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**TITLE: BROADCAST COPYRIGHT AND REGULATORY FRAMEWORK
FOR FREE ACCESS TO LIVE FOOTBALL BROADCASTS IN KENYA AND
SOUTH AFRICA**

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**BROADCAST COPYRIGHT AND REGULATORY FRAMEWORK FOR FREE
ACCESS TO LIVE FOOTBALL BROADCASTS IN KENYA AND SOUTH AFRICA**

By

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SUMMARY

This study investigates the impact of broadcast copyright on access to the broadcasting of football in Kenya and South Africa. Broadcasting is the most important and popular platform over which football matches are distributed globally. Modern broadcasting and telecommunication technologies have created multimedia channels and platforms over which football events are exploited. The exploitation of these sporting events places greater reliance upon copyright and other intellectual property rights. Intellectual property rights in general and copyright in particular monopolises and individualises that which they protect. When football events are broadcast in Kenya and South Africa, they are assimilated into broadcasts which form one of the categories that are copyright protected in the two jurisdictions. At the same time when football games are recorded before transmission, they are protected as audio-visual works within the meaning of the copyright laws of South Africa and Kenya. The exclusive rights that broadcasting organisations enjoy in Kenya and South Africa create a monopoly over the broadcast football matches. Access to these events, therefore, on the part of the public becomes discretionary at the whims of the broadcaster transmitting events.

On the other hand, the study found out that football is a popular culture not only in Kenya and South Africa but also across the world. Football is an expression of the people's culture and therefore glue that binds people together. It is viewed as a cultural heritage that promotes collective consciousness of a people. It promotes national cohesion and nationhood and thus important for countries like Kenya and South Africa where ethnicity and racial divisions are so pronounced. This calls for stronger legal and policy frameworks towards greater public access to broadcast football. This necessity is also justified by the fact that media transforms football events into stories through commentaries and analysis. The football events therefore become informational assets that have greater constitutional underpinnings within the context of the right to information. The public therefore has a constitutional claim to broadcast football as sports information as well as under the relevant international instruments like the International Convention on the Right of the Child of 1989 and the International Charter on Physical Education and Sport.

The major findings of the study are that live broadcasting of football events is copyright protected in Kenya and South. This copyright protection though is not backed up by copyright doctrines and philosophies because transmission of football events is not a creation of the mind. Additionally, the exclusive rights that broadcasters enjoy over their broadcasts are buttressed by technological protection measures employed by pay TV services which encase absolutely football events. This situation has been exacerbated by the migration of premium football events from free-to-air (FTA) channels to subscription services which further limits access to broadcast football events that are encrypted.

Based on the foregoing findings, the study makes appropriate recommendations that would bring Kenya and South Africa to a level consistent with the global development. The global development is constructed from the practices and comparative analysis done vis-à-vis developed countries with strong traditions of sports and intellectual property rights.

ORIGINALITY DECLARATION

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I acknowledge that I have read and understood the University's policies and rules applicable to postgraduate research, and I certify that I have, to the best of my knowledge and belief, complied with their requirements. In particular, I confirm that I had obtained an ethical clearance certificate for my research (**Certificate Number UZREC171110-030-RA Level 02PGM2014/137**) and that I have complied with the conditions set out in that certificate.

I further certify that this dissertation is original and that the material has not been published elsewhere or submitted, either in whole or part, for a degree at this or any other university. I declare that this dissertation is, save for the supervisory guidance received, the product of my own work and effort. I have, to the best of my knowledge and belief, complied with the University's Plagiarism Policy and acknowledged all sources of information in line with normal academic conventions.

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Date	19/10/2017

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TABLE OF ABBREVIATIONS

ADSL	Asymmetrical Digital Subscriber Line
AES	Advanced Encryption Standard
AFC	Asian Football Confederation
ALAI	<i>Association Litteraire et Artistique Internationale</i>
AM	Amplified Modulation
BBC	British Broadcasting Corporation
BSS	Back-up Support Systems
CAF	Confédération Africaine de Football
CAK	Communications Authority of Kenya
CAN	<i>la Coupe d’Afrique des Nations</i>
CAS	Conditional Access System
CCK	Communications Authority of Kenya
CD	Compact Disc
CDPA	Copyright, Designs and Patents Act
CECAFA	Council of East and Central Africa Football Associations
CHF	Swiss Francs
CJEU	Court of Justice of the European Union
CONCACAF	Confederation of North, Central America and Caribbean Association Football
CONMEBOL	Confederacion Sudamericana de Futbol
COSAFA	Council of Southern African Football Associations
COSATU	Congress of South African Trade Unions
CRC	International Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSA	Common Scrambling Algorithm
CSA	<i>Conseil Supérieur de l’Audiovisuel</i>
CW	Control Word
DBS	Direct Broadcasting Satellite
DRMS	Digital Rights Management Systems

DSL	Digital Subscriber Line
DTT	Digital Terrestrial Transmission
DVB-H	Hand-Held Television Broadcasting
EBU	European Broadcasting Union
ECJ	European Court of Justice
ECT	Electronics Communications and Transactions
EPL	English Premier League
EPO	European Patent Office
EU	European Union
FA	Football Association
FC	Football Club
FIFA	Fédération Internationale de Football Association
FKF	Football Kenya Federation
FSS	Fixed Satellite service
FTA	Free-To-Air
GATT	General Agreement on Tariffs and Trade
HD	High Definition
IASA	International Association of Sound and Audio-visual Archives
ICASA	Independent Communications Authority of South Africa
ICPES	International Charter on Physical Education and Sport
IFPI	International Federation of Phonographic Industry
ILO	International Labour Organisation
IP	Intellectual Property
IPRs	Intellectual Property Rights
IPTV	Internet Protocol Television
ISP	Internet Service Provider
ITU	International Telecommunication Union
KBC	Kenya Broadcasting Corporation
KTN	Kenya Television Network
MBMS	Multimedia Broadcast Multicast Systems
MOA	Media Owners Association

NBA	National Basketball Association
NBC	National Broadcasting Company
NFL	National Football League
NP	National Party
NSL	National Soccer League
NTV	Nation Television
NVOD	Near Video on Demand
OECD	Organisation for Economic Co-operation and Development
OFC	Ocean Football Confederation
OFCOM	Office of Communication
ORTM	Organisation de Radio et Télévision Malienne
OTT	Over The Top
P2P	Peer To Peer
PAL	Phase Alternating Technology
PANA	Pan-African News Agency
PLS	Premier League Soccer
PVR	Personal Video Recorder
SAAFA	South African African Football Association
SABC	South African Broadcasting Corporation
SACFA	South African Coloured Football Association
SAFA	South African Football Association
SAIFA	South African Indian Football Association
SASFA	South Africa Soccer Federation
SASL	South African Soccer League
SCCR	Standing Committee on Copyright and Related Rights
SD	Standard Definition
SECAM	Sequentiel Couleur à Memoire
SMS	Subscriber Management Systems
SROC	Sports Rights Owners Coalition
STB	Set-Top- Boxes
STV	Stellavision Television

SVOD	Subscription Video On Demand
TFEU	Treaty on the Functioning of the European Union
TPMs	Technological Protection Measures
TV	Television
UDHR	Universal Declaration of Human Rights
UEFA	Union des Associations Européennes de Football
UK	United Kingdom
UNESCO	United Nations Educational, Scientific and Cultural Organisation
USA	United States of America
VCRs	Video Cassette Recorders
VHS	Video Home Systems
VOD	Video on demand Services
VOK	Voice of Kenya
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty

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CHAPTER ONE

OVERVIEW AND ORIENTATION OF THE STUDY

1.0 Introduction

1.1 Background to the Study

The global advent of new communication technologies in the face of deregulated broadcast spectrum regimes has brought forth multimedia outlets and platforms that increasingly employ copyright and other intellectual property rights in order to exclusively control premium football events and other premium sports and content in order to dominate the market. Some of the new means of delivery and platforms used, besides free-over-the air broadcasting, include Pay-TV, video-on-demand and video-pay-per-view services. In addition to using conditional access systems that restrict access to the paying public, these platforms employ, largely, copyright to the further restrict access to broadcast content or reinforce the conditional access systems. The use of copyright to restrict access to broadcast football flies in the face of the global controversy as to whether copyright and indeed other intellectual property rights (IPRs) subsist in football matches at either the upstream or downstream level. The resultant effect of all this, is the constriction of the public sphere and social benefits vis-à-vis broadcast football to the public.

The doctrinal and philosophical basis for existence of IPRs, and more specifically copyright, in football rests on shaky grounds. This principle was founded in the 1930s by Latham CJ, in the Australian case, *Victoria Park Racing and Recreation Grounds Co. Ltd. v Taylor and others*.¹ In this case, the High Court ruled that a sports event cannot be treated as a property capable of being owned.² This position is supported by Papaloukas, among others, who posit that sports

* The citation style in this study is based on the Bluebook, *Uniform System of Citation 18th Edition*, published by Harvard Law Review. The style is adopted by the *Harvard Journal of Sports and Entertainments Law*, Vol.1, No. 1 of 2010, Harvard School of Law.

¹ (1938)58 CLR at 496, 497,503 and508.

² See also Mukul Mudgal, *Law and Sports in India, Development Issues and Challenges*, LexisNexis, ButterworthsWadhwa, and Nagpur (2011) at 189.

games do not enjoy copyright.³ The interface of copyright with the multimedia transmission and commercialisation of professional football renders the boundary between the commencement and end of copyright ill-defined. Besides, the doctrinal and philosophical basis for subsistence of copyright in football games is not clear-cut and felicitous.

The sport of football has not only become a global phenomenon but has also assumed the character of a mega business of monumental proportions which is exponentially and rapidly growing. The world of football has become an industry in its own sake involving huge sums of money.⁴ The sustainability of this industry demands protection grounded on sound jurisprudential doctrines. As alluded to above, the globalisation and commercialisation of football being constituted into mega business is argued to be underpinned by intellectual property rights.⁵ Intellectual property rights are negative rights that prescribe strong property rights which grant exclusive rights to authors over non-rivalrous intangibles.⁶ The effect of exclusive rights in football is that they grant a monopoly and greater control to the right holders thereby limiting access to the public. The IPRs-fuelled commoditisation and marketisation of football has effectively created a system of private gain by the capitalist conglomerates in the service of the public good.⁷ Put differently, the commercialisation of football through the

³ See e.g. Marios Papoloukas, Competition Rules and Sports Broadcasting Rights in Europe, 3 *INT'L SPORTS L. J.* 81, 82 (2009); See also Andrea Cattaneo, The Nature of Broadcasting Rights in the USA and Europe. Vol.1/2 *INT'L SPORTS L.J.*95, 96 (2012):

⁴ See Harald Dolles and Sten Soderman, Globalisation of Sports: The Case of Professional Football and its Management Challenges. Working Paper No.5/1, 2012 presented at the Germany Institute for Japanese Studies at 5; See also Gordon Hylton, The Overprotection of Intellectual Property Rights in Sport in the U.S.A. and Elsewhere, Faculty PA Faculty Paper No. 538, 2011 presented at the Marquette University Law School (giving an overview of global football and intellectual property protection).

⁵ See Lucio Colantuoni and Christiano Novazio, Intellectual Property Rights: a Comparative Overview of the USA, UK, and Italy, [James A.R. Nafziger and Stephen F. Ross ed 2011). *Handbook on International Sports Law*, Edward Elgar Publishing Ltd., Massachusetts at 457; See also Francis Gurry, "Sports, peace and development," May 10-11, 2011, Geneva (Francis Gurry is the current Director General of the World Intellectual Property Organisation (WIPO), who first elected as such by the WIPO General Assembly in 2008 and later re-elected for a further period of five years in 2013).

⁶ Stefan Hagan, *A critical Analysis of Intellectual Property Rights Within Sports Focusing on the Role of Copyright in Football*, LL.M Dissertation, University of Kent, UK, 27(2005/2006), (available online at <http://www.kent.ac.uk/law/ip/resources/ip-dissertation/2005-06/Stefan-Hagan.doc.>).Last accessed on June 10, 2016.

⁷ See Lucio and Navazio *supra* note 5 at 458; See also Ivana Andrijasevic, Public Service Broadcasting as a Public Good: Challenges in a Digital Era, *Meduskestudue Media Studies* (2015) at 5(because those who would not pay cannot be excluded from receiving broadcasts and everyone could receive broadcasts without reducing its value and availability to others; hence broadcasting is what economists call a public good. However technology is diminishing the doctrine in broadcasting).

instrumentality of IPRs, in general, and copyright in particular, has compromised access to public of the sport. This study, therefore, sought to investigate the impact and extent to which copyright, a branch of intellectual property which primarily deals with mass communication,⁸ in football matches impacts upon access by the public in South Africa and Kenya to broadcast football matches. The foregoing overview is further amplified by the following analysis of the prevailing tension between the public interest and the rights of entrepreneurs in football games.

1.1.1 Rationale for opposition to copyright-based denial of access to football

There is evident tension between public access of football on one hand and the exercise of IPRs as the engine of commoditisation and commercialisation. This study identified three factors that underpin this tension. The first factor looked at football through the prism of culture. According to Kate,⁹ football is a popular culture and has historically been intimately tied to communities and therefore a cultural embodiment of that community. Football, in the community, is enacted, *inter alia*, through cultural rituals that are performed around the match and in or around the stadia. These cultural rituals develop and take the shape of pre and post-match meetings in pubs, singing, dancing, waving flags, and other cultural performances.¹⁰ Football is, therefore, constructed in terms of its social and cultural character and has greater significance in the national character than even the theatre has.¹¹ Therefore, as a popular culture, football promotes cultural citizenship and the public have a moral claim over it.¹² Pursuant to Hagan,¹³ football is a game of the common people created by the common people and therefore it constitutes human heritage. This strong cultural dimension buttresses the argument that a balance be struck between

⁸ WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use*, WIPO Publication No.489 (E), Geneva, 40 (2001) (WIPO argues that in addition to dealing with all forms of creativity, concerned primarily with mass communication, copyright law also deals with virtually all forms and methods of public communication in form of among others, printed communication, sound and television broadcasting, audiovisual works and even computerised systems).

⁹ Emma Kate, *Changing Rhythms: Media and Globalisation in the English Premier League*, PhD Thesis, University of Minnesota, USA (2013) at 3.

¹⁰ *See id* at 4.

¹¹ Tom Evens *et al*, *The Political Economy of Television Sports*, Palgrave Global Macmillan, London (2013) at 54.

¹² *Id*.

¹³ *See Hagan supra note 6 at 28; Cf Samuel Keith, The Role and Impact of Commercialism in Sport and Consequences of its Transformation into Entertainment Industry*, Master of Arts, Thesis, Frankfurt School, Germany (2009) at 11.

the commercial interest in football and the larger public interest. In most countries, copyright is designed in such a way as to promote, enrich and disseminate the national cultural heritage.¹⁴

Copyright, therefore, is a vehicle for the development of the culture of the nation and it is the interest of the society to have access to these cultural expressions.¹⁵ Being a form of cultural expression, football should be promoted by copyright by ensuring its availability to the public. The issue whether culture itself can be copyrighted is polemical, however, Brown¹⁶ argues against copyrighting cultural heritage because it would hamper free speech and exchange of material in public domain.

The second factor revolved around the fact that the public funds the football infrastructural and physical facilities besides human resources. For instance, in hosting the World Cup, 2010, South Africa spent £3 billion (US\$4.17 billion) on the construction of new stadia, infrastructure and preparatory arrangements but only recouped a tenth of that expenditure.¹⁷ On the other hand, the Fédération Internationale de Football Association (FIFA) generated from the same event a net profit of US\$ 2.4 billion.¹⁸ The construction of the six new stadia alone in South Africa just before the 2010 World Cup cost the country US\$ 1.95 billion.¹⁹ Although Kenya has never hosted any major football competition either at the continental or global level, the two stadia of international standard, Kasarani and Nyayo are estimated to be worth US\$ 630 million.²⁰ In the month of November, 2015 a Kenyan newspaper reported the loss of a sum Kshs 17,200,000(US\$

¹⁴ See *Supra* note 8 at 41(WIPO, views copyright as an essential component in the development process and that the enrichment of the national cultural heritage depends on the level of protection afforded to literary and artistic works).

¹⁵ See generally, Sandy Norman, EU Copyright Directive: Harmony or Disharmony, *IASA.J. NO. 12, 21 22(1999)*.

¹⁶ Michael Brown, Can Culture be copyrighted? 32 *Current Anthropology J.NO. 2, 93 94(1998)*; Cf s. 45(1) of Kenya Copyright Act (it defines works in public domain to include those whose terms of protection have expired as well those in respect of which authors have renounced their rights...).

¹⁷ Rupert Neata, South Africa recoups just a tenth of the £3bn of staging World Cup, *The Telegraph*, December 10, 2010 (available at <http://www.telegraph.co.uk/finance/newbysector/retailandconsumer/leisure/8192484/south-africa-recoups-just-a-tenth-of-the-3bn-cost-of-staging-world-cup-2010>(accessed on January 9, 2016 at 7p.m.).

¹⁸ Leigh Baldwin and Tariq Panja, *FIFA says South Africa World Cup has sales of US \$ 3.7 Billion*. <http://www.bloomberg.com/news/article/2011-03-03/fifa-says-2010-world-cup-in-south-africa-brought-in-3-7-billion-of-sale.pdf> (accessed on January 9, 2016 at 8 p.m.).

¹⁹ See Ezeibe Christian Chukwueba and Ike Cyril Chinedu, FIFA World Cup Finals: Catalyst for Infrastructural development: A Case Study for South Africa 2010, 19 *Journ.of Humanities and Social Sciences (JHSS) 86 93(2014)*; see also Ramos Mabugu and Ahmed Mohammed, *The Economic Impacts of the Government Financing of 2010 FIFA World Cup*, Stellenbosch University Economic Working Papers 08/08 (2008) at 7.

²⁰ Morris Kibuga, A journey through some of Kenya's sports stadia, *The Daily Nation*, Oct.7, 2013 at 3.

172,000) released by the Kenya government to the Football Kenya Federation (FKF) in support of the national team, Harambee Stars, to travel to Cape Verde for the 2018 FIFA World Cup qualifying championship.²¹ The public expenditure and investment of human, financial and physical resources do not justify the concentration on and control of football by private hands. This system compromises the social benefits of football because it permits exaction of exorbitant prices and costs over football rights, a practice that cannot be justified by the public subsidies. This argument does not, however, purport to claim a right of access to all the categories of football games. The communities like Kenya or South Africa may not legally or morally claim a cultural link to all football contests and thereby a right of access thereto.²² Besides, a balance needed to be struck between the so-called community interest and that of those who have made creative as well as entrepreneurial contribution to the game.

The third factor was viewed against the constitutional right of access to information. Those who supported this view argued that sports transmission either on a linear or non-linear basis constitutes informational asset. Genevieve²³ equated sport with a speech capable of enjoying protection under the Constitution. Sport is both communicative and expressive. Access to such sporting events gives fans a basis of informed discursive analysis in pubs and other social places. Most football transmissions are accompanied by commentaries and other value-additions that, besides entertainment, convey information. The International Charter on Physical Education and Sport (ICPES) of 1978 gives sports a human rights perspective by stating that: “Every human being has a fundamental right of access to physical education and sports...”²⁴ The collection, provision and dissemination of information and documentation of physical education and sports constitute a major necessity.²⁵ The Charter springs from the United Nations Educational, Scientific and Cultural Organisation (UNESCO) itself established by, the United Nations to

²¹ Ayumba Ayodi, Police arrest FKF chief, Nyamweya over the Harambee Stars travel saga *Daily Nation*, Nov. 17, 2015 at 58 (this demonstrates that in addition to building infrastructure and other sports facilities, governments use public money to facilitate not only the hosting, where applicable, but also travel, accommodation and other relevant event participation expenses).

²² See e.g., the terms and definitions, at paragraph 1.8 of this chapter in which the definitions of broadcast football and football itself delineate the scope of football under the study.

²³ Genevieve Lakier, Sport as Speech, *University Pennsylvania Journal of Constitutional Affairs*, 1120 (2014).

²⁴ ICPES, Article 1 (the Charter, spearheaded by UNESCO was adopted in 1978 and pegged upon the Universal Declaration of Human Rights(UDHR) and thereby giving sport a human rights perspective).

²⁵ *Id* art.7.

further the increase and diffusion of knowledge, *inter alia*.²⁶ In terms of the Vienna Convention on the Law of Treaties,²⁷ the Charter is a treaty and UNESCO, under its constitutive instruments, is obliged to, in case of non-compliance, call upon the responsible states to remedy the default or even enforce compliance at international law. The general rule is that international agreements create rights and duties only for the parties.²⁸ According to Roy, ICPEs does not, in practice, create a legally binding international law but acts as, a reference point for articulating the rights granted thereby, a catalyst for action and holding member states accountable at the international level.²⁹ It follows, therefore, that UNESCO can pressure or enforce compliance with the Charter on the part of its defaulting members who include Kenya and South Africa.³⁰ Sport, in its generic sense, includes football and therefore falls within the scope of the Charter.

The Universal Declaration of Human Rights (UDHR) of 1948, on its part, grants every person a right to rest and leisure.³¹ By implication the right to rest and leisure may include the right sports and by extension a right to football. However, just like the ICPEs, UDHR is not legally binding but merely declaratory and aspirational.³² The International Convention on the Right of the Child (CRC) of 1989 recognises the right of the child to rest, leisure, to engage in play and recreational activities.³³ CRC also provides that children have a right to information important for their health and well-being and that member states are enjoined to encourage mass media, radio, television, newspapers and internet to provide information that those children can understand and that cannot harm them.³⁴ This provision by implication means that watching broadcast football is part of the information that children have a right to and any constriction or suppression of access to

²⁶ Malcolm N. Shaw, *International Law*, (6th ed. 2008) at 1312.

²⁷ Art.2 (the multilateral treaty was concluded at Vienna on May 23, 1969, defines a treaty as an international agreement concluded between states in a written form and governed by international law...).

²⁸ J.L Brierly, *The Law of Nations*, Oxford University Press, 325(1963).

²⁹ See e.g., Elise C. Roy, 'Aiming for Inclusive Sport: The Legal and Practical Implications of the United Nations' Disability Convention for Sport, Recreation, Leisure for People with Disabilities' 5 *ESLJ*. (2007) at para 9. Online available at <http://go.warwick.ac.uk/eslj/issues/volume5/number1/roy/> accessed on March 23, 2016.

³⁰ United Nations, Report on the International Year of Sport and Physical Education, 104(2005). Online available at http://www.un.org/wcm/webdav/site/sport/shared/sport/pdfs/Reports/Electronics_version_IYSPE_book accessed on March 28, 2016(the report, at page 104, cites the progress made by some signatory African countries to Charter in its implementation; the countries include South Africa and Kenya).

³¹ See art. 24.

³² Genevieve Lim 'The right to sport: Theory evidence and *implication*' 1-2 *INT'L SLJ* 120 (2012)at 122.

³³ See art. 31.

³⁴ See art.17.

broadcast football undermines such a right. CRC is an international agreement and therefore has a binding effect on member states and consequently binds Kenya and South Africa which are signatories to it.³⁵

The recording and transmission of football games has greater informational and entertainment implications that are constitutional in nature.³⁶ This point can be argued further that free access to major sporting events falls within the scope of the right of information because people do not only watch but they also talk about them and the conversational value of the event depends, in part, on the number of people who watch such events. This argument looks at football through the prism of infotainment, a concept that has both informational and leisure implications.³⁷

The Constitution of the Republic of South Africa, 1996, may be interpreted to cover a right of access to information relating to recorded and broadcast football matches. It entitles every person to, among others, “a right of access to information that is held by another person and that is required for the exercise or protection of any rights.”³⁸ In addition, Article 35 of the Kenyan Constitution being a replica of Section 32(1) of its South African counterpart, further provides that “every person has a right to freedom of expression which includes freedom to seek, receive and impart information or idea...”³⁹ To ‘receive and impart information’ should be construed broadly to cover such information that is for the public good. A broadcast match, in its expressive form, may be of public good because it is propagated over the airwaves which constitute public property and which must be utilised in such a way as to advance the public good.⁴⁰ This argument may run counter to John Locke’s labour theory that posits that “when an individual combines his labour with materials from the commons”⁴¹ he acquires private property

³⁵ See e.g., United Nations ‘Status of Ratification of Human Rights Instruments of Kenya and South Africa’ as at Jun.30, 2016.

³⁶ See Evens *supra* note 11 at 113 (holding that one cannot disentangle sports information disseminated by varied means of delivery from constitutional underpinnings).

³⁷ Ben Sihanya, *Infotainment and Cyber Law in Africa: Regulatory Benchmarks for Third Millennium*, Vol.10 2 *Transnational Law and Contemporary Problems* 583-640 (2000).

³⁸ See s.32 (1) b (this Section is a replica of Article 33 of the Constitution of Kenya, 2010).

³⁹ See art. 33(1); Cf s.16 of the South African Constitution.

⁴⁰ *Govt of India v Cricket Association of Bengal* (1975) 2 SCC 161.

⁴¹ Benjamin Damstedt, *Limiting Locke: Natural Law Justification for the Fair Use Doctrine* 12 *Yale L.J.* 1180 (2003) (quoting the original works of John Locke (1988),” *Two treatises of government*, Cambridge University Press).

rights whose scope covers even the items removed from the commons. This private property is intellectual property which also enjoys constitutional protection.⁴² These constitutional provisions, in both countries, that support public access to infotainment on one hand and intellectual property rights on the other, need to be harmonised in such a way as to attain some reasonable equilibrium.

1.1.2 Global Outlook and Commercialisation of Football

It was estimated that sport constitutes three per cent of the world trade.⁴³ Estimates further indicated that total revenue of US\$ 3.7 billion, excluding indirect economic gains, was realised by the FIFA, 2010 World Cup, which took place in South Africa.⁴⁴ The preceding World Cup that took place in Germany in 2006 generated total revenue of 2.85 billion CHF (Swiss Francs) (equivalent to about US\$ 3.2 billion).⁴⁵ The 2014 World Cup, that took place in Brazil, generated total revenue of US\$ 4.8 billion of which television broadcasting licensing rights alone accounted for \$US 2.4 billion.⁴⁶

In Africa, the growth of football was measured against the performance of African teams participating in World Cup tournaments.⁴⁷ Africa fares poorly in the FIFA global national teams

⁴² See art. 40(5) of the Constitution of Kenya which enjoins the state “to support, promote and protect the intellectual property rights of the people of Kenya”; Cf S. 25(1) of the Constitution of South Africa which, although it does not specifically mention the protection of intellectual property rights, it uses the term property in its generic sense.

⁴³ See Gardiner O’Leary *et al*, *Sports Law*, (2008 at 210); See also Germany Institute of Japanese Studies, *Globalisation of Sports: The Case of Professional Football and its International Management Challenges* (2009) at 6 (available online at <http://www.dijtokyo.org/publication/wp05-Globalisationofsportsprofessionalfootball.pdf>) (last visited on January 14, 2016).

⁴⁴ Net Result Solutions Ltd, *Digital Piracy on Sporting Events*, 2011 (a study report commissioned by the World Intellectual Property Organisation (WIPO) on the extent of signal piracy of sporting activities. The report was presented to the WIPO SCCR meeting of April, 2013 attended by this researcher); See also <http://www.fifa.com/world/archive/southafrica2010> (last visited, March 26, 2015).

⁴⁵ FIFA, Financial Report For 2006 at 21 (presented before the 57 FIFA Congress held at Zurich on May 30 and 31, 2007 by Julio Grondon, Chairman of the Finance Committee then). Available online at http://www.fifa.com/mm/document/affederation/administration/51/52/2006/_fifa_ar_en_1766.pdf. (last visited February 3, 2015).

⁴⁶ Tom Manfred, “FIFA made an insane amount of Brazil’s US\$ 15 billion World Cup,” *Business Insider*, June 9, 2015 at 4. Online available at <http://www.businessinsider.com/fifa-brazil-world-cup-revenue-2015-3> (reporting the FIFA financial report of 2014 the year in which Brazil hosted the FIFA World Cup during the months of June and July). (The website was last accessed on January 14, 2016).

⁴⁷ Manase Chiweshe, The problems with African football: Corruption and underdevelopment of the on the continent, 2 *African Sports Law and Business Bulletin* 33(2014).

rankings because of poor management, corruption, and inadequate and poor infrastructure.⁴⁸ The growth and development of African football has, however, been on an upward trajectory since 1994 when, in the history of the tournament, the first African country, Cameroun, reached the quarter finals of the FIFA World Cup that was hosted by the USA.⁴⁹ The upward progression is also witnessed in South Africa and Kenya. According to PricewaterhouseCoopers (South Africa)⁵⁰, in 2017, the total sports spend in South Africa and Kenya was projected to be R19.5 billion (US\$ 1.64 billion) and R1.2 billion(US\$100,884,000) respectively. Most of these revenues were drawn from sports media rights and sponsorships.

1.1.3 Interface between IPRs and Football

Before concretising the study on the bedrock of copyright, it was imperative to examine the broader intellectual property works that may be embodied in football. IPRs, according to Patricia Kameri-Mbote, are property in something intangible and protect innovations and reward innovative activity.⁵¹ The underlying principle in the award of IPRs is existence of innovativeness and creativity in a work. Therefore, before any football event is granted intellectual property protection, it must meet this threshold. Intellectual property is a composite term encompassing the following works: copyright and related rights, patents, trade secrets, trade marks, service marks and domain names, utility models, unfair competition, geographical indications, integrated circuits, plant breeder's rights, and industrial designs.⁵² However, not all the branches of intellectual property may be relevant to football. As explained immediately below, the aspects of intellectual property that impact on football, either directly or indirectly, are patents, trade marks, and copyright.

⁴⁸ *Id.* at 40; See also PANA, FIFA rankings for African football teams, *Panapress* June 13, 2015 (the paper is owned by the African Union and headquartered in Dakar, Senegal. At the time it ranked Cote D'Ivoire number *one in* Africa but thirteen globally, South African number and sixty respectively while Kenya is in that order ranked thirty one and 113).

⁴⁹ See Manase *supra* note 47 at 34.

⁵⁰ PWC (SA), South African entertainment and media outlook (2013-2017) including Kenya and Nigeria sports, available on www.pwc.co.za/outlook (PricewaterhouseCoopers (SA) is a South African affiliate of PricewaterhouseCoopers International Limited). Last accessed on May 2, 2016.

⁵¹ Patricia Kameri-Mbote, Monsato vs. Schemeiser: Implications for Land Rights of Farmers of Kenya (Moni Wekesa and Ben Sihanya ed., 2009). *Intellectual Property Rights in Kenya*, Konrad Adenauer Stiftung, and Nairobi at 115 (quoting US Council for International Business: New MTN Priorities for Intellectual Property 1986).

⁵² Ben Sihanya, Copyright in E-commerce and music industry in Kenya (Moni Wekesa and Ben Sihanya ed., 2009). *Intellectual Property Rights in Kenya*, Konrad Adenauer Stiftung, Nairobi at 143, See also the 1967 Convention Establishing WIPO which opted to list in Article 2(viii) limitative categories of intellectual property.

1.1.1.1 Patents

Patent law applies to industrially applicable inventions. A patent is a document, issued, upon application, by a government office (or a regional office acting for several countries), which describes an invention and creates a legal situation in which the patented invention can normally be exploited.⁵³ The grant of a patent effectively gives the inventor a monopoly to the exclusion of all others for a period not exceeding twenty years.⁵⁴ Whether, the patentee enjoys a monopoly over the invention or not is a subject of controversy.⁵⁵ Historically, patents were constructed to apply within the principle of territoriality.⁵⁶ Patents in South Africa and Kenya are respectively administered by the South Africa Patent Office⁵⁷ and Kenya Industrial Property Institute⁵⁸ respectively. They apply to both products and processes.

A patent may be granted to the invention that fulfils the following patentability criteria; novelty, inventiveness, industrial applicability and must not be excluded by any statutory exceptions to patentable subject matter.⁵⁹ There is also another fifth requirement of patentability which relates to whether or not the invention is sufficiently disclosed in the application. Disclosure is important because the operability of the patent largely depends thereon.⁶⁰ The Industrial Property Act of Kenya provides that “an invention is patentable if it is new, involves an inventive step, is industrially applicable or is a new use”.⁶¹ On the other hand, the Patent Act of South Africa provides that, “Patent invention may, subject to the provisions of this section, be granted for any

⁵³ WIPO, *Intellectual Property Reading Material*, WIPO publication, Geneva.(2d ed.1998) at 13.

⁵⁴ Industrial Property Act of Kenya, 2001, S. 60; Cf S.46 of the Patent Act No.57 of 1978 as amended by the Intellectual Property Amendment Act of 1997. (in the two countries the term of protection of 20 years is subject to the payment of annual renewal fee by the patentee or his agent failing which such a patent lapses).

⁵⁵ *United States v Dobilier Condenser Corp.* 289 US 178 (1933) (the Supreme of the USA ruled that monopoly connotes taking something away from the public that hitherto the public enjoyed and an inventor deprives the public of nothing that they enjoyed before but gives something of value to the community).

⁵⁶ The Nov.28, 1979 Edition of Paris Convention 1883 for the Protection of Industrial property, article 4bis (The Paris Convention for Protection of Industrial Property is reputed to be the first international instrument on intellectual property generally).

⁵⁷ See s. 2 of the South African Patent Act 57 of 1978, which designates the Patent Office as the Office of the Commissioner of Patents.

⁵⁸ See Industrial Property Act, 2001, s. 3.

⁵⁹ Hector Macqueen *et. al*, *Contemporary Intellectual Property Law and Policy*, Oxford University Press, New York (2007) at 433.

⁶⁰ See *e.g.* WIPO *supra* note 53 at 17.

⁶¹ See s. 22 (1).

new invention which involves an inventive step and which is capable of being used or applied in trade or industry or agriculture.”⁶²

In light of the foregoing requirements, patents have limited applications in the domain of broadcast football because football does not meet the criteria. Football is not an invention and therefore not patentable. Patents may however, apply to sports accessories. The Germany Company, Adidas, invented the Adi Dassler’s football boots with long studs that give players a better ground grip and ball control.⁶³ In January, 2012 Apple Company⁶⁴ obtained a USA patent for a smart garment on which advanced sensors are affixed that transfer data to a central control centre.

The other area where patents interact with football, albeit remotely, is in video games. The invented video games use real names of the players in order to make them more desirable by the consumers. However, the patent aspect thereof is anchored on the mechanics and processes involved. In 2006, Konami Company Limited was granted a patent by the European Patent Office for video game in technical systems that identify a player and the direction of the nearest player to pass the ball.⁶⁵ In 2000, a vanishing spray was invented by a Brazilian, Heine Allemagne. It is a type of form that is otherwise called “magic spray” which referees use in order to keep the defenders’ wall ten yards away and it disappears after sixty minutes.⁶⁶ The invention was patented in 2002, and has had a global impact on preserving the competitive balance of the game of football and fairness by ensuring that the defence wall is mounted on the spray mark.⁶⁷

⁶² See s.25 (1).

⁶³ Jochem Schaefer, Sports, Sports Goods and Sports Business *WIPO Magazine* 5/2 (Nov., 2012) (the patent was registered and entered in the European patent register as EP2926678 on Oct.6, 2015).

⁶⁴ Patently Apple, at <http://www.patentlyapple.com/patently-apple/2012/01/apple-wins-smart-garment-iphone-circuit-board-patents.html>. Last accessed on January, 17, 2016 (patent was granted and entered the register of the US Patent and Trade Mark Office as number 20080218310).

⁶⁵ European Patent Office, EPO-T0928/2003 (Konami Co Ltd applicant, 2006) (This was an appeal to the Appeals Board of the European Patent Office against the refusal of the grant of a patent for a video by the Examination Office). Online available at <http://www.epo/law/practice/case-law-appeals>, last accessed on January 20, 2016.

⁶⁶ Fiona Keating, FIFA World Cup 2014: Vanishing spray, *International Business Times*, July 13, 2014. Available online at <http://www.ibtimes.com.uk/fifa-world-cup-2014-vanishing-spray-inventor-heine-allemanne-set-make-millions-1456482>, last accessed on January 19, 2016 (the spray was first used in 2014, during the FIFA World Cup that took place in Brazil).

⁶⁷ Cesar Torres, Vanishing spray technology, *New York Times* (online), August 7, 2011. Available at <http://www.goal.blog.nytimes.com/2011/vanishing-spray-and-the-future-of-technology>, accessed on May 2, 2016 (the patent was granted and registered as number 0002743 in Brazil).

Generally, all industrial and technical facilities, which further the on-field efficiency and progress of playing football, like logos, emblems, stadia, goalkeeper gloves, boots, masks, helmets, computer-operated cameras are patent driven.⁶⁸

The application of patents upstream as demonstrated heretofore, is limited to patented products and processes that are incidental to football transmission and access; and are therefore largely used on the field. In a globalised world, such products and processes are universal and apply equally to Kenya and South Africa. Patented cameras and recording facilities are also employed on the field to embody the games into a tangible and transmissible form.⁶⁹ Satellites which are patented communication facilities are employed to distribute the broadcast signal.⁷⁰

Conversely, in a digital environment, access to and use of content is controlled by the application of technology which is itself a function of patent. Werra⁷¹ typifies two types of technology which control access to content. First, there is technology which controls access; and second that which controls the use of content including taking copies therefrom. Conroy⁷² characterises those technologies as encryption and decryption technologies and argues that they are the type that is used in South Africa by Multi-choice Africa, the biggest pay TV service in Africa. In Kenya, unauthorised access to encrypted content is illegal as against a person who “circumvents any effective technological measure designed to protect the work; or...”⁷³ In South Africa, technological measures that are employed by authors to protect works are not granted protection under the copyright law.⁷⁴ However, such protection is granted under the Electronic Communications and Transactions Act 25 of 2002 (ECT).⁷⁵ ECT provides protection against

⁶⁸ See <http://www.allproteamsport.com/resources/football-equipment-checklist>, last accessed on May 23, 2015;

⁶⁹ See generally <http://www.allproteamsports.com/resources/football-equipment-checklist>, accessed on January 20, 2014.

⁷⁰ See *supra* note 63 at 13

⁷¹ See Jacque de Werra, *The legal protection against technological protection measures, under the WIPO Treaties, the Digital Millennium Copyright Act, the European Union Directives and other national laws (Japan and Australia)*, Le Congres de association Littéraire et Artistique Internationale (ALAI), New York, July 2002 at 10.

⁷² Marlize Conroy, *Comparative Study of Technological Measures in Copyright Law PhD Thesis, University of South Africa, 2006 at 13.*

⁷³ Kenya Copyright Act s. 35(3).

⁷⁴ See *supra* note 72 at 254.

⁷⁵ S. 86 (1) (any person who internationally and unlawfully accesses or intercepts any data without authority or permission to do so shall be guilty of an offence. Sub section 3 thereof says that ‘a person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device,

circumvention of technological protection measures applied to digital data.⁷⁶ It may be argued that digital works of authorship may be subsumed into data and thereby enjoy protection under this Act. The conditional access technologies that are used in South Africa are the same as those used in Kenya because Multi-choice runs same pay-TV services in Kenya by way of a joint venture with Kenya Broadcasting Corporation.⁷⁷

To sum up, in a digital environment, hardware which falls under patent and software which falls under copyright complement one another in controlling access and thus had a bearing on this study.

1.1.1.2 Trade Marks

A trade mark is a mark or symbol used or proposed to be used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right to use the mark.⁷⁸ In other words, it is a distinguishing guise that distinguishes goods and services of one enterprise from those of other enterprises. A trade mark may include any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or seller to identify the source of the goods or services and distinguish them from those supplied by others.⁷⁹ According to Kamil Idris, trade marks serve two broad primary macro-economic functions: first, to facilitate consumers' decision-making about the choice of products in the market and second, to provide incentive for an enterprise to invest in the development and delivery of goods and services with the qualities that consumers desire.⁸⁰ The above features and attributes of trademarks are cascaded from the Paris

including a computer program or a component which is designed primarily to overcome security measures for protection of data or performs any of these acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilise such item contravene this section, is guilty of an offence').

⁷⁶ *See id.*

⁷⁷ Agreement dated Sept. 3, 1997 between Multi-choice Africa Limited and Kenya Broadcasting Corporation on the creation of the first pay-tv service in Kenya by way of a joint venture (the two registered a subscriber management company in Kenya called Multi-choice (Kenya) Limited which currently runs the service while transmission is done via satellite from South Africa, copy of the agreement is on file at the Kenya Broadcasting Corporation and Multi-choice Africa head offices).

⁷⁸ Louis Harms, *The Enforcement of Intellectual Property Right: A Case Book*, WIPO, Geneva, (2005) at 25

⁷⁹ Doris Long and Anthony D'Amato, *A Course Book in International Intellectual Property*, West Group, Minnesota, (2000) at 86.

⁸⁰ Kamil Idris, *Intellectual Property: A Power Tool for Economic Growth*, WIPO, Geneva, WIPO Publication No.888 (2003) at 150.

Convention⁸¹ and replicated, *mutatis mutandis*, in the trade marks statutes of Kenya⁸² and South Africa.⁸³

The poignant issue and germane to this study was the manner in which these marks interact with football and thereby impacting on access to the latter. According to Mark James, trade marks advance commercial interest of enterprises through the sale of goods and services or through association with football events or teams or federations.⁸⁴ As Harms puts it, a trade mark is a ‘creative silent salesman’ stimulating sales by creating goodwill.⁸⁵ What this means is that among other functions, trade marks are used as tools of trade or weapons of trade in the armoury of a trader. Therefore, the commercialisation of football employs trade marks as tools of trade. The nexus between trade marks and football in the context of the study may be viewed through the commercial use of football events or team or club logos, symbols or emblems because they constitute marks within the meaning of Sections two of trade marks legislations of Kenya and South Africa.⁸⁶

Names of clubs and federations as well as nicknames, mascots, sports slogans, signatures of players and teams’ uniform colours fit into the definition of a trade mark and are therefore protectable.⁸⁷ These trade marks, once registered, can be used as tools of merchandising, sponsorships, internet marketing and ambush marketing.⁸⁸ The courts are not settled as to whether unauthorised use of a registered football club symbol or badge by a merchandise trader

⁸¹ The Paris Convention for the Protection of Industrial Property, art. 1 (2) read together with articles 6 and 6bis. (the articles recognise trade marks at the international plane as forming part of intellectual property).

⁸² Trade Marks (Amendment) Act 2002, Section 2 defines a mark to include a guise, slogan, device, brand, label, name, signature, word, letter, numeral or a combination thereof. S.6 thereof states that marks must be registered in order to be protected by the Act and S.11 sets distinctiveness of a mark as the primary criterion of registrability.

⁸³ Trade Marks Act, 1993 (Act No. 194 of 1993), s 2 defines a mark as a sign capable of being represented graphically, including device, name, signature, word, letter, numeral, shape, configuration, pattern, colour, ornamentation or container for goods. Section 9 emphasises the distinguishing power of a mark as the main criterion of its registrability.

⁸⁴ Mark James, *Sports Law*, Palgrave Macmillan, New York, (2d ed.2013) at 292.

⁸⁵ See *supra* note 78 at 37.

⁸⁶ See *supra* notes 82 and 83.

⁸⁷ Lucio Colantuoni and Christiano Navazio (2011) “Intellectual Property Rights in Basketball.” *I-2 INT’L SLJ* 34 59 (2011).

⁸⁸ See Lucio and Navazio *supra* note 5 at 44.

would deceptively confuse and mislead consumers, who have knowledge that the symbol or badge has no commercial connection with the club, as to the origin of the goods.⁸⁹

Football sponsorship, which is a big source of revenue, employs trade marks in creating brand equity and awareness. The sponsors' association with football events uses the emblems, logos and mascots which identify and distinguish the particular sports body or event.⁹⁰ These symbols once registered as trade marks can be used in different strands of sponsorships like title sponsorships, official programme sponsorships and ticketing among others.⁹¹

Although it is said that trade marks underpin football marketing, such a role can be construed as secondary exploitation of football events majorly involving goods bearing the marks, signatures, names and colours either relating to a player or teams or federations. This mode of commercial exploitation may not have a major direct impact on access to broadcast football not only in Kenya but also in South Africa. However, when trade marks are incorporated into broadcasts without authority, the affected clubs or federation may apply for an injunction for trade mark infringement or passing off. This may lead to the stoppage of the transmission of the match embodying such infringing marks. The stoppage of transmission of the match means that the public cannot access it on television.

1.1.1.3 Unfair Competition

The term unfair competition has been given varied definitions. The European Court of Justice had equated it with anti-competitive behaviour or unfair trading or practice inconsistent with fair competition.⁹² The Paris Convention for the protection of industrial property defines unfair competition as acts of competition which are contrary to honest practices in the industrial or

⁸⁹ See *Arsenal Football Club Plc v Reed (No.2)* [2003] EWCA Civ. 96; See also *Score Draw Ltd v Finch* (2007) Ch. EWH 462.

⁹⁰ Ian S. Blackshaw, *Sports Marketing Agreements: Legal, Fiscal and Practical Aspects*, T.M.C Asser Press, Hague, (2012) at 21.

⁹¹ See *id.*

⁹² See *L'Oréal S.A. v Bellure NV and others* C-48/07 para.19 (the Court observed that comparative advertising which presents the advertiser's products as imitations of a product bearing a trade mark was inconsistent with fair competition and unlawful, any advantage gained by the advertiser through such advertising will be achieved as a result of unfair competition and must, be regarded as taking unfair advantage of the reputation of the mark).

commercial matters.⁹³The word competition is defined as the struggle for the market advantage: the effort or action of two or more commercial interests to obtain the same business from third parties.⁹⁴The legal framework, by which unfair competition is redressed, in most jurisdictions, is either under Unfair Competition Act or Competition Act.⁹⁵In South Africa, the two concepts apply to different situations. Unfair competition applies to business practice or conduct redressible under common law which revolves around unfairness and dishonesty.⁹⁶ On the other hand, competition law comprises statutory rules that are intended to protect the process of competition in order to maximise consumer welfare.⁹⁷ Unfair competition is designed to play a utilitarian role by ensuring that consumers are protected against market distortions brought about by those who wield stronger power in the market.

Unfair competition is a likely phenomenon in free market economies which allow free competition between commercial and industrial enterprises.⁹⁸ Free competition is believed to be the best means by which demand and supply of goods and services are optimally served.⁹⁹ This objective can be achieved if participants play by the basic rules.¹⁰⁰ Unfair competition laws seek to address, *inter alia*, anti-competitive agreements intended to stifle competition, abusive behaviour by firms with market power, and monopoly over the sale or distribution of goods and services.¹⁰¹

Today football has been commoditised and clubs, leagues and other organizers have become undertakings. The nature of football organization has a tendency to create monopolies because the organizers can decide the teams to play, when, who to broadcast the matches and at what cost. This practice is likely to harm the public interest in their consumption of broadcast football matches. This characterisation of modern football dictates that the exploitation of football

⁹³ See art.10bis.

⁹⁴ *Blacks Law Dictionary (9th ed. 2004)* at 323.

⁹⁵ WIPO, *Intellectual Property Handbook, Policy, Law and Use* (2001) at 299.

⁹⁶ See Kenya Resource Centre, *Unfair Competition* (2011) online available at <http://www.kenyalawresourcecentre.org/2011/07/unfair-competition.html>. Last accessed on June 2, 2017; see also the ruling in *Schultz v Butt* (1986) 2 All SA 403(A) at para. 37.

⁹⁷ See Richard Whish and David Bailey, *Competition Law* (8th ed. 2015) at 1.

⁹⁸ See *id* at 10.

⁹⁹ See *supra* note 96 at 131.

¹⁰⁰ See *supra* note 97 at 132.

¹⁰¹ See Doyice J. Cotton *et al*, *Law for Recreation and Sports Managers* (2001) at 602.

broadcasts is regulated under competition law and other regulatory frameworks to ensure and guarantee consumer satisfaction. The competition laws in South Africa and Kenya prohibit abuse of dominant positions as well as restrictive trade practices. However, to achieve that, association football competitions must first be designated as undertakings in order to bring them within the purview of competition law in and to effectively protect the public against any anti-competitive behaviour.

1.1.1.4 Industrial Designs

Industrial design refers to the aesthetic nature of a finished product, and is distinct from any technical or functional aspects.¹⁰² From the intellectual property point of view, an industrial design refers only to the ornamental or aesthetic aspects of the product.¹⁰³ Other scholars have restricted the industrial designs to the legal meaning only; the right granted to protect the original ornamental and non-functional features of and industrial article or product that results from the design activity.¹⁰⁴

From the foregoing definitions, the industrial design only focuses on the visual appeal of industrially mass-produced items. The visual appeal is intended to influence the decision of a consumer to prefer one item to the other. Thus, the industrial designs serve the important function of protecting one of the distinctive elements by which the manufacturers achieve their success in the market.¹⁰⁵ In other words, industrial designs bestow a competitive advantage on manufacturers over their competitors.

The application of industrial designs to football broadcasting is peripheral. This is because broadcasting is not an industrial activity manufacturing mass articles. However, industrial designs apply to sports accessories and products that may be used at the upstream levels. The accessories and products may include, the balls themselves which are manufactured in different aesthetic appearances and tastes. Football shoes or boots, sports bags and team jerseys may also carry industrial designs owing to the ornamental appeal and appearances. The football accessories and other related products that are protected under the industrial designs are

¹⁰² V.K Ahuja, *Law Relating to Intellectual Property Rights* (2012) at 195.

¹⁰³ *See id.*

¹⁰⁴ Tanya Aplin and Jenniffer Davis, *Intellectual Property Law: Text, Cases, and Materials* (2d ed. 2013) at 773.

¹⁰⁵ *See id.*

facilitative to football transmission. If such accessories and products are manufactured in contravention of the relevant industrial designs, this may lead to court injunctions and other infringement-related court orders that may impede the broadcasting of football matches and thereby frustrate access thereto by the public.

1.1.1.5 Personality Rights

Personality right is that which controls the commercial exploitation of one's personality and its peculiar attributes like the individual's name, image likeness and other personality traits or any other aspect relating to his or her potential identity.¹⁰⁶ Personality right is a long established marketing techniques in which the name, image and other personal characters of well-known personalities are used in association with goods and services.¹⁰⁷ The personalities whose personal traits are used in this kind of marketing are celebrities who are well known like David Beckham of England who played professional football for major clubs including Réal Madrid FC before retiring.¹⁰⁸ A High Court in India summarised the nature of personality rights as follows:

[T]he right of publicity has evolved from the right of privacy and can inhere only in an individual or in an indicia of an individual's personality like, name, his personality trait, signature, voice etc. As individual may acquire the right of publicity by virtue of his association with the event or sport....¹⁰⁹

In England, the personality rights are protected under the common law tort of passing off and false endorsement or approval.¹¹⁰ In the USA personality rights are protected under the common law right of identity and publicity.¹¹¹ Germany and France have in place legal frameworks that protect image rights.¹¹² In light of the foregoing global overview, one can conclude that personality or image rights are protected under either statutory or common law. The image of a celebrity has become a "commodity" that has commercial value. In order to succeed in a claim for personality right infraction, one must prove existence of fame arising from their profession and that such fame has been put into commercial exploitation without authority.¹¹³

¹⁰⁶ See Ugochukwu Johnson, *Intellectual Property Rights in Sports: A Tool or Two Nigeria can Learn from the Global Game*, Faculty Paper, Leeds Beckett University (2015) at 8.

¹⁰⁷ Hector Macqueen, *Intellectual Property Law and Policy* (2007) at 732.

¹⁰⁸ See *id.*

¹⁰⁹ *ICC Development International v Arvee Enterprises and another* (2003) VII AD, Dheli 405.

¹¹⁰ *Irwine v Talksport Ltd* (2003) 2 All E.R. 881(CA).

¹¹¹ Steve Cornelius, *Image Rights*, (in James A.R. Nafziger and Stephen Ross eds.) *Handbook on International Sports Law* (2011) at 50.

¹¹² See *id.*

¹¹³ See *id.* at 513.

South Africa anchors the protection of image rights upon both the common law of delict of right to privacy¹¹⁴ as well as the inherent dignity of a person protected under the bill of rights in the South African Constitution.¹¹⁵ Burchell argues that the concept of personality rights in South Africa has both delictious and constitutional underpinnings.¹¹⁶ Burchell further argues that the main facets of personality rights include privacy, dignity, identity and reputation.¹¹⁷ This implies that recordings or taking pictures of football players affects some or all these facets. In Kenya, there is no law which protects image rights. However, reliance may be placed upon the common law tort of false endorsement or approval as well as passing off. Additionally, in Kenya, one may invoke the constitutional protection of the right of privacy¹¹⁸ to extend protection to image rights. Players, as celebrities own image rights over their persons, names, voices and other traits. Exploiting such traits without their individual consent violates their image rights. Broadcasting of matches may involve clearance of images rights with individual players. Any transmission of a football match without such clearance violates such rights.

Taking of photographs or video footages of the best goal scored in the game or season or of the celebratory dances of players for commercial gain or for any advertisement or association with a service or a product violates the image rights of the players concerned. Such violations may, at times, risk stoppage of the broadcasting of the match which may deny the public relying on telecasts, access to the event. However, such eventualities are not common place and overallly, the impact of image rights on football broadcasting is not preponderant. Football organizers take pre-emptive measures to ensure such eventualities do not occur by making all the participating players, their coaches, referees and linesmen assign their images rights in relation to match to the league or any other organizing entity.

¹¹⁴ *Grutter v Lombard* (2007) 4 SA 244 (C) (the Supreme Court of Appeal recognized the protection of image rights under the South African Constitution).

¹¹⁵ Rachel Sikwane and Zaid Gardiner, *A Brief Introduction of Image Rights in South Africa* (2012) at 2.

¹¹⁶ Jonathan Burchell, "The Legal Protection of Privacy in South Africa: A Transplantable Hybrid," *13-1 Electronic Journal of Comparative Law* (2009) at 22.

¹¹⁷ *See id.*

¹¹⁸ Constitution of Kenya, 2010 art. 31 (every Kenyan has a right to privacy, including the right not have his person, home or property searched ...).

1.1.1.6 Copyright

Black's Law Dictionary defines copyright as:

A right to copy; specifically, a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphical, sculptural and architectural works; motion pictures and audio visual works; and sound recordings), fixed in any tangible medium of expression giving the holder the exclusive right to reproduce, adapt, distribute, perform and display the work.¹¹⁹

Paul Goldstein attempts to give copyright a historical perspective by stating that "... close to three centuries ago the term copyright just meant what it says, the right to make copies of a given work; at first it meant a right of literary author to stop others from making copies of his work without his permission."¹²⁰ Copyright has, however, evolved beyond what was originally contemplated so as to encompass all forms of creativity that primarily deals with mass communication. It is now concerned with virtually all forms and methods of public communication; not only through printed publications but also through sound and television broadcasting, films for public exhibition....¹²¹ The Berne Convention for the Protection of Literary and Artistic Works (hereinafter called 'the Berne Convention')¹²² gives an illustrative but limitative catalogue of works that are eligible for copyright protection. Such works include literary, artistic, musical or dramatic works. Some of the concepts and terms used in the Berne Convention are replicated in the copyright laws of Kenya and South as will be demonstrated hereinafter. The enjoyment of copyright shall not be subject to any formality.¹²³ Put differently, copyright shall automatically spring up once a work of authorship is created.

For copyright to subsist in literary, artistic, dramatic or musical work, it must first qualify as a 'work'.¹²⁴ Copyright extends only to expressive forms of works of authorship and not to the

¹¹⁹ Black's Law Dictionary (9th ed. 2009) at 387.

¹²⁰ Paul Goldstein, *Copyright Highway: From Gutenberg to the Celestial Jukebox*, Stanford University Press, (1994) at 3.

¹²¹ See *Supra* note 53 at 36 (nowhere does WIPO attempt to define copyright but sets out works that are protected under copyright).

¹²² Art. 2 (1) (the edition in point is the Paris Act of July 24, 1971 as amended on September 28, 1979. The preamble of the article gives a repertoire of protected works as literary and artistic works, derivative works, official texts, collections, and works of applied art, industrial designs and news).

¹²³ Berne Convention, article 5(2).

¹²⁴ David Bainbridge, *Intellectual Property*, Pearson Longman, London at (5th ed. 2002) at 39 (Bainbridge calls original literary, artistic, dramatic and musical works authorial works. They are authorial works because they are works of authorship which must meet the criteria of originality and tangibility. He distinguishes authorial

ideas or concepts themselves.¹²⁵ Most copyright laws require that a work be original before it qualifies for copyright protection.¹²⁶ According to Sihanya, a work is copyrightable if it is original and embodied into a tangible material or fixed form, the criteria called the twin doctrine of originality and tangibility.¹²⁷ Originality in copyright, in some jurisdictions, means that the work owes its origin to the author and that the same was independently created and not copied from other works.¹²⁸ In the UK originality means that the work should not be copied from another work and that it should originate from the author.¹²⁹ In the USA, courts have placed the threshold of originality at a higher pedestal than in the UK by insisting that the work should not only be independently created but should also possess a ‘modicum of creativity.’¹³⁰ In South Africa and Kenya, the originality threshold is much lower than USA; requiring that the work be independently created and should not be copied from another source.¹³¹ This study examined originality against broadcast football in paragraphs 3.2.2 and 3.2.4 of chapter three of this study.

On the other hand, fixation is the embodiment of a work into a tangible medium now known or later developed, which is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period more than transitory duration.¹³² The concept of

works from entrepreneurial works which are derived from the former and need not be original. Entrepreneurial works protect those who invest in authorial works like broadcasters, film producers and producers of sound recordings. .

¹²⁵ See David Vaver, *Principles of Copyright, Cases and Materials*, WIPO, WIPO Publication No. 844/A/E/F, (2002) at 20.

¹²⁶ *Id.* at 30.

¹²⁷ See Ben Sihanya, *Constructing Creativity and Copyright in Kenya: Cultural Politics and Political Economy of Transnational Intellectual Property*, Ph.D Thesis, Stanford University at 40; See also Lusi Wilfred, *Copyright Protection of Foreign Works*, 9 *LSK.L.J.*, 79 87 (2013).

¹²⁸ See e.g. Melville Nimmer and David Nimmer, *Nimmer on Copyright*, LexisNexis Wadhwa Nagpur, New Dheli (Indian Reprint) at (2010) at 2-9; See also *University of London Press Limited v University of Tutorial Press Ltd* (1962) 2 Ch. 601 (Justice Peterson held that the term original did not mean the work must be the expression of original or inventive thought but that the work should not be copied from another work and it should originate from the author).

¹²⁹ See *University of London v University of Tutorial*, *id.*

¹³⁰ See e.g. *Feist Publications v Rural Telephony Services Co. Inc.* 499 U.S. 340 (U.S.: Supreme Court 1991).

¹³¹ See *Haupt t/a Softcopy v Brewers Marketing Intelligence (pty) Ltd* (2005) (1) SA 398 (C) (the court held that originality means that the work should be the product of the author’s or maker’s own labor and endeavors and should be copied from other sources); See also *Faulu Kenya Deposit Taking Microfinance Limited v Safaricom Ltd* (2013) eKLR at par.6 (Justice Havelock held that to prove originality all that needs to be shown is that the author created the work independently and has not copied it from another and that he has expended towards its creation a substantial amount of skill and labour).

¹³² See The Copyright Law of the USA, Title 17, §102 (a); Cf Copyright Act of Kenya S. 22(3) b and South Africa Copyright Act S. 2 (2) (materiality is a statutory requirement for copyright ability in Kenya and South Africa).

materiality largely underpins the commercialisation of copyright as it constitutes a basis upon which individuals own, buy, sell and use their copyrighted works in a market economy.¹³³ The Berne Convention¹³⁴ gives member states an option to prescribe works in general or any specified categories of works that shall not be protected unless they have been fixed into material form. The issue as to whether a live football match sits well with the criterion of tangibility to warrant copyright ability formed part of the inquiry under the study.

The Kenyan copyright law prescribes that “the following works shall be eligible for copyright: literary works, musical works, artistic works, audio-visual works, sound recordings, and broadcasts.”¹³⁵ In its language, the Act is limitative and close-ended in its characterisation of what is eligible for copyright protection. However, the Act¹³⁶ also extends copyright to performances and dramatic works as well as moral rights of authors.

The South African copyright law also provides a repertoire of works that fall within the cathedral of copyright protection. It states “subject to the provisions of this Act, the following works, if they are original, shall be eligible to copyright: literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, programme-carrying signals, published editions, and computer programs.”¹³⁷

From the foregoing, it was noted that football games or sports do not constitute works eligible for copyright both in South Africa and Kenya. If the legislatures in the two the countries intended so, they would have expressly stated so. In conformity with the practice elsewhere in the world,¹³⁸ the legislatures in the two countries excluded football from the domain of copyright. However, it was observed that it is controversial whether football games may attract

¹³³ See WIPO, *Guide on Surveying the Economic Contributions of Copyright-based Industries*, WIPO Publication No. 893E, Geneva, 19 (2002).

¹³⁴ See art. 2(2).

¹³⁵ The Copyright Law, 2001 No.12 of 2001, Section 22(1) (the Act defines literary work to include novels, stories, plays, stage directions, film sceneries, letters etc.; artistic works to include paintings, drawings, etchings, maps, plans, photographs works of sculpture etc.; audiovisual work to mean a fixation in any physical medium of image either synchronised with sound... but does not include a broadcast).

¹³⁶ See respectively, s.30 (1); s. 26(1); and s. 32(1).

¹³⁷ Copyright Act No.98 of 1978, s. (2) 1.

¹³⁸ See *Supra* notes 2 and 3.

copyright rights at various stages of downstream exploitation as a consequence of entrepreneurial, technical and organisational contributions of cameramen, directors or broadcasters. According to Rowe,¹³⁹ sports are communicated and disseminated to the public by means of audio-visual recording and broadcasts acquired by media corporates by way of licensing. Therefore the study narrowed down copyright in football to audiovisual recordings, artistic works, broadcasts, technological protection means as well as dances, songs that are ancillary to football.

1.1.1.6.1 Interface of Football and Audiovisual /Cinematographic works

In Kenya and South Africa, the copyright legislations use the concepts of audio-visual and cinematographic works alternately. Audiovisual works is defined in Kenya as a fixation in any physical medium of images, either synchronised with or without sound, from which a moving picture may by any means be reproduced and includes videotapes and videogames but does not include a broadcast.¹⁴⁰ The South Africa copyright law defines cinematographic work as ‘a fixation or storage by any means whatsoever on film or any other materials of data or sequence of images, capable when being used in conjunction with any other mechanical, electronic or other device of being seen as a moving a picture...’¹⁴¹ The issue was whether a football match can at any stage become an audio-visual or cinematographic work. According to Bainbridge¹⁴², audiovisual or cinematographic work may or may not be based on original works. Those that are based on original works like literary, dramatic, musical and artistic works are categorised as derivative works and enjoy a two-tier protection, copyright and neighbouring rights. Those that are not based on underlying copyright enjoy only neighbouring rights.¹⁴³ In that context, a raw football match which is not copyrightable attracts neighbouring rights upon fixation. When these rights are exercised by the right holder, they impinge upon access to football even if the underlying content is not protected.

¹³⁹ Dave Rowe, *Sport, Culture and Media: The Unholy Trinity*, 30 (2nd ed.2008).

¹⁴⁰ Copyright Act, s.2 (1).

¹⁴¹ Copyright Act, s.1(1).

¹⁴² David Bainbridge, *Intellectual Property*, Pearson Longman, London at 53 (5th. Ed.2002).

¹⁴³ *See id.*

According to Nimmer, when a football game is covered by four television cameras with a director guiding the production activities and choosing which of the electronic images are sent to the public and in what manner and order; what the director and cameramen do constitutes authorship and therefore copyrightable.¹⁴⁴ To that end, the recording of a football match constitutes a work of authorship but the field movement and kicking of the ball does not constitute copyright. Such activities are mere facts devoid of any expressive form.¹⁴⁵ In the USA case of *National Basketball Association and NBA Properties Inc. v Motorola Inc. DBA Sports Spotra*¹⁴⁶, the Court of Appeal held that sports events are not authored in the common sense of the word but protection is only extended to recorded broadcasts of live events. It follows therefore that it is often difficult to draw a parallel between a fixed copyrightable work and the underlying uncopyrightable events or facts. Therefore the underlying content, though not copyrightable becomes caged into the contributions of directors and cameramen.

According to Marjut, once a football event is recorded, it becomes an audiovisual work.¹⁴⁷ As audiovisual work, the author enjoys exclusive right to control, inter alia, the reproduction, the broadcasting and communication to the public of the work.¹⁴⁸ This exclusivity restricts access to the underlying content which is not copyrightable.

1.1.1.6.2 Interaction between Football and Broadcasting Rights

Although it was argued that the globalisation and commercialisation of football is largely underpinned by intellectual property rights¹⁴⁹, broadcasting rights that flow from the

¹⁴⁴ *Supra* note 128 at 2-166, (Nimmer argues further that the expression of football the football is not located in the underlying content or the rough-and tumble on the field but in the activities of the director and cameramen. In other words there is no expressive work in the raw match).

¹⁴⁵ Doyice J Cotton et al, *Law for Recreation and Sports Managers*, Kendall/Hunt Publishing Company, Iowa (USA) at 612 (2001); *See also Supra* note 128 (where the dichotomy between the expression and fact and its relevance to copyrightability is highlighted).

¹⁴⁶ USA, Court of Appeal for Second Circuit, 105 F.3d 841(1997).

¹⁴⁷ Marjut Salikannel, *Ownership of Rights in Audiovisual Productions: A Comparative Study*, Martinus Nijheff Publishers, Helsinki at 68 (1997).

¹⁴⁸ *See* Copyright Act of Kenya, s. (26); Copyright Act of South Africa, s.8 (in South Africa, the Act does not mention audiovisual work but uses the term cinematographic work in such broad manner as to be subsumed into audiovisual work. This is also supported by the European Union Directive 92/111/EEC in which the term film is deemed to include both audiovisual and cinematographic work).

¹⁴⁹ Francis Gurry, *Supra* note 5.

contemporary concept of copyright are the most lucrative in the sports industry.¹⁵⁰ The number of fans who can watch a football match on television or listen to its commentaries on radio may only be limited by availability of broadcast receiving sets and access to the broadcast itself. Sports broadcasting gained pre-eminence with the advent of modern communication technologies that have made the world a much smaller and more tightly bound community.¹⁵¹ Broadcast matches do not suffer from limitations relating to sizes of stadia or arena. This means that more fans watch football matches off the field as opposed to those physically present at the field.

At the international level broadcasting is restrictively defined as the transmission by wireless means for public reception of sounds or of images and sounds.¹⁵² The South African Copyright Act defines a broadcast as ‘a telecommunication service of transmission of sounds, images, signs or signals which (a) takes place by means of electro-magnetic waves of frequencies of lower than 3000 GHz transmitted in space without an artificial conductor; and (b) is intended for reception by the public or section of the public, and includes the emitting of program-carrying signals to a satellite.’¹⁵³ This means that, like in the Rome Convention, broadcasting in South Africa is restricted to over the air transmissions and therefore excludes transmission over the cables. On the other hand, the Kenya copyright law defines broadcasting as ‘the transmission by wire or wireless, of sounds, of images or both or the representations thereof, in such manner as to cause such images or sounds to be received by the public and includes transmission by satellites.’¹⁵⁴ In Kenya therefore, the scope of broadcasting is broader than in South Africa because in the former broadcasting includes cable transmissions. Unlike, the Rome Convention, WIPO has since broadened the scope of protection so as to include satellite and encrypted transmissions while

¹⁵⁰ J. Gordon Hylton, *The Overprotection of Intellectual Property Rights in Sports*, Faculty Paper, Marquette University Law School, 2010 at 10 (copy available at the university library).

¹⁵¹ Fidelis Ramos, Speech made at the WIPO Symposium *on Broadcasting, New Communication technologies and Intellectual Property*, (April 28-30, 1997), Manila Hotel, Philippines (the speech and the other papers presented at the symposium were compiled by WIPO in the WIPO publication No.757(E/F/S of 98 and is available at the WIPO headquarters in Geneva).

¹⁵² Rome Convention (1961) for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (hereinafter called ‘the Rome Convention’), article 3; See also the Beijing Treaty on Audiovisual Performances (2012) (the treaty while retaining the basic concept of the activity, defines broadcasting so broadly as to include representations of sounds or both sounds and images in a digital environment, transmission by satellite as well as transmission of encrypted signals).

¹⁵³ S. 1(1).

¹⁵⁴ Copyright Act, 2001, S. 2(1).

retaining the basic requirement of over-the air transmission.¹⁵⁵ The minimum protection granted to broadcasting organisations under the Rome Convention include the right to authorise or prohibit the broadcasting and communication to the public, the rebroadcasting, the right of fixation, and the right of reproduction.¹⁵⁶ All these rights reflect the state of technology in 1961 and therefore constructed in an analogue environment and are largely replicated in Kenya and South Africa.¹⁵⁷

In relation to this study, the object of protection in a broadcast was relevant to access to the underlying content. The Rome Convention or indeed the two copyright legislations of South Africa and Kenya do not define the object and scope of protection in a broadcast. However, at the on-going negotiations at the WIPO on the updating of the intellectual property rights of broadcasting organisations, it has been agreed that the object of protection is the signal and not the content embodied into the signal.¹⁵⁸ This position was buttressed by Macqueen et al¹⁵⁹ who also argue that in a broadcast it is the signal and not the underlying content which is protected because of greater reliance upon machinery and technology than creativity.

In spite of this conceptual felicity on the object of protection in broadcast, judicial decisions in both Kenya and South Africa revealed that both signal and underlying content are protected and thereby denying access of the content itself. In the case of *Kenya Broadcasting Corporation v Royal Media Services Ltd*¹⁶⁰, the plaintiff filed a copyright infringement suit and obtained judgement against the defendant for making off-tube radio commentaries of live television broadcasts of the Africa Cup of Nations tournaments of 2010, which took place in Angola. In ruling that such simultaneous radio commentaries, based on live television broadcasts, infringed

¹⁵⁵ See WIPO Performances and Phonograms Treaty (WPPT), art. 2; WIPO Copyright Treaty (WCT), article 2.

¹⁵⁶ Rome Convention, *supra* note 125, article 7.

¹⁵⁷ See Kenya Copyright Act, S. 29; See also South African Copyright Act, S.10.

¹⁵⁸ See WIPO, Draft Treaty on the Protection of Broadcasting Organisations dated Geneva, Dec. 16-20, 2013, SCCR/26/6; See e.g. WIPO, Consolidated Treaty on Broadcasting Organisations prepared by the chairman of the WIPO SCCR then and circulated at the SCCR/12/2 meeting held in Geneva, May 2, 2005 (characterising the object of protection as important as signal in order to avoid a possible conflict with article 2 of the Rome Convention which enjoins that the rights of broadcasters shall leave intact and shall in no way affect protection of copyright in literary and artistic works); Cf Copyright Act of South Africa Ss. 1 and 10 (the noun broadcast is defined broadly as to include underlying content and signal).

¹⁵⁹ Macqueen *et. al*, *Contemporary Intellectual Property*, Oxford University Press Inc., New York, at 58 (2007).

¹⁶⁰ HCCC No.36 of 2010 at Nairobi, Milimani (unreported).

upon the plaintiff's copyright in the live television matches, the court placed a lot of weight on content than the technical and entrepreneurial contribution of the plaintiff. Besides, the plaintiff was merely rebroadcasting a signal originated by another broadcaster in Angola and therefore did not involve the creative endeavours of its cameramen and director. In *Kenya Broadcasting Corporation v Wananchi Group Ltd and Pan Africa Network Group (Kenya) Ltd*,¹⁶¹ the High Court, in Nairobi, granted an injunction restraining the defendants from rebroadcasting the 2014, FIFA World Cup tournaments that took place in Brazil over which the plaintiff held exclusive free-to-air rights. The Court intimated that in so doing the defendants were violating the plaintiff's copyright in the matches.

In South Africa, in *Southern African Music Rights Organisation v Svenmills Fabrics (Pty) Ltd*¹⁶², Justice Berman held that relaying through extension speakers, of music in a factory from a programme broadcast by a national broadcasting organisation constituted public performance and the owner of copyright in the music is entitled to have its rights therein protected. It is arguable therefore that what was received by the public in this case was the content and not the signal. The public is thereby denied access by the extension of copyright to the content even when the content is not a work of authorship. The same principle had earlier been applied in *Southern African Music Rights Organisation Ltd v Trust Butcher (Pty)*¹⁶³ in which Addleson J. held that a public performance of a broadcast without authorisation amounted to copyright violation.

In the European Union, the European Court of Justice (ECJ) adopted, in 2011, the USA position and ruled that English Premier League matches broadcast on a pay TV platform could not enjoy copyright as they could not be classified as works.¹⁶⁴ This ruling may not have a binding effect in Kenya and South Africa, it however, has a preponderant persuasive effect. The ruling contradicts

¹⁶¹ HCCC No.254 of 2014 at Nairobi, Milimani (unreported).

¹⁶² (1983) 1 SA 608 C at Para. 105.

¹⁶³ (1978) 1 SA 1052 (E) (also reviewed by Wim Albert of UNISA University and available on [Http/www.uj.ac.za/en/faculties/law/research/ip/documents/de](http://www.uj.ac.za/en/faculties/law/research/ip/documents/de) and last accessed on May4, 2016.

¹⁶⁴ *Football Association Premier League v Leisure and Others and Karen Murphy v Media Services Ltd* respectively, C-403 and C-429 of 2008 at 13 (the two cases had been referred to the ECJ by a British High Court. The ECJ in its ruling emphasised that only graphics, artworks, logos and opening signatures incorporated into the broadcast match could attract copyright and not the underlying content. This position supported by the on-going WIPO negotiation on broadcasters as well as the philosophical and doctrinal basis of copyright).

decisions of English courts that protect the underlying content of broadcasting regardless of whether they qualify as works of authorship.¹⁶⁵ In support of the English position, Handler¹⁶⁶ contended that electro-magnetic signals that are transmitted in a broadcast are evanescent and imperceptible and any rights over those signals alone are ineffectual. This study will seek to find out if this position will not lead to double protection as well as run the risk of contravening the Rome Convention.¹⁶⁷ Besides, protecting underlying content which is not a work of authorship would also bring every recording into the scope of copyright. In addition to these challenges, and although the English legal position is replicated in Kenya and South Africa, it would be difficult for copyright in broadcast football to resonate with the mandatory criteria of originality and materiality.¹⁶⁸ In the USA, the *NBA*¹⁶⁹ case stands out as landmark judicial authority conceptually disentitling copyright to pre-existing football but conferring the same on the recordings. This study therefore examined the philosophical underpinning for subsistence of copyright in broadcasts and its impact on access to the underlying football matches. It unravelled whether copyright-based access restriction is a fallacy or is grounded on sound copyright principles.

This was core to this study because the controversy as to whether it is the underlying football match or the broadcast signal that is the object of copyright protection revolves on this exposition. Two schools of thought were constructed in this controversy. The first one holds that in broadcasting, the underlying content should not be the object of protection because it would lead to appropriation by broadcasters of works, they did not create or that are in public domain or of activities that are not copyrightable. It therefore, posited that protection should be signal-based

¹⁶⁵ See *BBC v British Satellite Broadcasting Ltd* (1992)2 Ch. 141; See, e.g., *Norowzian v Arks Ltd No.2* (2000) EMLR 67; (2000) FSR 363, CA (the Court Appeal ruled that audiovisual works were distinct from the recordings and thereby underscoring the duality of copyright protection between the pre-existing works and the technical and entrepreneurial contribution).

¹⁶⁶ Michael Handler, Panel Case and Television Broadcast, 25 *Sydney L.REV.*, 399 407(2003).

¹⁶⁷ See article 1(the article prescribes that ‘the protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works...’).

¹⁶⁸ See Lionel Bently and Brad Sherman, *Intellectual Property Law* (2001) at 79 and 98(unlike literary, artistic, musical and dramatic works, there is requirement that films, sound recordings, broadcasts and cable programmes be original.The latter works are called entrepreneurial works which are copyright protected on the basis of the investment expended towards their creation.Thus they are protected irrespective whether or not the author exerted mental skill, labour or effort in their creation.The works whose creation calls for expending mental skills, labour or judgment are called authorial works, for instance, literary, artistic or musical works).

¹⁶⁹ See *Supra* note 146.

and consequently the underlying content which is in public domain or not copyrightable like football should not be denied access to the public by means of copyright protection. The second school of thought discounted the signal-based protection because an empty signal is ineffectual and does not meet the copyrightability criteria. Part of this study was to unravel this complex matter within the context of the interface between copyright and broadcast football and its impact on access to the public. The outcome of the study was designed to contribute to new knowledge in this field.

1.1.1.6.3 Artistic and other Works and Football

In the *Karen Murphy* case,¹⁷⁰ the European Court of Justice while denying copyright to live broadcast football matches embodied in a broadcast signal, ruled that only the opening video sequence, graphics, league anthems and pre-recorded films embedded in the signal would qualify as works of authorship. Arising from this judgment, only copyrighted work embodied in the signal can be eligible to copyright protection. Therefore, the underlying live football event not being a work of authorship cannot enjoy copyright protection. However, copyright could be claimed in respect of composite event mark which combines the name of the event in a distinctive original logo by use of, for instance, distinctive lettering and colours constituting artistic works which are copyrightable.¹⁷¹ Taking of still photographs of a television broadcast of a football match integrated into such works without authority may inevitably violate copyright of a broadcasting organisation transmitting the match. This would deny the public secondary access to the match; such photographs being viewed as artistic works.¹⁷²

Besides artistic works, House of Lords in England¹⁷³ also extended copyright to football league fixtures as literary works means that football magazines and score lists and tables may, by analogy, be similarly protected.¹⁷⁴ This analysis was closely tied to the exposition in the preceding analysis of the interface between broadcasting rights and football to the extent that any

¹⁷⁰ See *supra* note 164.

¹⁷¹ See Blackshaw *Supra* note 90 at 20.

¹⁷² See e.g. Kenya copyright Act, s. 29 (b).

¹⁷³ See e.g. *Football League Ltd v Littlewoods Pools Ltd* (1959) 2 All ER 546.

¹⁷⁴ *Independent Television Publications Ltd v Time Out Ltd* (1984) F.S.R 64 (the court held that the TV Times programme listings were an original literary work and hence copyrightable).

artistic work embodied in the broadcast signal may impact on access of broadcast football to the public because any unauthorised use of such works embedded into the signal will amount to copyright infringement. Similarly, literary works derived or generated from a broadcast football match as depicted above, may be argued as denying the secondary informational aspects of football to the public and therefore central to this study.

1.1.1.6.4 Copyright and Access to football Broadcast

The term access is used widely many in disciplines. There is access to information, access to justice among others. However, the concept of access as used in this study was intertwined with copyright and football. According to Bing, a broadcaster enjoys exclusive rights relating to the broadcasts and content it originates and it is illegal to access them without authorisation.¹⁷⁵ Therefore a broadcaster has a right to deny access to broadcast football to the end-user. The broadcaster uses copyright and other intellectual property rights to restrict access to the public.¹⁷⁶ Although the concept of access to works or broadcast has not been specifically defined in most jurisdictions; the High Court in Australia defined access in a digital environment as any form of access to copyrighted works with or without access code or use thereof.¹⁷⁷ Access right is the most important right to an author in a digital world.¹⁷⁸ According to Conroy, access is the ability to experience or apprehend a work; put differently it is the ability to view, read or listen to a work.¹⁷⁹ Arising from this, access of broadcasts and content can be viewed against copyright in both analogue and digital environments. To that end, access to football as content was viewed accordingly against that prism in this study.

¹⁷⁵ John Bing, *Intellectual property exclusive access right and some policy guidelines*, Stockholm Institute for Scandinavian Law (1957-2009) (policy guidelines available on file with the institute).

¹⁷⁶ See e.g. License Agreement dated May 4, 2009 on the 19th ed. of the FIFA, World Cup tournament of 2010, in South Africa, between FIFA on one part and Africa Union of Broadcasting (AUB) and Kenya Broadcasting Corporation (KBC) on the other (a copy of the agreement is on the AUB file in Dakar, Senegal) (the agreement vests all the intellectual property rights in the basic feed including transmissions and recordings thereof either by or under the direction of any licensee in FIFA).

¹⁷⁷ *Eddy Stevens and Kabushiki v Sony Computers Entertainment Europe Ltd and Sony Computer Entertainment Australia PTY Ltd* (2004) H.C.A. No. S319 of 2004 at 6 par. 4; *Cf Lexmark International Inc v Static Control Components Inc. U.S., 6th. Circuit*, 387 F. 3d 522 (2004) at 547-547 (the U.S.A. Court of Appeal did not extend the concept of access to use).

¹⁷⁸ See *id.*

¹⁷⁹ Marlize Conroy *supra* note 72 at 239.

The analogue technology employs traditional copyright to restrict access. For instance, in the *KBC/ Wananchi* case,¹⁸⁰ traditional copyright was used to restrict access and use by the exercise of a right of rebroadcasting¹⁸¹ to deny other broadcasters a right to retransmit the matches.

In South Africa, free-to-air broadcasters may invoke traditional copyright to restrict access for instance, the right to authorise public performance or communication to the public of the matches embedded in the broadcasts.¹⁸² The other rights which may be similarly used are for example right of fixation,¹⁸³ right reproduction¹⁸⁴ and, right of distribution of copies of fixed broadcasts.¹⁸⁵

The advent of digital technology has created multi-media platforms like digital free-to-air terrestrial broadcasting platforms, mobile TV, video-on demand, pay-TV, pay-per view, and online transmissions.¹⁸⁶ According to Mudgal, non-linear transmission and pay TV services employ conditional access systems while linear transmissions are largely free-to air.¹⁸⁷ Non-linear transmissions and pay TV services employ technological protection measures in order to restrict access of content to the public.¹⁸⁸ Globally the protection of technological protection measures were introduced following the adoption of the WIPO internet treaties of 1996.¹⁸⁹ These technology-based measures have created another layer of more stringent copyright protection

¹⁸⁰ See *supra* note 161.

¹⁸¹ See Kenya Copyright Act, s. 29 (the other economic rights, besides the right of rebroadcasting, provided under this section include the right of fixation, communication to the public and taking still photographs of a television broadcast).

¹⁸² See *e.g. Supra* note 162; Broadcasting organisations in South Africa, enjoy the right to authorise reproduction, rebroadcasting, taking still photographs or retransmission of the broadcasts, See also South African Copyright Act, s. 10 (the term retransmission covers new platforms like internet, mobile and other media otherwise than over the air).

¹⁸³ See Copyright Act of South Africa; *supra* note 110, s. 2(2).

¹⁸⁴ See *id* s.10 (b).

¹⁸⁵ See *e.g.* WPPT, art.12 and WCT, article 6 (globally the right of distribution was adopted in 1996 following the conclusion of the WIPO internet treaties of which Kenya and South Africa are signatories and therefore the right may be extended to apply to the distribution of copies of fixed broadcasts).

¹⁸⁶ See Damien Gera din, Global Competition Centre, "Access on Content by New Media Platform: A Review of Competition Law Problem", Working Paper 01/04 (Belgium, 2005).

¹⁸⁷ *Supra* note 2 at 213.

¹⁸⁸ See *e.g.* Jacques Werra, *The Legal System of Technological Protection Measures under WIPO Treaties, the Digital Millennium Copyright Act, the EU Directives and other National Law (Japan, Australia (2002)*, Faculty of Law Paper, University of Lausanne at 11.

¹⁸⁹ See WCT art.11 and WPPT art.18 (the two articles are identical and enjoin member states to provide adequate legal protection and effective legal remedies against the circumvention of technological protection measures that are used by authors in connection with the exercise of rights under this treaty or the Berne Convention....).

that is not even mitigated by the traditional copyright exceptions and limitations.¹⁹⁰ The same rights are replicated in the Kenyan copyright law¹⁹¹ but not under the copyright law of South Africa. In South Africa, the circumvention of technological protection is prohibited under the Electronic Communications and Transactions Act¹⁹² which deals with a plethora of other telecommunication abuses otherwise than copyright.

As football organisers, FIFA and its affiliated continental and national football associations exercise monopoly or near monopoly over football rights thereby making the cost of their procurement exorbitantly high. This has witnessed the migration of football matches from free-to air broadcasts to pay TV platforms and thereby denying the majority members of the public access.¹⁹³ This is because pay-TV penetration in Kenya and South Africa is limited. According to the 2014 WIPO survey, pay TV penetration is Sixteen per cent and Forty Seven per cent in Kenya and South Africa respectively.¹⁹⁴ The television households in Kenya and South Africa are 3.3 million and 15 million against total population of 45 million and 5.8 million respectively.¹⁹⁵ Broadband penetration in the two countries is also limited with Kenya enjoying One per cent and South Africa Forty Six per cent; which means that internet-based pay-TV services are equally limited.¹⁹⁶ In South Africa, Multi-choice, a pay service provider controls television broadcast of the South Africa Premier league having acquired exclusive broadcast rights from PSL for the 2015-2016 Season.¹⁹⁷ The same situation is replicated in Kenya not only with the Kenya Premier League but also with respect to the English Premier League matches.¹⁹⁸ This situation undermines public access to football and favours the feudalisation of football in preference of private entrepreneurs.

¹⁹⁰ See *supra* note 71 at 22.

¹⁹¹ See s.35(3) (the section provides a right against circumvention of TPMs designed to protect the work or manufacture and distribution of devices designed or produced for the purposes of circumventing TPMs designed to protect copyright law or remove or alter any electronic rights management information or distribute or import or broadcast or make available to the public protected works, records or copies from which electronic management information has been removed or has been altered without authority of the right holder).

¹⁹² Act No 25 of 2002, S. 86.

¹⁹³ See *Supra* note 10 at 104.

¹⁹⁴ WIPO, *Current Market and Technology Trends in Broadcasting Sector*, Geneva, June 29 to July 2, 2015, SCCR /30/3 at 40-44.

¹⁹⁵ See *Id.* at 42.

¹⁹⁶ *Id.*

¹⁹⁷ See *supra* note 11 at 179.

