



Copyright Law Reform in Uganda

Addressing International Standards
at the Expense of Domestic Objectives

Edgar Tabaro

ACODE Policy Briefing Paper No. 10, 2005

The views expressed in ACODE Policy Briefing Papers are entirely those of the authors and do not in any way represent the position of ACODE or its partners who provide financial support for these publications.

Copyright Law Reform in Uganda

**Addressing International Standards at the
Expense of Domestic Objectives**

Edgar Tabaro

ACODE Policy Briefing Paper No. 10, 2005

Table of Contents	Page
List of Acronyms.....	ii
Acknowledgement.....	iii
Executive Summary	iv
1. Introduction	1
2. Background.....	3
3. Uganda Copyright Bill in a Digital Age.....	5
4. The Ugandan Proposals for Reform.....	9
5. Moral Rights Protection.....	11
6. Right to Privacy in Photographs and Films.....	11
7. Performers Rights.....	12
8. Protection of Folklore.....	14
9. The Case for Further Reform.....	17
9.1 Copyright	18
9.2 Moral Rights.....	19
9.3 Domain Public Payant.....	20
10. Recommendations for Consideration.....	21
11. Conclusion.....	22
12. References.....	24
13. Publications in these Series.....	25

List of Acronyms

ACODE	Advocates Coalition for Development and Environment
Cap	Chapter
LDCs	Least Developed Countries
PC	Personal Computer
TRIPs	Trade Related Aspects of Intellectual Property Rights
UK	United Kingdom
UNESCO	United Nations Educational, Scientific and Cultural Organization
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performers and Phonograms Treaty
WTO	World Trade Organization

Acknowledgement

Copyright Law Reform ought to address domestic policy objectives as well as international standards to which Uganda is obligated. Uganda's Copyright Bill in its present form appears to address the latter at the expense of the former. Issues to do with increased presence and access of local creations on the international scene need to be addressed in the context of creating rights for protection and accruing benefits. Thus this policy briefing paper provides a timely insight into the reform process by highlighting the salient domestic issues to be considered.

This publication was commissioned by the Intellectual Property Rights and Biotechnology Policy Programme of Advocates Coalition for Development and Environment (ACODE) and could not have made possible without the financial support from the Global Inclusion Programme of Rockefeller Foundation. I am therefore, indebted to them for having facilitated the production and publication of this paper.

Ronald Naluwairo, Godber Tumushabe and Eunice Rhoda Musiime provided very useful insights to the development of this policy brief for which I am eternally grateful.

Executive Summary

In 2004, Hon. Jacob Oulanyah, (Member of Parliament for Omoro County, Gulu District) introduced a Private Member's Bill entitled *The Copyright and Neighbouring Rights Bill No. 16 of 2004*. The Bill seeks to repeal the outdated Copyright Act (Cap 215 Laws of Uganda), which is a replica of The United Kingdom Copyright Act of 1957, which has since undergone reform on numerous occasions.

This policy briefing paper analyses the concepts and principles adopted by the Bill in the context of Uganda's national development objectives and policy instruments. It is argued that the Bill does not address such objects as it principally seeks to update the Copyright Act and bring it to international standards at the expense of domestic objectives.

The paper underscores the policy framework and objectives to which a comprehensive copyright legislation should be based in order to serve a more meaningful purpose in the national development processes.

Issues of traditional/indigenous creations, long neglected are highlighted for specific attention given the growing awareness and consciousness on the need to protect such works.

Digitization and its effect on copyright as provided for in the Bill is addressed and particularly matters related to definition, interpretation and enforcement in the face of the ever changing technological environment.

Numerous proposals are made including but not limited to the right to privacy in photographs and films, measures for protection of folklore, moral rights, rights of performers and that the Bill should further be informed by broad policy

instruments such as the Poverty Eradication Action Plan (PEAP), Trade Policy, Information & Communication Technology (ICT) Policy, Telecommunications Policy, Science and Technology Policy, and other policy instruments with a bearing on copyright.

1. Introduction

Copyright¹ should primarily serve the instrumentalist function of satisfying social goals and values, the creation, spread and sharing of knowledge and information, and public use and access². In the current era, and particularly in regard to the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, the presumptions of copyright are ripe for wholesale reconsideration. The interests and biases of the developed countries have monopolized the international copyright agenda and in the process the interests of developing countries have been ignored.

International legal developments in this area call for a comprehensive understanding of the challenges to which copyright legislation must respond. The most prominent international trend affecting copyright that deserves attention is a growing consciousness of cultural self-determination among diverse countries and peoples, the internationalization of legal norms affecting culture and cultural developments in western countries all of which have evolved at the expense of the interests of indigenous people.

