for hiring or letting otherwise known as distribution rights are vested in the owner and copyright and third parties are prohibited from selling, renting, hiring or exposing for hiring or letting without authorization. South Africa and Botswana prohibit third parties from letting or exposing to hire and does not encompass sale. On the other hand, Mozambique includes prohibition against selling while Zimbabwe, Lesotho and Swaziland neither prohibits selling, letting or exposing for hire. It is important that sale rights be included in all the countries under discussion with the specific mention of whether or not the "first sale doctrine" or "exhaustion doctrine" applies or not as this doctrine is important for alienation of goods that were lawfully obtained.

3.4.6 Allowing public place for performing infringing work

It is an act of infringement in South Africa, Zimbabwe and Swaziland to allow a public place to be used for performance of infringing work whereas it is not the case in Lesotho, Botswana and Mozambique. For instance, this places a duty of club owners to ensure that no infringing work is being played in their clubs and should that happen, they will be facing a case of copyright infringement.

3.4.7 Selling or making a device to be used for making infringing copies

3.5 Remedies

Remedies are part of IP Policy protection; therefore, they should be used to strike a balance between two competing interests – access to protected work and protection of creators.¹⁶⁴ In light of limited court decisions in countries in discussion, it is hard to know whether the remedies below are invoked in such a way that they advance access to protected works while ensuring that authors are protected.

3.5.1 Seizure of infringing copies

This is the only remedy available in the Berne Convention, and all the countries except Swaziland provide for this remedy albeit at differing degrees. Thus, Botswana and Mozambique refer to impounding and confiscation respectively but these are words are in actual fact synonymous to seizure employed by the Berne Convention. To this end, seizure, impounding and confiscation refer to the act of taking possession of infringing copies by the authorities. On the other hand, South Africa and Zimbabwe refer to the delivery of infringing copies which can be interpreted literally as placing a duty on the infringing person perhaps after he has been found to have committed an act of infringement. In practice however, the South African authorities engage in the acts of confiscation especially during raids in suspected homes or shops.¹⁶⁵ This practice is common and has been witnessed in Zimbabwe as well where police raided DJs' homes in search of pirated music and confiscated laptops and music copies.¹⁶⁶

Interestingly, right of possession and use of infringing copies vests in the owner of copyright in Zimbabwe while in Mozambique right of possession and ownership of infringing copies vests in the person who applied for confiscation and this will most invariably be the owner of copyright. But, the contradiction lies also in the Mozambican law wherein Section 69 provides for confiscation and destruction of the infringing copies and the machines used to make such infringing copies. This is an a contradiction because on one hand Section 71 talks about ownership of infringing copies vesting in the party that applied for confiscation yet on the other hand Section 69 refers to destruction of infringing copies. Nevertheless, in Lesotho the infringing copies are forfeited to the state and it remains unclear whether the state destroys the infringing copies or passes them to the owner of copyright.

¹⁶⁴ Orit Fischman Afori, "Flexible Remedies as a Means to Counteract Failures in Copyright Law" (2011) 29 *Cardozo Arts & Entertainment Law Journal*, 4.

kkF

¹⁶⁵ "South African movie, music piracy labs busted – here they are", available at:

<https://mybroadband.co.za/news/general/119234-south-african-movie-music-piracy-labs-busted-here-they-are.html>

¹⁶⁶ "Police raid DJs in search of pirated music," available at: <http://www.chronicle.co.zw/police-raid-djs-in-search-of-pirated-music/>

In light of the premise above that remedies advance IP policy, ownership of confiscated infringing copies and machines used to produce such copies must vest in the copyright owner in order to protect the interests of creators. Equally, it would be ideal for the remedies to allow copyright owner to give consent to an infringing person to continue with the sale of such copies against the agreed fee. This is especially important in Southern Africa where informal market forms a major part of distribution channel. In so doing, the remedies would ensure that creators benefit from their work while the public access the work, which is the purpose of IP protection. In any event, I indicated earlier than in Lesotho copyright owners found themselves in a desperate situation whereby they participate in the sale of illegal copies of their music. Therefore, if this remedy were to be flexible, the copyright owner would not directly participate in this illegal distribution channel but would nevertheless get a particular fee while the state also get revenue in a form of taxes.