¹⁹⁸ *Id.*

1.1.1.6.5 Other factors that may Impede Access

According to the WIPO survey, other factors otherwise than copyright may curtail public access to broadcast football. The factors include limited broadband, receiving sets and signal reach.¹⁹⁹ Although these factors fell outside the scope of this study, they would be mentioned at the end of the study by way of recommendations for further research; because they also impact on access to broadcast football.

To sum up, foregoing overview demonstrated a Knowledge gap that the increasing proprietisation and individualisation of broadcast football through the instrumentality of copyright were anchored on weak philosophical, social, and jurisprudential doctrines and grounds. The subsistence of copyright in broadcast football, therefore, rests on shaky props from the point of view of two perspectives. First, there is global consensus that a raw football match or any sport is not copyrightable. Consequently, recording and transmission alone cannot make the event a work of authorship. Secondly, there is growing currency and understanding, especially within WIPO and its member states, that in a broadcast, it is the signal that should be the object of protection and not the content. Therefore, the limitation of public access to broadcast football based on copyright is not only justified by weak legal underpinning but also by weak practical and policy considerations. This limitation is neither justified by the provisions of the constitutions of both Kenya and South Africa which guarantee to every person freedom of expression and access to information. The denial or limitation of access to broadcast football to the public undermines not only the cultural citizenship of the people but does not also take account of the public subsidy towards football infrastructural facilities and other amenities that make the football organisations possible.

1.2 Problem Statement

Copyright, on one hand, is designed to promote innovation and creativity by rewarding for a limited period authors and owners of works; copyright on the other hand, is also designed to achieve a utilitarian role by promoting culture and knowledge through the unrestricted flow of information for the general public. The use of copyright and copyright-aided technical measures in Kenya and South Africa downplays the utilitarian role of copyright and the socio-cultural

¹⁹⁹*Supra* note 165 at 39.

function of football. First, that the copyright-aided technical measures encase football and other broadcast content indiscriminately without regard to the use of the football broadcasts authorized by the owner or permitted by the law or in public domain. Secondly, football as a popular sport is a cultural good that people should be allowed to enjoy either live or through the media. Thirdly, as developing countries characterised by racial and tribal tensions, Kenya and South Africa need football as a popular sport to promote cultural citizenship, collective consciousness and national cohesion. Fourthly, Kenya and South Africa guarantee freedom of expression and the right of access to information. It is evident that the commoditisation of football through the use of copyright and copyright-assisted technical measures compromises not only the public access to the popular sport but also downplays the socio-cultural benefits flowing from such public access. Evidently, then, there is tension between protecting individual rights of copyright holders and the upholding of the claim of the general public to access to football both as a cultural heritage and an informational asset.

The study explored different ways of remedying the situation. Among the suggested ways are, firstly, to introduce efficient and effective anti-siphoning and regulatory frameworks where non-existent or to strengthen the existing ones. Secondly, to explore the possibility of putting football broadcasts outside the armpit of copyright protection, Thirdly and finally, to align the protection of technological protection measures to the WIPO performances and Phonograms Treaty in which the use of such technical measures cover acts not authorized by authors concerned or permitted by the law. This will allow for circumvention of technical measures for acts permitted by the copyright law or allowed by the author or for unprotected works.

1.3 Aims of the Study

The aims of the study were closely intertwined with the scope and limitation of the study set out in paragraph 1.7 of this chapter. In line with bullet one of the scope of the study, the main purpose of the study was to establish the role of copyright in access to broadcast football in South Africa and Kenya. The current copyright-driven football transmission landscape in the world in general, and in Kenya and South Africa in particular, leans heavily in favour of commercial media entities and broadcasters at the expense of the consumers. The study thus examined the political economy of football in South Africa as well as the role football plays in

the promotion of culture as well the national prestige of a country. To that end, the study analysed the interventionist mechanisms which are in place or ought to be in place in order to promote access to football in the two countries.

The study, in conformity with bullet two of the scope and limitation of the study, looked at the international law and instruments that are relevant to copyright and football transmission and relate them to Kenya and South Africa and then evaluated the manner and extent to which they impacted on access to football. Besides, the study also aimed at analysing the digital and analogue environments in which football is transmitted in the two jurisdictions.

The study further examined copyright and broadcast football events in the selected countries with strong copyright traditions and developed copyright regimes like the USA, Britain, France and European Union. Thereafter, the study will narrow down to a comparative evaluation between Kenya and South Africa in relation to football and copyright. The specific rights that are granted and are exercisable by right holders will, in each case, be analysed. The available exceptions and limitations in the copyright legislations in South Africa and Kenya will be examined to find out the extent to which they mitigate the rigours of copyright in football in both analogue and digital environments. Related to this, the study examined the concept of authorship in football and who is the author and at what stage, if any, does a work of authorship spring up in football game?²⁰⁰

In particular, the study was guided by the following objectives:

- i. To examine and investigate the nature and scope of broadcast copyright and their impact on access to broadcast football by the public in South Africa and Kenya.²⁰¹
- ii. To establish whether public access to football in Kenya and South Africa is dependent upon copyright.²⁰²
- iii. To determine the global outlook of football broadcast, broadcast technology and platforms that impact on access to broadcast football.²⁰³

²⁰⁰ See para. 1.7 of the scope and limitation of the study bullet 7.

²⁰¹ See *id.* bullet 4.

²⁰² See *id.*

- iv. To examine the interface between copyright and football broadcasting and its impact on public access to the game.²⁰⁴
- v. To analyse the relevant international copyright instruments that and how the impact upon broadcast football in Kenya and South Africa.²⁰⁵
- vi. To examine the broadcast activities in Kenya and South Africa and how they interact with broadcast copyright and access to the public²⁰⁶
- vii. To assess the statutory provisions and policy guidelines in Kenya and South Africa that impact on access to broadcast football events.²⁰⁷
- viii. To examine the interface between economic rights broadcasters enjoy and the exceptions and limitations

1.4 Research Questions

Previous research studies have largely zeroed-in on the commercial rights and commercialisation of football. Little attention or interest has been shown in copyright and how it impacts on access to football transmissions of major football events by the large public. To be able to contribute to knowledge in this cross-disciplinary field six thematic research questions were conceptualised to guide the study:

- i. Is access to broadcast football in Kenya and South Africa a function the scope and nature of broadcast right?
- ii. To what extent does public access to major broadcast football events in Kenya and South Africa depend on copyright?
- iii. What is the impact of globalisation on broadcast football and its access to the public in South Africa and Kenya?
- iv. How does the interaction between copyright and football broadcasting play out in access by the public to game in Kenya and South Africa?
- v. Do what extent do copyright-related international instruments influence access to broadcast football in Kenya and South Africa?

²⁰³ See *id.* bullet 5.

²⁰⁴ See *id.* bullet 6.

²⁰⁵ See *id.* bullet 3.

²⁰⁶ See *id.* bullet 2.

²⁰⁷ See *id.* bullet 8.

- vi. What means of broadcast delivery and platforms in Kenya and South Africa that restrict public access to broadcast football?
- vii. What are statutory provisions and policy guidelines that exist or ought to be put in place in the two jurisdictions in order to promote public access to football?
- viii. To what extent is exclusive rights broadcasters enjoy are tempered with exceptions to permit public access to football?

1.5 Research Hypotheses (Assumptions Underlying the Study)

This study was undertaken upon the premises of the following assumptions:

- i. Access to broadcast football in Kenya and South Africa is a function of the scope and nature of broadcast copyright in place;
- ii. The public access to major broadcast football events in Kenya and South Africa is dependent on copyright;
- iii. Globalisation and commoditisation of football has impinged upon access to broadcast football in Kenya and South Africa;
- iv. The interface between copyright and football broadcasting affects access to football in Kenya and South Africa;
- v. Inadequate international copyright-related instruments contribute to curtailment of access to broadcast football by the public in Kenya and South Africa;
- vi. The current means and platforms of broadcast delivery restrict access to football in Kenya and South Africa;
- vii. Lack or inadequate regulatory or legal frameworks contributes to inability of the public to access broadcast football in Kenya and South Africa;
- viii. The prevailing exceptions and limitations do not adequately temper the exclusive rights of broadcasters to guarantee access to the public of football.

1.6 Research Methodology

1.6.1 Introduction

This study was a comparative study between Kenya and South Africa. The researcher selected the two countries first, because they are most affected by the legal problem under investigation. Secondly, because it would be convenient and cheaper to carry out the study in the two countries, one being the researcher's native country and the other one the study country. Thirdly, the

problem under study was of a universal character and the findings would be representative of a global phenomenon and fourthly, and finally the findings of the research would benefit the countries with which the researcher is closely associated.

1.6.2 Type of Research

The main thrust of this study is underpinned by doctrinal legal research. However, the study, on a less scale, also employed both descriptive and exploratory approaches.

1.6.2.1 Doctrinal Research

The doctrinal research is one that illuminates the legal concepts and principles of all types of cases, statutes and rules.²⁰⁸ The doctrine research is concerned with analysis of a legal doctrine and how it has been developed and applied over a period of time.²⁰⁹ It involves analysis of case law, arranging, ordering and systematising legal proposition and study the legal institutions through the prism of legal reasoning, analogy or rational deductions. The essential features of the doctrinal research include a critical conceptual analysis, critique of relevant legislation, case law in order to reveal a statement of the law relevant to the matter under investigation.²¹⁰ This study being a legal research investigating the interaction between broadcast football, copyright and access of the sport to the public; it sits well with the doctrinal method revolves around the analysis of issues and facts, legal principles and concepts, evolution of the social value and making deductions.

1.6.2.2 Descriptive and Exploratory Approaches

Kombo and Trump²¹¹ argue that the main purpose of a descriptive is the description of the state of affairs as it exists. This was consistent with this study which sought to locate the broadcast copyright and then interpret and analyse it within the context of football and its access to the

²⁰⁸ Vijay M. Gawas, *Doctrinal Legal Research Method: A Guiding Principle in Reforming the Law and Legal System Towards the Resaerch Development*, 3 *INT'L JOURNAL OF LAW* 128 (2017).

²⁰⁹ *See id.*

²¹⁰ *See* Terry Hutchinson, *The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law*, 38 (1) *USWL REV.* 318(2015); *see also* Terry Hutchinson and Nigel Duncan, *Defining and Describing what We Do: Doctrinal Legal Research* 17 *DEAKIN L. REV.* 89(2012).

²¹¹ *See* Donald Kombo and Delno Tromp, *Proposal and Thesis Writing: An Introduction*, Paulines Publications Africa, Nairobi at 9 (2013)

general public in both South Africa and Kenya. Mugenda and Mugenda²¹² point out that descriptive studies are not only restricted to the fact finding but may also result in the formulation of important principles and knowledge base as well as solution to significant problems. Exploratory research is a voyage of new discovery of knowledge. According to C.K. Kothari,²¹³ an exploratory research focuses on the discovery of idea and insights. Descriptive and exploratory approaches being inextricably intertwined worked in complementarity in the discovery of the new frontiers of knowledge.

1.6.3. Methodology and Procedure

The research method used was the literature study that comprised the examination, analysis and deduction of existing published materials.²¹⁴ The literature study does not require a researcher to go to the field but relies on primary and secondary sources of information.²¹⁵ According to Doyice et al²¹⁶ primary legal sources include constitutions, international instruments, statutes, rules and regulations, and court decisions. In other words primary legal sources represent the actual law. On the other hand, secondary sources include articles, journals, academic papers, legal dictionaries, treatises, books, and other written materials that explain, analyse and interpret certain issues of law.²¹⁷ Given the complex legal nature of this study, desk-top study was appropriate and precise. The field research approach was not suitable in this study because it would be riddled with bias and unreliability because not all interviewees may have had a solid legal and technical background to the study and besides some interview participants, who are employees, may not be willing to give the correct information. This study called for an in-depth analysis, evaluation and reasoning of copyright relating to broadcast football and its impact upon public access and thus a literature study was apt.

²¹²See Mugenda Olive Mwhaki and Mugenda Abel Gitau., *Research Methods: Qualitative and Quantitative Approaches*, Acts Press, Nairobi (1999) at 20.

²¹³See C.R. Kothari, *Research Methodology, Methods and Techniques*, New Age International (P) Limited, New Dheli at 2(2004).

²¹⁴See Mark Rickinson and Helen May, '*A Comparative Study Methodological Approaches*, The Higher Education Academy', UK (2009) at 8.

²¹⁵See *id.*

²¹⁶See Doyice Cotton *et al supra* note 145 at 14.

²¹⁷*Id.*

The study took a comparative approach which could be viewed in two-fold. First, by analysing the experiences in four jurisdictions with a history and tradition of strong intellectual property and sports law regimes, the study benefitted from a wide range of global best practices. These jurisdictions are US, Britain, France and the EU. Secondly, the study drew experiences from those regions and used them to analyse and evaluate the obtaining situation in Kenya and South Africa.

The main sources of the materials included libraries, both university and judiciary libraries, and other institutional depositories where primary and secondary data may be obtained. Tertiary sources were also employed. They included well edited encyclopaedias, newspapers, magazines and dictionaries.²¹⁸ Internet and other online networks also formed another valuable source of data. This necessitated getting access codes and passwords to such international and local sources as were appropriate to the study. However, only works posted online by renowned scholars, institutions and journals were be used.²¹⁹

1.6.4. Data Analysis

The data analysis was thematic. The analysis was consistent with the doctrinal legal research. It involved the assemblage of legal facts and issues, identification of the legal issues, analysing them before reading the relevant background material. The background material included dictionaries, encyclopaedias, relevant textbooks and journals. The background material also involved locating primary sources like legislations, treaties, judicial decisions and constitutions. The analysis was further done, based on the comparative approach to be employed in the study consistent with the scope and limitation designed.²²⁰ On the basis of the analysis, deductions and inferences were drawn which informed the thrust, recommendations and conclusion of the study.

²¹⁸See Kate L. Turabien, *A Manual for Writers of Research Papers, Theses and Dissertations*, University of Chicago Press, Chicago at 25(2007).

²¹⁹ See *id* at 26.

²²⁰See paragraph 3 of this chapter.

1.7 Scope and Limitation of the Study

Following the broad introduction, the study focused on the following specific and relevant fields:

- The role of copyright in access to broadcast football in Kenya and South Africa. In furtherance thereto the study gave an overview of the interface between football and audiovisual works as well as artistic, musical, literary works which may be incorporated into broadcast football. Audio-visual performances and football formations would be examined to find out if they could be assimilated into copyright. However, to the extent that they may not directly impinge on access to the events themselves, they were not covered in details.
- The core of the study focused on broadcasting and the transmission of football. Broadcasting in this context was examined in linear and non-linear sense. To that end, the study focused on the various platforms and means of signal delivery of the football content.
- The study also looked into the Berne Convention, the Rome Convention, the WPPT, WCT, Beijing Treaty on Audio-visual Performances, and the Brussels Convention; first at a global level, and secondly their replication in Kenya and South Africa and the manner in which they impacted on access to broadcast football.
- The study analysed the nature and scope of broadcast copyright and their impact on access to the football events.
- The study further examined the traditional copyright as well as the technological protection measures that may impinge upon transmitted football in Kenya and South Africa.
- The study also considered the interaction between exclusive rights that broadcasters enjoy and the exceptions and limitations that are designed to mitigate the former.
- The study also explored the cultural and constitutional implications of restricted access to broadcast football in South Africa and Kenya.
- The study picked selected countries and regions with strong history and traditions of copyright and sports and evaluated the prevailing regulatory and legislative regimes as well statutory frameworks that mitigated the rigours of football copyright in favour of public interest. Such countries would include the USA, Britain, European Union and France.

- The study drew from the global practice and undertook an in-depth separate evaluation of not only the state of copyright and football in South Africa and Kenya but also the existing legislative, regulatory, policy, and statutory frameworks that impacted on access to football.

1.8 Terms and Definitions

The study adopted the following terms and definitions: Football means association football organised under the auspices of FIFA, the confederations and associations or authorised by them.²²¹

- A Professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs.²²²
- Football broadcast means an electronically generated signal transmitted by wireless means and carrying a football event for reception by the general public; such transmission includes encrypted football carrying signal or propagated via satellite.
- Signal is an electronically-generated carrier capable of transmitting programmes.²²³
- Broadcasting means the transmission by wireless means for reception by the public of sounds or of images and sounds or of the representation thereof; such transmission by satellite is also broadcasting; the transmission of encrypted signals is broadcasting where the means of decryption are provided to the public by the broadcasting organisation or with its consent.²²⁴
- Access in relation to football broadcast means the ability of the desirous public to listen to the audio feed and the accompanying commentaries or watch or use the televised football event by the use of any broadcast receiving devices at no cost.²²⁵

²²¹ FIFA Regulations on the Status and Transfer of Players (2013) at 5.

²²² *See Id.* article 2(2).

²²³ *See*, the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, May 21, 1974, article 1(i).

²²⁴ *See e.g.* WPPT, article 2(f).

²²⁵ *See supra* notes 72 and 177.

1.9 Intended Contribution to the Body of Knowledge

This study was the first academic research on the topic in South Africa and Kenya. Given the trans-disciplinary and comparative nature of the study, it would make an innovative and worthwhile contribution to the field of copyright and football. The study not only examined but also unravelled the doctrinal basis for broadcast copyright protection in Kenya and South Africa. The study also investigated the deployment of new media platforms and technological measures that impact on access to broadcast football. The study appreciated the current commoditisation and commercial segmentation of football but sought to temper it with the public interest in accessing the sport. The migration of football transmission from free-to-air platforms to other media platforms whose access is conditioned upon payment of fee restricts public access to the event in the two jurisdictions where the majority people live below poverty line. The study therefore sought to delve into grey areas and create a contemporary and innovative approach aimed at ensuring greater access to major football transmissions by the people of the two countries.

1.10 Theoretical Framework

This study was anchored upon four thematic theories namely: the natural law or labour theory, utilitarian theory, public benefit theory, and the human rights approach theory. The first two have, doctrinally, influenced the development of intellectual property laws. Although they differ in philosophical and jurisprudential perspectives, they at times complement one another and at times compete against one another.²²⁶ The third, public benefit theory was conceptualised by the author. Its construct and conceptualisation was largely influenced by economic dynamism and support for greater social benefits as well as the larger public interest. The fourth theory, human rights approach, underpins the view that broadcasting of football events transforms them into narratives, stories and information that deserve constitutional and human rights guarantee.

²²⁶See generally Paul Goldstein, *Copyright, Patents, Trade marks and Related Doctrines on the Intellectual Property* (2002) at 12.

1.10.1 Natural Law Theory

The Natural Law theory stems from the belief that a person who labours upon resources that are either not owned or held in common has a natural property rights to the fruits of his or her efforts and that the state has a duty to respect and enforce that natural right.²²⁷ This theory was propounded by John Locke; and it is at times called the labour theory.²²⁸ In his treatise, Locke stated:

[T]hough the earth and inferior creatures be common to all men, yet every man has a property right in his person.... Whatsoever, then he removes out of the state that nature hath provided, and left in it, he hath mixed his labour with and joined to it something that is his own, and thereby makes it his property.... For his labour being unquestionable property of his labourer (sic), no man but he can have a right to what he once joined to, at least, where there is enough, and as good left in common for others.²²⁹

Benjamin argues that the labour mixing doctrine is coherent and sufficient to justify the private property rights advocated by Locke.²³⁰ Hughes found the theory an immediate intuitive appeal and added that people worked to produce ideas and that the value of the ideas... depended on the individual's mental work.²³¹ On the other hand, while supporting the theory, Chisum restated Lockes's proposition that God gave the earth to mankind in common and that the individual has property in his or her person and that of the labour of his body and the work of his or her hand.²³²

Drahos, however, describes Locke as an important intellectual theorist who provides the labour theory a justification for intellectual property rights whose analysis show indeterminacy of labour as a basis.²³³ In this literary piece, Drahos criticised the labour theory as one based on abstract considerations and for not being practical and failing to demonstrate the amount of labour that justifies the grant of protection. Macpherson also argues that Locke seemed an evil genius who justified unlimited capitalist appropriation but did not support a possibility of joint partnership between an individual and society at large.²³⁴ But Drahos further argues that

²²⁷ Benjamin Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 *YAL L.J.*, 117, 1180 (2003).

²²⁸ *Id.* at 1182.

²²⁹ See John Locke, *Two Treatises of the Government* (1690, Laslet ed. 1988).

²³⁰ See *id.*

²³¹ Justin Hughes, *Philosophy of Intellectual Property*, 77 *Geo. L.J.*, 287, 300 (1988).

²³² David Chisum *et al*, *Principles of Patent Law: Cases and Materials*, (2004) at 39.

²³³ Peter Drahos, *A Philosophy of Intellectual Property*, (1996) at 14 (Drahos further holds the view that Locke's text is capable of contrary interpretation).

²³⁴ Crawford Brough Macpherson, *Political Theory of Possessive Individualism*, (1979) at 209.

existence of natural property rights as advocated by Locke poses a problem because they are constructed to be consistent with the existence of an original common and original community, something which may be difficult to realise as the two are not phenomena that are static.²³⁵ Drahos²³⁶ concludes by holding that if God gave the earth to mankind in common, the individualisation of property goes against that intendment. Besides, he argues, that it is impractical to obtain consent from all commoners as posited by Locke.

Although the theory has its opponents and proponents, it is evident that it has relevance to the prevailing situation in South Africa and Kenya vis-à-vis copyright and football. The current level of development in football transmission and exploitation is a product of creative, technical and entrepreneurial skills that deserves protection consistent with the theory. While extending protection to recorded and transmitted football matches, the interest of the commoners should also be protected by ensuring that they have a stake in this common heritage. In other words, although broadcasters and the media outlets give value addition to football matches which warrants protection; such proprietary rights should be counterbalanced with the interest of the public in the underlying content. The theory, as Drahos²³⁷ puts it, tends to downplay the intimate relationship between football and the community in which it thrives by giving greater prominence to the commoditisation of the sport.

1.10.2 Utilitarian Theory

According to John Mill,²³⁸ utilitarianism holds that a law is justified when it promotes the general happiness of the people. In Mill's understanding, happiness is pleasure and freedom from pain.²³⁹ Utilitarianism envisages adopting intellectual property protection like copyright that yields an optimal amount of social utility.²⁴⁰ Adam Smith supported the utilitarian theory as realistic although he at times acted its critic.²⁴¹ Jeremy Bentham ridiculed the natural law theory

²³⁵ *Supra* note 233 at 15.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ John Stuart Mill, 'Of What Sort of Proof the Principle of Utility is Susceptible', (*Jonathan Glover ed.*). *Utilitarianism and its Critics*, London, Macmillan Publishers Ltd (1990) at 18.

²³⁹ *Id.*

²⁴⁰ Stanford Encyclopedia of Philosophy, *Intellectual Property*, (March 8, 2012) at 10.

²⁴¹ Campbell and Ross, Utilitarianism of Adam Smith: Policy Advice, 42 *Journal of History of Ideas*(1981)73-92

as rhetorical nonsense.²⁴² He posited that governments should enact laws that guarantee the greatest happiness to the majority; a phenomenon he called the ‘calculus of fidelity.’²⁴³

The utilitarian theory’s uniqueness and expression found its place in the Constitution of the USA.²⁴⁴ In giving support to the theory, Abraham Lincoln said: “{C} opyright is not a natural law but a positive law created by the legislation and that the creation of exclusive rights will induce investment in literary, artistic and scientific work by adding the fuel to the fire of genius”.²⁴⁵ The USA position in relation to the theory sits well with the copyright law in both South Africa and Kenya. In both countries, the copyright laws are creatures of parliament designed so that the welfare of the public is served by giving the authors limited periods of exclusivity. According to Sprigman,²⁴⁶ the exclusive rights granted under copyright law are neither limited nor primarily designed to provide private benefit; rather the limited grant is a means by which the public purpose may be achieved.

The theory underscores the centrality of the public as the primary beneficiary of copyright; the exclusive rights granted being temporary inducement for the authors to create the work for the public good. To that end, any copyright conferred upon broadcast football must be designed also to benefit the larger public interest in both Kenya and South Africa. To that end, this theory was relevant because it envisages the public as the ultimate beneficiary of copyright while advocating a limited incentive-based protection to authors and therefore justify public access to football as the primary purpose of copyright protection.

²⁴² Jeremy Bentham, *Introduction to the Principles of Morals and Legislations*, (Burns and Hart ed. 1970) (Bentham lived between 1748 and 1832).

²⁴³ *Id.*

²⁴⁴ Art.1§ 8 clause. 8 (the provision mandates Congress to promote the progress of science and useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries’. The theory is corroborated by the basic statement of the American Declaration of Independence (1776); that all human beings possess three basic rights: life, liberty and happiness).

²⁴⁵ Abraham Lincoln, *Second Lecture on Discoveries and Inventions*, Feb.11, 1959 (Abraham Lincoln was the 16th president of the USA).

²⁴⁶ Christopher Sprigman, *Reformalising Copyright*, 57 *Stanford L.Rev.* 486, 553 (Nov. 2004) (citing an orbiter in *the Sony Corporation v Universal City Studio 484 US 417,429(1984)*).

1.10.3 Public Benefit Theory

The Public benefit theory was conceptualised and constructed by this author to justify the growing public importance of football. It operates on the same premises as the public interest theory propounded by Richard Posner.²⁴⁷ This theory, however, places greater emphasis upon direct benefit to the public accruing from major football events. According to Posner²⁴⁸, Public benefit theory holds that regulation is supplied in response to the demand of the public for the correction of inefficiency or inequitable market supply. It is proposed in this study that copyright in football transmissions creates a deficiency in public access that should be remedied by ensuring that a substantial number of people or consumers access the game. Landes and Posner²⁴⁹ argue that since intellectual property has a public good character, a system of access versus incentive trade off should be established to guarantee some equilibrium between the two competing interests. In the current mode of football transmission configurations, this balance favours media conglomerates leaving the consumers hapless. Football is now being driven by money and the market, with little or no regard for the public who form the biggest stakeholders.²⁵⁰ Conversely, the sponsors and advertisers want the more audience, whom the copyright law seeks to keep away, so as promote brand equity and awareness of their services and products.²⁵¹ The theory complements the need of the advertisers and sponsors for greater virtual audience.

1.10.4 Human Rights Approach

Human right-based approach or right-based approach is a concept that incorporates into development and social change a principle that all people are entitled to the minimum standards of material and personal well-being based on human rights.²⁵² Sports and games are part of intangible heritage of mankind and a symbol of cultural diversity of societies that are integral the well-being of mankind. People participate in sports on a variety of levels—as fans, consumers, community participants, organizers, professionals, amateurs and casual critical observers and

²⁴⁷ Richard A. Posner, *Theories of Economic Regulation*, 5 *Bell Journ. of Economics* 335, 350 (1987).

²⁴⁸ *Id.* at 352

²⁴⁹ William Landes and Richard Posner, *Trade Mark Law: An Economic Perspective*, 30 *Journ. of L. and Economics* 265, 266 (1987).

²⁵⁰ T. Adorno and M. Horkheimer, *The Culture Industry, Enlightenment as Mass Deception* (1997) at 350.

²⁵¹ *Id.* at 342.

²⁵² Alessandra Teixeira, *Human Rights-Based Approach to Grassroots Sports and Physical Activities* (2012) at 3.

therefore the right to take part in a cultural life when applied to sports does not exclude any of these forms of participation.²⁵³

Every person is entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental rights.²⁵⁴ Social and cultural activities implicate sport and sporting activities.

According to Barnfield, sports events on television and radio are narrative events because their production is integrated with commentaries and narratives that transform them into stories and information.²⁵⁵ Spectator sport like football is expressive and communicative and therefore it is an informational asset and therefore falls within the protection of the constitutional right to information.²⁵⁶ Access to information is a human rights issue as much as sport as cultural heritage of the people is a human rights issue. The human rights approach views spectator sport from the prism of human rights and thus should be available to the public. The availability of these events to the public does not advocate gratuitous access but one in which the entrepreneurial interest is balanced with the public interest.

²⁵³ *See id.*

²⁵⁴ UNICEF, *The State of the World's Children: The Human Rights-Based Approach, Statement of Common Undertaking* (2004) at 92.

²⁵⁵ See Andrew Barnfield, *Soccer, Broadcasting and Narrative: On Televising Live a Soccer Match* (2013) at 327.

²⁵⁶ *See Genevieve supra note 32; see also* art.35(1) of the Kenyan Constitution and s 32(1) (b) of the South African Constitution.

TABLE 1.1**The Importance and Contributions of the Theories**

S/N	Theory and What It States	Contribution
1.	<p>Natural Law Theory. It supports limited private appropriation of property that flows from individual congealment of labour. It is grounded on the concept of labour and that everyone has a property right in his person or labour of his body.</p>	<p>The theory is the basis of, among others, the current copyright legislations of Kenya and South Africa, which are themselves grounded on the principle that it is just that the owner reap the pecuniary profits of his own ingenuity, creative efforts, and labour. Football transmission is a product of congealment of labour and therefore deserves protection. Whether this value-addition in form of technical, organisational and entrepreneurial undertakings deserves copyright protection or other forms of protection is a subject matter of the research.</p>
2.	<p>Utilitarian Theory. It posits that innovation and creations are good and necessary if they bring about general happiness to the public and that such innovations and creations would be slow if incentives and exclusivity derived from copyright and other IPRs are not granted.</p>	<p>Article 1 of the USA Constitution is utilitarian in nature and in its spirit; it is argued that the protection of IPRs is a means by which the greater public good is served. The analogy can be extended to Article 40(5) of the Kenyan Constitution which enjoins the state to protect the IPRs of its citizens. The limited protection granted under the copyright legislations of Kenya and South Africa is an incentive for the production of creative works with a view to occasioning the highest degree of happiness to the public. To that end, broadcast copyright must comport with the utilitarian spirit by ensuring greatest happiness to the larger public, a fact that can be realised through public access to broadcast football.</p>
3.	<p>Public Benefit Theory. This theory justifies state intervention in broadcast football in order to correct the access deficiency caused by copyright and copyright-aided technological protection measures that permit conditional access to football.</p>	<p>If the theory is employed it would guarantee the availability of football matches on free-to-air networks which would be accessed by most people. The theory would also assist Kenya and South Africa to formulate efficient and effective laws and regulations that would ensure greater public participation and access to broadcast football. The theory would further form a basis of identification and classification of football and other sporting events that should be available to the public on a free-over-the-air basis. The theory has been employed in the UK, under the Broadcasting Act 1996 in which some sporting events have been designated as events of national importance that must available to the public on a free-to-air basis.</p>
4.	<p>The Human Rights Approach. The theory posits that broadcast spectator football is communicative and informational in character and therefore entitled to protection within the framework of human rights. Besides, football is a cultural expression in which the public should participate.</p>	<p>If the theory is employed, it would elevate broadcast football to both constitutional and human rights levels by which the public would be guaranteed reasonable access.</p>

SOURCE: This Researcher.

In conclusion, the four theories, to a large extent, complement one another. Exploitation of football may be completed by the use copyright as well by as ensuring public access which in turn guarantees the sponsors the audience. Whereas the labour theory advocates greater property rights, the same is tempered with the utilitarian and public benefit theories which argue that the public is the ultimate beneficiary of copyright and other intellectual property rights. This study was well disposed to greater social benefit to society derived from public access to broadcast football. This is not only informed by weak constitutional and copyright justification for limiting access but also by cultural and political imperatives that favour public access to broadcast football. To that end the study with placed greater emphasis on public benefit theory over the other two theories.

1.11. Ethical Considerations

This research was primarily a legal study which will be grounded on legal sources and did not involve interviewing human subjects in the field. Consequently, it did have any ethical considerations. I therefore declare that to the best of my knowledge:

- i. My research did not fall into the category that requires ethical obligations
- ii. The research did not create any conflict of interest, real or perceived.
- iii. I did not involve in or associate myself with any project or activity that will become the subject-matter of research, nor any of my family members or close friends or associates involved in any way.
- iv. Except as might be disclosed in this dissertation, I did not have any direct or indirect financial interest in the conduct of this research or did any of my family members or close friends or associates.
- v. I undertook to abide by the general principles set out in the University's policies and the obligations which the policies imposed upon me and to mitigate any ethical and other risks that might arise. In particular I undertook to:
 - a. Respect the dignity, safety and well-being of others
 - b. Consider and being sensitive to different cultures, language, beliefs, perceptions, and customs of other persons.

- c. Ensure the research is relevant both to the broad legal and development needs of the country and to individual needs of those who might be affected by my research
- d. Conduct the research and produce my study on my own, subject to normal supervisor and collegial assistance.
- e. Acknowledge and attribute to others the ideas, designs and writings that are not original
- f. Reference my work accurately according to my chosen referencing guide. I will comply with copyright requirements and seek the necessary permissions, where required.
- g. Make use of text-book matching software throughout the research process, as discussed and required by my supervisors, and I will submit appropriate reports in this regard with my proposal and study when they are in final draft form.
- h. Disclose to my supervisors any circumstances that may arise that may impact upon the ethical obligations and we would take appropriate action in terms of the relevant University policy.

1.12 Resources

This research had cost implications having regard to its nature and scope. The most salient cost implications involved travels to and from South Africa, accommodation and subsistence. Engaging local researchers to collate material as well as buying stationery and laptop constituted further financial costs.

1.13 Harvesting the Research

This research topic, the study structure and research methodology create the possibility of publishing articles from the materials generated. I envisage submitting three articles to accredited journals covering the following areas:

- The Conceptual and Doctrinal Fallacy of Copyright in Sports
- The Application of Technological Protection Measures in Copyright: A Capitalist Device to Deny Access to Content.
- Transmission and Exploitation of Football games in a Digital Environment. A Kenyan Experience.

- The researcher will work under close supervision of the supervisors and where possible do joint conferences.
- The researcher will seek to present conference papers on the topic both locally and internationally. Since the research will break new grounds in South Africa and Kenya, there is a real likelihood of publishing a monograph on the topic. The researcher has, with the guidance of his supervisors, presented for consideration and publication an article titled “Dichotomy between signal and content as a basis of broadcast copyright: A Kenyan and South African perspective” to the South African Journal, *Obiter*. Another article titled “Broadcast Copyright in Sporting Events” to the Journal of World Intellectual Property.”

1.14 Declaration by Candidate

I acknowledge that I have read and understood that the University’s policies and rules applicable to postgraduate research and I certify that I have to the best of my knowledge and belief, complied with their requirements. I declare that this proposal, save for supervisory guidance received, is the product of my own work and effort. I have to the best of my knowledge and belief acknowledged all sources of information in line with normal academic conventions. I further certify that this study is original and that the material submitted for examination has not been submitted, either in whole or in part, for a degree at this or any other university. In furtherance of this, I have subjected this document to the University’s text-matching and/or similarity-checking procedures and I consider it to be free from any form of plagiarism.

CHAPTER TWO

LITERATURE STUDY

2.0 Introduction

This chapter seeks to deconstruct the elements that constitute telecast football and the extent to which such elements attract property rights, specifically copyright. If the so-called broadcast copyright exists in a football transmission, the literature examines its nature, scope as well as its overall impact on access by the public to such football telecast. In examining these phenomena, the study analyses the technical measures that broadcasters employ to limit public access to football telecasts and the constitutional as well as socio-economic impact of such controlled access on society. In carrying out this analysis, the literature seeks study to respond to the aims of study as well as the research questions and hypotheses set out in paragraphs 1.3; 1.4; and 1.5 of chapter one of this study. For the purposes of felicity, the notion of “public” connotes an indeterminate or a fairly large number of potential viewers or listeners.¹

In light of the foregoing, this literature study is based upon seven thematic areas, viz: broadcast copyright and football, the dichotomy between content and signal as a basis of broadcast copyright, broadcast copyright and recorded football, broadcast football as dramatic work, broadcast football and the right to information, football as a popular culture, and access to telecast football and technological protection measures, *inter alia*.

2.1 Study on Broadcast Copyright and Football

Mudgal posits that sporting events, in and of themselves, are incapable of being owned as property.² Although, Mudgal does not mention football, the term “sport” is generically used in this context to include the former. In propping up his argument, Mudgal relies upon the

¹See *Lagardère Active Broadcast v Société Pour la Perception de la Rémunération Equitable* C-192/04[2005] ECR. ECJ para. 31.

²Mukul Mudgal, *Law and Sports in India, Development Issues and Challenges* (2011) 189.

Australian case *Victoria Park v Taylor*³ in which the High Court of Australia held that event organisers do not own a spectacle and that there is no property in a sporting event capable of being owned. The Australian case heavily relied upon an earlier English case in which the Court of Appeal held that the organizer of a dog show had no property rights in the event capable of assignment.⁴ Mudgal concludes by holding that broadcasting rights are rights akin to but different from copyright.⁵ Mudgal, however, argues that these rights compromise the ability of the public to access broadcast sporting events and in order to mitigate these rigours, some governments have designated some sporting events as events of national importance which must be available on FTA channels.⁶ Mudgal's conceptualisation of copyright and sport is analogous to the prevailing jurisprudence in the USA before the promulgation of the 1976 Copyright Act⁷ During that time, the USA employed the doctrines of unfair competition and misappropriation of another person's labour in resolving any disputes relating to or connected with unauthorised use of the broadcasts by third parties.⁸ The import of this is that there is no property right and more especially copyright that could be assigned to a sporting spectacle. In reliance upon *Joint Sports Claimant v The Copyright Board of Canada*,⁹ Wark¹⁰ gives support to Mudgal's notion that there is no copyright in a sporting contest. Wark, in his literary piece, carries out a global comparative study on the possible copyrightability of sporting events in general and concludes that "courts have resisted recognising copyright in a sporting event *per se*."¹¹ This juridical argument finds

³ (1938) CLR 46 para. 79..

⁴ *Sports and General Press Agency Ltd. v Our Dogs' Publishing Co. Ltd.* (1917) 2 KB 125 CA (the Ladies' Kennel Association purported to assign the sole photographic rights in connection with a dog show to a photographic agency. An independent photographer was given access to the show and took his own photographs of the dogs exhibited which he sold to the publisher for use in a photo journal of the show. The agency sued the publisher of the photo journal for infringing his exclusive photography rights over the show).

⁵ See *supra* note 2 at 192.

⁶ See *id.* at 198.

⁷ Copyright Law of the United States of America; Title No. 17 of the United States Code, Pub.L. No. 94-553, 90 stat. 2451. (the Act repealed the Copyright Act 1909, Title No. 17 of the USA Code, Pub.L. 60-349, March 4, 1909).

⁸ Lawrence Home Miller., The Property in a Sports Telecast, 35 *Virginia L.Rev. No.2*, 246 263(1949) at 254.

⁹ (1992)36 CPR 3D 483 (the Federal Court of Appeal of Canada held that unlike a dance a sporting event, is in most part, a random series of events which lack in certainty and unity, and consequently are inconsistent with the concept of choreography).

¹⁰ Victoria Wark, No Free Kicks: Copyright in Sporting Arena, *Communication Law Bulletin Vol. 28 No.3 2009* at 22 (Wark was analysing the Australian Senate Inquiry into the reporting of sports news and the emergency of digital media).

¹¹ See *id.* para. 3.

support in Halsbury's Laws of England which argues that the law of England and Wales do not recognise the existence of broadcasting or other proprietary rights in sports.¹²

Although Mudgal's notion of property right in sporting events is almost universally supported, his concept of broadcasting rights being rights akin to but different from copyright, is however, riddled with ambiguity. It neither clarifies the nature and scope of these rights nor does it indicate the realm and circumstances in which they can attach. Works that are protected under copyright are, in most jurisdictions, specifically prescribed in copyright statutes.¹³ Even in statutes where the list of such works is illustrative like in the USA, rights akin to copyright may not extend to copyright if they do not meet the copyright threshold of originality and tangibility. To this end, Mudgal does not adequately unravel the conceptual fallacies revolving around the broadcast copyright, its nature and scope. Mudgal also left outside the scope of his literary piece, the impact of technical measures as well as non-linear transmission platforms upon public access to football broadcasts.

Beloff *et al*¹⁴ attempt, in their literary work, to deconstruct the concept of broadcasting rights. The authors argue that different legal systems adopt different approaches in relation to broadcasting rights and cite the USA case of *Pittsburg Athletic Co v KQV Broadcasting Co*¹⁵ in which the court held that a sporting event enjoyed a quasi-property right to control news which derived from the event organiser's entrepreneurial efforts in organising and controlling the ball park.¹⁶ They further argue that the test for intervention by the court should be whether a third party is free-riding on the plaintiff's efforts as opposed to copyright infringement.¹⁷ In concurrence with Mudgal¹⁸ and Wark¹⁹, Beloff et al point out that the English copyright law does

¹² Halsbury's Laws of England, *Sports Law, Stamp Taxes and, Statutes and Legislative Processes*, (5th ed. 2012) Para. 210.

¹³ See e.g., Copyright Right Act of Kenya, 2001 s.22(1) (the provision lists literary works, artistic works, musical works, sound recordings, audiovisual works, and broadcasts as categories of works eligible to copyright).

¹⁴ Michael Beloff et al, *Sports Law (2012)* at 170.

¹⁵ 24.F SUPP.490 (W.D. Pa 1938).

¹⁶ See *id* (Schoonmaker, J's ruling at Para. 25 (available online at <http://www.law.justicia.com/case/federal/district-court/Fsupp/24/490/1682221>. Last accessed on Feb.2, 2017).

¹⁷ See *id* at 171.

¹⁸ See *Supra* note 2.

¹⁹ See *supra* note 10.

not recognise property right in sports events but noted that, paradoxically, ‘broadcasting rights’ which, in reality, do not exist, are negotiated and sold.²⁰

Beloff et al further argue that broadcasting rights are a metaphor for a licence from the event organiser to a broadcasting organisation to enter the ground hosting the event and film it; and such a broadcaster may be described as owning the “broadcasting rights.”²¹ Beloff et al conclude that although a broadcasting right stems from a licence to enter property, as a matter of commercial reality, its value derives from the event itself and it is the organiser of or participants in that event that will usually gain most of the profit and thus broadcasting rights are a commercial rather than a legal concept.²² Beloff et al’s exposition receives support in Cattaneo²³ who dismisses those who seek to assimilate sporting events as a work protected by copyright. Cattaneo argues, *inter alia*, that the nature of sport broadcasting rights reside more in commercial law than in copyright.²⁴

In support of Beloff et al’s commercial approach to sports broadcasting rights, Cattaneo cites Germany as a perfect example where domain rights by way of sale of the licence of entrance to the playground are used as a basis of sports exploitation.²⁵ Beloff *et al*’s argument supports Croella²⁶ who argues that sporting events do not enjoy intellectual property right and that there is no municipal legislation or international instrument in which sports events are bestowed with IPRs. At the European Union level, courts have tended to support Beloff et al and like-minded scholars and academics.²⁷ The European Court of Justice ruled categorically that sporting events themselves embodied in a signal and in particular football matches could, under no circumstances, be classified as works for the purposes of copyright.²⁸ The court, however, further

²⁰ See *supra* note 14.

²¹ See *id.*

²² See *Id.* at 172.

²³ Andrea Cattaneo, The Nature of Broadcasting Rights in the U.S. and Europe, *INT’L Sports L.J.* 95 97(2012/1-2) at 95.

²⁴ See *id.*

²⁵ See *id.* at 97.

²⁶ See Carole Croella’ *The Broadcasting and Media Rights Scenario*’ Paper Presented at WIPO/ JIPO Conference, Kingston, Jamaica, April 19-20 2011 at 6.

²⁷ See *e.g.*, *Football Association Premier League v Leisure and Others and Karen Murphy v Media Services Ltd.* respectively C-403 and C-429 of 2008.

²⁸ See *id.* at 13.

ruled that only the opening video sequence, graphics, leagues anthems and pre-recorded films embedded in the signal would qualify as works of authorship.²⁹ The ruling in the FAPL case³⁰ has been domesticated in Sweden where it is argued that live broadcasts of sporting events do not meet the requirements of copyright protection since they are not the results of intellectual creation.³¹ Lindahl further states that unlike in other jurisdictions, in Sweden the work of commentators, cameramen, and picture producers was mainly driven by the events in the game and even taking account that there are some choices to be made in the creation of the broadcasts and use of graphic design elements, the result cannot be considered to constitute an intellectual creation and more especially copyright.³² Lindahl, however, holds that replays (video and sound recordings) of sport broadcasts are protected as audio-visual works.³³

Beloff et al in appreciation of the socio-cultural importance of access to the public of broadcast sporting events, argue that some sporting events must be available on FTA transmission channels. In support of the notion of public access to telecast sporting events, Beloff et al rely upon the European Union Audiovisual Media Services Directive³⁴ which enjoins all the Member States to ensure that broadcasters in their respective jurisdictions do not broadcast, on an exclusive basis, the events they consider as being of major importance for society, in such a way as to deprive a substantial proportion of the public of the possibility of following such events.

Although Beloff et al's analysis gives a deep insight into the nature of sports broadcasting rights which they characterise as commercial transactions, most of the focus zeroes-in on commercial relations at the upstream level. These transactions seem to dwell more on the relations between event organisers, broadcasters and sponsors. The analysis does not reveal what happens in the trajectory of downstream exploitation of the sporting events. The transmission of sporting events ends once the broadcast signal is received by the public over one or several platforms like

²⁹ *See id.*

³⁰ *See infra* note 31.

³¹ AdvokatfirmanLindahl, International Law Office, Intellectual Property-Sweden: *No Copyright Protection for Sport Broadcasts* (Oct. 3, 2016) available online at www.lindahl.se/media/1161760/no_copyright_protection_for_sport_broadcasts.Pdf. Last accessed on Jan.2, 2017(analysing the Supreme Court of Sweden's ruling in the case B-3510-11).

³² *See id.*

³³ *See id.*

³⁴ Directive 2010/13/EU of March 10, 2010 Art. 14.

internet, hand-held mobile sets and on-demand delivery platforms. The analysis does not demonstrate whether and the extent to which a broadcast signal carrying a sporting event is protected or whether a fixation of a sporting event is an audio-visual work.

Mark,³⁵ on his part, argues that the commoditisation of sports events has not only affected clubs and event organisers but has also impacted on the ability of spectators to access major sporting events. Mark argues that the commoditisation of sport has witnessed sport being rebranded and repackaged into a more attractive, valuable asset which is sold back to the consumers.³⁶ Mark advocates a strong regulatory framework in order to ensure that sporting events of national importance are available to the public in order to promote cultural citizenship.³⁷ In his argument, Mark agrees with Katrien and Evens³⁸ who contend that football should be available to the public in order to develop a sense of collective consciousness for citizens. Mark notes that as sport is being used as a driver for recruiting new subscribers, there is an increasing shift and migration of major sporting events from FTA channels to pay TV platforms which deploy copyright-aided technical measures.³⁹ Pay TV services are too expensive to be afforded by the majority people in Kenya and South Africa.⁴⁰ The high cost of pay TV services as well as the migration of premium football events to subscription-based platforms has made watching of such events in bars, pubs and other public commercial places popular.⁴¹

Mark does not, however, deconstruct the sports broadcasting rights into their minute components. He dwells more on the regulation of the marketing of sports broadcasting rights as well as the broadcasting of the actual events without discussing the nature of rights inherent in a broadcast of sporting events themselves, both at the upstream and downstream levels.

³⁵ James Mark, *Sports Law* (2d ed. 2012) at 220

³⁶ *See id.*

³⁷ *See id.*; *See also* Paul Smith *et al*, The Regulation of Television Sports Broadcasting: A Comparative Analysis 35(5) *Media, Culture and Society Journal* (2015).

³⁸ Katrien Levefever and Tom Evens, All Sports for Free: A Difficult Match? Right to Information in a Digital Broadcasting Era 3 *INT'L Sports L.J.* (2011) at 32.

³⁹ *See id.* at 301; *See also* Tom Evens *et al*, *infra* note 150) at 109 (the pay-tv services can afford to pay for the broadcasting rights and thus rights for premium football contents are shifting from FTA channels to pay tv platforms).

⁴⁰ In Kenya the DSTV Multi-choice pay Tv service bouquet that carries premium football matches cost KES 9400 (US\$ 92) per month. *See* Okutah Mark, DSTV Subscription Charges to go up by 15% from Next Month, *Business Daily* Sept. 3 2015 at 15.

⁴¹ *See supra* note 25 at 303.

Doyice et al⁴² argue that the U.S. Copyright Act protects the broadcast by radio or television of live sporting events. The authors argue that one of the objectives of the Act is to combat unauthorised interception of commercial-free feeds of broadcast signals. In reliance upon the USA Court of Appeal decision in *National Basketball Association and NBA Properties Inc. v Motorola Inc. DBA Sports Spotra*⁴³, Doyice et al reiterate that sports events are not authored in the common sense of the word and that the considerable preparation for any event is an expression of hope or faith as a determination of what will actually happen.⁴⁴ Doyice et al further argue that copyright in a sports broadcast only protects the broadcast and not the underlying content.⁴⁵ This, they point out, is in tandem with the USA copyright law.⁴⁶

Doyice et al's conceptualisation of broadcast copyright is supported by Karcher⁴⁷ who characterises the USA sports broadcast copyright as one that has been dogged with a lot of uncertainty because broadcasters produce and create broadcasts and hence authors. On the other hand, organisers and clubs produce games which are themselves, not copyrightable while being played on the pitch. Karcher points out that the situation is now settled by way commercial licences by which the teams or organisers own copyright to the broadcast of the event via the assignment of rights from the broadcaster.⁴⁸ Doyice et al's position is, thus, in consonance with the on-going WIPO⁴⁹ deliberations on the rights of broadcasting organisations in which a broadcast signal has been identified as the object of protection. This would ensure that the underlying content is sloughed-off the protection of copyright.

Although Doyice et al widely analyse the nature of copyright in a broadcast, they do not, however, show or examine whether and the extent to which copyright in a broadcast affects access to content embedded into a broadcast signal. They have not in practical terms indicated

⁴² Doyice et al, *Law for Recreation and Sports Managers* (2001) at 234.

⁴³ See USA, Court of Appeal, 105 F 3d 841 (1997) para 48.

⁴⁴ See *id.* at 612.

⁴⁵ See *id.* at 633.

⁴⁶ See 17 U.S.C. § 101.

⁴⁷ Richard Karcher, Broadcast Rights, Unfair Enrichment and the Student-Athlete 34 *Cardozo L.Rev.* 107 170 (2012) at 115.

⁴⁸ See *id.*

⁴⁹ See e.g., WIPO, *Draft Treaty on the Protection of Broadcasting Organisations*, SCCR 26/6 of 2013 at 2; See also WIPO, *Revised Consolidated Text on Definitions, Object of Protection and Rights to be Granted*, May 9-13, 2016.

the severability of a fixation from the fixed content so that when the fixed content is football it continues subsisting in public domain as facts and ideas. Besides, Doyice et al do not address the role of technical measures in enhancing the protection of copyright and thereby imposing a greater control of access to encrypted football and other sporting events.

According to Copeling,⁵⁰ whose argument is based upon the 1965 Act,⁵¹ broadcasts in South Africa are protected under copyright. This argument is based on the definition of the television broadcast as visual images broadcast by way of television together with any sounds broadcast for reception along with the images.⁵² The 1965 copyright law therefore protected content as opposed to signals and Copeling's argument reflects that law. The 1978 Act,⁵³ however, restricts a broadcast, and programme-carrying signals to electro-magnetic signals.⁵⁴ To sum up, in South Africa, the copyright law grants copyright protection to broadcast, and programme-carrying signal; the object of protection in either case is the signal and not the underlying content. However, it is difficult to locate originality, which is the only criterion for copyrightability for broadcasts which constitute signals that are imperceptible and transient. The detailed examination of this matter, is however, found in chapter seven, paragraph 7.2.5 of this study.

Unlike South Africa, the Kenyan copyright law conflates and subsumes the notion of programme-carrying signal into a broadcast. Although the copyright law does not define the term "a broadcast" it, however, defines the verb "broadcast" to mean an act of transmission by wires or wireless means, of images or sounds or both or the representation thereof, in such a manner as to cause such images or sounds to be received by the public and includes transmission by satellite.⁵⁵ The word "transmission" implies that the object of copyright protection in this case is a signal embedded with images or sound.⁵⁶ It follows therefore that in Kenya, the object of

⁵⁰ *AJC Copeling, Copyright in broadcasts in the Republic of South Africa, 5 Comparative and Int'l L.J. of South Africa* (1972) at 4 (The relevant Act was the Copyright Act 63 of 1965).

⁵¹ See Copyright Act No. 63 of 1965.

⁵² See *id.* s.1 (1) XIII

⁵³ Copyright Act No.98 of 1978 (the law in force in South Africa at the time of writing this study).

⁵⁴ See *id.* s.1 (1) (the Section gives clear-cut definitions of a broadcast and programme-carrying signal which imply that the object of protection of both cases is a signal).

⁵⁵ Copyright Act, 2001 s.2(1).

⁵⁶ See WIPO, *Protection of Broadcasting Organisations: Terms and Concepts, SCCR/8/INF/1*, August 16, 2002 at 3 Para. 9.

protection in a broadcast is the signal and not the underlying content. In recognition of this fact, the legislature specifically exempted broadcasts and other non-authorial works from the requirement of originality and tangibility.⁵⁷ There a signal need not be original and reduced into material form. The judicial decisions, in Kenya, however, support the view that a broadcast covers the content embodied into the signal.⁵⁸ The concept of broadcast copyright in Kenya is examined in detail in chapter seven, paragraph 7.2. of this study.

In conclusion, since an electro-magnetic signal is the object of copyright protection in both South Africa and Kenya, it would be difficult to protect the underlying football games as broadcasts. Even if some judicial pronouncements in Kenya seem to extend copyright to the content embodied into signal, this is not a dominant view globally. It is difficult conceptualise and fathom what would make football games, which are not copyrightable while being played on the pitch, works of authorship after transmission.⁵⁹ In a clear departure from the Supreme Court position in Kenya, Oira⁶⁰ argues that broadcast football does not enjoy copyright in Kenya. This suggests that a signal is copyright protected independently of the content in Kenya.

2.2 Dichotomy between Signal and Content as Basis of Broadcast Copyright

This paragraph examines the literature that seeks to unravel two phenomena each of which is contested by their respective proponents as the basis of copyright protection in a football broadcasting. There are those who argue that a broadcast signal is the object of protection in football or any other transmission;⁶¹ and yet there are those who argue that the *ensemble* of the underlying content and signal is the object of protection.⁶² The relevance of this examination is that if the content is copyright protected regardless of whether it constitutes a work of authorship, then a telecast football match is, *ipso facto*, being protected. The proponents of the signal-based

⁵⁷ See Copyright Act s. 22(3) (the Sub-section provides that a literary, musical or literary work shall not be eligible for copyright unless sufficient effort has been expended on making the work to give it and original character; and the work has been written down, recorded or otherwise reduced into material form).

⁵⁸ *Communications Commission of Kenya and Five Others v Royal Media Services Ltd.* (2014) eKLR at Para. 243.

⁵⁹ See *NBA v Motorola supra* note 43 at Para.20; see also *FAPL case supra* note 27 at Para.98.

⁶⁰ Hezekiel Oira, *Intellectual Property Rights in Sports: A Case for Kenyan Football (in Moni Wekesa and Ben Sihanya eds.) Intellectual Property Rights in Kenya (2009) at 191 (the author argues that a game of football cannot be a subject of copyrightability).*

⁶¹ See e.g., WIPO *infra* note 63; J. Gordon *infra* note 68; Rickett and Creswell *infra* note 73.

⁶² See e.g. Handler *infra* note 76; Hugh Laddie et al *infra* note 77; Colantuoni and Navazio *infra* note 81.

protection on one hand, and the proponents of content-based protection on the other, are respectively examined in the succeeding five paragraphs.

WIPO⁶³ traces the genesis of the rights of broadcasting organisations to the Rome Convention.⁶⁴ The organisation points out that the Rome Convention defines broadcasting as “the transmission by wireless means for public reception of sounds, or images and sound.”⁶⁵ The rights of broadcasting organisation and the concept of broadcast copyright are inextricably intertwined. WIPO identifies the minimum rights granted to broadcasting organisations under the Rome Convention as including the rights to authorise or prohibit: (a) the re-broadcasting of their broadcasts; (b) the fixation of the broadcasts; (c) the reproduction of fixations of broadcasts; and (d) the communication to the public of television broadcasts if such communication is made to in places accessible to the public against payment of an entrance fee.⁶⁶

WIPO argues that the object of protection under Article 13 of the Rome Convention, that is, a “broadcast”, is not defined. WIPO draws analogy from Article 3 (f) of the Rome Convention that the signal constituting the wireless transmission of images and/or sounds is the object of protection.⁶⁷ This position is supported by Gordon Hylton⁶⁸ who argues that sporting events are not authored works but special production techniques of sports broadcasting constitute creativity. The position is further supported by the delegation of South Africa and Mexico in their joint paper to WIPO in which they argued that the then pending deliberations on the rights of broadcasters be independent of the protection of content of the broadcast signal.⁶⁹ WIPO further argues in its subsequent draft treaty document on the rights of broadcasting organisations that “protection under this treaty extends only to the broadcast signals used for transmission by

⁶³ See WIPO, *Protection of Broadcasting Organisation: Technical Background Paper Prepared by the Secretariat*, 7th Session of SCCR, May 13-17, 2002 (this is the main background document that formed the basis of the WIPO deliberations on the updating of neighbouring rights of broadcasting organisations under the Rome Convention).

⁶⁴ See Rome Convention, 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (heretofore and hereinafter called the Rome Convention).

⁶⁵ See Rome Convention art. 3(f).

⁶⁶ See Rome Convention art. 13.

⁶⁷ See *supra* note 63 at 5.

⁶⁸ J. Gordon Hylton, *The Over-protection of Intellectual Property Rights in Sport*, (2008) at 10 (unpublished Marquette University Law School paper).

⁶⁹ South Africa and Mexico, *Joint Paper and Reaction to Comments on the Draft Treaty on the Protection of Broadcasting Organisations*, May 15, 2012.

broadcasting organisations and not to the works or other material carried by such signal.”⁷⁰ In these consensus-building deliberations on, *inter alia*, the object of copyright protection in a broadcast, WIPO got support from the World Broadcasting Unions operating under the auspices of the World Broadcasting Union (WBU).⁷¹ WBU argued that the proposed WIPO treaty would only improve protection of the broadcast but would not change the copyright status of programming content as either protected or in the public domain.⁷² The Union held further that protection of the broadcasts was required regardless of the technological platform used to transmit the signal.⁷³

Additionally, Ricket and Creswell,⁷⁴ among other signal-centric proponents argue that signals are the object of broadcast copyright. The duo further argue that “[a]lthough it is possible that a broadcaster has applied considerable skill and judgment in its selection and compilation of the broadcast, it does not seem these elements are part of Part IV protection. It is simply the transmissions themselves.”⁷⁵ Transmissions in this case are electromagnetic signals and not the embedded content. A broadcast therefore is not a tangible object but a dissemination of information by way of electro-magnetic energy.

The signal-based copyright protection has its own share of critics. One of those critics is Handler who contends that electro-magnetic signals that are transmitted in a broadcast are evanescent and imperceptible and any rights over those signals alone are ineffectual.⁷⁶ Handler further argues that a broadcast is not a tangible object, but a dissemination of information through the

⁷⁰ WIPO, *Working Document for a Treaty on the Protection of Broadcasting Organisations*, SCCR/27/2/Rev. April 28 May 2, 2014 art 6.

⁷¹ WBU, *Importance of the Broadcasting Industry*, May, 2010 (the document was supported by the following broadcasting unions: the Brazilian Association of Broadcasting (ABERT); Asia-Pacific Broadcasting Union (ABU); Association of Commercial Television-Europe (ACT); Association of European Radios (AER); African Union of Broadcasting (AUB); International Association of Broadcasting (IAB); Arab States Broadcasting Union (ASBU); Caribbean Broadcasting Union (CBU); European Broadcasting Union (EBU); National Association of Broadcasters—USA (NAB USA); National Association of Broadcasters-Japan (NAB-Japan); and North American Broadcasters Association (NABA).

⁷² The joint paper is available online at World Broadcasting Union’s website www.worldbroadcastingunion.org/wipo-broadcaster-treaty-group-wbu-wipo.pdf. Last accessed Dec. 12, 2016.

⁷³ *See id.* at 3.

⁷⁴ Staniforth Ricket and Christopher Creswell, *The Law of Intellectual Property, Copyright, Designs and Confidential Information* (2d ed. 2002) at Para.8:100.

⁷⁵ *See id.*

⁷⁶ Michael Handler, *Panel Case and Television Broadcasts*, 25 *Sydney L. Rev.* 391 407 (2003) at 399.

transmission of electro-magnetic energy and therefore copyright cannot subsist in an action of transmission.⁷⁷ Instead, a broadcast must subsist in a perceptible substance of broadcast—the visual images or sounds that are encoded as signal by the broadcaster, transmitted and finally decoded and received.⁷⁸ This position is supported by Colantuoni and Navazio⁷⁹ who argue that a sport broadcast enjoys copyright protection. They further argue that the basis of copyright protection in a football telecast is the dictates of commerce and that both the underlying content and signals must be simultaneously protected.⁸⁰ In a different academic piece, Colantuoni and Navazio⁸¹ argue that the copyright protection of both the content and the signal embodying it would increase the revenue of the right holders and stimulate long-term strategic investment in the football industry. Colantuoni and Navazio postulate that in a sport telecast, copyright attaches at the point of sports performance.⁸² The copyright jurisprudence propounded by Colantuoni and Navazio and the like, is replicated in Kenya and South Africa where courts have made judicial pronouncements consistent with that reasoning.⁸³

Colantuoni and Navazio's argument is as contradictory as it is inconsistent with the doctrines of copyright. First, the concept of sports performance is ambiguous because it is not clearly situated within the chain of football exploitation. Secondly, the argument places greater emphasis on the commercial value of sporting events than the copyright doctrine of originality. Thirdly, extending copyright to content would bring into the scope of copyright protection content in public domain or which is not copyrightable like football. The signal-content dichotomy revolves around the problem statement of this study, viz, whether broadcast copyright impinges upon

⁷⁷ *See id.*

⁷⁸ Hugh Laddie *et al*, *Modern Law of Copyright and Design* (3d ed. 2000) at Para. 8.15.

⁷⁹ Lucio Colantuoni and Christiano Navazio, Intellectual Property Rights: A Comparative Overview of the USA, UK, and Italy in James A.R. Nafziger and Stephen F. Ross (eds.), *Handbook on International Sports Law* (2011) at 429.

⁸⁰ *See id.*

⁸¹ Lucio Colantuoni and Christiano Navazio, Intellectual Property Rights in Basketball, *INT'L Sports L.J.* 58, 67(2011/1-2) at 61.

⁸² *See id.* at Para 2.

⁸³ *See e.g., Kenya Broadcasting Corporation v Royal Media Services Ltd. HCCC No. 36 of 2010, Milimani, Nairobi (unreported)* (where the High Court granted an injunction restraining the respondent from commentating the live television broadcasting of a Africa Cup of Nations games taking place in Angola. The commentaries were on content and not signals and the court held such an activity as copyright infringement); *see also South Africa Music Rights Organisation (SAMRO) v Sven Mills Fabrics Pty Ltd.* (1983) 1 SA 608 C (the court held that relaying through extension speakers of music in a factory from a broadcast program me amounted to a performance in public and thus copyright infringement).

public access to telecast football. Once it is established that copyright in South Africa and Kenya is signal-centric or content-centric, then a definitive determination may be made either way. Additionally, the determination will resonate with aims (i) and (ii) and research question (i) of this study.

2.3 Broadcast Copyright and Recorded Football

Nimmer⁸⁴ characterises a telecast football as an audio-visual work because it comprises works consisting of a series of related images which are intrinsically intended to be shown by the use of a machine. Nimmer argues that a parallel should be drawn between the creative aspect of the motion picture and the creative aspect of the underlying content.⁸⁵ He therefore points out that a telecast of an athletic event can qualify for copyright protection. Nimmer, however, throws a caution that when “ a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent to the public and in which order, there is no doubt that what the cameramen and director are doing constitutes authorship.”⁸⁶ He analogises that copyrightable expressions, in this case, do not reside in the rough-and-tumble of the game, but instead in the activities of the cameramen and director.⁸⁷ This analogy sits well with the USA Court of Appeal decision in the *NBA v Motorola*⁸⁸ in which the court held that copyright in a sporting event subsisted in the creative aspects of the recording and transmission and not in the game itself.

Marjut argues that recorded sporting events constitute a form of audio-visual work.⁸⁹ Marjut attributes the ensuing creativity, in this case, to the involvement of sound engineers, film crew, and cameramen and, the meticulous selection of technology; the creative elements that give the production an original character which justifies copyrightability.⁹⁰ Marjut does not specifically identify the object of protection in an audiovisual work. This audiovisual production involves the technical contribution of the cameramen, director and engineers as well as the recorded sporting event; and Marjut does not indicate where authorship resides. However, this position is clarified

⁸⁴ See Melville B. Nimmer and David Nimmer, *Nimmer on Copyright*, Volume 1(2010) at Para 2.09.

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See *supra* note 43.

⁸⁹ Marjut Salikannel, *Ownership of Rights in Audiovisual Production: A Comparative Study* (1997) at 17.

⁹⁰ See *id.* at 18.

by the Sports Rights Owners Coalition (SROC)⁹¹ who argue that recorded sporting events constitute audiovisual work in which the object of protection is the content. The alleged justification for such protection is the heavy investment involved in the organisation and transmission of the events. Marjut's argument receives support from the European Audiovisual Observatory which argues that although sports events do not qualify as works of authorship and therefore not copyrightable, in Europe, recorded sports events especially football games are protected as film or cinematographic works.⁹² In this audiovisual production, the producer is deemed to be the event organiser and if the recording is done by third party (that is, the broadcaster), the economic rights that accrue for the recorded event are contractually assigned to the event organiser.⁹³ This argument is supported by Papaloukas⁹⁴ who contends that although a sporting event is not a work of authorship; once it is recorded it becomes an audiovisual work capable of copyrightability. Papaloukas, however, contends that originality in the original fixation of a sporting event is blurred by modern technical means of production. In support of Marjut, Ohara and Eriko,⁹⁵ while giving the Japanese perspective of television rights, argue that although sporting events themselves are not copyright protected, once they are filmed they become audio-visual works that attract copyright protection in Japan. Marjut and those who support his position do not examine critically the ephemeral nature of football transmission. In most cases, football broadcasts are valuable when they are distributed to the public in a live manner. This means that live transmissions are not recorded and therefore audiovisual works are not created during live broadcasting of football. Audiovisual works are created in deferred broadcasting, catch-ups or a replay which may therefore attract copyright.

⁹¹ SROC, SROC Contribution to the DG INFSO Consultation Online Distribution of Audiovisual Works in the European Union (2011) at Para.3 (SROC brings together football governing bodies in Europe including FIFA as well as governing bodies for Tennis, Rugby, Cricket, Marathon, and Horseracing in Europe).

⁹² European Audiovisual Observatory, *IRIS Plus, Audiovisual Sports Rights between Exclusivity and Right to Information* (2016) at 6.

⁹³ See *id* at 7.

⁹⁴ Marios Papaloukas, Competition Rules and Sports Broadcasting Rights in Europe, 3 *INT'L Sports L.J.* 81, 82 (2009) at 81 para. 2.

⁹⁵ Yashimi Ohara and Eriko, TV Rights in Japan, *INT'L Sports L.J.* 74, 77(2010/1-2) at 74 Para.3 (the authors state that in the case of international sporting events, the event organiser appoints a host broadcaster that is responsible for preparing the international tv images which are distributed via communication satellites to licensed broadcasters globally).

The above analysis demonstrates that a recorded football game may be protected as either cinematographic or audiovisual work. Cinematographic or audio-visual work does not depend upon the authorship of the underlying content.⁹⁶ Bainbridge⁹⁷ argues that an audio-visual work may or may not be based on original works. A football game not being an original work becomes, nonetheless, an audiovisual work once recorded. Originality in the work resides in the creative contribution of the director and the technical crew. Once the game becomes copyright protected, the extent to which this protection affects, in Kenya, access of the sport to the public resonates to the aims (i) and (ii) and research question (i) of this study. The details of these effects are discussed in chapter seven paragraphs 7.2.8. of this study.

2.4 Broadcast Football and Dramatic work

Wark argues that courts in Australia are reluctant to assimilate the production of a sporting event to a dramatic work.⁹⁸ In this context, a sporting event is construed broadly to include a football event. Wark's argument is based on the judgment of the High Court of Australia in which it was held that a film of a sporting event was not itself a dramatic work and that more was required than recording the real event.⁹⁹ Wark suggested that a dramatic work presupposes that an action has been staged, contrived or directed and that the producer has been responsible for the arrangement, form or combination of incidents which create original end product.¹⁰⁰ To quote Justice Lindgren in the case, “[s]kill and labour in filming and editing would not transform naturally occurring events, over which the producer had no control into a dramatic work.”¹⁰¹ Overruling a sporting event from being dramatic work, Elam, in support of Wark argues that a dramatic work must have some movement, a story, a theme or action which are lacking in a football game.¹⁰² Elam cites an English Court of Appeal judgment¹⁰³ in which it was held that a dramatic work is a work of action, with or without music which is capable of being performed

⁹⁶ See European Audiovisual Observatory, *Audiovisual Sports Rights between Exclusivity and the Right to Information* (2016) at 16.

⁹⁷ David Bainbridge, *Intellectual Property*, (5 ed. 2002) at 53.

⁹⁸ See Victoria Wark *supra* note 10 at 22.

⁹⁹ *Australian Olympic Committee v Big Fights Inc.* (1999) 46 IPR 53, 67.

¹⁰⁰ *Supra* note 77.

¹⁰¹ See *id.* (quoting Justice Lindgren).

¹⁰² Viola Elam, Sporting Events as Dramatic Works in the UK Copyright System, *Entertainment and Sports L.J.* 13 (2015) at Para. 23.

¹⁰³ *Norowzian v Arks Ltd (No.2)* (2000) EMLR 67.

before the audience and applying that reasoning to broadcast football, dramatic work cannot be said to have been created. This is consistent with the Swedish position in which no category of copyright is recognised or contemplated under the copyright law.¹⁰⁴

Elam¹⁰⁵ concludes by holding that football matches are dictated by the rules of the game which impede the creative ability of the players and, besides, the matches themselves are a random series of events devoid of predictability upon which dramatic works are predicated. The reluctance to characterise football as dramatic work is supported by Nimmer¹⁰⁶ who defines dramatic work as “a written or literary work invented and set in order in which the narrative is not related but is represented by dialogue and action; a work in which the narrative is told by dialogue and action, and the characters go through a series of events which tell a connected story.” Football does not have a storyline, lacks unity as the particular sequence of images displayed on the screen will depend on the actual play, which always vary from one game to another.. Therefore the unpredictability of the outcome of the game is so pervasive as to constitute dramatic work.¹⁰⁷ The foregoing analysis demonstrates that a football contest, recorded or not, cannot constitute an artistic work. It therefore cannot be protected under copyright law in either Kenya or South Africa. Consequently, it may not have any relevance to any of the aims or research questions of this study.

2.5 Study on Broadcast Football and Right to Information

This paragraph examines the literature on broadcast football from the perspective of a right to information as vested in the public. The right is closely intertwined with the public access to telecasts of football events of significant importance to the public. In other words, if such access is denied through the application of copyright and copyright-aided technical measures, then the right to information is breached or violated.

¹⁰⁴ See *supra* note 31.

¹⁰⁵ See *supra* note 102 Para. 58.

¹⁰⁶ See *supra* note 84 Para. 2.06.

¹⁰⁷ See *supra* note 9. Para.28 and 30.

Genevieve¹⁰⁸ starts by quoting the founding father of the South African nation, the late icon Nelson Mandela that “I have always believed that sport is a right, not a privilege.” Genevieve argues that for legal rights to subsist in sports there must exist a system of law which recognises and embraces a rights tradition.¹⁰⁹ At the international level such rights are enshrined in the international instruments including the International Charter on Physical Education and Sport (ICPES) of 1978 which provides that “every human being has a fundamental right of access to physical education and sport...”¹¹⁰ Genevieve¹¹¹ also cites, *inter alia*, the International Convention on the Rights of the Child (ICRC) which recognises the right of the child to rest and leisure, and engages in play and recreational activities.¹¹² The author¹¹³ stresses that the children have a right to information that is important for their health and well-being and by dint of that, governments are enjoined to encourage mass media; radio; television; newspapers and the internet to provide information that those children can understand and which cannot harm them.¹¹⁴ Genevieve also cites the Convention on the Rights of Persons with Disabilities (CRPD) which espouses the human rights of persons with disabilities in relation, *inter alia*, to participation in and access to cultural life, recreation, leisure and sport.¹¹⁵ Although most of the international instruments relating to access to sports and sporting activities do not specifically prescribe a right to watch sporting activities, Dawson and Downward¹¹⁶ argue that there is a broad complementarity between sports participation, and viewing sports either live or via transmission media as live or recorded activity. Dawson and Downward further argue that sport broadcasting creates a platform by which critical sport-related information and messages relating to education, including physical education and health, are delivered and therefore the right to participate in sport and the right to view and watch sport complements one another.¹¹⁷

¹⁰⁸ Genevieve Lim, A Right to Sport: Theory, Evidence and Implication, *INT’L Sports L.J.* 120, 134 (2012/1-2) (the Mandela quote was cited from Jennifer Crwys-William (ed.), *In the Words of Nelson Mandela* (2014).

¹⁰⁹ *See id.*

¹¹⁰ *See id.* at 26 (referring to art. 1 of ICPES).

¹¹¹ *See id.*

¹¹² Art. 31.

¹¹³ *See id.*

¹¹⁴ Art. 17.

¹¹⁵ Art. 30.

¹¹⁶ Peter Dawson and Paul Downward, *University of Bath, Participation, Spectatorship and Media Coverage in Sport*, Bath Economic Research Paper No. 24/2009 at 21.

¹¹⁷ *See id.*; *see also* Sports and Health, at

http://www.un.org/wcm/webdav/sport/SPD/201WG/chapter2_SportandHealth.pdf, accessed on May 7, 2016.

Genevieve, however, concludes by arguing that there exists no right to participate or access to sporting events and that all the relevant international instruments in relation to sport are merely aspirational statements.¹¹⁸ Although Genevieve sounds intellectually lukewarm towards the right to sport, Lakier¹¹⁹ construes broadcast football through the prism of the right of information guaranteed under the First Amendment of the Constitution of USA. Lakier¹²⁰ argues that broadcast football is an informational asset and therefore a speech capable of constitutional protection and therefore should be universally available to members of the public.

Lakier receives support in this postulate from Barnfield who views broadcast football as a medium event comprising commentaries and interviews integrated into the event itself and therefore a source of information and entertainment.¹²¹ Lakier further argues that broadcast football is a spectator sport which is expressive and communicative and therefore entitled to legal protection under the First Amendment of the USA Constitution.¹²² Besides, spectator sport contributes to the democratic sphere because telecast football is narrative and informational which makes the audience knowledgeable so as to participate in democratic discourses.¹²³ Lakier, in her argument, is supported by Danielle and Lim¹²⁴ who contend that there exists a right to sport arising from the relevant international instruments like ICPEs¹²⁵ which guarantees every human being a right of access to physical education and sport. Danielle and Lim argue that in order to make a right to participate in and access to sport globally universal, governments should, first, domesticate the ICPEs, CRC and other relevant international instruments which would grant individuals substantive rights and; secondly, by the creation and co-ordination of various public policy initiatives that can serve to advance participation in and access to sport.

Danielle and Lim cite Australia as one country where there is no legislation specifically providing individuals with a right to sport and recreation but argue that such a right is implicit in

¹¹⁸ See *supra* note 108 at 127.

¹¹⁹ Genevieve Lakier, *Sport as Speech*, 16 *UNIV. OF PENN J.C.L.* (2014) at 120.

¹²⁰ See *id.*

¹²¹ Andrew Barnfield, *Soccer, Broadcasting and Narrative: On TV a Live Soccer Match* (2013) at 16.

¹²² See *supra* note 117.

¹²³ See *id.*

¹²⁴ Danielle Ireland-Piper and Kim Weinert, *Is there a Right to Sport?* Bond University, Faculty of Law Paper (2014), available online at www.epublications.bond.edu.au/slj accessed on June 30, 2016.

¹²⁵ See *supra* note 110.

the Disability Discrimination Act of 1992.¹²⁶ Danielle and Lim also cite South Africa as another country where the right to sport and recreation is implicit in the Bill of Rights, that is, chapter two of the Constitution of South Africa, 1996. Danielle and Lim point out that Section twenty eight sub section one of the Bill of Rights reflects the spirit and intendment of the CRC in that it states that “every child has a right to basic nutrition, shelter, basic health, care and social services”—social services has a wide application and includes art, culture, education, health, labour, social development, sports and recreation.¹²⁷ Danielle and Lim draw a close *nexus* between a right of access to sport and a right to leisure and rest. In this disposition, Danielle and Lim have support in Katrien and Evens who argue that denying public access to sport transmission undermines the public right to information which is guaranteed under the Constitution.

The foregoing literature review looks at broadcast football with the context of infotainment; a source of information and entertainment.¹²⁸ Broadcast football is a narrative activity in which information is communicated to the public. Although relevant international instruments support the conferment of this right to the public, very few countries have domesticated this right in their municipal laws. Even in South Africa where the CRC has been domesticated, this right is camouflaged as the right of the child and therefore devoid of universality but culturally relative.¹²⁹ In Australia too, the right to sport and recreation is implied in the Disability Discrimination Act.

The Constitutions of South Africa¹³⁰ and Kenya¹³¹ give a framework in which a general right to sport may be inferred. A right to receive and impart information and ideas under the twin

¹²⁶ See *supra* note 124 at 5.

¹²⁷ See *id* at 6.

¹²⁸ See e.g., Ben Sihanya, *Infotainment and Cyber Law in Africa: Regulatory Benchmarks for the Third Millennium, 3/2 Transnational Law and Contemporary Problems* 583, 640(2000) at 585.

¹²⁹ See The Children’s Act No. 38 of 2005 s.6(2)(e) (the Act seeks to give effect to the Bills of Rights Chapter Two of the Constitution of the Republic of South Africa. The Children Act Section 6(2) (e) sets one of its guiding principles to include recognition of a child’s need for development and engage in play and other recreational activities appropriate to the child’s age).

¹³⁰ S. 32(1) b (it provides that every person shall have a right of access to information that is held by another person and is required by another person for the exercise or protection of any rights); s. 28 (1) which heavily borrows from CRC which states that “every child has a right to basic nutrition, shelter, health and social services.

Constitutions could, by analogy, cover information and ideas in a broadcast football event. The constitutional right to sport transmission must be tempered with the commercial realities that are the hallmark of modern football. The state should therefore ensure that these rights are respected by creating enabling legislative and policy frameworks which would not only guarantee participation in but also on-or- off the venue viewing of sporting events.

The above exposition seeks to examine the constitutional implications of restricted or denied public access to broadcast football. In addition to the constitutional provisions in South Africa and Kenya, it also examines the relevant international instruments that impose obligations on the two countries to offer facilities and opportunities to their nationals for participation in and watching of broadcast sporting events. In doing so, the analysis responds to aim (vi) and research question (v) of this study.

2.6 Study on Football as Popular Culture

The proponents of football as a cultural expression argue in favour of a greater public role in the participation in and viewing of football games either at the stadia or on media platforms. “Football is neither a ritual of open rebellion nor the much-mentioned opium of the masses; it is a rich complex, open scenario that has to be taken seriously for it blends culture with society.”¹³² Storey characterises football as a popular culture constructed as a culture of the people for the people, a phenomenon akin to democracy.¹³³ Campbell describes popular culture as that which is an everyday phenomenon, the mainstream activity and what is commonly accessible; in short, culture which is for mass consumption.¹³⁴ Storey argues that popular culture is equated with the romanticised concept of working class culture construed as the major source of protest against capitalistic exploitation.¹³⁵ Storey’s argument is consistent with Taylor who historicises football and traces it to the working class in England who conceptualised the game in

¹³¹ Art.35 (1) (this article is a replica of s. 32(1) of the Constitution of South Africa); art. 33(1) (provides that every person has a right to freedom of expression which includes freedom to seek, receive and impart information or idea...).

¹³² Philipp Budka and Domenico Jacono, *Football Fan Communities and Identity Construction: Past and Present “Ultras Rapid” as Socio-Cultural Phenomenon*, Anthropology of European Football Conference, May 25-26, 2013.

¹³³ John Storey, *What is Popular Culture?* (2001) at 10.

¹³⁴ James Campbell, *Popular Culture*, *Journal of Fandom Studies* (2007) at 2.

¹³⁵ See *supra* note 111.

the eighteenth century as a sporting entertainment.¹³⁶ Taylor views football as people's game in the sense that it bears the stamp of the working class ideals and characteristics; and therefore argues that football belonged to the working class in England "who owned it in spirit and fact."¹³⁷

Morrow¹³⁸ equates the people's game with the massive crowds in stadia, streets, in home towns, pubs as well as convoys of supporters waving flags, blaring horns, small boys playing kick-about as an expression of dramatising the victory of their team. Morrow¹³⁹ therefore argues that in spite of the commoditisation and commercialisation of football, football clubs and associations continue to have social aspects that distinguish it from purely economic activity and that it is this social and cultural significance that makes football fascinating.

Drawing upon the philosophy of Storey,¹⁴⁰ Hagan conceptualises football as a game of the common people for the common people and therefore a cultural heritage of the community.¹⁴¹ Hagan argues that the current wave of commercialisation of football cannot be justified by copyright or indeed the labour or natural law theories, respectively propounded by John Mill and John Locke *inter alia*.¹⁴² Hagan contends that even if today, football has been transformed by technology and media, its dominant features are consistent with the view of the working class of the eighteenth century and therefore not copyrightable.¹⁴³ In support of Hagan, Rowe argues that because of the cultural importance of sport, telecast sport should be available on free-to-air broadcast channels as an inherent right to cultural citizenship.¹⁴⁴ Rowe characterises football events like FIFA World Cup, and Association Football League of Australia as constituting the national "cultural estate" which should not be siphoned to pay TV channels.¹⁴⁵ Rowe advocates

¹³⁶ Mathew Taylor, *Politics of the People's Game; Football and Political Culture in the Twentieth Century Britain*, Faculty Paper, University of Portsmouth (2007) at 2.

¹³⁷ See *id.*

¹³⁸ Stephen Morrow, *The People's Game? Football, Finance and Society* (2003) at 1.

¹³⁹ See *id.* at 2.

¹⁴⁰ See *supra* note 133.

¹⁴¹ Stefan Hagan, *A Critical Analysis of Intellectual Property Rights Within Sports Focusing on the Role of Copyright in Football*, LLM Dissertation, University of Kent (2005/2006) at 27.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ David Rowe, TV Sport Ingrained in Our Culture, Faculty Paper, *University of Western Sydney*, Dec.26, 2012.

¹⁴⁵ See *id.*

that the public should have free access to events of national and cultural importance.¹⁴⁶ This position is in tandem with Hagan's contention that copyright curtails access to football because one requires considerable expense to watch encrypted football events or footage of a footballer.¹⁴⁷ To this end, Scherer and Whiteson propose that regulators must move to protect the public right to watch sporting events deemed to be of national importance on the grounds that participation in these events and conversations that surround them are part of cultural citizenship.¹⁴⁸ Scherer and Whiteson further propose that events of national and cultural importance should not only be protected by anti-siphoning legislations but should also be available on FTA channels.¹⁴⁹

Evens et al¹⁵⁰ characterise sport as a popular culture that promotes cultural citizenship. By cultural citizenship, Evens *et al* imply a sense of collective consciousness and social identity of citizens which engender social cohesion and democratic accountability.¹⁵¹ The authors, to that end, argue that the world has a moral claim to sport as a cultural heritage.¹⁵² They conclude that sports should be available and accessible to the public because they are at best entertainment and cultural products that unite, socialise and address social divides.¹⁵³ Riedel holds that sport as a cultural heritage, sustains a spiritual connection of the people of the land and therefore falls in the public domain where market forces play a little role.¹⁵⁴ While arguing that football is a cultural activity which historically bonded society and its communities, Keith contends that its commoditisation is not justified.¹⁵⁵ Keith laments that the original purpose of the game has shifted from the promotion of cultural citizenship to being private property for profit and money and as a result the common interest and good of society is lost.¹⁵⁶ Citing Rowe¹⁵⁷, Keith further

¹⁴⁶ *See id.*

¹⁴⁷ *See supra* note 119.

¹⁴⁸ Jay Scherer and David Whiteson, Public Broadcasting, Sport and Cultural Citizenship: The Future of Sport on the Canadian Broadcasting Corporation, *44/2-3 INT'L REV. for SOCIOLOG. of Sport* 213, 229 (2009) at 216.

¹⁴⁹ *See id.*

¹⁵⁰ Tom Evens et al, *The Political Economy of Television Sports Rights* (2013) at 51.

¹⁵¹ *See id.* at 52.

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ J. Riedel, *Folklore of America*, *4 Intergo Year Book* 239 (1979) 144-145.

¹⁵⁵ Samuel Keith, *The Role and Impact of Commercialisation in Sports and the Consequences of its Transformation into Entertainment Industry*, Master of Art Thesis, Frankfurt School (2009) at 13.

¹⁵⁶ *See id.* at 23.

¹⁵⁷ David Rowe, *Sport, Culture and Media: The Unholy Trinity* (2d ed. 2008) at 30.

contends that football organisers and media conglomerates have become part of the global economy and the public is treated as consumers of this cultural commodity. The communist theory also views football through the prism of both culture and politics.¹⁵⁸ The theory posits that sport is a tool for mass mobilisation of the people in readiness for defence and labour of motherland.”¹⁵⁹

The literature under this paragraph demonstrates that the increasing commoditisation and commercialisation of sport and football in particular undermine the cultural citizenship of the public. This is achieved by making broadcast football inaccessible to the public because of not only the cost implications of the broadcast rights but also because of the siphoning of such rights to pay TV channels which are accessed against payment of fee and which have limited national geographical penetration. The literature is, therefore, in accord with the problem statement of this study as well as research question (v). It seeks to examine how denial or restriction of access to the public of broadcast football games undermines the public right to football as a cultural heritage.