The objective of Uganda's copyright legislative process is to address international standards and is manifestly set out in the Memorandum to the Copyright and Neighboring Rights Bill³, which reads:

The Bill seeks to update the Law on Copyright to bring it into line with international standards and to repeal the existing out-dated Copyright Act, (Cap 215) passed in 1964.

¹ Copyright is a property right that subsists in certain specified types of works such as original literary, musical or artistic work. See S. 3 Copyright Act Cap 215, Vol. IX, Laws of Uganda, 2000.

² See the argument pursued by Gordon A. Gow in *Copyright Reform in Canada: Domestic Cultural Policy Objectives and the Challenge of Technological Convergence* <www.sfu.ca/gagow/capcam/cpyrgh.htm.3k>.

³ Bill No. 16 of 2004.

The international developments in Copyright Law are taking place at the expense of indigenous persons. Notably, technological developments have increased accessibility of the developed nations to works of dispossessed groups in developing countries, the aboriginal peoples of the developed world and other sub-national groups in the developing world. This cultural heritage prominently features artistic works of joint, communal and sometimes unknown authorship, including works of folklore unknown in western cultures.

Underlying all, culture in indigenous societies has generally developed around a non-commercial understanding of cultural property. Creative work is believed to fulfill important social functions, enriching the knowledge and experience of members of society quite independent of its economic value. This perspective is the very antithesis of western industrial culture. The west apparently depends on the commoditization of culture for its continued vitality⁴.

It is increasingly becoming apparent that copyright reform is intrinsically linked to cultural policy, as a result of increased awareness of the value of cultural heritage and traditions, and a desire on the part of governments and other authorities to preserve and promote culture. Cultural vitality has become and will continue to be a valued and sought after goal for national authorities and agencies.

Objectives to which Copyright Reform should be premised

- Create opportunities for Ugandan creators in the global economy;
- Stimulate the production of Ugandan cultural content;
- Encourage presence of Ugandan content on the international scene;
- Enrich learning opportunities for Ugandans.

⁴ Michael Blakeney *Intellectual Property in the Dreamtime- Protecting the Cultural Creativity of Indigenous Peoples* <<http://www.oiprc.ox.ac.uk/EJWP1199.html>> .

The need to encourage the creative impulse⁵ in members of society, and measures to protect existing cultural heritage cannot be over emphasized. The intellectual property rights reform processes ongoing in a number of countries, Uganda inclusive, presents a major opportunity for the policy makers to rethink how cultural heritage of the indigenous people can be protected. This is essentially what this policy briefing paper seeks to do.

2. Background

Since the early 1960s, both African and Asian countries have attempted to put the issue of protecting indigenous creations on the international discourse. At the 1963 United Nations Educational, Scientific and Cultural Organization (UNESCO) organized 'African Study Meeting' held in Congo-Brazzaville a range of copyright issues were discussed. Prominent among them was the inclusion of special provisions safeguarding the interests of African countries in respect of their own folklore⁶.

At the Stockholm Revision Conference of the Berne Copyright Convention⁷, the Indian delegation proposed that works of folklore be specifically enumerated as literary and artistic works under Article 2(1). This effort was unsuccessful and the only significant change to the Berne Convention was the addition of the current Article 15(4) covering "unpublished works". This Article however makes no specific reference to the specific imperatives faced by indigenous people and as such has proved wholly unsatisfactory. The provision only mandates national authorities to regulate such matters.

⁵ Laddie Presott & Victoria in *The Modern Law of Copyright* postulate that '*the purpose of copyright is to encourage and reward authors, composers, artists, designers and other creative people as well as entrepreneurs, publishers who risk their capital in putting their works before the public*'.

⁶ Alan Story *Copyright and the Intangible Indigenous Heritage/Knowledge* available at <www.iprcommission.org/graphic/documents/final-report.htm>.

⁷ Berne 1886.

In 1976, a Tunis model on Copyright for developing countries established a definition of folklore, to constitute an appreciable part of folklore and further indicated that folklore need not be "fixed in some material form" to attract copyright protection. The model law is however yet to gain universal application.

In 1980, spurred by the growing consciousness of indigenous peoples on a number of continents, the issue was re-conceptualized as a matter of indigenous self-determination, collective rights and cultural preservation. In 1985, UNESCO recommended the passage of national legislation prohibiting a number of actions such as willful distortion.

The World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore noted that at least 23 countries and 3 regional integration organizations had made, or were in process of making available specific legal protection for traditional knowledge related subject matter⁸. The issue is far from being settled; with increased commoditization of knowledge, globalization and improved communication technologies, the misuse appears to be getting even more serious.