3.5.2 Interdict

Although the Berne Convention does not provide for an interdict as a relief, all the countries concerned recognized the importance of stopping the infringing person from continuing with acts of infringement with immediate effect to stop further harm from continuing while investigations are taking place. This is particularly so because it takes a long time to prepare a case and see it through to finality meanwhile the harm would be continuing.

In South Africa, Swaziland and Zimbabwe, it is an act of infringement to allow a public place to be used for performance copyrighted works without a permission, and as such, an interdict can be sought to prevent such performance from taking place. As indicated above, remedies are part of IP policy to ensure protection of creators while ensuring access to protected works. Therefore, if an interdict were to be given to stop, say for instance, a concert where people have already bought tickets, such a remedy may obstruct access to protected works in favour of protection, which does not even reward the creator. Yet, if a license fee were to be given as a remedy under such circumstances, it would ensure that creators reap the benefits of their works while the public access the work.

3.5.3 Damages

Any act of infringement carries with it loss of revenue for the copyright owner; thus, acts of reproduction, adaptations, and translations tap on the sales that the copyright owner would have otherwise made while transmission in a diffusion service or broadcasting tap from the royalties that copyright owner would have made. Consequently, it goes without saying that damages are the next best form of remedies after an interdict is issued. Although the Berne Convention does not provide for this kind of remedy, the countries in question have all made a provision for damages albeit in a differing degree. Thus, over and above ordinary damages resulting from infringement, Zimbabwe grants additional damages as a deterrence while Lesotho imposes additional damages as compensation for moral rights. Interestingly, in South Africa and Zimbabwe, the complainant can only be awarded damages provided the infringing

person knew of the existence of copyright in the work. Further, South Africa provide for royalties in lieu of damages. Royalties are usually important if the sales of infringing copies have considerably been a success as it usually happens especially with adaptations where the adapted music surpasses the original song in terms of sales.

Quill Associates (Pty) Ltd v Randfontein Local Municipality and Westonaria Local Municipality

3.5.4 Rendering of account

For purposes of determining appropriate damages, the infringing person can be ordered to render his or her accounts so that they can be analyzed to determine the appropriate damages to be paid to the copyright owner. Zimbabwe and Swaziland are the only ones providing for this remedy.

3.5.5 Attachment

Attachment as a remedy is available only in Zimbabwe.

4. Conclusion

Protection of works abroad has always been the reason behind adoption of multilateral treaties in the wake of early 19th century even before advancements in technology,¹⁶⁷ and it becomes even more compelling now with developments in technology which cause works to be consumed abroad the very same moment that they are published at home. The national treatment and reciprocity principles that became the cornerstone of bilateral or multilateral treaties are not adequate because it is on of no use to expect national treatment in jurisdictions where the standards of protection are weak. It is for this reason that I recommend herein that the countries under discussion should harmonise their laws and offer standard protection for the author's rights while balancing it with the different needs and economic growth of respective countries. Harmonisation of copyright law or any area of law has not been without negative effects as it often takes into granted that societies and countries are homogenous which is not the case. Thus, developed and developing nations have different needs in that developed nations require stronger protection while developing countries often want to benefit from intellectual property creations often created in the North. Looking at the countries under discussion, while South Africa still requires growth in its music industry, it is rather developed in comparison to its neighbours – Botswana, Lesotho, Mozambique, Swaziland and Zimbabwe. Therefore, the latter countries would undoubtedly require more room to exploit copyrights while South Africa may not to increase its level of protection. With this in mind, it is recommended herein that the following should be harmonised while the rest can be left to individual countries:

¹⁶⁷ Harry G Henn, "Quest for International Copyright Protection" 1953 (39) Cornell Law Review 1, 44