2.7 Study on Technology and Access to Football

The advent of digital technology has made it easier to control the access and use of the broadcast content, especially live or deferred football telecasts. The technical measures lock broadcast football from the public and can only be accessed against deployment of a password given by the encrypting broadcaster. This conditional access system denies access to the public of encrypted or encoded football telecast, which overall and constitutionally, amounts to a denial of the right of access to information and entertainment.

Werra¹⁶⁰ typifies the technological protection measures (TPMs) applied in the copyright regimes as one of the impediments to access to copyright works since the former seeks to protect encrypted works of authorship. Werra cites the adoption, at the international plane, of WIPO

¹⁵⁸ The Great Soviet Union Encyclopedia, *Master of Sport* (2d ed. 1970-1979).

¹⁵⁹ *See id.*

¹⁶⁰ Jacque Werra, *The Legal System of Technological Protection Measures under WIPO Treaties, the Digital Millennium Copyright Act, the EU Directives and Other National Laws (Japan and Australia)*, Faculty Paper, University of Lausanne (2002) at 11.

internet treaties¹⁶¹ as the advent of enhanced copyright protection in a digital environment. Werra argues that the TPMs effectively add two cumulative layers of protection to the traditional copyright protection; first, TPMs themselves that control access and use of copyright works and secondly, the legal protection against the circumvention of TPMs employed by the authors of works.¹⁶² In support of Werra, Conroy¹⁶³ argues that the TPMs have introduced another layer of exclusive right of access to copyright works which is encrypted. Conroy further argues that the protection of TPMs has upset the delicate balance of interests in favour owners of content because the scope of exceptions and limitations offered is narrow.¹⁶⁴ Therefore, Conroy argues that this narrow scope of exceptions and limitations compromises access to underlying content especially football and other premium content.¹⁶⁵

WIPO argues that the application of TPMs have limitations in relation to already existing and installed base of consumer devices that cannot function with the technology or instances where there exists in the markets works without copy technology.¹⁶⁶ This limitation may not affect live football broadcasting but recorded work in circulation. WIPO however, points out that the internet treaties do not specifically provide exceptions to the obligations to provide for adequate legal protection against circumvention and if such exceptions are granted at the national level they must be narrow in scope in order not to defeat the normal functioning TPMs.¹⁶⁷ Ginsburg argues that TPMs have become an impediment to the exploitation of works maintaining that the preponderance of balance of interest favours the copyright owners more than the general public.¹⁶⁸ The author further argues that intermediaries should be allowed to dictate and determine which work to offer the public, when and how including at what fee.¹⁶⁹ Finally,

¹⁶¹ See WIPO Performances and Phonograms Treaty (WPPT) and WIPO Copyright Treaty (WCT) of 1996 (the two treaties were adopted in response to challenges created by digital technologies).

¹⁶² See supra note 138 at 30.

¹⁶³ Marlize Conroy, *Comparative Study of Technological Protection Measures in Copyright Law*, PhD Thesis, University of South Africa (2006) at 30.

¹⁶⁴ See *id.* at 23.

¹⁶⁵ *Id.*

¹⁶⁶ WIPO, *Technical protection Measures: Intersection of Technology, Law and Commercial Licences*, WPPT/IMP/3, 1999 at 19.

¹⁶⁷ See *id.* at 9.

¹⁶⁸ Jane Ginsburg, Copyright and Control over New Technologies of Dissemination, *101 COLO. L.REV.* 1623, 1647 (2001) at 1630.

¹⁶⁹ See *id.*

Ginsburg proposes that a compulsory licensing scheme would work better than granting exclusive rights, to commercial entities, that are aided by technical measures.¹⁷⁰

In conclusion, the protection of TPMs under copyright legislations in most cases, have a limited scope of limitations and exceptions. In other words the full scope of limitations and exceptions cannot be employed to ameliorate the rigours of TPMs. Even in cases where exceptions are available, the public may not have the technical capacity to adequately make of use of the exceptions. To that extent, TPMs continue to lock broadcast content and more especially football from the public. TPMs are examined in detail in chapter four, paragraph 4 .5.1. of this study. They fit into the overall analysis of this study because they encase broadcasts and thereby deny their access to and use by the public absolutely unless the access password is given. The review on TPMs, therefore, seeks to achieve aim (iii) and answer research question (iii) as well as the statement of the problem of this study.

To sum up the literature review, and in light of the analysis given at the end of the examination of each thematic theme, the following observations are made. First, in Kenya and South Africa, the copyright laws protect both broadcasts and programme-carrying signals. In both cases, the signal which is copyright protected is that which is embedded with content destined for reception by the general public. The content itself is not protected as broadcasts. However, in Kenya judicial decisions implicate copyright protection that goes beyond the signal. Since the dominant view is that a broadcast and programme-carrying signal are constituted into a signal which is the object of copyright protection, then a broadcast cannot impede access to the underlying football which is, itself, not protected. In this context, theme one which zeroes-in on broadcast copyright and theme two on signal/content dichotomy are conflated and examined in relation to Kenya and South Africa in chapter seven, paragraph 7.2. and paragraph 7. 1. respectively.

Secondly, recorded football games are protected as audiovisual or cinematograph film. Since audiovisual works or cinematograph film are protected as works of authorship, chapter seven paragraphs 7.1.6 and 7.2.8 respectively examine them in the context of South Africa and Kenya.

¹⁷⁰ *See id.*

The examination seeks to find out their impact upon access to the public of recorded football games.

Thirdly, the attempt at assimilation of broadcast football to artistic work is limited in scope to the extent of graphics and other distinguishing devices incorporated into the broadcasts as analysed in chapter three paragraph 3.2. 12. of this study.

Fourthly, the items examined under themes five, six, and seven are examined in detail against the prevailing legal, cultural and technological environment in Kenya and South Africa. In doing so, the analysis resonates with the relevant aims and research questions cited in each thematic theme.

CHAPTER THREE

COPYRIGHT, FOOTBALL BROADCASTING AND ACCESS TO THE GAME

3.0 Introduction

The next chapter analyses the concept of broadcasting, broadcasting technology and the political economy of football broadcasting. The chapter gives solid background information to the phenomenon of football broadcasting and the property rights that it attracts. The rights in a television broadcasting of a football event are of a very unsettled quantity globally at present.¹ Because of this fact, different parts of the world have tried to prescribe different solutions to this problem. Besides, different scholars and judicial authorities across the globe have given different approaches to this matter. This chapter therefore seeks to unravel these contradictory and at times conflicting approaches to the property rights inherent in football telecasts. First, the chapter would give a brief outline of other property rights that attach to football before zeroing-in on copyright and its impact on access to this popular sport.

3.1 Nature of Rights at the Upstream Level

The upstream level is the point at where broadcasting and football organisers agree to the start of the value-chain of football transmission. It is generally settled legal jurisprudence that an on-the-field sporting spectacle and by implication a football spectacle cannot constitute a work of authorship.² The same principle was amplified by the Federal Court of Appeal of Canada, in which it was held that a sports event being a random series of events which lack certainty and unity cannot be copyrightable.³ In the absence of any property rights over raw football events, organisers of such events have placed reliance upon real property rights.⁴ The exercise of such

¹ Lawrence Home Miller, *The Property Rights in a Sport Telecasts*, 35 *Virginia Law Review*, 246-263 (1949) at 248. www.jstor.org/stable/1069226 accessed on Dec. 3, 2016.

² See *Victoria Park Racing and Recreation Grounds Co. Ltd v Taylor and Others* (1938) 38 CLR 496 (in this case the High Court of Australia ruled that a sports event cannot be treated as a property capable of being owned); the movement and exploits of athletes are only aimed at the achievement of specific sporting results and that the athletes are not designed to express or communicate particular thoughts or ideas. See e.g., Karol Kowalski, *The Rights to Broadcasting of Television Broadcasts of Sporting Events*, PhD Thesis, University of Lapland (2015) at 25.

³ *Joint Sports Claimants v Copyright Board* (1991) 36 CPR 3D 483 at Para 12 (the Federal Court of Appeal of Canada emphasised that even though sports teams may seek to follow the plays as planned by their coaches as actors follow the script, the other teams are dedicated to preventing that from happening and often succeed...in the end what transpires on the field is what was not planned but something totally unpredictable).

⁴ See Halsbury's *Laws of England, Sports Law, Stamp Taxes and Statutes, and Legislative Practices* (5th ed. 2012) at para. 210; see also Tom Rivers, *A Guide for Broadcasters to Ownership, Acquisition, Clearance and Enforcement of Right* (1998) (unpublished report commissioned by the European Broadcasting Union in which

real property rights is analysed in details in paragraph 3.1.2 of this chapter. In order to control the sporting event effectively, the organiser must not permit it to take place in a private area so that it does take a public character. The organisers must control the entrance of the spectators and the media and their activities once inside the stadium.⁵ Since the real property right of trespass to land is used to keep away non-paying and other unwanted spectators from the venue of the matches, one would argue, therefore, that access to the venues is not dependent upon copyright or any other IPRs. The genesis of a broadcasting right is a licence granted by the organisers to enter the property, as a commercial transaction. The broadcasting right, at this level, has a greater commercial than legal undertone.

3.1.1 Management of Rights Upstream

In deconstructing the management of rights at the upstream level it is imperative to know who enjoys the initial ownership of the broadcast rights. There are four possible claimants to these rights, namely, the owner of the stadium, the owners of the teams playing, the players themselves, and event organizers.⁶ In order to guarantee growth in the sport economy and the creation of new sports entertainment events, in most jurisdictions the rights to broadcast sporting events are vested in event organizers who control access to the venue where the competition takes place.⁷ It is through the sports organizers that the interests of other stakeholders are served. The principle that sports organizers are the owners of broadcast rights at the upstream level found its place in the European Economic Treaty in which Articles 85 specifically provided that “television rights are normally held by the organizer of the sports event, who is able to control the access to the premises where the event is staged.”⁸ In the USA, the broadcast rights relating to sports events are also vested in the event organizers.⁹ Therefore the number of teams in the leagues or any tournament as well as the number of games by teams is determined by the organizers. The organizers also determine the supply of football rights to be sold and the mode of sale.¹⁰

Rivers argues that a sports organiser enjoys the traditional property right of ejecting the unwanted from the venue of the event).

⁵ Andrea Cattaneo, Nature of Broadcasting Rights in the USA and Europe, *INT’L SPORTS L.J.* (2012 1/2) at 95.

⁶ S. Szymanski, *Playbooks and Checkbooks: An Introduction to the Economics of Modern Sport* (2009) at 130.

⁷ see Karol Kowalski supra note 2 at 49..

⁸ EEC Treaty(TV/32.150-EBU/Eurovision 1998), para.22.

⁹ Eric Johnson, *NFL, Intellectual Property, and the Conquest of Sports Media*, 86-789 *DAK.L.REV* (2011) 767.

¹⁰ IViR, *The Study on Sports Organizers’ Rights in the European Union: Final Report* (2014) at 25.

In South Africa, football is organized at two levels. At the first level, football is administered by the South African Football Association (SAFA).¹¹ SAFA is responsible for administering football tournaments involving national teams and the amateur games.¹² At the second level is the Premier Soccer League (PSL) which runs professional football competitions in South Africa.¹³ On the other hand, professional football in Kenya is run by the Federation of Kenyan Football (FKF).¹⁴ Currently the FKF runs the Kenya Premier League.

3.1.2 Organizers' Control Mechanism

The organizers of football events deploy the real property rights to control access to the venue of the events.¹⁵ They use real property rights to secure the place where the competition takes place because at the upstream level, the game of football does not enjoy property rights. This long standing principle in the common law jurisdictions was enunciated in Australia in *Victoria Park v Taylor*.¹⁶ In this case, the High Court ruled that a sports event cannot be treated as a property capable of being owned.¹⁷ The principle was later applied by the Canadian Federal Court of Appeal in *Joint Sports Claimants v Copyright Board*,¹⁸ in which it was held that the outcome in a football competition is characterised by such pervasive unpredictability as to attract copyright. It is argued that the movements and exploits of athletes in a football match are only aimed at the achievement of specific sporting results and not creativity.¹⁹

In applying the real property right, the event organizer can refuse to admit into the venue or give conditional access to the fans or broadcasters or other media entities. In doing so, the organizer exercise the right of the owner of land to control or exclude the unwanted.²⁰ However, the football pitches overlooked by neighbouring buildings cannot prevent broadcasters or cameramen from using long lens cameras to film football games being played in the adjacent

¹¹ See Eirik Fusaeter Solberg, *Contours, Dynamics and Impact of African Football Migration to South Africa*, MA thesis, Stellenbosch University (2008) 49.

¹² See *id.*

¹³ See *id.*

¹⁴ Korir Weldon, Impact of Sport on Economic Development of Kenya, 3 *INT'L JOURNAL OF ADVANCED RESEARCH* 1427(2015) at 1424.

¹⁵ See Tom Rivers *supra* note 4.

¹⁶ See *supra* note 2.

¹⁷ See *Id.*

¹⁸ See *supra* note 3.

¹⁹ See Kowalski *supra* note 2..

²⁰ See Tom Rivers *supra* note 4 (the guide was commissioned by the European Broadcasting Union and the Association of Commercial Television of Europe for the activities under the EC PHARE programme).

property. Football organisations are able to control the number of broadcasters who are admitted into the stadium and provided with coverage facilities to cover the events.²¹ Such facilities include seating for the commentating crew, access for the important games to team captain or coach for post-match interviews, fixed positions round the stadium for camera mounting, and other enabling facilities which may be needed from time to time.²²

Because the entrants pay and the organizers offer service in consideration for the payment, the latter therefore use the law of contract to control and achieve their commercial aims. With respect to fans, on the entry tickets the terms of entry include the undertaking that any photo taken, or performance done or video taken by the fan while inside the stadium in relation to the event or any ancillary activities in the field or terraces shall be the property of the organizer.²³ The video footage condition shall also include cheerleaders, pre-game activities, crowd sideline regardless of the source.²⁴ Besides, the broadcasters permitted into the venue will be required to sign an instrument of assignment over the broadcasts or any other intellectual property constituted or incorporated in the transmission of the match and any audiovisual or sound recording of the match shall at all time be the property of the organizers.²⁵

The players are also required to assign to the organizer their image or performance rights arising from or relating the matches managed and produced by or behalf of the organizer.²⁶

²¹ Paul Campbell, *The Stadium as a Platform: A New Model for Integrating Venue Technology in Sports Business* (2016) at 7.

²² *See id.* (the control and regulation of all the activities at the venue of the sporting event gives the event organizer an opportunity to maximize his commercial gains from the event. The event organizer may in his contractual agreement demand that any unauthorized recording of the match or the taking of still photographs by fans inside the stadium or from terraces be assigned to the organizer).

²³ *See Johnson supra* note 9.

²⁴ *See* Thomas Margoni, The Protection of Sports Events in the EU: Property, Intellectual Property, Unfair Competition and Special Forms Protection 47(4) *INT'L Rev. of IP and Competition Law* 386(2016) (Margoni argues that sports organizers in EU deploy 'house rights' which are contract based and the power to control access to a specific venue. The power is based on property or exclusive right to use and is normally stipulated to determine who and under which conditions can he review, film or broadcast the event. This determination is based on a contractual relationship, not on a property right).

²⁵ *See id.*

²⁶ *See Rivers supra* note 4.

Based on the foregoing contractual arrangements, the organizer of any football allow for downstream exploitation of the event. In exercising the real property right, the event organizer must ensure total enclosure of the football pitch so as to control the any entry thereto.

3.2 Copyright and Event Organizer

Copyright as a concept is extensively analysed in paragraph 1.1.3.6 of chapter one of this study. However, in this paragraph this study examines the extent to which football organizers deploy copyright in the exploitation of football games. It then narrows down to the concept of copyright and its interaction with football in Kenya and South Africa.

As demonstrated in paragraph 3.1 of this chapter, on-the-field football matches are not copyrightable. Consequently, football organizers cannot rely on copyright to protect such sporting events. As Johnson puts it, at the level of physical locations where football games take places, intellectual property rights are ‘innocent’ as they play no significant role.²⁷ According to Reto and Bodewig, football games are held in dedicated venues to which access can be controlled because of the presence of perimeter walls, doors, gates or boundaries delimiting and containing the areas where the games take place.²⁸

The material faculty to exclude access and the regulated legal powers to regulate access to the venue are crucial elements the ensemble of which is called ‘house right.’ The ‘house right’ constitutes a term that legal scholars and courts normally invoke to refer to a common hermeneutic construction: the property-based power to control admission (*a jus excludendi alios* from the sport event site) and the contractual faculty to establish entrance conditions.²⁹ The possibilities for sports organizers to protect their investments are based primarily on a combination between the exclusive right to use and regulate access into the sports venue and the network of contractual agreements based on exclusivity.³⁰ The exclusive use rights of the sports organizers are based either on the right over the property of the stadium/venue or derive from a

²⁷ See Eric Johnson *supra* note 9 at 762.

²⁸ Hilty Reto and Henning-Bodewig, *Football Organizers’ Rights in Germany*, Study Report Commissioned by Germany Football Association (2006).

²⁹ See *id.*

³⁰ Lawrence Clive and Taylor Jonathan, Property Rights in Sports (in Lewis and Taylor eds.) *Sport: Law and Practicice*(2008) 1076.

contractual arrangement between the owner of the stadium and the sports organizer.³¹ It therefore follows that such exclusivity which is contractually constructed may also be transferred contractually. A football spectacle cannot be a performance because it is not based on any pre-existing work (literary or artistic or musical works) as the playing of a football game is not based on a written script.³² Football games are adversarial in nature and thus the rough-and tumble of a sport cannot be copyrighted.³³ Quoting the Australian jurisprudence, Wark argues that a sporting event cannot qualify as a dramatic work.³⁴

Because, in most cases, raw football games cannot attract copyright, this study examines hereinafter the place copyright in live broadcasting of the football events, their fixation and other downstream exploitation of the events in Kenya and South Africa.

3.2.1 Copyright in Kenya

The protection of copyright in Kenya is implicated in the Constitution.³⁵ The Constitution provides that “[t]he state shall support, promote and protect the intellectual property rights of the people of Kenya.”³⁶ The term intellectual property is composite and thus includes copyright. Being positive law, copyright protection in Kenya is a creature of the statute.³⁷ The Act provides that no copyright or rights in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf.³⁸ Just like in most common law jurisdictions, in Kenya both the authors’ rights and the neighbouring rights conflated into copyright.³⁹ This means that neighbouring rights are treated as copyright. Subject to certain exceptions, the author

³¹ *See id.*

³² *See supra* note 3 (the Federal Court of Appeal of Canada observed that even if football players are well prepared for the match, the opponents are bound to disorganize that formation and thereby creating a state of unpredictability); see also the Kenya Copyright Act s. 30(6) which define a performance “means the representation of a work by such action as dancing, playing, reciting, singing, declaiming or projecting to listeners by any means whatsoever.”

³³ Melville Nimmer and David Nimmer, *Nimmer on Copyright* (2010) para 2.09.

³⁴ Victoria Wark, No Free Kicks: Copyright in Sporting Arena, 28 *Communication law Bulletin* (2009) at 22.

³⁵ *See* the Constitution of Kenya of 2010.

³⁶ *See* art.40(5).

³⁷ Copyright Act No.12 of 2001.

³⁸ *Copyright Act s.51.*

³⁹ UNESCO, *the ABC of Copyright* (2010) 15.

is always the first owner of copyright.⁴⁰ The term of protection of copyright conferred by the Copyright Act is calculated in terms of the criteria set under Section 23(2) thereof.

The copyright Act enumerates an exhaustive list of works that are protected under copyright. They are literary works, artistic works, musical works, audiovisual works, sound recordings, and broadcasts.⁴¹ For Literary works, artistic works, and musical works to be eligible for copyright protection, they must be original and reduced to tangible or material forms. The Act is silent about whether the other works need be original and reduced to material form. The twin doctrine of originality and materiality enjoys greater eminence with respect to authorial works than entrepreneurial works.⁴² The next sub-topic examines the concept of originality in Kenya.

3.2.2 The Concept of Originality in Kenya

Currently, there is neither international instrument nor municipal which specifically defines the notion of originality. In the Berne Convention the concept of originality is implied in the terms “works and the “mode of expression.”⁴³ It is through originality that a work comes into existence. This argument is emphasized by Harms that the concept of what constitutes a “work” and the concept of originality is inextricably intertwined because one cannot discuss what amounts to a work without discussing originality for without a sufficient degree of originality a work cannot spring into existence.⁴⁴

In Kenya, the copyright law does not define the term originality. However, originality is implicated in the Copyright Act which provides that a literary, musical or artistic work shall not be eligible for copyright unless sufficient effort has been expended on making the work to give it an original character.⁴⁵ The Act does not set the parameters of the quantum of the effort necessary to attain originality of a work. No judicial precedent has set this threshold. However,

⁴⁰ See for example the definition of author in relation to literary, musical or artistic works who means the person who first makes or creates the work; and audiovisual work as the person by whom the arrangements for making of the film were made. Copyright Act s.1(1).

⁴¹ See s.22(1) (performances are protected under Section 30 of the Act).

⁴² Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development* (2016) at 197.

⁴³ See art. 2(1).

⁴⁴ LTC Harms, *Enforcement of Intellectual Property Rights: A Case Book* (2005) 36.

⁴⁵ Copyright Act of Kenya s. 22(3)(a).

in the absence of such precedent, one relies on decisions of other jurisdiction. In *Hyperion Records v Sawkins*⁴⁶, the Court of Appeal in England held that the degree of skill, labour and judgment expended into the work must be decided both quantitatively and qualitatively in determining substantiality in originality. However, Lord Oliver in *Interlego v Tyco*⁴⁷ cautioned that it would be erroneously to apply the test of the degree of skill, labour and judgment as a universal test of originality in all copyright cases. In Kenya originality is only a requirement in literary, artistic and musical works.⁴⁸ The Copyright Act is, however, silent as to whether originality is a requirement for the categories of works protected under copyright. This study posits that it is not a requirement for broadcasts, phonograms, audiovisual works, and performances for they are entrepreneurial while literary, artistic and musical works are authorial in nature.

Courts in Kenya, in reliance upon precedents from the UK and other common law jurisdictions have tended to construct the notion of originality. In *Faulu Deposit Taking Microfinance Ltd v Safaricom Limited*⁴⁹, the High Court in Nairobi observed the following about originality:

The law on this is very clear. Originality in this regard does not mean novelty or uniqueness nor does it necessarily involve inventiveness. All that needs to be shown is that the author created the work independently and has not copied it from another and that he has expended towards its creation a substantial amount of skill, labour and judgment.⁵⁰

Justice Ringera had, previously, also emphasized that in order for copyright to subsist, sufficient mental labour must be expended in order to give the creative expression an original character.⁵¹ One of the most recent cases in Kenya on originality is *Alternative Media Ltd v Safaricom Ltd*⁵² in which the plaintiff claimed that the defendant had used the plaintiff's artistic work on mobile scratch cards without authority. The plaintiff had claimed originality in the design of the artworks and High Court entered judgment in his favour.

In light of the going, it is evident in Kenya the jurisprudence in relation to the concept of originality is a construct that has been nourished and shaped by judicial pronouncements. The

⁴⁶ (2005)1 WLR 3281.

⁴⁷ (1989) AC 217 at pp 256-63.

⁴⁸ See *supra* note 45.

⁴⁹ (2004) eKLR.

⁵⁰ See *id* at 15.

⁵¹ *Nevin Jiwani v Going Out Magazine* (2002) eKLR at 23.

⁵² (2005) 2 KLR 253 para. 39.

judicial interventions, in this context, have been necessitated by want of conceptual and definitional felicity in the notion of originality. The standard of originality is based on the “sweat of the brow” or the substantial skill, labour and judgment as propounded in the UK case of *University of London Press v University Tutorial Press*.⁵³ This means that the standard of originality for works cited in Section 22(3) of the Copyright Act of Kenya is lower than in the USA where an additional criterion of creativity must be attained.⁵⁴ Works which must be original in Kenya are literary works, artistic works or musical works otherwise called authorial work, while the remaining categories of work need to be original in order to attract copyright.⁵⁵

3.2.3 Copyright in South Africa

Copyright in South Africa is protected under the South African Copyright Act.⁵⁶ Copyright Act No. 98 of 1978 was amended Act No.63 of 1965. Like the Kenyan Copyright Act, the South African Copyright Act conflates authors’ rights and neighbouring rights into copyright in accordance with the dominant practice in the common law countries.⁵⁷ According to the Copyright Act, the following works, if original, shall be eligible for copyright; literary works, artistic works, musical works, cinematographic films, sound recordings, broadcasts, programme-carrying signals, published editions, and computer programs.⁵⁸ Additionally, a work except a broadcast or programme-carrying signal shall not be eligible for copyright unless it has been reduced to a tangible or material form.⁵⁹ The author is the first owner of copyright subject to a few exceptions like when the work is made by the employee.⁶⁰

⁵³ (1916)2 Ch. 601 (the finding of the court was that originality did not involve independent ideas but the expression of those ideas. The ideas themselves need not be original or novel but the work must not be copied from another work and must be original from the author).

⁵⁴ See *Feist Publication Inc v Rural Telephony Services Inc* 499 US 340(1991) (Justice O’Connor made the following observation in relation to originality “ to qualify for copyright protection a work must be original to the author.Original as the term is used in copyright means that the work was independently created by the author and at least it possesses a modicum of creativity).

⁵⁵ See *supra* note 45.

⁵⁶ See Copyright Act No 98 of 1978.

⁵⁷ See UNESCO *supra* note 39.

⁵⁸ See s. 2(1).

⁵⁹ See s. 2(2).

⁶⁰ Intellectual Property Office (IPO), *Intellectual Property Guide: South Africa* (2016) at 7-8.

To enjoy copyright protection in South Africa, the author needs to be a qualified person who must meet the following criteria; first he must be a citizen of South Africa or a habitual resident, foreigner or company registered in South Africa. Secondly, he must be a person living in or habitually residing in a country which is a member of the Berne Convention.⁶¹ The Duration of protection is fifty years computed from the moment of a certain event relating to each work. The other requirement is that the subject-matter must be a work which is original.

3.2.4 Concept of Originality in South Africa

Pursuant to Section 2(1) of Act 98 of 1978 the enumerated works it cites, if they are original, will be eligible for copyright.⁶² Sections 3 and 4 of the Copyright Act 63 of 1965 also provide that copyright can only subsist in original works of authorship. Although the two Acts underscore the centrality of originality in the subsistence of copyright in South Africa they however, do not define what originality is and what are its out contours. The pivotal role played by originality in copyright is emphasized by Harms when he compares originality to a work of authorship itself.⁶³ Just like in Kenya, in South Africa the development and nourishment of the concept of originality has been shaped by legal scholars and judicial pronouncements.

Among the first scholars who set to deconstruct the notion of originality is Copelling.⁶⁴ The author argues that originality for the purposes of copyright refers not originality of either thought or expression of thought, but to original skill and labour in the execution. All that is required is that the work should emanate from the author himself and not copied.⁶⁵ According to Dean, originality is a requirement for the subsistence of copyright in a work.⁶⁶ This does not mean that the work must in any way be unique or inventive but merely that it be a result of the author's own labour and endeavour and should be copied from another. Originality is a matter of degree depending on the amount of skill, judgment or labour involved in the creation of the work.⁶⁷

⁶¹ *See id.*

⁶² Act No 98 of 1978 is the current Copyright Act in force in South Africa having repealed Act No 63 of 1965.

⁶³ *See Harms supra note 44.*

⁶⁴ A.J.C. Copeling, *Copyright and the Act of 1978* (1978 at 15).

⁶⁵ *See id. at 15.*

⁶⁶ O.H. Dean, *Handbook of South African Copyright Law* (1987) 133.

⁶⁷ *See id.*

There is no precise formula that can be prescribed to determine the quantum of skill, labour and judgment necessary to attain originality. However, reliance can be placed upon the Kenyan High Court at Nairobi in which it was held that the test to be applied in determining the quantum of substantiality in the skill, labour and judgment expended on a work is a qualitative and quantitative one.⁶⁸ Additionally in the *Exxon Corporation v Exxon Insurance Consultation Ltd*⁶⁹, the court declined to recognize alleged copyright in a single word “Exxon”, first for want of substantiality, and secondly because it did not convey informational and literary pleasure.⁷⁰ The two preceding cases can be contextualized and applied in South Africa in relation to substantiality of skill and labour.

On his part, Smith⁷¹ argues that it is necessary to establish that the author used sufficient skill and labour in making the work in order to justify copyright protection and that each case is normally considered on its merit. It is not certainly clear exactly when the sufficient amount of skill and effort has been put in the creation of a work. Courts in South Africa in their judgments have cited with approval various principles articulated by law scholars in relation to originality. In *Haupt t/a Soft Copy v Brewers marketing Intelligence Pty Ltd*⁷² the Supreme Court of Appeal relied on Dean Handbook and reiterated that “this does not mean that the work must be in any way unique or inventive...”⁷³ In *Jacana Education Pty Ltd v Frandsen Publishers Ltd*,⁷⁴ Schutz JA ruled that the collecting of operating rules from different sources and arranging or renewing them does not constitute a work of authorship for want originality. This principle had earlier been established in *Waylite Diary CC v First National Bank*⁷⁵ in which the Supreme Court of Appeal held that designing, formatting and composing field diaries complete with appointment pages did not constitute copyright for lack of originality. Harm, on his part argues that in South Africa, the idea of creativity lurks in the South Africa, and thus in determining originality,

⁶⁸ *Parity Information Systems Ltd v Vista Solutions Ltd and Others* (2012) eKLR para.19.

⁶⁹ (1981) All ER 241

⁷⁰ *See id.*

⁷¹ Alan Smith, *Copyright Companion: Paper Back* (1995) 9-10.

⁷² 2006 4 SA 458 (SCA).

⁷³ *See Dean supra* note 66.

⁷⁴ (1998) 2 SA 965 (SCA) para.30.

⁷⁵ (1995) 1 SA (A)..

creativity should be taken account of.⁷⁶ However, in light of the findings of the Court in the Jacana case and Waylite case as well as Harms' view above, it would appear like originality in South Africa is more than the sweat of the brow. Consequently, fitting originality into a broadcast or programme-carrying signal would require more than a technical and entrepreneurial contribution.

Besides originality, eligibility to copyright protection, in most copyright laws, is dependent upon embodiment of a work into a tangible, material or fixed form.⁷⁷ These criteria are, to a large extent, replicated in the Kenyan⁷⁸ and South African⁷⁹ copyright laws. In South Africa, broadcasts and programme-carrying signals need not be fixed in order to attract copyright.⁸⁰ In Kenya, the law is silent whether broadcasts, performances, sound recording and audiovisual works require fixation before attracting copyright. However, fixation is implied in sound recording and audiovisual works, because what is protected is the recording of the work.

3.2.5 Works Protected under Copyright in Kenya and South Africa

In Kenya, just like in most common law jurisdictions both authors' rights and neighbouring rights are conflated into and protected as copyright.⁸¹ Thus the works protected under the Kenya copyright legislation are literary works, artistic works, musical works, sound recordings, audiovisual works, performances and broadcasts.⁸² On the other hand, the copyright law of South Africa protects literary works, musical works, artistic works, cinematograph film, sound recordings, broadcasts, programme-carrying signals, published editions and computer

⁷⁶ L.T.C. Harms, *Originality and Reproduction in Copyright Law with Special Reference to Photographs* (2016) 501/614.

⁷⁷ See e.g., Ben Sihanya, *Constructing Creativity and Copyright in Kenya: Cultural Politics and Political Economy of Transnational Intellectual Property*, PhD Thesis, Stanford University (2003) at 40; See also Vaver *supra* note 37 at 22.

⁷⁸ Copyright Act, 2001 s.22(3) (the provision states that literary, musical, and artistic works shall not be eligible for copyright unless they are original and embodied into a physical medium).

⁷⁹ South African Copyright Act No.98 of 1978 s.2 (1) (2) (originality and materiality are respectively made pre-conditions for eligibility for copyright protection under this provision).

⁸⁰ See Copyright Act of South Africa s. 2(A).

⁸¹ UNESCO *supra* note 39 (the booklet gives the highlights and the distinction between copyright and neighbouring rights).

⁸² Kenya Copyright Act s. 22(1).

programme.⁸³ In examination of most of the work protected under copyright in Kenya and South Africa, this study sought to demonstrate how the play out in football broadcasting and thereby inhibit public access to the popular sporting event in the two jurisdictions.

3.2.6 Copyrightability of Football Broadcasting

3.2.6.1 Introduction

The rights in a broadcast of football events, just like in other sporting events, are muddled in uncertainty. The core of this problem revolves around the nature of property rights in a football broadcast over which the owner could exercise control. The problem was first addressed in the USA when the court held that a baseball game constituted news and that there was no absolute property right in a sporting event.⁸⁴ The courts at the time prescribed a remedy of unfair competition and common law misappropriation of property in case of any unfair commercialisation of the broadcasts.⁸⁵ The characterisation of sports broadcasts as news did not offer adequate safeguards. It was not until 1996 when the USA, Congress passed a copyright legislation which accorded protection to simultaneously-recorded live sports broadcasts.⁸⁶ Such protection did not extend to the underlying events themselves which continued staying in the public domain as facts.⁸⁷ What is therefore, protected in the USA is the technical contribution of the promoter's intellectual effort and skill in the production of the telecast.

In Kenya and South Africa, the obtaining situation in relation to broadcast copyright is blurred with ambiguity. This ambiguity is created by lack of conceptual felicity in relation to the object broadcast copyright and the extent to which the object fits into the copyright twin doctrine of

⁸³ *Copyright Act No. 98 of 1978 s.2 (1).*

⁸⁴ *See Pittsburg Athletic Co. v QOV Broadcasting Co.* 24 F SUPP.490 (W.D. Pa 1938).

⁸⁵ *See e.g., International News Service v Associated Press* 248 U.S. 215, 39 S.Ct. 68 63 L.ED 211(1918) (the Supreme Court held that the unauthorised use of wire to transmit newstories to the defendant newspaper where the factual stories would be lifted from the bulletin and sent by wire for publication amounted to common law misappropriation of the plaintiff's property).

⁸⁶ 17 U.S.C. § 101 (the television pictures were equated with the photographs in sequential motion and therefore a proper subject of copyright because photographs were already protected as artistic works); the making of a telecast requires finest artistic and technical skill in photographing the subject, in the adaption of the commentary to the picture, in the selection of the most appropriate image and all other requisite skill, represents an exceptional intellectual production meriting copyright protection. L.H.M., *The Property Right in a Sport Telecast* 35 *Virginia L.Rev.* 246 ,263 (1949) at 258.

⁸⁷ *See Doyice Cotten et al, Law for Recreation and Sports Managers* (2nd ed. 2001) at 632.

originality and tangibility. This problem is replicated into the football broadcasts and copyright as demonstrated in the next paragraph.

3.2.7 Global Copyrightability of Football Broadcasting Vis-à-vis Kenya and South Africa

Football broadcasting transforms a game into a composite activity that encompasses any of following elements: musical works and artwork presented in part, moving images of the football event, live football transmission, the recordings of the football event, and football commentaries synchronised with the moving images.⁸⁸ The ensemble of these elements complements a football transmission. Football transmission is constructed as a medium event into which the game is integrated with all the sequence of activities including the commentary, interview and graphics. The viewer therefore receives not a direct image of the event, but through the medium event and corresponding images and sound, and an attempt is made to portray a coherent analysis, evaluation and assessment of the event.⁸⁹ This medium event is the subject of evaluation as to whether it may amount to a work of authorship. In paragraph 3.3 of this chapter, works that are eligible for copyright protection in various jurisdictions are analysed.⁹⁰ In most countries, the categories of copyright works are exhaustive and it is only through the courts' creative interpretation that new categories of works can be brought into existence.⁹¹ However, sport or indeed football is not one of the categories of protected works. Besides, there is no international instrument or municipal law in which football or sport right or copyright is the object of protection.⁹²

Whether or not a copyright attaches to football telecast is a highly contested subject matter. Although, broadcast football is a function of many individuals and thematic activities, the

⁸⁸ See e.g., Kowalski *supra* note 2 at 24.

⁸⁹ Andrew Barnfield, *Soccer Broadcasting and Narrative: On Televising a Live Match Communication and Sport (2013)* at 228.

⁹⁰ See e.g., U.S.C. of 1976 §102 (a) (works of authorship includes literary works, music works, dramatic works, pantomimes and choreographic works, motion picture and audiovisual works, sound recordings, and architectural works; see also South Africa Copyright Act No.98 of 1978 s.2(1) (the provision cites copyrightable works as literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, programme-carrying signal, published editions, and computer programs).

⁹¹ See e.g., UK Copyright, Designs and Patents Act 1988 chap 1, s.1(1); Kenya Copyright Act s.22(1).

⁹² Carole Croella, *The Broadcasting and Media Rights Scenario*, April 19-20, 2011 at 4 (the paper was presented at a seminar on "Intellectual Property and Sport" organised by WIPO in co-operation with the Jamaica Intellectual Property Office at held at Kingston, Jamaica).

predominant view is that football matches both at the upstream and downstream levels do not attract copyright.⁹³ This is a long established principle, in the Commonwealth Jurisdictions, which constitutes the current law of England and Wales.⁹⁴ In support of this principle, it is argued that the movements and exploits of athletes are only aimed at the achievement of specific sports results and that the athletes are not designed to express or communicate particular thoughts, ideas or feelings.⁹⁵ Similarly in Canada, the Federal Court of Appeal held that a football game is not copyrightable either as a dramatic or choreographic work because, unlike a dance, the game is, in most part, a random series of events which lack certainty and predictability.⁹⁶

The non-copyrightability of sports events does not only affect unrecorded spectacles but also covers recorded events.⁹⁷ The Federal Court of Australia held that a film of a sporting event was not itself a dramatic work and more is required than recording a real live event.⁹⁸ It is argued that a production which is solely dictated by its technical function does not embed the modicum of creativity and individuality necessary to attain originality which is integral to copyrightability.⁹⁹ Football involves movements that can be expressed in one way or embody the underlying idea of performing an action that is functional in the context of the competition and therefore it is not copyrightable.¹⁰⁰

⁹³ See *Victoria Park Racing case supra* note 2 (in this case the claimant operated the Victoria Racing Course and the defendant owner land adjacent to from where he let other defendants to erect an elevated platform from where they could watch the horse-racing event and provide simultaneous commentary for broadcasting over the radio. The claimant argued that it had a quasi-property right of the sporting event which had been violated by the defendants. The High Court of Australia held that a spectacle of the kind could not be owned in the ordinary sense of that word).

⁹⁴ See Halsbury's Laws of England *supra* note 4 para.210.

⁹⁵ See Kowalski *supra* note 2 at 25.

⁹⁶ See *Joint Sports Claimants case supra* note 3 (in this case the Federal Court of Appeal was asked to decide whether the decision of the Copyright Board to deny copyright over a football play was valid. The Court of Appeal upheld the decision of the Board on the basis that in football games the unpredictability was so pervasive to attract copyrightability. The court however, distinguished football from aesthetic games like yoga which could attract copyright).

⁹⁷ *Australian Olympic Committee v Big Fights Inc.* (1999) 46 IPR 53, 67 (the court was of the view that a dramatic work presupposes the action has been staged, contrived or directed and that the producer has been responsible for the arrangement, form and combination of incidents which create and original end product. Skill and Labour in filming and editing would not transform naturally occurring events over which the producer has control, into a dramatic work).

⁹⁸ See *id.*

⁹⁹ Viola Elam, Sporting Events as Dramatic Works in the UK Copyright System, *13 Entertainment and Sports L.J.* (2015) para.6.

¹⁰⁰ See *id.*

According to Nimmer, when a football event is being covered by the technical crew, four television cameras with the director guiding the production activities and choosing which electronic images are sent to the public and in what manner and order; what the director does constitutes authorship which is copyrightable.¹⁰¹ This is the position espoused by the USA statutory¹⁰² and judicial authorities; which is informed by the reasoning that facts existing in nature cannot suddenly become copyrightable by a mere fact of recording.¹⁰³

In the National Basketball Association and NBA Properties Inc. v Motorola Inc. DBA Sports Spotra,¹⁰⁴ the Court of Appeal held that “sports events are not authored in the common sense of the word” but copyright protection only extends to recorded broadcasts of live events. The court further held that the underlying basketball games did not constitute original works of authorship.¹⁰⁵ In support of this principle, it has been observed that if sport were copyrightable, every sport team that invented unique tactics or movements would claim copyright, and exclude another rival team from using them, thus stifling the integrity of the competition.¹⁰⁶ On the other hand, some scholars in the USA have argued that broadcasting rights stem from the licence to enter the property where the sporting event is taking place, as a matter of commercial reality, their value is derived from the event itself and thus such rights are a commercial rather than a legal concept.¹⁰⁷ From the foregoing analysis, it may be inferred that the ensuing rights should be viewed more through the prism of contractual arrangements than copyright (is this your opinion? Then indicate this fact very clearly, or otherwise supply a reference). The recent USA legal disposition toward sports broadcasting rights is supplemental to the principle formulated in

¹⁰¹ See Nimmer *supra* note 33 para.2-9 (Nimmer argues that further that the expression football is not located in the underlying content or the rough-and tumble on the field but in the activities of the director and Cameraman. In other words, there is no expressive work in the content).

¹⁰² See *supra* note 93.

¹⁰³ See e.g., *Feist Publication v Rural Telephony supra* note 54.

¹⁰⁴ United States Court of Appeal for Second Circuit 105 F.3d 841 (1997) at para. 847.

¹⁰⁵ See *id* at para.849.

¹⁰⁶ See Kowalski *supra* note 2 at 24.

¹⁰⁷ See Michael Beloff et al, *Sports Law* (2012) at 172 para. 6.33; Mukul Mudgal, *Law and Sports Development: Issues and Challenges in India* (2011) at 140; Mark James, *Sports Law* (2013) at 303; Andrea Cattaneo *supra* note 5 (Cattaneo argues that broadcast copyright in football is at variance with the copyright doctrine and philosophy. He argues that sporting rights are better dealt with under commercial law). The reader expects you to cite “some scholars” here not just one scholar.

*Pittsburg Case*¹⁰⁸ that sports events enjoy quasi-property rights recognised as part of the doctrine of commercial misappropriation.

At the European Union level, the Court of Justice of the European Union (CJEU) while denying copyright to football matches embodied in a broadcast signal ruled that only the opening video sequence, sequence, graphics, league anthems and pre-recorded films embedded to the signal would be eligible to copyright protection as works of authorship.¹⁰⁹ The court was emphatic that telecast football games are not original works of authorship.¹¹⁰ The graphics which the court held are copyrightable can be categorised as artistic works, pre-recorded films as audio-visual works, and club anthems as musical works do not form the integral part of the broadcast match but accessory thereto which can enjoy independent protection. If they formed an integral part of the broadcasts, the court would have held otherwise. The CJEU decision is binding on the European Union member states and it is up to municipal courts to dispose of similar cases in the like manner.¹¹¹ It was the opinion of the court that football matches are subject to the rules of the games thereby leaving no room for creative freedom for the purposes of copyright.¹¹²

The Court relied upon the standard of originality set in the case of *Infopaq International A/S v Danske Dagblades Forening*,¹¹³ in which it was held that a work of authorship is only original in the sense that it is the author's own creativity. Intellectual creation is deemed to be the author's

¹⁰⁸ See *Supra* note 84 (in this case the radio station was sued for broadcasting play-by-play commentaries of Pittsburg Pirates games. The necessary information was obtained from observers whom it paid to watch the games from premises that the radio station leased next to the venue. The court ruled that the plaintiff had a property right in the news disseminated and the defendant's conduct amounted to unfair competition).

¹⁰⁹ *Football Association Premier League (FAPL) v Leisure and Others and Karen Murphy v Media Services Ltd* respectively, C-403 and C-429 of 2008 paras 97-98 (the decision in this case was delivered in 2011. The defendants in this case had imported into the UK foreign decoders and smart cards issued by a Greek broadcaster to subscribers resident in Greece to access the English Premier League matches. The defendants acquired the decoders and smart cards at prices lower than those charged by the UK Sky tv that enjoyed exclusivity in the UK. FAPL took that view that those acts undermined the exclusivity in the UK and besides was tantamount to copyright infringement. The dispute was taken to the High Court which referred it to the European Court of Justice for interpretation).

¹¹⁰ See *id* Para. 99.

¹¹¹ See Information Society Directive (2001/29/EC).

¹¹² See *supra* note 109 para. 98.

¹¹³ See CJEU C-5/08 (*Infopaq* was a firm which by means of a "data capture process" drew up summaries of articles from a Danish newspaper and sent them by e-mail to its customers on the basis of agreed criteria. *Danske* became aware that *Infopaq* did not have authority to do that and demanded that the latter stop or seek authorisation. *Infopaq* disputed *Danske's* claim and filed that matter for interpretation by the Court of Justice of the European Union).

own if it reflects his or her own personality; and the creation is the author's own when the author in conjunction with the creation of his or her work has been able to express his or her creative ability by making free or creative choices.¹¹⁴ This standard of originality was applied in the context of broadcast football in *FAPL*¹¹⁵ case and the event did not meet the threshold and therefore could not be characterised as a work of authorship. It could be argued that the football commentaries being controlled by the field action cannot constitute a creative output. The same principle may also cover football analysis and interviews carried out during and after the game which may not meet the threshold of originality.

Broadcasting organizations in Kenya and South Africa enjoy protection for the transmission for the public reception of their broadcasts.¹¹⁶ This protection extends to the exclusive right to prohibit fixation, reproduction of fixations of broadcasts, and rebroadcasting of the broadcasts, as well as the communication to the public of the telecasts including the taking therefrom still photographs or in case of South Africa, causing a broadcast to be transmitted by a diffusion service.¹¹⁷ Although the Kenya Copyright Act does not specifically grant a right of reproduction to broadcasting organizations, such a right is implicated in other post-fixation rights whose exercise is dependent upon a fixation. For instance, a communication to the public of the broadcast must be based upon a fixation of that broadcast. These rights which vest in broadcasting organizations over their broadcasts operate independently from, and regardless of any copyright in the underlying content of the signal. In other words, the copyright or neighbouring rights of broadcasting organizations exist even in the absence of any copyright in the content carried by the signal.¹¹⁸ The signal is protected as such even if the underlying content is neither a work of authorship nor other subject matter protected as a work of authorship.¹¹⁹ However, when a broadcasting organization prohibits a given copyright-protected use of its signal, the prohibition, *de facto*, extends to the content of the programme carried by the signal,

¹¹⁴ See e.g., *Eva-Maria Painer v Standard Verlag and others* C-145/10 paras 88-93.

¹¹⁵ See *supra* note 109 paras 97 and 98 (ECJ held that the live football broadcasts were not works of authorship).

¹¹⁶ See Kenya Copyright Act s.29; see also Copyright Act of South Africa ss 10 and 11.

¹¹⁷ See *id.*; see also the Rome Convention art 13 which grants broadcasting organizations exclusive right of fixation, reproduction, rebroadcasting, as well as communication to the public; see also the EU InfoSoc Directive arts. 2(2) or 3(2).

¹¹⁸ See Margoni *supra* note 24 at 392.

¹¹⁹ See *id.*

but only in that particular context and in that particular combination.¹²⁰ The copyright holder of the content is free to use it in any way provided that such use does not affect the content embodied in the signal.¹²¹

In light of the foregoing analysis, when a football game is broadcast in Kenya or South Africa by a broadcasting organization, such transmission is copyright protected irrespective of whether the underlying content enjoys copyright or not. Broadcast copyright subsists independently of the copyrightability of the content or otherwise.¹²² This position is consistent with the Kenyan copyright law which predicates the copyright protection of broadcasts on the entrepreneurial effort, as well as the investment of the broadcasting organization originating and editorially responsible for the broadcast.¹²³ This exemption provision is grounded on the fact that it is difficult to locate originality in a broadcast but does not define the specific subject matter that is protected under copyright. This principle was put to judicial test in *Kenya Broadcasting Corporation v Wananchi Group and another*¹²⁴ in which the High Court at Milimani, Nairobi ruled that the unauthorized rebroadcasting by the defendants of the plaintiff's signals embodied with FIFA World Cup tournaments that took place in Brazil in 2014 was tantamount to copyright violation. In making such finding, the High Court did not make any inquiry as to whether the audiovisual content underlying the signal was copyrighted or not. It would therefore appear that in Kenya, live or deferred football broadcasts are copyright protected and the *raison d'être* for such protection is the entrepreneurial, organizational and technical efforts of the broadcasting organization.

In South Africa, no judicial decision has been proclaimed in which the object of copyright protection in a broadcast is canvassed. This is, arguably, partly because before the legislation of the 1978 Copyright Act, the copyright protection of broadcasts was dependent upon the

¹²⁰ Werner Rumphorst, *The Broadcasters' Neighbouring Rights: Impossible to Understand? e-Copyright Bulletin* July-Sept. 2006 at 4.

¹²¹ *See id.*

¹²² *See id.*

¹²³ Copyright Act of Kenya s.22(3) (this provision requires that only literary, musical or artistic works meet the threshold of originality and tangibility before they qualify for copyright protection. This means that only authorial works must fulfil these requirement and that broadcasts being entrepreneurial works shall not be subjected to the condition.

¹²⁴ HCCC No. 254 of 2014 at Nairobi, Milimani at 6(unreported).

copyrightability of the underlying content and partly because of the contradictions in the current 1978 Act itself.¹²⁵ Section 2(1) of latter Act provides that all the works it prescribes, if original, shall be eligible to copyright protection. The repertoire of works prescribed in the provision includes broadcasts and programme-carrying signals.¹²⁶ This implies that all works protected under the Copyright Act of South Africa are authorial in nature and must meet the requirement of originality which is analyzed in depth in paragraph 3.2.4 of this chapter. Goldstein argues that broadcasts and [programme-carrying signals] are entrepreneurial works whose existence does not depend on creativity, skill and judgment.¹²⁷ Therefore conditioning broadcast copyright on originality would lead to failure. Besides, the Act does not define the elements of a broadcast against which originality is determined. Therefore, in practical terms, although broadcasts and programme-carrying signals are copyright protected in South Africa, it may be difficult for broadcasters to enforce their protection under copyright law owing to originality requirement.

3.2.8 Emerging Global Issues on Copyright and Football Broadcasting

The concept of what constitutes a broadcast for the purpose of copyright is unsettled both at the national and international level. According to Rumphorst, broadcasts are electronic signals which carry radio and television programmes, and which are transmitted over the air for reception by the public.¹²⁸—an electromagnetic energy which is capable of transporting programmes to the public.¹²⁹ This scope of protection does not therefore extend to the underlying content. In case the underlying content is a football match, it will not form the object of protection. The signal is not defined in either the Kenyan or South African copyright legislations. The Satellite Convention of 1974 defines a signal as an electronically-generated carrier capable of transporting programmes.¹³⁰ The signal-based protection was approved by the WIPO General Assembly in

¹²⁵ See e.g., s. 15 of Copyright Act 63 of 1965; see also AJC Copeling *supra* note 64 at 2 (although broadcasts were not the subject matter of protection under the 1965 Copyright Act, they nevertheless enjoyed certain measures of protection through copyright subsisting in the underlying literary, artistic, dramatic or musical works).

¹²⁶ See Copyright Act of South Africa s. 2(1)(f).

¹²⁷ Paul Goldstein, *International Copyright, Principles, Law, and Practice* (2002) at 59.

¹²⁸ Werner Rumphorst, Protection of Broadcasting Organizations, 27 *Copyright Bulletin* (1993) at 13; see also the WIPO Consolidated Draft Treaty, SCCR/12/2 of May 2, 2005 (characterising the object of protection in a broadcasting treaty as the signal. This seeks to draw a balance with the art.2 of the Rome Convention which enjoins that the rights of broadcasting organisations shall leave intact and shall in no way affect protection of copyright in literary and artistic works).

¹²⁹ See Michael Handler, The Panel Case and Television Broadcast Copyright, 25 *Sydney L.Rev.* 391 405(2003).

¹³⁰ Satellites Convention art.1.

2006 in its decision aimed at facilitating the achievement of consensus prerequisite for the convocation of diplomatic conference on the protection of broadcasting organisations.¹³¹ The signal which is the basis of protection is one that embodies content originated by a broadcaster and intended for reception by the public, otherwise called the broadcast signal.¹³² Although the on-going WIPO deliberations on the protection of broadcasters have dragged on for well over fifteen years, the object of protection which is the broadcast signal, has been retained and programmes contained therein excluded from the scope of protection.¹³³ The programme content may include football games, documentaries, talk-shows, news, and movies or any other programme capable of being transmitted. However, the controversy surrounding the deliberations is whether signal alone can form a viable basis of copyright protection having regard to its imperceptible and transient nature.¹³⁴

In terms of South Africa/Mexico joint paper, concept of a broadcast signal is an expression of the total programme output for which a broadcaster is legally and editorially responsible; it includes the securing of necessary investment of finance, expending of skill, labour and technical resources needed to have the broadcast signal and its embedded content put together and delivered to the public.¹³⁵ The broadcast signal is a legal metaphor for such output as each broadcast signal represents the broadcaster's investment.¹³⁶

In WIPO parlance, whereas it is evident that the object of protection is the signal, it is quite difficult to separate a signal from the content. It is owing to this fear that right holders are

¹³¹ See WIPO General Assembly, *Protection of Broadcasting Organisations*, Sept.26, 2006 (the General Assembly emphasised that the legal protection for broadcasters should be independent of the protection of content of the broadcast signal).

¹³² See South Africa and Mexico, *Joint Reaction to Comments on Draft WIPO Treaty on Protection of Broadcasting Organisations*, May 15, 2012 at 2.

¹³³ See e.g., WIPO SCCR/32/3, *Revised Consolidated Text on Definitions, Object of Protection and Rights to be Granted*, May 9-13, 2016 (the negotiations started in 1997 in the Philippines, Manila when WIPO convened a symposium on broadcasting and telecommunication technologies which laid a foundation for the current negotiations).

¹³⁴ See Handler *supra* note 129 at 407; see also James Love, Works in the Public Domain Become Copyrightable, paper presented at the WIPO SCCR on the *Rights of Broadcasting Organizations*, Geneva (November, 2004) at 3.

¹³⁵ See *supra* note 133 at 2 (the paper argued that the broadcasters' investment in generation of the signal justifies copyright protection without expounding on how a signal alone be protected without affecting the underlying content.)

¹³⁶ See *id.*

opposed to a new treaty for broadcasters, arguing that it would create another layer of rights and that broadcasting is a technical activity where the freedom creativity or creative choices are limited.¹³⁷ Works of authorship can only derive from broadcasts of sporting activities that embody creativity of the author. It would look appear that football playing or transmission on live basis does not embody the creativity threshold.¹³⁸ Yet the broadcast activity may embody works that may be copyright protected and such works are summarized in paragraph 3.3 below,

In the midst of these conflicting positions, many scholars and intellectual property experts argue that football broadcasting falls outside the cathedral of copyright protection. Among those scholars is Cattaneo, who argues that protecting broadcast football is tantamount to sacrificing creativity and expression at the altar of commercial value of content of the broadcast¹³⁹. The other scholar is Papaloukas who posits that sports events do not enjoy copyright as sportsmen cannot fulfil the threshold of authorship.¹⁴⁰ Additionally, Doyice *et al* argue that a broadcast sporting event does not enjoy copyright because it does not constitute works of authorship. In their argument, Doyice *et al* rely largely upon the Court of Appeal case of *National Basketball Association v Motorola Inc.* in which the court was emphatic that “sports events were not authored in any common sense of the word.”¹⁴¹

¹³⁷ See e.g., CISAC, *Rights of Broadcasting Organisations*, April 7, 1999 (CISAC is a French acronym for the Confédération Internationale des Sociétés Artistiques et Compositeurs which brings together artistes and composers. The Confederation had submitted its memorandum to the WIPO SCCR/2/6 over the negotiations at the time for the updating the copyright protection of broadcasters).

¹³⁸ See e.g., The Intellectual Property Code L. 112-2 para. 6.

¹³⁹ See Andrea Cattaneo *supra* note 5 (Cattaneo argues that football broadcasting rights should be defined outside the purview of copyright and maintained that they should be adequately addressed under commercial law since the starting point is a licence agreement to enter the venue and cover the event); see also Victoria Wark, No Free Kicks: Copyright in the Sporting Arena, 28 *Communications Law Bulletin* 22 27 (2009) at 23 (Wark pointed out that the role of copyright is to protect expressive works and not content or commercial value of a sport and noted the judicial reluctance in Australia to recognise copyright in a sporting event); but see J. Gordon Hylton, The Overprotection of Intellectual Property Rights in the USA and Elsewhere, 21 *J. Legal Aspects Sport* 43 65 (2011) at 54 (Gordon restates the USA legal position that what copyright protects is a recording and not content).

¹⁴⁰ Marios Papaloukas, “Competition Rules and Sports Broadcasting Rights in Europe” 3 *INT’L Sports L.J.* 81 82(2009).

¹⁴¹ See *supra* note 104 at Para.22.

In South Africa, the Copyright Amendment Bill, 2015 had generated discourse beyond the traditional boundaries of broadcasts. Although the present copyright law¹⁴² protects broadcasts and programme-carrying signals, the emerging consensus is that broadcasts are not copyrightable and that copyright should only be restricted to original works of authorship.¹⁴³ The main thrust for the objection to copyright in broadcasts and programme-carrying signals is, first to assure against the protection of the fundamental building blocks of knowledge. Secondly, in keeping with the modern global intellectual property trends in which the threshold of originality excludes copyright protection for works of minimal creative or expressive value like broadcasts and broadcast signals.¹⁴⁴ This demonstrates that, even in South Africa where the copyright law protects both content and signal, the paradigm is shifting.

Although, for reasons canvassed above, the reigning position in the world is that broadcast football is not copyrightable, there are scholars who argue that a broadcast is copyrightable. These scholars include Michael Handler and, Colantuoni and Navazio discussed in paragraph 2.2 of chapter two of this study. These scholars constitute a minority who anchor the protection of broadcasts on the underlying content and not upon the signal. This conceptualisation is supported by Hugh¹⁴⁵ who argues that a broadcast is not a tangible object but a dissemination of information through the transmission of electro-magnetic waves. Copyright cannot therefore subsist in an action of dissemination. Because the electro-magnetic signals transmitted in a broadcast are evanescent and imperceptible, any rights over signals alone would be ineffectual.¹⁴⁶ Therefore, copyright must subsist in a perceptible substance of broadcast; visual

¹⁴² See Copyright Act No.98 of 1978 s.2(1) f.

¹⁴³ Joint Academic Comments on the South Africa Copyright Amendment Bill, 2015 (these comments were crafted by eminent IP scholars in South Africa and USA and submitted them to the government. They proposed that broadcasts and programme-carrying signals be deleted from the categories of works eligible to copyright protection in the Bill). Among the South African scholars were Caroline Ncube, Coenraad Visser, Tobias Schonwetter, Denise Nicholson and, Andrew Rens. The document is available online at <http://www.infojustice.org/wp-content/uploads/2015/SACCcopyright-Joint-Academic-Comments-Table-pdf>. Last accessed on July 2, 2016.

¹⁴⁴ See the forwarding comments to the joint academic paper. Infojustice, "Academic Comments: South African Copyright Amendment Bill 2015" Sept.17, 2015. Available at <http://infojustice.org/archives/35403.pdf>, accessed on June 13, 2017.

¹⁴⁵ Hugh Laddie et al, *The Modern Law of Copyright and Designs* (3d ed. 2000) para. 8.15.

¹⁴⁶ See *id.*

images or sounds that are encoded as signal by the broadcaster; transmitted and finally decoded and received by the public.¹⁴⁷

This position is supported by Colantuoni and Navazio¹⁴⁸ who argue that sport and by extension football, attracts copyright at the stage of sports performance. They argue that a broadcast and its underlying content should enjoy copyright protection because of their commercial value.¹⁴⁹ This position runs into problems in relation to works which are in public domain which upon transmission will become protectable. This will go against the public policy and the utilitarian theory which holds that the public should be the primary beneficiary of copyright. Secondly, this argument poses a danger that everything of commercial value must be a subject of copyright protection which is a fundamental derogation from the doctrine of copyright. Thirdly, this argument will not be in tandem with the Rome Convention which requires the protection granted thereunder shall leave intact and shall in no way affect the protection of copyright in literary and artistic works.¹⁵⁰ In extending protection of broadcast copyright to the content, the protection of copyright in such content will be affected in contravention of Article 2 of the Rome Convention.

In Kenya and South Africa, broadcasts are one of the categories of copyright that are protected under the respective copyright legislations.¹⁵¹ However, the legislations do not state or imply whether the object of protection is the underlying content or the signal into which the content is embedded. However judicial authorities from the two countries imply that the object of protection is the underlying content. In South Africa, in *South African Music Rights Organisation v Svenmills Fabrics (Pty)*, Justice Berman held that the relaying through extension speakers, of music in a factory from a programme broadcast by a national broadcasting organisation constituted public performance and thus copyright infringement.¹⁵² What was communicated to the public at the time was the content and not the signal. The same

¹⁴⁷ See *id.*

¹⁴⁸ Lucio Colantuoni and Chistiano Navazio, Intellectual Property Rights: A Comparative Overview of the USA, UK and Italy (James A.R. Nafziger and Stephen F. Ross eds.), *Handbook on International Sports Law* (2011) at 457.

¹⁴⁹ See *id.* at 460.

¹⁵⁰ Rome Convention 1961, art. 1 (the provision is titled "Safeguard of Copyright Proper").

¹⁵¹ See *supra* notes 85 and 86.

¹⁵² (1983) 1 SA 608 C at para.105.

jurisprudence is replicated in *South African Music Rights Organisation v Trust Butcher (Pty)*¹⁵³ in which Justice Addleson held that in operating a radio set in his premises so that the broadcasts of SABC (some of which carried some musical works of the plaintiff) could be heard by the passing public as well as his customers was tantamount to public performance of such works.

On the other hand, in Kenya, a High Court granted an injunction against an infringing broadcasting station which was rebroadcasting the football broadcasts of the national broadcaster, Kenya Broadcasting Corporation.¹⁵⁴ What was rebroadcast in this case was the football content and not the signal which fizzled out at the point of the rebroadcasting. The position propounded by the High Court was supported by the Supreme Court in *Communications Commission of Kenya and 5 others v Royal Media Services Ltd and 5 others*.¹⁵⁵ While holding that the appellants did not infringe the broadcast copyright belonging to the respondents, the Supreme Court was emphatic that the appellants did not interfere with the content broadcast by the 1st, 2nd and 3rd respondents.¹⁵⁶ The two judicial authorities implicate that broadcast copyright in Kenya is grounded upon use or interference with the underlying content.

Among those who support copyright in broadcasts, there is no clear consensus on the scope of protection. There are those who argue that a pluralist of images must constitute a unit of programme and therefore a basis for protection.¹⁵⁷ Yet there are those who rely upon the neo-classicist approach and argue that copyright is a mechanism of market facilitation allowing works to be transferred in the market to those who value them most; and such owners should be given rights over the use of their works. On that basis every visual image in a broadcast has a market value which must be protected.¹⁵⁸ However, courts in Australia have tended to prefer the former approach by holding that individual words are not computer programs because each word

¹⁵³ (1978)1SA 1052 (E) para. 34.

¹⁵⁴ *Kenya Broadcasting Corporation v Wananchi Group Ltd. and Pan Africa Network Group Ltd.* HCCC No. 254 of 2014 at Milimani, Nairobi (unreported).

¹⁵⁵ (2014) eKLR

¹⁵⁶ *See id* para. 243.

¹⁵⁷ *See* judgment in *TCN Channel Nine v Network Ten Ltd* (2002) 118 FCR para 89.

¹⁵⁸ Neil Netanel, *Copyright and a Democratic Civil Society*, 106 *Yale L.J.* 283(1996) at 509.

is not a set of instructions.¹⁵⁹ If the same analogy is transposed to broadcasting, one image is not enough to complement a broadcast programme.

3.2.9 Recording of Football Events and Implication on Broadcast Copyright

While football events as such do not attract copyright or neighbouring rights, this does not by any means, imply that copyright or related rights play no role in protecting the commercial interests of football organizers or those who derive rights under them.¹⁶⁰ Audiovisual recordings of sports events could amount to works of authorship which are variously known as audiovisual works, films, cinematographic works or motion picture.¹⁶¹ Such works are copyright protected if they are original. However, not all audiovisual recordings of non-copyrightable subject matter such as football events are copyrightable. Audiovisual recordings that contain free and creative choices qualify for copyright protection.¹⁶² In recording football events, which are themselves not copyrighted, the director can influence the framing, choice and selection of images, as well as the angle views of cameras.¹⁶³ The activities of the director in which he directs the production and transmission of the sporting event constitute an original work of authorship, the protection of which is independent of the underlying content.¹⁶⁴ Thus, copyrightability of football events can be traced to recording of moving images which gives rise to an audio-visual work.¹⁶⁵ The scope of protection of audio-visual works varies from one country to another.

The Berne Convention does not specifically define audio-visual work. The Convention defines it indirectly as works produced by a process analogous to photography.¹⁶⁶ The expression also applies to cinematographic works since they comprise a series of moving photos or images. The Convention clarifies that a cinematographic work shall be protected as original works, implying

¹⁵⁹ *Data Access Corporation v Powerflex Services Pty Ltd.* (1999) CLR 1 at 27.

¹⁶⁰ See e.g., European Audiovisual Observatory, *Audiovisual Sports Rights between Exclusivity and Right to Information, IRIS Plus* (2006-2) at 30.

¹⁶¹ See *Id.*

¹⁶² See Margoni *supra* note 24 (Margoni argues that for an audiovisual work to be created substantial skills and judgment must be expended to the work and such work must have both commercial and entertainment value).

¹⁶³ See Nimmer *supra* note 33.

¹⁶⁴ See *id.*

¹⁶⁵ See e.g., Marjut Salikannel, *Ownership of Rights in Audiovisual Production: A Comparative Study* (1997) at 67; European Audiovisual Observatory “Audiovisual Sports Rights between Exclusivity and Right to Information” *Iris Plus 2006-2* at 43; See also Nimmer *supra* note 108 at Para. 2-9.

¹⁶⁶ See Berne Convention art. 2 (1) (the Paris Act of July 24, 1971 as amended on September 23, 1979).

that it is the recorded work and not the recording itself which is protected.¹⁶⁷ This implies that a cinematographic work must be a derivative work from artistic or literary work. However, in the common law tradition, the recording of moving images is protected under copyright irrespective of the originality of the underlying content.¹⁶⁸ The recording which is the first fixation or film or videogram is protected as a neighbouring right.¹⁶⁹ Therefore in the common law jurisdictions, there is a two-tier protection, one based on the recordings that are not grounded on underlying copyright and, secondly, based on original works like literary, artistic, dramatic and musical works.¹⁷⁰ In this context, a recorded football match may be protected as a neighbouring right because the recording is not based on an existing work of authorship. This protection, does not however, extend to the football match itself which remains unprotected.

In Kenya¹⁷¹ and South Africa,¹⁷² the copyright legislations are not specific as to which elements are protected in an audiovisual work. However, since the two countries embrace common law jurisprudence, the interpretation of audio-visual works may lean towards the two-tier protection, in which a recording of a football match is protected as a related right, but not the match itself. Quite often, football matches are watched live without having been recorded; this makes the right ineffective. Besides, most broadcasters transmit football as rebroadcasts of an entity commissioned to distribute the signals relating to the event. This means that it is the signal distributors who could lay claim to recording rights. Recording rights may therefore be claimed in delayed transmissions especially in non-linear environments. Video games, digital versatile disks (DVDs) and Video compact disks (VCDs) may be protected as audiovisual works.

¹⁶⁷ See Berne Convention art.14 bis.

¹⁶⁸ Pascal Kamina, The Subject-matter of Film Protection in Europe (in Estelle Derclaye ed.) *Research Handbook on Future of EU Copyright* (2009) at 77.

¹⁶⁹ See *id.*

¹⁷⁰ See David Bainbridge, *Intellectual Property* (5th ed. 2002) at 53; *The football game is covered by four cameras with a director guiding the production activities and choosing which of the electronic images are sent to the public and in what manner and order; what the director and cameraman does constitutes works of authorship and therefore copyrightable.* See Nimmer *supra* note 33.

¹⁷¹ Copyright Act, 2001 s. 2(1) (audiovisual work is defined as a fixation in any physical medium of images, either synchronised with or without sound, from which a moving picture may by any means be reproduced and includes videotapes or videogames but does not include a broadcast. The Key word here is a fixation which is understood to be a recording).

¹⁷² Copyright Act s.1(1) (the Act defines cinematographic work as a fixation or storage by any means whatsoever on film or any other materials of data or sequence of images, capable when used in conjunction with any other mechanical, electronic or other device of being seen as a moving picture...).

Football events are, however, more valuable when they are consumed live.¹⁷³ In other words, they are ephemeral in nature and consumers and fans normally prefer them live; but live transmissions are not based on any fixation. Live transmission does not require recording. However, some countries like the USA which protects football as an audiovisual work enjoins broadcasters to simultaneously record the live matches in order to enjoy protection as such.¹⁷⁴ Although football events are consumed live without fixation, such events can be protected as audiovisual fixations once they are recorded. The right holder of an audiovisual work or cinematograph film enjoys exclusive right over the reproduction thereof or its communication to the public or its broadcasting.¹⁷⁵ It is the exercise of these exclusive rights which control the use of the recorded football match and thereby impede its access to the public.

3.2.10 Football Game and Performances

In examining this sub-heading, the salient issue was whether a football contest could be assimilated into a performance. The issue could be broadened to cover such incidental activities in the field by players and fans like celebratory and scoring dances. The notion of performers is defined under the Beijing Treaty on Audiovisual Performers (BTAP) as follows: “Performers are actors, singers, musicians, dancers and other persons, who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions.”¹⁷⁶ The Copyright Act of Kenya defines a performer as an actor, singer, declaimer, musician or other person who performs a literary or musical work and the conductor of the performance of any such work.¹⁷⁷

The Performers’ Protection Act of South Africa¹⁷⁸ defines a performer in a fashion substantially similar to the Kenya Copyright Act. The notion of a performer in South Africa is also implicated

¹⁷³ See Tom Evens et al, *The Political Economy of Television Sports* 54(2013).

¹⁷⁴ See 17 Copyright Law of the USA § 102(a)(6).

¹⁷⁵ See Copyright Act of South Africa s. 8; Copyright Act of Kenya s.26(1).

¹⁷⁶ BTAP (2012) art. 2 (a) (the BTAP is the latest international instrument on the protection of audiovisual performances and heavily borrows from the WPPT of 1996).

¹⁷⁷ See s. 30(6) (a performance is defined as the representation of a work by such action as dancing, playing, reciting, singing, declaiming or projecting to listeners by any means whatsoever).

¹⁷⁸ See Performers Protection Act NO 11 of 1967, s.1(1) (the similarity is anchored on the fact that what must be performed must be literary or artistic work).

in the definition of the term performance. The Copyright Act of South Africa defines a performance to include, “any mode of visual or acoustic presentation of a work...”¹⁷⁹

From the foregoing analysis, in Kenya and South Africa, a performance must be based on a pre-existing work. The principle was affirmed in South Africa in the *Svenmills case*¹⁸⁰ in which the High Court held that relaying through extension speakers of musical works in a factory from radio transmission was tantamount to public performance. It was a performance because what was being performed was a musical work, protected under the Copyright Act of South Africa.¹⁸¹ A football contest either at the upstream or downstream level cannot qualify as a performance because it is not based on a pre-existing work. The same analogy applies not only to the rough-and-tumble on the field but also to the celebratory dances of either the players or fans. This principle is consistent with the Canadian Federal Court of Appeal ruling in *Joint Sports Claimants v Copyright Board*¹⁸² that spectator games are so unpredictable and unplanned that they cannot attract copyright.

Although the game of football cannot be protected as performances in Kenya and South Africa in terms of their relevant laws, this does not mean that other countries may not so protect football games. The Rome Convention gives member States latitude or an option by their laws or regulations, to extend the scope of protection to artists who do not perform any work.¹⁸³ Any country may exercise its sovereign choice to extend performances to artists who do not perform a work. Some countries have ipso facto extended protection to aesthetic sporting events and folklore.

Aesthetic or choreographed sports include acrobatics gymnastics, yoga, ice dancing, and ballroom dancing and wrestling. Aesthetic games are protected under the UK copyright law¹⁸⁴ because they present a more artistic component than adversarial games which emphasize more on direct

¹⁷⁹ See Copyright Act, s 1(1).

¹⁸⁰ See *supra* note 152.

¹⁸¹ See s.(6)(c) (the right holder of any musical work enjoys an exclusive right over the public performance of their works. He also enjoys under Sub-section (d) an exclusive right over the broadcasting of the same work.

¹⁸² See *supra* note 3; cf *NBA v Motorola* *supra* note 104 (the court held that sports events are not authored in the common sense of the term.

¹⁸³ See art.9.

¹⁸⁴ Copyright, Designs and Patents Act (CDPA), s. 3(1).

competition.¹⁸⁵ In Kenya and South Africa, cultural activities may be performed during the match by the fans like blowing of trumpets and horns as well as performing the Mexican waves by fans in support of their team.¹⁸⁶ Such performances may be protected as folklore but are incidental to the match itself and thus do not form part of this study. Besides, creating a multiplicity of rights that are anchored on peripheral activities on terraces would compromise the integrity of the match itself. However, to the extent that football games are not performances, they cannot attract copyright whose exercise could impede their access to the public in Kenya and South Africa.

3.2.11 Football Sound Recording and Broadcasting

The sound recordings also called phonograms of a football game may revolve around the club or league anthems, commentaries and other verbal communication of the match. Barnfield argues that a football game has the beginning, middle and end which must be communicated.¹⁸⁷ Football games are transformed into stories through commentaries, interviews of fans or players, match analysis by football experts, and the singing of the league or club anthems.¹⁸⁸ Relevant to this study is whether the recording of above activities can be assimilated into sound recordings. In Kenya a sound recording is defined as an exclusively aural fixation of the sounds of a performance or of other sounds or of a representation of sounds regardless of the method by which the sounds are fixed or the medium in which the sounds are embodied but does not include a fixation of sounds and images, such as the sound track of an audiovisual work.¹⁸⁹ In South Africa, a sound recording is defined as a fixation or storage of sounds, or data or signals representing sounds capable of being reproduced, but does not include a sound-track of a cinematograph film.¹⁹⁰

From the foregoing analysis, what is protected in a sound recording is the recording itself, provided it comprises embodied sounds, or data or signals representing sound. The sound may be

¹⁸⁵ See *Viola supra* note 99.

¹⁸⁶ Performances of folklore and other traditional expressions of culture are recognized under the Copyright Act in Kenya. See s.2 (1).

¹⁸⁷ See Andrew Barnfield *supra* note 89 at 3.

¹⁸⁸ See *id.*

¹⁸⁹ Copyright Act of Kenya, s.2(1).

¹⁹⁰ Copyright Act of South Africa, s.1(1).

that of performance or otherwise. So, the activities mentioned above are not the ones that can be protected but the media in which they are embodied. However, in practical sense, the protection of a recording will *ipso facto* extend to the content, and therefore the anthems, football commentaries and analysis once recorded enjoy copyright as sound recording. Producers of phonograms enjoy the exclusive right to control their communication to the public or their broadcasting in whole or in part.¹⁹¹ These exclusive rights grant monopoly to the producers which constrict public access because the broadcasting or communication to the public of the phonograms or part thereof is controlled. However, the rights the phonogram producers enjoy do not extend to television broadcasting or any other audiovisual transmissions. The rights are only limited to recorded sounds and not live radio broadcasting. Few people listen to deferred radio broadcasts of football commentaries because the results are already in the public domain. Consequently, the impact of a football-related phonogram on public access to the event may be minimal in Kenya and South Africa, first because sporting events are transient in character and thus are consumed live. Compact disks, tapes, and even flash disks embodied with football recordings can be copyright protected. Secondly, radio broadcasting of a phonogram of a match is less preferable than telecasts of the same event.

3.2.12 Football and Dramatic Work

According to Vaver, in determining what constitutes a dramatic composition, there must be a story—a thread of consecutively related events, either narrated or presented by dialogue or action or both.¹⁹² In New Zealand, the Privy Council refused to recognize a television show as a dramatic work because it lacked certainty or sufficient unit in order to be capable of being acted.¹⁹³

Although there is no case law in either Kenya or South Africa in which the court has tried to examine the possible assimilation of a football game to a dramatic work, one can look beyond the two jurisdictions for a precedent. In the *Sports Claimants case*,¹⁹⁴ the Canadian Federal Court of Appeal declined to uphold the appellants' attempt to call a football game a choreographic

¹⁹¹ See Copyright Act of Kenya s. 28(1)(d) and South African Copyright Act s.9(c).

¹⁹² David Vaver, *Principles of Copyright Law, Cases and Materials* (2002) 40.

¹⁹³ *Greev v Broadcasting Corporation of New Zealand* (1989)3 N.Z.L.R. 18.

¹⁹⁴ See *supra* note 3.

work (sub-category of dramatic work) holding that “even though sports teams may seek to follow plays as planned by their coaches as actors follow a script, the other teams are dedicated to preventing that from occurring and often succeed.”

Borrowing the principles propounded by the courts in Canada and Australia and applying them to Kenya and South Africa, it can be posited that football games cannot be a dramatic work. Thus access to broadcast football in the two jurisdictions by the public cannot be dependent on the exclusive rights that holders of dramatic works enjoy, for football *rencontres* are not dramatic works.

3.2.13 Artistic work and Football broadcasting

Whereas a football game cannot be termed as an artistic work, there are some elements around the field and in football broadcasts that manifest artistic creations. For instance, the stadia where the games are played are expressions of artistic creation. So are paintings across the stadia as well as the still photographs and statues, if any, affixed thereto. In the *FAPL and Karen Murphy cases*,¹⁹⁵ while denying copyright protection to live football matches embodied in a broadcast signal, the ECJ observed that only opening video sequence, graphics, league anthems and pre-recorded films embedded in the signal would qualify as works of authorship. In this context the graphics, logos and the lettering colours consisting of any patterns constituting the name or club logo will qualify as artistic works.¹⁹⁶

When they are so embedded into a broadcast, these works can enjoy a distinct and separate protection from the broadcast. And so may be the stadium itself and all the paintings appurtenant thereto. The protection of these artistic works may impede public access to the broadcast football into which they are embodied. Failure to clear rights with the right holders of these artistic creations may justify the grant of any injunction to stop the whole broadcasts into which they are incorporated.

¹⁹⁵ See *supra* note 109.

¹⁹⁶ See *e.g.* Kenya Copyright Act s. 29(b).

3.2.14 Literary Works and Football broadcasting.

The copyright laws of Kenya and South Africa do not define the term “literary work.” The laws however, give a non-exhaustive repertoire of works that are protected as literary works as including novels, stories, stage directions, broadcasting scripts, textbooks, articles, letters, reports, lectures, tables, computer programs, and compilations of data.¹⁹⁷ The High Court in the UK attempted to define literary work in *University of London Press Limited v University Tutorial Press Limited*.¹⁹⁸ In his judgment, Justice Peterson observed that the word “literary seems to be used in a sense somewhat similar to the use of the word “literature” in political or electioneering literature and refers to written or printed matter. Papers set by examiners are, in my opinion, literary work.”¹⁹⁹ However, the scope of a literary work has since been expanded to cover works that are not only written but also spoken or sung.²⁰⁰ The notion of writing includes any form of notation or code, whether by hand or otherwise regardless of the method by which, or medium in or on which it is recorded.²⁰¹

Literary works may be incorporated into broadcasts as messages that are scrolled on the television sets simultaneously with the broadcasts of the game. The scrolls may communicate a commercial message or the name of the sponsor. Names identifying the transmitting broadcaster, numerals on the screen indicating the goals and in favour of or against the participating teams may qualify as literary works. However, names, words or numerals scrolling as the bottom of the screen are too ephemeral to be considered a fixation which is stable and permanent.²⁰² Such scrolls therefore cannot enjoy copyright in Kenya or South Africa for want of fixation.²⁰³ Single words or names or numerals cannot attract copyright protection because their creations do not require substantial skill and judgment.²⁰⁴

¹⁹⁷ See Copyright of Kenya s.2 (1); Copyright Act of South Africa s. 1(1).

¹⁹⁸ See (1916) 2 Ch. 601 (in this case the High Court was invited to determine whether examination papers were literary works and ruled that they were).

¹⁹⁹ See *id* para. 27.

²⁰⁰ Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases, and Materials* 65 (2d ed. 2013)

²⁰¹ See *id*.

²⁰² See Harms *supra* not 44 (fixation is also a mandatory requirement in Kenya and South Africa for subsistence of copyright in literary works).

²⁰³ See Copyright Act of Kenya s. 22(3)(b); Copyright Act of South Africa s.2(2).

²⁰⁴ See the judgment in *Exxon Corp v Exxon supra* 69.

However, any literal works relating to football games like sports news journals, the league tables, the list of fixtures and dates and time of the competition or the most goal scorer of the season are copyright protected in the UK.²⁰⁵ In South Africa, the Supreme Court of Appeal in *Waylite Diary CC v First National Bank Ltd*²⁰⁶ held that designing, formatting and composing field diaries, complete with appointment pages, names of weeks, number of weeks and days of the week could not enjoy copyright for want of originality. At the level of the European Union, the Court of Justice of the European Union in *Football Dataco v Yahoo UK*²⁰⁷ held that football fixture lists are not copyright protected on account of insufficient intellectual creation. To wrap up, football fixture lists and other post football transmission writings, and on the basis of the court reasoning in the EU and South Africa, are not copyright protected. Thus “literary works” embodied into football broadcasts or flowing therefrom cannot enjoy copyright which could have a bearing on access to any broadcast football event by the public.

3.3. Access to broadcast Football by the Public

In light of the foregoing analysis which has examined all relevant copyrighted works that could be incorporated into a football broadcast, it is evident that some of these works have little impact on access to broadcasts of football and some have a lot more impact. Among those that have greater impact are those in which copyright is pronounced. First, in this category are the broadcasts or programme-carrying signals. Although the concept of a broadcast as a subject of copyright protection is in controversy, it is agreed that it is an electromagnetic carrier embodied with content is the object of protection.²⁰⁸ Consequently, any protection granted to the carrier will inevitably extend to the content. This protection permits broadcasters to monopolize content including football matches. Therefore broadcasters enjoy, inter alia, the exclusive right to authorize the fixation and rebroadcasting of their broadcasts including communication to the public of the telecasts.²⁰⁹ In South Africa, a programme-carrying signal is protected independently of the broadcasts.

²⁰⁵ See the judgment of the High Court in *Football Dataco Ltd and others v Britten Pools Ltd and others* (2010) EWHC 841.

²⁰⁶ (1995) (1) SA 645 (A).

²⁰⁷ C-604/10 CJEU para. 38.

²⁰⁸ See WIPO *supra* note 133.

²⁰⁹ See Copyright Act of Kenya s.29; Copyright Act of South Africa s.10.

The exclusive broadcasting rights that broadcasting organisations enjoy foreclose media markets and thus deprive the public access to football.²¹⁰ This is owing to the fact that exclusive rights are negative in nature as they bestow on broadcasters control over the underlying football content.²¹¹ Access to such content by the public is at the discretion of the broadcasting entity. The broadcasting entity decides when, when and at what cost the public may access the broadcast football games.

A programme-carrying signal is one that has been emitted through a satellite in space and is on a downlink path to the surface of the earth.²¹² This programme-carrying signal is protected against unauthorized direct or indirect distribution to the public in or from South Africa.²¹³ The protection of the programme-carrying signal also extends to the content embedded into it; which also cannot be distributed to the public without authority. Similarly, exclusive rights are enjoyed in an audiovisual or sound fixation of a football match as analysed in paragraphs 3.2.9 and 3.2.11 above. Once these rights are deployed by the relevant producers as authors, their exercise of these rights also controls the use of the recorded games thereby impeding their access to the public. Artistic works incorporated into a football broadcast may also impede public access to the game itself. Once the incorporated artistic works like graphics and other designs are broadcast, they become part and parcel of the broadcast and stopping a person from accessing one would mean stopping from accessing the other.

The copyright which these works enjoy is also assisted by the technological protection measures which absolutely encase the football games. The technological protection measures are discussed extensively in the preceding chapter, paragraph 4.6. The application of technical measures in Kenya and South Africa is absolute and does not even allow authorized acts under the limitations

²¹⁰ See e.g. Evens Tom and Lefever Katrien, Watching the Football Game: Broadcasting Rights for the European Digital Television Market, 35 *Journal of Sport and Social Issues* 33 40(2011).

²¹¹ Stefan Hagan, *A Critical Analysis of Intellectual Property Rights within Sports Focusing on the Role of Copyright in Football*, LLM Dissertation, University of Kent(2005/2006) at 27.

²¹² See Copyright Act of South Africa s.2A.

²¹³ See Copyright Act of South Africa s.11.

and exceptions in the copyright laws.²¹⁴ The exceptions are intended to balance the interest of the public and that of the right holders; yet this is not the case in the two countries. The pendulum of interest, thus, swings in favour of the right holders and cannot be justified by their entrepreneurial contribution.²¹⁵

²¹⁴ See e.g. Caroline Ncube and Tobias Schonwetter, New Hope for Africa: Copyright and Access to Knowledge in the Digital Era, *INFO Vol.* 13 3 (2011) at 3; see also Copyright Act of Kenya 26(1); South Africa Copyright Act ss. 12-19.

²¹⁵ Unlike WPPT, art.18 which does not ban all acts of circumvention of technical measures designed to protect the works, s.86 (1) of the ECT Act of South Africa and s.35 (3) of the Kenya Copyright Act ban all acts of circumvention of technical measures.