This paper therefore analyses whether the Ugandan Copyright Bill modeled on continental European principles adequately protects and supports indigenous creations. It is stressed that indigenous knowledge is a pressing issue due to increased trade in indigenous heritage, which benefits non-indigenous entities. It is further argued that modern copyright regimes have facilitated and reinforced the economic exploitation and erosion of indigenous people's cultures. The problem stems from a difference of social paradigms: a Eurocentric view of property

⁸ See WIPO Report of the Fact Finding Mission on Indigenous Knowledge at <www.wipo.int>.

ownership, which is alien and detrimental to the indigenous world-view. The latter regards property rights as means of maintaining and developing group identity rather than furthering individual pursuits⁹. A framework for the protection of indigenous creations is outlined for evolution of policy guidelines and inclusion in the Bill.

3. Uganda Copyright Bill in a Digital Age

Prior to the 1996 WIPO Copyright Treaty (WCT), the main international treaty was the Berne Convention which had been rendered inoperative by the rapid change in technology and in particular digitalization. Article 11bis (1) of the Berne Copyright Convention required member states to give an exclusive right to the copyright owner of literary and artistic works to do or to authorize four different classes of acts: wireless broadcasting, cable transmission of a broadcast, rebroadcasting of a broadcast, and the communication to the public of works which had been broadcast.

The global nature of broadcasting and communication technologies exacerbated the shortcomings of the Berne Convention as a tool for legal harmonization. To this end, the wide development of the internet and the production of works in a digital form made infringement of copyright material much easier and therefore the scope for economic loss increased too.

The potential for this behavior to damage the ability of authors and creators to control the communication of their work to gain financial compensation as a result of exploitation of their work strikes at the very purpose of copyright law. These values

⁹ This underlies the very nature of property ownership in the western world, which emphasizes individual as opposed to communal ownership.

can be argued in the realm of human rights and the more utilitarian concern to encourage creativity.

The development of the Internet and other similar forms of transmission, have had implications for copyright law, which go beyond its abilities to regulate the phenomenon. In response to the existing difficulties of the Berne Convention and the difficulties caused by rapid technological development, WIPO established a Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms. Thus the new treaties, WIPO Copyright Treaty (WCT)¹⁰ and WIPO Performers and Phonograms Treaty (WPPT)¹¹ are a result of the initiatives of this committee.

The WIPO Copyright Treaty operates as a special agreement under Article 20 of the Berne Convention and only binds those members of the Berne Union who ratify it. Subscribing states that are not members of the Berne are required to comply with the substantive provisions of the Berne Convention¹².

In the context of the new communication technologies, the important provision of the treaty is Article 8, which reads as follows:

Without prejudice to the provisions of Articles 11(1) ii, 11bis(1)(i) and (ii) 11ter (1) (ii) and 14bis (1) (ii) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and time individually chosen by them.

¹⁰ WCT 1996, incorporating the agreed statements of the Diplomatic conference that adopted the treaty.

¹¹ WPPT 1996.

¹² Uganda is member owing to its colonial heritage.

This Article augments provisions of the Berne Copyright Convention in at least two ways; it gives exclusive rights in respect of diffusion of literary and artistic works by wire and also with respect to communication to the public of text and images. It further brings within the notion of communication to public the making available of literary and artistic works so that they may be accessed at any time by individual members. This is clearly intended to deal with the storage of copyright works on such things as the World Wide Web.

The WIPO Performers and Producers of Phonograms Treaty (WPPT) splits concepts in Article 8 of the WIPO Copyright Treaty (WCT) into two free standing rights, rather than conceptualizing the rights of making available to the public as an aspect of communication to the public. Articles 10 and 14 of the Performers and Phonograms Treaty give phonogram performers and producers respectively, the right to authorize the making available to the public of their performances and recordings at a time chosen by individual members of the public. Article 15(1) gives performers and producers of phonograms the right to a single equitable remuneration in respect to broadcasts and communication to the public.

The dichotomy of the concepts is laudable. On its own, Article 8 of the WCT might have suggested an international consensus to the effect that making available to the public at a time chosen by individual members of the public was an aspect of communicating to the public. This might have cast light on for example, the exclusive rights which the Berne Copyright Convention confers on dramatic and/or musical works in Article 11(1) (ii). These types of works, which are dominant in Ugandan literary creations, are not covered by Article 8 of the WCT. It would be helpful to know whether or not the making available online of such works would be regarded as communicating them to the public within the meaning of Article 11(1) (ii).

The crucial role communication carriers play in availing (communicating) material to the public at a time chosen by an individual should be borne in mind. Concerns about the exposure to liability under Article 8 of the WCT were resolved by the Diplomatic Conference in its Agreed Statement in relation to Article 8, which read thus:

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within meaning of this treaty or the Berne Convention¹³.

The foregoing position appears to exempt communication carriers from liability in respect of provision of 'physical facilities'. The expression 'physical facilities' itself is not clear, as in the communication environment there are two players, the internet service providers and the network providers. The former merely provide the facilities for communication and the later are the content providers. This does not address the question of liability arising from authorizing an infringement. The Ugandan Copyright Bill does not address this question at all. S.9 of the Bill reads:

The author of a protected work shall have, in relation to that work, the exclusive right to do or authorize other persons to do the following- (e) to communicate the work to the public by wire or wireless means or through any known means or means to be known in the future, including making the work available to the public through the internet or in such a way that members of the public may access the work from a place and time individually chosen by them.

It may well be important for the Bill to address this aspect, as it may open up an array of litigation against communication carrier in an attempt to clarify the position through the courts.

¹³ <<http://www.wipo.int/eng/dip/conf/distrib/96dchtm>>

4. The Ugandan Proposals for Reform

The Ugandan proposals for reform are contained in the Copyright and Neighboring Rights Bill. The proposals appear to bifurcate the provisions of Article 8. The proposed new right of communication is contained in s.2 of the Bill. It reads thus:

"Broadcast," means any communication or transmission of sound, video or data intended for simultaneous reception by the public by means of any electronic apparatus; and reference to broadcasting shall be construed accordingly;

"Communication to the public" means the operation by which sounds or images or both sounds and images are transmitted to the public whether through broadcast, performance or other means.

It is not yet understood why the draftsman chose to separate the right to broadcast from the right to communicate to the public. A broadcast is essentially a communication to the public, and the right to communicate to the public does cater for the right to broadcast. The right to communicate to the public is broad based and technologically neutral, as any broadcast at present or in the future is basically a communication to the public. It therefore follows that the phrase 'any known means or means to be known in the future' under clause 9 of the Bill is largely misplaced. Further to this, the definitions currently worded appear to alienate on-demand interactive services that have been enabled by the internet.

A potential overlap between the new rights and the exclusive right of copyright holders to authorize any production of their work emerges. For instance uploading of a copy of an article on an internet site may be accessed by the public and thus can be reproduced with ease. This accessibility allows for the breach of copyright but with the authority of the author.

Particular concern in the new transmission rights is the common law defence of fair dealing, and whether the same would apply in relation to the proposed transmission type and making available to the public. In one United States case *A.M Records v Napster*¹⁴, the first real test to the Digital Millennium Copyright Act¹⁵ wherein the defendant designed and operated an interactive system that enabled Personal Computer (PC) users to make music files stored on individual computer hard drives available for copying by other Napster users, to search for music stored on other users' computers, and to transfer exact copies of others users' music files from one computer to another via the internet.

A.M Records is a label under which music is produced which permitted Napster to upload its site with its music. In spite of evidence indicating increased sales for A.M Records amongst college students who were exclusive users of Napster's system, Napster was held to be infringing A.M Records' copyright. Their defence failed under the doctrine of contributory copyright infringement and vicarious copyright since Napster had a direct financial interest in its users infringing activity and retained the ability to police its systems for any infringing activity.

It is unlikely that the courts in Uganda would develop the present realm of common law, which is wholly based on archaic doctrines derived from English tradition unlike the Anglo-American principles, which have advanced with technology change. For this reason it is proposed that copyright defences be made statutory rather than relying on what may turn out to be inapplicable common law defences in the face of new communication technologies.

¹⁴ Case No. 00-16401/403.

¹⁵ US Title 17, Public No. 105-304.

5. Moral Rights Protection

The development of Copyright Law in Uganda is closely linked to the Law of Copyright in England. Moral rights were non-existent under traditional English Law. It was under the Continental European Law that moral rights were found. Typically a moral right is the right to claim for the work and thus seek compensation if and where there is distortion or modification of the work in such a way that the resulting situation is prejudicial to the good name, honor and reputation of the author. Living authors as well as their heirs enjoy this right.

Evidence of moral rights recognition abounds in traditional customary law in respect of traditional creations¹⁶. It is characteristic of the African traditional society to honor and in some respects fear the dead and to treat elders with respect. Though Clause 10 of the Bill provides for moral rights, the provisions are restrictive. It recognizes moral rights for authors, who are defined under clause 2;

"Author" means the physical person who created or creates work protected under clause 5 and includes a person or authority commissioning work or employing a person making work in the course of employment.

The definition by implication eliminates indigenous works. The absence of recognition of authorship of traditional creations is thus a serious omission¹⁷.

6. Right to Privacy in Photographs and Films

Ugandan Copyright Law presently and indeed in the proposed Bill does not recognize the right to privacy. The inclusion of

¹⁶ Joseph Kakooza, Note on the "IS" and the "OUGHT" of the Law of Copyright in Uganda. (2001) MLJ 112.

¹⁷ A more detailed discussion on the broad subject of indigenous folklore follows.

the right to privacy in photographs and films is considered necessary because of the power of the media and the danger that photographs and films made for private purposes might be published against the wishes of the person who commissioned them. This new right would place some safeguards to prevent a publication or a broadcast that would be an unwelcome invasion of the privacy or that of the persons appearing in the photograph or film, or at least dress them with some form of legal redress.