CHAPTER FOUR

GLOBAL OUTLOOK OF FOOTBALL BROADCASTING AND BROADCASTING TECHNOLOGY

4.0 Introduction

Sport broadcasting has grown dramatically in significance and popularity since the advent of broadcasting. This development has, largely, been brought about by the conflation and convergence of telecommunication technologies, internet and broadcasting.¹ Broadcasting is one of the media that have the capability to reach, in real time, both national and transnational audiences. Broadcasting responds to the inadequacy in physical space and thereby becoming an alternative to stadia. It creates a large diasporic (off the pitch) fan and spectator base; compressed into a global village in which a huge audience watches broadcast matches off the field.²

Broadcasting has now moved beyond the traditional over-the-air transmissions to include new media platforms and means of delivery, like pay television services, on-demand content delivery, interactivity and multimedia, pay-per view sports on television, broadband, and internet.³ This convergence has created the capability, on the part of consumers, to access the same content or different types of content over different platforms. A computer in addition to surfing internet, can receive audio and television broadcasting or transmit data.⁴

Since its advent, the primary functions of broadcasting remain the same; to educate, inform, and entertain.⁵ The other main feature of broadcasting that has remained unchanged and immutable is

¹ John McCoy, Radio Sports Broadcasting in the USA, Britain and Australia 1920-1956 and its Influence on the Olympic Game, *Journal of Olympic, Spring* (1997) at 1.

² Maurice Roche, *Olympic and Sports Mega-events as Media Events: Reflections on the Globalisation Paradigm, 6th International Olympic Symposium Research* (2002) at 3.

³ See e.g., Grant Jarvie, *Sports Culture and Society: An Introduction* (2006) at 132; See also, EBU, *The Future of Terrestrial Broadcasting* (Technical Report 103) (2002) at 6.

⁴ See *infra* note 6 at 66.

⁵ See e.g., The Kenya Broadcasting corporation Act No.15 of 1989 s. 8(1) (the section provides that the Kenya Broadcasting Corporation shall provide impartial broadcasting services of information, education and entertainment...); See also Eve Salomon, *Guidelines For Broadcast Regulation (Commonwealth Broadcasting*

the propagation of signals embodying sounds or images for reception by the public.⁶ In spite of these basic characterisations of broadcasting, technology has created new and modern means of delivery and platforms that impact upon the mode of exploitation and access of content by the public. Broadcast football is part of the content and therefore germane to this study.

This chapter therefore focuses on the historical evolution of sports broadcasting, the definitions and conceptualisations of football broadcasting, traditional broadcasting, and new forms and platforms of broadcasting, the political economy of football broadcasting, broadcast football access and technological measures.

4.1 Historical Background to Broadcasting

The word broadcasting has its origins in agriculture and farming. It meant and still means the agricultural method of scattering seeds over a broad area rather than showing them in drills.⁷ The term was later assimilated, by Frank Conrad, to audio transmission of signals or amplified modulation (AM) radio waves by the use of analogue terrestrial transmitters.⁸ The world's first radio transmitting station was KDKA that went on air in Pittsburgh, USA, in November 1920.⁹ It broadcast a *mélange* of different programme menu including drama and sports. The radio station broadcast the first football game between Philadelphia Phillies and Pittsburgh Pirates on August 5, 1921.¹⁰ In Britain, although radio broadcasting started in 1922, BBC was permitted to carry sports commentaries in May, 1925. At that time, the games broadcast by radio were sustaining broadcasts in which case neither the organiser nor the broadcaster paid the other.¹¹ The principal means of revenue generation was the sale of stadia entrance tickets to the public desirous of watching the games.¹² In these arrangements, the organisers deployed real property rights to

Association) (2005) at 7; Mark Armstrong, *Public Service Broadcasting*, University College of London, Faculty Paper (2006) at 6.

⁶ See WIPO, *Technical Background Paper Prepared by the Secretariat*, 7th Session (May 13-17, 2002) at 3.

⁷ Webster's NewWorld Dictionary, (2nd ed.1980) at 179.

⁸ James Wood, *History of International Broadcasting* (IET 2000) at 191.

⁹ See John McCoy supra note 1 at 20.

¹⁰ See Mukul Mudgal, *Law and Sports in India: Development and Challenges* (2011) at 191.

¹¹ See e.g., Eric Johnson, *The NFL Intellectual Property and its Conquest of Sports Media*, 68, 759 *North Dakota L. REV.* (2010) at 762.

¹² See *id.*

protect their commercial interest by denying entry to the sports venues by the unwanted individuals.¹³

The advent of television broadcasting can be traced to 1923 when John Baird started a Nipkow disk-operated amateur television pictures that he demonstrated in London.¹⁴ In 1926 he was granted the first licence to transmit television broadcasts and, in 1928 he succeeded to transmit from London to New York.¹⁵ In 1936, BBC started to broadcast television services on a limited time and geographical space from Alexandra Palace.¹⁶ The limited time and space of transmission was attributed to inadequate programme content as well as the technological inadequacies. The first, outside television broadcasting took place in 1937, when BBC covered live the coronation of King George VI and subsequently, the first live football broadcasting took place on April 30, 1937 during which the finals of the Football Association (FA) Championship were covered.

In the USA, trial laboratory-based television transmissions started as early as 1928 when Francis Charles Jenkins began broadcasting regular telecasts designed to be received by the public.¹⁷ The first televised sporting event was a baseball game between Columbia and Princeton in 1939, while the first television football transmission took place in 1944 on National Broadcasting Company (NBC).¹⁸

¹³ The real property right employed was largely the common law tort of trespass on land. The organiser could exercise this right to keep away all the unpaid audience from the stadium, Tom Rivers, *A Guide for Broadcasters to the Ownership, Acquisition, Clearances of, Enforcement and Management of Rights* (1991) at 1 (on account of this mode of exploitation, organisers initially objected to sports broadcasting because it kept away from the stadia would-be paying audiences and thereby diminishing their revenue base).

¹⁴ Kate Pierce, *The Evolution of Television in the USA*, available on <https://www.eolss/Samples-Chapters/CO4/E6-33-01-07pdf> accessed on November 11, 2016.

¹⁵ *Id.*

¹⁶ Telectronic, *The Television History Site: The History of BBC, First TV Era*, available at <http://www.telectronic.co.uk/tvera.htm> accessed on Nov.12, 2016 (the transmission was done to about 100 or receiving sets to hours every day).

¹⁷ See generally, Jeff Miller, *A US TV Chronology 1875-1970 (2012)*.

¹⁸ See e.g., *Supra* note 14.

In Germany, the first television broadcasting took place in Berlin in March, 1935.¹⁹ The advent of television in Germany was shaped by the socio-economic and political environment that prevailed there at the time. The pre-World War II national mobilisation as well as the instrumentalisation of the military and technological primacy gave Germany a technical advantage over other European countries.²⁰ In spite of the technical superiority, German's deployment of the television technology to cover live the 1936, Berlin Olympic Games did not meet the public expectation in terms of quality of the transmission and signal reliability.²¹

The French concept of *télévision* was used in France for the first time in 1900 by a Russian physicist, Constantine Perskyi, during an exhibition in Paris.²² Later, the concept was subsumed into English equivalent, television, *televisie* in Dutch, *televisione* in Italy and so forth.²³ The first television transmission in France took place in November, 1935. The transmission was based upon a mechanical system for picture analysis.²⁴

From the beginning, broadcasting in both Europe and the USA was influenced by two divergent philosophies. The USA, on the one hand, adopted a model under which broadcasting organisations relied on advertising revenue propped up by strong regulatory regimes for economic survival, while Europe, on the other, favoured government-financed and regulated model.²⁵ Whatever the model and merits of the economic dynamics operative in any jurisdiction, it is universally agreed that broadcasting must be regulated to avoid confusion and chaos over the use of the airwaves “which are of the nature of public resources that can carry only a limited number of channels.”²⁶ Since broadcasting is done over the spectrums and airwaves that are public resources, it must serve the public good. According to Reith, broadcasting is a public good

¹⁹ William Uricchio, Introduction to the History of Germany Television 1935-1944, 10 *Historical Journal of Film, Radio and Television* (1990) at 2.

²⁰ *Id.*

²¹ See e.g., *supra* note 17.

²² Jean-Jacques Peter, *A History of Television* (1985) available at <http://www.ebu.ch/dvb-article-tv-history.htm> and accessed on November 24, 2016 (this article was commissioned by the European Broadcasting Union (EBU) in which an over-view of evolution of television broadcasting is analyzed).

²³ Grand Dictionnaire Anglais Hachette and Oxford, Nouvelle édition (2009) at 833.

²⁴ See e.g., *supra* note 22.

²⁵ See e.g. Roy L. Moore et al, *Media Law and Ethics*, (4th ed. 2012) at 304.

²⁶ Harold Nelson and Dwight L. Teeter, *Law of Mass Communications, Freedom and Control of Print and Broadcasting Media* (4th ed.1982) at 483.

in “the technical sense of the word” because its consumption by one person does not preclude its consumption by another.²⁷ Broadcasting therefore is “as universal as the air” and therefore equitable access to this resource is critical to the full participation in the contemporary society. This equitable access should extend to all *genres* of programme content including football and other sporting activities.

4.1.1 Advent of Colour Television

By 1950s colour television services had been commenced on a trial basis.²⁸ The world’s first colour television service was based on National Television Standard Committee (NTSC) video system or standard. It was carried by NBC during the telecast of the tournament of Roses Parade in 1954.²⁹ In 1967, BBC2 broadcast Europe’s first colour television transmission during a tennis championship at Wimbledon.³⁰ The transmission was based on the Phase Alternating Technology (PAL) system, which is a colour video encoding technology for analogue television.³¹

In 1961, Henri de France inaugurated the first colour television in France which was based on Sequentiel Couleur à Memoire (SECAM) system in which two chrominance components are transmitted in Sequence.³² Although colour television had numerical advantages over black and white television, the transition from the latter to the former enjoyed slow acceptability-- first, because of the high cost of colour television sets and, secondly, because of the scarcity of colour audio-visual programmes.³³ Some of the advantages of colour television include, offering of

²⁷ Baron John Charles Reith, *Broadcast over Britain* (1st ed. 1924) at 112 (Reith was the Director General of BBC from 1926-1938. His vision of the role and responsibilities of public service broadcasting shaped not only the modern BBC but also other public service broadcaster globally).

²⁸ Jean Jacques Peters, *A History of Television* (1985) at 4 (paper commissioned by the European Broadcasting Union, a professional body that brings together public service broadcasters in Europe and headquartered at Geneva, Switzerland).

²⁹ See *supra* note 15.

³⁰ See e.g. Iain Logie Baird (National Media Museum), *Colour Television in Europe* (2011) available on www.nationalmediamuseum.org.uk accessed on November 20, 2016 (according to Iain, the PAL system which gained currency in Britain and elsewhere in Europe was a marked improvement of NTSC which was used in the USA).

³¹ See *Id.*

³² See e.g., *supra* note 23.

³³ See e.g., *supra* note 30.

greater fantasy and realism, giving natural feel and reconstruction of images, presenting better image clarity and, enhancing of visual impacts of pictures.³⁴

Since the advent of colour television, technology has dramatically altered the contours of broadcasting. Today television exists in high definition (HDTV) formats which represent the highest image and sound quality that can be transmitted over the air.³⁵ HDTV provides the image quality that approaches that of Thirty Five mm motion picture film which has image resolution of approximately twice that of analogue television.³⁶ Television and radio sets have also increased exponentially. According to the International Telecommunication Union (ITU) survey, in 2000 there were 1.4 billion television sets in the world.³⁷ A subsequent survey commissioned by WIPO revealed that, in 2009, there was a global television penetration of Ninety per cent.³⁸ These figures bear testimony that radio and television broadcasting is one of the most potent and effective tools of communication to the public. The bar charts below give an overview of the global television penetration.

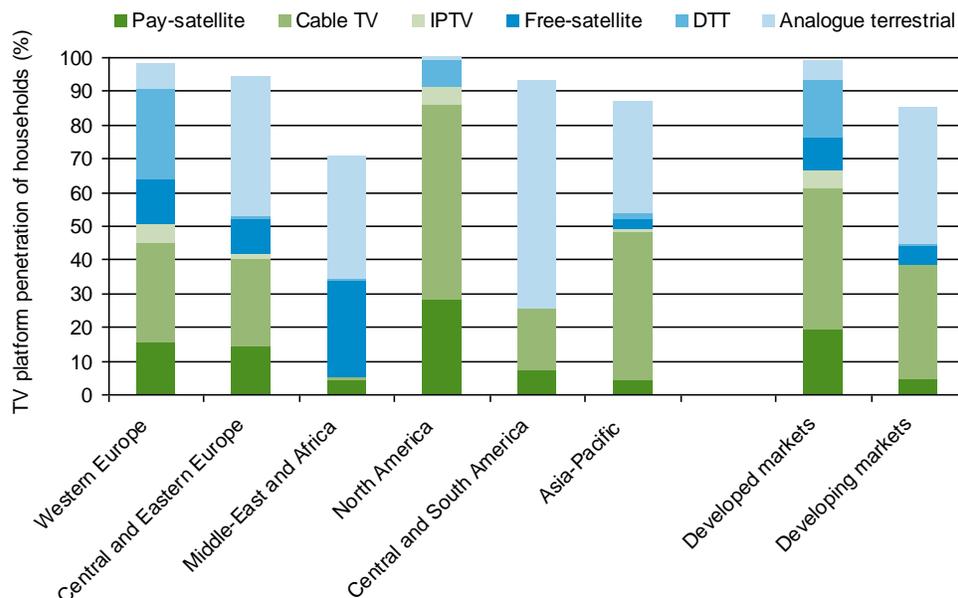
³⁴ *See id.*

³⁵ Peter Steel and Michel Dupagne, *Digital Television (in August Grant and Jennifer Meadow eds.) Communication Technology Update and Fundamentals*, (11th ed.2008) at 79.

³⁶ *See supra note 28* at 28.

³⁷ IEEC, Overview of Digital TV Development Worldwide, *IEEC Magazine*, Vol. 94 Issue 1 (2006).

³⁸ WIPO, *Study on the Socio-Economic Dimension of Unauthorised Use of Signals: Current Market Trends in Broadcasting Sector*, SCCR/19/12(Nov.30, 2009) at 58.

Table 4.1 TV Platform Penetration of Households in 2009

Source: WIPO SCCR/19/12 of Nov., 2009

Today broadcasting organisations broadcast a wide range of programme content which includes sports, music, soaps, drama, news, talk shows, and documentaries. This programme content is programmed, scheduled and transmitted via varied delivery means and on such platforms as are largely dictated by the changing consumer tastes and preferences. The content which is of relevance to this study is football games which are transmitted either live or deferred

4.2 Evolution of Broadcasting in Kenya and South Africa

4.2.1 Kenya

Broadcasting in Kenya is a reflection of the vestiges of colonialism. The advent of radio broadcasting in Kenya was in 1927 when the British colonial government allowed the British East African Broadcasting Company Limited to operate an all English language radio station.³⁹ The single-channel broadcast service called Kenya Radio Service was launched on June 21, 1928

³⁹ Edwin Okoth, *The Emergence and Growth of Vernacular Radio in Kenya: A Case Study of Radio Having a Positive Economic Impact*, Fellowship Paper, Reuter Institute for the Study of Journalism (2015) at 10 (*the broadcast service having been transmitted in English was designed to service the settler community and thereby advance their exploitative and imperialist agenda*).

and targeted Nairobi and other parts inhabited by the white settlers.⁴⁰ In 1953, new radio broadcast services transmitting in major local languages were commenced.⁴¹ Among the languages which were earmarked were Dholuo, Kikuyu, Luhya, Swahili, Kamba and Kipisigisi.⁴² The advent of radio transmission in major Kenyan languages was a colonial design to indoctrinate and pity the local communities against each other with a view to weakening the liberation struggle spearheaded by Mau Mau, amongst other progressive liberation forces.⁴³ The ethnicity-based radio stations are currently a source of national debate as to whether they advance nationhood and national cohesion or the ethnic agenda designed by the colonialists.⁴⁴

In 1959, the Kenya Broadcasting Corporation was created by the colonial government to provide television and radio broadcasting service.⁴⁵ Television broadcasting was launched in 1962 radiating broadcasts from a farmhouse in Limuru within a radius of fifteen miles.⁴⁶ In 1970, a second television station, an affiliate of the then Voice of Kenya (VOK) was established at coastal town of Mombasa.⁴⁷

In 1964, soon after independence in 1963, broadcasting service was nationalised in Kenya and renamed the VOK.⁴⁸ The VOK was then placed under the supervision of the department of Information and Broadcasting.⁴⁹ The nationalisation was designed to reformulate and configure broadcasting in line with the aspirations of the new post-independence political leadership.⁵⁰ In 1989, following the pressure for media deregulation and political pluralism and accountability, the VOK was reformed and a more responsive public service broadcasting, Kenya broadcasting

⁴⁰ Nyongesa Wafula, *Kenya Broadcasting Corporation in a Liberalised Market Economy: A Need for a New Model of Public Service Broadcasting*, MA Thesis, University of Nairobi (2005) at 30.

⁴¹ See Report of the Task Force on Migration from Analogue to Digital Broadcasting in Kenya, September, 2007 at 6.

⁴² See *id.*

⁴³ See e.g., Grace Githaiga, *State of Future Public Broadcasting in Kenya* (2011) at 11.

⁴⁴ Peter Oriare et al, *The Media We want: The Kenya Media Vulnerability Study* (2010) at 12.

⁴⁵ See *supra* note 43.

⁴⁶ Edith Njeru, "Kenya Broadcasting Corporation: Bridging the Digital Divide in Kenya Through Wireless Radio and Television Signal Distribution" Research Paper (2005) at 6.

⁴⁷ See *id.*

⁴⁸ See *supra* note 40 at 29.

⁴⁹ See *id.*

⁵⁰ Grace Githaiga, *Public Broadcasting in Africa: Kenya* (2011) at 11.

Corporation, was created by an Act of Parliament.⁵¹ The current broadcast landscape in Kenya is analysed in chapter seven paragraph 7.3.3 of this study.

4.2.2 South Africa

The first radio broadcasting in South Africa took place in July, 1924 when the JB Calling, a Johannesburg-based radio service went on air followed by the Cape Town Station in September, 1924 and the Durban station in December, 1924.⁵² Soon, the three privately-owned stations started experiencing financial problems because they relied upon revenue from licensing which was limited.⁵³ They were then placed under the management of an entrepreneur, African Broadcasting Company, which revitalised them.⁵⁴

Fearing that the interest of the public could not be served well by commercial broadcasters, the then prime minister, J.B.M. Hertzog invited to South Africa, the then head of BBC, John Reith.⁵⁵ Reith was asked to investigate the problems bedevilling broadcasting in South Africa and recommend a model that was more responsive to the needs of the public. Among Reith's recommendations was that South Africa adopt a broadcasting model of a public corporation like BBC.⁵⁶ In 1936, the new Broadcasting Act was passed by parliament which established the South African Broadcasting Corporation (SABC).⁵⁷ The Broadcasting Act gave monopoly over radio and television broadcasting to the SABC.

On the other hand, television transmission trials in South Africa took place in 1929 in Cape Town and Johannesburg.⁵⁸ The trials were short-lived for they went off-air following the

⁵¹ Kenya Broadcasting Corporation Act, Cap 221 s. 3; Katharine Allen and Iginio Gagliardone, Kenya Media Map Project: Case Study Snapshot of Donor Support to ICTs and Media (2011) at 5.

⁵² Carin Bevan, *Putting Up Screens: A History of Television in South Africa 1929-1976* (2008) at 48.

⁵³ Thokzani Mhlambi, *Early Radio Broadcasting in South Africa: Culture, Modernity and Technology*, PhD Thesis, University of Cape Town (2015) at 24.

⁵⁴ *See id.*

⁵⁵ Media Development and Diversity Agency, *Trends of Ownership and Control of Media in South Africa* (2009) at 30.

⁵⁶ *See id.*

⁵⁷ *See* Broadcasting Act No. 22 of 1936.

⁵⁸ John Matisonn, *Reflections of a Regulator in Democratic South Africa* (2001) online available at www.hsf.org.za/resource-centre/focus/focus-66/jmatisonn.pdf. Last accessed on May20, 2017,

outbreak of the World War 11.⁵⁹ The successive apartheid regimes feared that the introduction of television broadcasting would introduce unfavourable political influence and degrade the moral purity of the Afrikaans.⁶⁰ After the World War 11, the NP government placed a ban on any form of television broadcasting.⁶¹ It was not until 1976 when television broadcasting was officially launched in South Africa.⁶² In the meantime, SABC enjoyed monopoly over the airwaves till 1980s when new broadcasting entrants like M-Net pay television service was launched in 1986.⁶³ The current television broadcasting scenario is analysed in chapter seven paragraph 7.2.3 of this study.

4.3 Conceptualisation and Definitions in Broadcasting

The term that has gained currency in various discourses relating to broadcasting is traditional broadcasting or traditional broadcaster. At the advent of the Rome Convention, the term broadcasting was given a narrow definition ‘the transmission by wireless means for public reception of sounds or of images and sound.’⁶⁴ The Convention does not define the concept of broadcasting organisations as the subject of protection. The 2014 WIPO General Assembly restated its mandate that “the WIPO deliberations on the possible treaty for the rights of broadcasting organisations should revolve around traditional broadcasters.”⁶⁵ The word ‘traditional’ in this context is devoid of conceptual felicity. What does it relate to? Is it technology or platform or means of delivery? Traditional broadcasters may be taken to mean all the broadcasters envisaged under the Rome Convention.⁶⁶ They are radio and television broadcasters who propagate their signals over hertzian waves without physical conductors or guides for reception by the general public and are subject to regulatory controls.⁶⁷ By inference,

⁵⁹ See *supra* note 55.

⁶⁰ Libby Lloyd et al, *Public Broadcasting: A Survey South African Country Report* (2010) at 31.

⁶¹ See *supra* note 58.

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See art. 3(f) (the Rome Convention was adopted in 1960 and came into force in 1961 and effectively created three categories of neighbouring right holders namely; performers, producers of phonograms and broadcasting organisations).

⁶⁵ WIPO General Assembly, Report on the WIPO SCCR (WO/GA/46/5) Sept.22-30, 2014.

⁶⁶ See art.3 (f).

⁶⁷ See e.g., WIPO, Protection of Broadcasting organisations: Terms and Concepts, SCCR/8/INF/1 (August 16, 2002) at 3.

satellite broadcasting may be subsumed into traditional broadcasting since it embodies transmission over the air signals to and from satellites.⁶⁸

A broadcast is not defined or extrapolated in either the Rome Convention or any other relevant international instruments. A broadcast is understood to be the object of protection in a broadcast service.⁶⁹ It is argued that a broadcast is the signal constituting the wireless transmission of sounds or images or of both the sounds and images when such signals are intended for reception by the general public.⁷⁰ Therefore, the object of protection in broadcasting is the signals themselves and not the content they transmit⁷¹. If the content of the broadcasting is a football match, what is protected in this context is the signal and not the match itself.

Broadcasting as a concept has no standard definition. The definition varies with the evolution of technology and this conceptual dynamism will continue evolving with the ever changing technology. From the beginning, the term broadcasting was restricted to the transmission of signals over the air.⁷² However, in some jurisdiction the scope of broadcasting has been elongated to cover cablecasting and broadcasting by encryption.⁷³ Within the framework of international telecommunication law, radio and television broadcasting is one of the telecommunication services under the administrative competences of ITU. Radio frequencies and the geostationary satellite orbits are limited natural resources that must be used efficiently and economically in order to guarantee universal access to information. Proper citing and assignment of frequencies are necessary in order to avoid or minimise harmful interference or distortion to transmissions.

⁶⁸ See the Convention Relating to the Distribution of Programme-Carrying Signal Transmitted by Satellite art. 1 hereinafter called the Satellites Convention (it defines emitted signal as any programme-carrying signal that goes to or through a satellite. Any uplink to and downlink from a satellite is not guided by any physical device).

⁶⁹ See e.g., Electronic Frontier Foundation (EFF), Statement on the Broadcast Treaty (2012); See also EFF's position paper of 2007, on the proposed WIPO Treaty available online at <http://www.eff.org/issues/wipo-broadcasting-treaty>. Accessed on Dec. 24, 2016.

⁷⁰ See *id.*

⁷¹ See e.g., Thomas Dreier, Reflections on the Draft WIPO broadcasting Treaty and its Impact on Freedom of Expression, e-Copyright Bulletin (July-Sept., 2006) (Dreier argues that in a broadcasting service it is imperative to distinguish that content that is broadcast and the broadcast itself which comprises the technical output of a broadcasting organisation. The technical output, namely the signal, is the object of copyright protection. This arrangement will guarantee freedom of access to and use of the underlying content which may include football games.

⁷² See *supra* note 40.

⁷³ See e.g., *infra* note 86.

ITU therefore defines broadcasting service as a radio communication service in which the transmissions are intended for direct reception by the general public and this service may include sound transmissions, television transmissions or other types of transmissions.⁷⁴ It would appear that the concept of broadcasting under international telecommunication regime is broader and could encompass other types of transmissions otherwise than sound and images, for instance data, signs and intelligence information propagated in other forms than sound and images.

Although the Berne Convention⁷⁵ grants authors of copyright an exclusive right of broadcasting of their works, it does not, however, define the term broadcasting. The WPPT of 1996, however, sought to update the concept of broadcasting in response to the technological realities of the time. It defines broadcasting as “the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also broadcasting ; transmission of encrypted signals is broadcasting where the means of decryption are provided to the public by the broadcasting organisation or with its consent.”⁷⁶ This definition retains the basic feature of broadcasting namely ‘transmission over the air of images or sound for reception by the public. It means, therefore, that if a transmission via a communication satellite in space is intended for reception by another broadcaster or by the originating broadcaster’s own affiliate then that is not broadcasting but a pre-broadcast signal.⁷⁷ Such transmissions are simply point to point transmissions and cannot qualify as broadcasting.

In South Africa no judicial authority has attempted to specifically define the term broadcasting or broadcast. In *Southern Africa Music Rights Organisation Ltd v Svenmills Fabrics (Pty) Ltd*,⁷⁸

⁷⁴See International Telecommunication Convention (Nairobi 1982), Annex 2-2012 at 150(the Convention also defines a radiocommunication as telecommunication by means of radio waves. Radio waves are electromagnetic waves of frequencies arbitrarily lower than 3000 GHz, propagated in space without artificial guides).

⁷⁵ See art. 11^{bis}.

⁷⁶See, WPPT art. 2 (f).

⁷⁷ See e.g., WIPO SCCR/24/5, The Draft Treaty on the Protection of Broadcasting Organisation: Joint Proposal by South Africa and Mexico (the proposal characterises pre-broadcast signal as a private transmission of content to a broadcasting organisation which the broadcasting organisation intends to include into its programme schedule) (this characterisation is narrow in scope because it pre-supposes a private transmission from another source but meant for use by the broadcasting organisation. It leaves out a transmission originated by one organisation from a remote location being relayed to its studios before being made available to the public).

⁷⁸ (1983) (1) SA 608 C at Para.24.

the High Court in defining the term broadcast, it restated the definition of a broadcasting service in Section one of the Broadcasting Act 73 of 1976. Such broadcasting service cited in Section one consists of the broadcasting of television or sound broadcasting or material to the public, sections of the public or to subscribers... In *South African Broadcasting Corporation Limited (SABC) v National Director of Public Prosecutions and Others*,⁷⁹ the Supreme Court glossed over the concept of broadcasting by citing the objectives of SABC to include transmission of sound and television programmes of information, education and entertainment. The provision of sound and television programmes implicates broadcasting. Copeling's definition of television broadcast relates to the period prior to 1965 as "visual images broadcast by way of television together with any sounds broadcast for reception along with the images."⁸⁰ The judicial decisions and other relevant literature have not deconstructed the concept of broadcasts or broadcasting.

The current South African broadcasting legislation⁸¹ gives the term broadcasting a broader definition than the copyright legislation which restricts broadcasting to over-the-air transmission without artificial guides.⁸² While the broadcasting legislation in South Africa envisages transmission over other communication means including cable and internet transmissions, its counterpart, the copyright legislation restricts broadcasting to over-the-air transmissions. The broadcasting legislation defines broadcasting as "any form of unidirectional telecommunications intended for the public, sections of the public or subscribers to any broadcasting service having appropriate receiving facilities whether carried by means of radio or any other means of telecommunication ..."⁸³ Its copyright counterpart defines a broadcast when used as a noun as:

[A] telecommunication service of transmission consisting of sounds, images, signs or signals which; (a) takes place by means of electromagnetic waves of frequencies of lower than 300GHZ transmitted in space

⁷⁹ (2007) (1) SA 523 (CC) at Para 26.

⁸⁰ A.J.C. Copeling "Copyright in Broadcasts in the Republic South Africa" 5 *Comparative and International Law Journal of South Africa* (1972) at 8 (Copeling focused on ss 1 and 15 of the 1965, Copyright Act of South Africa).

⁸¹ Broadcasting Act NO.4 of 1999, s.1 (it defines broadcasting as any form of unidirectional telecommunication intended for public, section of the public or subscribers to any broadcasting service having appropriate receiving facilities, when carried by means of radio or any other means of communication or any combination of the aforementioned and 'broadcast' is construed accordingly).

⁸² See Copyright Act NO.98 of 1978, s.1 (the provision attempts to define the term broadcast by which the term broadcasting is inferred by implication).

⁸³ Broadcasting Act 4 of 1999 s. 1 (1) (the phrase any other means of telecommunication may be interpreted to include cable and internet transmissions).

without artificial conductors, and (b) is intended for reception by the public or sections of the public and includes the emitting of programme-carrying signals to satellite, and when used as a verb shall be construed accordingly.”⁸⁴

The phrase “without artificial conductors” implies wireless transmission. This means that the signal is propagated over the air without any artificial guide. Therefore in South Africa, the concept of broadcasting in the Broadcasting Act is broader than in the Copyright Act.

In Kenya the Copyright Act defines ‘broadcast’ to mean “ the transmission, by wire or wireless means of sounds or images or both or the representations thereof, in such a manner as to cause such images or sounds to be received by the public and includes transmission by satellite.”⁸⁵ From the wording of the definition, one would conclude that what were intended to be defined is the verb broadcast or broadcasting and not the noun broadcast. Besides, the definition makes it crystal clear that broadcasting in Kenya under the copyright law embodies both wire and wireless transmission. Wire transmission would by implication cover cablecasting and net casting. According to the Kenya Information and Communications Act as amended in 2013, broadcasting means “unidirectional conveyance of sounds or television programmes whether encrypted or not by radio or other means of telecommunication, for reception by the public.”⁸⁶ This definition does not materially differ from the one found in the copyright legislation although the term ‘by other means of communication’ may suggest a broader concept of broadcasting to include interactive services.

On its part, Kenya Broadcasting Corporation Act defines broadcasting to mean radio communication whether by sound or vision for reception by members of the public.⁸⁷ The Act also defines radio communication to imply transmission over the air of electro-magnetic energy of a frequency not exceeding 3000,000 megahertz.⁸⁸ The concept of broadcasting is narrower in the Kenya Broadcasting Corporation Act than in the Copyright Act. In *Communications*

⁸⁴ South Africa Copyright Act No. 98 of 1978 s. 1(1).

⁸⁵ Kenya Copyright Act, 2001 s.2 (1).

⁸⁶ See s. 2 (the Kenya Information and Communications Act creates under s.3 the Communications Authority of Kenya which is the national telecommunications regulatory agency.

⁸⁷ Kenya Broadcasting Corporation Act of 1989, Revised Ed. 2012 s. 2.

⁸⁸ *See id.*

Commission of Kenya and Five Others v Royal Media Services Limited and Five Others,⁸⁹ the supreme Court of Kenya adopted the definition of the term broadcasting from the Philippines Intellectual Property Code as “the transmission by wireless means for the public reception of sounds or of images or of the representations thereof; such transmission by satellite is also broadcasting where the means of decrypting are provided to the public by the broadcasting organisation or with its consent.” While noting that definition of the term broadcasting under the Filipino Code is broader than the Kenyan Copyright Act⁹⁰ definition, the Supreme Court observed that conceptually, they bear close resemblance.

Time-shifted viewing is a legal term which initially referred to the recording of a broadcast such as television programmes via video home systems (VHS) or Betamax tapes for later viewing.⁹¹ The concept has changed today to mean content watched via a personal video recorder (PVR), set-top box, or an online or pay catch-up service within seven days of original broadcast.⁹² The time shifting viewing that takes place seven or more days after the day of broadcast is considered as a video and today time-shifting is possible up to twenty seven days.⁹³ This kind of service is becoming increasingly popular because it can address different consumer interests at different times and locations individually chosen by the viewer. The content viewing may include football game and other programme content like movies, documentaries and talk-shows.

A signal is defined as an electronically- generated carrier capable of transporting programme.⁹⁴ One may pose a question whether a broadcast football match is a programme? The Satellites Convention defines a programme as a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purposes of ultimate distribution.⁹⁵ Since recorded football games comprise images and sounds, they fall within the ambit of programme. Technically, a signal is an electric or electromagnetic pulse that transports a telecommunication

⁸⁹ (2014) eKLR Para. 242.

⁹⁰ See *supra* note 82.

⁹¹ See Copyright Laws, at www.copyright.laws.com/time-shifting accessed on Oct.30, 2016.

⁹² WIPO, *Current Market and Technology Trend in Broadcasting Sector*, SCCR/30/5 (2015) at 14.

⁹³ Stichting Kijkonderzoek, *Time-shifting Viewing 28 Days after broadcasting* (2015) available at www.kijkonderzoek/images/2015, accessed on Nov.12, 2016.

⁹⁴ See, Satellites Convention *supra* note 68, art.1.

⁹⁵ See *id.*

material.⁹⁶ The concept of signal is important because, it is arguably the basis of copyright protection in a broadcast service.⁹⁷ However, there are other scholars who hold the view that the copyright protection of broadcasting organisation must be based on content because signals are evanescent, imperceptible and therefore ineffectual.⁹⁸

4.3.1 Platforms of Broadcasting

Broadcasting platforms may broadly be divided into two major classifications. The first one is linear transmission and the second, non-linear transmission. The two platforms operate in complementarity in fulfilment of diverse and increasingly changing audience tastes and preferences.

4.3.2 Linear Transmission

Linear transmission is one in which the broadcast content is consumed at the time of the broadcast direct from the broadcast source.⁹⁹ In other words, linear transmissions are downlink transmissions with programme content propagated in a time sequence determined by the broadcaster.¹⁰⁰ Linear transmissions are mass television services that are normally available on the ordinary broadcast receiving sets like radio and television sets, and set-top boxes, among others.¹⁰¹ From the above analysis, it can be stated that linear transmissions include traditional broadcasting services that may be delivered on analogue or digital platforms. Linear broadcasts must be viewed at the scheduled time and on the channel prescribed by the broadcasting organisation. This may therefore include a simulcast or near simulcast of a traditional broadcast

⁹⁶ See Michael Handler, Panel Case and Television Broadcast, 25 *Sydney L.REV.* 399 407 (2003) (Handler argues that a signal on its own has no commercial value); *Protection of broadcast sports events must be based on content in order to carry any commercial sense*. Lucio Colantuoni and Christiano Navazio, Intellectual Property Rights in Basketball 1-2 *INT'L Sports L.J.* 58 60(2010).

⁹⁷ See e.g., EBU and ACT, *Joint Proposal to Improve SCCR24/10* Document (Presented to WIPO Inter-Sessional Meeting of April 10-12, 2013; the committee re-affirmed the decision of the General Assembly that the protection of the broadcasting organisations must be established on a signal-based approach and the convening of a diplomatic conference must be reflect that fact, WIPO SCCR 17th Session, Protection of Broadcasting Organisations (Nov.3-7, 2008).

⁹⁸ See *supra* note 57.

⁹⁹ See *supra* note 53.

¹⁰⁰ ITU, *Trends in Broadcasting: An Overview of Developments* (2013) at 7, available at <http://www.itu.int/en/ITU-D/Technology/Documents/Trends.Pdf>.

¹⁰¹ See Ofcom, *Linear vs Non-Linear Viewing*, available at http://www.ofcom.org.uk/_data/assets/pdf. Last accessed on April 2, 2015.

service over other platforms like internet, pay-TV service and, cable transmissions.¹⁰² Different types of linear transmission platforms are individual analysed below.

4.3.1.1 Terrestrial Broadcasting

This is the transmission by which signals are sent over the earth's surface from a transmitter on land, rather than by satellite.¹⁰³ It was the first platform used for broadcasting by which radio and television signals were propagated over-the-air for reception by the general public.¹⁰⁴ One terrestrial transmitter depending on its strength and could cover as many as 2,000,000 people.¹⁰⁵ This kind of transmission was originally designed to be wireless without any physical guide and was point to multipoint.¹⁰⁶ The broadcast signal must originate the source and reach multiple points at the same time. From the beginning, terrestrial broadcasting was based on analogue technology.¹⁰⁷ Analogue transmission is continuously variable along amplitudes and frequencies which have large bandwidth. Because of limited bandwidth, analogue transmission cannot support high speed data and is prone to sound and picture distortion.¹⁰⁸

The 21st century has witnessed a migration from analogue to digital broadcasting.¹⁰⁹ Digital migration involves a total transmission switch over from analogue to digital technology in the terms of the guideline and timelines set by the ITU.¹¹⁰ Digital transmission involves turning data into binary digits (bits) for strong processing and transmission purposes.¹¹¹ Digital signals are

¹⁰² See., Guillaume Posch, Transformation of Television Industry, Brussels, Cable Congress, March 11, 2015.

¹⁰³ Collins Dictionary and Thesaurus, (3rd ed. 2005) at 1249.

¹⁰⁴ See WIPO, *Protection of Broadcasting Organisations: Technical Background Paper Prepared by the Secretariat*, SCCR/7/8 May 13-17, 2002) at 3.

¹⁰⁵ See *id.*

¹⁰⁶ Roland Beutler, *The Future Role of broadcasting in the World of Changing Electronic Communication*, EBU Technical Review 2013-Q1 at 7.

¹⁰⁷ See *id.*

¹⁰⁸ Lillian Goleniewski, *Telecommunication Technology Fundamentals* (2001) at 6 available on <http://www.informit.com/articles/article.aspx> accessed on November 20, 2016 (the article is a chapter from the book titled 'Telecommunications Essentials: Complete Global Source for Communications Fundamentals...').

¹⁰⁹ See *supra* note 61.

¹¹⁰ ITU, *Press Release on Digital Terrestrial Broadcasting* (2006) available on http://www.itu.int/newsroom/press_release/2006/11.html (the ITU member states resolved that by 2015 all regions of the world would have attained a total switch-over from analogue to digital terrestrial audio and television broadcasting).

¹¹¹ Makolo Sasaki, *Terrestrial Digital Television, Broadcasting Technology* NO. 20 (2004).

transmitted in a series of discreet pulses representing bits of one and zero.¹¹² Digital technology has brought into the world wide-ranging dividends including, expanded services, high quality audio and video, faster data transfer, and efficient and effective use of spectrums.¹¹³ Digital technology has brought about broad possibilities in the field of broadcasting and distribution of content including, mobile reception video, internet and multimedia video, hand-held television broadcasting (DVB-H), and high definition television (HDTV).¹¹⁴

4.3.1.2 Satellite Broadcasting

Satellite broadcasting is another form of linear transmission by which signals are propagated over the air via geostationary satellites.¹¹⁵ Satellite broadcasting is the distribution of content over satellite networks. The audio and video signals are acquired at the uplink and origination point to a geostationary satellite which downlinks the signals to predetermined geographical area otherwise called footprint.¹¹⁶ Satellites are located in geostationary orbits above the earth and cover a much wider geographical area than terrestrial broadcasting.¹¹⁷ Satellites offer alternative to ground-based terrestrial broadcasting. The diagram below shows the layout of satellite broadcasting.

¹¹² See *id.*

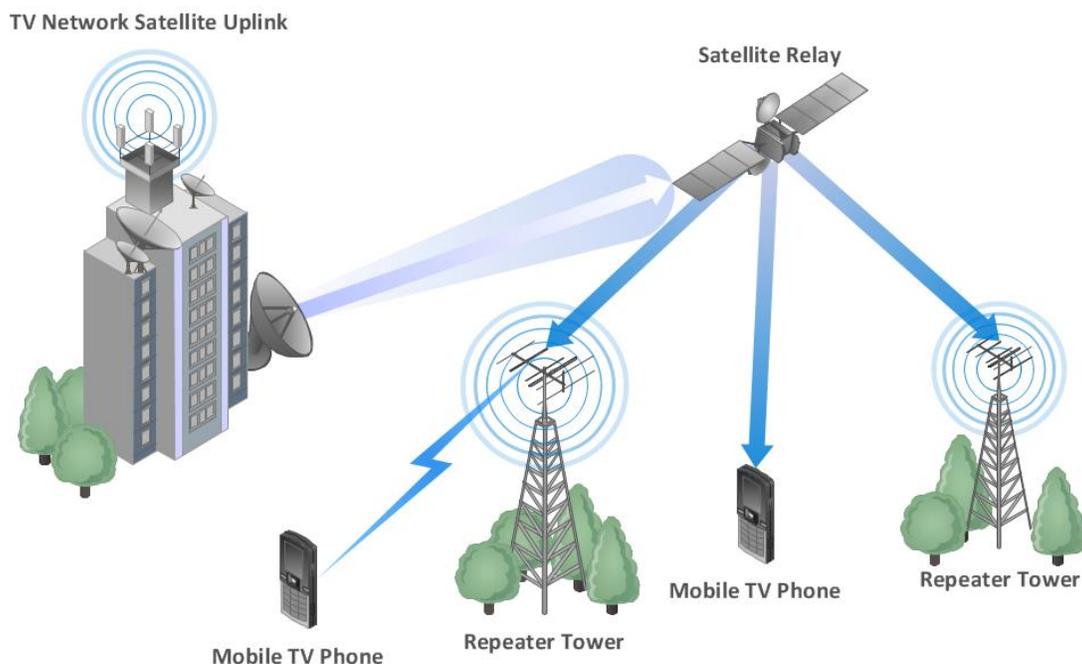
¹¹³ See *supra* note 69.

¹¹⁴ See *supra* note 70.

¹¹⁵ See e.g., Oyansola Ogundele and Yinusa Adediran, *History of Satellite Broadcasting: Development of Radio and Television Technology* (2010) Para.12 (Faculty paper available at the Library of the Federal University of Technology, Nigeria). Is this referencing format adequate? Check for completeness.

¹¹⁶ Hezekiel Oira *Addressing the Controversies of Neighbouring Rights of Broadcasting Organisations under Kenyan and International Law*, LLM thesis, University of Nairobi (2006) at 21.

¹¹⁷ See *supra* note 74.

Table 4.2

Source: ITU Satellite Broadcasting Images

The history of satellite broadcasting service can be traced to 1957 when the Russians launched their first man-made orbiting device SPUTNIK1; which was followed by the actual television signal distribution over geostationary satellite in 1960s.¹¹⁸ Satellite broadcasting has since revolutionised the world. It has not only transformed the world into a global village but has also broadened commercial opportunities for premium content. For instance in 1914, during the FIFA World Cup tournament which took place in Brazil 3.2 billion people globally watched live the event through the instrumentality of satellite broadcasting.¹¹⁹ Such sporting events and premium content have become global mediated commodities. Besides, satellite broadcasting has brought about inter-cultural influence through global sharing of information and culture.¹²⁰

¹¹⁸ See Davis Whalen, *Communication Satellites: Making a Global Village*, available at <http://www.nasa.gov/history/nasa/gov> accessed on Dec. 2, 2016.

¹¹⁹ See <http://www.fifa.com/worldcup/news/Y=2015-fifa-world> accessed on Nov. 23, 2016.

¹²⁰ Tom Martelanc, *Social and Cultural Impact of Satellite-based Television*, (1974).

Satellite broadcasting is divided into Fixed Satellite service and Direct to home Satellite broadcasting or Direct Broadcasting Satellite (DBS).¹²¹ The former is a point-point satellite service which is operated over either c-band or Ku-band. ITU refers to Fixed Satellite service(FSS) as radio communication service between earth stations at given positions when one or more satellites are used, and in some cases these services may include satellite to satellite link or may provide links to other radio communications.¹²² The DBS, on the other hand, is a television service which is delivered directly to the viewer via communication satellites. The signal is received by satellite dishes and set-top boxes or by any other integrated receiving device.¹²³ WPPT defines the term broadcasting to include satellite broadcasting.¹²⁴ It would appear that, it is the direct-to- home satellite broadcasting which may fall well with the definition of broadcasting because it is meant for reception by the public.¹²⁵ The FSS may qualify to be referred to as a private telecommunication which is not available for public reception.¹²⁶ Therefore, it would appear that any satellite transmission from a venue of a sporting event to the studios of that broadcasting organisation may not qualify as broadcasting but as a pre- broadcast signal.¹²⁷

Frequently, satellite broadcasters employ encryption technology to restrict the reception of their programmes.¹²⁸ Such technology can also be used to limit the programme distribution geographically. Premium programmes like football games are encrypted before transmitted through direct communication satellites. In this case, equipment necessary for decryption of the scrambled programmes, like smart cards and the decoders are issued to the subscribers. The largest DBS-based pay television in Africa, Multichoice Africa and British Sky broadcasting Limited employ such technology in order to deliver to the public premium content including the

¹²¹ Kathryn Queeney, *Direct Satellite and United Nations* (1978) at 67.

¹²² ITU Radio Regulations, art. 1 (21).

¹²³ OECD, *Competition Issue in Television and Broadcasting* (2013) available online at <http://www.oecd.org/daf/competition/tv-and-broadcasting-2013.pdf>. Last accessed on June 2, 2017.

¹²⁴ See art. 2 (f); broadcasting means the transmission by wireless means for public reception of sounds or images or of images and sounds or of the representations thereof, such transmission by satellite is also; transmission of encrypted signals is also broadcasting where the means for decrypting are provided to the public by the broadcasting organisation or with its consent, the Beijing Treaty on Audiovisual Performances (2012), art. 2(c).

¹²⁵ See *supra* note 42.

¹²⁶ See *supra* note 48.

¹²⁷ See *id.*

¹²⁸ See *supra* note 98, See also *British Sky Broadcasting Ltd and Sky Television PLC v The Performing Rights Society Ltd*, UK, Copyright Tribunal Case NO. 123 of 1997 (*unreported*) at 20.

English Football Premier League (EPL) matches¹²⁹ There are, however, free-to-air (FTA) satellite systems that are designed to be received over-the-air unscrambled. They include Organisation de Radio et Télévision Malienne (ORTM) a French language satellite broadcasting originating in Mali; which is received in the USA on an FTA basis via the West Galaxy 19 satellite.¹³⁰ The most vexing problem is the choice of the place of broadcast, is it the country of uplink or is it the countries where the satellite footprint affects and where the signal is received (country of downlink)? Although the matter is not universally settled, in other jurisdictions the law and place of broadcast is the uplink country.¹³¹

4.3.1.3 Cable Broadcasting

This is television transmission via optical fibre or any fixed coaxial cable which allows operator to avoid the traditional system of broadcasting antennae.¹³² This kind of transmission is called cablecasting. Cablecasting is the transmission of the programme-carrying signals by wire for reception by the public; transmission by wire of encrypted signals is cablecasting where the means of decryption are provided by the cablecasting organisation or with its consent.¹³³ The operation of cablecasting involves transmission of video for public reception via physical conductors. Cablecasting systems have been in existence for many years; initially designed to cover the so-called shadow areas where normal television reception was difficult or impossible.¹³⁴ However, these systems evolved in 1990s in terms of capabilities to carry several programmes either from terrestrial broadcasting, internet, and satellite or even by way self-programme generation (cable-originated programmes).¹³⁵

Cable operators run two modes of transmission; either as carriers where the cable network is a physical transmission facility, used as a conduit for third party materials known as cable

¹²⁹ See Mugambi Mutegi, DSTV Under Fresh Probe over Exclusive Premier League Deal, *Business Daily*, Nov.3 2016.

¹³⁰ Mike Kohl, *Global Communication: Ku-Band FTA Satellite Received in the USA* (2015) available on <http://www.global.cm.net/us> accessed on Dec. 3, 2016.

¹³¹ See *Lagardère Active Broadcast v Société Pour la Perception de la Remuneration Equitable* C-192/04 (2005) ECR I-7199 ECJ.

¹³² See *supra* note 82.

¹³³ See e.g., WIPO, *Revised Consolidated Text on Definitions, Object of Protection and, the Rights to be Granted*, SCCR/32/3 (2006).

¹³⁴ Walter Ciciora, *Cable Television in the United States: An Overview* (1995) also available on <http://www.people.seas.harvard.edu/~jones/cscie129/nu-lecture13/pdf>. Last accessed on Nov.12, 2016.

¹³⁵ WIPO, *Intellectual Property Handbook: Policy, Law and Use* (2001) at 453.

retransmission, or as content providers transmitting content which the cable operator has selected or produced known as cable-originated programmes.¹³⁶ Cable-originated programs are transmitted to the public in a manner analogous to broadcasting and have been accorded copyright in certain jurisdictions like Kenya.¹³⁷ The Rome Convention does not recognise as broadcasters, cable operators or any form of wire distribution because broadcasting is restricted only to over-the-air transmissions.¹³⁸ Cable retransmission of broadcast signals is a commercial practice that is prevalent in most jurisdictions in order to ensure that public service broadcasting is accessed by as many people as possible. In this case cable operators are obliged to a must-carry rule obliging them to retransmit the broadcasts or some programmes of public service broadcasters.¹³⁹ Cablecasting being a closed-circuit service whereby transmission is done through physical conductors, unauthorised fixations and retransmissions are not uncommon.¹⁴⁰ There is now increasing global consensus that cable-originated programmes should be subsumed into broadcasting and enjoy all the intellectual property rights that broadcasts merit.¹⁴¹

4.3.1.4 Broadcasting by Encryption

Signal encryption is a commercial mode of broadcasting by which a broadcast signal is scrambled so that it cannot be accessed or intelligibly seen.¹⁴² In order to access the broadcasts one needs a ‘key’ or magic number that unscrambles the broadcasts. The key is issued to the authorised users either against payment of a fee or after confirmation that the user is indeed authorised to so access the broadcast.¹⁴³ An encryption scrambles the bits of digitised content which can only be descrambled (decrypted) by authorised set-top- boxes (STB).¹⁴⁴

¹³⁶ See *supra* note 65 at 6.

¹³⁷ See Copyright Act No. 12 of 2001, s. 2(h) (it defines broadcast as transmission by wire or wireless means of sounds or images or both or the representation thereof, in such manner as to cause such images or sounds to be received by the public and includes transmission by satellite).

¹³⁸ See *supra* note 38.

¹³⁹ See *supra* note 65 at 6.

¹⁴⁰ See *supra* note 75 at 25.

¹⁴¹ See *e.g.*, WCT art. 8 (the article grants a right of communication to the public, by wire or wireless means, for all categories of works, this therefore means that cable-originated programmes are envisaged because such programmes are scheduled and technically undertaken by an entity that assumes editorial responsibility therefor).

¹⁴² Dean Marks and Bruce Turnbull, *Technical Protection Measures: The Intersection of Technology, Law and Commercial Licensing*, European Intellectual Property Rev. (2007) at 198.

¹⁴³ See *id.*

¹⁴⁴ Selichi Nambia, *Technologies and Services of Digital Broadcasting: Scrambling (Conditional Access Systems)*, NHK, *Japan Broadcasting Technology Policy Document No. 2* (2002) at 10. Available online at <http://www.nhk.or.jp/str/publica/bt/bt12/pdf>. Last accessed on Dec.27, 2016.

The authorisation is managed by Conditional Access System (CAS) which is linked to the Subscriber Management Systems (SMS) and other Back-up Support Systems (BSS).¹⁴⁵ Encryption uses an algorithm to scramble the content based on the encryption key also known as a Control Word (CW).¹⁴⁶ The CW is changed on a regular basis to deter hacking.¹⁴⁷ The encryption system generates the CWs and provides them to the CAS. The CAS generates entitlement messages that are sent to the STB. The entitlement messages are used to identify on an STB by STB basis, which programmes can be viewed.¹⁴⁸

The use of the scrambling algorithm creates options for STB choices. The most widely adopted standard is the Common Scrambling Algorithm (CSA) which is commonly used in Europe.¹⁴⁹ Another scrambling algorithm is the Advanced Encryption Standard (AES) which is widely employed in Internet Protocol Television (IPTV).¹⁵⁰ This platform of transmission offers opportunity for commercialisation of programme content including sporting activities. Encryption technology and pay television services restrict access of content to the public.¹⁵¹ Football organisers, FIFA and its affiliated continental and national associations exercise monopoly over football broadcast rights and thereby making the costs of their procurement expensive. These commoditised football events become unaffordable on the part of free to air broadcasters. This has seen the migration of football events from FTA broadcasters to pay-TV platforms.¹⁵²

Encryption, on the other hand, is a self-help mechanism in form of technical measures of protection. This mode of exploitation buttresses the real fears amongst right holders that digital reproduction and communication technologies present a threat of such widespread private copying that, copyright law, by itself cannot be relied upon to protect the investment involved in

¹⁴⁵ *See id.*

¹⁴⁶ W.G. Mooji, *Conditional Access Systems for Digital Television Broadcasting, International Broadcasting Convention*, IEE Conference Publication No. 397 (1997) 490.

¹⁴⁷ *See Id.*

¹⁴⁸ INTELSAT, *Direct-to-home (DTH) Service, (2011) at 4.*

¹⁴⁹ *See id.*

¹⁵⁰ *See Id.*

¹⁵¹ *See Mudgal supra note 10 at 213.*

¹⁵² *See Tom Evens et al, The Political Economy of Television Sports Rights (2013) at 54.*

creating and publishing the work.¹⁵³ However, such encryption should not restrict activities beyond what is necessary to protect under copyright laws. The issue central to this study is whether a football game constitutes a work so as to enjoy copyright-assisted technical measures of protection.

4.3.1.5 Internet Transmissions

The internet is a global system of connected networks that are connected by virtue of the use of common protocol, created through an open standard-setting process.¹⁵⁴ The World Wide Web has been widely adopted from the 1990s and by virtue of its open nature along with its multifunctional character; its technical capability has enormously grown. The open network is providing access to a digital medium in which multiple perfect copies of text, images and sounds can easily be transmitted.¹⁵⁵ There are two methods that are used to deliver content over internet namely downloads and streaming.¹⁵⁶ Accessing the majority of the internet content involves downloading a copy of the content onto the user's personal computer. The texts of the web pages and images are typically downloaded but with media files, may also be streamed.¹⁵⁷

Download methods are designed to ensure reliable data transfer; should any packet get lost which may result (in case of progressive downloading) in playback interruptions, while lost data is buffered.¹⁵⁸ Conversely, the streaming method of video delivery aims to ensure an uninterrupted real-time viewing. Internet television services which show live broadcasts typically rely upon streaming, as all users are viewing content at the same point in time.¹⁵⁹ Streaming and downloading methods can use various network protocols to transfer data, with both techniques able to work using peer to peer and TCP/IP standards.¹⁶⁰

¹⁵³ Lionel Bentley and Brad Sherma, *Intellectual Property Law* (4th ed. 2014) at 359.

¹⁵⁴ WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use* (1998) at 556

¹⁵⁵ *See id.*

¹⁵⁶ *See supra* note 133.

¹⁵⁷ *See* WIPO SCCR, *supra* note 38 at 8.

¹⁵⁸ Royal Van Horn, *Streaming Video and Rich Media*, 18 *The Phil Delta Kappan Journal*, 562 (2001).

¹⁵⁹ *See e.g.*, Karen Fessler, *Webcasting Royalty Rates*, 18 *Berkeley Tech. L. J.* (2003) at 412.

¹⁶⁰ *See id.*

4.3.1.5.1 Webcasting/streaming

Webcasting is the new model of content delivery on internet. Webcasting may encompass both on-demand services and real-time streaming.¹⁶¹ Access to internet is normally supported by telecommunication networks (wire communication), but may also be wireless. Internet-based streaming is normally a point to point technical activity although the programme is transmitted to several recipients.¹⁶² Typically, there is an individual connection between each user and the source of the streamed content (host).¹⁶³

Although content is streamed in conformity with the scheduled time by the person responsible for the host, access to the stream is instigated by the receiving person at the time individually chosen by him via the server.¹⁶⁴ Today internet has evolved to extend to such non-linear platforms as internet protocol television (IPTV) services, over-the top (OTT) services and VOD.¹⁶⁵

4.3.1.5.2 Simultaneous Transmission

Simultaneous transmission is the dissemination of the same broadcast over two different platforms.¹⁶⁶ This could happen when a broadcasting organisation carries out simultaneous broadcasting and streaming over the internet of the broadcast. The broadcasting organisation is said to be simulcasting its broadcast.¹⁶⁷ Traditional broadcasting organisations often simulcast their broadcast over various platforms. Such platforms may be either analogue or digital. Simultaneous transmissions may include radio programmes being simultaneously transmitted over internet network.¹⁶⁸ The issue whether the concept of a broadcasting service also covers

¹⁶¹ Steve Jones, Music and the Internet, *19 Popular Music Journal No.2* (2000) at 218.

¹⁶² Linda Pickering et al, Music on Internet: How to Minimise Liability Risks While Benefitting From the Use of Music on Internet, *15 BUSINESS L.J.* (1999) at 420.

¹⁶³ See *id.*

¹⁶⁴ See *supra* note 125.

¹⁶⁵ See *OECD supra* 123.

¹⁶⁶ See *supra* note 36 at 12.

¹⁶⁷ See e.g., Yu Choi, *Simultaneous Transmission and Reception: Algorithm* (2013) at 3.

¹⁶⁸ See D. Son, *Experimental Study of Concurrent Transmission in Wireless Sensors*, available at www.isi.edu/~John/Paper/son.pdf. Accessed on Dec. 16, 2016.

internet streaming or retransmissions is a controversial one. In Australia, the Court of Appeal held that broadcasting rights do not include simultaneous radio broadcast over internet.¹⁶⁹

4.3.1.6 Mobile Television

Mobile television is a modern transmission of television channels over a small hand-held mobile device.¹⁷⁰ It includes pay television services via mobile phone networks or FTA broadcasts via terrestrial stations.¹⁷¹ This new platform of broadcasting signals to the public via mobile devices or the like is at times called mobile casting. Mobile casting is defined as a mobile-content distribution in which television programmes are delivered to mobile phones.¹⁷² It is the transmission of on-demand, recorded or live audio-visual content to the receiver, at a rested position or on the move.¹⁷³

Television content to mobile devices can be distributed in several ways. Such content distribution may be realised through the use of DVB digital television standard or is downloaded via a third generation (3G) connection or slide-loaded onto the mobile device after the downloading via a fixed internet connection.¹⁷⁴ One of the commonest standards used for linear broadcasting is DVB-H which is optimised by hand-held devices. DVB-H services technically function like a digital terrestrial service where the user picks a range of linear television channels.¹⁷⁵ DVB-H cannot support on-demand access to content but can be combined with DVB-T multiplexes and broadcast from the same tower; though mobile operators prefer owning their own infrastructure. 3-G cellular standard may be enhanced by multimedia broadcast multicast systems (MBMS) which have point-multipoint transmission capabilities.¹⁷⁶ Traditionally mobile content distribution was unicast- focusing on data transmission intended for reception by a single user and could not address content distribution to a large number of

¹⁶⁹ See *Phonographic Performances Company of Australia Ltd v Commercial Radio of Australia Ltd* (2013) FCAFC 11.

¹⁷⁰ See eg. Makoto Manabe and Lois Lydens, *Making Connections: Using Mobile Phones as a Museum Tool* (2007) at 30.

¹⁷¹ See *supra* note 114 at 10.

¹⁷² Community Broadcasting Foundation Ltd, *Mobile Broadcasting for Community Radio Stations* (2009) at 4.

¹⁷³ Mobile TV World available at <http://www.mobiletvworld.com/p/Glossary.aspx>.

¹⁷⁴ See e.g., *supra* note 53.

¹⁷⁵ See *supra* note 172.

¹⁷⁶ Pablo Anguira et al *Next Generation Mobile Broadcasting* (2013) at 1-39.

users.¹⁷⁷ The advent of the MBMS made multicast and broadcasts to a large number of users possible.¹⁷⁸

Because of the growing importance of mobile casting, several European countries have dedicated the lower band of UHF broadcasting spectrum—790—862 MHz to mobile operators.¹⁷⁹ The growth of smart phones, tablets and 3-G and 4-G networks have fuelled the growth of and demand for mobile video access. In 2013, BBC reported that 47 per cent of its player requests came from mobiles and tablets.¹⁸⁰ Mobile phones can transmit live or deferred sports broadcasts and texts. If a football transmission over mobile devices is a mere retransmission of a terrestrial broadcasting service, it may not qualify as a broadcast that merit copyright protection.¹⁸¹

4.3.3 Non-Linear Transmissions

Non-Linear transmissions occur over platforms which require some level of user interaction beyond switching on and selecting a programme menu.¹⁸² Put differently, non-linear content refers to material that is consumed on request outside the original broadcast period. The user can select individual pieces of content and control, as a minimum, the timing and sequence of the consumption of the content.¹⁸³ The user exercises autonomy to decide what to consume, when and where to consume it and which device. The user has a choice not use the traditional receiving sets (radio and television receiving sets) and opt to use such devices as smart phones, tablets, smart watches, MP3 player, and computers.¹⁸⁴ Non-linear transmissions are based on video or audio on demand or pre-recorded services that include archived programmes, time-shifted services, catch-up, video-on-demand, and internet interactive services each of which is analysed below.¹⁸⁵

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

¹⁷⁹ Walid Sami, *How Mobile Broadcasting Networks Use Adjacent Bands* (2011) (this was a report commissioned by the European Broadcasting Union in collaboration with ITU in order to make a technical review of the impact of mobile broadcasting on the lower band of UHF and whether such operations could have harmful effects on other adjacent telecommunication operators).

¹⁸⁰ WIPO, *Current Marketing and Technology Trends in The Broadcasting Sector* (2015) at 21.

¹⁸¹ *See e.g., supra* note 137.

¹⁸² *See supra* note 53 at 14.

¹⁸³ Roland Beutler, *Evolution of Broadcast Content Distribution* (2012) at 6.

¹⁸⁴ *See EBU infra* note 195.

¹⁸⁵ *See Id.*

4.3.3.1 Time-shifted Services

Time-shifted service is watched via a personal video recorder (PVR) or via an online or pay-catch-up service within seven days of the original broadcast.¹⁸⁶ Time-shifting can also refer to the practice of broadcasting television at different time zones. Time-shifted viewing that takes place seven or more days after the day of transmission is reported as video.¹⁸⁷ Time-shifting was coined by the Sony Corporation founder, Akio Morita in 1979. He summarised the term as follows:

The concept of time-shifting has now become common, and although the phrase sounds like something new, any tape recording of a speech or musical performance, or news event, or any film including your home movies represents time-shift. I have been dealing with time-shift all my life, from the time of my mother and listened to those old classical records, to when Noria Ohga said he needed a vocal mirror.¹⁸⁸

The concept of time-shifting typically entails recording of a transmission to be watched later. The issue is whether a time-shifted programme or broadcast of a football is a fixation of a broadcast which if unauthorised by the broadcaster is tantamount to copyright infringement. The Supreme Court of the USA held that the practice of recording television programmes and watching them at a later time was a non-commercial, non-profit activity that had no demonstrable effect upon potential market for, or the value of, the copyright work.¹⁸⁹

4.3.3.2 On Demand Services

On-demand services are those transmissions that carry audio and video content on demand on the part of customers. The most popular on demand transmissions are Video on demand Services (VOD).¹⁹⁰ VOD is a streaming service that gives customers the chance to select when and where to watch or listen to the preferred programme. Video on demand services produced by broadcasters enable the users to select a video programme and have it sent to them via a cable or satellite connection; either for direct viewing or the film may be stored in the users' hard disks in

¹⁸⁶ See e.g., supra note 53.

¹⁸⁷ See supra note 54.

¹⁸⁸ Jonah Volk, *Betamax Case and the History of Timeshifting Copyright, Legal Issues and Policy* (2008) at 1.

¹⁸⁹ *Sony Corporation of America v Universal City Studio Inc. and Walt Disney Production*, 464 U.S. 417 (1984) (the case is otherwise called the Betamax case).

¹⁹⁰ See supra note 53.

the television sets and watched later.¹⁹¹ The customers or subscribers are given the possibility to continuously access any desired video stream and manage it (pause, random access, fast-forward, fast-reverse etc.).¹⁹² VOD constitutes major business models for broadcasting organisations that may operate on either a pay-per-view or gratuitous basis.

The architecture of VOD consists of video servers, transport network, service gateway, and the Subscribers' STB devices.¹⁹³ All these components are integrated into a network by which VOD services are offered. The video formats that are employed are either the standard definition (SD) or high definition (HD), both of which guarantee high picture resolutions.¹⁹⁴ These services can be offered on smart phones, laptops or on computers. The VOD services offered on the basis of subscription is called subscription video on demand (SVOD) in which a customer enters into a subscription agreement in order to enjoy unlimited access to the service during the life of the subscription.¹⁹⁵ Another form of VOD is near video on demand (NVOD) with a pay-per-view service used by multi-channel broadcasters.¹⁹⁶ Multiple programmes are broadcast at short intervals so that viewers can watch the programme without needing to tune in at the only scheduled time. A viewer may only have to wait a few minutes before the next time a movie will be programmed.¹⁹⁷

VOD services are also used in catch-up television services where programmes are provided by a broadcaster after the initial broadcasting. Catch-up services involves recording of preferred programmes so that one may watch later what was missed during the earlier broadcasting. Catch-up services also allow viewers to watch the content they missed or that has been recommended to them following a broadcast. Most pay-TV services provide catch-up options with defined

¹⁹¹ See *supra* note 7 at 10.

¹⁹² Lindia Jordanova and Jordan Nekev, Distribution of Video-on-Demand Service Over Cable Television Networks, *Radio engineering Vol. 18 No. 2(2009) 112*.

¹⁹³ See *supra* note 61.

¹⁹⁴ See *supra* note 114.

¹⁹⁵ EBU, *Future of Terrestrial Broadcasting, Technical Report 013* (2011) at 22.

¹⁹⁶ See e.g., Jack Yiu-bun Lee, *Video-on Demand, Chinese University of Hong Kong* available on www.mclab.info/internal/vodtsa.pdf. Last accessed on July 12, 2017.

¹⁹⁷ See *supra* note 163.

timelines. Catch-up transmissions can be based on linear transmissions so that viewer can watch what was missed like football highlights or the goal of the moment.¹⁹⁸

4.3.3.3 Internet Protocol Television (IPTV)

IPTV is defined as multimedia services such as television, video, audio, text, graphics and data over internet protocol-base networks.¹⁹⁹ It is a type of VOD services normally offered against payment of a fee. IPTV is a digital only television in which channels are streamed to end-users. IPTV services use information which is encapsulated with internet protocol and then delivered via broadband connections to the users' premises.²⁰⁰ IPTV is delivered via high-speed Asymmetrical Digital Subscriber Line (ADSL) or fibre-optic connection.²⁰¹ ADSL is a set of technologies used for digital data transmission over a local telephone network.²⁰² On account of the foregoing, IPTV services are normally offered by telecommunication operators over managed networks with guaranteed quality of service.²⁰³

IPTV works differently from radio frequency broadcasts. Consumers receive a single channel at any single moment. The end-user switches on the channel; the signal is relayed up the network, the unwanted signal is discarded and the desired one sent to the user.²⁰⁴ IPTV services are less constrained in capacity and can offer multiple channels to the subscribers. IPTV services are delivered via closed networks with the content transmitted being inaccessible to those outside the network.²⁰⁵ The compression of the broadcasts or any other content is done using the algorithms of MPEG-4 or MPEG-2. To that extent, IPTV can offer VOD and time-shifting services as well

¹⁹⁸ See *ITV Broadcasting and 6 Other v TV Catch-Up* C-607 /2011 CJEU (the Court of Justice of the European Union ruled that online streaming constituted a communication to the public regardless of whether such streaming was intended for profit or not. The principle can be extended to VOD services and according the VOD services constitute communication to the public).

¹⁹⁹ Khai Vuong, *Internet Protocol Television, Oslo University College*, (2011) at 13 (Faculty of Engineering paper available at the university library).

²⁰⁰ Broadband Forum, *Broadband Suite Solution Series: Enabling IPTV Service Delivery* (2003) at 3.

²⁰¹ See e.g., Antti Heikkinen et al, *Wireless IPTV Development Platform* (2008) 7.

²⁰² See *supra* note 53 at 80.

²⁰³ See *id.*

²⁰⁴ WIPO SCCR, Study on the Socio-Economic Dimensions of the Unauthorised Use of Signals: Current Market Technology Trends in the Broadcasting Sector, (2009) (the study was commissioned by the SCCR of WIPO and the Screen Digest Ltd of the UK undertook the actual research and compiled the report and submitted it to WIPO on June 2, 2009).

²⁰⁵ European Audiovisual Observatory, *Television, Cinema, Video on Demand Audiovisual Services in 39 European States, Vol.1 European Audiovisual Observatory* (2008)at pp 11and 42.

as IPTV broadcasting. Today most IPTV service providers are telecommunication companies since the provision of the service largely relies on their infrastructure²⁰⁶. Some of the companies that offer IPTV services either alone or in reliance upon a local telecommunication company are, for instance, BBC and Netflix Inc.²⁰⁷

4.3.3.4 Over-the- Top (OTT) Transmissions

OTT is the delivery of video, audio and other media over the internet with a multiple system operator (MSO) being involved in the control and distribution of broadcast or media content.²⁰⁸ MSOs are operators of multiple cable or direct broadcast satellites. OTT services include video for television broadcasters delivered over the top of the broadband data.²⁰⁹ These services are normally aggregated by third parties and transmitted over the network. In OTT transmission, the internet service provider (ISP) maybe aware of the content being delivered but does not have the control or responsibility for the viewing abilities, copyright and/or redistribution of the content.²¹⁰ The ISPs are only responsible for the transportation of the IP packets. The OTT service is not programme production but third-party content owner collection, packaging and transmission to the public.²¹¹ Content owners may also use OTT to distribute their content since OTT service is unmanaged service based upon open-internet and requires no independent infrastructure.²¹²

The OTT messaging services, which work over the internet, instead of the wireless or cellular networks that short message services (SMS) texts travel on, are provided also by third parties.²¹³ Consumers gain access to OTT through such devices as smart phones, tablets, gaming consoles and set-top boxes. OTT offers easy mobile and web services for free using the data networking. Customers can download applications they want any time and from any place of their choice.

²⁰⁶ See *id.*

²⁰⁷ See *supra* note 125.

²⁰⁸ Wesley Clover, Over-The –Top (OTT): Dramatic Make Over of Global Communication, *NewsLetter*, July 12, 2014.

²⁰⁹ See WIPO *supra* note 53.

²¹⁰ Moktar Mnakri, *Over-the-Top Services: Enablers of Growth and Impact on Economies* (2015) (a paper presented at the ITU Regional, Economic and Financial Forum of telecommunications/ ICT for the Arab region in Bahrain, November 29, 2015).

²¹¹ See *id.*

²¹² See *id.*

²¹³ See *OECD supra* note 123 at 14.

²¹⁴Companies that have successfully employed and commercialised this platform include YouTube, WhatsApp, Time Warner, and Cable One.²¹⁵

In South Africa, three types of broadcast services are operated, namely public broadcasting services, private and community broadcasting services.²¹⁶ Being a developing country, South Africa does not deploy all the platforms discussed hereinabove. The main platforms in vogue, are limited in scope. First, the most predominant platform is over the air digital terrestrial broadcasting.²¹⁷ This platform mainly affects television broadcasting. According to ITU deadline on global migration from analogue to digital television broadcasting, all countries were obligated to attain a total switch-over to digital technologies by June, 2015.²¹⁸ In the wake of the switch-over, the predominant platform in South Africa became the digital terrestrial television transmission based on 220 digital terrestrial transmitter sites scattered across the country.²¹⁹ Most of these channels are run by the SABC through its technical arm, Sentech.²²⁰ The second platform is the use of geostationary satellites in the distribution of either pay television programmes or free over the air programmes. M-Net (Pty) Ltd runs a digital terrestrial television on a subscription basis in South Africa while Multi-choice/DSTV runs a digital satellite pay television service.²²¹ The third platform is IPTV which Telkom Ltd is licensed to operate by ICASA in South Africa.²²²

Mobile casting is limited in scope. In 2010, DSTV launched a mobile broadcast service in reliance upon the technical infrastructure belonging to MTN and Vodacom.²²³ On the other hands, radio transmission in South Africa is grounded on free over the air FM services. However,

²¹⁴ See *id.*

²¹⁵ See *infra* note 223 at 145.

²¹⁶ Media Development and Diversity Agency, Trends of Ownership and Control of Media in South Africa, Version 3.3., June 15, 2009.

²¹⁷ Chris Armstrong and Richard Collins, *Digital Turmoil for South African Television (2010)* at 4. Available online on <http://www.wits.ac.za/media/migration/files/cs/38933-fix/migrated.pdf>. Last accessed on May 25, 2017.

²¹⁸ Somba Benjamin Muvaka *Assessment of the Impact of Digital Migration Process on Media Consumers: A Case of Television in Kenya*, MA Thesis, University of Nairobi (2015) at 12.

²¹⁹ See *supra* note 217 at 4.

²²⁰ National Association of Broadcasters, *State of Broadcasting Industry Report of 2014* at 3.

²²¹ See *id.*

²²² Libby Lloyd, *supra* note 60 at 96.

²²³ PWC South Africa, South African Entertainment and Media Outlook 2012-2016. Online available at www.pwc.co.za/en/assets/pdf. Last accessed on May 20, 2017.

SABC runs a radio-streaming service over internet, which members of the public can access online.²²⁴

In Kenya, just like in South Africa, the broadcast platforms are limited to free over the air digital terrestrial transmission (DTT) and satellite signal distribution.²²⁵ The DTT service providers on an FTA basis include, Kenya Broadcasting Corporation, Nation Group Ltd, The Standard Ltd, and Royal Media Services Ltd-owned broadcasting stations.²²⁶ Satellite subscription broadcasting services are offered by Multi-choice/DSTV, StarTimes television service as well as Zuku television.²²⁷ Most of the sixty two television stations that are licensed in Kenya operate on free over the air digital terrestrial platforms while the 139 radio stations operate on the FM platforms.²²⁸

Most of the satellite subscription pay television services are based in urban areas.²²⁹ Most urban dwellers enjoy a higher purchasing power than their rural counterparts. Thus most of the rural inhabitants depend upon free over the air terrestrial transmissions. Although there several internet service providers in Kenya, like Wananchi Limited, Telkom Ltd and Swift Global Ltd, none has enabled dedicated IPTV or OTT service.²³⁰

In conclusion both linear and non-linear platforms operate in complementarity. To a large extent, non-linear transmissions draw most of its content from linear satellite, cable as well as terrestrial broadcasting services. The advent of multimedia technology has offered the consumers the flexibility not only on the choice of the means, place and time but also on the platforms of delivery. Football matches can be accessed over cross-media platforms either live, near-live or recorded. However, given the transient nature of football *rencontres*, most audience would prefer reliance upon linear transmissions. This is based on the fact that the interest in any sport is

²²⁴ See *supra* note 222 at 29.

²²⁵ WIPO, *supra* note 180 at 44.

²²⁶ See *id.*

²²⁷ Media Council of Kenya, *Impact of Digital Technologies and Internet, Report* (2016) at 19.

²²⁸ See *id.*

²²⁹ Katharine Allen and Iginio Galiardone, *The Media Map Project, Kenya* (2011) at 11; see also *supra* note 218 at 12.

²³⁰ Njogu Kimani, *Market Penetration Strategies Used by Internet Service Providers in Kenya*, MBA Thesis, University of Nairobi (2014) at 4.

anchored upon the unpredictability of its outcome. The interest of the audience fizzles out once the results are known. Traditional and non-linear broadcasting like terrestrial digital broadcasting, satellite and cable transmissions as well as other live retransmissions and simulcasts would continue to be preferred platforms to non-linear transmissions. A few fans who may be interested in repeat broadcasts and highlights may fall back to non-linear transmission like catch-up and other time-shifted services.

4.4 Political Economy of Football Broadcasting

The Origin of the term political economy can be found in the work of Adam Smith's *Wealth of Nations*, of David Ricardo, and Karl Marx. In this body of work the term refers to the conditions of production organisation in nation states.²³¹ This term was greatly influenced by the Marxist ideology and prevailing circumstances of the time. Today the term is defined as the analysis that studies the linkages between politics and economics, drawing on the theories of economics, law as well as political social science.²³² The economic theory traditionally focuses on the market decisions where voluntary exchange leads to *pareto*²³³ efficient outcomes, and the decisions that political economy focuses on are those where markets do not produce the desired outcomes and that merit regulatory interventions.²³⁴

In the field of football broadcasting, political economy is the interaction between communication technology, market structures and regulations.²³⁵ Evens terms the political economy of television sports rights as the interplay and contest between politicians, regulators, sports organisations and broadcasters in relation to the legal and regulatory frameworks for sports broadcasting.²³⁶

²³¹ See generally, Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of the Nations* (1st ed. 1776) at 229.

²³² World Bank, *Dimensions of Political Economy*, available at site resources. Worldbank.org/EXTSOCIALDEV/Resources/PER_Chapter_Dimension_of_Political_Economy.pdf accessed on December 7, 2016.

²³³ Pareto efficiency also called pareto optimality is realised when resources are allocated to maximise the benefits of all individuals but without making individuals worse off in the process.

²³⁴ See *supra* note 146.

²³⁵ Arinaitwe Ruyendo, *Political Economy of Ugandan Football* available at <http://www.redpepper.co.ug/the-political-economy-of-ugandan-football.pdf>. Accessed on Nov 12, 2016.

²³⁶ See Evens *supra* note 152 at 5 (it is argued that the relationship between media and sports organisations has been shaped by a combination of economic, political, socio-cultural and technological forces that include satellite broadcasting, terrestrial broadcasting, cablecasting, mobile casting and cable transmissions, among others).

In this analysis, the author focuses more on television broadcasting than radio broadcasting of football events. This is based on the fact that, although radio broadcasters participate in sports rights markets, television broadcasters are the dominant participants and exercise far greater influence on the operation of sports industry.²³⁷ Television images have greater social connection and appeal to the audience than audio broadcasting.²³⁸ The exposition, therefore examines, the market, technological, socio-cultural and regulatory environments in which these forces interplay.

4.4.1 Economic and Technological Factors

Sport and television broadcasting have a long history of mutual interdependence. They have nurtured and still keep nurturing a mutually beneficial relationship.²³⁹ This symbiotic relationship is anchored on programme content in form football matches and other sports events. First, there is demand for programme content by broadcasters. The demand for football rights is fuelled by the demand for broadcast service by the audience, and advertisers and sponsors. The football rights are controlled by the football organisers.²⁴⁰ Typical football events are not works under copyright law because the movements and exploits of athletes are only aimed at the achievement of specific sporting results.²⁴¹ They organisers therefore deploy real property rights²⁴² to prevent the unwanted into the stadium or any venue of the event. The right exercisable is based on the tort of trespass to land where the possessor or owner enjoys a traditional property right to prevent or eject any trespasser.²⁴³ In exercise of this right, the organiser gives right of entrance to television broadcasters to the stadium to record, broadcast,

²³⁷ Roger Noll, *Broadcasting and Team Sport*, Stanford Faculty Paper (2007) at 5 (a copy of this paper can be found at the university library).

²³⁸ See *id.*

²³⁹ Jean-jacque Gougnet and Jean François Bourg, *Political Economy and Professional Sport: Economic Relationship Between Professional Sport and Television* (2010) at 100.

²⁴⁰ See *supra* note 190.

²⁴¹ See e.g. Karol Kowalski, *The Right to TV Broadcasts of Sports Events*, LLM Thesis, Lapland University (2015) at 25; See also *Joint Sports Claimants v Canada (Copyright Board)* (1991) 36 CPR 3D 483 (the Federal Court of Appeal of Canada held that, unlike a dance, a sporting event is, in most part, a random series of events which lack in certainty and unity, and subsequently are inconsistent with the concept of choreography).

²⁴² The concept of real property means land and generally any structure that is affixed to, erected on, or growing upon the land. Sports facilities are constructed and maintained on real property; See Doyice Cotten *et al*, *Law for Recreation and Sport Managers*, (2nd ed. 2001) at 119.

²⁴³ Gilbert Kodilinye and Oluwole Aluko, *Nigerian Law of Torts* (2009) at 182.

shoot video including shooting ancillary activities on the side-lines, terraces, and foot-overs.²⁴⁴ Football organisers assume the administrative structure designed by the Fédération Internationale de Football Association (FIFA).²⁴⁵ FIFA is the world football governing body which was founded in 1904 and based in Zurich, Switzerland. It has two hundred and twenty one associations.²⁴⁶

At the continental levels, FIFA is affiliated to six confederations that assist in the administration of football at those levels:²⁴⁷

- a. Confédération Africaine de Football (CAF);
- b. Confederation of North, Central America and Caribbean Association Football (CONCACAF);
- c. Confederacion Sudamericana de futbol (CONMEBOL);
- d. Asian Football Confederation(AFC);
- e. Union des Associations Européennes de Football (UEFA) ;
- f. Ocean Football Confederation (OFC).

At the national levels, there are national football federations that are linked to both FIFA and the relevant continental confederations. All football clubs in any jurisdiction must be affiliated to the local federation. FIFA, its members and confederations are the original owners of the rights emanating from the competitions and other events falling under their respective jurisdictions.... Such rights include any financial rights, audio-visual and radio recording, reproduction and broadcasting rights.²⁴⁸ In this context, football organisers have a right over the commercial exploitation of their football events. The scope of exploitation includes broadcasting, rebroadcasting and retransmission of their events. It also includes on-demand and other interactive modes of exploitation as well as image rights and market licensing.²⁴⁹

²⁴⁴ Eric Johnson, NFL, Intellectual Property, and the Conquest of Sports Media, *86 North Dakota L.Rev.* 760 762(2010).

²⁴⁵ FIFA, FIFA Statutes (ed. 2015) at 57.

²⁴⁶ See FIFA, at <http://www.fifa.com/about-fifa/who-we-are/index.html>. Accessed on Nov.10, 2016.

²⁴⁷ See FIFA, at <http://www.fifa.com/associations/index.html> Accessed on Dec.10, 2016.

²⁴⁸ See FiFA Statutes, art. 78.

²⁴⁹ Asser institute, Study of Sports Organisers Rights in the European Union: Final Report (2014) 14.

The new broadcasting technologies have broadened the opportunities of commercial exploitation of football events. The relationship between broadcasters and football organisers²⁵⁰ has benefitted from the convergence of information and telecommunication technologies. The emergence of multiple means and platforms of delivery of broadcast signals has created new commercial opportunities. The emergence of satellite, digital broadcast, cable, VOD, NVOD, and on-line interactive services increases demand for football broadcast rights.²⁵¹ Besides, new broadcasting technologies have compressed the geographical space so that a sporting event can be watched live across the globe. This has been made possible by the advent of satellite broadcast technologies.²⁵²

Communication satellites like FBS and DBS services have brought about global interconnectedness and made the world a much smaller and more tightly bound community.²⁵³ This has created a greater diasporic football audience across the world; in 2014 alone, 3.2 billion people watched the FIFA World Cup which took place in Brazil.²⁵⁴ The huge virtual football audience offers a big market for sponsors and advertisers who want to create brand awareness of their services and products. In 2014, during the World Cup in Brazil, the major FIFA partners, Coca-Cola, Hyundai, Emirates, Emirates and Adidas paid annually between US\$ 25-50 million for exposure of their products and services across the world owing to the phenomenal global television audience.²⁵⁵

The football programme market and broadcasting rights market can be structured into two parts. The first one is the upstream market whose main actors are the broadcasters, organisers of the football events like clubs, leagues and federations, and football market companies which provide much needed sponsorship revenue.²⁵⁶ The second is the downstream market which links the

²⁵⁰ By football organisers, the author means a person responsible for undertaking the political and administrative procedures regarding the planning and organisation; and the funding and staging the event.

²⁵¹ The means and platforms of signal delivery are discussed in details under paragraph 1.3.0 of this chapter.

²⁵² See e.g., David Rowe, *Sports, Culture and Media: The Unholy Trinity*, (2nd ed.2008) at 30.

²⁵³ See *id.*

²⁵⁴ FIFA, at www.fifa.com/worldcup/news/=2014-fifa-world-cuptm-reached-3.2billion. Accessed on Dec. 3, 2016.

²⁵⁵ Chris Smith, Biggest Sponsors of Brazil 2014 World Cup: Big Spend to Engage with Fans, *Forbes Magazine* June 2, 2014 available on www.forbes.com/sites/chris-smith/2014/06/the-biggest-sponsor-of-brazil-2014-world-cup.

²⁵⁶ See *supra* note 153 at 103.

audience with broadcasters over numerous platforms like; pay TV or terrestrial broadcasting. The market is structured broadly in both product and geographical terms.²⁵⁷ For instance, the geographical area of coverage is identified on country by country basis, for example, South Africa or Kenya. The Product identification should not only be the event but also includes alternative commercial activities like merchandising²⁵⁸ and image rights relating to the events. Merchandising rights may include manufacture and distribution of articles like scarves, shirts, caps, handkerchiefs and socks having any form of association with the football event, team, club, organiser or player in terms of trade mark, name, symbol, or image.²⁵⁹ In addition, platforms of exploitation are disaggregated for the purposes of licensing. Satellite broadcasting by virtue of its wide coverage is licensed separately from terrestrial broadcasting or from internet broadcasting or video-on demand or mobile broadcasting services.²⁶⁰ The same principle applies to the nature of broadcast rights granted; exclusive rights are normally more expensive than non-exclusive rights.²⁶¹ Besides, exclusive rights have greater impact on market control and monopolistic tendency. This market segmentation increases the potential to maximise on the returns from commercial exploitation of football.

Today the sport of football has become a global phenomenon. The world of football has become an industry involving huge sums of money.²⁶² According to the FIFA estimates, the world had a total of 265 million players and 5 million referees.²⁶³ This is indicative of the fact the football as a mega industry directly and gainfully engages players and referees. This excludes those who are indirectly employed by or benefit from the sport.