The U.K Copyright, Designs and Patents Act¹⁸ provides under s.85

A person who for private and domestic purposes commissions the taking of a photograph or making of a film, has where copyright subsists in the resulting work, the right to have:

- (1) copies of the work issued to the public*
- (2) the work exhibited or shown in public or*
- (3) the work broadcasted or included in a cable programme service.*

Introduction of such provisions would do well to protect persons against media houses that have made it a practice to invade the privacy of individuals by publishing and/or broadcasting fixed or motion pictures taken at private occasions.

7. Performers Rights

Clause 22 of the Bill introduces, in addition to moral rights of performers under clause 23, a range of new economic rights in both unfixed and fixed performances¹⁹. Performers have the right under clause 22 to:

¹⁸ 1988.

¹⁹ Performance is defined under s.2 as the presentation of a work by actions such as dancing, acting, playing, reciting, singing delivering, declaiming or projecting to listeners or spectators.

- (a) *the fixation of his or her live performance not previously fixed on as physical medium;*
- (b) *the broadcasting or communication to the public of his or her unfixed performance except where-*
 - (i) *it is made from a previously authorized fixation;*
 - (ii) *the transmission has been authorized by a broadcasting company that transmitted the first performance.*

The above provision denies the performer the right to both fixed and unfixed performances by excluding the word 'exclusive' from the wording in clause 22 (1). Further clause 22 (1) b, denies a performer an exclusive right to have their performance broadcast or communicated to the public where it is made from a previously authorized fixation or the transmission has been authorized by a broadcasting company that transmitted the first performance. The denial of the exclusivity goes to the core of copyright Law.

The biggest set back for Ugandan performers has been the absence of a law for exclusive rights to economic gain from their performances. These provisions benefit the broadcasting companies and directors of fixations at the expense of performers. The need to include the exclusivity of deriving economic benefit from communication to the public of performances of performers need not be over emphasized as it is real.

However the Bill is commendable in as far as it extends performers rights to audio-visual fixations. The WPPT under Articles 7, 8, 9, and 10 as noted earlier extends their rights to only fixed phonogram performances, contrasted with the position in the Ugandan Bill that provides for fixations which is in turn defined as the embodiment of images or sound or both images and sound in a material form sufficiently stable or permanent, to permit them to be perceived, reproduced or otherwise communicated through a device during a period of more than

transitory duration. The scheme of rights granted excluded audio-visual rights as a result of international pressure from the EU countries in spite of opposition from the United States with the support of India²⁰. This position is in tandem with the draft Broadcasting Policy that is desirous of developing a vibrant film industry through the protection of their productions.

8. Protection of Folklore

The fields of arts and the media have developed tremendously over the past decade and with increased globalization constraints in protecting indigenous intellectual property are introduced. Cultural productions such as bark paintings, poems, songs and the like are appropriated by western based persons who in turn market them for their own benefit as they are recognized as "authors" in the style of copyright law²¹.

For example, Enigma, a German rock group, produced a hit that was at the top of the US and world charts for more than six months. Their rock buster single 'Return to Innocence' sold more than 5 million copies and was featured at the 1996 Olympic Games in Atlanta. "Return to Innocence", however, was not Enigma's song. It belonged to an indigenous community in Taiwan who through cultural exchange with the French Ministry of Culture performed Taiwanese tribal songs across Europe, which were recorded and sold to the German group Enigma. Neither recognition nor financial reward was given to the Taiwanese²².

In one Australian case *Milpurrurru & Ors v Indofurn (PTY) Ltd*²³ the defendant company produced carpets on which were designs

²⁰ The two were desirous of protecting their film industry, as they are the world's leading film producers.

²¹ Christine Morris *Indigenous Intellectual Property Rights: The Responsibilities of Maintaining the Oldest Culture in the World* (1997) ILB 19.

²² Alan Story *Copyright and Intangible Indigenous Heritage/ Knowledge. Report of the Commission on Intellectual Property Rights -UK* available at <www.iprcommission.go.uk>.

²³ (1994) 30 IPR 209.

of clan totems and other sacred images of Aboriginal traditions. The court imported traditional Aboriginal law into copyright to find that there was unauthorized reproduction which is a breach of copyright. The concept of communal ownership of works under Aboriginal Law was not relevant to the validity of an assignment of copyright in works of the creator.

It has been argued by most writers that modern intellectual property law regimes, which are rapidly gaining universal application, are detrimental to the rights of indigenous people. The argument here is that modern intellectual property is a western concept premised on notions of individual ownership of property as opposed to the indigenous world-view where property rights are a means of developing group identity. Conventional intellectual property systems vest copyright in the owner, who is generally presumed to be the author of the work. Eurocentric discourse perceives the aim of copyright law to be the encouragement and reward of individual creativity. Folkloric works are intimately linked with identity of the indigenous community which concept is akin to custodianship (or holding in trust) rather than exclusive proprietorship. Therefore ownership of folklore lies with tribal custodians and not the individual authors who define the limits for reproduction and the use of works.