²⁵⁷ Pwc, Changing the Game: Outlook of Global Sports Market to 2015, Dec. 2011 at 22. Available online at www.pwc.com/sportsoutlook. Last visited on Nov.12, 2016.

²⁵⁸ The author uses the term merchandising in this context to mean the sale or offering for sale or promotion of mass-produced articles engraved or embossed with the football club, team or federation's logo, trade mark, mascot, symbol, name or the like manner use of the event name or the name of a participating athlete or his image or signature.

²⁵⁹ Mark James, *Sports Law* (2nd ed. 2013) at 291.

²⁶⁰ Mark Long, Receiving International Satellite Signal, *World Satellite TV Journal, Asia Edition* (1997) at 11.

²⁶¹ Beloff *et al*, *Sports Law* (2nd ed. 2012) at 181.

²⁶² See Harald Doles and Sten Soderman, Globalisation of Sport: The Case of Professional Football and its Management Challenges, Working Paper No. 1/5 (2012)

²⁶³ Matthias Kunz, 265 Million Playing Football, *FIFA Magazine*, July 2007 at 4.

It is estimated that sport constitutes three per cent of the world trade. It is estimated that the FIFA World Cup, 2010, which took place in South Africa generated total revenue in US\$ 3.7 billion, excluding indirect economic gains.²⁶⁴ The preceding World Cup which took place in 2006, in Germany generated total revenue of 2.85 billion CHF (Swiss Francs) (equivalent to about US\$ 2.80 billion as per the currency conversion as at Dec. 9, 2016).²⁶⁵ The World Cup which took place in Brazil in 2014 realised total revenue of US\$ 4.8 billion of which television broadcasting licensing accounted for US\$2.4 billion.²⁶⁶

The sale of broadcasting and media rights is now the biggest source of revenue generating funds to finance major sporting events, refurbish various stadia and contributing to the development of football at the grassroots level.²⁶⁷ In addition, football has created millionaires of hitherto unknown players. According to Forbes, Cristiano Ronaldo of Real Madrid FC was the highest-paid football in 2016 with a package of US\$ 82 million a year. He was followed by Lionel Messi of FC Barcelona who earned US\$ 77 million a year.²⁶⁸

The hosting of a major football tournament, like the World Cup, brings about economic investment. It brings inward economic development ranging from the modernisation of infrastructure and other football related facilities like stadia, roads and means of communication.²⁶⁹ The teams, officials, spectators and other visitors from across the globe bring foreign exchange into the host country and thereby increasing the foreign exchange reserve. Local investors and business people gain by offering such services as hotel accommodation, communication and transport services.

²⁶⁴ Net Results Ltd, *Digital Piracy on Sports Events* (2011) at 22.

²⁶⁵ FIFA, Financial Report for 2006 at 21.

²⁶⁶ Ton Manfred, FIFA Made an Insane Amount of Brazil's US\$ 15 Billion World Cup, *Business Insider* June 9, 2015.

²⁶⁷ See www.wipo.int/ip-sport/en/broadcasting.html. Accessed on Dec.9, 2016.

²⁶⁸ See www.forbes.com/athletes. Accessed on Nov.3, 2016(the computation of salary is based on calendar month).

²⁶⁹ Ramsey Al-Khalil, Socio-economic Considerations of 2010 FIFA World Cup in South Africa, Duke University, Faculty Paper (2015) at 3.

4.4.2 Socio- Cultural Factors

‘{S}port has power to inspire and unite people. In Africa soccer enjoys great popularity and has a particular place in the hearts of people....’²⁷⁰ this quote by the founding father of South Africa, Nelson Mandela, summarises the socio-cultural importance of sport. This point was amplified by the European Court of Justice when it noted that sporting activities have considerable social importance and in particular football.²⁷¹ Football is typified as a popular culture which promotes cultural citizenship besides promoting openness and democracy in society.²⁷² It promotes national culture and heritage. Cultural citizenship is a sense of collective consciousness and belonging imbedded in a community.²⁷³ Through cultural citizenship the public connection of a people is raised. Such public connection and orientation are sustained by the convergence of broadcast media nourished by football and other sporting activities.

Professional and semi-professional footballers move across the globe where their talents in football playing are needed. The migration of players as such brings about globalisation and global culture. This globalisation is also complemented by television and more particularly satellite broadcasting which enjoys trans-continental footprint.²⁷⁴ Owing to the international character of professional football, some players have been accredited as brand ambassadors for their countries. Cristiano Ronaldo, though of Portuguese nationality, has been so accredited *ambassadeur de la culture* (cultural ambassador) of Spain in order to promote the Spanish culture and tourism.²⁷⁵

Football broadcasting is a lubricant that oils the wheels of international connectedness of the people without actually playing. Football broadcasting cuts across all cultural and language barriers to reach out directly to billions of people of the world.²⁷⁶ Football develops a sense of

²⁷⁰ Nelson Mandela, In *Quotes: Mandela and Football*, FIFA Collections (2016). Available at www.fifa.com/news/y=2013/=12/news/quotes-mandela-and-Football.html. Last accessed Jan.2, 2015.

²⁷¹ See *Jean-Mark Bosman v Royale Club Liégeois SA Union Royale Belge des Sociétés de football Association SA C-415/1993 EJC* (otherwise in brevity, called the *Bosman case*).

²⁷² See *supra* note 150.

²⁷³ Nick Couldry, *Culture and Citizen: The Missing Link* (2006) at 3.

²⁷⁴ See *supra* note 80.

²⁷⁵ Carolina Pina, *The Role of Intellectual Property in Sports, Sponsorship, Media Rights, and Merchandising* (2011), available at www.wipo.int/edocs/mdoc/en/wipo_reg-IP.pdf accessed on Oct.2, 2016.

²⁷⁶ Joseph Maguire, *Power and Global Sport: Zone of Prestige, Emulation and Resistance* (2005) 10.

unity and belonging to the imagined global community.²⁷⁷ The migration and integration of players and other athletes across globe has created global citizens. Besides, there exists global allegiance to football stars who have become global celebrities.²⁷⁸ Underscoring the social importance of sport, the European Union reiterated that sport and by implication football forges identity and brings people together.²⁷⁹

Football can foster improved health in society. This principle was notably put into use by the former Soviet Union that arguably used sport as a tool for mass mobilisation of its people in readiness for labour and defence of the ‘motherland.’²⁸⁰ Although the Soviet Union gave sport greater military and political significance, sport is gaining even greater social importance in addressing lifestyle diseases and obesity. The European Union has identified key roles of sports in society to include health promotion, fostering sound educational foundation, social inclusion, recreational role, and cultural promotion.²⁸¹ The International Charter on Physical Education and Sport (ICPES) also emphasises the importance of sport and that access to sport by all persons is a global commitment on the part of member states.²⁸²

Football broadcasting fulfils the basic need of leisure and entertainment.²⁸³ People have always harboured the desire to participate actively or passively in football.²⁸⁴ Because of inadequate capacity in stadia, live television broadcasting offers a better alternative. Television broadcasting brings the events live in front of viewers. In spite of the event taking place thousands of miles afar, broadcasting compresses the distance and transmits the event in real time.²⁸⁵

Because of communication and broadcasting capabilities, most people are able to watch live football broadcasts. When the home team is playing, it inspires some high level of national pride

²⁷⁷ See Rowe *supra* note 163.

²⁷⁸ See, for instance, a football star like David Beckham has permitted perfume makers to merchandise his name.

The perfume called David Beckham for men and women is taking advantage of his global fame and affiliation.

²⁷⁹ See EU Declaration No 29 attached to the 1997 Amsterdam Treaty.

²⁸⁰ Great Soviet Union Encyclopedia, Master of Sport (2nd ed. 1970-1979).

²⁸¹ European Union, White Paper on Sport (2007) at 1.

²⁸² See art.2 (every human being has a fundamental right of access to physical education and sport...).

²⁸³ See *Evans Supra* note 152.

²⁸⁴ *Id.*

²⁸⁵ See *id.*

and patriotism. In 2008, the Kenya government extended funds to the public broadcaster, Kenya Broadcasting Corporation, to acquire television broadcast rights for the Africa Cup of Nations tournament which took place in Ghana as part of national healing and restoration of national pride in the wake of the 2007/2008 post-election violence.²⁸⁶

Football broadcasting especially of major football tournaments inculcates a positive impact on the youth. It is argued that the 2010 FIFA World Cup which took place in South Africa changed the delinquent tendencies of the South Africa youth who hitherto were pre-disposed to vandalism and other criminal activities. The tournament inculcated in them the virtues of respect, fair play and social involvement.²⁸⁷ The 2010 World Cup gave Africa in general and South Africa in particular a reputational boost and propagated across the globe African humanism or *ubuntu*.²⁸⁸

4.4.3 Regulatory Frameworks

The contours of television broadcasting across the world have undergone significant technological and structural changes. These transformations have given consumers wide latitude to access football games over a variety of communication services including new platforms and various wireless portable devices. The evolution of digitisation and convergence coupled with the socio-cultural factors, among others, make regulatory interventionist measures necessary. This is critical even when those who are involved in the organisation and broadcasting of football events are non-state actors; governments cannot be kept out of football completely because they offer infrastructural and physical facilities besides other services like security, immigration visa and other exemptions necessary for hosting any tournament.²⁸⁹ Regulation is designed to protect the market for football rights against disruptive market practices that may undermine free competition or restrict the freedom to pursue economic interest on the free

²⁸⁶ This author was at time the corporation Secretary of the Public broadcaster. The acquisition of the television right was done irrespective of whether the national team was participating or not. The post election violence was touched off the widespread perception that the results of the 2007 presidential elections were rigged. The violence snowballed to a near civil war in which 1500 people were officially reported killed across the country. The situation was calmed when the UN intervened and crafted out a power-sharing formula).

²⁸⁷ See Walid Sami *supra* note 179 at 2.

²⁸⁸ See *id.*

²⁸⁹ See e.g., Ramos Mabugu and Ahmed Mohammed, *The Economic Impact of Government Financing of the 2010 FIFA World Cup*, Stellenbosch Economic Working Papers: 08/08 at 7.

market. The regulatory framework should be guided by public interest criteria, market competitiveness, and football programming market.

4.4.3.1 Regulation Based on Public Access

It has been argued that broadcasting services take place over spectrums that are owned by the public and that all broadcasting activities must be regulated in such as to serve the public good.²⁹⁰ Events that are of national resonance are a source of national pride and an avenue for expression and dramatisation of national cultural heritage²⁹¹. Because of the liberalisation of airwaves, commercial broadcasting organisations and other actors have increased demand for premium football events.²⁹² This situation has been compounded by the advent of pay TV services which rely upon premium sporting events for survival. Convergence has also created diverse transmission platforms which have put a strain on football events whose supply is elastic.²⁹³ This has led to the migration of premium football events from free-to-air (FTA) broadcast services, most of which are public service broadcasters, to Pay TV and other subscription-based non-linear platforms.²⁹⁴ This practice denies the majority of the people access to broadcast football on FTA channels. Pay TV and other on-demand services make access to football matches conditional upon payment of prescribed fee. The broadcast matches are locked in a conditional access system and can only be accessed with the aid of decoder and smart card supplied by the encrypting organisation.²⁹⁵

The public access to certain categories of football matches should be managed under a regulatory framework. This may be done by either introducing anti-siphoning²⁹⁶ regulations or permitting subscription to different platforms in order to avoid abuse of dominance. Alternatively, football

²⁹⁰ *Secretary of the Ministry of Information and Broadcasting v Cricket Association of Bengal* (1995) 2 SCC 161 (the Supreme Court added that no individual has a right to utilise the airwaves at his choice and pleasure and for the purposes of his choice including profit).

²⁹¹ Thomas Hoehm and Zafeira Katrinaki, *Broadcasting and Sport: Value Drivers of TV Rights in European Football* (2010) available at www.city.ac.uk/_data/assets/pdf accessed on Dec. 12, 2016.

²⁹² See *id* at 7.

²⁹³ See *OECD supra* note 123.

²⁹⁴ See *Evens supra* note 152.

²⁹⁵ See para 1.3.1.3 above where different technical technologies relating to encryption are analysed.

²⁹⁶ Anti-siphoning laws and regulations are those designed to prevent pay tv broadcasters from buying the monopoly rights to television rights to telecast important and culturally significant football events before FTA channel has a chance to bid for them.

events of national importance can be listed and be characterised as a must-carry by FTA broadcasters. Such events could be, for instance, the FIFA World Cup tournaments or continental championships organised by confederations or national league tournaments.

4.4.3.2 Regulation on Marketing of Football Rights

The number of teams in the leagues or any tournaments as well as the number of games played by the teams is determined by the organisers. The organisers therefore determine the supply of football rights to be sold at any one season. They also determine the mode of sale to be used in the market. For instance, they determine whether the rights should be sold by individual teams or clubs, or they should be sold centrally. It is instructive to note that, globally, the supply of football events is inelastic vis-à-vis the demand of the same events. This is owing to the fact that the number of broadcasters is growing, in view of the migration from analogue to digital broadcasting, while the supply of football events has largely remained static.

In the market set-up, there is no equality in the purchasing power amongst broadcasting organisations. Public service broadcasters which rely on the public for funding have less purchasing power than commercial and Pay TV service providers. A few countries boast of FTA channels holding transmission rights over domestic leagues. In Kenya and South Africa²⁹⁷ SuperSport Sports channels enjoy exclusive rights to broadcast local football league matches over their Pay TV platforms. In Spain, Canal Plus Pay TV channels has control over thirty eight local live games out of forty two.²⁹⁸

Football programming is underpinned by two major characteristics. First, sports rights are an ephemeral product because viewers are more interested in live coverage for once the results are known, the match loses attractiveness, suspense and unpredictability. Secondly, there hardly exist substitutes for the live coverage of a football event. This creates a narrow market which is prone to dominance abuse which would infringe upon competition law.²⁹⁹

²⁹⁷ See e.g., *Evans supra* note 152 at 177.

²⁹⁸ See *id.*

²⁹⁹ See *id.* at 96.

The sale of football rights may be either on an exclusive or non-exclusive basis. Exclusive sale and rights provides one broadcaster and exclusive right to broadcast a football event. The choice of either has implications on market competition. For instance, exclusive football broadcast rights may have greater commercial value but detrimental to competing television organisations to stay in the market. When exclusive rights are granted for a long period of time it may lead to a takeover of the market and may create horizontal restriction of competition and abuse of dominance.³⁰⁰ In the European Union, properly canalised and regulated sale of exclusive rights to broadcast sports events is an accepted commercial practice which is informed by economic realities.³⁰¹ Therefore all this market matrix of football rights necessitates regulatory intervention based on each country's unique environment.

4.4.3.3 Mergers

Football markets operate differently from other markets. Whereas, competition in the latter seeks to annihilate the competitors, in the former, competing teams need one another and in relative equality in order to generate suspense and unpredictability in the game.³⁰² Mergers in the broadcasting sector leads to concentration through the strengthening of one player with significant market power which subsequently harms consumers through higher prices, reduced choices and less innovation.³⁰³ Media products (football broadcasts included) are distinct from other marketable commodities due to the former's ability to shape public opinion and because broadcasting remains the most popular medium of entertainment and information.³⁰⁴ However, certain practices must be regulated in order to maintain the level-playing field necessary to sustain the desire to allow access to broadcast football to as many consumers as possible. Some

³⁰⁰ See Katrien Lefever, *New Media and Sport: International Legal Aspects*, (2012) at 138.

³⁰¹ See Thomas Margoni, *The Protection of Sports Events in the EU: Property, Intellectual Property, Unfair Competition and Special Forms of Protection*, 47/4 *IIC-International Review of IP and Competition Law* (2016) 17; Richard Parrish, *Sports Law and Policy in the European Union* (2003) at 12 (exclusivity is an accepted commercial practice in the broadcasting sector because it guarantees the value of the sporting event which is valuable for a limited time).

³⁰² Christian Huvener, *Marketing of Football Broadcasting Right: Competition Off-side* (2014) at 7.

³⁰³ Konstantin Banin, *European Merger Control in the Broadcasting Sector: Does Media Pluralism Fit?* Faculty Paper, Gerog-August Universtat (2012) at 2. (unpublished, available at the university library).

³⁰⁴ See *id.* (Banin argues that mergers reduce the number of independent operators and undermine diversity in content delivery for the merged entities may offer the same content in order to reduce cost).

of these practices include vertical or horizontal integration³⁰⁵ of key players in the sector. The abusive consequences of mergers would lead to a monopolistic situation which would impede access to the football events by the public. In 1998 an English Pay TV broadcaster, BSkyB sought to do a vertical integration with Manchester United Plc, the parent company of Manchester United FC. The proposal was rejected because it would tilt the balance of competition for football broadcast rights in favour of BSkyB.³⁰⁶

4.5 Technical Measures and Access to Broadcast Football

4.5.1 Background to Technological Protection Measures

Digital technologies act like a double-edged sword. They are both significant threats to legitimate interest of content owner and also a useful tool for their protection.³⁰⁷ Digitisation has changed the way of making reproductions of works, their distribution and access by the public. Analogue technology only allowed mass reproduction of physical copies through the use of photocopiers, tape recorders, and video cassette recorders (VCRs). These were only the legitimate threats to copyrighted works which could be addressed under the traditional copyright.³⁰⁸

Digital technologies enable inexpensive and widespread production of instant perfect copies of works like sound recordings, books, movies, and many other types of works without compromising the quality of such works. These days simple and less complicated digital devices such as smart phones, Compact Disc (CD), Minidisc, digital video compact (DVD) or Blu-ray disc recorders, MP3 player or computers, to reproduce and store huge amounts of data. Computers with large hard drives and appropriate software can copy voluminous amounts of

³⁰⁵ Vertical intergration occurs when a broadcasting organisation mergers with a football organiser, for instance, E-tv and PLS merging in South Africa. Horizontal integration occurs when two broadcasters merge especially those which command a big audience and football rights.

³⁰⁶ See Evens *supra* note 152 at 100.

³⁰⁷ See e.g., David Price, *Fighting Fire With Fire: Monitoring Intellectual property in a Digital Age*, 111 *Copyright World* (2001) at 14; Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (2003) (see particularly Goldstein's slogan that 'the answer to the machine is in the machine' in which he underscore the reliance of technology to address widespread copyright infringement).

³⁰⁸ Marlize Conroy, *A Comparative Study Technological Protection Measures in Copyright*, PhD Thesis, University of South Africa (2006) at 26.

works.³⁰⁹ Besides, internet can facilitate millions of unauthorised circulation of and access to content without border restriction. Online world distribution has become simple and inexpensive.³¹⁰ Digital technology facilitates user-generated content which can be produced and distributed by any person whose only authority could be possession of a digital camera or mobile and a connection to internet.³¹¹ Viewers can put video extracts on the web and this gives football fans some influence over the content.

In the field of broadcasting, digitisation has increased capacity and quality of signals. One analogue channel can carry up to 10 digital services. This efficient spectrum use has offered opportunity for new services like pay TV services and other non-linear services.

4.5.2 Technological Protection Measures

The European Parliament defined technological protection measures (TPMs) as ‘any technology (software or hardware) which restricts access to a copyrighted material without the consent of the copyright holder’.³¹² The Information Society Directive of the European Union defines TPMs as ‘any technology device or component that in the normal course of its operation’ is designed to prevent or restrict acts which are not authorised by the right holder of copyright.’³¹³ One of the fundamental characteristics of TPMs is that they must be effective. The effectiveness of TPMs must be considered in relation to the average user at the time of the infringement.³¹⁴ In most jurisdictions, adequate legal protection is granted against circumvention of any effective technological measures which the person concerned carries out in the knowledge or with reasonable grounds to believe that he or she is pursuing that objective.³¹⁵

As part of the technological measures, right holders often add electronic rights management information to copies of the copyright works in order to be able to trace the copies of the work.

³⁰⁹ See *supra* note 211 at 10.

³¹⁰ Branislav Hazucha et al, *Copyright Technological Protection Measures and Their Acceptance by Consumers in Japan (2013)* at 2 also available at www.serci.org/2013/hazucha-serci-2013pdf. Accessed on Dec.2, 2016.

³¹¹ See *id.*

³¹² See EU Directive 2001/29/EC, art. 6 (3).

³¹³ INFOSCO Directive 2001/9EC, art. 6 (3).

³¹⁴ INBrief, *Technological Protection Measures and Copyright* at www.inbrief.co.uk/intellectual/copyright/technological-technological-measures . Accessed on March 10, 2016.

³¹⁵ See *infra* note 323 at 289.

Information in this context is defined as ‘any information provided by the right holder, that identifies the work, the author or any other right holder or information about the terms and conditions of use of the work, and any numbers or codes that represent such information.’³¹⁶ TPMs police the private use of works, by forcing the users to enter into contractual arrangements before they can access, and use or copy the works. They deny access to copyright work or limit the person’s ability to make copies once access is gained. Measures designed to prevent pirate games on a console fall outside the scope of TPMs, as they only prevent access after infringement.³¹⁷ In other words, such measures do not meet the threshold of effectiveness.

If the users cannot seek consent from the owners, they cannot get a set of keys to open the technological locks with.³¹⁸ TPMs protect works in a digital format by way of integrating them either into the software or hardware.³¹⁹ The deployment of TPMs relies upon encryption or scrambling technology which is analysed in details in paragraph 4. 4.1 .4 above.

4.5.3 Concept of Access to Encrypted Content

The term access was defined in by Australian case of *Eddy Stevens and Kabushiki v Sony Computer Entertainment Europe and Sony Computer Entertainment Pty Ltd*³²⁰ as any form of access to copyrighted works with or without access code or use thereof. The Court of Appeal of the USA defined access as the ability to enter, to obtain or to make use.³²¹ This would mean that access encompasses the initial act or the initial act with all subsequent acts of accessing a work.³²² According to Natalie, access is the electronic equivalent of breaking into a locked room

³¹⁶ Paul Torremans, *Intellectual Property Law* (7th ed. 2013) at 288.

³¹⁷ *See id*; *See also R v Neil Stanley Higgs* (2009) 1 WLR 23 (the court affirmed the principle that to succeed in any TPMs circumvention case, the prosecution must prove that copying does, in fact, take place when the game is played in the buyer’s console. The court further restated the principle that to succeed in any TPMs circumvention case, the prosecution must prove that the measure which the device is capable of circumventing was effective technological measure, that is to say, that the anti-piracy measure physically prevents copyright infringement i.e. copying and reproduction of the work).

³¹⁸ *See Supra* note 107 at 304.

³¹⁹ *See* the definition of TMP under the EU Directive 2001/29/Ec.

³²⁰ H.C.A. NO. S319 /2004 at 6 par. 4.

³²¹ *See Lexmark International Inc v Static Control Components Inc*, USA, 6th Circuit, 387, F 3d 522 (2004) (the Court of Appeal relied heavily upon literal dictionary meaning without contextualising it to the access of encrypted digital content).

³²² *See e.g.*, Jessica Litman, *Digital Copyright* (2001) at 95.

in order to obtain a copy of a book, but the anti-circumvention provisions do not apply when a person breaks into his own electronic device in order to gain access to independently marketed functional components.³²³ Heide defines access in such a broad manner as to include any act by which a work is made perceptible.³²⁴ Since TPMs are designed to control either access or the use of copyright works, the technical measures employed are two, access control measures and use control measures:

4.5.3.1 Access Control

Access control technology is the most widespread and basic type of technological protection that copyright owners enjoy. It prevents any form of viewing, reading, hearing and/or perceiving the work without authority of the owner of the work.³²⁵ It can also prevent access at the online outlet or at the user of the information level or it can be used to control subsequent access to an already copy of a work.³²⁶ Access may be conditional upon use of appropriate password or other means of data authentication.³²⁷ The use of the password and encryption protection needs not limited to initial act of access.³²⁸ The access measures may also involve the deployment of digital modulation, encryption or scrambling as well as the use of smart cards fitted with microprocessors which activate or deactivate the conditional access systems.³²⁹

4.5.3.2 Copy Control

These are technical measures that control the use of a work after the initial access.³³⁰ This would appear like an overlap with the access control because controlling initial access also means controlling the use of the work so accessed. However, sometimes the industry practice demands

³²³ Natalie Bajalcaliev, *Lexmark International Inc. v Static Control Components: Enjoining Proper Usage of Digital Millennium Copyright Act's Anti-Circumvention Provisions*, 5 *North Carolina Journ. of L. and Technology*, Issue 1 (2003) at 114.

³²⁴ Thomas Heide, *Access Control and Innovation under the Emerging EU Electronic Commerce*, 15 *Berkeley Technology L. J.* 999 1047 (2000) at 1023.

³²⁵ *See supra* note 218 at 28.

³²⁶ *See id.*

³²⁷ Jeffrey Libby, *The Best Games in Life Are Free? Emulation in a Copyright World*, 36 *Suffolk U.L.Rev.* 843(2006).

³²⁸ A. H. Rajani, *Davidson and Associates v Jung: Reinterpreting Access Controls*, 21 *Berkeley Technology L.J.* 365 394 (2006) at 383.

³²⁹ *See Supra* note 234.

³³⁰ *See e.g.*, Jane Ginburg, *Copyright and Control over New Technologies of Dissemination*, 101 *Col.L.Rev.* 1613 1647 (2001) at 1631.

that the author of a work authorise only access to it while reserving its subsequent use.³³¹ When deployed the copy control device makes content files unintelligible once copied thereby rendering them unusable.³³² One of the most popular copy control technology is the Serial Copy Management System (SCMS). It prevents the making of copies of a digital copy. It allows only one copy of a work to be made.³³³

4.5.4 Legal Protection of the TPMs

Since the advent and spread of digital reproduction and communication technologies in the 1990s, major copyright owners started yearning for an international normative system against the circumvention of their TPMs and digital rights management systems (DRMS).³³⁴ In response to the concerns raised by copyright holders the World Intellectual Property Organisation (WIPO) started preparatory work that led to the adoption of the internet treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in December, 1996.³³⁵ The protection of TPMs and DRMS are granted protection under these treaties. The protection of the former revolves around the unauthorised circumvention³³⁶ of any effective technological measures that are used by authors in connection with the exercise of their rights granted under the treaties or the Berne convention that restrict acts, in respect to their works.³³⁷

The protection of the latter revolves around knowingly and without lawful authority removing or altering any electronic rights management information; distributing, importing for distribution, broadcast or communicating to the public works or copies of works knowing that the electronic right management information has been removed or altered.³³⁸ The treaties therefore illegalise the circumvention of TPMs and removal or alteration of electronic rights management information.

³³¹ See Marlize *supra* note 308 at 27.

³³² See *id.*

³³³ Joseph Rothstein, Dream Machine for Computer Music: In Honour of John Pierce, *15 Computer Music Journal*, 113, 115 (1991) at 114.

³³⁴ See *supra* note 220 at 5.

³³⁵ www.wipo.int/export/site/www/copyright/en/activities/pdf/wct_wppt.pdf accessed on December 3, 2016.

³³⁶ To circumvent a technology means to descramble a scrambled work, to decrypt an encrypted work or otherwise to avoid, bypass or remove or deactivate or impair technological measures without the authority of the copyright owner, Digital Millennium Copyright Act, § 1201 (a) (3).

³³⁷ See WCT arts. 11 and 12 (the former relates to the obligations concerning TPMs and the latter obligations concerning the right management information systems); See also WPPT art. 18.

³³⁸ See WCT, art. 12; see also WPPT art. 19.

The treaties also oblige contracting states to provide adequate and effective legal remedies against the said infractions. The TPMs must effectively control access to a work if the measure in the ordinary course of operation requires application of information or process or a treatment with the authority of the copyright owner to gain access to the work.³³⁹

TPMs are prone to hacking and other forms of abuses. They have proven effective in controlling access to encrypted movies, digital television broadcasts and videogames. They have, however, failed in music CDs and online music downloading.³⁴⁰

In Kenya, TPMs are protected under the copyright law against, among other, the circumvention of any effective technical measures designed to protect the works.³⁴¹ In other words, TPMs in Kenya protect works that are copyright protected. Such works may exist either in an analogue or digital form. The works that are copyright protected are literary works; musical works; artistic works; audio-visual works; sound recordings; and broadcasts. Whether broadcast football events constitute broadcasts in order to trigger the invocation of Section 35(3) of the Copyright Act, is examined in chapter seven paragraph 7.3.5 of this study.

On the other hand, in South Africa, TPMs are not protected under the copyright legislation. They are instead protected under the Electronic Communications Transactions (ECT) Act.³⁴² The Act criminalises the circumvention of the TPMs or unauthorised access or interception of any data protected by TPMs.³⁴³ Although the word data may imply copyright works in a digital form, the application of the ECT Act to copyrighted works may be excluded by section four subsection three. However, broadcasting by encryption of football events may be protected under section eighty six of the ECT Act because encrypted broadcasts may be construed as data. The fact that the ECT Act prescribes criminal sanctions for circumvention of TPMs or unauthorised access or

³³⁹ See *Supra* note 224

³⁴⁰ See *supra* note at 6.

³⁴¹ Copyright Act, 2001 s. 35(3) (Copyright and related rights shall be infringed by a person who (a) circumvents any effective technical measure designed to protect works (b) manufactures or distributes devices which are primarily designed or produced for the purpose of circumventing technical measures...(c) removes or alters any electronic rights management information(d) distributes, imports, broadcasts or makes available to the public protected works, records or copies from which electronic rights management information has been removed or altered with authority of the right holder).

³⁴² Electronic Communications and Transactions Act s.86 (1).

³⁴³ See *id.*

interception of data, denies the owner of the TPMs or data any civil remedy which may be faster by way injunctive relief.

TMPs have created an additional layer of protection over scrambled broadcast content on pay TV services. Football games are some of the premium content for such broadcast services. TPMs have therefore created another economic right of access to encrypted content. Technically, the access control is absolute and does not accord with the copyright limitations and exceptions. Even where the law may permit circumvention within the ambit of exception and limitations, this would be thwarted by lack of capacity to deactivate the access controls by most people. The pendulum of balance that copyright seeks to attain shifts in favour of content owners like football broadcasters who encrypt the matches. The global discourse in currency is whether the content owners should control every new market created by new technologies of which they may have had no role in their creation.

4.6 Free Access to Football Telecasts and Stakeholder Interests

While advocating free access to football telecasts, this study does not lose sight of the interests of other stakeholders in the chain of exploitation of the telecasts. Besides the viewers and listeners, other key stakeholders include the organizers of the games on the one hand and the media on the other.³⁴⁴ Media and sport enjoy a symbiotic relationship; media rights play a pivotal role in the broadcasting and distribution of football games.³⁴⁵ Globally, there is no settled legal position as to the entity that controls the media rights of a football match. In Italy, Greece, Portugal, and Spain the football media rights are owned by the participating football clubs while in England, Germany and Austria the rights are owned by the leagues.³⁴⁶ However, in South Africa and Kenya football media rights are managed centrally by the respective leagues.³⁴⁷

³⁴⁴ Thomas Hoehn and Zafeira Kastrinaki, *Broadcasting and Sport: value Drivers of TV Right Deals in European Football*, Imperial College Business School, Faculty Paper (2012) at 4 (other stakeholders include the player or participants, spectators, community members, and commercial partners who either advertise the products downstream or sponsors whose financial contribution guarantee development of the game).

³⁴⁵ *See Id.*

³⁴⁶ Vladimir Andreff and François Bourg, *Broadcasting Rights and Competition in European Football* (2015) at 5.

³⁴⁷ *See e.g.*, Tom Evens *et al*, *Political Economy of Television Sports Rights* (2013) at 177; Otieno Nyanjom and Siteni Twaweza, *Foul Play! The Crisis of Football Management in Kenya*, Technical Report (2010) at 11 (the report was commissioned by the Minister for Sport over the poor management of football in Kenya)

This study posits that the attempt by some scholars to extend copyright protection to live football broadcasts in order to secure the commercial interests of football organizers or broadcasters is fallacious.³⁴⁸ It is difficult to assimilate a game football into an original work of authorship or an intellectual creation, first because its outcome is characterized with unpredictability and secondly, the ultimate aim of a sporting event, like football, is to win and not display creativity.³⁴⁹ Thus, the denial of access to the public of live football broadcasts on the grounds of the doctrines of copyright rests on weak legal props. It is on the basis of the foregoing that this study advocates copyright-free access to football telecasts on free-to-air broadcast outlets. Free access to football telecasts does not mean free commercial exploitation or use of the broadcasts. The right holder can still be protected against actions of persons who want to exploit the rights related to the event.

The media rights owned by the event organizers should not be based on copyright but on any of the following three doctrinal and jurisprudential theories: First, because sports clubs and other organizers are commercial enterprises because they trade and invest in sports events, their protection should be based on commercial law.³⁵⁰ The organizers and broadcasters can leverage on the popularity of football events through commercialization through broadcasting which bears a commercial rather than a legal concept. Secondly, the organizers of football events can exercise the domain right over the venues at which the games take place. With the domain power, they can control access of others by way of sale of tickets, restriction of recording or broadcasting of the event.³⁵¹ In doing so, the organizers use the traditional property rights to deny the unwanted access to the venue of the sport. Thirdly, and finally, the event organizers can employ the doctrine of unfair competition against any third party exploiting or gaining unfairly from the

³⁴⁸ See e.g., Lucio Colantuoni and Cristiano Navazio, Intellectual Property Right in Sports: A Comparative Overview of the USA, UK, and Italy (James Nafziger and Stephen Foss(eds) handbook on International Sports Law 2011) at 440(the authors argue that sports events attract copyright protection “at the stage of sports performance.” It is not clear what is meant by the term “sports performance” for copyright-based performances is anchored on pre-existing works and football playing or transmission is not based on any pre-existing work).

³⁴⁹ See generally Andrea Cattaneo, Nature of Broadcasting Rights in U.S. and Europe, 1-2 *INT’L Sports L.J.* (95(2012); see also Karol Kowalski, *The Rights of TV broadcasts of Sports Events*, LLM Thesis, University of Lapland (2015) 32; see the CJEU judgment in *FAPL v Leisure and others*, and *Karen Murphy v Media Services Ltd* C-403 and C-429 of 2008 at 13 in which the Court emphatically held that live sports broadcasts of EPL football matches were not works of authorship.

³⁵⁰ M. Beloff et al, *Sports Law* (2d ed. 2012) at 172.

³⁵¹ See Tom Rivers, *A Guide to Broadcasters to Ownership, Acquisition, and Clearance of, Enforcement and Management of Rights*, (1998) at 30; see also Cattaneo *supra* note 349.

use of the sports telecasts. The doctrine of unfair competition is analysed in details in paragraph 1.1.3.3 of chapter one of this study.

4.7 Conclusion

In conclusion, the evolution of communication and broadcasting technologies in combination with the deregulation of airwaves has brought forth different means of signal delivery and platforms of exploitation. In particular, satellite broadcasting has compressed the world into a global village in which an event taking place in one corner can be broadcast live or in real time in the other corner. Kenya and South Africa is part of the world that has benefited from these technologies. The different modes of exploitation have created an increase in the demand for programme content. Broadcast sporting events in general and football events in particular, constitute part of the content broadcasters need. Premier football events have been converted into a commodity that is consumed by the public over different platforms offered by broadcasters. The commodification of football events has prompted governments across the world to regulate the marketing of football broadcasting rights, the transmission and competition in the sector.

Some of the platforms that broadcasters employ include pay television services which largely rely on technical measures as a commercial segment based on subscription by the public. Public broadcasters employ free over the air transmissions in order to fulfil effectively their public service broadcasting role. Most broadcasters in South Africa and Kenya are free over the air service providers while pay television service providers and cable operators have limited operations. Making public access to football broadcasts free especially, on free-to-air channels is in recognition of the fact that such transmissions are effectuated on frequency spectrums that are owned by the public. Additionally, football broadcasting rights are commercial rights which should be exploited within the framework of contractual arrangements between the broadcasters and event organizers on the one part and advertisers or sponsors and broadcasters on the other without invoking the concept of copyright which is 'innocent' in these arrangements.

CHAPTER FIVE

ECONOMIC RIGHTS IN FOOTBALL BROADCASTS AND THEIR WIDER IMPLICATIONS ON PUBLIC ACCESS TO BROADCAST FOOTBALL

5.0 Introduction

The individualisation and access control of telecast football by either football organisers or broadcasting organisations is achieved through the use or application of exclusive economic rights granted under copyright laws. In chapter four of this study, the object of protection in a broadcast and categories of works of authorship that subsist in a football broadcast are examined and analysed in depth and breadth. Whereas chapter four identifies the categories of works protected in football broadcasts, it does not however, examine the specific exclusive rights appurtenant to such works. The rigours of monopoly created by these exclusive rights are, in most jurisdictions, tempered with the recognition and application of limitations and exceptions.

This chapter therefore examines the economic rights and how and the extent to which their exercise impinges upon the access to broadcast football and other connected rights that the public should enjoy in relation thereto. The chapter also examines the limitations and exceptions that have been introduced to temper with the rigours of the economic rights on access to broadcast football on the part of the public. The overall objective in this analysis is to respond to the research questions one and five which are intertwined with the aims of the study. Research question number one seeks to answer the question as to the extent to which public access to major broadcast football events in Kenya and South Africa depends on copyright. Research question number five seeks to answer the question whether denial or restriction of access to such football broadcasts undermines the constitutional rights or the cultural heritage of the people of Kenya and South Africa. The research questions are closely linked to objective number one which seeks to examine the nature and scope of broadcast copyright and their impact on access to broadcast football in the two jurisdictions as well as objective four that examines the cultural and constitutional implication of any restriction to the public of broadcast football.

5.1 Economic Rights

The term economic rights refers to exclusive rights of the owner of copyright or other intellectual property rights, to authorise certain acts in respect of the work.¹ Economic rights help the author to reap economic benefits by direct or indirect exploitation of his work.² They give the owner of copyright the exclusive rights to authorise or prohibit certain uses of a work.³ According to Sihanya, “economic rights relate to an author’s or entrepreneur’s right to secure economic and financial benefits from investing in a work. It relates to innovation in the second sense; that is marketing the work and commercially benefitting from it as opposed to creating the work in the first instance.”⁴ Other scholars equate exclusive rights to economic rights and thus use the two terms interchangeably.⁵ Mihaly Fiscor defines exclusive right as a right that is enjoyed by the owner of copyright or related rights, excluding the acquisition and enjoyment of the same right in respect of the same work or object of related rights anyone else, on the basis of which the owner of the rights—and nobody else—may perform a certain act and may authorise or prohibit the performance of that act by others.⁶ The overall effect of exclusive right there is to give the right holder a right of excludability against unauthorised use or exploitation of the work

Several exclusive or economic rights may exist in parallel within the same category of work; for instance a broadcaster may enjoy in parallel an exclusive right of fixation, and reproduction over its broadcast.⁷ The term economic right is mainly used in order to draw a parallel between it and another separate set of rights namely moral rights.⁸ The differentiation is important for the

¹ Mihaly Fiscor, *Guide to the Copyright and Related Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (2003) at 284.

² See e.g., Arathi Ashok, Economic Rights of Authors under Copyright Law: Some Emerging Trends, *15 Journal of Intellectual Property Law* 46,54(2010) at 46.

³ See WIPO, Module 05, Copyright and Related Rights available at www.wipo.int/expert/sites/sme/document.pdf accessed on Jan.12, 2017.

⁴ See Sihanya *infra* note 10 at 194.

⁵ The rights bestowed by the law on the owner of copyright in a protected work are frequently described as exclusive rights. WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use* (2001) at 43.

⁶ See Fiscor *supra* note 1 at 287.

⁷ See *supra* note 1 at 287.

⁸ As a creation of the mind, copyright work reflects the author’s personality. Apart from economic considerations, the authors have also interests in the works which are not strictly financial or monetary, such as the right to claim authorship and to object to derogatory uses of the works. These prerogative that authors enjoy independently of economic rights are referred to as authors’ moral rights. The moral rights are intertwined with the natural law theory which characterises copyright as the embodiment of the personality of the author, first recognised in France as les droits morales (the moral rights). See UNESCO, *The ABC of Copyright Handbook (2010)* at 30.

benefit of performers and some categories of authors who normally enjoy moral rights.⁹ Moral rights consist of four categories namely the right to be named; the right to integrity; the right and freedom from false attribution; and the right to privacy.¹⁰

Consistent with the theoretical framework of this study under paragraph 11.2 of chapter one, the economic rights are anchored on the incentive utilitarian theory because they incentivise the authors to create and disseminate their works to the public.¹¹ Unless the right holders are vested with power to exclude others from the exploitation of their works; the incentive to create works would be impaired.¹² In cases where the law provides for non-voluntary licensing of any of the exclusive rights, at least rights to equitable remuneration are granted in lieu of consent or authorisation.¹³ When various categories of copyright and more particularly broadcasts are exploited, exclusive economic rights deployed create private property rights over broadcasts which are normally considered as a public good.¹⁴ This individualisation of broadcasts creates a monopoly by which the public is excluded from its use. When the broadcasts embody football events, such events are individualised by the application of copyright or copyright-protected TPMs.

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (hereinafter referred to as ‘the Rome Convention’) does not define the term exclusive right but the opening words of Article thirteen imply that the rights granted

⁹ See *supra* note 1 at 284.

¹⁰ See Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development* (2016) at 193; see also Copyright Act of Kenya s. 32; Copyright Act of South Africa s. 20.

¹¹ See Para.5 of chapter one; see also Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 *Harvard L.Rev.* 1569, 1633(2009) at 1577.

¹² See *id.*; see also Paul Goldstein, *Law and Contemporary Problems*, 55 *Copyright and Legislation, the Kastenmier Years*, 79, 91 (1992) at 85.

¹³ See *e.g.*, *supra* note 1 at 284.

¹⁴ Although digitisation has undermined the concept of excludability, non-rivrousness remains as strong as ever and therefore broadcasting is a public good. Gavyn Davis OBE, *The BBC and the Public Value* (2004) at 15; A broadcast is a public good because it is propagated over airwaves which constitute public property and which must be used in such a way as to advance public interest. *Govt of India v Cricket Association of Bengal* (1975) 2 SCC 161.

thereunder are exclusive.¹⁵ The Convention for the Protection of Literary and Artistic Works (hereinafter called the Berne Convention) does not either define “exclusive” but uses the term in the identification and grant of the exclusive rights.¹⁶

The Rome Convention was the first international instrument to create international normative structures for the protection of broadcast copyright of broadcasting organisations. In most commonwealth jurisdictions, the concept of copyright covers both related rights and copyright,¹⁷ and this study adopts the structure which is also in vogue in both South Africa and Kenya.¹⁸ In this study, the author will first focus on the economic rights granted to broadcasters under the Rome convention before addressing new and emerging economic rights necessitated by new and not so new technologies before addressing exceptions and limitations to copyright.

The Rome Convention grants broadcasting organisations the right to exclude or prohibit:

- a) the rebroadcasting of their broadcast
- b) the fixations of their broadcasts
- c) the reproduction
 - i. of their fixations made without their consent, of their broadcast
 - ii. of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is for the purposes different from those referred to in those provisions
- d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.¹⁹

¹⁵ Broadcasting organisations shall enjoy the right to authorise or prohibit.... Rome Convention art.13 (to enjoy the right to authorise or prohibit means that this right can only be exercisable by the right holder alone and therefore is exclusive).

¹⁶ See e.g., article 11bis (1) the authors of literary works and artistic works shall enjoy the exclusive right of authorising....).

¹⁷ See e.g. Shyam Balganes, *The Social Cost of the Property Rights in Broadcasts (and Cables) Signals*, 22*Berkeley Technology Law Journal* 1303 1312(2008) (Balganes argues that in the wake of the adoption of the Rome Convention of 1961 most commonwealth countries subsumed neighbouring rights into copyright and thereby neighbouring rights became rights analogous to copyright).

¹⁸ In Kenya and South Africa, the copyright legislations do not disaggregate neighbouring rights from copyright. Both of them are lumped together as copyright. Section Twenty-Two Subsection one of the Kenyan Copyright Act, 2001, grants copyright to all the listed works including broadcasts and sound recordings which are neighbouring rights-protected works. The same applies to Section 2(1) of the South African Copyright Act, 1978). This is inconsistent with the WIPO tradition in original works of authorship are called copyright and entrepreneurial works like broadcasts, performances and phonograms are called related or neighbouring rights.

¹⁹ See art. 13.

The exercise of the economic rights prescribed under the Rome Convention is intended to leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of the Convention may be interpreted as prejudicing such protection.²⁰ Arising from this safeguard clause, WIPO argues that the object of protection in a broadcast is a signal and not the content.²¹ This analogy is drawn from Article 3 of the Rome convention.²² Protection of literary and artistic works envisaged under the Rome Convention are the copyright works protected under the Berne Convention that may be transmitted by a broadcasting organisation. Such works could include audiovisual works, musical works, graphics and football highlights.²³

Football games embedded into a signal are part of the underlying content, though not copyrightable. The delicate balance to be maintained is how copyright protection could be extended to the signal without encroaching upon the copyright of content or content that is not the subject of copyright or is in public domain.²⁴ One of the most contentious issues in the ongoing WIPO negotiations on the possible treaty for the protection of broadcasters is the potential danger of the signal protection to extend to content of the signal because the exclusive rights already granted under the Rome Convention suggest so, as will be shown anon.²⁵

²⁰ See Rome Convention art 1.

²¹ See *infra* note 25 at 5.

²² See *id.*

²³ See Thomas Hoehn and ZafeiraKatrinaki, *Broadcasting and Sport: Value Drivers of TV Right deals in the European Football (2012) at 12*. Online available at [www.city.ac.uk/ data/assets/pdf](http://www.city.ac.uk/data/assets/pdf) last accessed on Jan.23, 2017; See also *Football Association Premier League v Leisure and Others*, *Karen Murphy v Media Services Ltd* respectively C-403 and C-429 of 2008 at 13.

²⁴ See WIPO SCCR/32/3, *Revised Consolidated Text on Definitions, Object of Protection and Rights to be Granted*, (May 9-13, 2016) (in the text the object of protection is identified as the programme-carrying signal including pre-broadcast signal but the programmes contained therein); *but see* Lucio Colantuoni and Christiano Novazio, Intellectual Property Rights: a Comparative Overview of the USA, UK and Italy (James A.R. Nafzinger and Stephen F. Ross eds.) *Handbook on International Sports Law* (2011) at 440 (it is argued that copyright protection in a sporting activity is not only anchored on a broadcast signal but on content).

²⁵ Divyanshu Sehgal and Siddhart Mathur, Rights and Duties of Broadcasting Organisations: Analysis of the WIPO Treaty on the Protection of Broadcasting Organisations, *16 Journal of Intellectual Property Rights*, 402 408(2012) at 404.

5.1.1 Right of Rebroadcasting

The Rome Convention defines a “rebroadcasting to mean the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.”²⁶ This definition restricts rebroadcasting to traditional broadcasting in which another traditional broadcaster retransmits without any changes the broadcasts of another traditional broadcaster. It excludes delayed rebroadcasting which is transmitted at a time later than the original broadcasts. The doctrinal basis for exclusion of delayed rebroadcasting from the definition is because delayed broadcasting is based on a fixation of the broadcasts or reproduction of fixation. Upon fixation, the original signal fizzles out and the recorded content is transmitted by a new signal the *ensemble* of which constitutes a new broadcast since the object of protection of a broadcast is a signal and not content.²⁷

The scope of rebroadcasting keeps changing with the evolution of new technologies. In 2003, WIPO formulated a much broader definition of rebroadcasting to mean “simultaneous and unchanged broadcasting by one broadcasting organisation of the broadcast or cablecast of another broadcasting organisation.”²⁸ The definition takes account of the possibility of a traditional broadcasting organisation simulcasting²⁹ a broadcast over the air and on cable networks simultaneously (cablecasting). The traditional broadcaster does not therefore lose its right to fight piracy of its broadcasts which take place on other platforms otherwise than transmission over hertzian waves. This practically extends the scope of broadcasting beyond the traditional sense of broadcasting which is restricted to over-the-air transmissions.

Under the Berne Convention,³⁰ the exclusive right of authorising rebroadcasting is confined to a situation when such rebroadcasting is done by an organisation other than the original one. Article

²⁶ Rome Convention art.3 (g).

²⁷ See WIPO, *Rights of Broadcasting Organisations: Technical Background Paper Prepared by the Secretariat*, SCCR/7/8, (May 13-17 2002) at 5 Para.17; See also Karol Kowalski, *The Rights to TV Broadcast of Sports Events*, LLM Thesis, Lapland University (2015) at 25; *but see also* Michael Handler, *Penal Case and Television Broadcast*, 25 *Sydney L.REV.* 399 (2003) at 407 (it is argued that signals are so transient to be the basis of broadcast copyright).

²⁸ See Fisor *supra* note 1 at 306.

²⁹ The author uses the term simulcast to mean a simultaneous transmission over another medium the traditional over-the-air transmission by a traditional broadcaster.

³⁰ See Berne Convention art.11 bis 1(i).

11 bis (2) of the Convention, however, permits for limitation on such a right in a way that the application of non-voluntary licences or subjecting its exercise to the condition that it may only be through collective management.³¹

The Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite of 1974 (Satellite Convention) obliges member states to take adequate measures to prevent the distribution on or from their territories of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended.³² The Satellite Convention defines a distributor as a person or legal entity that decides that the transmission of the derived signals to the general public or any section thereof should take place.³³ The subject matter of protection under the Satellite Convention is a signal embodied with programmes and since there is a predominant global consensus that the object of protection is a signal, then one of the activities it protects is a rebroadcasting of a broadcast propagated via a satellite. Currently unauthorised rebroadcasting of satellite broadcast signals both at national and extra-territorial levels is a major form of piracy.³⁴ The term piracy in the context of this study refers to the commercial exploitation of a broadcast programme by third parties without authorisation from the originating broadcaster.³⁵ Rafiei divides unauthorised rebroadcasting into two namely unauthorised terrestrial rebroadcasting which takes place from terrestrial broadcasting; and unauthorised satellite rebroadcasting which involves illegal interception of a broadcast signal either at an uplink or downlink stage of the uninterrupted chain satellite transmission.³⁶

In light of its exclusive nature, unauthorised rebroadcasting of a broadcast is tantamount to copyright infringement. In the USA, however, the law permits a system of compulsory licensing under which cable operators intercept television signals from outside a local viewing area and

³¹ See *supra* note 1 at 306.

³² See art.2.

³³ See art.1 (vii).

³⁴ See Gholamreza Rafiei, *The Possibility of Granting New Legal Protection and IP Rights to Broadcasting Organisations Against the Unauthorised Exploitation of their Broadcasts*, Ph..D Thesis, University of Neuchatel (2015) at 51; See also WIPO, *Analytical Document on the Study on the Socio-Economic Dimension of the Unauthorised Use of Signals*, Parts I, II and III, SCCR/21/4, Nov.8-11, 2010 at 5 Para. 8.

³⁵ Louis Caldwell, *Piracy of Broadcast Programmes*, 30 Columbia L.REV. 1084, 1114 (1930) at 1086.

³⁶ See Rafiei *supra* note 34.

retransmit them to their cable subscribers upon payment of a statutory copyright fee.³⁷ The payment for the statutory copyright is an affirmation that a rebroadcasting is copyright protected. The Copyright Act gives guidelines on the assessment of the cable operator's loyalty payment for such rebroadcasting at a percentage pegged upon each operator's subscription revenue.³⁸

In Kenya, a rebroadcasting is defined as the simultaneous or subsequent broadcasting by one or more broadcasting authorities of the broadcasts of another broadcasting authority.³⁹ The copyright law grants the broadcasting authority exclusive right to control the rebroadcasting of the whole or a substantial part of its broadcast.⁴⁰ The concept of rebroadcasting in Kenya is broader than that envisaged under the Rome Convention because in the former rebroadcasting extends to deferred transmissions. The definition of a rebroadcasting under the Kenyan copyright law clarifies that an infringement cannot be committed unless the rebroadcasting extends to a substantial portion of the broadcasts.⁴¹ Two problems crop up in this definition, first what are the outer boundaries of rebroadcasting, and secondly, what is a substantial part of a broadcast? According to Handler, the concept of substantiality in television broadcasting takes the notion that the threshold of substantiality is achieved when a plurality of visual images that constitute a unit of programming is rebroadcast as opposed to a single image.⁴² On the other hand Copeling argues that in a rebroadcasting of visual images comprising a telecast, an infringement is committed even though a rebroadcasting extends to no more than a sequence of such images sufficient to be seen as a moving picture.⁴³ The sequence of images sufficient to be seen as a moving picture is what Handler characterises as a unit of programming.⁴⁴

³⁷ See U.S.C §111; see also Stephen Hopkins Willard, New Method of Calculating Copyright Liability for Cable Rebroadcasting of Distant Television Signals, *94 Yale L.J.* 1512, 1528 (1985) at 1513.

³⁸ See *id.*

³⁹ Copyright Act, 2001 s. 2 (the section also defines a broadcasting authority to mean Kenya Broadcasting Corporation established under the Kenya Broadcasting Corporation Act or any other broadcaster authorised by or under any written law. The mention of Kenya Broadcasting Corporation which is a public broadcaster, in the definition is superfluous in a liberalised broadcasting sector).

⁴⁰ See Copyright Act s.29.

⁴¹ See *id.*

⁴² Michael Handler, The Panel Case and Television Broadcast Copyright, *25 Sydney L. Rev.* (2003) at 401.

⁴³ A.J.C. Copeling, Copyright in Broadcasts in the Republic of South Africa, *Comparative and International Law Journal of Southern Africa* (1972) at 10.

⁴⁴ See *supra* note 34.

In South Africa, the copyright law defines rebroadcasting as the simultaneous or subsequent broadcasting by one broadcaster of the broadcast of another broadcaster.⁴⁵ The copyright legislation of South Africa also grants broadcasters exclusive right over the rebroadcasting of their broadcasts. Both Kenya and South Africa have gone beyond the Rome Convention in the scope of protection of rebroadcasting. Their copyright legislations extend the notion of rebroadcasting to deferred retransmission. The boundaries of subsequent retransmission are not defined. However, as argued before in this chapter,⁴⁶ a deferred or subsequent retransmission regardless of quantitative duration is always based on a fixed signal. Once a signal is fixed or recorded it fizzles out and leaves behind the content. It is this content alone whose source can be traced to the originating broadcaster. Therefore a claim for a subsequent retransmission must be pegged on content and not on the signal. This therefore reinforces the argument that in South Africa and Kenya the copyright protection of a broadcast is anchored on both the content and the embodying signal. Judicial pronouncements in Kenya and the UK point to that direction, while in South Africa courts have not had the opportunity to interpret the matter.

In *Kenya Broadcasting Corporation (KBC) v Wananchi Group Ltd. and Pan African Network Group (K) Ltd.*,⁴⁷ the latter rebroadcast the broadcasts embodying the 2014, FIFA World Cup matches of the former without authority. KBC applied and was granted an injunction restraining the latter from carrying live or deferred rebroadcasting of its broadcasts. In *Communications Commission of Kenya and 5 Others v Royal Media Services Ltd Others*,⁴⁸ the Supreme Court of Kenya made a controversial judgment in which it held that unauthorised retransmission of FTA broadcasts over pay television channels and signal distribution networks was not a rebroadcasting of the respondents' content because the appellants were not broadcasting organisations since they did not take financial and editorial responsibility for the selection and arrangement of content. "That is to say that the appellants did not interfere with the broadcast content of the first, second and third respondents. The content was delivered digitally without

⁴⁵ Copyright Act of South Africa s. 1.

⁴⁶ See *supra* note 20.

⁴⁷ HCCC No. 254 of 2014 at Nairobi Milimani.

⁴⁸ (2014) eKLR Para.243 (the appeal arose from the decision of the Court of Appeal in which Signet Kenya Ltd (a signal distributor), Startimes Media Ltd (a pay TV operator), Pan Africa Network Group Kenya Ltd (signal distributor), and GOtv (a pay TV channel) were prohibited from broadcasting any content from Royal Media Services Ltd, Nation Media Group Ltd, and Standard Group Ltd all FTA broadcasters, without their consent).

any interference from the digital distributor. As they were not rebroadcasting the content, we find that the appellants did not infringe on the intellectual property rights of the 1st, 2nd, and 3rd respondents.”⁴⁹

The decision is controversial because the Supreme Court found out that there was retransmission which did not amount to rebroadcasting because the appellants were not broadcasting organisations and ipso facto they did not take editorial and financial responsibility for the content selection and arrangement. The essence of rebroadcasting according to WIPO⁵⁰ is not only the simultaneity and immutability of the rebroadcast broadcast but also the fact that a rebroadcasting is a mere retransmission for which a rebroadcasting organisation has no financial and editorial responsibility. These are the attributes that are inherent in a rebroadcasting and thus the reason for which it constitutes an infringement if unauthorised. In addition, the concept of broadcasting includes transmission of encrypted signals where the means of decrypting are provided to the public by the broadcasting organisation or with its consent,⁵¹ as was in this case. To that end, the entity that transmits encrypted signals with decrypting means being provided to the public is a broadcasting organisation and therefore capable of effectuating a rebroadcasting. GoTV and Startimes Media having been entities transmitting encrypted programme-carrying signals to their subscribers, they were broadcasting organisation and their retransmission of FTA signals of other broadcasters amounted to rebroadcasting and therefore the Supreme Court’s finding is doctrinally unsound and potentially detrimental to broadcasters’ commercial interests. It rewards pirating broadcasters and renders them unaccountable because they do not invest in nor take editorial responsibility for what they retransmit.

5.1.2 Right of Fixation

Fixation is the capturing of a broadcast or object of related rights in some material form including storage in an electronic format in a sufficiently stable form, in a way that on this basis the broadcast or object of related rights may be perceived, reproduced or communicated to the

⁴⁹ *See id.*

⁵⁰ *See Supra* note 21.

⁵¹ *See* WPPT art.2 (f).

public.⁵² WPPT defines fixation as the embodiment of sounds or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.⁵³ The two definitions are conceptualised to address specific works. Nimmer however, expounds the concept by stating that a work is not fixed under the Copyright Act (reference was to the USA Copyright Law) unless its embodiment in tangible form is sufficiently permanent or stable to be perceived, reproduced, or communicated for a period of more than transitory duration.⁵⁴ Whereas in most jurisdictions fixation is the second criterion for copyrightability after originality, it is however, not a mandatory condition for copyright protection under the Berne Convention.⁵⁵ The Convention gives member states an opt-out option in relation to fixation as a pre-condition for copyright protection.⁵⁶ By implication “material form” means embodiment in a copy or phonorecord which is sufficiently permanent or stable to permit the work to be perceived or reproduced or otherwise communicated for a period more than a transitory period.⁵⁷ Materiality in this case refers to a physical form into which a work is first expressed. This means that a fixation cannot be derived from another existing fixation because it is understood to be the first fixation.⁵⁸

The Rome Convention does not define the term fixation.⁵⁹ However, the Convention grants broadcasting organisations the right to authorise or prohibit the fixation of their broadcasts.⁶⁰ During the adoption of the Rome Convention in 1961, it was agreed that fixation included fixation of a part of the broadcast but no position was taken whether taking a single still photograph from the television screen constituted a fixation.⁶¹ This was left to national laws to

⁵² See *supra* note 1 at 290.

⁵³ See WPPT art. 2(c).

⁵⁴ Melville Nimmer and David Nimmer, *Nimmer on Copyright* (Vol.1 2010) para. 2-34 (citing 17 U.S.C. § 102 (a)).

⁵⁵ See art. 2 (2) (the Article provides that it shall be a matter for legislation in countries of the Union to prescribe that works in general or any specified categories of work shall not be protected unless they have been fixed in some material form).

⁵⁶ See *id.*

⁵⁷ See Nimmer *supra* note 54 Para. 2-9.

⁵⁸ Fixation of a live broadcast should not be confused with fixation of a work which may be the subject matter of a broadcast, thus a musical work if fixed once its fixed into a phonore and if such a work is performed on live television broadcast, any unauthorised reproduction of such work would be an infringement.

⁵⁹ See art.3 (the article defines other concepts other than fixation namely; performers, phonogram, producers of phonograms, publication, reproduction, broadcasting, and rebroadcasting).

⁶⁰ See art. 13.

⁶¹ WIPO, *Neighbouring Rights: A Guide to the Rome Convention and to the Phonograms Convention* (1981) at 53.

individually decide although the omission of the right to control the taking of still photographs can be damaging to right holders especially in football transmission.⁶² The exercise of this right will, however, depend on whether the object of protection is a signal or both signal and content. If the object of protection is a signal then taking a still photograph only attaches to content and therefore there is no infringement.⁶³

WPPT defines fixation as the embodiment of sounds or of the representations thereof, from which they can be perceived, reproduced or communicated to the public.⁶⁴ Although this definition relates to sound recording, it may be subsumed into broadcasting to mean the embodiment of broadcast images or images and sound or of the representations thereof from which they can be perceived, reproduced or communicated to the public through a device. A right of fixation of broadcasts grants the broadcasting organisation the exclusive right to authorise or forbid any other person, including other broadcasting organisations to fix its broadcasts. This therefore logically means that an exclusive right of fixation of a broadcast can be meaningfully exercised in countries where fixation is not a condition for copyrightability in terms of the opt-out clause under the Berne Convention.⁶⁵ It is posited that if fixation is a precondition for copyright protection of a broadcast, then live transmission of a broadcast which has not been recorded cannot be eligible to protection.

Unauthorised fixation in countries which uphold the twin doctrine of originality and materiality as a condition for copyright protection will not be in violation of copyright because it occurs before the second criterion attaches.⁶⁶ Since a right of fixation vests in the broadcasting organisation over its broadcasts, unauthorised fixation cannot be a fixation for the purposes of subsistence of copyright in jurisdictions where fixation is a precondition.⁶⁷ Unauthorised fixation

⁶² *See id.*

⁶³ *See* Chapter 3 of this study, Para. 3.3.1.

⁶⁴ *See supra* note 53.

⁶⁵ *See supra* note 43.

⁶⁶ This is the inference drawn by the author based on the definition of fixation and whether or not it forms the basis of copyrightability.

⁶⁷ USC §101 (the provision provides that a work is fixed in a tangible medium of expression when its embodiment in a copy or phonorecord by or under the authority of the author, is sufficiently stable to permit to be perceived, reproduced or otherwise communicated for a period more than transitory duration); *but see e.g.* Copyright Design and Patent Act 1988 s.3(2) (it is immaterial for the purposes of subsistence of copyright as to whether

of a football broadcast therefore is not an infringement of copyright. Countries which uphold the twin doctrine of originality and fixation as precondition for copyright protection in broadcasts include the USA.⁶⁸ In the USA therefore, the requirement of fixation cannot be met by live broadcasts of events such as baseball or football games.⁶⁹ This is because the broadcast signals emitted to the atmosphere are continuous out in space and grow weaker in power over distance and thus lack permanence and stability to enjoy copyright protection.⁷⁰

In South Africa, there is no legal requirement for fixation of a broadcast as a condition for copyrightability.⁷¹ However, all the categories of work eligible for copyright in South Africa must be original.⁷² The copyright law does not mention what constitutes originality, which remains a condition for copyright protection in a broadcast or a programme-carrying signal. Because fixation is not a condition for broadcast copyright protection in South Africa, it follows that the only requirement necessary for accrual of copyright is originality which takes place at the time of field production as particularly examined under chapter four, paragraph 4.3 of this study. Although the copyright legislation of South Africa does not specifically grant a right of fixation,⁷³ the right is, however, implied from the right of reproduction. A reproduction of a work is normally based on a fixation. Therefore, a fixation of a broadcast football is copyright protected. This right individualises both signal and the football content embedded into it. This individualisation restricts access to the public of football games because any unauthorised

the fixation is done by or on behalf of the author, and where it is done without authority copyright will still spring up if other conditions are met).

⁶⁸ See USC § 102 (a) (the provision states that copyright protection subsists, in accordance with this title, in original works of authorship fixed in a tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device).

⁶⁹ John William Nelson, *Live Broadcast Performance Aren't Per se Copyrightable: Revisiting the Fixation Requirement* (2010) at 1.

⁷⁰ See *id.*

⁷¹ South African Copyright Act No. 98 of 1978 s. 2(2) (the provision stipulates the except broadcasts or programme-carrying signals all other works must be written down or recorded before they become eligible for copyright protection); as a general rule, works are not eligible for copyright in common-law countries unless they are original and reduced to a material form, but this rule does not apply to a broadcast or programme-carrying signal. LTC Harms, *the Enforcement of Intellectual Property Rights: A Case Book*, WIPO (2005) at 135.

⁷² South African Copyright Act s.2(1) (it provides that subject to the provisions of this Act, the following works, if they are original, shall be eligible to copyright: literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, programme-carrying signals, published editions, and computer programs).

⁷³ See s.10 (the provision grants broadcasters an exclusive right of reproduction, rebroadcasting, and retransmission among others).

interception and fixation of football broadcasts transmitted either via satellite or terrestrially would constitute copyright infringement.

In Kenya, the copyright legislation⁷⁴ provides that a literary, musical or artistic work shall not be eligible for copyright unless:

- a) Sufficient effort has been expended on making the work to give it an original character;
- b) The work has been written down, recorded or otherwise reduced to material form.

The law is silent on whether a broadcast requires to be original and recorded or written down in a physical medium before it enjoys copyright. This could be interpreted to mean that the two criteria are not a condition precedent for broadcast copyright. It therefore follows that in Kenya, broadcasts enjoy copyright independent of originality and tangibility. This would also mean that a live football transmission which has not been recorded enjoys copyright because tangibility is not a requirement for copyright protection in broadcasts. Kuloba⁷⁵ argues that Kenya and other Africa should altogether do away with the fixation requirement because there are creators whose works do not exist in fixed forms, like orate creators. The Kenya Copyright Act defines a fixation as the embodiment of sound or images, or a representation thereof from which they can be perceived, reproduced or communicated through a device.⁷⁶ The Act grants, among others, an exclusive right of fixation of the whole or substantial part of the broadcast.⁷⁷ Just like in South Africa, unauthorised fixation of a broadcast is tantamount to copyright infringement. In determining substantiality of or the whole of the broadcast, courts rely on the quality and the economic significance of the fixation.⁷⁸ In South Africa, a substantial part of a work is dependent on quality than quantity.⁷⁹ However, it is arguable whether the substantiality is based on the signal or content. Bently and Sherman argue that broadcasting involves provision of a service; the act of transmitting or communicating signals. These signals encode visual or aural content

⁷⁴ See Copyright Act, 2001 s.22 (3).

⁷⁵ See Richard Kuloba, *Principles of Injunctions* (1987) at 124-134; See also Peter Wasamba and Ben Sihanya "What do Kenyan Artistes Get for their Skill: Reforming Compensation under Copyright" 24-2 *Journal of Africa Cultural Studies* 124 134 (2012).

⁷⁶ Copyright Act. s. 2(1).

⁷⁷ Copyright Act s.29.

⁷⁸ Michael Handler *supra* note 42.

⁷⁹ Eric Levenstein and Ryan Tucker, "*South Africa: Introduction to Law of Copyright (2005)*". Available online at [www.mondaq.com/southafrica/x/36570/copyright/introduction+ To + The+ Law-of-copyright.pdf](http://www.mondaq.com/southafrica/x/36570/copyright/introduction+To+The+Law-of-copyright.pdf). Last accessed on May 12, 2017.

which itself constitutes copyright subject matter.⁸⁰ Yet there are those who support the signal-based approach and argue that the doctrine of substantiality should be signal-centric.⁸¹ The problem with the latter is that the signal is imperceptible and therefore difficult to quantify.

In *Theberge v GalerieD'Art Du Petit Champlain Inc.*,⁸² the Supreme Court of Canada held that “fixation has a relatively well settled but rather different connotation in copyright law as it distinguishes works capable of copyright protection from the general ideas that are the common intellectual “property” of everyone. Thus copyright springs into existence as soon as the work is written down or otherwise recorded in some reasonably permanent form.” The ruling indicates that although fixation is not a pre-condition for broadcast copyright, it is however, important in the authorial works (artistic, literary and Musical works). In *Northern Office Micro Computers v Rosenstein*,⁸³ the High Court held that copyright subsists not in ideas but in forms in which the ideas are expressed and thus copyright must subsist in some form of material form. Only broadcasts and programme-carrying signals are exempted from this requirement.⁸⁴ Stressing the importance of fixation, the court in *Payen Components v Bovic Gaskets*⁸⁵ asserted that a work is final complete version when it is ready for utilisation or commercial exploitation taking account of the effort, skill, labour, and ingenuity congealed into it.

5.1.3 Right of Reproduction

A reproduction, according to the Rome Convention, refers to the making of a copy or copies of a fixation.⁸⁶ This means that a reproduction is based upon a fixation. In the Berne Convention, right holders in literary, artistic and musical works enjoy the exclusive right of authorising the reproduction of their works in any manner or form.⁸⁷ The right of reproduction under the Berne Convention is broader than that granted under the Rome Convention because in the latter,

⁸⁰ See Lionel Bently and Brad Sherman *Intellectual Property Law* (2001) at 7.

⁸¹ See WIPO, *The WIPO Draft Treaty on Broadcasting Organisations*, Paper Prepared by WIPO Secretariat and Presented at the WIPO SCCR Meeting, Nov. 3-7, 2008 at 24.

⁸² (2002) SCC 34.

⁸³ (1981) (4) SA 123 Para. 129.

⁸⁴ See supra note 64.

⁸⁵ (1995) (4) SA 441 A at Para. 93.

⁸⁶ See art.3 (c); but see e.g., supra note 1 at 307(the term reproduction is defined as a “new” fixation of the work sufficiently stable in a way that the work may be perceived, reproduced and communicated on the basis thereof.

Storage of works in any electronic computer memory is also a reproduction, since it corresponds to the concept).
⁸⁷ Berne Convention art.9(1).

reproduction is restricted to physical copies while in the former the notion of reproduction is broader including reproductions in digital environments where physical copies may not be reproduced. In this context, a copy is a by-product of a reproduction of a work which may be permanent or temporary/transient and/ or which may be tangible or intangible and may be perceived directly by human beings or only by means of appropriate device.⁸⁸ Under Article 9(1) of the Berne Convention, a right of reproduction cannot be affected by the method, manner or form of reproduction or whether the copy of the work may be perceived directly or through a device.⁸⁹ It is also irrelevant whether or not the work is embodied on a tangible object; whether the reproduction is made directly from a tangible or an intangible or whether the duration of fixation (including the storage in an electronic memory) is permanent or temporary as long as on the basis of the reproduction of the work can be perceived or reproduced or communicated.⁹⁰

The Rome Convention grants producers of phonograms a right to authorise or prohibit the direct or indirect reproduction of their phonograms. The term “indirect reproduction” may cover other forms of reproductions otherwise than those that are copy-based. Although this clarification broadens the notion of reproduction, the concept is conflated with contradictions and therefore devoid of felicity.⁹¹ The Rome Convention has kept itself to the traditional and historical scope of the notion of reproduction which focuses on the production of additional or new copies without regard to the implications of new technologies.

Modern international instruments for the protection of copyright and neighbouring rights have adopted the notion of reproduction in the Berne Convention. The WPPT grants performers the exclusive right of authorising direct or indirect reproduction of their fixed phonograms, in any manner or form.⁹² The Beijing Treaty on Audiovisual performances⁹³ replicates, *mutatis mutandis*, the reproduction right under WPPT. On its part, the TRIPs Agreement restricts the

⁸⁸ See Fisor *supra* note 1 at 228.

⁸⁹ See *id* at 307.

⁹⁰ See *id*.

⁹¹ See Rome Convention art.10.

⁹² See art. 7.

⁹³ See art 7(the Beijing Treaty on Audiovisual performances was adopted in Beijing, China in order to update the intellectual property rights of audiovisual performers on the international plane).

reproduction right of broadcasting organisations to a “right of prohibition.”⁹⁴ The import of this is that broadcasting organisations under the TRIPs Agreement can only use a reproduction right as a shield and not as a sword. The right can only be used to stop any unauthorised reproduction but cannot be used to authorise a reproduction of fixed broadcasts.

In the on-going negotiations for the updating of the rights of broadcasting organisations under the auspices of WIPO, there is controversy regarding the extent to which rights should be conferred on broadcasters for any use subsequent to fixation.⁹⁵ Some delegates have argued against conferment of post-fixation rights to broadcasting organisations.⁹⁶ The proponents of this argument are also proponents of a signal-based protection of the rights of broadcasters. They argue that the rights in a signal can logically only relate to the simultaneous retransmission of the signal and possibly its fixation⁹⁷. After fixation the signal fizzles out leaving only the content. Granting rights beyond the fixation, they posit, will create an overlapping protection which may bring unintended consequences and is not necessary and risks making access to the broadcast content or football more difficult.⁹⁸

The general rule is that the exclusive right of reproduction is infringed when a substantial portion of the work is reproduced.⁹⁹ In the case of television broadcasting, an infringement is committed even though the reproduction extends to no more than a sequence of such images sufficient to be seen as a moving picture.¹⁰⁰ In *Infopaq International A/S v Danske Dagblades Forening (DDF)*,¹⁰¹ the court employed the qualitative test to hold that eleven words extract from a

⁹⁴ See art. 14(3).

⁹⁵ See e.g., Manon Ress, Knowledge Ecology International, WIPO 31 SCCR: Statement of India Regarding the Broadcasting Treaty, Dec.7, 2015 (referring to an intervention made by Sumit Sethi, leader of the Indian delegation at the 31st SCCR of WIPO on Dec.7, 2015).

⁹⁶ WIPO, *WIPO Treaty on the Protection of Broadcasting Organisations*, SCCC/17/INF/1, Nov. 3-7, 2008 at Para. 23.

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ *National Soccer League T/A Premier League v Gidani (Pty) Ltd* (2014) All SA 461 at Para 90 (the High Court held that the plaintiff had proven that from a qualitative view there is little doubt that the fixtures taken by the defendant for the purposes of its “Sport Stake” publication was substantially significant to the whole list of football fixtures).

¹⁰⁰ See *supra* note 35 at 10.

¹⁰¹ C-5/08, ECJ, July 2009 (By means of data capture, Infopaq drew up summaries of articles from a Danish newspaper and sent them by e-mail to its customers on agreed terms. DDF, an association of Danish Daily Newspaper Publisher whose function included assisting its members with copyright wrote to Infopaq who had

newspaper contain an expression of intellectual creation of the author and hence substantial part of the newspaper in question. In *Cricket Board Ltd and Anor v Tixdaq Ltd*,¹⁰² Judge Arnold held that:

Although quantitatively eight seconds is not a large proportion of a broadcast of a film lasting two hours or more, qualitatively, however, most clips uploaded constituted highlights of matches, replays and the like. Each clip substantially exploited the claimants' investment in the broadcast and accordingly each clip constituted a substantial part of the relevant copyright work and thus copyrightable.

In South Africa, reproduction is broadly interpreted. It protects against infringement in material and non-material form.¹⁰³ Consequently, the reproduction covers activities of the kind that take place in a digital environment like downloading from or uploading materials to internet or displaying works on computer screens. In this connection, the High Court in Gauteng¹⁰⁴ restrained the defendants from infringing the applicant's copyright in the cinematographic work titled "Truth be Told: Project Spear" by, inter alia, reproducing the work in any manner or form including taking still photographs therefrom. It would appear that in South Africa, taking even a single still photograph off the broadcast constitutes copyright actionable infringement. The judgment is consistent with the South African copyright law¹⁰⁵ which grants broadcasters an exclusive right of reproduction of the broadcast including taking a still photograph therefrom. This provision is replicated in the Kenya copyright law which provides that a copyright in a telecast shall include the right to control the taking of still photographs therefrom.¹⁰⁶ This right therefore prohibits the taking and distributing of copies of a broadcast football match to the public. This prohibition covers recorded highlights, footages, scores of the moments the ensemble of which will deny the public access to the events in their recorded form.

not obtained consent and asked them to obtain consent. Infopaq disputed DDF's claim and applied to court for acknowledgement that consent was not legally justified).

¹⁰² (2016) EWHC 575 Ch.

¹⁰³ See *supra* note 71.

¹⁰⁴ *SABC SOC Ltd v Via Vollenhoven and Appollis Independent CC and others* 13/23293{2016} ZAGP JHC 228.

¹⁰⁵ See Copyright Act No. 98 of 1978 s.10 (a).

¹⁰⁶ Copyright Act, 2001 s.29 (b).

5.1.4 Communication to the Public

The Rome Convention does not define the term communication to the public but confers on broadcasters an exclusive right of communication to the public of their broadcasts conditioned upon payment of an entrance fee.¹⁰⁷ This right is historical and reflects the state of technology at the time when the Convention was adopted in 1961. Historically, the right of communication to the public was granted right holders of literary and artistic works after the advent of radio and television broadcasting.¹⁰⁸ At the time, the right was justified because broadcast receiving sets were insufficient for most of the households.¹⁰⁹ Consequently, the majority of the people patronised public places including, cinemas, hotels, pitched tents, and restaurants in order to listen to or watch radio and television programmes including those carrying football events. In a way, the right served the economic interest of those establishments because the broadcasts attracted increased audience and revenue. However, no communication to the public for payment occurs within the sense of the Rome Convention when the communication takes place for commercial purposes, such as in bars, department stores or restaurants; it is only used as an accessory, without imposing an entrance fee.¹¹⁰ The right of communication to the public under the Rome Convention is, however, subject to reservation and thus contracting states may opt not to grant it to broadcasters headquartered on their territories.¹¹¹

Before the adoption of the Rome Convention, the Berne Convention had granted authors of literary and artistic works the exclusive right to authorise the broadcasting or communication to the public of their works.¹¹² In this context, the notion of communication to the public covers the transmission of signs, sounds or images of a work by wire or wireless means or by use of devices like loudspeakers or instruments analogous thereto.

¹⁰⁷ See art.13 (d).

¹⁰⁸ See *supra* note 26 at 103-4.

¹⁰⁹ See *id.*

¹¹⁰ See *supra* note 61 at 284.

¹¹¹ See art.16 (1) b.

¹¹² See art. 11^{bis}(1) (authors of literary and artistic works shall enjoy the exclusive right of authorising: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by the organisation other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work); see art. 11 (i) (any means or process includes recorder player or jukebox).

WPPT defines “communication to the public” of a performance or a phonogram as the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or representations of sounds fixed in a phonogram.¹¹³ The Treaty grants performers and producers of phonograms a right of a single equitable remuneration for direct or indirect use of phonograms published for commercial purposes for broadcasting or for communication to the public.¹¹⁴ WPPT, to that extent, excludes wireless transmission for the reception by the public but covers all retransmissions by wire or any other transmissions, including broadcasting.¹¹⁵ On the other hand, WCT¹¹⁶ adopts the Berne Convention concept of communication to the public but extends it by referring to (interactive) making available to the public. It therefore, extends the notion of communication to interactive networks.

The concept of public is restricted to a group consisting of a substantial number of persons outside the normal circle of family and its closest social acquaintances.¹¹⁷ It is not decisive whether the group is gathered at one place; the availability of works for the group suffices. In cases of communication to the public (including broadcasting) and (interactive) making available to the public; it is irrelevant whether members of the public capable of receiving the works may receive them at the same place or at different places, and at the same time or different times.¹¹⁸

The concept of “public” was explained in *ITV Broadcasting Ltd and Others v TV Catch-up Ltd*¹¹⁹ in which the ECJ held that internet streaming services were retransmissions that constituted communication to the public in terms of the European Union Directive 2001/29, article 3(1) 2. In the ruling the Court defined “the public” as an indeterminate number of potential recipients that

¹¹³ See art.2(g).

¹¹⁴ See art. 15(1) (phonograms published for commercial purposes or those produced commercially for domestic use like tapes and CDs and if they are broadcast or for any communication to the public a single equitable remuneration is payable by such users).

¹¹⁵ WIPO, *Protection of Broadcasting Organisations: Terms and Concepts*, SCCR/8/INF/1, Nov 4-8, 2002 at 9 Para. 41.

¹¹⁶ See art. 8; see also *supra* note 1 at 306.

¹¹⁷ See *Fiscor supra* note 1.

¹¹⁸ See *id.*

¹¹⁹ See C-607/2011, ECJ (*TV Catch-Up Ltd* was a service that streamed live tv broadcasts over internet. The services were accessible on the computers and mobile phones. *TV Catch-Up Ltd* required end users to hold a valid UK TV licence and use the service within the UK only. *ITV* sued *TV Catch-Up* for breach of copyright hence the suit. *TV Catch-Up* argued that streaming the broadcasts to a selected group of end users did not amount to communication to the public).

implies a fairly large number of persons. Closely related to the above, is *SBS Belgium v SABA*¹²⁰ in which the ECJ held that broadcasting organisations do not carry out an act of communication to the public when transmitting programme-carrying signals exclusively to the signal distributors without those signals being accessible to the public. At the European Union level Courts¹²¹ have also laid down another criterion of determining if communication to the public has been effected or not by examining the profit nature of the use and observed that café-restaurants, hotels and department stores made a communication to the public if they had intentionally broadcast protected works to their clients.

An act of communication to the public is done if the audience receiving a transmission is “a new public.” A new public is a public not taken into account by authors to the protected works when authorising their use.¹²² In the *Reha v GEMA*,¹²³ Reha’s patients were the public as they were a group not so insignificant and a new public. In *SGAE v Rafael Hoteles*,¹²⁴ the ECJ held that the distribution of broadcast signals through television sets in hotel rooms constituted a “new public” and therefore constituted an act of communication to the public. The Court stressed:

When the author authorises the broadcast of his works, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme. If the reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes a simple reception of the programme itself but it is an independent act through which the broadcast work is communicated to the new public.¹²⁵

In England the copyright law¹²⁶ defines communication to the public as communication to the public by electronic transmission. The definition identifies two specific ways in which such communication may take place namely the broadcasting of the work, and making the work available by electronic transmission on demand.¹²⁷ In *ITV Broadcasting Ltd v TV Catch-Up*

¹²⁰ See C-325/15 ECJ.

¹²¹ See e.g., *Reha Training Gesellschaft für Sport und Unfallrehabilitation v GEMA C-117/15* (the ECJ held that broadcasting programmes to patients in a rehabilitation centre was a communication to the public).

¹²² Sam Van Velze, *Communication to a New Public? A Critical Analysis of the CJEU’s New Public Criterion in the European Copyright Law*, Master of Information Law thesis, University of Amsterdam (2015) at 8.

¹²³ See *id*; see also *Football Association Premier League (FAPL) v Leisure and Others*, *Karen Murphy v Media Services Ltd* respectively C-403 and C-429 of 2008, ECJ.

¹²⁴ C-306/05 at Para. 40.

¹²⁵ See *id* Para. 41.

¹²⁶ CDPA s.20 (2).

¹²⁷ See *id*.

Ltd,¹²⁸ Kitchin J. held that the right of communication of a work to the public had to be interpreted broadly to cover all communications to the public not present where the communication originated and included, but not limited to broadcasting and access on demand.

In Kenya, the copyright law confers on broadcasting organisations an exclusive right to control the communication to the public of the whole or a substantial part of a television broadcast either in its original form or in any form recognizably derived from the original.¹²⁹ The test employed to determine the substantiality of a television broadcast is qualitative as opposed to quantitative.¹³⁰ The test does not only apply to broadcast copyright but also to other categories of copyrighted works.¹³¹ An infringement is committed even though “[the communication to the public]” extends to no more than a sequence of images sufficient to be seen as a moving picture.¹³² The notion¹³³ “in any form recognizably derived from the signal means” expands the scope of platforms over which communication to the public can be realised. This scope may include transmission over interactive networks. The concept of the substantial part of a television broadcast is not defined in the Kenyan Copyright Act; nor has there been any judicial intervention in Kenya in that regard. However, in *TCN Channel Nine v Network Ten Ltd*,¹³⁴ the High Court of Australia appreciated the complexity of delimiting the scope of a television broadcast and of establishing the out boundaries of substantiality in a broadcast necessary to constitute a communication to the public. The court, however, noted that copyright cannot exist in each and every image broadcast but in, at the very least, a plurality of images constituting a unit of programme which should form the threshold for substantiality that may be applied. This analogy may be transposed to Kenya and applied to similar cases. In Kenya and South Africa the concept of ‘the public’ which is not also defined in the copyright laws may adopt European

¹²⁸ (2010) EWCA 3063 (Ch).

¹²⁹ Copyright Act s.29.

¹³⁰ *Cricknet Board Ltd. and Anor v Tixdaq Ltd (2016) EWHC (Ch)* (Judge Arnold held that although quantitatively eight seconds is not large proportion of a broadcast or film lasting two hours or more, qualitatively, however, most the clips uploaded constituted highlights of matches’ wickets taken. Each clip substantially exploited the claimants’ investment in the broadcast and thus copyrightable).

¹³¹ See *Designer Guild Ltd v Russell Williams (Textile) Ltd* (2001) 1 All ER 700 (HL) (where the House of Lords underscored the qualitative test).

¹³² See e.g., AJC Copling supra note 43.

¹³³ See supra note 97.

¹³⁴ See (2002) 118 FCR; See also WIPO, *Introduction to Intellectual Property Theory and Practice* (1997) at 120.

Union standard of an indeterminate number of people outside the normal circle of family and its closest social acquaintances.¹³⁵

In South Africa, the Copyright Act does not confer on broadcasters a specific right of communication to the public. However, the Act grants broadcasters an exclusive right over the retransmission of their broadcasts in a diffusion service, unless such service is operated by the original broadcaster.¹³⁶ Diffusion service is defined in the Act as a telecommunication service of transmissions consisting of sounds, images, signs or signals, which takes place over wires or other paths provided by material and intended for reception by specific members of the public; and diffusion shall not constitute a performance or a broadcast or as causing sounds, images, signs or signals to be seen or heard, and where sounds or images, signs or signals are displayed or emitted by any receiving apparatus to which they are conveyed by diffusion in such a manner as to constitute a performance or causing of sounds, images, signs or signals to be seen or heard in public, this shall be deemed to be effected by the operation of the receiving apparatus.¹³⁷ Although a right of communication to the public may be inferred from the above statement, it is however, limited in scope to retransmissions over physical conductors and targeting a “specific” section of the public. The Act does not define the notion of specific members of the public. Therefore retransmissions over cable and computer networks¹³⁸ with identifiable subscriber base may have been among what was in contemplation. The notion of the “specific members of the public” may not fall well with the concept of the large number of people outside the normal circle of family and its closet social acquaintances.¹³⁹

The South African copyright law also grants broadcasters exclusive right over their programme-carrying signals in relation to direct or indirect distribution of such signals by any distributor to

¹³⁵ See *supra* note 95

¹³⁶ See s. 10 (C).