It is evident that the requirement for individual ownership and author identity are reflections of the underlying Eurocentric notion that economic benefit is the primary motivation for creativity, for which property rights are introduced to allow economic exploitation. It is here argued that the tenets of communal ownership can be introduced into copyright legislation as a means of regulating the use of Ugandan folkloric works and thereby maintain integrity and identity of cultural preservations²⁴.

²⁴ Under trademark law, collective trademarks are basically owned by associations rather than individuals. Introduction of such an aspect would therefore in my opinion not be an innovation in intellectual property law.

Further, Copyright Law requires that for a work to be original, it should have "the distinct individual creative style" of the author. Folkloric works tend to be inspired by pre-existing traditions and successive patterns of imitation over time, thus in this case the condition of originality is not satisfied²⁵. WIPO has further strengthened this argument by observing that the very nature of many folkloric works is that they are repetitive, rely on tradition and that the scope for interpretation and individual expression is limited.

The above arguments cannot pass without challenge. Property rights may be individual or communal. The mere fact that Copyright Law was developed in a different legal paradigm does not necessarily mean that the same cannot be adopted and adapted to fit in the traditional notions associated with copyright ownership. The most known paradigm shift in copyright law has been its traditional association with its territorial application. However, with globalization, the fast application of the internet has rendered the notion inapplicable hence requiring the development of new rules. In the same spirit Copyright Law can be modified to cater for folkloric works.

A key tenet of copyright law is the protection of the expression of an idea as opposed to the ideas themselves²⁶. Fixation or reduction into material form is a condition precedent to the protection of works. This has serious consequences for indigenous creations since most folkloric works tend to be orally and visually represented. Furthermore, indigenous presentations are regarded as ideas rather than expression of ideas. In this regard non-indigenous people are at liberty to commercially exploit indigenous works. Even where such works are protected,

²⁵ Githaiga Joseph *Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge* (1998) 5 Murdoch E-Law Journal.

²⁶ Sees.6 of the Copyright Bill.

non-indigenous people can create their own versions, which are protected as original works²⁷.

The limited duration of copyright offers inadequate protection as it conflicts with longevity of indigenous works²⁸. The concern for indigenous communities is that folkloric works are not limited in duration.

9. The Case for Further Reform

Proposals of mechanisms for the protection of traditional knowledge have ranged across two axes. Along one axis are various suggestions to improve the private law rights of the creators or custodians of traditional knowledge. These suggestions range from proposals to modify existing copyright law through to the creation of sui generis traditional knowledge rights. Along another axis are suggestions to deal with the protection of traditional knowledge as a public law right. These suggestions range from the creation of a public protection authority, through domaine public payant proposals, to the empowerment of Indigenous peoples' protective agencies. These various suggestions are considered below.

At the minimalist end of discussions concerning the protection of folklore, are suggestions to deal with the perceived inadequacies of existing intellectual property laws by supplementary legislation.

Key Issues for Bill to address on Folkloric Expressions

- Copyright protection is available to an “author”. In the case of folklore such as traditional songs and dances, authorship often cannot be traced to any single person
- Copyright applies to works that are “fixed” in material form. Folklore embodied in oral traditions, such as dances, songs and stories, often are not “fixed” and therefore fall outside the ambit of protection under the Bill
- Copyright protection usually ends when the author of the work has been dead for fifty years. Traditional songs, dances and stories have been around for generations, with the result that most folklore fell into the public domain

²⁷ Michael McMahon *Indigenous Cultures, Copyright and the Digital Age* (1997) ILB 10.

²⁸ s.13 of the Bill limits such works to the life of the author and 50 years after the author's death.

A number of commentators have questioned whether traditional knowledge is amenable to private law rights and remedies. For example, Githaiga²⁹ questions the applicability of western property law concept to cultural expressions. Blakeney³⁰ explains, indigenous peoples do not view their heritage as property at all- that is something which has an owner and is used for the purpose of extracting economic benefits- but in terms of community and individual responsibility. Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships rather than a bundle of economic rights.

However, bearing these reservations in mind, the various private and public law suggestions for the protection of traditional knowledge are canvassed below.

9.1 Copyright

As has been discussed above, existing copyright law does not easily recognise communal authorship and to a lesser extent, communal ownership. Both of these matters can be dealt with by introducing statutory provisions.

Another ownership issue is the matter canvassed in the Milpurrurru case, discussed above, whether notwithstanding an assignment of copyright, a communal group retains the underlying right to the folklore. It has been suggested that, that could be dealt with by the recognition of an underlying equitable right in the communal group. This right would seem

²⁹ Githaiga *ibid* note 21.

³⁰ Blakeney *ibid* note 4.

to have a similar quality to the moral rights, which are recognized in civil law jurisdictions.

A major limitation of western copyright law is its insistence upon material fixation as a precondition for protection. The Tunis Model Law on Copyright for Developing Countries, 1976, in s.1 (5bis) provides a useful precedent of the fixation requirement being waived for folklore. The limited duration of copyright protection has been perceived as a problem for traditional works, some of which may have originated many thousands of years ago. Again this is a problem, which could yield to appropriate legislative drafting. It has also been suggested that the unauthorized appropriation of the styles of Indigenous peoples, could be dealt with by the concept of copyright in derivative works. In general, the view of many commentators and committees of review is that the legal structure of copyright, with its emphasis on private property rights, is ill suited to protect folklore.

9.2 Moral Rights

Another copyright possibility for the protection of traditional knowledge is within the rubric of moral rights. Each of the moral rights of publication, paternity and integrity, have applicability to the protection of traditional knowledge. The right of publication allows a creator to decide whether a work should be made public. This would permit the creators of spiritually sensitive works to control their dissemination. The right to have paternity acknowledged would be useful in securing the authentication of traditional works. Most important is the right of integrity, which protects works from distortion, alteration, or misrepresentation.

9.3 Domain Public Payant

To deal with the fact that copyright works fall into the public domain after a finite time, a number of states have introduced legislation to prevent or sanction the use of such works, which would prejudice their authenticity or identity. Additionally, a fee may be imposed for the use of such works. The monies thereby received can be diverted to the promotion of cultural activities. This scheme is particularly suited for the nurturing of traditional works. The Tunis Model Law on Copyright encourages the use of domaine public payant to assist developing countries to "protect and disseminate national folklore".

Further statutory modification can be introduced in the Bill to envisage a system of prior authorization to be administered by a competent authority, which represents the relevant traditional community's interest in protecting its folklore. Authorization would be required for commercial uses of folklore other than in the traditional and customary context, subject to the supervision of the competent authority.

Where folklore is used in a traditional context, an authorization would be needed for the publication, recitation, performance, or distribution. Use of folklore outside its traditional context would have to seek the prior consent of the community or an authorized person. Authorization would not be required for uses of expressions of folklore if the purposes relate to research, conservation and archiving. Furthermore, there is no need for authorization outside the traditional or customary context, when an expression of folklore is used: for educational purposes; by way of illustration; for creating an original new work; for reporting of a current event; and where folklore is permanently situated in a public place.

The Tunis Model Law prohibited unauthorized commercial use of expressions of folklore. It provided that where the competent authority granted authorization, it could set the level of remuneration and collect fees. The fees would be used for the purpose of promoting or safeguarding national culture or folklore. The commentary on the Model Law suggested that it would be advisable to share this fee with the community from which the folklore originated. The Model Law provided for offences relating to distortions of expressions of folklore. The offence provisions required the element of "willful intent", with fines and imprisonment imposed as punishment. There were also civil sanctions and seizure provisions. The folklore provisions of the Nigerian Copyright Act 1988 are based extensively on the WIPO/ UNESCO Model Law and the supervision of the exploitation of cultural works is conferred upon the Nigeria Copyright Council.

The Copyright Bill emphasizes international developments and digital agenda as opposed to domestic objectives. Emphasizing the primacy of individual interests over those of group reflects a lack of respect for indigenous law and might facilitate exploitation of indigenous creations. It is thus unjustifiable and detrimental to domestic objectives. To this end, the subsequent section makes some specific recommendations for consideration.

10. Recommendations for Consideration

- ❑ The proposed Bill should revert to the previous provisions in the 1964 Copyright Act³¹ which provided that "No person shall be entitled to copyright in any literary, dramatic, musical or artistic work, whether published or unpublished". This would allow for protection of those works that are not reduced into some material form as those of indigenous people are. Alternatively

³¹ Now Cap 215, vol IX, Laws of Uganda 2000.

the Bill should expressly include folkloric creations under clause 3, as it by implication excludes them. Clause 3 provides that the ACT applies to any work, created or published before commencement of this Act, which has not yet fallen into the public domain(emphasis added)³².

- ❑ Introduction of the doctrine of domain public payant that essentially allows the use of works that have entered the public domain for the payment of royalties would also go a long way in ensuring that communities benefit from their works. Folkloric works being basically in the public domain would generate income for indigenous communities.
- ❑ The provisions on moral rights should be amended to reflect folkloric expressions. The provisions presently worded are premised on a Eurocentric notion of private ownership even of non-economic value of works by specific reference to an "author".
- ❑ The Copyright Legislative Process should be transparent and widely consult all the relevant stakeholders.

³² Folkloric works are basically in the public domain.