¹³⁷ See s. (1) (this is the provision which provides the definitions of terms and concepts employed in the South African Copyright Act No. 98 of 1978).

¹³⁸ See *supra* note 119 (where the ECJ held that internet streaming was a communication to the public. Since internet streaming takes place over computer networks interconnected by wire, it properly fits into the definition of a diffusion service).

¹³⁹ See *supra* note 1, see also *the Rehav GEMA supra* note 121.

the general public or any section thereof in the Republic or from the Republic of South Africa.¹⁴⁰ Signal distribution, in relation to programme-carrying signal means any operation by which a distributor transmits a derived signal to the general public or any section thereof.¹⁴¹ Once a programme-carrying signal has been down-linked, it can be distributed to the general public or part thereof by any means and this may cover communication to the public.¹⁴²

5.1.5 New and Emerging Economic Rights

The new and emerging economic rights are those that are not conferred upon the broadcasting organisations under the Rome Convention. Their advent was dictated by the new information and communication technologies that have brought forth new means of content delivery as well as platforms of exploitation. These rights include a right of retransmission of the signal, the making available to the public of the broadcast, the performance in public of the broadcasts, and the use of pre-broadcast signal.

5.1.5.1 The Right of Retransmission

This right protects broadcasting organisations against unauthorised retransmission of their broadcasts. The expression retransmission and redistribution of a broadcast signal are used interchangeably. In that context, a retransmission is a kind of redistribution of a broadcast signal over other modern or non-traditional platforms.¹⁴³ Traditional broadcasters and platforms are analysed in detail in chapter four, paragraph 4.3 of this study.¹⁴⁴ Redistribution of a broadcast signal by another broadcasting organisation over traditional platform is a rebroadcasting. A retransmission is defined as the simultaneous or delayed transmission for the reception by the public by any means of a broadcast by any other person other than original broadcasting

¹⁴⁰ See s. 11 (a programme-carrying signal is one that has gone through an interrupted chain of communication from the uplink station via a telecommunication satellite to the downlink station).

¹⁴¹ See s.1; derived signal is a signal obtained by modifying the technical characteristics of the emitted signal, whether or not there have been one or more intervening fixations. Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite art.1 (v).

¹⁴² See *supra* note 1 at 306.

¹⁴³ See *supra* note 26 at 52.

¹⁴⁴ See also WIPO *supra* note 24 at 10 (it is argued that traditional transmission is understood to mean over-the-air transmissions for direct reception by the general public).

organisation.¹⁴⁵ It may also include a near-simultaneous retransmission which is one which is delayed only to the extent necessary to accommodate time differences, or to facilitate the technical transmission of the broadcast or cablecast.¹⁴⁶

The right of retransmission was necessitated by the convergence of communication and information technologies and the parallel emergence of digital technology. As a consequence, multiple new platforms have sprung up which have offered a wide choice of means of simultaneous or deferred retransmission.¹⁴⁷ A retransmission of a broadcast may be simultaneous with the original over-the-air broadcast or delayed on the basis of a fixation or a reproduction.¹⁴⁸ Owing to the emergence of new media platforms, such retransmission may take place over cable networks, hand-held mobile platforms, or over online interactive networks.¹⁴⁹

The Rome Convention does not grant the right of cable retransmission. This is because in the 1960s coaxial cable distribution was at its formative stages and therefore widespread abuse of broadcast signals was not foreseen.¹⁵⁰ The right of retransmission is, however, implied in the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite.¹⁵¹ The Convention obliges contracting states to take adequate measures to prevent the distribution on or from their territories of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended.¹⁵² The Berne Convention, on its part, implicitly grants an exclusive right of retransmission of works. The right is couched as an “exclusive right of authorising any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by the organisation other than the original one.”¹⁵³ This right could by implication extend to and cover

¹⁴⁵ See WIPO, *Draft Treaty on the Protection of Broadcasting Organisation: Proposal by South Africa and Mexico*, SCCR/23/6, Nov. 28, 2011 at 3.

¹⁴⁶ WIPO, *Draft Report on the Rights of Broadcasting Organisations*, SCCR/31/6, Feb. 19, 2015 at 12 Para. 40.

¹⁴⁷ EBU/UER, Copyright White Paper, March 2010 at 36 Para. 1.2.1.

¹⁴⁸ See *supra* note 120 at 11.

¹⁴⁹ See *id.*

¹⁵⁰ See *supra* note 20 at 6 para. 22.

¹⁵¹ This Convention otherwise known as the “Satellite Convention” was adopted in Brussels in 1974 in response to piracy of programme-carrying signals.

¹⁵² See art. 2(1) (Kenya and South Africa are not party to this Convention and consequently they are not under any obligation to give effect to all or any part of its provisions).

¹⁵³ See art. 11^{bis} (ii); see also Australian Law Reform Commission, *Retransmission of Free-to-Air Broadcasts: Copyright and the Digital Economy* (2012) at 306. Available online at, <http://www.alrc.gov.au/publications/15-retransmission-free-to-air-broadcasts/current-retransmission-scheme>, last accessed on Feb. 15, 2017.

new forms of broadcast signal distribution and delivery which underpin the right of retransmission. The principal new forms of signal distribution include cable and internet retransmission.¹⁵⁴

5.1.5.1.1 Cable Retransmission

In cable retransmission, cable operators act as carriers in which the cable network is a physical transmission facility used as a conduit for third party broadcasts.¹⁵⁵ In most cases cable retransmission of broadcast signal is a commercial practice which is globally prevalent. The cable operators pick with or without authority broadcast of other transmission entities and propagate them over their cable networks for reception by the authorised or access-enabled members of the public.¹⁵⁶ In Certain countries, cable operators are permitted to follow the must-carry rules that oblige them to retransmit some public service programmes.¹⁵⁷ A must-carry rule does not exempt cable operators from obtaining authorisation from right-holders and from paying the latter a fee for the exploitation of their television programmes in cables. If it is a broadcasting organisation exercising the must-carry rule to demand a cable retransmission of its broadcasts, such broadcasting organisation must pay the cable operator.¹⁵⁸

A cable retransmission targets a new audience by means of cable, wire or microwaves. A cable operator can downlink satellite or terrestrial broadcasts and propagate them over its networks in unaltered form to its subscribers.¹⁵⁹ In principle, cable retransmission can be either simultaneous with the original broadcast or delayed (deferred retransmission) based on a fixation of the original broadcast or its reproduction.¹⁶⁰ In some instances, retransmissions may be altered in order to create the opportunity for the insertion of commercials.¹⁶¹

¹⁵⁴ See *supra* note 20 para. 22.

¹⁵⁵ See WIPO *supra* note 96 at para. 47.

¹⁵⁶ See *id.* para. 48.

¹⁵⁷ See Malta Communication Authority, *Must-Carry Obligations: Guidelines*, Dec.2, 2011 at 5

¹⁵⁸ See EBU, *Cable Retransmission of Broadcasts: A Study on the Effectiveness of the Management and Clearance of Cable Retransmission Rights*, Nov.14, 2007 at 22.

¹⁵⁹ See *supra* note 93 at 10.

¹⁶⁰ See *id.*

¹⁶¹ See *supra* note 130 at 23.

If the cable retransmission constitutes a communication of a broadcast made in a family circle, it does not constitute an infringement for a “family circle” does not constitute a public.¹⁶² The notion of “family circle” refers to a limited and defined group of persons who have a close relationship such as family and friends. To that end, a private household may be a public place opened up for a private function. However, cable retransmission in hotel rooms was held by the Court of Appeal¹⁶³ in France as a communication to the public because the receiving audience was outside the family circle.

The vexing question in a simultaneous cable retransmission is the identity of the party that enjoys broadcast copyright in such retransmission. Arguably, no exclusive right is needed for the activity of a mere simultaneous retransmission of another broadcaster’s signal. This is because, first, the protection of the initial broadcast also extends to the signals that are simultaneously retransmitted. Secondly, simultaneous retransmission requires less investment than the initial act of broadcasting.¹⁶⁴ Conversely, a deferred retransmission may enjoy independent copyright because it is based on a fixation whose transmission is anchored upon a new signal and not the original signal.¹⁶⁵ The signal is argued as the object of copyright protection in a broadcast, and thus a new signal constitutes a new broadcast which is eligible for new copyright.¹⁶⁶

5.1.5.1.2 Retransmission over Internet

This is a signal distribution in which technical means allow a broadcast signal to be captured and retransmitted over internet¹⁶⁷. The retransmission may take the form of simultaneous or deferred retransmission.¹⁶⁸ The growing penetration of internet and broadband has resulted in increasing piracy by way of unauthorised retransmission of broadcasts.¹⁶⁹ The sources of the broadcasts that

¹⁶² For the detailed analysis of the concept of the public, see para. 5.5 of this chapter.

¹⁶³ *CNN v Novotel*, Cass. Fr., le 6 avril, 1994.

¹⁶⁴ Thomas Dreier, Reflection on the Draft on WIPO Broadcasting Treaty and its Impact on Freedom of Expression, *E-Copyright Bulletin*, July—Sept., 2006 at 11.

¹⁶⁵ See e.g. WIPO *supra* note 115.

¹⁶⁶ See *id.*

¹⁶⁷ See WIPO *supra* note 96 at 10.

¹⁶⁸ See *id.*

¹⁶⁹ WIPO, *Study on the Socio-Economic Dimensions of the Unauthorised Use of Signals-Part II: Unauthorised Access of Broadcast Content, Causes and Effects: Global View*, SCCR/20/2/Rev. May 10, 2010 at 6.

are illegally propagated over interactive networks include extra territorial signal access, which is captured where there is satellite or terrestrial signal overspill.¹⁷⁰ These signals that spill over to unlicensed areas are captured and retransmitted over computer networks.¹⁷¹ The other source is through the unauthorised interception of intra-territorial broadcasts or pre-broadcast signals transmitted under licence, and retransmitted over the internet.¹⁷²

There are two main architectural paradigms that are used in retransmission over internet: client server architecture and peer to peer (P2P) architecture.¹⁷³ In client-server architecture there is an ‘always-on’ host called server which services the requests from several other hosts called clients. You-tube, Facebook, and MySpace are some of the services that are based on client-server architecture. On the other hand, P2P architecture hardly depends upon always-on infrastructure servers. The application relies upon direct communication between pairs of intermittently connected hosts called peers.¹⁷⁴ The peers are not owned by service providers, but are instead desktops or laptops controlled by users with most of the peers residing in private homes.¹⁷⁵ Unauthorised retransmission over internet uses P2P technology in the form of P2P file sharing of real-time broadcasts. P2P software is the leading technology which enables file sharing and the most commonly shared contents are retransmissions of sporting events or highlights thereof.¹⁷⁶ The other P2P protocol used to retransmit content online is the BitTorrent which normally distributes online games.¹⁷⁷ BitTorrent is one of the most popular P2P protocols. Some of the platforms over which retransmission over internet is done include Digital Subscriber Line (DSL), Internet Protocol television (IPTV), and over-the-top (OTT)¹⁷⁸ which are examined in detail in chapter four paragraph 4.3.1.5 of this study.

¹⁷⁰ *See id.*

¹⁷¹ *See e.g.*, supra note 169.

¹⁷² *See id.*

¹⁷³ *See supra* 26.

¹⁷⁴ *See id.*

¹⁷⁵ *See id.*

¹⁷⁶ *See supra* note 169.

¹⁷⁷ *See id.*

¹⁷⁸ *See supra* note 169 at 12.

According to the global study commissioned by WIPO, unauthorised online retransmission is not a major threat in Kenya and South Africa because of the low level of broadband penetration.¹⁷⁹ The major forms of unauthorised retransmissions in the two jurisdictions include cable retransmission, retransmission over pay TV channels, and signal overspill retransmission.¹⁸⁰ Because of evolving communication technologies, VOD streaming, use of 3G and 4G mobile phones, and user generated live streaming are gaining foothold in South Africa and Kenya in the retransmission of sporting events.¹⁸¹

5.1.5.2 The Right of Making Available

The exclusive right of making available is not defined in most international instruments. It is not one of the copyright traditional rights because it is an offshoot of digital technology. The International Federation of Phonographic Industry (IFPI) defines the making available right as the exclusive right for authors, performers and phonogram producers to authorise or prohibit the dissemination of their works and other protected material through interactive networks such as internet.¹⁸² The use of the term author in the definition implies that broadcasts can be the object of making available. The making available to the public of fixed broadcasts occurs once such broadcasts have been converted into the digital formats, in websites for public access and viewing¹⁸³. In making available fixed or recorded broadcasts or uploaded user-generated services on interactive platforms, broadcasters permit members of the public to access and watch the fixed broadcasts by using video streaming technology or by downloading the whole file at the time and place and over any devices that they chose.¹⁸⁴ The act of making available to the public includes the offering of fixed broadcasts to the public for access at their choice regarding the place and time.¹⁸⁵ The mere act of placing a fixation of a performance or phonogram on a server

¹⁷⁹ *The broadband penetration in Kenya and South Africa is respectively 1% and 23%. See* WIPO, Current Market and Technology Trends in Broadcasting Sector, SCCR/30/5, June 2, 2015 at 42 and 43.

¹⁸⁰ *See id.* Some South African channels have stopped using satellite broadcasting in order to prevent unauthorised signal overspill retransmission. Screen Digest Ltd, Study on the Socio-Economic Dimension of the Unauthorised Use of Signals: Unauthorised Access of Broadcast Content, Causes and Effect: Global View (2009) at 55.

¹⁸¹ *See e.g., supra* note 151 at 24; *Cf supra* note 26 at 22.

¹⁸² *See IFPI, WIPO Treaties: Making Available Right, March, 2003. Available online at* www.ifpi.org/content/library/wipo-treaties-making-available-right.pff, last accessed on February 17, 2017.

¹⁸³ *See Rafiel supra* note 34 at 52.

¹⁸⁴ *See id.*

¹⁸⁵ *See WIPO supra* note 96 at 11 para.52.

which may be accessed by members of the public constitutes the making available under WPPT regardless of whether it is actually accessed.¹⁸⁶

5.1.5.2.1 Background

The right of making available can be seen through the prism of the growth of new technologies and the parallel emergence of digital capabilities that has expanded the availability of copyrighted works through both legal and illicit sources. In 1990s internet was at its formative stages but growing exponentially thereby causing widespread unauthorised use of works of authorship in a digital environment. This created a need for a new, effective and adequate protection online. To further this objective, WIPO and its member states as well as the interested civil societies began deliberations on how to best guarantee copyright protection in this new medium. These discussions culminated in the adoption of the WIPO internet treaties—The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) of 1996.¹⁸⁷

5.1.5.2.2 Legal Nature of Making Available Right

Among other obligations, the WCT obliges member states to recognise the literary and artistic authors' exclusive right of making and authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access from a place and at a time individually chosen by them.¹⁸⁸ On the other hand, the WPPT extends the exclusive right of making available to the public to performers and producers of phonograms over their fixed performances and phonograms respectively.¹⁸⁹ These twin treaty provisions ensure that copyright holders enjoy exclusive right to control on-demand access to their works on internet and other interactive

¹⁸⁶ *See id.*

¹⁸⁷ WIPO, WIPO Record of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions (1996), available at http://www.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_348_v.1.pdf. last accessed on March 12, 2017.

¹⁸⁸ WCT art. 8 (under this provision there is an agreed statement that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of the Treaty or the Berne Convention. Besides, nothing in Article 8 precludes a contracting party from applying Article 11^{bis} (ii) of the Berne Convention.

¹⁸⁹ *See* WPPT arts.10 and 14.

networks.¹⁹⁰ Some of the notable achievements of the Treaties was the affirmation of the operation of exclusive right in a digital environment, including the prerogative of the copyright owners to authorise the making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them.¹⁹¹

In countries where the making available right has been specifically adopted, it has been interpreted to cover the placement of a work on the internet, where it can be accessed by individual members of the public.¹⁹² The making available right is technology-neutral and covers all formats on which a work may be digitally communicated, including downloads, streams and any other existing or future developed methods of online transmission.¹⁹³ Technology neutrality avoids technological obsolescence and guarantees effectiveness of a right in the face of changing technology.¹⁹⁴

During the negotiations which led to the adoption of the WCT and WPPT there were two competing bundle of exclusive rights through which to provide protection—the right of reproduction plus a broad right of distribution, or a reproduction plus the Berne Convention’s right of communication to the public under Article 11^{bis}(ii).¹⁹⁵ During the negotiations, the USA argued that the right of distribution properly encompassed digital transmission but several other delegates including the EU preferred to cover such transmission through the right of communication to the public. Because of these divergent positions a compromise solution referred to as “umbrella solution” was incorporated into the WCT and WPPT.¹⁹⁶

¹⁹⁰ United States Copyright Office, Haria A. Pallante (Register of Copyright), A Report of the Register of Copyright Register: The Making Available Right in the USA, February, 2016. Online available at http://www.copyright.gov/docs/making_available/making-available-right.pdf. Last accessed on April 20, 2017.

¹⁹¹ *See id.*

¹⁹² Internet Policy Task Force, U.S. Dep’t of Commerce, Copyright Policy, Creativity and Innovation in the Digital Economy (2013) at 15. Online available <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>. Accessed on May 21, 2016.

¹⁹³ *See* Jane C. Ginsburg, Comments Submitted to the U.S. Copyright Office’s Feb 25, 2014 Notice of Enquiry, April 7, 2014 at 3.

¹⁹⁴ *See id.*

¹⁹⁵ *See supra* note 160.

¹⁹⁶ *See* MihalyFiscor *supra* not 1; *See* also WCT art.8 and WPPT arts. 10 and 14 (WPPT uses communication to the public in a different context referring not to the interactive elements, but to more traditional communication to the public, analogous to public performance).

The umbrella solution was that any state can apply any particular exclusive right or a combination of exclusive rights as long as the acts described in the Treaty Articles were covered by such acts.¹⁹⁷ Though the applicable treaty provisions employed the terms ‘communication to the public’ and ‘making available’ member states were obliged to implement the obligations either as a subset of the right of communication to the public, as a stand-alone ‘making available’ right, or through some other exclusive right or, a combination of rights found in their national laws.¹⁹⁸

During the Diplomatic Conference that gave rise to the WCT and WPPT, the Chairman of the Committee of Experts, Jukka Liedes of Finland, stressed that the objectives of Article 8 of WCT was ‘to make it clear that interactive on-demand acts of communication are within the scope of the provisions.’¹⁹⁹ Similarly Articles Ten and Fourteen are based on interactivity and on-demand access by transmission rather than physical distribution of copies.²⁰⁰ The action covered by the exclusivity is the making available of the work by providing access to it; and what matters is the initial act of making the work available, not the provision of server space, communication connection or facilities for the carriage routing of signals.²⁰¹

In light of the above analysis, different countries have embraced ‘umbrella solution’ which is a legal-characterisation-free description of the right of making available. In the USA, the right of making available is encompassed in the exclusive rights of distribution, public performance, and public display. The extent that the act of making a work available to the public involves the creation of a copy, it may also implicate the right of reproduction.²⁰² In the UK²⁰³ and most European countries, the making available right is subsumed into the broader right of communication to the public. However, the making available right is a restricted act of

¹⁹⁷ *See id.*

¹⁹⁸ Silke Von Lewinski, *International Copyright Law and Policy* (2008) at 428-29.

¹⁹⁹ WIPO, WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights, Basic Proposal for the Substantive Provision of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference, Dec. 2-20, 1996 at 44.

²⁰⁰ *See id.*

²⁰¹ *See id.*

²⁰² *See supra* note 162 at 18; *See also* 17 U.S.C. §106(3) -(6).

²⁰³ *See* Copyright, Designs and Patents Act (CDPA) 1988 s. 20(2) (the section provides that public communication also includes making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them).

communication to the public which takes place over computer networks and other online transmissions.²⁰⁴

In Kenya, the making available right is not provided under the copyright law.²⁰⁵ In the absence thereof, one is obliged to resort to the umbrella solution incorporated under the WCT and WPPT²⁰⁶ by finding out if the right is implicated under the right of communication to the public. The notion of communication to the public is defined in such a traditional sense as to exclude interactive elements.²⁰⁷ Therefore, it safe to conclude that making available right is not provided to broadcasters or other owners of copyrighted works in Kenya.

In South Africa, the exclusive right of reproduction granted to broadcasters over their fixed broadcasts may implicate the right of making available.²⁰⁸ The act of making available involves making copies which may then be uploaded or transmitted through interactive networks. This means that the act of making available of broadcast football without authority from the right holder is tantamount to copyright infringement.

In spite of the possible extension of the making available right to the right of reproduction of fixed broadcasts, South Africa is not a signatory to the WCT and WPPT.²⁰⁹ Like South Africa, Kenya has also not acceded to the internet treaties.²¹⁰

5.1.5.3 Performance in Public of Broadcasts

A public performance occurs when there is a performance “at a place open to the public or at any place where a substantial number of persons outside of normal circle of family and its closest acquaintances are gathered” or when one transmits or otherwise communicates a performance to

²⁰⁴ Hector Macqueen et al, *Contemporary Intellectual Property Law and Policy* (2007) at 147.

²⁰⁵ See Copyright Act No.12 of 2001.

²⁰⁶ See *supra* note 168.

²⁰⁷ Copyright Act s.2 (communication to the public is defined as a live performance; or a transmission to the public, other than a broadcast, of images or sounds or both, of a work, performance or sound recording. This definition does not mention the technical means of transmission or the manner of reception of the public).

²⁰⁸ Copyright Act No.98 of 1978 s. 10(a) (the broadcasters are granted exclusive right of reproducing directly or indirectly, the broadcast, in any manner or form, in case of a telecast, making of a still photograph therefrom. ‘The term ‘directly or indirectly, or in any manner or form’ can encompass reproductions over the internet and other online environments).

²⁰⁹ WIPO, WPPT/WCT: Status on Feb 2, 2017. <http://www.wipo.int/export/sites/treaties/en/documents.pdf>. Accessed on May 2, 2017.

²¹⁰ See *id.*

such a place.²¹¹ According to Fisor,²¹² performing a work means the act of a performer concerning a work as a result of which the work becomes audible and/or visible for those who are present at the place of the performance. It may also mean the making audible or visible of an audio-visual work or work embodied in a phonogram through appropriate equipment.²¹³ The Berne Convention grants authors of dramatic, dramatic-musical and musical works exclusive right of authorising the public performance of their works, including such public performance by any means or process.²¹⁴ This Convention provision clarifies that the notion of public performance extends to public performance by any means or process, which means that public performance of such works fixed in audio-visual fixations or in phonograms is also covered.²¹⁵ If works are made audible or visible to the public to those who are not present at the place from where this takes place, it is not a performance but a communication to the public.²¹⁶

In the context of a broadcast, public performance means making the broadcast audible or visible, or audible and visible, in places accessible by the public.²¹⁷ This position is illuminated in the UK copyright law which also extends public performance to broadcasts.²¹⁸ The broadcasts so performed publicly must meet the test of substantiality in order to constitute an infringement against the person responsible for the infringing performance.²¹⁹ A performance takes place where it is heard or if it is a film where it can be seen. In cases where more artificial means of delivery are deployed, for instance, where a phonogram is played on radio in a restaurant, the person who infringes is not a broadcaster or a radio supplier but the person who operates the radio set.²²⁰ In most cases, public performance is adjunct to commercial activity; the test has

²¹¹ SESAC Inco., *The Right of Public Performance Under Copyright Law* (2012) at 1.

²¹² See Fisor *supra* note 1 at 196.

²¹³ See *id.*

²¹⁴ Berne Convention art. 11(1).

²¹⁵ See *supra* note 184 at 301.

²¹⁶ See *id.*

²¹⁷ WIPO, *Working Document for a Treaty on the Protection of Broadcasting Organisations* (Revised Version Jan. 18, 2013), SCCR/24/110, Sept. 21, 2012 at 5.

²¹⁸ CDPA 1988, s. 19(2) (the provision affirms that public performance includes delivery, in relation to lectures, addresses, speeches and sermons; it also includes any mode of visual or acoustic presentation, including presentation by means of a sound recording, film, or broadcast of a work).

²¹⁹ Hector Macqueen *et al supra* note 204 at 142.

²²⁰ Lionel Bentley and Brad Sherman, *Intellectual Property Law*, (4th ed., 2010).

been employed to determine if a performance shall fall into a public performance.²²¹ In most cases, the attendance at the performance is not restricted to certain categories of the public only.²²² It matters not the size of the audience or the profit, if any, received by the performer but if the audience is unrestricted and the performer is acting for profit, if unauthorised, the performance is patently an infringement.²²³ Courts have held that performances in members' clubs were in public and therefore, if not authorised, constitute an infringing public performance which is actionable under copyright law.²²⁴ In the European Union, the authors' right of communication is so broad a concept that it encompasses the right of retransmission, making available and public performance.²²⁵ Besides the *FAPL case*²²⁶, the ECJ ruled in the *Catch-Up Ltd case*²²⁷ that internet streaming services of broadcasts were retransmissions that constituted a communication to the public. These different terms and approaches across the globe do not impinge upon the specific acts of infringement that form the subject of protection.

In Kenya, broadcasters do enjoy a specific right of public performance. However, such right can be implicated from the exclusive right of communication that broadcasters enjoy under the Copyright Act.²²⁸ This right is so broad as to encompass public performance of broadcasts. In South Africa, just like Kenya, broadcasters do not specifically enjoy a right of public performance but such right be inferred from the broad language of the right of reproduction under Section 10 (a) of the Copyright Act.²²⁹ However in the two jurisdictions, courts have enforced a right of public performance in relation to phonogrammes as shown hereinafter. In

²²¹ The critical considerations were whether the defendants' activities were for profit, who was admitted and where did the performance take place. See *Ernest Turner Electrical Instruments v PRS* (1943) 1 Ch 167.

²²² See e.g., *PRS v Harlequin Record Shops* (1979) 1 WLR 851 at 856.

²²³ See *id.*

²²⁴ *Harms (Incorporated) Ltd v Martans Club Ltd* (1926) Ch 870; *PRS v Rangers FC Supporters Club* 1974 SC. 49.

²²⁵ See *Football Association Premier League (FAPL v QC Leisure and others, and Karen Murphy v Media Services Ltd* C-403 and C-429 of 2008 (the ECJ held that showing of broadcasts of football matches on a screen in a public house was a communication to the public whereas under the UK law it would have fallen under section 19(3) of the 1988, CDPA and therefore a public performance.

²²⁶ See *FAPL id.*

²²⁷ The decision was anchored upon the EU Directive 2001/29 art. 3(1) 2.

²²⁸ See s. 29 (the broadcasters shall enjoy the exclusive right of communication to the public "of the or substantial part of the television broadcasts either in the original form or in any from recognizably derived from the original").

²²⁹ Copyright Act No. 98 of 1978 s. 10(a) (the section provides that broadcasters shall enjoy the exclusive right of reproducing directly or indirectly the broadcast in any manner or form including, in case of telecasts, taking a still photograph therefrom).

South African Music Rights Organisation Ltd v SvenmillFrabrics Pty Ltd,²³⁰ Justice Berman held that the relaying through extension speakers, of music in a factory from a programme broadcast by a national broadcasting organisation constituted a public performance. In *Music Copyright Society of Kenya v Parklands Shade Hotel t/a Klub House*,²³¹ a High Court in Nairobi recognised that public performance of a work without authorisation is tantamount to copyright infringement, although it declined to grant the plaintiff the injunction sought.

5.1.5.4 Unauthorised Use of Pre-broadcast signals

The term pre-broadcast signal was coined during the on-going negotiations at the WIPO for the enhancement of the rights of broadcasting organisations. It was contained in the proposal presented by the global association of broadcasters under the umbrella of the World Broadcasting Union.²³² The term is understood to mean a signal that is produced by a broadcasting organisation or its agent prior to the transmission of that signal for reception by the public and that a broadcasting organisation intends to include it in its programme schedule.²³³ Pre-broadcast signals are not intended for direct reception by the public, but for use by the broadcasting organisations in their broadcasts.²³⁴ They are not, strictly speaking, broadcasting, but point to point transmissions. The typical examples of this activity include, transmission between two broadcasters by satellite, wire or other telecommunication links, or by links from the site of the event (football, news or cultural events) to one or more national and/or foreign broadcasting organisations for the purpose of enabling the latter's broadcasting of the event.²³⁵

²³⁰ (1983) 1 SA 608 at para.105; see also *South African Music Rights Organisation Ltd v Trust Butcher (Pty)* (1978) 1 SA 1056 (where a broadcast of musical works in a butcher's shop was characterised by the court as a public performance).

²³¹ HCCC No 1458 of 2000 at Milimani, Nairobi (unreported).

²³² WIPO, WIPO Treaty for the Protection of Broadcasting Organisations (WIPO Broadcasters' Treaty, Explanatory Memorandum to the Draft WIPO Broadcasters' Treaty) April 7, 1999 at 14 Para. h (the unions of broadcasters included ABU, EBU, ACT, AER, IAB, CBU, NABA, NAB, OTI and URTNA which collectively underscored that 'the entrepreneurial efforts of broadcasters can be thwarted not only by the direct use of its broadcast, but also by unauthorised use of programme signals via communication satellites and intended not for reception by the public but only for the broadcaster himself').

²³³ WIPO, Working Document for a Treaty on the Protection of Broadcasting organisations, SCCR/24/110, Sept.21, 2012 at 4: a pre-broadcast signal is a private transmission of content to a broadcasting organisation which the broadcasting organisation intends to include in its programme schedule. See WIPO, Draft Treaty on the Protection of Broadcasting Organisations: Joint Proposal by South Africa and Mexico, SCCR/24/5, July 2, 2012 at 2.

²³⁴ See WIPO *supra* note 96 at 5.

²³⁵ See *id.*

Such transmissions can also take place in other cases, such as from some premises of the broadcasting organisation to other of its premises or pre-broadcast transmission of programming from a broadcast network to its affiliated stations.²³⁶ The transmissions can take the shape of programme distribution between a programme supplier and a broadcasting licensee. Pre-broadcast signals only become broadcast to the public after editing of the content, for example, through addition of commentaries or advertisement.²³⁷ In the course of pre-broadcast signal transmissions, pirates can illegally intercept the signals with content either off a satellite or from other transmission platforms and retransmit them live or on a deferred basis.²³⁸ Since the pre-broadcast signal is digital, pirates are guaranteed perfect digital clones for retransmission.²³⁹

As seen from the above analysis, a pre-broadcast signal is not a broadcast and therefore falls outside the scope of broadcast copyright. However, those who support its inclusion as one of the objects of protection argue that it is futile to grant a broadcast right if the same can be circumvented through the appropriation of pre-broadcast signals.²⁴⁰

To sum up exclusive rights granted to broadcasting organisations individualise the broadcasts. The propertisation of the broadcasts inevitably extends to the underlying contents. As noted from the above analysis, retransmission of football events and other contents constitutes an infringement of the exclusive right of communication to the public or if such right is broken down, an infringement of the right of making available or reproduction. On the other hand, watching or listening to a football event in a pub or a butcher's shop outside the family circle is copyright protected in terms of an exclusive right of public performance.²⁴¹ This exclusivity of rights creates a monopolistic position which pushes the prices of transmission rights beyond the reach of most broadcasters. This situation was experienced in Kenya in January, 2017 when the FTA broadcasters could not afford to procure the rights for the African Cup of Nations football

²³⁶ EBU, *Recommendations to the Committee of Ministers of Member States on Measures to Enhance the Protection of Neighbouring Rights of Broadcasting Organisations*, Sept. 2002 at 5 para.25.

²³⁷ *See id.*

²³⁸ *See supra* note 96 at 5.

²³⁹ *See id.*

²⁴⁰ *See EBU supra* note 236.

²⁴¹ *See e.g., South African Music Rights Organisation v Trust Butcher supra* note 230.

tournament that took place in Gabon.²⁴² This failure denied most Kenyans access to the football events associated with the CAF-organised tournament by way of broadcasting. When these exclusive rights are granted to broadcasting organisations they are complemented by the technological protection measures (TPMs),²⁴³ that further encase and lock sporting activities away from the general public.

5.2 Limitations and Exceptions and to Broadcast Copyright

No international instrument or national legislation has attempted to define the concept of limitations and exceptions. Fiscor, however, defines it in broad language to cover all kinds of free uses, non-voluntary licences as well as other possible limitations such as subjecting a right to obligatory collective management.²⁴⁴ Free uses suggests non-existence of legal obligation for authorisation and even for payment of remuneration, while the term non-voluntary licences cover both statutory and compulsory licences—statutory licences meaning a direct permission granted by the law, and compulsory licence meaning an obligation of the right owner, under the law, to grant licence, both against payment.²⁴⁵ Limitations and exceptions are the main legal provisions used to guarantee access, use and dissemination of creative works to the general public.²⁴⁶ Limitations and exceptions are designed in order to strike an appropriate balance between the interest of the right holders and the users of copyrighted works. Copyright laws therefore allow certain limitations and exceptions on economic rights. Economic rights are extensively discussed in paragraph 5.2 of this chapter. Within the constraints of limitations and exceptions, works may be used without authorisation of the right holder and with or without payment or compensation²⁴⁷ or within the framework contemplated by Fiscor.²⁴⁸ In Kenya and South Africa, broadcasts are

²⁴² See Gilbert Wandera, AFCON: Nyamweya Decries TV Blackout, *The Standard Newspaper*, Jan.24, 2017. Online available at <http://www.standardmedia.co.ke/m/article/200231022/afcon-nyamweya-decries-tv-blackout>. Last visited on Feb.19, 2017(Nyamweya was the former Chairman of the Football Kenya Federation who was lamenting the failure of the Government to put the public broadcaster in funds in order to acquire broadcast right of the AFCON tournament then taking place in Gabon. The FTA media rights were then costing a sum of US\$ 1000,000 per the state category into which Kenya was classified).

²⁴³ See chapter four paragraph 4.5 of this Study where the TPMs are extensively analysed.

²⁴⁴ See *Fiscor supra* note 1 at 284.

²⁴⁵ See *id.*

²⁴⁶ Viviana Munoz Tellez and Andrew Chege Waitera (South Centre), *A Development Analysis of the Proposed WIPO Treaty on the Protection of Broadcasting and Cablecasting Organisations*, January 2007 at 26.

²⁴⁷ See WIPO, at www.wipo.int/copyright/en/limitation-exceptions. Last accessed on February 21, 2017.

²⁴⁸ See *Fiscor supra* note 1.

protected as copyrighted works which enjoy a bundle of exclusive rights and, ipso facto, limitations and exceptions apply equally to broadcasts.²⁴⁹

5.2.1 Importance and Justification of Limitations and Exceptions

According to Sihanya, one of the most important rationales for the grant of limitations and exceptions is not only to ensure access of information and knowledge to the public but also to avoid authorship obsolescence by guaranteeing the creation of new works that draw on existing ones either by way of adaptation or value-addition.²⁵⁰ In other words limitations and exceptions promote authorship because all authors draw upon pre-existing works in the process of creating new ones.²⁵¹ To that end, limitations and exceptions minimise the barrier of access to information and entertainment created by exclusive rights that are granted for a long term. The term of protection for broadcasts in Kenya is fifty years after the end of the year in which the broadcast took place.²⁵² The South African copyright law provides the same duration of fifty years commencing from the end of the year in which the broadcast “first” took place.²⁵³ The notion of ‘first’ may be controversial where a broadcast signal is construed as a broadcast for every new transmission will be propagated by a new signal and thus a new broadcast. This renders the term “first” superfluous and therefore rendering the Kenyan version more amenable.

This duration of protection of exclusive rights is too long in a society where technology is fast changing and therefore merits the intervention of limitations and exceptions in order to ensure overall growth in the information and cultural industry.²⁵⁴ Without limitations and exceptions therefore, right holders would have an absolute and total control over the work and thereby exclude the public. This would thereby undermine the theoretical principles upon which this

²⁴⁹ See Copyright Act of Kenya s.29; see also South African Copyright Act s.10.

²⁵⁰ Ben Sihanya, *Promoting Access through Legal Reform: Kenyan Case Study*. Available at www.aca2k.org/attachment/155_BS/presentation/Ghana.pdf. Last accessed on May 23, 2017.

²⁵¹ See e.g., Pamela Samuelson, *Justification for Copyright Limitations and Exceptions*, Faculty Paper, Berkeley University (2015) at 11. Online available at www.law.berkeley.edu/files/justifications_for_copyright_limitations_and_exceptions_pamela_samuelson. Last accessed on Feb.20, 2017.

²⁵² See Kenya Copyright Act s. 23(2).

²⁵³ See Copyright Act s.3 (2) (d).

²⁵⁴ Daniel Rutto and Japhet Otike. *Copyright Limitations and Exceptions for Information Users in Kenya Copyright Act and the Uganda Copyright Act: Comparative Analysis*. Available online at www.academia.edu/25357709/copyright-limitations-and-exceptions-for-information-users-in-Kenyan-copyright-and-the-ugandan-copyright-comparative-analysis. Accessed on Feb.21, 2017.

study and IPRs are based, more especially the utilitarian, and public benefit theories explained in paragraphs 1.10.2 and 1.10.3 of chapter one of this study.

Pursuant to Lepage,²⁵⁵ the philosophical basis underpinning copyright limitations and exceptions stems from the desire to achieve a sustainable compromise between the interests of authors and users who represent society at large. Lepage further argues that society grants exclusive rights to be counterbalanced by limitations and exceptions²⁵⁶. By allowing users to use protected work without requiring the authors' permission; limitations and exceptions are a reminder that copyright is granted by society with a view to deriving cultural and scientific benefits from it.²⁵⁷ On the other hand, Hugenholtz²⁵⁸ argues that there are three principal reasons justifying the promulgation of limitations and exceptions. The first one is constitution-based and is one upon which freedom of expression and information is anchored. This encompasses the right to quotation, parody or press review, and caricature. The second one is the protection of the public interest by mitigating the monopoly brought about by exclusive rights, and thirdly the limitations and exceptions respond to market failure especially in instances where copyright holders cannot police their works.²⁵⁹ In addition to the foregoing, other reasons that have been advanced which have a bearing upon broadcasting include, a desire to accommodate incidental uses of broadcasts and programmes. Broadcasters make ephemeral copies of football events for later broadcasting at prime time, especially if the live transmission takes place during dead hours because of global time differences. Fixation can also be done for the purposes of inserting advertisements or commentaries in the appropriate language. Such incidental uses fall under the exceptions lest broadcasting organisations would be constrained in their operations.²⁶⁰

²⁵⁵ Anne Lepage, Overview of Limitations and Exceptions to Copyright in the Digital Environment, *e-Copyright Bulletin Jan-March, 2003 at 2.*

²⁵⁶ *See id.*

²⁵⁷ *See id.*

²⁵⁸ Bernt Hugenholtz, *Future of Copyright in a Digital Environment, Kluwer Law International* (1996) at 94.

²⁵⁹ *See id.*

²⁶⁰ *See e.g., Pamela Samuelson, Justifications for Copyright Limitations and Exceptions, Berkeley Law School, Faculty Paper, (2015) at 11.*

5.2.2 International Perspective of Limitations and Exceptions

Globally, Limitations and Exceptions to copyright are enshrined in two kinds of legislation namely, open systems, and closed systems.²⁶¹ The open systems contain broad general clauses outlining limitations and exceptions. The most typical example of the open system is the fair use doctrine preferred by the USA.²⁶² The doctrine is based on the principle of equity. The fair use doctrine is anchored in the copyright law which gives broad guidelines upon which the doctrine operates.²⁶³ In determining whether the use falls with the fair use doctrine, one must look at the purpose and character of use; including whether the use is of a commercial nature or is for non-profit educational purposes; the nature of copyright work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyright work.²⁶⁴ On the other hand the closed system of limitations and exceptions prescribe an enumerative and exhaustive list of lawful acts that are exempted from copyright. Most EU countries have adopted this solution.²⁶⁵ The EU Directive gives an *à la carte* enumerative list of limitations and exceptions from which member states may select those consistent with their national dictates.²⁶⁶ The Directive however, includes a grandfathering clause that allows members to continue applying existing limitations and exceptions in cases of minor importance that are analogue in character.²⁶⁷ In England, however, the copyright law gives a series of limitations and exceptions to copyright based on the notions of, among others, criticism, information or educational purposes.²⁶⁸ These exceptions are interpreted in light of the fair dealing doctrine. The law does not define what is fair dealing. What is fair dealing depends on the facts of each case. Lord Denning in *Hubbard v Vosper*²⁶⁹ said that “{i}t is impossible to define what is fair dealing. It must be a question of degree.”

²⁶¹ See Lepage *supra* note 255 at 6.

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ 17 U.S.C. § 107.

²⁶⁵ See EU Information Society Directive 2001/29/EC art.32 (the Article guarantees an exhaustive enumeration of exceptions and limitations for the reproduction right and the right of communication to the public).

²⁶⁶ Peter K. Y., Overview of the EU Information Society Directive, *Gigalaw.com* Nov., 2007 at 1.

²⁶⁷ See *id.*

²⁶⁸ See CDPA 1988. Cha 3 (gives a broad list of acts that permitted under the Copyright Act).

²⁶⁹ (1972) 1 ALL ER 1023 at 1023.

English courts have interpreted the fair dealing doctrine within the delimits of the three-step test.²⁷⁰

The fair dealing doctrine is permitted only for the purposes specifically listed in the 1988 Act.²⁷¹ This means that fair dealing must be fair for the purposes of research or private study, criticism or review, quotation, the reporting of current events, parody or illustration for instruction.²⁷² Even if the dealing falls within the permitted acts, it has to be considered further if it is fair. In this context, an objective test is used which takes account of the following factors; amount of the work taken, the use made of the work and whether a commercial benefit is realised, the consequences of the dealing on the market, and how much work is reproduced.²⁷³

In comparison with fair use, fair dealing is largely based on rules and regulations within and between the member states of the Berne Convention.²⁷⁴ On the other hand, fair use is to a large extent based upon judicial principles and therefore less predictable and certain.²⁷⁵ Both concepts share the same fundamental objective and idea of permitting uses which are considered fair in operative jurisdictions. The three-step test is discussed in paragraph 5.2.3. below.²⁷⁶

5.2.3 Three-step Test

The three-step test is said to be the best criterion for appraising the limitations and exceptions for both the closed and open systems.²⁷⁷ Under most international and municipal copyright laws, the scope and conditions for the application of limitations and exceptions to exclusive rights are constrained by the application of the three-step test. The test must be taken into consideration in applying any limitations or exceptions in respect of any copyright exclusive right. The test was first introduced under the Berne Convention.²⁷⁸ The Convention permits member states to make exceptions with respect to the right of reproduction of copyrighted works provided such

²⁷⁰ See Lepage *supra* note 255 at 7.

²⁷¹ See CDPA of 1988 ch.3.

²⁷² See Lionel Bentley and Brad Sherman, *Intellectual Property Law* (4th ed. 2014) at 224.

²⁷³ See *id* at 226.

²⁷⁴ See Berne Convention art.10

²⁷⁵ Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa: Transferring Technology for Sustainable Development* (2016) at 232.

²⁷⁶ See Tobias and Ncube “New Hope for Africa? Copyright and Access to Knowledge in the Digital Age” *Info Vol. 13*(3) (2011) at 3.

²⁷⁷ See Lepage *supra* note 255 at 7.

²⁷⁸ Berne Convention, Paris Act 1974 art. 9(2).

exceptions: (a) are a special case, (b) do not conflict with a normal exploitation of the works, and (c) do not unreasonably prejudice the legitimate interests of the author.²⁷⁹ The Convention does not define what constitutes “a special case” but Fiscor²⁸⁰ argues that the concept of special case includes two aspects first, any limitation or exception must be limited in scope, and secondly, a special case should be viewed in the sense that there must be a specific and sound legal-political justification for its introduction. Okediji²⁸¹ argues that in spite of the three-step test, the limitations and exceptions under the Berne Convention are couched in such a discretionary and generalised language while exclusive rights are crafted in a mandatory language which gives authors a dominant position which negates and upsets the delicate balance between the public and the owners.

The TRIPs Agreement, on the other hand, enjoins member states to confine limitations and exceptions in their national laws to the threshold prescribed by the three-step test.²⁸² The WCT in Article 10(1) gives member countries a non-mandatory option to employ the test in formulating the limitations and exceptions in their municipal laws.²⁸³ The Rome Convention grants non-mandatory limitations and exceptions without any standard reference like the three-step test.²⁸⁴

Member states are obliged to extend the same level of limitations and exceptions that they provide for copyright in literary and artistic works to performers, producers of phonograms, and broadcasting organisations regardless of whether they grant the exceptions stipulated under Article Ten Sub article One.²⁸⁵ Since the protection of literary and artistic works is provided for under the Berne Convention, it means that the limitations and exceptions provided thereunder may be extended to the categories of right holders under the Rome Convention. By implication

²⁷⁹ See *id*, see also INFLA, *Limitations and Exceptions to the Copyright and Neighbouring Rights in the Digital Environment: An International Library Perspective* (2004) at 10.

²⁸⁰ See Fiscor *supra* note 1 at 57.

²⁸¹ Ruth Okediji, *ICTSD, International Copyright System: Limitations and Exceptions and Public Interest Considerations for Developing Countries in the Digital Environment*, Sept. 2006.

²⁸² TRIPs Agreement art.13.

²⁸³ Contracting parties, in their national legislations, provide for limitations and Exceptions to the rights granted to authors of literary and artistic works under this treaty in certain special cases.... WCT art.10; But see WPPT art. 16 (contracting parties were obliged to apply the limitations and exceptions in their national legislations).

²⁸⁴ Rome Convention art. 15 (the exceptions are restricted to private use, use of short excerpts for reporting current news, ephemeral fixations, and use solely for teaching and scientific research).

²⁸⁵ See Rome Convention art.10 (2).

therefore, the three-step test may be applied to performers, phonogram producers, and broadcasters.

In Kenya limitations and exceptions to copyright are provided for without any reference to the three-step test.²⁸⁶ Relevant to this study is Section Twenty Six (a)²⁸⁷ which provides for limitations and exceptions to exclusive right granted to broadcasters. These exceptions include fair dealing for the purposes of scientific research, private use, criticism or review or reporting of current events subject to acknowledgement of the source. Whatever is covered by the limitations and exceptions constitute lawful acts that can be carried out without the authority of the right holder. The limitations and exceptions are too general and limited in scope. According to Sihanya, the Kenya copyright legislation does not give guidelines on how to control the doctrine of fair dealing²⁸⁸. The Limitation and exceptions do not either cover the ephemeral fixations of broadcasts for an authorised use or exploitation of broadcasts in a digital environment. Finally limitations and exceptions do cover e-learning or indeed persons with disability.

On the other hand, the South African copyright law provides more comprehensive exceptions in relation to each category of copyrighted works.²⁸⁹ Exclusive rights enjoyable by broadcasters are subjected to broad limitations and exceptions that include reproduction for scientific research, private study, personal or private use, review or criticism, judicial proceedings or to the extent justified by the purpose.²⁹⁰ In relation to programme-carrying signal, limitations and exceptions are restricted to short excerpts of the programme so carried that consist of reports of current events or as are compatible with fair practice.²⁹¹ However, the limitations and exceptions provided by the copyright legislation in South Africa are bedevilled by the same drawbacks that characterise the Kenyan copyright laws. The drawbacks include the fact that they are discretionary, they do not apply to works that are encased by TPMs, and they do not apply to persons with disability.

²⁸⁶ Copyright Act s.26 (the provision enumerates acts that are exempted from copyright to include acts by way of fair dealing, and incidental inclusion of artistic in a film or broadcast).

²⁸⁷ Copyright Act of Kenya s.26 (a).

²⁸⁸ See Ben Sihanya *supra* note 250.

²⁸⁹ Copyright Act No. 98 Of 1998 ss.12-19B.

²⁹⁰ *See id.* s.12.

²⁹¹ Copyright Act No.98 of 1998 s.13.

5.3 Conclusion

In conclusion, the exclusive rights granted to broadcasters are so extensive, mandatory and technology-neutral vis-à-vis the exceptions and limitations that they give authors a predominant position over the users. For instance, the exclusive right of communication to the public of broadcasts or their performance in the public; are so broad that they cover all business premises or public places. In that context, watching a football match in a café or a theatre hall without authority is tantamount to copyright infringement. The exceptions do not extend to broadcasts of national or cultural importance or to the underlying content which is not copyrightable like football or content which is in the public domain. Besides, Limitations and exceptions in broadcasts do not resonate well with the dichotomy of signal and content in relation to the object of copyright protection. For instance, in the case of signal-based copyright protection, guidelines have not been formulated about how the exceptions would operate. Besides, few or no exceptions have been formulated to control broadcasts in a digital environment and more especially where technical measures are employed to encase broadcasts. In particular, the scope of exceptions and limitations is limited. It does not cover persons with disability nor does it cover transformative and derivative works and e-learning. All these copyright-controlled activities undermine public access to content and in particular broadcast football.

The situation is aggravated when the broadcasters employ technical means to encase football broadcasts and other content. The technical measures, in their nature, lock broadcast content indiscriminately without having regard to the permitted acts under the copyright law. When deployed together with exclusive rights, technical measures create a double layer of protection in the underlying content. The technical means negate and neutralise the counterbalancing role that the limitations and exceptions are intended to play against copyright exclusive rights. In other words, the technical measures limit access. This phenomenon is compounded by the migration of premium football events and other premium content from FTA broadcasting networks to Pay TV channels. In Kenya and South Africa, DSTV Multichoice, transmits most of the national and foreign league matches on its Pay TV networks and thereby locking out most potential customers. Even in situations where it transmits football matches to its subscribers, the applications of such rights as communication to the public restricts the possibility of communal watching of the broadcasts without running afoul of the copyright law.

CHAPTER SIX

INTERNATIONAL LEGAL FRAMEWORK AND REGIONAL APPROACHES TO COPYRIGHT AND BROADCAST FOOTBALL

6.0 Introduction

This chapter examines the international legal instruments that have a bearing on and close association with copyright and broadcasting, more particularly the broadcasting of football. In this context, the study takes a first look at the Berne Convention which is the first copyright-related multinational convention for the protection of literary and artistic works. Closely related to broadcasting is the Rome Convention for the protection of performers, producers of phonograms, and broadcasting organisations. Another broadcast-related international instrument to be examined is the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, otherwise called the Brussels or Satellites Convention of 1974. The WIPO Internet Treaties of 1996 namely the WIPO Performances and Phonograms Treaty (WPPT), and the WIPO Copyright Treaty (WCT) as well as the Beijing Treaty on Audio-visual Performances of 2012 form the final examination of the relevant international instruments.

Besides the international instruments, the study examines, on a comparative basis, selected countries and regions of the world with a history and tradition of strong intellectual property and sports law regimes. The countries and regions are the USA, Britain, France and the EU. The study heavily draws experiences from these regions and countries in evaluating the obtaining situations in Kenya and South Africa relating to or connected with this study.

6.1 Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works was adopted in Berne, Switzerland on September 9, 1886.¹ The Convention has undergone several modifications since

¹ The Berne Convention's premiers signataires included the UK, France, Spain, Germany, Switzerland and, Italy. The realisation of the Convention was spearheaded by the authors themselves through association called ALAI (Association Littéraire et Artistique Internationale) then headed by its president Victor Hugo. Since its adoption

its inception owing to changing technology and globalisation.² The first modification was done in 1908 in Berlin under the Berlin Act during which time a prohibition was imposed upon the use of formalities as a condition for the enjoyment of copyright, and a non-mandatory minimum duration of protection of life plus fifty years was introduced.³ The last amendment was done on September 28, 1979 to the Berne Convention, the Paris Act of 1971.⁴ The adoption of the Berne Convention was in response to the widespread and transnational piracy of copyrighted works as well as the desire to create a uniform and more effective multilateral instrument with which to keep in check the threat of piracy.⁵

6.1.1 Historical Overview of the Berne Convention

Before the adoption of the Berne Convention, several diplomatic efforts had been expended in Europe and Latin America to forge bilateral agreements as a basis of extraterritorial protection of works.⁶ These bilateral agreements were based upon formal reciprocity, a prelude to the modern day material or substantive reciprocity under which there was approximate parity in the level of protection accorded to each other's nationals.⁷ The Kingdom of Prussia had thirty two bilateral agreements with the German states.⁸ In 1852, France promulgated a decree in which it extended protection to all works published abroad regardless of whether the laws of those countries in question protected works of French authors or not.⁹

the Convention has been revised several times including in 1908 in Berlin, 1928 in Rome, 1948 in Brussels and in 1971 in Paris. Akiko Sonoda "Historical Overview of Formation of International Copyright Agreements in the Process of Development of International Copyright Law from the 1980s to 1960s" IIP Bulletin 2007 at 6, online available at http://www.iip.or.jp/e/e_summary.pdf; Peter Burger, Berne Convention: Its History and Key Role in the Future, 3Journal of Law and TechnologyJ (1988)at 1. Available online at <https://litigation-essentials.lexisnexis.com/..app?/TECH.pdf>. Last accessed on June 12, 2017.

² See Burger *id.*

³ Doris Estelle Long and Anthony D'Amato, *International Intellectual Property (2000)* 298; WIPO, *The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986 (1986)* at 20 (Berlin Revision was mooted in 1896 at the Paris Conference. The Revision Convention was signed by the representatives of Belgium, Denmark, France, Germany, Great Britain, Italy, Japan, Liberia, Luxembourg, Monaco, Norway, Spain, Sweden, Tunisia and Switzerland).

⁴ Peter K. Yu, Copyright Divide 25 *Cardozo L.Rev.* 331(2003) at 2.

⁵ Samuel Ricketson, The Birth of the Berne Union, 11 *Colum. VLA J.L.and Arts* 9(1986) at 3.

⁶ See *id.*

⁷ See *id.*; see also WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (1978) at 5

⁸ See Sonoda *supra* note 1 at 2; see also Burger *supra* note 1 at para.7; Alhaji Tejan-Colle, *International Copyright Law: Berne Convention* (2011) at 2.

⁹ See Burger *supra* note 1.

As the bilateral agreements proved ineffective, the civil societies in Europe representing authors brought pressure to bear on their respective governments to act against trans-border piracy and infraction. Notable among them was the French *Société des Gens de Lettres*¹⁰ which was led by the famous essayist, playwright and novelist Victor Hugo. In 1878, the Society convened a major literary congress in Paris and one of its resolutions was a call on the French government to convoke an international conference to formulate a uniform convention to regulate the use of their literary property.¹¹ Five years later, the membership of the society was expanded to include artists and its name changed to the present title *l'Association Littéraire et Artistique Internationale* (ALAI).¹² ALAI held several congresses driven by the desire to create an international system of copyright protection. At its congress in Rome in 1852, ALAI adopted a proposal for the creation of a multilateral convention for the protection of authors.¹³ In 1878, ALAI, under the presidency of Victor Hugo, convened and adopted five resolutions that essentially became the foundation of the original Berne Convention of 1886.¹⁴ ALAI agreed that the only way to achieve its goal of achieving an international copyright normative order was by the formation of a Union for the protection of the authors.¹⁵

In 1883, ALAI convened a meeting of all the parties interested in creating the Union. The meeting took place in Berne, Switzerland where a draft treaty comprising ten articles was

¹⁰ Translated into English as the “Society of Literary Authors” which was at the time charged with the responsibility of protecting authors of literary works and its mandate did not extend to or cover other authorial works like artistic and musical works.

¹¹ See Ricketson *supra* note 5 at 2.

¹² The English equivalent is the “International Literary and Artistic Association.” The two associations bear French names because they were created within the French Territory. On its part ALAI was at the time headed by Victor Hugo. Hugo was a Frenchman who thinking and copyright philosophy was influenced by the French copyright law which embraced moral and proprietary rights of the author other called *les droits d’auteurs*. *Les droits d’auteurs* themselves were anchored upon the natural law theory which places greater prominence the personality, spirit and integrity of the authors.

¹³ Daniel Gervais, A Look at the Constraints Imposed by the Berne Convention, *640 Vanderbilt L. Rev. En Banc* 147 163(2011) at 155 (the multilateral agreement was grounded upon the principle of national treatment and material reciprocity).

¹⁴ See *id.*

¹⁵ See Berne Convention (Article 1 the 1886 version of the Berne Convention provided for the creation of a Union of member states. The creation of the Union was designed to create a genuine family of nations with a common desire to protect the rights of authors at the international plane as well as guarantee existence of the Union even if one or more members withdrew their membership. The Union also affirms the universal nature of the Convention).

crafted. Among the most salient provisions were those which provided for national treatment¹⁶ and the absence of formalities as a pre-condition for copyright protection. The Swiss government invited delegates from various countries to meet in Berne on September 8, 1884. This was followed by a flurry of diplomatic activities that culminated in the adoption of the Berne Convention on September 9, 1886. The *premiers signataires* of the Convention were Germany, Belgium, Spain, France, the UK, Haiti, Italy, Liberia, Switzerland and Tunisia.¹⁷ The USA and Japan attended the final conference as observers.¹⁸

Although the Berne Convention came into force on December 5, 1887, most of the delegates that participated in the 1884 and 1885 drafting conferences did not sign it because the pre-existing laws in their countries could not permit that.¹⁹ They included Sweden, Norway, the Netherlands and Austria-Hungary which joined later after synchronising their copyright laws with the Berne provisions.²⁰ USA joined the Berne Union in 1989 and thus adhering to its most recent version, the 1971 Paris Act. Kenya and South Africa respectively joined the Berne Union on June 11, 1993, and October 11, 1998.²¹ As at March, 2017, the Berne Convention had a membership of 172 countries, the latest entrant being São Tomé and Príncipe on June 14, 2016.²²

6.1.2 Legal Principles that Underpin the Berne Convention

Although the Berne Convention does not specifically grant intellectual property protection to broadcasting organisations, it, however, lays a foundation upon which such protection is based.²³ Being the basic and most fundamental international instrument on copyright, all other subsequent copyright instruments on copyright or related rights must be in accord with the Convention. The Convention recognises the exclusive rights that literary and artistic authors have over the

¹⁶ National treatment was and is important because it ensures a non-discriminatory treatment for authors in all contracting states. This non-discriminatory treatment is guaranteed through the application of the doctrine of material or substantive reciprocity. Doris Estelle Long and Anthony D'Amato, *A Course Book in International Intellectual Property* (2000) at 298.

¹⁷ See Ricketson *supra* note 5.

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See e.g., Paul Goldstein and Bernt Hugenholtz, *International Copyright, Principles, Law and Practice* (2013) at 34.

²¹ See www.wipo.int/treaties/en/ShowResults.jsp? Last accessed on March 4, 2017 (the site gives an updated repertoire of countries that are members of the Berne Convention as well as the Berne Union).

²² See *id.*

²³ Berne Convention art.2 (the provision categorically states that the protected works are literary and artistic works).

broadcasting of their works.²⁴ The right became critical in the wake of the invention of radio and television transmission and the broadcast receiving technologies in 1920s and 1930s respectively.²⁵ During the 1928 Revision of the Convention, the exclusive right of broadcasting was vaguely subsumed into the right of communication to the public.²⁶ It was not until the 1948 Revision under the Brussels Act that the subject was reconsidered and the right broken into its facets taking account of the various ways and techniques by which it might be exploited.²⁷ The Article provides that the authors of literary and artistic works shall enjoy the exclusive right of:

- i. the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
- ii. any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by the organisation other than the original one;
- iii. the public communication by the loudspeaker or any other analogous instrument transmitting by, signs, sounds, or images, the broadcast of a work.

The exercise of the exclusive rights granted under Article 11^{bis} of the Berne Convention can be applied in three scenarios: First, the right to authorise broadcasting of a work and the communication thereof to the public by any other means of wireless diffusion of signs, sounds, and images. It applies to both images and sounds. What matters is the emission of signals; it is immaterial whether or not they are in fact received.²⁸ Second scenario relates to the subsequent use into which the emission is put. The author has a right to control the communication of the broadcast to the public either by wire or without if the communication is made by an organisation other than the original one²⁹. Thirdly, the exclusive right is to authorise the public

²⁴ Berne Convention art. 11 bis 1 (the provision is titled “broadcasting and related rights”).

²⁵ The evolution radio and television transmission and receiving equipment is discussed in detail in chapter four paragraph 4.1 of this thesis.

²⁶ See Berne Convention, 1928, the Rome Act art. 11.

²⁷ See Berne Convention, 1971 Paris Act, art. 11^{bis} (1).

²⁸ WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971)* (1978) at 67.

²⁹ See *id.*

communication of the broadcast by loudspeakers or on a television screen.³⁰ This right can be exercised by broadcasters in Kenya and South Africa in order to seek protection of their broadcasts or the content thereof if it is copyrightable. It is instructive to note that the Berne Convention does not specifically protect broadcasts. It only protects right holders of authorial works from unauthorised broadcasting of their works. Works eligible to protection under the Convention are literary and artistic works.³¹ Such copyrighted works are protected against unauthorised broadcasting. The issue is whether live football matches, in both jurisdictions constitute a work that may be protected under copyright. Chapter four, paragraph 3.1 of this study demonstrates that a raw football event is not a work of authorship capable of copyrightability. However, if a football match is recorded it becomes a cinematographic work under Article 7 of the Convention. The producer of such audio-visual work is protected against unauthorised broadcasting or communication to the public of the work under Article 11^{bis}. To that extent and in terms of the Berne Convention it is only recorded football matches which if broadcast or communicated to the public that can enjoy copyright protection and thereby limit public access to the matches themselves. Even in an audiovisual recording of a football match, it is not clear-cut whether the object of protection is the material recorded or the recording itself.

6.2 Rome Convention

6.2.1 Introduction

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (hereinafter called “the Rome Convention”) was finalised on October 26, 1961 at the end of the Diplomatic Conference held in Rome. It came into force on May 18, 1964.³² It is the first international instrument that recognises and secures protection in performances of performers, phonograms of the producers of phonograms, and in broadcasts of broadcasting organisations.³³ WIPO is responsible for the administration of the Rome Convention jointly with the International Labour Organisation (ILO) and the United Nations

³⁰ *See id.*

³¹ Berne Convention art.2 (the Article provides that works protected under the convention are literary and artistic work. The Article provides that literary and artistic works shall include every production in literary, scientific and artistic domain, whatever may be the mode of expression...).

³² WIPO, *Guide to the Rome Convention and to the Phonograms Convention* (1999) at 7.

³³ *See* www.wipo.int/treaties/en/IP/rome. Last accessed on Feb.29, 2017.

Educational, Scientific and Cultural Organisation (UNESCO).³⁴ The rights that are conferred upon the three new categories of right holders under the Rome Convention are called neighbouring rights or related rights.³⁵ The term ‘related rights’ or its French equivalent ‘droits voisins’ has become the official WIPO expression, for instance, the name of the current permanent WIPO body in the field of copyright is called the Standing Committee on Copyright and Related Rights (SCCR).³⁶ In this study, the terms related rights, and neighbouring rights are used interchangeably. Related rights are rights akin to but different from copyright.³⁷ In other words, related rights are those rights owned by entities or persons who not only act as auxiliaries to creative authors but also render entrepreneurial, organisational and technical contribution to original works of authorship.³⁸ Consequently, Performers, producers of phonograms, and broadcasting organisations act as such entities in terms of the Rome Convention.

6.2.2 Historical Background to the Rome Convention

The need for the grant of related rights was inextricably intertwined with growth of new technical methods of recording and dissemination of creations of the mind--gramophone records, cinema, radio and television.³⁹ This technological evolution gave rise to the proliferation of phonographic industry, the parallel development and expansion of recording industry as well as the advance in radio and television broadcasting.⁴⁰ This in turn increased the threat of widespread unauthorised use of the works of the three beneficiaries of the Rome Convention.⁴¹ Prior to the adoption of the Rome Convention, several proposals had been mooted to include phonograms, broadcasts, and interpretations of performing artists in the Berne Convention but

³⁴ *See id.*

³⁵ WIPO, *Intellectual Property Handbook* (2001) at 41.

³⁶ Mihaly Fiscor, *WIPO, Collective Management of Copyright and Related Rights* (2002) at 13 (the WIPO SCCR is the technical arm of the Berne Union responsible for preparatory negotiations on any matter touching on copyright and related rights before the convocation of a diplomatic conference to adopt or decline any proposed international instrument).

³⁷ Mukul Mudgal, *Law of Sports in India, Development Issues and Challenges* (2011) at 192 (Mukul argues that related rights enjoys privileges that copyright enjoys but they are largely dependent upon investment and technical undertaking congealed thereto).

³⁸ *See supra* note 33 at 41.

³⁹ *See supra* note 32 at 7.

⁴⁰ UNESCO, Twenty-Fifth Anniversary of the Rome convention, *Copyright Bulletin* VOL.XX No. 4, 1986 at 10.

⁴¹ *See id.*

none of them got sufficient support.⁴² In the case of producers of phonograms, the main ground of objection was that the skills needed to produce a phonogram were mainly of a mechanical and Industrial nature and this did not constitute literary or artistic creations. Consequently, such interest could be best served in the sphere of industrial property.⁴³

In the case of broadcasters, the claim for copyright protection was only anchored upon the financial investment which fell below the threshold of copyrightability namely originality and tangibility.⁴⁴ On the part of performers, their plight enjoyed relative support because their performances involved intellectual skill and creativity but they were weakly organised at the negotiating table.⁴⁵ Right from the beginning, the International Literary and Artistic Association, ALAI, was opposed to the idea of granting specific rights to performing artists, producers of phonograms, and the broadcasting organisations owing to the dynamics of the “cake theory.”⁴⁶ There was only so much cake to be shared by the copyright holders and the new beneficiaries of related rights. The other reason for opposition was the fear over the overlapping of rights which would increase the cost of the works on the part of consumers.⁴⁷

Before the adoption of the Rome Convention, there were three streams of discussions that led to the adoptions of the Convention.⁴⁸ These discussions were led by different stakeholder institutions. The first round of the discussions brought together various performer associations at the Congress convened by ALAI in 1903.⁴⁹ At the Congress, the artists expressed concerns over the loss of business opportunity occasioned by lack of protection of their performances.⁵⁰ The second round of deliberations was convened under the auspices of the Berne Union in 1928 at the Berne Convention Revision Conference in Rome.⁵¹ At the Conference, delegates examined

⁴² See Sam Recketson, *The Berne Convention for the Protection of Literary and Artistic Work 1886-1986*, Kluwer (1989) 309-310.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See UNESCO *supra* note 40 at 9.

⁴⁷ See *id.*

⁴⁸ Megumi Ogawa, *Protection of Broadcaster's Rights* (2006) at 32.

⁴⁹ ILO, UNESCO and WIPO, *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and broadcasting Organisations* (1968) at 65.

⁵⁰ See *id.*

⁵¹ See Ogawa *supra* note 48.

whether performers would be granted copyright protection or not. The third round of discussions was led by UNESCO in 1955 in the wake of the adoption of the Universal Copyright Convention in 1952.⁵²

The first consolidated draft treaty convention on neighbouring rights was done by the joint committee of experts in 1951 in Rome.⁵³ After deliberating the draft treaty, UNESCO, ILO and the Berne Union prepared another harmonised Draft International Convention for the Protection of Performers, Phonogram Producers, and Broadcasting Organisations at The Hague (Hague Draft).⁵⁴ The Hague Draft formed the basis of the Diplomatic Conference that adopted the Rome Convention on October 26, 1961.⁵⁵

6.2.3 Nature and Scope of the Rome Convention

The preamble of the Rome Convention provides that in relation to the activity of broadcasting, it is the broadcasting organisation which is the subject of protection.⁵⁶ It therefore flows from the preamble that the notion of a broadcaster under the Rome Convention is restricted to an artificial person and not an individual. Therefore to enjoy protection, individuals must constitute themselves into body corporates to be called organisations. The Convention does not either define what a broadcasting organisation is. In its absence, one has to look for the definition in related literary pieces. According to WIPO, the notion of broadcasting organisation applies to a legal entity that takes the initiative for the packaging, assembling, and scheduling programme content for which it has, where necessary, been authorised by right holders, and takes the legal and editorial responsibility for the communication to the public of everything which is included in the broadcast.⁵⁷ This definition takes account of the changing landscape in broadcasting in a digital environment in which broadcast signal distributors actually transmit broadcasts to the public, in most jurisdictions, on behalf of broadcasters.

⁵² *See id.*

⁵³ *See* WIPO Guide *supra* note 32.

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ The Contracting States moved by the desire to protect the rights of performers, producers of phonogram, and broadcasting organisations. *See* Rome Convention, preamble.

⁵⁷ WIPO, *Protection of Broadcasting Organisations*, SCCR 24, July 23, 2012.

The concept of broadcasting must also be understood within the context of the activity of broadcasting in terms of the Rome Convention which restricts it to over-the-air transmission or by wireless means for the reception of the public.⁵⁸ The reference to wireless means constricts the scope of broadcasting to Hertzian waves or other wireless means now known or later to be known.⁵⁹ To that end, cable transmissions, transmission over the internet, and other non-linear transmissions supported by wire or other artificial guides fall outside the scope of the Rome Convention. Therefore a broadcasting organisation in the context of the Rome Convention, in addition to taking the initiative for packaging, assembling and scheduling programme content as well as assuming legal and editorial responsibility, must also be one which, at the same time, engages in free-to-air transmissions for reception by the public. This kind of transmission is at times called traditional broadcasting.⁶⁰ In order to satisfy the notion of reception by the public, the transmission must be point to multipoint and not point to point.⁶¹ In this context, transmissions to one person or a defined group of persons, for instance, passengers in aircraft, ships at sea or a fleet of taxis are not broadcasts for the purposes of the Rome Convention.⁶² What constitutes the public is discussed in detail in chapter five, paragraph 5.1.4 of this study.

On the other hand, the concept of “broadcasts” is not defined under the Rome Convention. However, from the definition of broadcasting in its Article 3 (f), which qualifies the act of broadcasting as ‘the transmission,’ it would appear that a broadcast is the signal constituting the wireless transmission of images and/or sounds when such signals are intended for reception by the general public.⁶³ In that context, the object of protection under the Rome Convention is the signals themselves and not the content that they transmit.⁶⁴ The content, if copyrighted, can enjoy its own protection independently of the signals.

⁵⁸ Broadcasting ‘means the transmission by wireless means for public reception (sic) of sounds or of images and sounds. Rome Convention art. 3(f) (the word ‘public reception’ may give a wrong impression that the reception is only received in public places. The best wording should be for ‘reception by the public).

⁵⁹ See WIPO *supra* note 32 at 24.

⁶⁰ See WIPO, *Protection of Broadcasting Organisations: Terms and Concepts*, SCCR/INF/1, Aug. 6, 2002 at 2.

⁶¹ See WIPO, *Protection of Broadcasting Organisations: Technical Background Paper Prepared by the Secretariat*, SCCR /7/8, April 4, 2002 at 5, Para. 18.

⁶² See *supra* note 57 at 2.

⁶³ See WIPO *supra* note 57 at 3.

⁶⁴ See *id.*

The Rome Convention serves a purpose different from the Berne Convention. The latter was a negotiated instrument based on the then existing national copyright laws and what should be protected.⁶⁵ The Rome Convention on its part set out the rights that parties would incorporate into their municipal laws.⁶⁶ Others call it a “Pioneer Convention” in that when it was adopted it laid down standards of protection that did not exist in many countries and has greatly influenced the development of national copyright laws.⁶⁷ The Convention prescribes the minimum rights of protection for the three categories of related rights holders and reflects the state of broadcasting, communication technology, and recording industry that existed at the time of its adoption (1961).⁶⁸ Just as the state of the art in the technical field now presents a fundamentally different appearance from the situation prevailing at the time when the Convention was adopted, so too has the legal situation evolved over the time and thus a need for the revision of the instrument.⁶⁹

6.2.4 Exclusive Rights the Rome Convention Grants Broadcasters

As exemplified in the previous paragraph, only traditional broadcasting organisations enjoy protection under the Rome Convention.⁷⁰ Satellite broadcasting organisations may be assimilated into the notion of traditional broadcasting because the transmission is over the air from the uplink point to the downlink location.⁷¹ Internet broadcasting and cablecasting are excluded from traditional broadcasting because they are not wireless. Article 13(b) of the Rome Convention grants broadcasting organisations a limitative number of exclusive rights.⁷² The exclusive rights that broadcasters enjoy under the Rome Convention are examined in width and breadth in chapter five, paragraphs 5.1.1-5.1.4 of this study.

⁶⁵ Sam Rikeston and Jane Ginsburg, *International Copyright and Neighbouring Rights* (2d ed.2006) at 46.

⁶⁶ *See id.*

⁶⁷ *See supra* note 49 at 11.

⁶⁸ *See UNESCO supra* note 40.

⁶⁹ *See id.*

⁷⁰ *See supra* note 59.

⁷¹ *See WIPO supra* note 71 at 2 Para.4.

⁷² The exclusive rights granted under Article 13 are: the right of fixation of broadcasts, the right of rebroadcasting, the right of reproduction, and the right of communication to the public pegged against payment of entrance.

In order to strike a balance between the interest of broadcasters and that of the larger public, the Rome Convention gives a list of non-mandatory acts that are not protected under related rights.⁷³ Such exempted acts include the use of fixed or unfixed broadcasts for private use, or use of short excerpts of broadcasts for reporting current events, or ephemeral fixation by a broadcasting organisation by means of its facilities and for its own broadcasts, and use of broadcasts for the purposes of teaching or scientific research.⁷⁴ The exceptions permit broadcast performance for private use, for instance, watching a football match at a private residence or even recording the match by a broadcasting organisation in order to achieve an authorised use.⁷⁵

The limitations and exceptions granted under the Rome Convention are so general and ambiguous that they cannot achieve a balance of the conflicting interests.⁷⁶ Besides, the minimum rights provided are mandatory, whereas the limitations and exceptions are discretionary and therefore the broadcasters enjoy a more dominant position than the consumers and thus access to football broadcasts by the public is compromised. The exceptions and limitations do not apply to encrypted transmissions. In fact, pay TV channels that encrypt their broadcasts enjoy an absolute blockade of their broadcast unless consumers are given decrypting codes. Persons with disability cannot employ the existing exceptions and limitation to access or use broadcasts in formats appropriate to their physical conditions.

As at March 9, 2017 only ninety two states had acceded to the Rome Convention.⁷⁷ Although Kenya and South Africa are not members of the Rome Convention, they have nevertheless granted wide copyright protection to broadcasting organisations.⁷⁸ On its part, the Kenya Copyright Act grants a higher level of protection to broadcasters than the Rome convention. This is deduced from the definition of the term ‘broadcast’ in the Kenyan copyright law which covers transmission by wire or wireless means, of sounds or images or both or the representations

⁷³ Rome Convention art.15 (the Article provides that any Contracting State may, in its domestic laws and regulations, provide for exceptions for the protection guaranteed by this Convention in regard to...).

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ Ruth Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries in the Digital Environment* (2005) at 14.

⁷⁷ *See* WIPO, WIPO-Administered Treaties, available online at www.wipo.int/treaties/en/ShowResults.jsp?. Last accessed on March 12, 2017.

⁷⁸ *See id.*

thereof, in such a manner as to cause such images or sounds to be received by the public and includes transmission by satellite.⁷⁹ In the definition, wireless transmission implies over-the-air signal transmission. Transmission by wire may cover cable transmission or retransmission for reception by authorised subscribers. It may also implicate transmission over computer networks and other interactive broadcast services. Since the notion broadcasting also covers satellite broadcasting it means that it can cover Fixed Satellite Broadcast Service or Direct Broadcast service. The latter is the technical means that DSTV-Multichoice, the biggest Pay TV Service in Africa uses to transmit football and sporting events to its subscribers across the African continent.⁸⁰

The protection of broadcasts in Kenya and South Africa, both of which are not signatories to the Rome Convention, is based on the colonial history of the two countries. The first post-independence Copyright Act of Kenya was based on the 1956 UK Copyright Act.⁸¹ At that time, the UK copyright law had granted protection to neighbouring right holders including broadcasting organisations in respect of their broadcasts.⁸² On the part of South Africa, the current Copyright Act which was enacted in 1978 was replicated on the British Copyright Act, which had already extended protection to broadcasts.⁸³ It was not until 1995 when the two countries acceded to the TRIPs Agreement that legally obliged them to protect the rights of broadcasting organisations.⁸⁴ Article 14(3) of the Agreement grants broadcasting organisations a right to prohibit, *inter alia*, the unauthorised fixation, reproduction, and rebroadcasting of their

⁷⁹ Copyright Act of Kenya, 2001 s. 2(1).

⁸⁰ ICASA, Inquiry into Subscription Broadcasting, Report of April 23, 2004 at 18 para. 3.1.2.

⁸¹ Copyright Act, Cap 30, 1966; see Ben Sihanya, Copyright Law in Kenya, 41 *International Review of Intellectual Property and Competition Law* 926-930(2010).

⁸² See Copyright Act of the UK, 1956 s. 14 (the provision extended copyright to television broadcasts and sound broadcasts).

⁸³ See Denise Rosemary Nicholson, *South African Copyright Law: A Historical Overview and Challenges to Address Access to Knowledge Issues in a Country in Transformation* (2010) at 1. Available online at <http://www.library.infla.org/1248/1/138-nicholson-en.pdf>. Last accessed on June 2, 2017.

⁸⁴ The TRIPs Agreement is Annex 1C to the WTO Agreement that entered into force on January 1, 1995. The Agreement extended protection to trade-related aspects of intellectual property. Besides it harmonised the protection of intellectual property and created an enforcement mechanism through WTO. Kenya and South Africa acceded to the TRIPs Agreement on January 1, 1995. The Agreement is binding on every member state of WTO.

broadcasts.⁸⁵ Therefore the legal force and application of the Rome Convention in Kenya and South Africa is justified indirectly through the TRIPs Agreement.

The South African copyright law, like the Rome Convention, restricts the notion of broadcasting to transmission over Hertzian waves.⁸⁶ This implies that the scope of protection of broadcasters in South Africa is in consonance with the Rome Convention. This means that only over-the-air transmissions including programme-carrying signals are protected. The Act further defines a broadcaster to mean a person who undertakes a broadcast.⁸⁷ Unlike the Rome Convention which restricts a broadcaster to a body corporate, the South African copyright law uses the term ‘person.’ This means that in South Africa, an individual may qualify as a broadcaster. Besides, the South African law does not give enumerative activities necessary to qualify a person as broadcaster, for instance, programme assemblage, packaging, and scheduling as well as assumption of legal and editorial responsibility for the programme content.⁸⁸ The term of protection of a broadcast in South Africa is duration of fifty years computed from the end of the year in which the broadcast first takes place.⁸⁹ In case of a programme-carrying signal, the duration of protection of fifty years from the end of the year in which signals are emitted to a satellite.⁹⁰ This term of protection is latently content-based because a signal is imperceptible. Besides, every transmission is generated by a new signal and thus the phrase “first takes place” is superfluous.

⁸⁵ The TRIPs Agreement grants protection to broadcasting organisations that are only limited to and to the extent that they fight signal piracy. They are only limited to prohibiting any infringing act but not authorising the exploitation of the broadcasts. To that extent, the right can only be used as a shield and not as a sword. WTO, Trade-Related Aspects of Intellectual Property Rights: Background Material (2008) at Para. 24.3.

⁸⁶ South African Copyright Act No. 98 of 1978 s.1 (1) (the Section defines “broadcast” as a telecommunication service of transmissions consisting of sounds, images, signs or signals which (a) takes place by means of electromagnetic waves of frequencies of lower than 3000GHz transmitted in space without an artificial conductor and (b) intended for reception by the public or sections of the public and also includes the emitting of programme-carrying signals to satellite).

⁸⁷ Section 1(1).

⁸⁸ These activities of a broadcasting organisation are implicated in Art.3 of the Rome Convention; see also WIPO, Draft Treaty on the Protection of Broadcasting Organisations (Joint Proposal by South Africa and Mexico), SCCR 24/5, July 2, 2012 at 3 (the paper defines a broadcasting organisation as a legal entity that takes the initiative for packaging, assembling, and scheduling of programme content for which it has, where necessary, been authorised by the right holders and takes legal and editorial responsibility for the communication to the public of everything which is included in its broadcast signal. Thus the activity of broadcasting defined under Art.3 of the Rome Convention is undertaken by the entity fulfilling the said criteria).

⁸⁹ See Copyright Act No. 98 of 1978 s.3 (2) (d).

⁹⁰ See *id.*

As alluded to above, the concept of broadcasting in Kenya is broader than the notion of broadcasting under Article Three (f) of the Rome Convention and under the Copyright Act of South Africa.⁹¹ Just like the South African Copyright Act, the Kenya copyright law does not define the entity or person who undertakes the activity of broadcasting. In the absence thereof, the definition of a broadcasting organisation derived by WIPO from the term broadcasting may be adopted by Kenya.⁹² The term of protection of a broadcast in Kenya is fifty years from the end of the year in which the broadcast took place⁹³. This implies that a broadcast can only take place once. The signal which constitutes a broadcast fizzles out upon reception by the public of the broadcast. The specific exclusive rights that broadcasters enjoy in Kenya and South Africa as well as the mitigating limitations and exceptions are analysed in detail in chapter five paragraphs 5.1 and 5.2 of this study.

To sum up, the exclusive rights granted to broadcasters under the Rome Convention are mandatory whereas the limitations and exceptions granted are discretionary and non-mandatory. The same position is replicated in both Kenya and South Africa. The exclusive rights create monopolistic situations which undermine competitiveness and thereby increase the price of football broadcast rights. Watching of football matches in public places becomes a broadcast performance which is copyright protected. This deters the owners of restaurants, theatres and cafes from showing the matches without authorisation. This situation is compounded by the advent of technological protection measures that encase football matches and make them available to the public only upon payment of subscription fee. This is further compounded by the dominance of few operators in the pay television sector in Kenya and South Africa. There is likelihood that Multi-choice Africa, which commands the biggest pay television share in Kenya and South Africa, may abuse their market dominance and deny the public the much needed access to football events of national and public importance.

⁹¹ See *supra* note 81.

⁹² See definition of a broadcasting organisation adopted by WIPO in *supra* note 60.

⁹³ Copyright Act, 2001 s. 23 (2) 4.

6.3 Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite

This international instrument, variously known as the Satellites Convention or Brussels Convention, was adopted on May 21, 1974 in Brussels.⁹⁴ It is the second international treaty on the protection of broadcasting. However, the scope of protection it gives broadcasting organisations is only limited to transmission via communication satellites⁹⁵. Whereas the Rome Convention covers only broadcasts to the public, which is based on point to multipoint transmission, the Satellites Convention is adopted to cover point to point transmission of programme-carrying signals⁹⁶ propagated via satellite.⁹⁷ The beneficiaries of the Satellites Convention are satellite broadcasters and the Convention is therefore only meant to protect a particular kind of signal transmission.⁹⁸

The advent of satellite communication in the 1960s was riddled with a parallel problem of signal theft or piracy, particularly television transmission via satellite.⁹⁹ To address such a problem, the Satellites Convention was designed in order to prevent distributors from distributing programme-carrying signals transmitted via satellite which are not intended for those distributors.¹⁰⁰ The concept of distribution in the Satellites Convention is different from the concept applied in copyright and related rights.¹⁰¹ Under the Convention, distribution is realised once the transmission of the programme-carrying signal is made to the public or any sector thereof.¹⁰²

⁹⁴ The Convention Relating to the Distribution of the Programme-Carrying Signal Transmitted by Satellite, done at Brussels on May 21, 1974, WIPO Publication No. 289(E). The Convention protects signals that distributed on point to point basis. Article 3 thereof states that “{t}his Convention shall not apply where the signals emitted by or on behalf of the originating organisation are intended for direct reception from the satellite by the general public.” It protects signals distributed between broadcasters for their own use or distributed amongst the distributaries of a broadcasting organisation.

⁹⁵ Gholamreza Rafiel, *The Possibility of Granting New Legal Protection and IP Rights to Broadcasting Organisations Against Unauthorised Exploitation of Broadcasts*, PhD Thesis, University Neuchatel (2015) at 106.

⁹⁶ Signal is an electronically-generated carrier capable of transmitting programmes. Satellite Convention art.1 (i).

⁹⁷ This Convention shall not apply where the signals emitted by or on behalf of the originating organisation are intended for direct reception from the satellite by the general public. Satellite Convention art. 3.

⁹⁸ See Ogawa supra note 48.

⁹⁹ Vivian Munoz Tellez and Andrew Chege Waitara, South Centre, *A Development Analysis of the Proposed WIPO Treaty on the Protection of Broadcasting organisations and Cablecasting Organisations*, Research Papers 9 (2007) at 21.

¹⁰⁰ See Satellites Convention, Preamble.

¹⁰¹ Distribution is the operation by which a distributor transmits derived signals to the general public or any section thereof. Satellites Convention art.1(viii).

¹⁰² See *id.*

This concept is therefore broad enough to cover any existing or future telecommunication methods for signal transmission including transmission by wire or wireless means.¹⁰³

The Satellites Convention does not grant any intellectual property rights or any additional specific or exclusive rights to those granted to broadcasters under the Rome Convention.¹⁰⁴ The main obligation contained in the Satellites Convention is for each Contracting State to “take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through a satellite is not intended.”¹⁰⁵

6.3.1 Implications of the Satellites Convention on Kenya and South Africa

The Satellites Convention was ratified by Kenya in 1976.¹⁰⁶ South Africa has not yet ratified the Convention.¹⁰⁷ Although satellite broadcasting and programme-carrying signals are protected in Kenya and South Africa, they are not so protected if they are not destined for reception by the general public or any part thereof.¹⁰⁸ Besides, during the negotiation of the Convention, it was agreed that the Convention would regulate satellite transmission as a matter of public international law, obliging member states to comply with regulatory standards, instead of granting broadcasters private rights or related rights against unauthorised retransmission of signals via satellite.¹⁰⁹ Consequently, since the Satellites Convention deals with point-point transmission, it falls outside the scope of copyright protection in Kenya and South Africa. The Convention deals with the transmission of programming-carrying signals via satellite for reception by other entities before broadcasting.¹¹⁰ These signals may be called pre-broadcast

¹⁰³ See *supra* note 61.