11. Conclusion

Hon. Jacob Oulanyah's efforts to develop Uganda's copyright are commendable. However, it is the writer's opinion that copyright legislation reform should continue to be relevant to domestic objectives by reflecting social values of domestic policies. Its evolution should be adapted by lawmakers to promote present day social values and priorities. A chasm has emerged between copyright law and the social values about culture and it ought to be addressed. By developing some projections about how the relationship between domestic cultural objectives and copyright is likely to evolve, it may become possible to identify a satisfactory set of parameters incorporating domestic objectives in the legislative process. To this end the legislative process needs to widely consult and in particular be informed by existing policies that have a bearing on copyright including the industrial policy, cultural policy, trade policy, science and technology policy, broadcasting policy and the Poverty Eradication Action Plan.

12. References

1. Alan Story Copyright and the Intangible Indigenous Heritage/Knowledge Report of the U.K Intellectual Property Commission 64 (2004).
2. Christine Morris Indigenous Intellectual Property Rights: The Responsibilities of Maintaining the Oldest Culture in the World. (1997) Indigenous Law Bulletin 19.
3. Gordon A. Gow Copyright Reform in Canada: Domestic Cultural Policy Objectives and the Challenge of Technological Convergence.
4. Hugh Laddie The Modern Law of Copyright London Butterworth 1980.
5. Joseph Githaiga Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge (1998) 5 Murdoch E-Law Journal.
6. Joseph Kakooza, Note on the "IS" and the "OUGHT" of the Law of Copyright in Uganda. (2001) Makerere Law Journal 112.
7. Michael Blakeney Intellectual Property in the Dreamtime-Protecting the Cultural Creativity of Indigenous Peoples <<http://www.oiprc.ox.ac.uk/EJWP1199.htm>>l.
8. Michael McMahon Indigenous Cultures, Copyright and the Digital Age (1997) Indigenous Law Bulletin 10.
9. The Agreed Statements of the Diplomatic Conference Concerning Certain Provisions of the WIPO Copyright Treaty 1996.
10. Tunis Model Law on Copyright for Developing Countries 1976.

13. Publications in these Series

- **Mpeirwe A., (2003), WTO Negotiations on Geographical Indicators: A Case for non-Discrimination of Products of Interest to Developing Countries.** *ACODE Policy Briefing Paper No.1, 2003*
- **Tumushabe G., (2004), Type II Partnerships As a Strategy for Implementing WSSD Outcomes: Considerations to Guide Government Decision Making.** *ACODE Policy Briefing Paper No.2, 2004*
- **Mugenyi O., (2004), Status of EPA Negotiations: Eastern and Southern Africa Approach and the Challenges to Effective Negotiations.** *ACODE Policy Briefing Paper No.3, 2004*
- **Tumushabe G., and Naluwairo R., (2004), COP-MOP 1 Decision on Liability and Redress: Analysis of Implications and Challenges for Eastern and Southern Africa.** *ACODE Policy Briefing Paper No. 4, 2004*
- **Naluwairo R., and Tumushabe G., (2004), Uganda's Position on GMOs: Whose Position? Reflections on Uganda's Policy Making Process on GMOs.** *ACODE Policy Briefing Paper No.5, 2004*
- **Naluwairo R., and Tumushabe G., (2004), Approaches to Biosafety Legislation in Africa: Options to Facilitate National Decision Making.** *ACODE Policy Briefing Paper No. 6, 2004*

- **Tumushabe G., and Bainomugisha A., (2004), The Politics of Investment and Land Acquisition in Uganda: A Case Study of Pian Upe Game Reserve. *ACODE Policy Briefing Paper No.7, 2004***

- **Naluwairo R.,(2005), Promoting Common Property Rights in Fisheries Management in Uganda: A Review of the National Fisheries Policy and Proposed Fisheries Legislation. *ACODE Policy Briefing Paper No. 8, 2005.***

- **Tumushabe G., and Naluwairo R.,(2005) Harnessing the Power of Intellectual Property Rights in Building Science and Technological Capacity : Key Issues for Policy Makers in East Africa. *ACODE Policy Briefing Paper No. 9, 2005.***

About the Author

Edgar Tabaro is an Advocate and Research Associate of ACODE. He holds a Master of Laws degree (LLM) from University of Witwatersrand, South Africa. He also holds a Bachelor of Laws degree (LLB) from Makerere University and a Postgraduate Diploma in Legal Practice from Law Development Centre.

Edgar is a practicing Advocate with the Nile Law Chambers and he is the founding Head of Department, Law at the Kampala International University .



Advocates Coalition for Development and Environment
Plot 96 Kanjokya Street, Kamwokya
P.O. Box 29836, Kampala
Tel: 256- 41-530798

E-mail: library@acode-u.org, acode@acode-u.org

Website: www.acode-u.org