¹⁰⁴ WIPO, *Guide to Copyright and Related Rights, Treaties Administered by WIPO* (2002) AT 174.

¹⁰⁵ See Satellites Convention art. 2(1).

¹⁰⁶ See WIPO, at <http://www.wipo.int/treaties/en/ip/brussels> . Last accessed on Feb.21, 2017.

¹⁰⁷ See *id.*

¹⁰⁸ A broadcast means the transmission, by wire or wireless means, of sounds or images or both or the representation thereof in such a manner as to cause such images or sounds to be received by the public and includes transmission by satellite. Kenya Copyright Act s.2 (1) h; see also South Africa Copyright Act No. 98 of 1978 s.1.

¹⁰⁹ Paul Goldstein, *International Copyright, Principles, Law and Practice* (2002) at 44.

¹¹⁰ This is an analogy drawn from the definition of broadcasting in Section 2(2) of the Kenya Copyright Act and section 1 of the South African Copyright Act which require that a transmission must be intended for reception by the general public in order to qualify as a broadcast. Article 3 of the Satellites Convention excludes signals meant for reception by the general public from the scope of protection.

signals which do not constitute broadcasting.¹¹¹ The fact that the Convention does not grant broadcasters exclusive rights makes it ineffective and irrelevant in access control against the public.

6.4 The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)

The WCT and WPPT are copyright and related rights international instruments that were adopted in December, 1996 in response to widespread copyright abuse on the internet and other digital networks.¹¹² The WCT and WPPT are commonly called the “internet treaties” because they expand the rights of copyright and certain related rights holders in the digital environment and also create new obligations for countries to prevent the circumvention of TPMs or digital rights management (DRM) schemes.¹¹³ Both treaties set down international norms aimed at stemming and controlling unauthorised access to and use of creative works on the internet and digital networks.¹¹⁴ WCT deals with the protection of authors of literary and artistic works while WPPT deals with the protection of authors of rights of performers and producers of phonograms.¹¹⁵

6.4.1 Historical Development

The adoption of the WCT and WPPT was done against the backdrop of the growth of new technologies in the digital era that rapidly expanded the availability, access and use of copyrighted works through both legal and illicit sources.¹¹⁶ In the 1990s, though internet was at its formative stages, it was cumulatively growing thereby providing immense opportunities for the public to gain access to digital works and also facilitate unauthorised copying of the works and objects of related rights for commercial exploitation.¹¹⁷ On the other hand, digital technology had also increased the ability for copyright and related right holders to control access to and use of the works and objects of related rights.¹¹⁸

¹¹¹ Pre-broadcast signals are examined in detail in chapter five Para. 5.1.5.4.

¹¹² See WIPO, at www.wipo.int/copyright/activities/en/internet_treaties.html. Last accessed on March 10, 2017.

¹¹³ See *supra* note 61 at 22.

¹¹⁴ See *supra* note 65.

¹¹⁵ See *id.*

¹¹⁶ See WIPO *supra* note 104 at 315.

¹¹⁷ See Munoz and Chege *supra* note 99 at 22.

¹¹⁸ See *id.*

In order to respond to these challenges, the international copyright community and stakeholders sought to ensure that copyrighted works would be adequately and effectively protected in this new medium. To further this objective, WIPO and its member states began deliberations on how to best guarantee copyright protection online.¹¹⁹ In the beginning, the preparatory work had suggested to subsume the WPPT into the Rome Convention, and the WCT as a protocol to the Berne Convention.¹²⁰ However, the idea did not get enough support from the delegates and the two were shaped into self-standing treaties. Ironically, the WPPT in its current form follows the structure of the Rome Convention and the WCT that of the Berne Convention.¹²¹

The preparation of the new norms began in two forms. The first one was driven by the WIPO Intergovernmental Committee of the Rome Convention in the 1980s and later under the auspices of the General Agreement on Tariffs and Trade (GATT) within the framework of the Uruguay Round of negotiations.¹²² The negotiations culminated in the convocation of a Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions in Geneva on December 2-20, 1996. On the final day of the Diplomatic Conference WPPT and WCT were adopted.

The WPPT is modelled upon the Rome Convention because they both espouse related rights. The former incorporates a number of substantive provisions of the latter. The WPPT was intended to address transmission over digital networks. It grants performers and producers of phonograms, inter alia, a right of making available of fixed performances fixed in sound recordings by wire or wireless means; and a right of reproduction of their performances fixed in phonograms in any manner or forms. The Treaty also proscribes the circumvention of TPMs that are used by right holders to control access to and use of phonograms in a digital medium; and also protects the integrity of the electronic rights management information deployed by the phonogram producers. These kinds of protection enjoyed by performers and phonogram producers in a digital environment may apply mutatis mutandis to broadcasts in a digital

¹¹⁹ Maria Pallante, *USA Copyright Office Report, The Making Available Right in the USA* (2016) at 4.

¹²⁰ See WIPO, at www.wipo.int/export/site/www/copyright/en/activities/pdf/wct_wppt pdf. Last accessed on March 11, 2017.

¹²¹ See *id.*

¹²² See *id.*

environment to encase and/or restrict public access to broadcast football and other broadcast content in Kenya and South Africa.¹²³ In this context, the internet treaties introduced the protection of TPMs which have contributed to encasement of broadcast football thereby denying its access to the public.

6.5 The Beijing Treaty on Audio-visual Performances

The Beijing Treaty on Audio-visual Performances (hereinafter called “the Beijing Treaty”), known also in its abbreviated form as BTAP was adopted on June 24, 2012, in Beijing, China. The instrument is a self-standing treaty which deals with the intellectual property rights of performers in their fixed performances.¹²⁴ The background to the treaty can be traced to 1996 when the WPPT and WCT were adopted.¹²⁵ The two treaties failed to address the plight of performers with respect to their audio-visual fixations and consequently WIPO and its member states resolved that preparatory work for a possible new instrument in that regard commence.¹²⁶ In furtherance of this aim, several SCCR meetings were held which culminated in the convening of a Diplomatic Conference in Geneva in 2000. The Conference deadlocked over one Article 12 on the transfer of rights to producers upon fixation of a performance.¹²⁷ The Diplomatic Conference therefore ended in failure.

In September, 2011, the WIPO General Assembly gave the mandate for the reconvening of a Diplomatic Conference in Beijing from June 20-26, 2012 which culminated in the adoption of

¹²³ See Marlize Conroy, *A Comparative Study of Technological Protection Measures in Copyright Law*, PhD Thesis, University of South Africa (2006) at 233 (Conroy points out that in South Africa, technological protection measures are protected under Section 86 of the Electronic Communications and Transactions Act No.25 of 2002. It criminalises unlawful interception or access of data transported electronically. Conroy posits that copyright work in a digital form is data. Since encrypted broadcasts exist a digital form, they fall under the protection offered by the Act); See also Copyright Act of Kenya, 2001 s.35 (3) (the provision protects, among others, the circumvention of technical measures designed to protect works. Broadcasts are works that are protected under Section 22 (1) f of Act).

¹²⁴ See WIPO, at www.wipo.int/treaties/en/ip/beijing/summary_beijing.pdf. Last accessed on Feb. 27, 2017.

¹²⁵ WIPO, *the Beijing Treaty on Audiovisual Performances: Creativity and Access to Knowledge: A Social and Economic Impetus for Africa*, March 27, 2017 (a WIPO paper presentation in Kampala, Uganda).

¹²⁶ See *id*

¹²⁷ See *id*

the Treaty on June 24, 2012¹²⁸. Although the treaty is self-standing, it is, however, modelled on the WPPT which deals with performances in sound recordings.¹²⁹

Although the Treaty does not protect broadcasting organisations, it however, updates some concepts and definitions that relate to broadcasting. Additionally, it introduces new exclusive rights that may effectively combat piracy and infringement on internet and other digital networks. For instance, the concept of broadcasting is defined under the Beijing Treaty to mean “the transmission by wireless means for public reception of sounds, or of images or of images and sounds or of the representation thereof; such transmission by satellite is also broadcasting; transmission of encrypted signals is broadcasting where the means for decrypting are provided to the public by the broadcasting organisation or with its consent.¹³⁰ While the definition has maintained the traditional character of broadcasting and the corporate nature of a broadcaster, it however, clarifies that the notion of broadcasting includes representations of a transmission in a digital environment, satellite broadcasting, and transmission of encrypted signals. In this context, subscription broadcast services were specifically brought within the scope of broadcasting.

The Beijing Treaty grants performers exclusive rights of authorising the broadcasting and communication to the public of the performances fixed in audio-visual fixations.¹³¹ The other exclusive right conferred upon performers which may be extended to broadcasters is the exclusive right of authorising the making available to the public of performances fixed in audio-visual fixations¹³². This right may, by analogy, extend to broadcasters over the making available to the public of their fixed broadcasts.

The other provisions which are relevant to broadcasters are the proscription of the circumvention of TPMs that control access and use of protected performances,¹³³ and the protection of the integrity of electronic rights management information.¹³⁴ These technical measures are regularly employed by pay TV services in Kenya and South Africa. Additionally, these measures are

¹²⁸ See *supra* note 104.

¹²⁹ See <http://www.congress.gov/treaty/-document/114th-congress/8/document>. Last accessed on March 2, 2017.

¹³⁰ BTAP art .2(c).

¹³¹ BTAP art. 11.

¹³² See BTAP art. 10

¹³³ BTAP art. 15.

¹³⁴ BTAP art. 16.

protected under different regimes of law in Kenya and South Africa. In Kenya technical measures are protected under the copyright law,¹³⁵ and in South Africa under the Electronic Communications and Transaction Act.¹³⁶

To sum up, the economic rights granted to audio-visual performers are to a large extent similar in structure to those granted to broadcasters under the Rome Convention as well as those suggested in chapter five, paragraph 5.1.5 of this study. The ensemble of these economic rights granted; and the technical measures deployed tilt the balance of interest in favour of right holders. The limitations and exceptions granted just protect public interest and not the public right and thus the public access suffers. The resultant effect of this controlled access to broadcasts affects not only Kenya and South Africa but elsewhere in the world. The public is not adequately cushioned against the TPMs and access is not a right granted by a copyright holder that the public may resort to. The laws that prescribe anti-circumvention measures in Kenya and South Africa are indiscriminate as they do not recognise acts permitted by copyright limitations and exceptions.

6.6 Regional Approaches to Broadcast Football and Treatment of Access to the Public

6.6.1 Introduction

As highlighted earlier, this paragraph focuses on four major jurisdictions with a long history and tradition of strong intellectual property and sports law regimes. They are the USA, the UK, the EU, and France. The experiences drawn from these regions inform the analysis and evaluation of the Kenyan and South African situation.

6.6.2 United States of America

The USA professional sports teams and organisers were, historically, slow to embrace sports broadcasting.¹³⁷ They did not appreciate the potential of the virtual audience. Many sports organisers initially opposed the broadcasting of games on radio or television because they feared

¹³⁵ Copyright Act of Kenya of 2001 s. 35(3)(copyright and related rights shall be infringed by a person who-(a) circumvents any effective technical measure designed to protect works; or (b) manufactures or distributes *devices* which are primarily designed or produced for the purpose of circumventing technical measures designed to protect works protected under this Act; or (c) removes or alters any electronic rights management information; or (d) distributes, imports, broadcasts or makes available to the public, protected works, records or copies from which electronic rights management information has been removed or altered without authority) .

¹³⁶ ECT Act No. 25 of 2002 s. 86.

¹³⁷ Paul Weiler, *Levelling the Playing Field: How Law Can Make Sports Better for Fans* (2006) at 296.

that the availability of games in electronic media would undercut live attendance.¹³⁸ Owing to this opposition, in 1950, television broadcasts of sporting events earned the country less than \$ 6 million per year while the National Sports League (NSL) earned less than \$ 1 million in the same period.¹³⁹

The history and nature of rights in a broadcast of sporting events in the USA has been evolved by judicial pronouncements. This is owing to the fact that the passage of the 1909 USA Copyright Act¹⁴⁰ took place before the invention of radio or television. In other words, under the 1909 USA copyright law, sports events were not copyrightable. Moreover, doubt existed even as to whether a broadcast or videotape of such events was copyrightable. This view is demonstrated in *Pittsburg Athletic Co. v KQV Broadcasting Co.*, where the court ruled that a baseball game was news and that there was no property in news capable of being protected under copyright.¹⁴¹ The Supreme of the USA later developed jurisprudence in this area by holding that in expending money, effort and skill in the collection of the news there was a quasi-property right that must be protected under the common law doctrine of misappropriation.¹⁴² The Court further held that the quasi property right was sufficient to merit protection against misappropriation as compared to absolute property right which is entitled to protection against all infringements, and this notion could also be extended to sports broadcasts.¹⁴³ The application of the doctrine of common-law misappropriation in sports broadcasts prevailed in the USA till 1976 when a new copyright legislation (hereinafter called the 1976 Act) was created in place of the 1909 version.¹⁴⁴

The 1976 Act extended copyright protection to live sports broadcasts by providing that “{c}opyright shall subsist in accordance with this title in original works of authorship fixed in

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ USA Copyright Act s. 5 does not include broadcasts as the object of copyright protection. Additionally, the first radio transmission took place in the USA in the 1920s while television transmission followed later in the 1930s.

¹⁴¹ 24F Supp. 490 (W.D. Pa 1938).

¹⁴² *International News Service v Associated Press* 248, U.S. 215, 39 S. Ct. 68, 63 L. Ed. 211 (1918) (International News Service (INS) involved two wire services the associated Press(AP) and INS that transmitted newsstories by wire to member newspapers. INS would lift would lift factual stories from AP bulletin and send them by wire to INS papers. INS would also take factual stories from east coast AP papers and wire them to INS paper in on the west coast that had yet to publish owing to time differentials. The Supreme Court held that INS’ conduct was a common-law misappropriation).

¹⁴³ Lawrence H. Miller. The Property Right in a Sports Telecast 35 *Virginia. L. Rev.* 246(1949) at 250.

¹⁴⁴ See USA Copyright Act of 1976, Pub. 94-553, 90 Stat. 2541 (for the general revision of copyright law title 17 of the United States Code), Oct.19, 1976).

any tangible medium of expression, now known or later developed, from where it can be perceived, received, reproduced or otherwise communicated, either directly or with the aid of a machine or device.”¹⁴⁵ Works of authorship enumerated in the provision include “motion pictures and other audio-visual works.”¹⁴⁶ The concept of motion picture and other audio-visual works extends and covers broadcasting and in particular sports broadcasting. The 1976 Act could only afford copyright protection to simultaneously recorded broadcasts of live performances such as sports events; this is in fulfilment of the legal requirement of tangibility.¹⁴⁷ In other words, unlike Kenya and South Africa, broadcasts in the USA must attain the threshold of originality and tangibility before they are eligible for copyright protection.¹⁴⁸ This begs the question as to what constitutes a work of authorship in a broadcast. According to Nimmer, when a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent to the public and in which order, there is no doubt that what the cameramen and the director are doing constitutes authorship.¹⁴⁹ In this context, copyrightable expression in a football game is located in the technical and artistic contribution of the cameramen and director and not in the athletic event itself.¹⁵⁰

In *Baltimore Orioles Inc. v Major League Baseball Players Association*,¹⁵¹ the Seventh Circuit rightly observed that telecasts of a game are copyrightable because of camera angles, types of shots, the use of instant replays and split screens as well as other elements of audio-visual creativity. However, on the question of copyrightability of the game itself, the court gaffed in holding that the players’ performances possess a modest of creativity required for copyrightability. This heresy was later corrected by the Court of Appeal in *National Basketball*

¹⁴⁵ See 17 U.S.C. § 102 (a).

¹⁴⁶ See 17 U.S.C. § 102(a)6.

¹⁴⁷ See 17 U.S.C. § 101 (a work is fixed in tangible medium of expression when its embodiment in a copy or phonorecord by or under the authority of the author is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than a transitory duration. A work consisting of sounds, images or both, that are being transmitted, is “fixed” for the purposes of this title if a fixation of the work is being made simultaneously with its transmission).

¹⁴⁸ See *supra* note 123.

¹⁴⁹ Milville Nimmer and David Nimmer, *Nimmer on Copyright: 1 Analysis Chapters 1-6A* (2010) at Para.2-166.

¹⁵⁰ See *id.*

¹⁵¹ 805 F.2d 663 (7th Cir. 1986)

*Association and NBA Property Inc. v Motorola Inc. DBA Sportstrax*¹⁵² by holding that the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute original works of authorship under 17 U.S.C. § 102(a). Although the Court of Appeal was adjudicating broadcast copyright in a basketball game, the same principle can similarly apply to a football match. Section 102(a) lists eight categories of works of authorship covered by the Act but the list does not include athletic events. The Court of Appeal underscored the fact that “[s]ports events are not authored in the common sense of the word. There is, of course, at least, at the professional level, considerable preparation for the game. However, the preparation is as much an expression of hope or faith as a determination of what will actually happen. Unlike movies...athletic events are competitive and have no underlying script.”¹⁵³

In Baltimore *Orioles*,¹⁵⁴ the court vested copyright in football games in local teams and leagues and not in players. Although the dominant view is that copyright in football games vests in the home team, since 1960 there has been a growing appreciation of pooling broadcasting rights in a centralised position and selling them as a package by the leagues in order to reap the economies of scale.¹⁵⁵ The USA, Sports Broadcasting Act of 1961 was amended to accommodate this mode of exploitation of sports rights.¹⁵⁶ Therefore, the Sports Broadcasting Act was passed in recognition of the uniqueness of football exploitation and thus exempted NFL’s sale of its member clubs’ television rights from anti-trust laws.¹⁵⁷

In USA, sports teams are obliged to broadcast sporting events on free-to-air networks in order to ensure greater public access to the events. This is the obtaining practice in the USA notwithstanding the fact that there is no right to watch a particular sporting event on open air televisions. The practice of major sporting events being broadcast free over-the-air networks is

¹⁵² 105 F.3d 841, 846 (2d Cir. 1997).

¹⁵³ See *id* para 56.

¹⁵⁴ See *supra* note 152.

¹⁵⁵ J. Gordon Hylton, *Over-Protection of Intellectual Property Rights in Sports in the USA and Elsewhere*, Marquette University Law School, Faculty Scholarship (2011) at 53

¹⁵⁶ See *id*.

¹⁵⁷ James Mitten and Aaron Hernandez, Sports broadcasting Act 1961: Comparative Analysis, 39 *Ohio University L. Rev.* 745 (2013) at 747.

historical and the attendant costs are recouped through commercial advertisements.¹⁵⁸ The possibility of the popular sporting events migrating to pay TV channels from FTA channels is circumvented by the Cable Television Consumer Protection and Competition Act.¹⁵⁹ In 1992 when the apprehension of siphoning occurred in the USA, the Statute authorised the Federal Communications Commission (FCC) to investigate the situation of sports broadcasting and report the findings to Congress.¹⁶⁰ The report found a significant shift to pay TV channels at the level of local sports broadcasting but not at the national level. This did not justify the creation of any anti-siphoning legislation or indeed any legislative or regulatory intervention. However, in 1975 the FCC formulated anti-siphoning regulations according to which popular sporting programming could be limited on cable networks. The regulations were, however, adjudged unconstitutional in *Home Box Office v Federal Communications Commission*.¹⁶¹

In the USA, public service broadcasting is funded by a mixed model of parliamentary grants and commercial sources.¹⁶² The public service broadcasting therefore is a not-for-profit activity which is considerably more distant from direct government control or ownership.¹⁶³ Instead, it is controlled by a consortium of not-for-profit TV stations that are themselves owned by a variety of local sources; some belonging to universities, others are owned by states, districts, cities or private trusts. Funds for public service broadcasting come both from member stations' commercial activities and annual funding from the national Corporation for Public Broadcasting whose board is nominated by the president of the USA and confirmed by the Senate.¹⁶⁴ Owing to this model of funding, the national broadcast networks that control free sports broadcasting are able to compete with pay TV networks in the market for sports broadcasting rights.¹⁶⁵ Any shift to pay TV services would provoke a public outcry.¹⁶⁶ Additionally, the USA enjoys a pay TV

¹⁵⁸ See *supra* note 134 at 48.

¹⁵⁹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 §26, 106.

¹⁶⁰ See James B. Perrine, Constitutional Law Challenges to Anti-Siphoning Laws in the USA and Australia, *Sports Administration Vol. 3 (2001) at 23*.

¹⁶¹ 567 F 2d 9 (1977) (District of Columbia, Court of Appeal).

¹⁶² CBC/Radio Canada, *Analysis of Government Support for Public Broadcasting*, Nordicity Research Report, April, 2012 at 23.

¹⁶³ Patrick O'Mahen, Public Broadcasting, *Public Funding and Public Content: How Government Broadcasting Subsidies Affect Political Knowledge and Participation*, PhD Thesis, University of Michigan (2013) at 34.

¹⁶⁴ See *id*.

¹⁶⁵ See *supra* note 157.

¹⁶⁶ See *id*

penetration of seventy five per cent. This means that any siphoning of sporting events to pay TV channels may not greatly affect access on the part of the public to those events.¹⁶⁷

6.6.2.1 Implications of the USA Position on Kenya and South Africa

In the United States of America, live sporting events are not copyright protected unless they are simultaneously recorded. The simultaneous recording fulfils the copyright requirement of tangibility and secondly, it renders the recording an audio-visual work.¹⁶⁸ Upon fixation of a sporting event including football games, what constitute the object of protection are not the underlying content but the recording and the technical contributions made by the cameramen and directors, among others.¹⁶⁹ The USA position is different from the Kenyan and South African positions where the copyright laws do not specifically protect broadcast sporting events. The protection of football events in Kenya and South Africa is inferred from the concept of broadcast and the exclusive rights granted as explained in chapter five paragraphs 5.1 and Paragraph 5 .2 of this study. The two jurisdictions should emulate the USA and felicitously and unambiguously legislate on the object of copyright protection in a broadcast and what should be the subject matter of protection in a broadcast football game. However, the regulatory framework and the access policy of sporting events in the USA may not be applicable to Kenya and South Africa because of different traditions and levels of socio-economic development between Kenya and South Africa on one hand and the USA on the other. The socio-economic environment obtaining in Kenya and South Africa calls for greater access to sporting activities in general and broadcast football in particular.

In the USA, competition law is stringently applied in order to prevent anti-competitive behaviour in the sports broadcast rights market. Although centralised marketing of sports rights is gaining foothold in the USA because of its comparative advantage over the individual selling, such practice must be exempted from anti-trust laws Besides, even if the anti-siphoning was declared unconstitutional in the USA, its necessity was not negative. Therefore in Kenya and South

¹⁶⁷ *See id.*

¹⁶⁸ *See supra* note 147.

¹⁶⁹ *NBA v Motorola supra* note 152.

Africa, there is need for a framework by which sports broadcasting rights market is regulated, besides the deployment of effective anti-siphoning and competition laws.

6.6.3 United Kingdom

The law of England and Wales does not recognise the existence of broadcasting or proprietary rights in sports events. In other words, a football game on the pitch does not attract copyright because “a spectacle cannot be owned in any ordinary sense of the word.”¹⁷⁰ In *Sports and General Agency Limited v Our Dog Publishing Co. Ltd.*¹⁷¹ the Court of Appeal held that there was no property rights in a dog show capable of being assigned to a third party. In the UK, the Copyright, Designs and Patents Act does not suggest that a sporting event can be assimilated into a work of authorship.¹⁷² The Act defines a broadcast to mean an “electronic transmission of visual images, sounds or other information which (a) is transmitted for simultaneous reception by the members of the public and is capable of being lawfully received by them, or (b) is transmitted at a time determined solely by the person making the transmission for reception by members of the public.”¹⁷³ The purpose of drawing a distinction between (a) and (b) is to accommodate the phenomenon of satellite alongside more traditional terrestrial wireless and cable transmissions.¹⁷⁴ The definition of broadcasting makes it apparent that broadcasting could include other material such as teletext information services but internet transmissions are excluded.¹⁷⁵ However, an internet transmission can fall within the definition of a broadcast if (a) the transmission takes place simultaneously on internet by other means such conventional television or radio (streaming) (b) it is concurrent transmission of a live event, or (c) it is a transmission of recorded moving images or sounds forming part of a programme service offered

¹⁷⁰ See *Victoria Park Racing and Creation Grounds Co. Ltd. v Taylor and others* (1938) 58 CLR at 496.

¹⁷¹ (1917) 2 KB 125 (the Ladies Kennel Association purported to assign the sole photographic rights in connection with a dog show to a photographic agency. An independent photographer was given access to the show and took his own photographs of the dogs exhibited which he sold to a publisher for use in an illustrated photo-journal of the show. The agency sued the publisher for infringing his exclusive rights. The Court of Appeal held that the agency was unable to prevent others from taking similar photos).

¹⁷² See CDPA s. 1 (1) (the provision lists original literary, dramatic, musical and artistic works, films, sound recordings and broadcasts as the copyright protected works)

¹⁷³ See CDPA s.6.

¹⁷⁴ See *supra* note 98 at 56.

¹⁷⁵ See *eg.*, *supra* a note 144 at 80.

by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by that person.¹⁷⁶

In a broadcast, it's the medium itself or the signal which is protected rather than the material embodied within it.¹⁷⁷ In a football telecast therefore, it is not the underlying content that is protected but the signal and other technical production contribution to the content.¹⁷⁸ This is consistent with the natural law theory upon which this study is anchored. Copyrightability must derive from the individual labour of the body or mind or hand in adherence to the theory.¹⁷⁹

Although raw¹⁸⁰ sports events do not qualify as works of authorship and therefore are not in principle subject to copyright and neighbouring rights protection, this is not so for audio-visual recordings of sports events such as football.¹⁸¹ The recordings of sporting events meet the required level of originality as to qualify as works of authorship. The number of cameras involved in filming the football match, as well as the use of different angles and perspectives involve creativity.¹⁸² In the UK, the recordings are called film or cinematographic work.¹⁸³ In copyright parlance, it is the recording which is protected and not the underlying football content.¹⁸⁴ The following judicial decisions are a pointer to the broadcast copyright in the UK.

In *BBC v British Satellite Broadcasting Ltd.*,¹⁸⁵ the court held that the BBC had copyright in the rebroadcasting of the football matches it broadcast. In the case, the claimant broadcaster had claimed to have paid a substantial sum of money for the media rights to broadcast the 1990 FIFA World Cup played in Italy. It alleged that it held copyright in the broadcasts it transmitted of the tournament. The defendants had used clips from the footage on its satellite sports channel

¹⁷⁶ See CDPA s.6 (1A).

¹⁷⁷ Hector Macqueen *et al*, *Contemporary Intellectual Property Law and Policy* (2008) at 57.

¹⁷⁸ See *supra* note 131.

¹⁷⁹ See David Chisum *et al*, *Principles of Patent Law, Cases and Materials* (1979) at 300.

¹⁸⁰ The author uses the word "raw" to mean the on-the-pitch running and tumbling of players in chasing or playing the ball.

¹⁸¹ European Audiovisual Observatory, *Audiovisual Sports Rights Between Exclusivity and the Right to Information* (2016) at 16.

¹⁸² See *Nimmer supra* note 149.

¹⁸³ See e.g. Pascal Kamina, the Subject Matter of Film Protection in Europe in *Estelle Derclaye (ed.) Research Book on the Future of EU copyright* (2009) at 85.

¹⁸⁴ See *id.*

¹⁸⁵ (1992) Ch 141.

without authority. The clips must have been based on a recorded broadcast of a football event and thus qualified as a film or cinematographic work. In *BBC v Talksport Limited*¹⁸⁶ the former lost a copyright claim against the latter who were broadcasting “live” commentaries of a Euro football championship taking place in summer 2000. BBC had exclusive right to broadcast live the event on radio and television. Talksport Radio broadcast commentary of the matches, transmitted not from the venue but from a nearby hotel room where Talksport commentator viewed the matches taking place on a room television and added pre-recorded ambient sound effects in the broadcast to give the impression that they were broadcasting live. BBC sued for passing off and misrepresentation. Justice Blackburne dismissed the claim on the basis that BBC did not have a protectable goodwill in the expression such as live coverage of sporting events.

The UK broadcast copyright jurisprudence could have been altered in 2008 when the High Court in England and Wales referred two inter-related cases to the European Court of Justice (ECJ) for interpretation.¹⁸⁷ In particular, the ECJ was asked to interpret various Directives of the Union including the Copyright directive 2001/29/EC and whether the screening of the matches in pubs and bars amounted to communication to the public in terms of the Copyright Directive. The ECJ, in a landmark decision held that exclusive rights to broadcast live football games from the English Premier League do not constitute the author’s own intellectual creation and thus are not works under the Copyright Directive 2001/29/EC.¹⁸⁸ At the time of the ruling of the ECJ, the UK was a member of the European Union and thereby bound by the decisions of the Court.

6.6.3.1 Regulatory Framework and Public Access in the UK

In order to guarantee public access of major sporting events and engender competitiveness in the media rights sectors, the UK government has put in place regulatory mechanism. The regulatory

¹⁸⁶ (2000) All ER 832.

¹⁸⁷ *Football Association Premier League (FAPL) and Others v QC Leisure and Others C-403/08*; *Karen Murphy v Media Protection Services Ltd C-429/08* (In the first case by FAPL was against pubs that screened the English Premier matches using unauthorised Greek decoder cards issued by a Greek broadcaster to subscribers in Greece to access the English Premier League matches; and against the supplier of the decoder cards. The second case C-429/08 arose from the criminal proceedings against Karen Murphy, the landlady of a pub that screened the Premier League matches using a Greek decoder card)

¹⁸⁸ *See id*, Judgment of the European Court of Justice (Grand Chamber) of October 4, 2011. *FAPL and others v QC Leisure and Others C-403/2008 and Karen Murphy v Media Protection Services Ltd C-429/08* at Para.97-98. Available online at <http://curia.europa.eu/juris/cgi-bin/form.pl>. Last accessed on May 2, 2017.

functions are bestowed upon the Office of Communications (Ofcom) which is the government-approved regulatory and competition authority for broadcasting, telecommunications and postal industries in the UK.¹⁸⁹ In carrying out its regulatory function Ofcom uses the Broadcasting Acts of 1990 and 1996 as well as the Communications Act of 2003.¹⁹⁰ Owing to the limitation placed by the growth of satellite and other forms of subscription-based television services on the general accessibility of popular sporting events to the public, Part IV of the Broadcasting Act 1996 titled “Sporting and Other Events of National Interest” was introduced.¹⁹¹

The Act permits the Secretary of State to draw up and publish a list of sporting events of national interest.¹⁹² The list must be divided into two categories: Group A and Group B.¹⁹³ Before exercising such power, the Secretary of State must consult with the BBC, the Welsh Authority, Ofcom and the holder of the rights for the event(s) in question.¹⁹⁴ Group A, events must be covered live and in entirety on free-to-air channels that are received by at least Ninety Five per cent of the UK population¹⁹⁵. Such channels include BBC1, BBC2, ITV 1, Channel 4, and Channel 5.¹⁹⁶ Group B events may have live coverage on subscription television channels provided secondary coverage is offered to free-to-air broadcasters¹⁹⁷. Qualifying broadcasters are only those whose channels are available without payment to at least 95 per cent of the UK population.¹⁹⁸ The qualifying broadcasters are not obliged to bid for all the rights in the relevant listed categories; an event may therefore take place without coverage.¹⁹⁹

¹⁸⁹ See *supra* note 164 at 174.

¹⁹⁰ See *id.*

¹⁹¹ Tom Evens *et al*, *The Political Economy of Television Sports Rights* (2013) at 204.

¹⁹² See *id.*

¹⁹³ John Woodhouse, Listed Sporting Events, Brief Paper No.2 House of Commons Library, April 2016 at 3.

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ See *e.g.*, Tom Evens *et al supra* note 188.

¹⁹⁷ See Michael Beloff *et al*, *Sports Law* (2012) at 173

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

Table 6.1. The current list was compiled in June 1998

	Group A
Serial Number	Events whose full love coverage is protected
1	The Olympic Games
2	The FIFA World Cup Finals Tournament
3	The European Football Championship Finals Tournament
4	The FA Cup Final
5	The Scottish FA Cup Final (in Scotland)
6	The Grand National
7	The Derby
8	The Wimbledon Tennis Finals
9	The Rugby League Challenge
10	The Rugby World Cup Final
	Group B
	Events whose secondary coverage is protected
1	Cricket Test matches played in England
2	Non-Finals play in the Wimbledon Tournament
3	All other matches in the Rugby World Cup Finals
4	Six Nations Rugby matches involving home countries
5	The Commonwealth Games
6	The World Athletics Championship
7	The Cricket World Cup - the final, semi-finals and matches involving home nations' teams
8	The Ryder Cup
9	The Open Golf Championship 9

Source: Ofcom Website (UK listed events), 2001²⁰⁰

²⁰⁰ See Ofcom Website. Available at http://www.ofcom.org.uk/_data/assets/pdf_file/0029/35949/ofcom_code_on_sport.pdf. Last accessed on October 14, 2017.

The Broadcast Act does not define the term “national interest” but a listed event is understood as one which is generally felt to have special national resonance and which contains an element which serves to unite the nation and a shared point on national calendar.²⁰¹

6.6.3.2 Funding of Free Access to Listed Events

In the UK, the funding of free access to sporting events of national interest must be seen in the context of public service broadcasting. The concept of public service broadcasting in the UK was exemplified in 1924 by the then newly appointed General Manager of the newly formed BBC, John Reith.²⁰² One of the salient principles of public service broadcasting propounded by Reith was that the service must be universally available to everybody in the UK.²⁰³ Thus sporting events of national character carried by the public service broadcaster must be available to all persons. Universal access is funded through the statutory exaction of licence fee currently fixed at the annual rate of £145.50 per licence-liable household.²⁰⁴ Other sources of income include commercial sales and parliamentary grants.²⁰⁵ BBC is the only public service broadcasting organisation in the UK and is publicly funded.²⁰⁶ Out of its total revenue of £4.8 billion in the fiscal year 2014/2015, licence fee constituted its single largest source of funding accounting for 72% of the total revenue. The other 28% was derived from commercial sales revenue and parliamentary grant.²⁰⁷ Other broadcasting activities in the UK otherwise than public service broadcasting driven by BBC are funded through the sale of air time to advertisers and sponsors, direct viewer charges on subscription or pay-per-view basis, and programme production and third-party broadcast licensing.²⁰⁸ Besides BBC, there is a strong presence of commercial free-to-air broadcasting organizations in the UK which privately fund their activities; ITV mainly

²⁰¹ See Woodhouse *supra* note 190 at 4.

²⁰² John Reith, *Broadcast over Britain* (1975) at 31.

²⁰³ See Bjorn Sorensen, *The Socially Useful in Public Broadcasting: Between Idealism and Utilitarianism-the Griersonian Element in a Tradition*, Norwegian University of Technology and Science, Faculty Paper (2009) 72.

²⁰⁴ M. Armstrong and H. Weeds, *Public Service broadcasting in a Digital World*, University of Essex (2005) at 5 (the rate of licence fee payable of £145.50 shall be valid till March 31, 2017 when it would be subject to review).

²⁰⁵ See *id.*

²⁰⁶ Updated Royal Charter of the BBC of Nov. 2016 s. 4.

²⁰⁷ CBC/Radio Canada, *Analysis of Government Support for Public Service Broadcasting*, Nordicity Report April 2016 at 37.

²⁰⁸ Armstrong *supra* note 201.

broadcasts in England and Wales, STV in Scotland and UTV in Northern Island.²⁰⁹ The success of public service broadcasting should be measured not by profit but by a variety of matrices like public, reaching variety audiences and preserving cultural autonomy.²¹⁰

6.6.3.3 Implications of the UK position on Kenya and South Africa

Prior to the decision in the *FAPL v Leisure*,²¹¹ broadcast sporting events were copyright protected. This position is underpinned by the decision in *BBC v British Satellite*²¹² in which it was held that the plaintiff enjoyed copyright in football matches it telecast. However, the situation changed in the wake of the ECJ decision in the *FAPL v Leisure* in which it was held that live football matches telecast in bars and pubs were not works of authorship.²¹³ Although Kenya and South Africa are not bound by the decisions of the ECJ, its decision in the case has a preponderant persuasive value. Additionally, the UK's regulatory framework is designed to assure greater access on the part of the public to sporting events of national importance. The UK has a stronger anti-siphoning legislation that staves-off migration of major sporting events to pay TV channels. Besides, the UK has instituted legal and policy frameworks that guarantee greater public access to sports events of national interest. The sale of sports rights is well regulated in terms of competition law to avoid market distortion. Being developing countries in socio-economic and cultural transformation, Kenya and South Africa require not only stronger anti-siphoning legislation but also coherent legal regimes and policies that promote public access to broadcast football events analogous to the UK model.

6.6.4 European Union

Sporting activities in the EU are run in accordance with the Treaty on the Functioning of the European Union (TFEU) of 1958 and other Resolutions and Directives promulgated by the European Union Parliament. Among the Directives issued by the European Union is the Information Society (InfoSoc) Directive on the harmonisation of certain aspects of copyright and

²⁰⁹ Department of Culture, Media and Sport, A New Framework for Local TV in the UK, Report of July 2011 at 24.

²¹⁰ See O' Mahen *supra* note 163 at 33.

²¹¹ *FAPL v QC Leisure supra* note 184.

²¹² See *supra* note 183.

²¹³ See *supra* note 184.

related rights in the information society.²¹⁴ The InfoSoc Directive was designed in such a way as to adapt on copyright and related rights the new technological development.²¹⁵ The legal provision of interest in the Directive is Article 3(2) which provides that “Member States shall provide authors with exclusive right to authorise or prohibit any communication to the public of their works by wire or wireless means including the making available to the public of their works....

In applying the Article to live hockey match broadcasts, the European Court of Justice (ECJ) ruled that although the Article extends protection to broadcasters with regard to broadcasting and communication to the public of their works, it could not offer copyright protection to the live broadcasting of hockey games because they did not meet the requirement of copyright protection since they were not the results of intellectual creation.²¹⁶

The other relevant resolution from the EU Parliament was passed in 1996 in which it was declared that the EU considered it essential for all spectators to have a right of access to major sporting events. Additionally, “exclusive broadcasting rights for certain sports events which are of general interest in one or more Member States must be granted to channels which broadcast in non-encrypted form so that these events remain accessible to the population as a whole.”²¹⁷ The issue of public access to sporting events had been addressed since 1989 by the Television Without Frontiers Directive later renamed the Audio-visual Media Directive of 2007.²¹⁸ The Audio-visual Media Directive encourages Member States to broadcast sporting events on free-to-air channels in order to reach the vast majority of the population.²¹⁹

The Directive provides that

²¹⁴ InfoSoc Directive 2001/29 EC (the Directive 2001/29/EC was promulgated by the European Parliament and the Council of May 22, 2001. It was designed to harmonise certain aspects of copyright and related rights in the Information Society era by bring it into the new digital networked environment. It is sometimes called InfoSo Directive).

²¹⁵ Lucie Guibault, *Evaluating the Directive 2001/29/EC in Light of the Digital Public Domain* (2008) at 2.

²¹⁶ See *C More Entertainment AB v Linus Sandberg* C-279/13 CJEU at Para. 30.

²¹⁷ European Parliament Resolution of May 22, 1996.

²¹⁸ See *J. Gordon Hylton, Over-Protection of Intellectual Property Rights in Sport*, Marquette University Law School and National Sports Law Institute (2011) at 16.

²¹⁹ See European Union Council Directive 89/552 as amended by Directive 97/36.

“[e]ach Member state may take measures in accordance with the community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial portion of the public... live coverage or deferred coverage on free television.”²²⁰

Presently, most European countries have complied with the Directive including Austria, Belgium, Finland, France, Germany, Italy and the United Kingdom.²²¹ The TFEU provides rules that ensure the selling and broadcasting of media rights do not restrict or cause distortion of competition within the common market.²²² The TFEU prohibits any abuse by one or more undertakings of a dominant position within the common market or in any substantial part of it.²²³ In *Union Royale Belge des Sociétés de Football Association v Jean Marc Bosman*,²²⁴ the ECJ confirmed that sport itself is an economic activity and subject to all the Community laws, including competition and market regulation laws. Additionally, the TFEU Article 101(3) recognises the fact that joint marketing of media rights may create efficiency through the reduction of transaction costs for football clubs and media operators and therefore joint market is more pro-competitive than anti-competitive.²²⁵ This position was amplified in *Re Televising Premier League Football Matches*; the court held that the benefits of collective selling of football media rights outweigh any potentially anticompetitive disadvantages.²²⁶

6.6.4.1 European Football Governance

The governance structure of the European football takes a pyramidal shape. It relies upon a set of interrelated organisations with the FIFA positioned at the top of the hierarchy.²²⁷ Under FIFA are five continental organisations which in turn control national associations.²²⁸ All the organisations in the network are responsible for the regulations of football in their own jurisdictions or functional sphere of competence, but are under the supervision and control of organisations that

²²⁰ See Media Services Directive 2007 art.3 (a).

²²¹ See *supra* note 161 at 17.

²²² TFEU art.101 (this provision prohibits any activities incompatible with the common market in relation to all agreements between undertakings. It characterised sport as an economic activity).

²²³ See TFEU art. 102.

²²⁴ C-415/93 ECJ at 20.

²²⁵ See Michael Beloff *et al supra* note 194 at 176.

²²⁶ (2000) EMLR 78 (the court further noted collective selling of media rights enabled a package of games that was representative of the entire championship, and it allows for profit maximisation as a group).

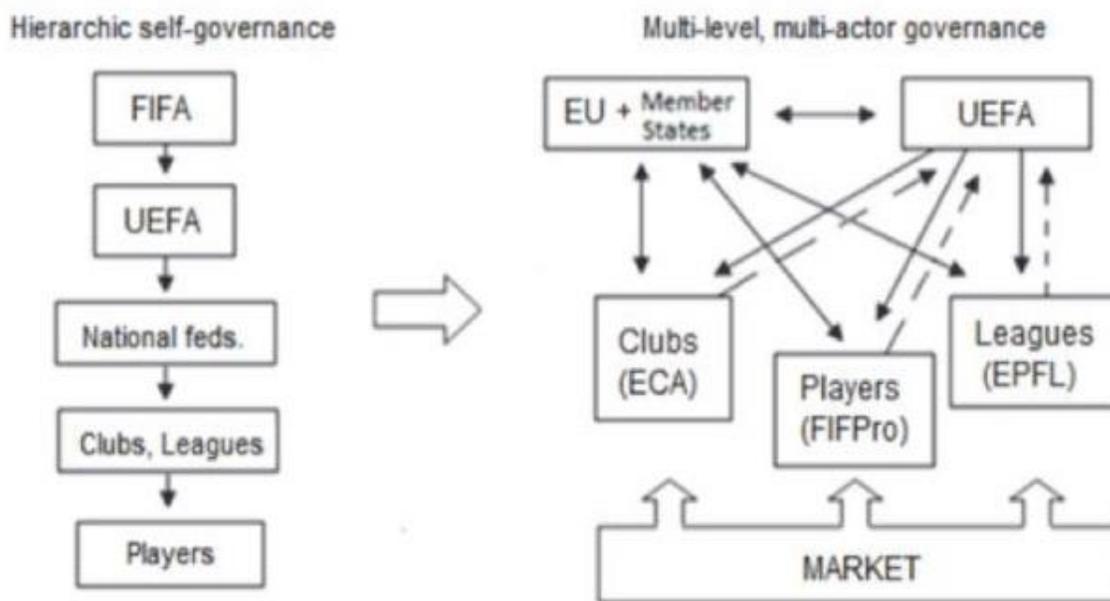
²²⁷ FIFA Statute art.20(3) a.

²²⁸ European Audiovisual Observatory, *Audiovisual Sports Rights between Exclusivity and Right to Information* (2016) at 59.

are situated above them in the hierarchy.²²⁹ In Europe, UEFA complies with FIFA rules and regulations, and national associations in Europe are required to comply with and enforce UEFA statutes and regulations in their jurisdictions.²³⁰

Sports organisations have a long tradition of self-regulation and governance.²³¹ They set their own rules and regulations in a number of areas including internal functioning and inter-organisations relationships, rules of the game and financial rules.²³² Besides, they enjoy a significant degree of autonomy from the relevant states in which they operate. In most EU member states, most national associations remain in practice politically independent structures and FIFA has contributed to establishing the principle of limited state interference.²³³

Table 6.2: The Governance Structure of European Professional Football



Source: Geeraert *et al.* (2012)

²²⁹ *See id.*

²³⁰ UEFA Statutes art. 7 bis (b).

²³¹ *See supra* note 183.

²³² *See Mathew Holt, UEFA Governance and Control of Club Competition in European Football (2008) at 15*

²³³ *See id.*

6.6.4.2 Broadcast Copyright in the EU

Issues relating to the recognition of a sports event as a work of authorship are shaped by the jurisprudence of the Courts of Justice of the European Union. In 2011, the European Court of Justice²³⁴ in a landmark decision ruled that live broadcast matches from the English Premier League did not constitute the author's own intellectual creation. The Court further held that sports events are not works under the EU copyright law namely the InfoSoc Directive (2001/29/EC).²³⁵ The Court stressed that only the opening video sequence, the premier League previous games, and some graphics could be considered as works under the copyright law.²³⁶ In the opinion of the Court, football matches are regulated and controlled by the rules of the game, leaving no room for creativity and creative independence for the purposes of accrual of copyright. In making the ruling the Court relied upon the standard of originality set earlier in *Infopaq International A/S v Danske Dagblades Forening*²³⁷ in which it was held that the work of authorship is only original in the sense that it is the author's own creativity. This position had been restated in *Eva-Maria Painer v Standard Verlag and Others*.²³⁸ The position was later reaffirmed in 2015 in the *C More v Sandberg*.²³⁹ The jurisprudential development in the European Union will have a major impact on member states.

6.6.4.3 Implications of the EU Position on Kenya and South Africa

Jurisprudentially, the European Union has had little impact on the Kenya and South Africa because the decisions of the ECJ have no binding force in the two countries. However, Kenya and South Africa do not exist in splendid isolation from the rest of the world. In that context, best legal practices and authorities of the EU may be transposed to Kenya and South; for instance, the ruling in *FAPL v QC Leisure*²⁴⁰ may be applied in Kenya and South Africa where courts have not broken grounds on the fundamental and germane issues in point. The European Union has classified professional football as undertakings that must be regulated by competition and other

²³⁴ See *supra* note 184, *Football Association Premier League (FAPL) v Leisure and Others, and Karen Murphy v Media Services Ltd.* respectively C-403 and C-429 of 2008 at 13 (Judgment of the European Court of Justice (Grand Chamber of Oct.4, 2011).

²³⁵ See *id* para. 98.

²³⁶ See *id*.

²³⁷ C-5/08 ECJ (the case popularly referred to Infopaq Case).

²³⁸ See C-145/10 paras. 88-93.

²³⁹ See *supra* note 171.

²⁴⁰ See *supra* note 179.

relevant laws. The sale of sports broadcast rights is done centrally and the market segmentation for sports rights is well structured on the basis of territories and platforms of exploitation. Greater emphasis is placed upon the desire at the EU for as many members of the public to access sporting events and thus a need for anti-siphoning legal frameworks. Additionally, the fact that the UK has been a member of the European Union²⁴¹ bound by the decision of the Union, Directives and ECJ decisions, such decisions once domesticated in the UK could influence Kenya and South in the context of the doctrine of judicial *stare decisis* adopted in Commonwealth jurisdictions.²⁴²

6.6.5 France

In France the broadcasting industry is regulated by the *Conseil Supérieur de l'Audiovisuel* (CSA) while competition authority (Autorité de la Concurrence) regulates competition in order to stave-off anticompetitive behaviour. France is a member of the European Union and therefore most of the Union's jurisprudential development impacts on it. According to Vouilloz, and in Keeping with the evolution of broadcast copyright in Europe, sports performances are not copyright protected in France.²⁴³ This position is reinforced by *Le Code de la Propriété Intellectuelle* (the Intellectual Property Code) which specifically excludes sporting events from the list of protected works.²⁴⁴ The Code further provides that "the provisions of this Code shall protect the rights of authors of all works of the mind, whatever their kind, form of expression, merit or purpose."²⁴⁵

Just like other European Countries, the media rights are regulated in keeping with the European competition law and other Directives. The most relevant Directive is the Audio-visual Media Services Directive.²⁴⁶ In compliance with the Directive in 1995, the CSA published in the official journal upon consultation with "Canal Plus", the then monopolist terrestrial pay TV

²⁴¹ See <http://www/countries-of-the-world.com/european-union-countries.html>. Last accessed on June 23, 2017.

²⁴² See e.g., Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 *Wash. and Lee L.Rev.* 411 426 (2010)

²⁴³ See François Vouilloz, *Sport and Copyright* (1996) at 3.

²⁴⁴ The Intellectual Property code of 2003 art. L 112-2(available online at www.wipo.int/edocs/lexdocs/laws/en/fr pdf. Last accessed on Feb.28, 2017).

²⁴⁵ Intellectual Property Code art. L112-1.

²⁴⁶ See *supra* note 161.

broadcaster.²⁴⁷ As a result, events of public importance were listed in the licence so as to be available on free-to-air outlets. The events included, Olympic Winter Games, Olympic Summer Games, Tour de France, FIFA World Cup matches, UEFA matches, and the final of French national football competition.

In spite of the subsistence of regulatory mechanism, Canal Plus and bien Sport enjoy a market duopoly in terrestrial pay TV services by controlling 70% to 80% of the market share in football rights.²⁴⁸ On the other hand, the following free-to air channels dominate the broadcast landscape TF1, France 2, France 3, France 4, Arte 5, TMC, NTI, and M6.²⁴⁹

The broadcasting rights for local sporting events are controlled by the relevant federations while the rights for international sporting events are centrally negotiated by the European Broadcasting Union (EBU).²⁵⁰ Not all broadcasters in France and Europe may be members of EBU and therefore this arrangement gives EBU and its member broadcasters a competitive advantage over non-member broadcasters.

6.6.5.1 Models of Funding of Public Access in France

In France public access to broadcasts is funded through a cocktail of four models.²⁵¹ The first one is parliamentary grants which the national parliament approves from time to time towards funding public service broadcasting. The second is the licensing of broadcast receiving equipment/apparatus through exaction of fee on those who possess or own them. The third model is through hypothecation of levies on commercial operators in the broadcasting industry. The fourth and last model is through commercialisation of the public service broadcasting's own services.²⁵² In 2009, the French government introduced the law that eliminates the sale of advertising on *Télévisions Publiques Françaises* (French public television stations) during prime time. In order to compensate for the loss of revenue arising the ban higher hypothecated levies

²⁴⁷ EU, *Television Without Frontier and Major Sports Events*, EC Communication, Brussels, February, 1997.

²⁴⁸ OECD, *Competition Issues in TV and Broadcasting* (2013) at 128.

²⁴⁹ *See id.*

²⁵⁰ Frederic Jenny, *Media under French Competition Law*, 12 *Fordham INT'L L.J.* 679 (1997) at 704.

²⁵¹ *See supra* note 207 (the law that informs the model is "Loi de Finance pour 2018 et loi de finances rectificative pour).

²⁵² *See id.*

were imposed on commercial broadcasters at 3% of their gross advertising revenue. Additionally new hypothecated levies were imposed on the internet service providers (ISPs) and mobile telecommunication operators at 0.9% of their individual gross revenue.²⁵³ The Justification for the ban of advertisements during prime was to re-emphasize the central importance of *Télévisions Publiques Françaises* in dissemination information, preservation of cultural autonomy as well as higher level of democratic and political sophistication.²⁵⁴

6.6.5.2 Implications of the French Position on Kenya and South Africa

Just like the UK and the rest of the EU countries, the French sports broadcast legal framework and policies promote general public access not only to broadcast football but also to other sporting events. It has a strong anti-siphoning legislation that ensures that sporting events of national character and importance are available on FTA channels. In adherence to the InfoSoc Directive 2001/29/EC and the ECJ ruling in *FAPL v QC Leisure*, France does not grant copyright to live football transmission. These practices and judicial decision should be considered by Kenya and South Africa while relooking at copyright and broadcast football and its access to the public.

6.7 Conclusion

To sum up, in the four jurisdictions examined hereinabove, it is discernible that broadcast football is treated not only as a source of information and entertainment but also as a promoter of culture, national cohesion and pride. To that end, the broadcasting of sporting events of significant national and cultural importance should be transmitted on free-over-the-air networks by broadcasters with a national coverage capability. To that end, there is greater emphasis on anti-siphoning legal frameworks while characterising professional sport as undertakings to be regulated under anti-trust laws. On the part of football events, it is clear that there is a shift from considering the recording of sporting events as the object of copyright protection while the

²⁵³ Jennifer Whitehead, France Halts Plans to Ban Remaining Ads on Public TV, *Advertising Age*, October 6, 2010 at 15.

²⁵⁴ See o'Mahen *supra* note 163. The French models of financing public broadcasting demonstrates that access to broadcasts football by the public can be achieved through many approaches in recognition of that fact the public have an inalienable right to information and entertainment. The inalienable right transcends monetary consideration.

underlying content remains in the public domain. There is greater focus and emphasis on the natural law theory, which underpins the value addition of a broadcaster in the context of the technical and artistic contribution as a basis of copyrightability. The Satellites Convention for the protection of programme-carrying signals propagated via satellite specifically protects the signals as opposed to the programmes embodied thereto.²⁵⁵ The Rome Convention itself does not provide the subject matter of protection. However, the definition of the term broadcasting in Article 3(f) implies that the object of protection is the signal.²⁵⁶ Whereas the Berne Convention does not protect broadcasts, it however, provides a basis upon which neighbouring right holders are protected. Besides, the Berne Convention provides protection against unauthorised broadcasting of copyright works.²⁵⁷ The WCT, WPPT, and the Beijing Treaty on Audio-visual performances provide a broad scope of protection of other works otherwise than broadcasts. The broad scope of protection which takes account of digital technology and modes of exploitation could be extended to broadcasts whose protection at the international is based upon the Rome Convention.

²⁵⁵ See the preamble of the Convention which provides that an international system should be established under which measures would be provided to prevent distributors from distributing programme-carrying signals transmitted via satellite which were not intended for those distributors.

²⁵⁶ Article 3(f) of the Rome Convention qualifies the broadcasting as the transmission which implies that a broadcast is the signal constituting wireless transmission of the images and/or sounds intended for public reception. WIPO, Protection of Broadcasting Organisations: Terms and Concepts, Working Paper Prepared by the Secretariat, WIPO SCCR/8/INF/1 Nov. 4-8, 2002 at 4.

²⁵⁷ See Berne Convention art.2 read with art.11^{bis}.

CHAPTER SEVEN

BROADCASTING ACTIVITIES AND FOOTBALL BROADCASTING IN SOUTH AFRICA AND KENYA

7.0 Introduction

This chapter examines the broadcasting landscapes in both South Africa and Kenya. Besides, the chapter gives an overview of football as a sporting event in the two countries, its organisation, broadcasting, marketing and regulation. Additionally, the chapter examines the nature and scope of broadcast copyright and its impact on access to public access of football game in the two jurisdictions. In examining the impact of broadcast copyright on football access to the general public, the study analyses the interface between broadcast copyright and access to football in the two countries. The chapter finally, undertakes a comparative analysis between South Africa and Kenya. In carrying out the analysis, the author seeks to respond to the research objective three as well as research questions three and five of the study.

7.1 South Africa

7.1.1 History of Football in South Africa

Football is the most popular sport not only in South Africa but also on the entire African continent.¹The history of football in South Africa reflects the deep-rooted racial divisions and bigotry that characterised the country during the time preceding the 1994 transition to a truly democratic and multiracial society.²The racial divisions were a hallmark of the early football

¹ Arnold Pannenbog, *Football in Africa: Observation about Political, Financial, Cultural and Religious Influences* (2010) at 48.

² Although there had always been an informal policy of segregation with South African Sports, with the formal realisation of apartheid in 1948 divisions on the playing field were further entrenched through legislation. Sporting activities had to comply with the broader policies of the so-called separate development and there was no interracial mixing in sport. See Justin Van de Merwe, *The Road to Africa: South Africa's Hosting of the "African" World Cup* (2009). Online available at <http://www.hsrcpress.ac.za/downloads.pdf>.

development since its introduction by the British working-class soldiers who took part in the Anglo-War of 1879.³ Upon the introduction of football, the then white-dominated government helped the establishment of the whites-only, South African Football Association (SAFA) in 1892.⁴ In 1897, SAFA applied and joined the English Football Association in a bid to get a condiment of international legitimacy for its exclusionist and racist policy.⁵ In 1947, SAFA toured Australia and New Zealand.⁶ It is noteworthy that all these activities took place within the realm of the United Kingdom, the then colonial master. However, SAFA's attempt at making a sports tour of Belgium, France and Norway in 1951 was rejected.⁷

In the meantime, in 1903 the South African Indians followed suit and established their own South African Indian Football Association (SAIFA).⁸ The Black South Africans established their own football association in 1933 and called it the South African Football Association (SAAFA), and the South African Coloureds also set up their own in 1936 calling it the South African Coloured Football Association (SACFA).⁹ The formation of racially-segregated football associations was designed to perpetuate the white political and cultural dominance and purity. In 1952, the non-white South African football associations; the SAAFA, the SAIFA, and the SACFA formed the anti-apartheid South Africa Soccer Federation (SASFA) in order to collectively advance their football interests. In the meantime, 1958 FIFA recognised SAFA as

³ See *id* at 49; Soldiers and employees of the colonial administration played what is possibly the earliest documented football match in Africa in Cape Town, in South Africa. It was during this period that football became very popular and transformed into association football. Hikabwa Decius Chipande, *Introduction and Development of Competitive Football in Zambia (1930-1969): Historical Perspective*, Master Thesis in Sports History, Norwegian School of Sports Sciences (2009) at 39.

⁴ News 24 Archives, *History of South African Soccer*, May 7, 2004. Online available at www.news24.com/xArcives/sport/2010worldcup/history-of-South-African=soccer-20040507. Last accessed on March 12, 2017.

⁵ Peter Alegi, *African Soccerescapes: How a Continent Changed the World's Game*, (2010) at 108; South Africa had a longstanding connection with the British. It began with SAFA's affiliation to the English Football Association in 1897 after which a number of incoming and outgoing tours followed over the course of years. Individual South African players also began playing professionally in Britain. Gustav Barend Venter, *Gone and Almost Forgotten? Dynamics of Professional White- Football in South Africa (1959-1990)*, PhD Dissertation, University of Stellenbosch (2016) at 59.

⁶ See Alegi, *id* (foreign player association and contacts were designed to introduce new impetus, blood and experience as well as professionalism).

⁷ See *id*.

⁸ See *supra* note 4.

⁹ See *id*.

the sole football governing body of South Africa.¹⁰ At that time, FIFA was dominated by whites and thus well-disposed to SAFA. The greater involvement of blacks in football in South Africa was felt in 1932 when Chief Albert Luthuli (the grand freedom fighter and first black Nobel Prize Laureate) became the national secretary and treasurer of SAAFA.¹¹ Luthuli underscored the special value of football as a cultural force and believed that it could assist in the process of forging alliances among the Natal's urban workers and rural migrants.¹²

In 1959, the National Football League was established but its rank and file were dominated by whites and only white players could, at the time, participate in competitive football matches.¹³ Because of its exclusionist and racist policies, SAFA was suspended from FIFA in 1961.¹⁴ This action precluded its affiliated teams and clubs from participating in international football competitions. On the other hand, in 1961, SASFA started its own association football leagues called South African soccer League (SASL) to oversee local football competitions involving teams drawn from their members.¹⁵ Under the auspices of SASL the first black women's football teams sprung up including the Orlando Pirates Women's Football Club and Mother City Girls.¹⁶

The development of football in parallel with racial segregation continued in South Africa till 1991, when all the hitherto racially divided football bodies joined the then reconstituted South African Football Association (SAFA).¹⁷ In the same year, FIFA re-admitted SAFA into its ranks in appreciation of its reconstitution a long non-racial and democratic principles. In 1985, the National Soccer League (NSL) was launched. In 1996 the Premier Soccer League (PSL), the commercial vehicle of the NSL was established.¹⁸

¹⁰ South African History Online, Football in South Africa Timelines 1862-2012. Online available on www.sahistory.org.za/topic/football-south-africa-timeline-1862-2012. Last accessed on March 12, 2017.

¹¹ Eirik Fusaeter Solberg, *Contours, Dynamics and Impact of African Football Migration to South Africa*, MA Thesis, Stellenbosch University (2008) at 49.

¹² Peter Alegi, *Football Heritage Complex in African Spectrum Issue: The Other Game, Politics of Football in Africa* (2006) at 422.

¹³ *See id.*

¹⁴ *See* Supersport, South African History. Available online at www.supersport.com/football/sasoccer/content.aspx. Last accessed on February 23, 2017.

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See* Alegi *supra* note 5.

¹⁸ *See supra* note 4.

Upon accession to political independence in 1994, South Africa infused a democratic culture under the rallying call “a rainbow nation” into football.¹⁹ All football clubs and teams were obliged to reflect as much as possible all the races that make South Africa. In the wake of the democratisation of football, South Africa was re-admitted into the international football arena. To that end, South Africa rejoined the African continental football governing body, CAF in 1992.²⁰ In the preceding year, it had been re-admitted to FIFA; and the newly reconstituted and integrated national team, Bafana Bafana defeated the visiting Cameroun one goal to zero.²¹ In 1996, South Africa hosted the continental football championship tournament, African Cup of Nations or Known by the common French title *la Coupe d’Afrique des Nations* (CAN) and won the tournament after beating Tunisia two goals to zero.²² In 2009 South Africa hosted the FIFA Confederations Cup, and in 2010 it became the first African country to host the FIFA World Cup championship.²³

7.1.2 Organisational Structure of South African Football

The South African football organisation is modelled upon the British Football Association.²⁴ The administration of football in the country is divided into two, the South African Football Association (SAFA) and Premier Soccer League (PSL).²⁵ SAFA was incorporated on March 23, 1991, following the conflation of four football-related associations.²⁶ The association is run by an elected National Executive Committee, while the Chief Executive Officer oversees the running of the staff operation.²⁷ The execution of the mandate of the association is guided by its Constitution which was adopted at its inception.²⁸ Part of the mandate of SAFA is to oversee the country’s national teams and the amateur games.²⁹ At the top of the hierarchy of the structure is

¹⁹ See Peter Alegi *supra* note 5.

²⁰ See *id.*

²¹ See Dirk Nikulski and Martin Tabeira, *South Africa: International Matches 1992-1997* (2006) at 1.

²² Gerard Akindes, *Football in Sub-Saharan Africa: New Technologies and Broadcasting Regulations, Football Development or Electronic Colonialism* (2008) (paper presented to the African Studies Association Annual Meeting in Chicago, U.S.A., 2008).

²³ See *id.*

²⁴ See Rober Archer and Antoine Bouillon, *The South African Game: Sport and Racism*, Zed Press (1982) at 316.

²⁵ See *id.*

²⁶ SAFA, Introduction to SAFA, available at www.safa.net/about-us-information-to-safa. Last accessed on March 17, 2017.

²⁷ See *id.*

²⁸ See *id.*

²⁹ See Oshebenp A. Kooniyaditse, *The Politics of South Africa Football* (2010) at 30.

FIFA which is the global football governing body.³⁰ At the continental level is CAF which SAFA joined in 1991; and at the regional level, SAFA is affiliated to the Council of Southern African Football Associations (COSAFA) which brings together fourteen countries from the Southern African region.³¹ SAFA is made up of fifty two different regional affiliates which cut across the nine geo-political provinces of South Africa as defined by the Municipal Structures Act 117 of 1998.³² Functionally, all the organisations in the hierarchical structure oversee the administration of football in their areas of competence but are under the supervision and control of organisations above them.³³

The objectives of SAFA include, carrying on the public benefit activity of administering, developing, co-coordinating and promoting the game of football in which participants take part in accordance with the principles laid down by the FIFA Statutes; improving the game of football constantly and promoting, regulating and controlling it in accordance with the principles of fair play and its unifying, educational, cultural and humanitarian values; and organising competitions in association football.³⁴

On the other hand, PSL runs professional football games in South Africa. Its main objective is to promote, organise, control, and administer professional football.³⁵ It administers the South Africa Premier League and the National First Division tournaments.³⁶ Although PSL is affiliated to SAFA by providing one of its vice presidents, SAFA does not, however, govern PSL competitions.³⁷ Most of the clubs under the administrative competence of PSL are owned by private entrepreneurs in a franchise system that enables the clubs to be commoditised, much as the sporting events themselves.³⁸ For instance, Ajax Cape Town FC is owned by Ajax Amsterdam, while Jomo Sono owns Jomo Cosmos FC, Irwin Khoza owns Orlando Pirates FC,

³⁰ FIFA Statutes art. 7 bis (b).

³¹ See www.cosafa.com. Accessed on March 15, 2017.

³² SAFA Statutes of Oct. 1, 2011 art. 10.

³³ European Audiovisual Observatory, *Audiovisual Sports Rights Between Exclusivity and Rights of Information* (2016) at 59.

³⁴ See SAFA Statutes of 2011 art. 3.

³⁵ See www.psl.co.za/log asp. Last accessed on March 17, 2017.

³⁶ See *id.*

³⁷ Geoff Walters and Sean Hamil, *Governance and Regulation in South Africa: A Case Study of the Emergence of a Professional Football Industry in a Developing World*, Working Paper (2009)

³⁸ See *supra* note 11 at 51.

and Khaizer Mataung owns Kaiser Chiefs FC.³⁹ The entrepreneurial activities relating to football exploitation have made football an economic undertaking which calls for careful regulatory and marketing frameworks while counterbalancing them with the public interest. Some of the premier league participating clubs include, Bidvest Wits, Cape Town City, Supersport United, Kaiser Chiefs, Polokwane City, and Ajax Cape Town.⁴⁰

7.1.3 Football Broadcasting in South Africa

Football broadcasting is dominated by both the South African Broadcasting Corporation (SABC) and Multichoice Africa. The former is the South African public broadcaster whose mandate is to supply broadcasting and information services as well as other services ancillary thereto, to the general public.⁴¹ Its programming is tailor-made to respond to public information, education, and entertainment funded by advertisements, subscriptions and sponsorships.⁴² The Broadcasting Act of South Africa provides for the incorporation of SABC under a Charter.⁴³ The corporation is established as a public company with the state as the sole shareholder.⁴⁴ SABC runs three television services that are mainly free-to-air (they include SABC1, SABC2 and SABC3), and nineteen radio services.⁴⁵ Few commercial television services have been licensed in South Africa to compete with SABC. SABC1 television reaches eight per cent, SABC2 seventy Two per cent, and SABC3 fifty Seven per cent of the South Africa population per week.⁴⁶ In 1998, the Independent Communications Authority of South Africa (ICASA) licensed the eTV⁴⁷ as a private free over air television service. ETV broadcasts in English language and is effectively the second biggest FTA television service in South Africa covering Seventy Seven per cent of the

³⁹ See *id.*

⁴⁰ See www.psl.co.za/log.asp. Last accessed on March 17, 2017.

⁴¹ See www.sabc.co.za/wps/portal/SABC/SABCHOME. Last accessed March 24, 2017.

⁴² Broadcasting Act No. 4 of 1999 s.8 (b).

⁴³ Broadcasting Act No. 4 of 1999 s. 6.

⁴⁴ Broadcasting Act No. 4 of 1999 s. 8A.

⁴⁵ Z.E. Tshabalala and L.P. Mokhobo, *Overview of the SABC Performance 2012/2013*. Available on www.sabc.co.za/wps/wcm/connect/.../SABC+AR+part2.pdf. Last accessed on March 12, 2017; National Association of Broadcasters, *State of Broadcasting Industry Report 2014* at 8, available at http://www.nab.org.za/uploads/files/NAB_state_of_the_broadcasting_industry_Report_2014.pdf. Last accessed on June 12, 2016.

⁴⁶ See www.sabc.co.za/digital/stage/advertising/television/New_TV_Sales_kit_changes.pdf, Last accessed on March 12, 2017.

⁴⁷ *Pocket Guide in South Africa 2015/2016-Communication*. Available on www.gcis.gov.za/sites/www.gcis.gov.za/files/pdf, last visited on February 21, 2017.

population.⁴⁸ ETV is owned by Sabido Investments which has also been licensed to start a Pay TV service called E-Sat.⁴⁹

There are two subscription services in South Africa at the moment, namely M-Net Subscription service and DSTV/Multichoice subscription service.⁵⁰ M-Net service revolves on the transmission of digital terrestrial subscription service while Multichoice/DSTV service offers satellite subscription service.⁵¹ Both services are subsidiaries of Naspers, a media conglomerate of the Afrikaner National Party during the apartheid era.⁵² They run pay TV networks not only in South Africa but also in fifty other countries, most which are on the African continent.⁵³ In the early 1990s, Multichoice purchased the Pretoria City FC and renamed it, in 1994, the Supersport United FC.⁵⁴ Through its aggressive marketing, Multichoice has made the English Premier League (EPL) and other European championships popular across Africa. The dominance of Multichoice in South Africa had started brewing socio-economic tension. In 2005, Multichoice acquired from the PSL, on exclusive basis, the television broadcast rights sold collectively for South Africa domestic football competition for five years at price of R1.6 billion.⁵⁵ This provoked an outcry from SABC and the Congress of South African Trade Unions (COSATU) who argued that the deal would deprive the majority of people in South Africa access to the PSL-organised broadcast events.⁵⁶ Although the dispute was resolved by Multichoice agreeing to sub-license SABC to broadcast some of the games on its FTA networks, in 2012, the deal between PSL and Multichoice was renewed for further five years, Multichoice agreeing to pay PSL over R 2 billion for television rights.⁵⁷

Although Multichoice has dominated the pay TV landscape in South Africa, new players have started emerging. In 2010, ICASA licensed a second pay TV service called “Top Tv.” Top TV

⁴⁸ *See id.*

⁴⁹ Libby Lloyd *et al*, *Public Broadcasting in Africa, South Africa Country Report*, Jan, 2010 at 57.

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See peter Alegi supra* note 5

⁵³ *See id.*

⁵⁴ *See id.*

⁵⁵ Tom Evens *et al*, *Political Economy of Television Sports Rights* (2013) at 177.

⁵⁶ *See id.*

⁵⁷ *See id.*

has a subscription base of 360,000.⁵⁸ The total pay TV subscription base in South Africa was projected to hit a 5.9 million mark in 2016.⁵⁹ In order to consolidate its dominance, Multichoice launched in 2010, a subscription mobile television services under the slogan “New Watch Wherever You Are” on DVB-H-enabled cell phones. The service has, however, not been popular.⁶⁰

7.1.4 Political Economy of Football Broadcasting in South Africa

The political economy of football may from the outset be viewed against the historicised role of football in the struggle against the apartheid regime. In other words, the historical significance of South African football must be explained within the context of broader anti-discrimination campaigns, the growing influence of pan-Africanism, and vital global solidarity.⁶¹ The popularity of football with the black community imbues it with political, social and cultural meaning. Football constituted a rallying call and was used as a platform to raise the consciousness of the blacks against the apartheid.⁶² In 1932, Chief Albert Luthuli in partnership with Rev. Bernard Sigamoney formed the Natal Inter-Race Soccer Board which became a vital political platform for challenging apartheid.⁶³ Additionally, the expulsion of South Africa from FIFA (From 1961-1991) and other global football bodies portrayed football as a passive resistance catalyst for change in South Africa.⁶⁴ In the wake of political independence of South Africa, the social function of football shifted. Football was, in post-apartheid era, used to evoke the euphoria, jubilation, solidarity and the unity of the people of South Africa; a country that has had a history of sports isolation, apartheid and racial tension.⁶⁵ The country emerging from an era of

⁵⁸ Pricewaterscoopers (PWC), Entertainment and Media Outlook in South Africa, Kenya, and Nigeria 2012-2016 at 73. Available online at www.pwc.co.za/en/assets/pdf/enm/entertainment-and-media-outlook-2012-2016pdf. Last accessed on March 12, 2017.

⁵⁹ *See id.*

⁶⁰ *See supra* note 46 at 75.

⁶¹ Peter Alegi, *The Football Heritage Complex: History, Tourism, and Development of South Africa*, *African Spectrum* 41 (2006) at 417.

⁶² Peter Alegi and Chris Bolsmann, *South Africa and the Global Game: Introduction*, available at www.publication.aston.ac.uk/9960/1/Bolsmann-and-Alegi-intro.pdf. Last accessed on March 17, 2017.

⁶³ *See supra* note 54 at 420.

⁶⁴ *See supra* note 11 at 48.

⁶⁵ *See supra* note 54 at 2.

segregation and apartheid was using football to humanise the lives of its people and propel the anti-apartheid struggle internationally.⁶⁶

With the hosting of major football events, including, the Confederations Cup in 2009, FIFA World Cup 2010, South Africa has escaped the undignified past and projected itself as a democratic and globalised South Africa.⁶⁷ According to Ramsey, football, especially the FIFA 2010 World Cup, has inculcated a sense of respect for others, fair play and social involvement on the part of the urban youth, hitherto delinquent and pre-disposed to criminality, in South Africa.⁶⁸ The construction of six new stadia and other infrastructural facilities in South Africa did not only provide extra football facilities but also created direct and indirect employment opportunities in the country.⁶⁹

According to Alegi and Bolsmann, the PSL is the richest football league on the African continent.⁷⁰ The average income of PSL clubs per annum is R Fifty Two million with Kaiser Chiefs, Orlando Pirates, and Mamelodi Sundowns, being the dominant clubs in the league, taking the lion's share of the earning.⁷¹ In mid-2012 Vodacom renewed a sponsorship deal for five years with Orlando Pirates and Kaiser Chiefs worthy R1 billion.⁷² Puma entered a sponsorship deal as a technical supplier of SAFA for 2014 FIFA World Cup in Brazil and the next one in Russia in 2018 worthy R 14 million.⁷³ In 2012, Multichoice entered into an exclusive broadcast agreement with PSL in which the former would exclusively broadcast on television all PSL matches for the next five years at a fee of R 2 billion.⁷⁴

⁶⁶ *See id.*

⁶⁷ *See e.g.,* Eddie Cottle, World Cup in South Africa: Impact and Consequences in (Withelm Hofmeister and Megha Sarmah eds) *More Than a Game, Sport, Society and Politics* (2014) at 77.

⁶⁸ Ramsey Al-Khalili, *Socio-Economic Consideration of 2010 FIFA World Cup in South Africa, Duke University, Faculty Paper* (2015) at 2.

⁶⁹ Media Club South Africa available at www.mediaclubsouthafrica.com/component/content/article?93 world. Accessed on Jan.13, 2017.

⁷⁰ *See supra* note 59 at10.

⁷¹ PWC South Africa, South Africa Entertainment and Media Outlook, 2012-2016 at 289.

⁷² Tom Evens *supra* note 55 at 178.

⁷³ *See supra* note 69.

⁷⁴ *See id.*

Sport broadcasting is regulated by the ICASA under the Electronic Communication (EC) Act of 2005. The Act provides that ‘[s]ubscription services may not acquire exclusive rights that prevent or hinder free-to-air broadcasting of national sports events as identified in the public interest from time to time, by the Authority after consultation with the minister of sports and in accordance with the regulations prescribed by the Authority.’⁷⁵ It would appear that this right must be exercised by both the ICASA and the Minister of Sport, for one party alone cannot act without the other. Section 60(1) of the EC Act does not impose a mandatory obligation on subscription service providers. The background and nature of the regulatory framework over the broadcasting of sporting events is analysed in paragraph 7.1.4.1 hereinafter.

On April 7, 2010, ICASA published in the Government Gazette the Sports Broadcasting Services Regulations pursuant to Section 60(1) of the EC Act.⁷⁶ Regulation 4(1) of the Regulations gives the criteria of identifying the sporting events of public interest as: (a) Confederation sporting event involving a national team or individual (b) a semi-final or final of a national knockout completion, or (c) an opening game, semi-final and final of a confederation sporting event, or Regulation 4(2) any new sporting event that falls within the criteria set out above 1(a)—(c) shall be considered for listing during the review period in terms of the Regulations.⁷⁷

The current listed National Sporting events are:

1. Summer Olympic Games;
2. Paralympics;
3. Commonwealth Games;
4. All Africa Games;
5. FIFA World Cup;
6. Africa Cup of Nations;
7. IRB Rugby World Cup;
8. ICC T20 Cricket World Championships;
9. ICC Cricket World Cup;
10. Comrades Marathon;

⁷⁵ E.C. Act No. 36 of 2005 s. (60) (1).

⁷⁶ See www.icasa.org.za/portals/0/Regulations/Review/sports-broadcasting. Last accessed on March 2, 2017.

⁷⁷ See *id.*

11. Two Oceans Marathon;
12. Super 14 Rugby;
13. COSAFA Cup;
14. CAF Championship League;
15. CAF Confederations;
16. Telkom Charity Cup (Soccer);
17. MTN Supa 8 Cup (Soccer);
18. Telkom Knockout(Soccer);
19. Nedbank Cup (Soccer),
20. Currie Cup (Rugby);
21. MTN 40 (Cricket);
22. International Boxing Federations.⁷⁸

The subscription broadcasters who acquire rights under Regulation are obliged to inform the free-to-air broadcasting licensee within five days of acquiring such rights, of the opportunity to tender for the same. In addition, the provision requires that listed events may be broadcast live, delayed live or delayed by the free-to-air broadcasting licensee.⁷⁹

7.1.4.1 The Background and Nature of Sports Broadcasting Regulatory Framework under EC ACT

The introduction of anti-siphoning legislation in South Africa is attributed to the increasing dominance of pay TV services over the control of sports broadcasting rights, more especially by the Multichoice-DSTV.⁸⁰ Since its inception, Multichoice has controlled sports rights for both domestic competitions and the South African national team.⁸¹ Most of the sports coverage that

⁷⁸ See Sports Broadcasting Services Regulation of April 7, 2010 Reg. 5.

⁷⁹ Sports Broadcasting Services Regulations, Reg. 6.

⁸⁰ See Alegi *supra* note 5. In the wake of the majority rule in South Africa, the ANC government noted that there existed huge disparities between the rich and the poor which necessitated introduction of regulatory regimes in order to ensure that the biggest segment of population access infotainment on free-to-air networks. See *e.g.* André Louw, *Sports Law in South Africa* (2010) at 493.

⁸¹ See *id.*

took place on free-to-air channels took place through the regulatory intervention of either the South Africa Government or by international regulatory authorities.⁸²

In the later 1990s and 2000s, the South African government became concerned over the increasing migration of major sports events and competitions from free over the air broadcasting services to pay TV outlets.⁸³ In 2003, the then Minister for Sports and Recreation, Ngconde Balfour, expressed the concern of the government by saying:

It is an unfortunate reality that the majority of South Africans have for years been denied this right access national sports events on national television as a result of introduction of subscription television in this country. Free-to-air television has virtually been starved of the coverage of sports events of national interest as a result of commercial considerations.⁸⁴

Arising from that concern, anti-siphoning legislation was introduced to address this problem as part of the 1999 Broadcasting Act, which was slightly amended and integrated into the 2005 EC Act. The EC Act provides that subscription services may not acquire exclusive rights that may prevent or hinder free-to-air broadcasting of national sporting events designated in the public interest from time to time by the Authority (ICASA) in consultation with the Minister of Sports and in pursuance of the regulations prescribed by the Authority.⁸⁵

Following wide consultative engagement with the stakeholders, in 2002, ICASA identified the sporting events to be covered by the legislation.

Evidently the legislation was designed in a way that it could unify the nation in a shared viewing experience as well as to bridge the disparities between the rich and the poor in the football entertainment industry. The exposure to more football codes by historically disadvantaged individuals and communities would accelerate the transformation of sporting codes themselves.⁸⁶

The EC Act was complemented with the adoption by ICASA of the Sports Broadcasting Services Regulations.⁸⁷

⁸² See ICASA, *The Review of the Broadcasting Regulatory Framework: Towards a Digitally Converged Environment* (2012) 23.

⁸³ Paul Smith, *Television Sports Rights, Beyond the West: The Cases of India and South Africa*, *12(1) Global Media and Communication* (2016) at 77.

⁸⁴ See *id.* at para.3.

⁸⁵ ICASA, *Review of Sports Broadcasting Rights Regulations: Discussion Document* (2008) at 7.

⁸⁶ See *id.*

⁸⁷ See *supra* notes 78 and 79.

The protection offered to the free-to-air viewers in South Africa may have improved the situation as free-to-air broadcasters could invoke the legislation to demand broadcast rights over the designated sporting events held by pay TV outlets. However, this major events legislation has significant limitations.⁸⁸ First, under the EC Act, a pay TV service is not prevented from acquiring the rights to the national sporting event.⁸⁹ The pay TV is merely required to sub-licence the rights to an event to a free-to-air broadcaster. Secondly, there is no criterion that such free-to-air broadcaster must meet in relation to the extent of its signal reach relative to the territory of South Africa. Thirdly, the Sports Broadcasting Services Regulations do not require live coverage of the designated events. A national sporting event may broadcast live, delayed live or delayed by a free-to-air broadcaster.⁹⁰ Fourthly, the requirement imposed by the legislation is not couched in an obligatory language on the part of pay TV service providers.

These features, it is argued were deliberately constructed by ICASA to protect the interests of commercial sports broadcasters and the needs of sports organizers to maximise revenue from their TV rights.⁹¹ As a consequence free-to-air television viewers have often only limited access to the coverage of major sporting events.⁹² In practice, the legislation has meant that the television rights to most events are first acquired by Multichoice and the public broadcaster, SABC is forced to negotiate with the pay TV for secondary rights in a weakened and disadvantaged position.⁹³

In addition to the limitations inherent in the anti-siphoning legislation, the same rules are characterised with technological obsolescence.⁹⁴ The legislation was crafted in an analogy environment and thus the rules do not go beyond linear broadcast services. They do not cover non-linear broadcasting services and new media like VOD, OTT and IPTV which can also lock sporting events away from the public and deny them access.⁹⁵

⁸⁸ See Tom Evens *supra* note 55.

⁸⁹ See *supra* note 75.

⁹⁰ See *supra* note 79.

⁹¹ See ICASA *supra* note 85.

⁹² ICASA, *Sports Broadcasting Services Regulations* (2010) at 12.

⁹³ See ICASA *supra* note 82 at 23.

⁹⁴ Z-Coms, *Research and Analysis of Broadcasting in South Africa: Final Report* (June 27, 2014) at 222.

⁹⁵ See *id.*

7.1.4.2 Competition Law in South Africa

On the part of competition law, Tom Evens argues that its application or impact on sports broadcasting is limited in South Africa.⁹⁶ This argument is deduced from the obtaining broadcasting practices which are incongruent with competition law. In early 1990s vertical integration took place in South Africa between the pay TV, Multichoice and Pretoria City FC which was renamed Supersport United.⁹⁷ This merger or integration between the football club and the dominant pay TV service strengthened its market dominance which is anticompetitive. A similar merger arrangement in 1998, in the UK between Manchester United Plc, the parent company of Manchester United FC, and a broadcaster BSKYB was rejected because it would tilt the balance of competition.⁹⁸ Smith argues that in South Africa, competition law has little, if any, impact on sports broadcasting market.⁹⁹ Owing to little impact of competition in the sports broadcasting industry, the dominance of Multichoice in pay TV services keeps increasing correspondingly with its control of sports television broadcast rights. In 2013, Multichoice accounted for 95 per cent of the pay TV market in South Africa.¹⁰⁰ Competition law and unfair competition are analysed in details in Chapter One paragraph 1.1.3.3.

It is posited here that the competition law has limited application to sports broadcasting and sporting activities because it has not been clarified whether in South Africa, a sporting activity and its transmission constitutes an economic undertaking. The competition laws normally apply to economic activity within or having an effect within the country.¹⁰¹ This begs the question whether a football game is an economic activity or a socio-cultural activity. One of the research questions in this study is whether football bears the hallmark of a cultural tool which promotes, *inter alia*, collective consciousness of citizens.

⁹⁶ Tom Evens *et al supra* note 55 at 182.

⁹⁷ *See supra* note 43.

⁹⁸ *See supra* note 55 at 10.

⁹⁹ *See supra* note 83.

¹⁰⁰ *See id; see also* Smith *et al*, The Regulation of TV Sports Broadcasting: A Comparative Analysis, 37(5) *Media Culture and Society Journal* 720(2015) (it is argued in the article that competition law does not apply to sports broadcasting in South Africa).

¹⁰¹ *See e.g.*, The Competition Act of South Africa No. 89 of 1998 s. 3 (the provision gives the scope of application of the Act by stating that “[t]his Act applies to all economic activity within or having an effect within the Republic except...).

Although the law in South Africa does not give guidelines on how football television rights are owned and marketed, the practice that can be inferred from licensing contracts indicates that such rights are owned and centrally sold by the league organisers. The sale of the television broadcasting rights by PSL to Supersport in 2005 at R 1.6 billion exclusively for five years reinforces this fact.¹⁰² Although, the collective selling of media rights may stifle competition between clubs *inter se*, it may foreclose the market to potential entrants by tying rights up together.¹⁰³ It has, however, been argued that the positive effects of joint selling of broadcast rights outweigh the negative effects on competition.¹⁰⁴ Additionally, the sale of football broadcast rights on an exclusive basis has recently been accepted in the European Union as a sound commercial practice.¹⁰⁵ Exclusivity has greater economic value than non-exclusivity of broadcast rights and most broadcasters prefer exclusive rights because they offer greater advertising and sponsorship opportunities.¹⁰⁶

In spite of the foregoing, South Africa has not put in place marketing guidelines for football broadcasting rights. With the increasing commercialisation and commoditisation of football events, a structured marketing framework should be put in place in order to rationalise the upstream and downstream exploitation of broadcast football, including over linear and non-linear platforms.

7.1.5 Nature and Scope of Broadcast Copyright in South Africa

Broadcasts and programme-carrying signals are copyright protected in South Africa.¹⁰⁷ This protection is granted notwithstanding the fact that South Africa is not a signatory to the Rome Convention,¹⁰⁸ which for the first time recognised, at the international plane, the neighbouring rights of broadcasting organisations. South Africa, just like most countries which embrace the

¹⁰² See Tom Evens *et al* supra note 55.

¹⁰³ Michael Beloff *et al*, *Sports Law* (2012) at 176.

¹⁰⁴ See *id* at 177.

¹⁰⁵ See *id*.

¹⁰⁶ See *id* at 179.

¹⁰⁷ Copyright Act No. 98 of 1978 s. 2(1) (it provides that “subject to the provisions of this Act the following works if they are original shall be eligible to copyright; literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, programme-carrying signal, published editions, and computer programs).

¹⁰⁸ See www.wipo/treaties/ShowResults.jsp?Treaty_id==17. Last visited on March 12, 2017.

common law system, assimilates neighbouring rights to copyright.¹⁰⁹ In South Africa, a work can only be eligible for copyright protection if it is original and has been written down, recorded, represented in digital data or signals or otherwise reduced to a material form.¹¹⁰ However, without prejudice to the originality or individuality criterion, a broadcast or a programme-carrying is exempt from the criterion of materiality as a condition to copyright protection in South Africa.¹¹¹ This means that for broadcasts or programme-carrying signals to enjoy copyright protection, they need not be fixed in a tangible medium but must be original. The copyright law also qualifies the stage at which a broadcast or a programme-carrying signal should attract copyright; and it says it is the stage at which a broadcast has been broadcast or a programme-carrying signal has been transmitted by a satellite.¹¹² The copyright qualification clause under Section 2A seems to suggest that there could be a broadcast which is not copyrightable, and that the programme-carrying signal is only protected at the downlink stage whether it is meant for reception by the public or not. This runs counter to the definition of the terms “broadcast” and “programme-carrying signal” in the copyright legislation.

A “broadcast” when used as a noun is defined as a telecommunication service of transmission consisting of sounds, images, signs, or signals which: -- (a) takes place by means of electronic waves of frequencies of lower than 3000GHz transmitted in space without an artificial conductor, and (b) is intended for reception by the public or sections of the public, and includes the emitting of programme-carrying signals to a satellite, and, when used as a verb shall be construed accordingly.¹¹³

The definition covers free over the air transmission only but excludes transmission by wire like cable and internet transmission from the ambit of the notion of broadcast. The Act also defines a programme-carrying signal as a signal embodying a programme which is emitted and passes

¹⁰⁹ Other countries like Tanzania have adopted the WIPO tradition where a distinction is drawn between copyright and related or neighbouring rights. See Copyright and Neighbouring Rights Act No. 7 of 1999 of the United Republic of Tanzania.

¹¹⁰ See *supra* note 86.

¹¹¹ See Copyright Act s.2 (2).

¹¹² See *id.* s.2A (the Section provides that a “broadcast or programme-carrying signal shall not be eligible for copyright, until, in the case of a broadcast, it has been broadcast and, in the case of a programme-carrying signal, it has been transmitted by a satellite).

¹¹³ See Copyright Act s.1 (1).

through a satellite.¹¹⁴ Arising from the foregoing analysis, it is arguable that the definition of the term “broadcast” in the Act renders Section Two A superfluous and possibly redundant.

The definition of a broadcast covers transmission over-the-air only and does not include any form of wired transmission. Secondly, the definition suggests that what qualifies a transmission to be a broadcast is the mere fact of being intended for reception to the public or sections of the public. Therefore what qualifies a transmission to be called a broadcast is its availability to the public and thus there cannot be broadcast which has not been broadcast.¹¹⁵ A transmission that has not been broadcast may qualify as a pre-broadcast signal. On the other, the qualification clause under Section 2A implies that a programme-carrying signal is only a broadcast, and thus copyright protected, once the signal has passed through a satellite towards the earth. Conversely, the definition of a programme-carrying signal suggests that such satellite transmission is eligible to copyright protection from the time the signals are introduced into uninterrupted chain of communication, including the chain leading to the satellite and down towards the earth.¹¹⁶

When the concept of programme-carrying-signal is subsumed into a broadcast under the Act, it means a signal.¹¹⁷ A signal is defined as an electronically-generated carrier capable of transmitting programmes.¹¹⁸ The notion of a signal as a broadcast may be extended to terrestrial free-to-air transmissions.¹¹⁹ The word transmission itself implies a distance between the place of origin of the communication, where the images, sounds or broadcast may be originally seen or heard, or where the recording is situated from which the content of the transmission comes—and the place where the general public may receive it.¹²⁰ It therefore follows that a broadcast which is the protected subject matter under the copyright law of South Africa is the signal into which content is embodied and not the content itself. Ricket and Creswell support the notion of a signal being the object of copyright protection in a broadcast by arguing that } although it is possible that the broadcaster has applied considerable skill and judgment in its selection and compilation

¹¹⁴ See *id.*

¹¹⁵ See e.g., *WIPO, Protection of Broadcasting Organisations: Terms and Concepts*, SCCR/8/INF/1, Aug.6, 2002.

¹¹⁶ See *supra* note 93.

¹¹⁷ See the definition of broadcast, *supra* note 113.

¹¹⁸ See *Satellites Convention art.1.*

¹¹⁹ See *WIPO supra* note 60 at 3 Para.9 (a broadcast is defined under the Rome Convention but from the implication of the term broadcasting under 3(f).

¹²⁰ See *WIPO supra* note 61 at Para.8.

of what is broadcast, it does not seem these elements are part of Part IV protection. It is simply the transmissions themselves.”¹²¹ The UK copyright law gives a pointer to the fact that it is the electro-magnetic signals that form the object of copyright. It defines a broadcast as “electronic transmission of visual images, sounds or other information which (a) is transmitted for simultaneous reception by the members of the public and it is capable of being lawfully received by them or (b) it is transmitted at a time determined by the person making the transmission for presentation to members of the public.”¹²²

From the above analysis it is evident that a broadcast is not a tangible object but a dissemination of information through the transmission of electro-magnetic energy. Yet a broadcast constitutes a protected category of copyright in South Africa. One of the requirements of copyright protection is that the “work” must be original. This begs the question as to what constitutes originality or individuality in a broadcast and how it would be determined. The copyright legislation does not provide the boundaries of originality in a broadcast. In assessing originality of a work, one needs to remind himself that copyright protects the expressive form of ideas or concepts.¹²³ It must be a product of human spirit and genius.¹²⁴ The notion of originality in the UK is limited in a sense that the author originated the work by his effort rather than slavish copying it from the work produced by the efforts of another person.¹²⁵

However, at the EU level, the European Court of Justice, in *Infopaq International A/S v Danske Dagblades*,¹²⁶ attempted to harmonise the standard of originality by holding that, in addition to the work having been independently originated from the author; it must be his own intellectual creation, which implies some form of human creativity. In South Africa, Justice Harms argues

¹²¹ Staniforth Ricket and Christopher Creswell, *The Law of Intellectual Property, Copyright Designs and Confidential Information*. (2d ed.2002) at Para.8: 100.

¹²² CDPA of 1988 s. 6(1).

¹²³ See e.g., David Vaver, *Principles of Copyright, Cases and Materials* (2002) at 73

¹²⁴ Ramon Casas Vallés, “The Requirement of Originality” (in Estelle Derclaye ed.) *Research Book on the Future of EU Copyright* (2009) at 115.

¹²⁵ See *University of London Press Ltd v University of Tutorial Press Ltd* (1916) Ch.601; *But see Fiess Publications Inco v Rural Telephony Services Co. Inc.*, 499 U.S. 340 (U.S. Sup. Ct, 1991) (the Supreme Court held that in addition to the work originating from the author independently, it must possess a modicum of creativity).

¹²⁶ C-5/05 of July, 2009 ECJ at Par. 93.

that one cannot talk of a work without talking of originality.¹²⁷ The contention is whether a broadcast possesses originality in light of the foregoing analysis to constitute a work of authorship. A broadcast is a technical telecommunication by which electronic signals are generated which has a remote relationship to the principles of copyright. Amid this lack of felicity, some South African scholars have recommended to the government during the public hearings in relation to the Copyright Amendment Bill of 2015, that broadcasts and programme-carrying signals be removed from the list of works eligible for copyright under the Bill. Beyond South Africa, other scholars have argued that electro-magnetic signals cannot be the basis of copyright protection because they are evanescent and imperceptible.¹²⁸ Copyright, they argue, cannot reside in an action of transmission¹²⁹. Colantuoni and Novazio argue that the protection of a telecast should be dualist by embracing both the signal and the content.¹³⁰ They further argue that protecting a signal alone would not have any commercial value.¹³¹

The light of the above analysis, it is contestable whether a live football broadcast is copyright protected in South Africa. This is because a signal, the object of copyright protection, is imperceptible and evanescent. Being evanescent, it would be difficult to locate originality or individuality in the signal. Originality or individuality is the only criterion of copyrightability that applies to all the categories of copyright cited in the Act including broadcasts. On the other hand, football games are not such works of authorship,¹³² and therefore cannot attract copyright by a mere fact of transmission. A broadcast is separate and distinct from the underlying content which can enjoy its separate copyright protection if it meets the threshold of copyright protection. In South Africa, in spite of a broadcast being a subject matter of copyright, it is difficult to fit it into the conventional copyright doctrines. In *Southern African Music Rights*

¹²⁷ *Waylite Diary CC v First National Bank Ltd* (1995) (1) SA 645 (A).

¹²⁸ *Michael handler*, *The Panel Case and Television Broadcast Copyright*, 25 *Sydney L.Rev.* 391 (2003) at 399.

¹²⁹ *See id.*

¹³⁰ Lucio Colantuoni and Christiano Novazio, *Intellectual Property Rights: a Comparative Overview of the USA, UK and Italy* in James AR and Stephen F. Ross (eds) *Handbook on International Sports Law* (2011) 429-59.

¹³¹ *See id.* at 432.

¹³² *See Joint Sports Claimants v Canada Copyright Board* (1991)36 CPR 3D 483; *Australian Olympic Committee v Big Fights Inc* (1999) IPR 53, 67 (Justice Lindgren held that a film of a sporting event was not itself a dramatic work and that skill and labour of filming and editing would transform “naturally occurring events” over which the producer had no control, into a work of authorship.

Organisation (SAMRO) Ltd v Ssev Mills Fabrics (Pty) Ltd,¹³³ Justice Berman held that “relaying through the extension of speakers of music in a factory from a programme broadcast by a national broadcasting corporation constitutes a performance in public, and the owner of copyright in the music was entitled to protection.” In this instance, the subject matter of the suit was the musical work which is original work of authorship, and claimant was not the broadcasting entity but SAMRO on behalf of its members. If the subject matter were a live football match, there would have been no cause of action. If the match were recorded, then there would have been a cause of action based on infringement of cinematographic film under the Copyright Act.¹³⁴

On the other hand, a recorded football match may be copyright protected not as broadcast, but as a cinematographic film.¹³⁵ A cinematographic film is defined as any fixation or storage by any means whatsoever on the film or any other material of data, signals or a sequence of images capable, when used in conjunction with any other mechanical, electronic or other devices, of being seen as a moving picture and of a reproduction, and includes the sound embodied in a sound-track associated with the film, but shall not include a computer program.¹³⁶ From the definition, the object of copyright protection is the recording itself and not what is recorded. This notion is supported by Bainbridge¹³⁷ who argues that the protection of cinematographic or audiovisual work may or may not be based on original works. This therefore brings recorded football matches into the scope of protected works. Although football events as such do not qualify as works of authorship and hence not copyrightable, this is normally not the case in recorded games in most jurisdictions.¹³⁸ Audiovisual recordings of sports events such as football games, in Europe (except Sweden), meet the required level of originality so as to qualify as works of authorship. The originality of the work resides in the technical production of the cameramen and other technical crew as well as in the director guiding the production activities and selecting

¹³³ (1983) (1) SA 608 (the same principle had earlier been extended to *SAMRO Ltd v Trust Butcher Pty* (1978) (1) SA 1052(E) in which Justice Addleson held that a public performance of a broadcast without authorisation amounted to copyright violation).

¹³⁴ See *infra* note 133.

¹³⁵ See Copyright Act 1978 s. 8

¹³⁶ See Copyright Act, 1978 s. 1(1).

¹³⁷ David Bainbridge, *Intellectual Property* (5th ed. 2002) at 53.

¹³⁸ European Audiovisual Observatory, *Audiovisual Sports Rights between Exclusivity and Right to Information* (2016) at 16.

which of the electronic images to be recorded.¹³⁹ This originality threshold fulfils the requirement of Section two of the Copyright Act. Bainbridge further argues that an audio-visual or cinematographic work whose underlying content is not a work enjoys related rights and that which is based upon original works like literary and artistic works are called derivative works.¹⁴⁰

As a cinematograph film, a recorded football match enjoys copyright protection under the Copyright Act.¹⁴¹ Some of the exclusive rights enjoyable include, the rights of reproduction of the film including taking of a still photograph therefrom; the right of broadcasting of the film; and the right of public performance of the film.¹⁴² However, this right can effectively be realised in a live football transmission if there is simultaneous recording of the event. This is simply because football broadcast rights are an ephemeral product, as viewers are often interested in live coverage, which in most cases does not require recording.¹⁴³

7.1.6 Copyright and Access to Broadcast Football in South Africa

Marlize defines access as the ability to experience or apprehend a work or the ability to view, read or listen to a work.¹⁴⁴ A broadcast is a work in terms of the copyright Act of South Africa and therefore a subject matter of access.¹⁴⁵ Lloyd looks at access in a broader context by referring access to “availability of services to all citizens; genuine access depends upon not only on existence of channels but also on their effective availability, distribution and affordability.”¹⁴⁶ In the context of broadcast football therefore, access thereto should be viewed against general availability, distribution and affordability.

The access to broadcast football in South Africa may, first, be viewed against the background of international law. The relevant international instruments on either the right to information or to

¹³⁹ See Melville Nimmer and David Nimmer, *Nimmer on Copyright* (2010) Para. 2-9.

¹⁴⁰ See *supra* note 137.

¹⁴¹ See *supra* note 111

¹⁴² See *id.*

¹⁴³ Tom Evens *supra* note 55 at 96.

¹⁴⁴ Conroy Marlize, *Comparative Study of Technological Protection Measures in Copyright Law, PhD Thesis, University of South Africa (2006)* at 239 (in his thesis Marlize looks at access from both digital and analogue perspectives).

¹⁴⁵ See the Copyright Act 98 of 1978 s.2(f) (which provides that broadcasts are works protected under copyright).

¹⁴⁶ See Libby Lloyd *supra* note 49 at 66.

participation in sports are discussed in depth in chapter one, paragraph 1.1.1 of this study. Secondly, it may be viewed against the prism of municipal law. The supreme municipal law is the Constitution of the Republic of South Africa which by implication guarantees the access to broadcast football. The Constitution entitles every person to, *inter alia*, a “right of access to information that is held by another person and that is required for the exercise or protection of any right.”¹⁴⁷ This constitutional provision is broad enough to cover information held by the public and private persons. The provision could be extended by analogy to cover information contained in football transmission. This is because football transmission in itself is an informational asset capable of constitutional protection.¹⁴⁸ It is therefore contended that limiting or denying public access to broadcast sporting events would undermine the public right to information.¹⁴⁹ This principle was reinforced by the founding father of the free South Africa, Nelson Mandela, when he said “I have always believed that sport is a right and not a privilege.”¹⁵⁰ The constitutional guarantee of access to information is operationalised under the Promotion of Access to Information Act.¹⁵¹ The Act does not define the notion of access but its preamble provides that “It gives effect to the constitutional right of access to any information held by the state and any information held by another person and that is required for the exercise or protection of any rights, and to provide for matters connected therewith.”

The Independent Communication Authority of South Africa Act¹⁵² was promulgated to create ICASA as a regulator in telecommunications and broadcasting sectors in South Africa. ICASA’s guiding principles that inform regulation of the broadcasting Industry include; the protection of public interest by requiring that all broadcasting services be responsive to the needs of the public. Responsiveness to the needs of the public implicates guarantee of access of broadcast content to the public. In giving effect to this call, ICASA employs several statutes at its disposal.¹⁵³ The most relevant one is the Electronic Communication Act (and the regulations made thereunder)

¹⁴⁷ Constitution of the RSA 1996 s. 32 (1).

¹⁴⁸ Genevieve Lakier, Sport and Speech, *16 Univ. of Penn. J.C.L. (2014) at 1120.*

¹⁴⁹ Katrien Levefever and Tom Evens, All Sports for Free: A difficult Match? Right to Information in the Digital Broadcasting Era, *3 INT’L Sports L.J. (2011) at 322.*

¹⁵⁰ Jennifer Crwys-Williams (ed) *In the Words of Nelson Mandela (2004) at 23.*

¹⁵¹ Act No. 2 of 2000 available online at www.justice.gov.za/legislation/acts/2000-002 pdf. Last visited on March 20, 2017.

¹⁵² ICASA Act No. 13 of 2000.

¹⁵³ Libby Lloyd *supra* note 49 at 90.

which is examined in depth in paragraph 7.2.4. of this chapter. Other statutes that ICASA uses include the Broadcasting Act No. 4 of 1999, and the Electronic Communications and Transaction (ECT) Act No. of 2002. Ironically the latter does not promote access to broadcasting services by the public. It protects against circumvention of technological protection measures deployed to encase digital data and broadcasts.¹⁵⁴ TPMs block access to and/or use of digital broadcasts and other data on an absolute or conditional basis.¹⁵⁵ The ECT Act criminalises the circumvention of the TPMs or the unauthorised access or interception of any data protected by the TPMs.¹⁵⁶ The scope of the application of the ECT Act is broad enough to include copyright work in a digital format.¹⁵⁷

7.1.6.1 The Extent that Copyright Impacts on Access to Broadcast Football

In South Africa, broadcasters enjoy copyright protection of their broadcasts. A broadcast under the South African copyright law is defined as a “telecommunication service of transmission consisting of sounds, images, signs or signals....”A service is defined as a system provided by a government or an organisation for the needs of the public.¹⁵⁸ Broadcasting service is defined in South Africa as “service which consists of the broadcasting of television or sound broadcasting material to the public, section of the public or the subscribers to such a service.”¹⁵⁹ In light of the foregoing definitions, it can be deduced that the object of protection in a broadcast is the content which is transmitted over the air for the reception of the public. The High Court of South Africa ruling in the *SAMRO v Trust Butcher*¹⁶⁰, held that a public performance of a broadcast in a butchery from where such broadcast could be heard by the public amounted to copyright violation. This means that the rights that broadcasters enjoy in South Africa extend to the programmes being broadcast irrespective of whether its copyright protected or not.

¹⁵⁴ See ECT Act No. 25 of 2002 s. 86(1).

¹⁵⁵ TPMs are discussed in detail in chapter four Para. 4.5. of this study.

¹⁵⁶ See ECT Act s 86(1) and (3).

¹⁵⁷ See ECT s. 1 (it defines data as electronic representation of information in any form. There a digital copyright work may take the formation of electronic representation of information)

¹⁵⁸ See Macmillan English Dictionary for Advanced Learners (2002) at 1295.

¹⁵⁹ See Broadcasting Act 4 of 1999 s.1(1).

¹⁶⁰ See supra note 115; see also James Handler supra note 128 (Handler argues that the protection of a broadcast must be based upon the underlying content that is transported by the signal); see also Lucio Colantuoni and Christiano Navazio supra note 112 at 440.; but see WIPO supra note 61 at para. 18 (WIPO argues that the broadcast copyright should be signal based and not content-based. This argued is partly based on Article 1 of the Rome Convention that requires that the rights its grants do not affect in any way the underlying content).

According to Werra, the current protection granted to broadcasters is configured into three layers. The first layer comprises the traditional copyright protection, the second layer comprises the deployment of technological protection measures and the fourth constitutes the protection against the circumvention of the technical measures.¹⁶¹ The South African copyright law grants broadcasters traditional exclusive rights to authorise or prohibit the direct or indirect reproduction of their broadcasts in any manner of form; including the taking of still photographs of their telecasts.¹⁶² Broadcasters also enjoy exclusive rights to control the rebroadcasting of their broadcast. Although the right of fixation of a broadcast is not specifically granted, it is implied in the right of reproduction because a reproduction is always based upon a fixation.¹⁶³ A broadcaster is further protected over the unauthorised distribution of its programme-carrying signals to the public in the Republic or from the Republic of South Africa.¹⁶⁴

They exclusive rights granted to broadcasters over the content they broadcast, individualise and monopolise the content. When a football match is broadcast it becomes a subject matter of copyright which is monopolised through the exclusive rights granted to the broadcasting person. When football is so individualised, it loses the character of a public good.¹⁶⁵ Copyright, therefore, makes football a private good available to the public at the discretion of the football club or organiser or licensed broadcaster and all others are excluded unless authority is granted. Broadcasting of football events in public places would be a public performance protected under the copyright law.¹⁶⁶ The Act prohibits even the taking of still pictures of a football broadcasts otherwise than for private use.¹⁶⁷ Besides, the individualisation of football transmission increases

¹⁶¹ See Jacque de Werra, *The Legal Protection of Technological Protection Measures Under the WIPO Treaties and Digital Millennium Copyright Act, the EU Directives and other National Laws (Japan and Australia)* (unpublished Faculty paper) University of Lausanne (2002) at 3.

¹⁶² See Copyright Act No 98 of 1978 s.10.

¹⁶³ See *id.*

¹⁶⁴ See *id.* s.11.

¹⁶⁵ David Rowe and Callum Gilmour, *Contemporary Media Sports De- or Re-Westernisation*, *International Journal of Sports Communication* (2008) at 194 (referring to John Reith, Rowe and Gilmour argue that broadcasting is a public good in the technical sense that its consumption by one person did not preclude its consumption by another and the broadcasting is as universal as the air).

¹⁶⁶ See e.g., *SAMRO v Butcher supra* note 133.

¹⁶⁷ See *supra* note 145.

the cost of acquisition of the rights thereby limiting access of the event to the public.¹⁶⁸ Although the copyright legislation provides for exceptions and limitations, they are discretionary and simply protect the interest of the public. They do not provide consumers a right over the broadcasts which are encrypted in a digital environment.¹⁶⁹

The access to broadcast football is majorly constricted in a digital environment through the use of technological protection measures (TPMs). According to Ncube and Schonwetter, TPMs are employed to protect both copyright protected works and unprotected or public domain works. TPMs do not distinguish between infringing and non-infringing access to and use of copyright protected works, including broadcasts.¹⁷⁰ Coenraad Visser argues that “[i]n South Africa the prohibition on the circumvention of TPMs and control access to the copyright work is absolute—not only the circumvention of access control is proscribed but also trafficking in devices that are designed primarily for circumventing access control is proscribed.”¹⁷¹ Multichoice, the most dominant subscription service in South Africa employs TPMs to control access to its football broadcasts. The TPMs encase broadcasts absolutely without any regard to copyright exceptions and limitation.¹⁷² However, Multichoice pay TV service has a penetration of 47 per cent in South Africa with a subscriber base of 3,000,000.¹⁷³ Using its dominance and strong economic base, Multichoice controls television rights for PSL matches on an exclusive basis for the season 2015-2016.¹⁷⁴ Additionally, in 2012 Kaiser Chiefs and Orlando Pirates renewed an exclusive sponsorship deal with SuperSport, a sports arm of Multichoice.¹⁷⁵

To sum up, in South Africa, statutory authorities do not support copyright protection of a raw broadcast football match. Indeed, it is trite law that a raw football match is not copyrightable because, first, of the unpredictability of its outcome, secondly, because the overall objective of a

¹⁶⁸ WIPO, *Current Marketing and Technology Trends in Broadcasting Sector*, SCCR/30/3, July 2, 215 at 40-44.

¹⁶⁹ Copyright Act 98 of 1978 s. 12 (provides too broad and general exceptions and limitations to copyright).

¹⁷⁰ Tobias Schonwetter and Caroline Ncube, *New Hope for Africa? Copyright Access to Knowledge in the Digital Age*, *Info Vol.13 (3) (2011) at 10*.

¹⁷¹ Coenraad Visser, *Technological Protection Measures: South Africa Goes Overboard*, *Overboard 7 SAJIC 54 62 (2006)*.

¹⁷² *See supra* note 149.

¹⁷³ *See supra* note 150 at 44

¹⁷⁴ *See Tom Evens et al supra* note 55.

¹⁷⁵ *See id.*

football contest is to win and not to showcase creativity, and thirdly, the sport of football is regulated by rules of the game and thereby leaving little or no room for creativity. Sporting events or indeed football games are not one of the categories of works protected under the Copyright Act in South Africa or indeed elsewhere in the world. What are protected under the copyright law, that relate to this study are the broadcasts, cinematograph films and the programme-carrying signals. In South Africa therefore sporting events in general are protected as either broadcasts, programme-carrying signals or audio-visual works.¹⁷⁶ Audio-visual works are created upon fixation of a football event.¹⁷⁷ The transmission of audio-visual football games is not popular because football is an ephemeral product; valuable and relevant when broadcast live.¹⁷⁸ The exclusive rights that broadcasters enjoy over their broadcasts individualise and monopolise the broadcast football. The monopolistic position that the organisers football events and broadcasters enjoys constricts public access. First, as private property, football games are transmitted at the discretion of the organisers and broadcasters. Secondly, any unauthorised rebroadcasting or communication to the public of a broadcast embodying football matches constitutes any infringement actionable in court at the instance of originating broadcaster. Additionally, encrypted football transmission in a digital environment in which TPMs are deployed is absolutely encased and locked away from the public. The TPMs control access to works. They control without discrimination both infringing and permitted access to or use of works. However, because the access control is total, the application of limitations and exception is *ipso facto* negated and thereby rendering access of the works to public only conditional upon payment of subscription fee or obtaining the access password from the encrypting broadcaster or its agent.

¹⁷⁶ See Copyright Act 98 of 1978 s. 2(1) (d) and (f).

¹⁷⁷ European Audiovisual Observatory, *Audiovisual Sports Rights Between Exclusivity and Right of Information, IRIS Plus 2016-2* at 16 (although sports events in Europe do not qualify as works of authorship and hence not subject matter of copyright and neighbouring rights, this is not so for audiovisual recordings of sports events like football).

¹⁷⁸ Sport is an ephemeral product. Viewers are mainly interested in live broadcasts of the events. Alexander Schaub, *Broadcasting Rights of Sports Events* (Speech Delivered at Madrid on Rights of Sports Events, Feb.26, 2002).

On the part of public access to broadcast, the anti-siphoning measures instituted in South Africa have not been effective and efficacious.¹⁷⁹ The provisions of the EC Act that prohibit pay TV services from acquiring exclusive rights over the events listed under Regulation Four of the Sports Broadcasting Services Regulations of 2010 are non-mandatory.¹⁸⁰ Consequently, pay TV services continue acquiring the same rights but with an option to sublicense them to FTA channels.¹⁸¹ However, there are no guidelines on the terms of the anticipated sub-licence. Additionally, the signal coverage of the FTA broadcast is not a condition, so even an FTA broadcaster operating in a small township like Soweto will meet the requirement. More importantly, if the FTA broadcasters is sub-licensed by pay TV broadcaster to broadcast certain games, the former are not obliged to broadcast them live.¹⁸² This kind of arrangement does not appreciate the fact that broadcast football games are ephemeral broadcasts that consumers would prefer watching live. On account of this, pay TV services continue dominating the sports broadcast scene in South Africa.¹⁸³ The pay TV broadcast services are absolutely or conditionally protected under the ECT Act and only allows public access against payment of a fee.¹⁸⁴ The Act protects the signal encrypting technology without giving the consumers the option to exercise rights reserved under the exceptions and limitations given under the copyright law.¹⁸⁵

¹⁷⁹ The anti-siphoning law in South Africa has been only a qualified success and that free-to-air viewers (and broadcasters continue to have limited access to coverage of national sporting events. Tom Evens *et al supra* note 55 at 183.

¹⁸⁰ *See id*; see also Libby Lloyd *supra* note 49 at 89.

¹⁸¹ *See* Regulation 4 of Sports Broadcasting Services Regulations, 2010.

¹⁸² *See id*.

¹⁸³ Multichoice is the dominant subscription television broadcaster in South Africa with a market share in excess of 95% and a subscriber of over 4,000,000. It holds exclusive broadcast rights over PSL League matches. Multichoice is the only fully vertically integrated pay TV service in South Africa. OECD, *Competition Issue in Television and Broadcasting* (2013) at 275. Online available at <http://www.oecd.org/daf/competition/TV-and-broadcasting-2013.pdf>. Last accessed on June 20, 2017.

¹⁸⁴ *See* Conroy Marlize, *Supra* note 144 at 10.

¹⁸⁵ Technological protection measures protected under the ECT Act and the Kenya Copyright Act potential block both types of access and/or use. The blockade is absolute and total and thereby does not distinguish fair dealing from copyright infringement. Tobias Schonwetter and Caroline Ncube *supra* note 170 at 10.

7.2 Kenya

7.2.1 The Concept of Football in Kenya

The term football is not defined in any Kenyan legislation. The concept of football in Kenya may be implicated in the definition of sport under the Sports Act of 2013.¹⁸⁶ The Act defines sport to include:

“[A]ll forms of physical or mental activity which through casual or organised participation or through training activities, aims at expressing or improving physical or mental well-being, forming social relationships or obtaining results in competition at all levels, and includes any other activity as the Cabinet Secretary may, from time to time after consultation with the technical department responsible for sports, prescribe.”¹⁸⁷

The notion of sport is generic and includes football events. The definition of sport therefore covers football. The definition is; however, narrow in scope as it places much emphasis upon sports as social phenomenon. It does not take account of the obtaining global trend in which football activities have become highly professionalised and commoditised.¹⁸⁸ Physical and mental well-being as the main drive for sporting activities, especially professional football, are giving way to commerce and economic well-being as the main driving force in the current global socio-economic order.¹⁸⁹ The specific objectives of this study are to examine how the commoditisation and propertisation of football has impacted upon the public access to this cultural heritage of mankind. In giving sport a social dimension, the legislature in Kenya appreciated the social and cultural significance of sport in promoting cultural citizenship and social development. In order to realise this objective, the general public should access certain football tournaments of FTA broadcast outlets and that such events of cultural significance should not form objects of copyright protection which would further keep them away from the public.

¹⁸⁶ The Sports Act, 2013, Kenya Gazette Supplement No. 39

¹⁸⁷ Sports Act, 2013 s. 2(1).

¹⁸⁸ Sport has not only become a mega business in the world but also an industry in its own sake involving huge sums of money. Harald Dolles and Sten Soderman, *Globalisation of Sports: The Case of Professional Football and its Management Challenges*, Working Paper No. 5/1, 2012 (presented at the Germany Institute for Japanese Studies).

¹⁸⁹ *See id.*

7.2.2 Copyright and Access to Broadcast Football

The current copyright regime in Kenya protects broadcasts without specifically defining the proprietary rights that are protected. This lacuna has led the judiciary in Kenya to interpret broadcast copyright to cover content which is broadcast. Thus once a live football event or any material in public domain is broadcast it becomes a subject of copyright protection.¹⁹⁰ The exclusive rights that broadcasters enjoy in Kenya include the right of fixation, rebroadcasting, communication to the public, and the taking of still photographs of the broadcasts.¹⁹¹ A right of reproduction is implied in the right communication to the public which is normally based on a reproduction. The exclusive rights exclude the public from viewing football matches in public places which would be tantamount to communication to the public.

Copyright individualises and monopolises this popular cultural event and thereby deny its access to the public. This position is in contradistinction with the global trend where sporting events are not treated as works of authorship.¹⁹² Additionally, the copyright law in Kenya protects TPMs.¹⁹³ Just like elsewhere; TPMs lock content absolutely away from the public. All works protected under copyright and so locked are protected against circumvention of the protecting technical measures. Among the works protected under TPMs are broadcasts embodying football run by pay TV companies in Kenya like Multichoice/SuperSport and Zuku subscription service.¹⁹⁴ The penetration of Multichoice pay TV service is limited to 16per cent with a subscriber base well over 100,000.¹⁹⁵ Therefore access to broadcast football is restricted by the exclusive rights granted to broadcasters under the copyright legislation Section 129. Secondly, access to broadcast football is also restricted to the extent that football media rights are being exploited within the contours of TPMs which encase such events and keep them away from the public unless access code is given.

¹⁹⁰ See *The Communications Commission of Kenya v Royal Media Services Ltd* infra note 284; see also *Kenya Broadcasting Corporation v Royal Media* infra note 283.

¹⁹¹ Copyright Act, 2001 s. 29(the exclusive rights granted control the broadcasts implicate the control of content. For instance, the taking of still pictures implies the taking of such pictures of the content)

¹⁹² See FAPL case infra note 276.

¹⁹³ Copyright Act, 2001 s.35(3) (copyright and related rights shall be infringed by a person who (a) circumvents any effective technical measures designed to protect works...).

¹⁹⁴ See infra note 227 (Zuku service has not greatly ventured into the field offering sports programme bouquet. This leaves the Multichoice which controls 52% of the pay TV market share to dominant in the offering of various sporting programmes on its bouquet; including various local and international competitions).

¹⁹⁵ See *WIPO supra* note 168.

7.2.3 History of Football in Kenya

The history of Kenya football is closely intertwined with the advent of colonisation in 1895 by the British.¹⁹⁶ In 1920 Kenya was proclaimed a British colony till 1963 when political independence was attained.¹⁹⁷ During the colonial époque, some foreign sporting activities were introduced replacing the traditional sports. Among those foreign sports which were introduced was football in the early twentieth century.¹⁹⁸ According to Andanje and Wanderi,¹⁹⁹ different foreigners who set a foothold in Kenya in the colonial days introduced different sporting events. The British introduced rugby and football, the American missionaries introduced basketball in 1952, while the Goans and Sikhs from Asia introduced hockey in 1950.²⁰⁰ The National Football Association was formed in 1956 in order to organise and develop association football.²⁰¹ In 1966 the Kenya National Sports Council was formed to co-ordinate the activities of sports federations.²⁰² In 1960 Kenya Football Association was replaced by Kenya Federation of Football (KFF), and became affiliated to FIFA later in the year.²⁰³ By 1963, KFF had ten football clubs under its competence, drawn from Nairobi, Nakuru and Mombasa.²⁰⁴

In the wake of independence most of the football clubs (FCs) were ethnic-based and players were drawn from rural enclaves into which various ethnic communities were consigned.²⁰⁵ However, two football clubs Abaluhya FC and Luo Union dominated respectively by the Luos

¹⁹⁶ Andanje Mwisukha and Peter Mwangi Wanderi, *Review of Management Issues and Challenges in Kenya's Sports as a Basis of Future Development*, *Journal of Int'l Research Development* Vo.4 No.1 (2009) at 81.

¹⁹⁷ *See id.*

¹⁹⁸ Elijah Ritaugu *et al*, *Sports: On the Right Track* (2011). Available online at www.ku.ac.ke/ir-library-ku.ac.ke/bitstream/handle/.../sports.pdf. Last visited on March 23, 2017.

¹⁹⁹ *See supra* note 138 at 80.

²⁰⁰ *See id.*

²⁰¹ Korir Wedon, *Impact of Sports on Economic Development of Kenya*, *3 Int'l Journal of Advanced Research* 1427(2015) at 1424.

²⁰² *See id.*

²⁰³ Otieno Nyanjom and Siteni Twaweza, *Foul Play! The Crisis of Football Management in Kenya: Technical Report* (2010) at 11.

²⁰⁴ *See e.g. supra* note 138.

²⁰⁵ *See supra* note 143.

and Abaluhya dominated the football scene. Abaluhya FC was started in 1965.²⁰⁶ In 1968 Gor Mahia FC was created as a conflation of the Luo Union FC, Kisumu All Stars FC and other clubs that hitherto drew support from the Luo community.²⁰⁷ In 1970, Kenya Breweries FC was established which briefly broke the Gor Mahia-Abaluhya FC competitive football dominance in Kenya.²⁰⁸ In 1980s the then Kenyan president, Daniel Arap Moi issued a decree by which he banned the use of names for football clubs which depicted tribal identity. In obedience of the decree, the Abaluhya Football Club was transformed into AFC Leopards. Gor Mahia, however, retained its name after the intervention of some politicians from the Luo community.²⁰⁹

7.2.4 Organisational Structure of Kenyan Football

In Kenya, sports organisations are registered by the Sports Registrar, which is an office within the Public Service of Kenya.²¹⁰ Among the organisations registered by the Sports Registrar is the Federation of Kenyan Football (FKF). The membership of FKF comprises

1. FKF Premier Leagues clubs;
2. FKF Division One clubs;
3. 20 branches;
4. FKF Association of Coaches;
5. FKF Association of Footballers;
6. FKF Association of Women's Footballers.²¹¹

The twenty branches that are affiliated to FKF are spread out throughout the Republic of Kenya. Subject to the FKF Statutes and Constitution, the branches administer football in their respective areas of competence.²¹² FKF is affiliated to the Council of East and Central Africa Football Associations (CECAFA).²¹³ CECAFA organises football tournaments within East and Central Africa.²¹⁴ CECAFA, CAF, FIFA and FKF work in collaboration in a hierarchical structure.²¹⁵

²⁰⁶ See *supra* note 145

²⁰⁷ See *id* at 14.

²⁰⁸ See *id*.

²⁰⁹ See *id*.

²¹⁰ Sports Act, 2013 s.46.

²¹¹ See FKF Constitution 2012 art. 10.

²¹² See www.footballkenya.org/branches. Last accessed on March 12, 2017.

²¹³ See www.cecfafootball.org. Last accessed on March 28, 2017.

²¹⁴ See *id*.

²¹⁵ See Oira *infra* note 275 at 183.

FKF must be a member of the regional and continental confederations which govern football in the geo-political region in which Kenya is situated.²¹⁶ Currently, the FKF administers and manages the Kenya Premier League owned by sixteen major clubs as a limited liability company, Sportspesa, and Division One tournaments.²¹⁷

7.2.5 Football Broadcasting in Kenya

The broadcasting sector was liberalised in Kenya in the 1990s.²¹⁸ Before then, broadcasting was virtually dominated by the state broadcaster, Kenya Broadcasting Corporation (KBC). The successive governments in Kenya preferred the monopoly of airwaves by KBC because they used it as an instrument of political propaganda and misinformation.²¹⁹ However, in the wake of the introduction of the pluralist multi-party politics in 1992, KBC started losing the monopoly. New commercial broadcasting stations were licensed which could offer Kenyans alternative news, information, and entertainment.²²⁰ Among the first FTA private commercial television broadcasting station to go on air in Kenya was Kenya Television Network (KTN) in 1989. In 1995 the first private radio station, Capital FM, was launched in Kenya.²²¹ By the year 2000 several FTA commercial televisions had been launched in Kenya, including Nation Television (NTV), Citizen TV, and Stellavision Television (STV).²²² According to Synovate Kenya, a media research company in Kenya, in 2010 there were one hundred and seven radio stations, and fifteen television stations in Kenya, most of which are free over the air.²²³ The most popular and extensive private commercial television services are Citizen TV, KTN, and NTV.²²⁴

On the other hand, the pay TV market in Kenya is at its infancy. Pay TV service enjoys a penetration of 8per cent which is projected to snowball to 15per cent by 2017.²²⁵ By 2017, the

²¹⁶ *See id.*

²¹⁷ *See* www.footballkenya.org. Last accessed on March 12, 2017.

²¹⁸ Robert Powell, *Kenya Media and Telecoms Landscape Guide*, Nov., 2010 at 6.

²¹⁹ *See id.*

²²⁰ *See id.*

²²¹ Open Society Foundations, *State and Future of Public Broadcasting in Kenya*, Nov., 2011 at 35.

²²² *See id.* at 37.

²²³ Synovate Kenya, *Explosion in Media Changes the Audience and Advertising Trends, 1999-2010*, at 1.

²²⁴ *See supra* note 185 at 37.

²²⁵ PWC, *Kenyan Entertainment Media Outlook 2013—2017* at 5. Available online at www.pwc.com/ke/en/assets/pdf. Last visited on March 24, 2017.

total subscription base is projected to hit 531,000.²²⁶ The dominant players in Kenya are Multichoice's DSTV subscription service, StarTimes, and Zuku Satellite Television.²²⁷ By virtue of its earlier entry into the market in 1995, Multi-choice has consolidated its market network and currently controls 52 per cent of the market share.²²⁸

7.2.6 Political Economy of Football in Kenya

As demonstrated in the Sports Act,²²⁹ the social and cultural importance of sports and by extension football is given an exalted prominence in Kenya. This does not mean that other functions which are anchored on, inter alia, commercial and informational activities are less important. As a developing country, Kenya places a lot of significance on national cohesion and peaceful co-existence of its people. Kenya has come from a past riddled with massive ethnic killings. The last round of such killings took place in the wake of the disputed presidential election results of 2007 in which over 1500 people were killed.²³⁰ In order to restore peace and re-awaken a sense of patriotism, the government has used football and sporting events. In 2008, during the Africa Cup of Nations tournament that took place in Ghana, the government of Kenya gave funds to its public broadcaster, KBC, in order to acquire television rights, which the former had declined to, acquire owing to cost implications.²³¹ The broadcasting of the tournament which ran for well over three weeks showcasing the great African players was intended serve as the restoration of national pride, national healing, and the re-awakening a sense of collective consciousness.²³²

Before then, the government of Kenya had accredited the former international cross-country champion, Tegla Lorupe, a peace ambassador in the war-stricken West Pokot region of Kenya.²³³ Lorupe may have not been a footballer but the role she played showed how any sport including

²²⁶ See *id.*

²²⁷ Boniface Otieno, Azam's Game Plan to Break Satellite TV's Dominance, *The East African Business Times*, March 28, 2015 at 26-27.

²²⁸ See e.g., Pius John Onung, *Strategies adopted by Multichoice (K) Ltd in Response to Information and Communication Convergence*, MBA Thesis, University of Nairobi (2009) at 4.

²²⁹ See *supra* note 135.

²³⁰ A. Ohanga, *Kenya's Post-Election Violence in 2007 (2014)*. Online available at www.mobile.repository.ueab.ac.ke/kenya-post-election-violence. Last accessed on March 30, 2017.

²³¹ This author was at the time the Corporation Secretary of KBC and was directly involved in the receipt of the funds and the subsequent clearance of telecast rights for tournament.

²³² See e.g., Tom Evens *supra* note 55 at 96.

²³³ See e.g., Paul Osborne, *From Running Star to Champion For Peace: The Story of Tegla Lorupe* (2014) at 1.

football could be used a weapon of peace or silencing the gun. In the same vein, in 2008, Kenya established a body called the National Cohesion and Integration Commission in order to promote peace, equality, and peace co-existence amongst Kenyans in the wake of the post-electoral violence.²³⁴ To achieve this objective, the Commission in collaboration with other agencies organised football tournaments. One of such tournaments was a peace-promotion football game between Gor Mahia and FC Leopards that took place in December, 2011 at the Nyayo Stadium in Nairobi.²³⁵ Additionally, on June 14, 2016 a street soccer tournament was organised in Kibera slums, in Nairobi, an area that was the hotbed of violence in 2007/2008, in order to promote peace and reconciliation.²³⁶ In another slum, Mathare, which was similarly affected, Mathare Youth Sport Association was formed at the initiative of Mathare United Football Club in order to inculcate into the youth love and peace so as to slough-off the proclivity towards criminality and youth delinquency.²³⁷

The global wave of commoditisation of football has not spared Kenya. According to PWC (SA), the total sports spend in Kenya is projected to amount to R1.2 billion in 2017.²³⁸ However, no independent study has ever been carried out in Kenya to establish the financial worth of the Kenya Premier League (KPL).²³⁹ According to Wandera, as at September, 2013, the five richest football clubs in Kenya were Gor Mahia with the net asset value of Kes 65million (US\$ 643,000), AFC Leopards Kes 52 million (US\$514,000), Sofapaka Kes 50 million (US\$497,000), Tusker FC Kes 45 million (US\$445,000), and Thika United FC Kes 20 million (US\$198,000).²⁴⁰ Currently the title sponsor of the KPL is Sportspesa which signed the title sponsorship deal in 2015 for four and half years at a sum total of Kes 360 million(US \$3.5 million).²⁴¹ In 2008 KPL

²³⁴ See www.cohesion.or.ke. Last visited on March 25, 2017.

²³⁵ Muthuri Daniel Kimathi, *The Role of Football in Conflict Resolution in Kenya: A Case Study of Kibera Constituency*, MA Thesis, University of Nairobi (2016) at 26.

²³⁶ See *id.*

²³⁷ See *id.*

²³⁸ PWC (SA) South Africa Entertainment and Media Outlook Including Kenya and Nigeria, 2013-2017 Projections at 3-4.

²³⁹ See Gilbert Wandera, Money and the Football Clubs: Kenya's Richest Five, *Standard Digital*, Sept. 6, 2013.

²⁴⁰ See *id.*

²⁴¹ Nairobi News, KPL Signs A Multi-million Shillings Sponsorship Deal With Sportspesa, August 6, 2015. Online available at www.nairobinews.nation.co.ke/sports/kpl-signs-a-multimillion-shillings-sponsorship-deal-with-sportspesa.pdf. Last visited on March 25, 2017.

and Supersport entered into a four year contract for the transmission of KPL League matches on the DSTV pay TV platforms for a sum US \$5.5 million.²⁴²

Other football sponsors include Kenya Breweries Ltd which sponsored the Kenyan national team, Harambee Stars in a sum of US \$ 1.34 million towards the preparation for the FIFA, 2014 World Cup.²⁴³ In the same football calendar season, Blue Triangle Ltd, a cement manufacturer in Kenya, sponsored Sofapaka FC in a sum of Kes 15 million (US\$ 148,000) in 2008.²⁴⁴ On the other hand Kenya Data Networks Ltd sponsored Mathare United FC in a sum of Kes 20 million (US\$ 198,000).²⁴⁵

Despite the positive development of football in Kenya, the country has nonetheless to contend with violent incidents relating to and connected with football fans or supporters. These events occur either during, or immediately before or after the match. In 2010 eight fans died and several others injured at a soccer match involving Gor Mahia and AFC Leopards FCs, the two soccer rival clubs with the largest fan base in Kenya.²⁴⁶ In a related incident, in 2005, a young boy was killed and several fans injured in a stampede that ensued before a kick-off to the 2006 FIFA World Cup qualification *rencontre* between Kenya and Morocco.²⁴⁷ Therefore, while football is lauded as a unifying factor, at the local levels it may sow the seeds of conflict, hooliganism and disharmony.

In Kenya the Media Owners Association (MOA)²⁴⁸ has for a long time advocated self-regulation in terms of media content, and that the regulator should only control spectrum and broadcasting architecture and topology. As a consequence, the Communications Authority of Kenya (CAK), the Kenya's telecommunications and broadcasting regulator, has minimal regulatory power over

²⁴² See *supra* note 145 at 30.

²⁴³ Denis Mbuka, *Sports Sponsorship*. Available at www.topnews.in/sports/kenya-football. Last accessed on Jan.13, 2014.

²⁴⁴ Moni Wekesa, Regulation of Doping in Sports in Kenya, *Mount Kenya University Law Journal*, Vol.1 No.2 (2012) at 1.

²⁴⁵ See *id.*

²⁴⁶ Ben Akech, *Public Regulation of Sports in Kenya*. Online available at www.mmnlaw.co.ke/our-team/team/team-ben-akech.html. Last visited on March 29, 2017.

²⁴⁷ See *id.*

²⁴⁸ The MOA is a constituted body bringing together the owners of media and media-related undertakings in Kenya with a view to advancing their economic and welfare interest.

broadcast content.²⁴⁹ This has left the broadcasting of sport in general, and football in particular unregulated. Although Kenya appreciates the cultural and social significance of football, there are no regulations obliging FTA to broadcast certain categories of matches that resonate with the majority of Kenya people.²⁵⁰ Besides, there is no anti-siphoning legislation that restricts the migration of football from FTA outlets to pay TV channels. This situation is exacerbated by the state neglect of the KBC, the public broadcaster which is enjoined to operate commercially in competition with commercial broadcasters.²⁵¹ This has exposed KBC to financial stress and at times cannot afford television broadcast rights.²⁵² Few commercial television stations are keen to broadcast local matches, including international games in which national teams participate.²⁵³ Most football fans prefer watching European League matches which are better produced, marketed, and performed.²⁵⁴ To quote a disappointed Nigerian football commentator: “When you look at the stadiums [sic], you will find that the stands are virtually empty while bars and joints that have satellite televisions are full. People will pay to watch the Premier League on television but not to watch the Nigerian football live.”²⁵⁵ The Premier League he is lamenting about is the English Premier League. This worrying phenomenon is what Akindes calls “electronic colonialism.”²⁵⁶ The Nigerian phenomenon is replicated across Africa including Kenya.

The Kenya Information and Communications (Amendment) (KIC) Act of 2013 creates the CAK.²⁵⁷ CAK is the Kenya’s regulator of the broadcasting and telecommunications sector. In the

²⁴⁹ See www.ca.go.ke/index.php/what-we-do. pdf. Last accessed on March 24, 2017.

²⁵⁰ See the definition of sports. Sports Act, 2013 s.2(1).

²⁵¹ It shall be the duty of the corporation to conduct its business according to commercial principles.... KBC Act, Cap 221 s. 38.

²⁵² See e.g., Gilbert Wandera, AFCON: Nyamweya Decries TV Blackout, Standard Digital, Jan.24, 2017. Online available at www.standardmedia.co.ke/sports/article/2000231022/afcon-nyamweya-decries-tv-blackout. Last visited on March 25, 2017(Nyamweya was the Former Football Kenya Federation president who expressed concerns that Kenyans could not watch on television the Africa Cup of Nations tournament of 2017 which took place in Gabon because the public broadcaster could not afford Kes 116 million (US\$ 1,150,000) for broadcast rights demanded by CAF).

²⁵³ For football fans in Africa, the UK’s English Premier League (EPL) is the king, the ultimate championship, their main place of their worship. BBC, which is Africa’s Favourite Premier League Team? Online available www.bbc.com/news/world-Africa-33808566. pdf. Last visited on March 24, 2017.

²⁵⁴ See *infra* note 256.

²⁵⁵ David Goloblat, *The Ball is Round: A Global History of Soccer* (2008) at 688.

²⁵⁶ Gerard Akindes, Football in Sub-Saharan Africa: New Technologies and Broadcasting Regulation: Football Development or Electronic Colonialism? Conference Paper, African Studies Association, Annual Meeting, Chicago 2008 at 108.

²⁵⁷ KIC Act No. 41A of 2013, s.3.

discharge of its mandate, CAK is required to display independence and freedom from the control by the government, political and commercial interest.²⁵⁸ Other than prescribing, among other, guidelines on the classification of broadcasting services, and eligibility criteria for licensing of broadcasters under Section 46 A, the Act is silent on sports and sports broadcasting generally. The Kenya Information and Communications (Broadcasting) Regulations of 2009, which are industry-tailor made for broadcasting are silent on football broadcasting, or indeed sports broadcasting. Even the public broadcaster is not obliged to broadcast sporting events.²⁵⁹ The Regulations only obliges broadcasters to observe “local content” programming while broadcasting. However, the local content does not cover broadcasting of football events.²⁶⁰ Under the Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulation of 2010, CAK has power to determine, pronounce upon, administer, and enforce compliance of its licensees with competition laws and regulations that relate to commercial activities in the communications sector.²⁶¹ The marketing, sale of media rights, and broadcasting of sporting events seem to fall outside the mandate CAK.

On the exploitation of the football media rights, there are no statutory or policy frameworks that underpin the activity. However, KPL, as a way of industry practice, markets and sells the media rights centrally.²⁶² The media rights are sold on the exclusive basis.²⁶³ All these practices may appear ant-competitive, but, the commercialisation of sports broadcast rights has not yet been characterised as an economic activity in Kenya.

²⁵⁸ See KIC Act No. 41A of 2013 s. 5A.

²⁵⁹ The role of the public broadcaster is provided for under Regulation 11 of the KIC (Broadcasting) Regulation of 2009.

²⁶⁰ Local content is defined as a total of all television or radio programmes which fulfill any five of the following conditions: (a) production is made in Kenya in either Kenya’s native languages or official languages of Kenya (b) production is done in Kenya (c) at least 25% of the shares of the production company are owned by Kenyans (d) majority of artistes are Kenyans (e) the location of shooting, in case of audiovisual programmes, or performance, was in Kenya (f) the author thereof must be a Kenyan national and in case of a co-production or multi-authorship 50% or most must be Kenyans (g) production is made under the Kenyan creative and technical control. See KIC (Broadcasting) Regulations, 2009 R.2.

²⁶¹ See Regulation 4.

²⁶² See *supra* note 174.

²⁶³ See *id.*

7.2.7 Nature and Scope Broadcast Copyright in Kenya

Broadcasts are among the six categories of works that are protected under the copyright law in Kenya.²⁶⁴ The limitative categories of works eligible for copyright protection are drafted in such a mandatory language that the list is definitively exhaustive.²⁶⁵ Sporting activities or indeed football games are not part of the works cited for copyright protection under the Act. The term broadcast is defined in the Act as “the transmission of, by wire or wireless means, of sounds or images or both or the representations thereof, in such a manner as to cause such images or sounds to be received by the public and includes transmission by satellite.”²⁶⁶ This definition refers to act of transmission which implies that the word “broadcast” is used as a verb as opposed to a noun. This is consistent with the definition of “broadcasting” in the Rome Convention as the transmission by wireless means for public reception of sounds or of images and sounds.”²⁶⁷

Unlike the Rome Convention or the WPPT which restrict the notion of broadcasting to over the air transmissions, the Kenyan Copyright Act gives broadcasting a broader meaning and application to cover, in addition to over the transmission, transmissions guided by physical conductors like cable and internet transmissions.²⁶⁸ In a bid to clarify the concept of broadcast, the Act provides that “a broadcast means the first broadcaster.”²⁶⁹ This clarification is not only superfluous but also redundant. It creates more confusion than clarification because a broadcaster cannot be equated with a broadcast.

In light of the foregoing analysis, one can safely argue that the Kenyan copyright law does not define the noun broadcast. The Rome Convention does not either define the notion of a broadcast. However, according to WIPO, the concept of broadcast can be inferred from the word

²⁶⁴ Copyright Act, 2001 No. 12 of 2001 s. 22(1) (the Act prescribes an exhaustive list of literary works; musical works; artistic works; audiovisual works; sound recordings; and broadcast as works that shall be eligible for copyright protection in Kenya).

²⁶⁵ The mandatory language is implied by the use of “...the following works shall be eligible for copyright.” *See id.*

²⁶⁶ Copyright Act, 2001 s.2(1).

²⁶⁷ *See* Rome Convention art.3 (f); Cf WPPT art. 2(f) (the Article defines broadcasting as “the transmission by wireless means for public reception of sounds or images and sounds or of the representation; such transmission by satellite is also broadcasting; transmission of encrypted signals is broadcasting where the means of decrypting are provided by the broadcasting organisation or with its consent”).

²⁶⁸ The term “wire” implies transmission guided by artificial means as opposed to over Hertzian waves.

²⁶⁹ Copyright Act, 2001 s. 2(f) (whatever consequences this definition was intended to achieve, it is more confusing than enlightening because a broadcast and a broadcaster cannot be the same thing. The definition is therefore superfluous).

broadcasting in Article 3(f) of the Rome Convention which qualifies the broadcasting to a transmission.²⁷⁰ Consequently a broadcast is the signal constituting wireless transmission of images and/or sounds when intended for public reception.²⁷¹ Additionally, in the on-going negotiations on the updating of the rights of broadcasting organisations under the auspices of WIPO, the object of protection in the draft treaty documents has been identified as the electromagnetic signal carrying images and/or sound or data, and not the underlying content itself.²⁷² The separation of content from the signal is important because it accords with the Rome Convention which requires that the protection granted thereunder shall leave intact and shall in no way affect the protection of copyright in literary and artistic works.²⁷³ Besides, if such protection extends to content, it may not only conflict with the rights of content owners where such exist, but may also bring content which is in the public domain into the scope of copyright protection.

The signal being the object of protection in a broadcasting activity in Kenya, the next issues is whether its fits into the copyrightability requirements set under the Act. The Act provides that a literary, musical or artistic work shall not be eligible for copyright unless:- (a) sufficient effort has been expended on making the work to give it an original character; and (b) the work has been written down, recorded or otherwise reduced to a material form.²⁷⁴ It would appear that the twin doctrine of originality and tangibility applies only to authorial works, literary, musical, and artistic works. Broadcasts are not affected by this requirement. The only requirement that transmission must fulfil to be a broadcast is that must be either over the air or by wire intended for reception by the public. What constitutes a public is discussed in depth in chapter five, paragraph 5.1.4. of this study.

²⁷⁰ WIPO, *Protection of Broadcasting Organisations: Concepts and Terms, Working Paper Prepared by the Secretariat*, SCCR/8INF/1 (2002) Para.9 at 3.

²⁷¹ *See id.*; In a broadcast it is the signal that is the object of protection and not the underlying content because broadcasting places greater reliance upon machinery and technology which stifle creativity. *See also Macqueen et al. Contemporary Intellectual Property Law and Policy* (2007) at 433.

²⁷² *See* WIPO, *Consolidated Draft Treaty on the Rights of Broadcasting organisations*, May, 2, 2005 at 2.

²⁷³ *See* Rome Convention art. 1.

²⁷⁴ *See* Copyright Act, 2001 s. 22(3).

Relating to the subject matter of the study is the issue whether signal is embodying a live football game would be copyright protected. Since in Kenya, there is no requirement for a wire or wireless transmission to be original or embodied into a tangible medium in order to attract copyright, such transmission constitutes a broadcast if it is intended for reception by the public. However, such protection would be restricted to the signal and would not extend to the underlying content. Therefore, in Kenya, there is no legally recognised property right in live broadcast football events.²⁷⁵ This is consistent with the dominant views of scholars and judicial pronouncements across the world.²⁷⁶

On the flipside, a recorded football match could be copyright protected in Kenya as audio-visual work. Audiovisual work is defined as a “Fixation in any physical medium of images, either synchronised with or without sound, from which a moving picture may, by any means, be reproduced and includes videotapes and videogrammes but does not include a broadcast.”²⁷⁷ The provision protects the recording of images with or without sound from which a moving or a series of related pictures can be reproduced. An audio-visual work need not meet the threshold of originality and tangibility.²⁷⁸ The Act excludes broadcast from the scope of audiovisual works; meaning that a signal embodied with images and /or sounds cannot be an audiovisual work. For it to qualify as an audio-visual work, it must first be recorded into a physical medium, and signals are not such a medium.

Football broadcasts therefore may be protected as audio-visual works, if they are first recorded into a physical medium.²⁷⁹ If such games are later broadcast as highlights or replays based on the

²⁷⁵ See Hezekiel Oira, *Intellectual Property Rights in Sports: A Case for Kenyan Football* in (Moni Wekesa and Ben Sihanya eds). *Intellectual Property Rights in Kenya* (2009) 182.

²⁷⁶ See Nimmer *supra* note 139 Para.2-9; see also *FAPL v Leisure and others*, and *Karen Murphy v Media Services Ltd* respectively C-403 and C-429 of 2008 (the ECJ held that the broadcasting of a live football matches from the English Premier League tournament does not constitute author’s own creations and consequently are not works for the purposes of copyright protection); see also *NBA v Motorola Inc.*(1997) 105 F 3d 841 (the USA Court of Appeal explicitly stated that in the broadcasting of a sporting event “the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute original works of authorship.” In regard to sport as a whole the Court was of the view that “sports events are authored in the common sense of the word.”

²⁷⁷ Copyright Act, 2001, s.2 (1)(f).

²⁷⁸ See *supra* note 205.

²⁷⁹ See e.g., *FAPL v Leisure case supra* note 276 (the ECJ, in an orbiter, clarified that only pre-recorded films, graphics, video sequence and league anthems embedded into the signal are copyright protected).

original fixation it amounts to copyright infringement in Kenya.²⁸⁰ However, the broadcasting of football games is ephemeral in nature in which consumers and fans prefer to watch them live.²⁸¹ In this context, the application of audio-visual copyright as a basis of protection of football broadcasting would only be limited to recorded matches. Most of the matches are watched live in order to generate the passion and excitement revolving around the outcome unpredictability.²⁸²

In the face of clear legislative provisions on the object of protection in a broadcast, the judicial pronouncements emanating from Kenya support the notion that the underlying content of a transmission is a broadcast. In *KBC v Royal Media Services Ltd*,²⁸³ the plaintiff filed a copyright infringement suit and obtained judgment against the defendant for making off-tube radio commentaries of live television broadcast of the Africa Cup of Nations tournament of 2010 which took place in Angola. The ruling placed more weight on content than the technical and entrepreneurial contribution of the plaintiff. Besides, the plaintiff was merely rebroadcasting the events distributed by satellite by the host broadcaster in Angola. In a related matter, the *Communications Commission of Kenya and Five Others v Royal Media Services and Others*,²⁸⁴ the Supreme of Kenya held that the unauthorised retransmission of FTA broadcast over pay TV channels and signal distribution networks was not a rebroadcasting of the respondents “content” because the appellants were not broadcasting organisations since they did not take financial and editorial for the selection of the content. The court emphasised that “The appellants did not interfere with the broadcast content of the first, second, and third respondents. The contents are delivered digitally without any interference from the signal distributor.”²⁸⁵

²⁸⁰ *Copyright Act, 2001 s.26 (1).*

²⁸¹ *See Tom Evens supra note 55 at 96.*

²⁸² *See e.g., Karol Kowalski, The Rights to TV Broadcasting of Sports Events, LLM Thesis, University of Lapland (2015) at 25, see also Joint Sports Claimants v Canada (Copyright Board) (1991) 36 CPR 3D 483 (the Federal Court of Appeal underscored the unpredictability of the outcome of any sporting activity as its hallmark).*

²⁸³ *HCCC No. 36 of 2010 at Nairobi, Milimani (unreported).*

²⁸⁴ *(2014) eKLR Para.243. (Communications Commission of Kenya purporting to act under the “Must-carry Rule” authorised Go-tv and StarTimes, both pay services to incorporate into their programme bouquet FTA channels owned by Nation TV, KTN TV, and Royal Media Services Ltd, Citizen Tv without authorisation. Royal Media Services Ltd filed the suit for, among others, copyright infringement and unauthorised rebroadcasting).*

²⁸⁵ *See id.*

7.2.8 Access to Broadcast Football Events in Kenya

Access to broadcast football in Kenya may be understood from two perspectives. The first perspective is anchored on the international instruments that create obligation on the part of Kenya to promote access to physical education and sport. The right of access to sport includes the right to participate and view sports events either live or via media as live or recorded activities.²⁸⁶ The second perspective looks at the existing legislative and policy framework in Kenya that impact upon public access to broadcast football. The first constitutive document to examine is the Constitution of Kenya, 2010. Article 11(2) (a) of the Constitution enjoins the state to promote all forms of national and cultural expressions through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage. Although football was introduced in Kenya by the British in the early twentieth century,²⁸⁷ it forms part of Kenya's culture. According to Kate, football is a popular culture which is intimately intertwined with human communities and thus an embodiment of those communities.²⁸⁸ In the same vein, football is argued to be a game of the common people created by the common people and therefore constitutes a common cultural heritage of the people.²⁸⁹ Being a popular culture that promotes cultural citizenship besides playing a democratising role in society, broadcast football should be accessible to the general public.²⁹⁰

The Constitution is also supports the right of access to information held either by the state or any other person and which is required for the exercise or protection of any right or fundamental freedom.²⁹¹ This constitutional provision enjoins both the state and private person to promote access to information. Football transmission is viewed as informational because it is expressive and communicative.²⁹² According to Barnifield, sport on television is a narrative event due to the

²⁸⁶ Peter Dawson and Paul Downward, Participation, Spectatorship and Media coverage in Sports, Bath Economic Research Papers No.24/09, University of Bath, 2009 at 21.

²⁸⁷ See *supra* note 140.

²⁸⁸ See Emma Kate, *Changing Rhythms: Media and Globalisation in the English Premier League*, PhD Thesis, University of Minnesota (2013) at 3; See also Samuel Keith, *The Role and Impact of Commercialisation in Sports and Consequences of its Transformation into an Entertainment Industry*, MA Thesis, Frankfurt School (2009) at 11.

²⁸⁹ Stefan Hagan, *A Critical Analysis of Intellectual Property Rights Within Sports: Focusing on the Role of Copyright in Football*, LLM Thesis, University of Kent (2005/06) at 22.

²⁹⁰ See Tom Evens *et al supra* note 55 at 11.

²⁹¹ Constitution of Kenya, 2010 art. 35(1).

²⁹² See Genevieve *supra* note 148.

fact that matches have a beginning, middle and an end; and that television does not only cover events but also transforms them into stories.²⁹³ Denying the public access to broadcast football will therefore undermine the public the right to access information under Article 35(1) if the Constitution of Kenya. In order to further this constitutional provision, the legislature in Kenya, promulgated the Access to Information Act, 2016. The Act defines “Information to include all records held by the public entity or a private body regardless of the form in which the information is stored, its source or date of production.”²⁹⁴ Section three of the Act sets out the purpose and object of the Act to include provision of a framework to facilitate public education on the right of access to information. Any broadcaster transmitting football games may be requested to provide the information pertaining to the event.

In spite of the above constitutional and legal frameworks that underpin the importance of access to information and sport, Kenya has not promulgated a policy or legal guidelines towards access on the part of the Kenyans to access certain categories on FTA platforms. The Sports Act focuses on the development and funding of sport and sports facilities without addressing access to either venues of sporting events or accessing electronic media coverage of such events. For instance, in the UK, the law designates certain sporting events as events of national importance that must be broadcast on FTA channels with at least Ninety Five per cent of national coverage.²⁹⁵ This anti-siphoning provision ensures that sporting events that resonate with national appeal and that can promote cultural citizenship are accessed by as many people as possible.

In the absence of any policy or legal framework which promotes public access to football events of national character, such events are left to whims of broadcasting cartels and organiser who use traditional copyright and TPMs to deny the public access to these cultural events. The traditional protection of copyright individualises content which is transmitted to the public by broadcasters.²⁹⁶ The Act also protects TPMs against circumvention or trafficking of devices

²⁹³ See Andrew Barnfield, *Soccer, Broadcasting, and Narrative: On Televising a Live Soccer Match* (2013) at 327.

²⁹⁴ Access to Information Act No. 31 of 2016 s. 2.

²⁹⁵ See Broadcasting Act 1996 supra 184.

²⁹⁶ See Copyright Act, 2001 s. 29 (which provides that broadcasters must, among others, authorise the fixation and rebroadcasting of their broadcasts)

primarily designed to circumvent access control.²⁹⁷ In particular the Act makes it a copyright infringement by a person who:- (a) circumvents any effective technical measures designed to protect works; or (b) manufactures or distributes devices which are primarily designed or produced for the purpose of circumventing technical measures designed to protect works protected under this Act; or (c) removes or alters any electronic rights management information; or (d) distributes, imports, broadcasts or makes available to the public, protected works, records or copies from which electronic rights management information has been removed or been altered without the authority of the right holder.²⁹⁸ The technical measures must be effective and intended to protect a work or works. As demonstrated above, broadcast football matches are not works of authorship and therefore fall outside the scope technical protection. However, a recorded football match which is copyright protected as audio-visual work qualifies for protection under Section Thirty Five subsection Three. Protected as audio-visual works, encrypted football broadcasts maybe protected against any circumvention measures including removing or altering any electronic rights management information.

7.3 Comparative Analysis between Kenya and South Africa

Historically Kenya and South Africa share similar socio-political antecedents revolving around the British colonial heritage which balkanised the two countries along ethnic and tribal lines. In the wake of independence, the two countries were faced with the challenges of reconciling and promoting a sense of collective consciousness.²⁹⁹ The two countries appreciate the importance of using sports and more particularly football as one of the tools for social mobilisation and building a society grounded upon democratic ideals, love, peace, and ethnic and racial tolerance.³⁰⁰ The broad socio-cultural importance of football to society is discussed widely in chapter four, paragraph 4.4.2 of this study.

²⁹⁷ See e.g., Coenraad Visser supra note 171.

²⁹⁸ Copyright Act, 2001 s. 35(3).

²⁹⁹ Most people share an orientation to the public world where matters of common concern are or at least should be addressed. A phenomenon called public connectedness and mediated connectedness. Nick Couldry, *Culture and Citizenship: The Missing Link*, 9 *European Journal of Cultural Studies* 321, 339(2006); soccer is inherent in the people. It is built into the urban psyche, as much a common experience to our children.... The way we play, organise it and reward it reflects the kind of community we are in. See e.g., Tom Evens et al supra 52 at 54.

³⁰⁰ Sport has power to unite people in a way little else can. It breaks down racial barriers.... Nelson Mandela, Football quotes. Available at <http://www.facebook.com/soccercntrix/posts.pdf>.

Football was introduced in Kenya and South Africa by the British and is the most popular sporting event in the two countries. Being a popular culture event, the two countries are keen about promoting it and its social values. However, the sport of football can only create socio-cultural impact if interventions are made by the state or state actors towards ensuring that the general public can access the event both at the pitch and off the pitch through electronic media. South Africa has instituted anti-siphoning legal frameworks under the EC Act³⁰¹ and the regulations³⁰² made thereunder that regulate the migration of football events from FTA broadcast networks to pay TV channels. The penetration of pay TV services in South Africa is forty seven per cent which leaves a huge segment of the population out of reach.³⁰³ Although the anti-siphoning legislation may have its own deficiencies, it has nonetheless mitigated the migration of football events to Supersport subscription service networks. The market monopoly and control that Supersport hitherto enjoyed has been extenuated and SABC, the public broadcaster or any other FTA broadcasters may broadcast under license listed events that may have been acquired by the pay TV service. However, such FTA broadcasters are not obliged to broadcast live the football events; they may carry them live or delayed live or delayed.³⁰⁴ Besides, the application of the provisions of the Sports Broadcasting Services Regulations is not mandatory. This renders the anti-siphoning legislation ineffective because football is a transient event which is more valuable when transmitted live.³⁰⁵

Conversely, anti-siphoning legislation does not exist in Kenya. Besides, there is no characterisation of any football events as events of national importance and which must be broadcast on FTA channels. As a consequence, most football events are broadcast on Supersport channels.³⁰⁶ According to WIPO, the pay penetration in Kenya is sixteen per cent.³⁰⁷ This suggests that less than sixteen per cent of the Kenyan population have the potential of accessing subscription-based broadcasts. The subscription nature of the pay TV services makes them far

³⁰¹ See *supra* note 73.

³⁰² See Sports Broadcasting Services Regulation of 2010 R. 4(1).

³⁰³ See *infra* note 307.

³⁰⁴ See *supra* note 76.

³⁰⁵ See Tom Evens *supra* note 55 at 96.

³⁰⁶ Supersport acquired exclusive broadcast rights over the KPL Leagues matches in 2008 for four years. See *supra* note 183.

³⁰⁷ WIPO, *Current Market and Technology Trend in Broadcasting Sector*, June 29—July 2, 2015, SCCR 30/3 at 40-44.

beyond the reach of most Kenyans. The characteristics of these services, which ironically exclusively transmit football matches, render them inaccessible to most fans and consumers.

In both Kenya and South Africa, there is no legal framework on the market segmentation of football events. Clear definition of sports rights at the upstream and downstream levels and the manner in which they should be exploited is deficient. Additionally, the application of competition law in football exploitation is not clear-cut. This is because football has the attributes of both a cultural activity and a commercial activity and no statute exists which characterises football as a commercial undertaking so as to invoke the competition law.

The Constitutions of South Africa and Kenya provide for the right of access to information that is held by another person and which is required for the exercise of another right.³⁰⁸ The two constitutions also provide for the promotion of national cultural expressions. In particular the Constitution of South Africa provides that every person has the right to use the language and participate in the cultural life of their choice.³⁰⁹

On the other hand, the Constitution of Kenya provides that the state is obliged to nurture and promote all forms of national and cultural expressions through among others, literature, arts , communication, and mass media.³¹⁰ The constitutional right of access to information, in both countries, has been actualised through the legislation of self-standing statutes.³¹¹ Football broadcasting is narrative in its characterisation as the events are turned into informational assets. Although there is no explicit and specific right to participate in football games or watch them when broadcast such rights can be constructed and inferred from the foregoing constitutional provision and the relevant international instruments. Those international instruments are discussed in detail in chapter one paragraph 1 .1.1 of this study. In spite of all these international instruments and constitutional guarantees, there exists no right to watch football or any sporting event in Kenya and South Africa.

³⁰⁸ See the Const. of RSA 1996 s. 32(1); the Const. of Kenya 2010 art. 35(1).

³⁰⁹ See *id* s.10.

³¹⁰ Constitution. of Kenya, 2010, art.11 (2).

³¹¹ See Promotion of Access to Information Act No.2 of 2000 of South Africa, and Access to Information Act of 2016 of Kenya.

The copyright laws in both Kenya and South Africa do not protect football events either at the pitch or while being broadcast. However, the two statutes protect broadcasts, and in the case of South Africa, programme-carrying signals are protected separately. In South Africa, the definition of a broadcast implies an electro-magnetic signal embodied with sounds, images or signs. Although a programme-carrying signal is not defined in the Act, it can be implied from the term “emitted signal” which means a signal which goes to satellite.³¹² In a broadcast and a programme-carrying signal therefore, the object of protection may be interpreted as a signal and not the underlying content.³¹³ However, judicial authorities pronounced in South Africa have extended protection to content and thereby extending by analogy protection of broadcast football to content.³¹⁴

The judicial interpretation and pronouncements in South Africa constitute the law the way it in the country. In that context and contrary to the emerging dominant global trend,³¹⁵ broadcast football live or deferred is copyright protected. However, the Copyright Act in South Africa requires that a broadcast and programme-carrying signal among other works, be original in order to be copyrightable.³¹⁶ It is difficult to locate originality in a signal which is a product of a technical process and so evanescent. Looking, for a moment, at a football match embedded into a signal, it may be conversely argued that it cannot be copyright protected. An event which is not copyrightable while being played at the pitch, cannot suddenly attract copyright because it has been subjected to a technical process of transmission.³¹⁷

³¹² Copyright Act No 98 of 1978 s.1.

³¹³ See European Audiovisual Observatory *supra* 159; WIPO *supra* note 150; Karol Kowalski, *The Right of TV Broadcast of Sports Events*, LLM Thesis, Lapland University (2015) at 25; Doyice J. Cotten et al *Law for Recreation and Sports managers* (2d ed. 2001) at 211.

³¹⁴ See *SAMRO v Ssevmills* *supra* note 133.

³¹⁵ A coin-operated game, based on the theme of the pool could not be classified as a dramatic work, being to the contrary, just a game and lacking in sufficient unity for it to be capable of being performed. *Green v Broadcasting Corporation of New Zealand* (1989) RPC 700 (judgement of Lord Bridge of Harwich); *Nimmer* *supra* note 139 para. 2-166 (Broadcast copyright is located in the copyrightable expression for the football not in the rough-and-tumble on the field, but instead in the activities of the camera and director, the conclusion follows that the athletic event itself is not subject to copyright protection); see *FAPL v Leisure* *supra* note 276; see also *Australian Olympic Committee v Big Fights* (1999) 46 IPR 333 (Justice Lindgren said that a film of a sporting event was not itself a dramatic work of a sporting event and more is required than recording the real event).

³¹⁶ Copyright Act No. 98 of 1978 s. 2(1) read together with s. 2(2) (originality is an obligatory requirement for copyrightability in South Africa for all works).

³¹⁷ See the Court of Appeal of the USA argument in *National Basketball Association and NBA Properties Inc v Motorola Inc DBA Sports Spotra* 105 F. 3d 841 (1997) Para.113.

On the other hand, the Kenya copyright law does not define a broadcast. It, however, defines that act of transmission which implies that a broadcast is a signal carrying images and/or sounds. The Act, however, does not require that a broadcast be original and reduced to a tangible form in order to enjoy copyright. Theoretically, a signal can be protected under copyright in Kenya. Therefore, a signal embodied with football games can be copyrightable but not the games themselves as they are not works of authorship. However, judicial pronouncements in Kenya indicate that the signal and the underlying content are protected together as broadcasts.³¹⁸

On the other hand, recorded football games can enjoy copyright protection as audio-visual or cinematographic works. Audio-visual or cinematographic works are not dependent upon the copyrightability of the recorded material. The production contribution of the director, cameramen, and creative selection of what is to be recorded informs the copyrightability of the output. Thus, in both countries fixed broadcasts of matches enjoy copyright protection as opposed to unfixed ones. However, such protection applied to recorded football matches will have a limited application owing to the transient nature of football.

In both South Africa and Kenya, encrypted transmission is protected against the circumvention of encrypting technologies. In South Africa the ECT Act criminalises the circumvention of TPMs or the unauthorised access or interception of any data protected by the TPMs.³¹⁹ The protection accorded by the Act is broad enough to cover all sorts digital data even if it is not copyright protected. To that end, a football match converted into a digital form falls under the scope of protection. Conversely, TPMs are protected under the Copyright Act in Kenya. The circumvention of TPMs is protected if the TPMs are effective and intended to protect the work. In other words, the TPMs are designed to protect any work protected under the Act. Football games are not among those works envisaged under Section 22(1) of the Copyright Act. Owing to their evanescent nature, signals alone cannot be encrypted. However, recorded football games, protected as cinematographic or audio-visual works may constitute a work that can be protected by

³¹⁸ See *CCK and Five Others v Royal Media Services Ltd* supra note 284; See also *KBC v Royam Media case* Supra note 283.

³¹⁹ See supra note 132.

TPMs. However, to enjoy the protection, the encrypted broadcast may be based upon a fixation of the original transmission.

7.4 Conclusion

In conclusion, the copyright laws in South Africa and Kenya protect broadcast football. This position is not in tandem with the global trend in which a broadcast football is not treated as a work of authorship because it does not involve any creative endeavour.³²⁰ The protection which is therefore extended to broadcast football is not justified by the copyright doctrines and philosophy. It also follows that the exclusive rights that curtail access to broadcast football are devoid of any copyright doctrinal basis. Because the underlying football in a broadcast is an object of copyright protection, the TPMs apply to and protect it like any other work. Therefore the TPMs deployed by pay television services in Kenya and South Africa are copyright protected the work in combination with the traditional copyright protection to constrict access to broadcast football. This is worsened in Kenya by lack of any regulatory framework for the promotion of public access to broadcast football and curtailment of the migration of major sports events to pay TV services. South Africa has put in place anti-siphoning legislation which is a laudable gesture. However, the legislation requires revamp to avoid manipulation and circumvention by pay television services. For instance, events must be designated which be available on FTA channels with nationwide or near nationwide coverage. The sub-licensing option given to FTA channels may be abused by the pay TV channels which may opt to charge exorbitant sub-licensing fee.

³²⁰ See e.g., *FAPL v Leisure supra* note 258, *NBA Case supra* 299.

CHAPTER EIGHT

SUMMARY OF FINDINGS, DISCUSSION AND ANALYSIS

8.0 Introduction

This chapter highlights findings of the study in relation to the interaction between broadcast copyright, broadcasting of football games and their access to the public in the two jurisdictions under focus. The study posits that as a popular culture in both South Africa and Kenya, developing countries with a history of racial and tribal tensions and disharmony, football is a major social tool for national cohesion and promotion of cultural citizenship and therefore public access to this sporting event plays a pivotal role.

The findings under this chapter were collated in accordance with the descriptive and exploratory research methods employed in this study. Inextricably intertwined with the descriptive and exploratory research methods is the qualitative approach in which qualitative elements like legal theories, doctrines, judgments, legislation, and policy documents have been deconstructed and analysed.¹ Overall, the chapter summarises the findings of the study based on the objectives, the thematic themes in the literature review, and the research questions as outlined below.

8.1 Broadcast Copyright and its Impact on Access to Football in Kenya and South Africa

Research objective one and the corresponding research question sought to find out the extent to which broadcast copyright affects the ability of the people of Kenya and South Africa to access football on their broadcast receiving sets. Objective one revolves around the examination of the nature and scope of broadcast copyright and their impact on public access to telecast football in Kenya and South Africa. Objective one is closely intertwined with objectives two and three. Objective two seeks to determine if access to football in the two jurisdictions is dependent on copyright while objective three attempts to establish the media technologies and platforms that impact on public access to broadcast football. Additionally, research question one is intertwined

¹ See Terry Hutchinson and Nigel Duncan Defining and Describing What We Do: Doctrinal Legal Research 17 *Deakin L. Rev.* (2012) at 89.

with research questions three and four. Research questions one, two and three correspond to objectives one, two and three cited above. Research question four seeks to establish the categories of copyright works that are embodied into broadcast football that impact on public access to football. The ensemble of these objectives and research questions will all be conflated in this first part of this analysis. In carrying out this investigation, the study examined the existing legal and regulatory framework in the two countries. For the sake of convenience and coherence, the findings are structured on a country by country basis.

8.1.1 Interface between Copyright and Football in Kenya

The copyright legislation in Kenya protects broadcasts.² The legislation does not define the term “broadcasts.” Broadcasts are among the six categories of works that are protected under the copyright law in Kenya.³ The limitative categories of works eligible for copyright protection are drafted in such a mandatory language that the list is definitively exhaustive.⁴ Sporting activities or indeed football games are not part of the works cited for copyright protection under the Act.

The term broadcast is defined in the Act as “the transmission of, by wire or wireless means, of sounds or images or both or the representations thereof, in such a manner as to cause such images or sounds to be received by the public and includes transmission by satellite.”⁵ This definition refers to the act of transmission which implies that the word “broadcast” is used as a verb as opposed to a noun. This is consistent with the definition of “broadcasting” in the Rome Convention as “the transmission by wireless means for public reception of sounds or of images and sounds.”⁶ Unlike the Rome Convention or the WPPT which restrict the notion of broadcasting to over the air transmissions, the Kenyan Copyright Act gives broadcasting a

² Copyright Act No. 12 of 2001 s. 22(1).

³ See *id.* (the Act prescribes an exhaustive list of literary works; musical works; artistic works; audiovisual works; sound recordings; and broadcast as works that shall be eligible for copyright protection in Kenya).

⁴ The mandatory language is implied by the use of “...the following works shall be eligible for copyright.” See *id.*

⁵ Copyright Act, 2001 s.2 (1).

⁶ See Rome Convention art.3 (f); *Cf* WPPT art. 2(f) (the Article defines broadcasting as “the transmission by wireless means for public reception of sounds or images and sounds or of the representation; such transmission by satellite is also broadcasting; transmission of encrypted signals is broadcasting where the means of decrypting are provided by the broadcasting organisation or with its consent”).

broader meaning and application to cover, in addition to over the transmission, transmissions guided by physical conductors like cable and internet transmissions.⁷

In a further bid to clarify the concept of broadcast, the Act provides that “a broadcast means the first broadcaster.”⁸ This clarification is not only superfluous but also redundant. It creates more confusion than clarification because a broadcaster cannot be equated with a broadcast. However, according to WIPO, the concept of a broadcast can be inferred from the word broadcasting in Article 3(f) of the Rome Convention which qualifies the broadcasting to a transmission.⁹ Consequently, a broadcast is the signal constituting wireless transmission of images and/or sounds when intended for public reception.¹⁰

On the other hand, Kenyan courts have never been invited to rule on whether or not on-the-pitch football games are copyrightable. In the absence thereof, this study was constrained to place reliance upon the common law doctrine of judicial precedents which form part of Kenyan law. Most Commonwealth-originated judicial decisions do not support copyright in raw football matches. In the Australian case of *Victoria Park Racing and Recreation Grounds Company Ltd v Taylor and Others*, the High Court ruled that a sports event cannot be treated as property capable of being owned.¹¹ Applying these judicial precedents to the Kenyan situation, and sport being a universal phenomenon; it can be argued that on-the-site football games are not copyrightable.

The Kenya Copyright Act grants protection to broadcasts.¹² The Act does not, however, define a broadcast and what property it constitutes. The Act does not include or imply that raw sporting

⁷ The term “wire” implies transmission guided by artificial means as opposed to over Hertzian waves.

⁸ Copyright Act, 2001 s. 2(f) (whatever consequences this definition was intended to achieve, it is more confusing than enlightening because a broadcast and a broadcaster cannot be the same thing. The definition is therefore superfluous).

⁹ WIPO, Protection of Broadcasting Organisations: Concepts and Terms, Working Paper Prepared by the Secretariat, SCCR/8INF/1 (2002) Para.9 at 3.

¹⁰ See *id.*; in a broadcast it is the signal that is the object of protection and not the underlying content because broadcasting places greater reliance upon machinery and technology which stifle creativity. See also Macqueen et al. *Contemporary Intellectual Property Law and Policy* (2007) at 433.

¹¹ (1938) 59 CLR 496; *Joint Sports Claimants v Canada (Copyright Board)* (1991) 36 CPR 3D 483 (the Federal Court of Appeal of Canada held that unlike a dance, a sport event is, in most part, a random series of events which lack certainty and unity and thus not copyright).

¹² See Copyright Act s.22 (1) (f) (the Section provides that literary works; musical works; artistic works; audiovisual works; sound recordings; and broadcasts shall be eligible to copyright).

events or football games can be copyright protected.¹³ It is, however, contestable whether a live or recorded broadcast of a football event attracts copyright. The Act does suggest that a football event embodied into a transmission may be protected under copyright. The Act does not, however, clarify whether the object of protection in this case is the underlying content or the technical contribution expended into the production. The subject matter of protection is by implication drawn from the exclusive rights that broadcasters enjoy under the Act. The Act provides that “copyright in a broadcast shall be the exclusive right to control the doing in Kenya of any of the following acts, namely, the fixation and rebroadcasting of the whole or a substantial part of the broadcast and the communication to the public of the whole or substantial part of a television broadcast either in its original form or in any form recognizably derived from the original, but the copyright in a television broadcast shall include the right to control the taking of still photographs therefrom.”¹⁴ These exclusive rights implicate content-based protection of copyright. This argument is based on the fact that a signal is not quantifiable. A substantial part of television broadcast must be determined by the use of visual images that constitute a television programme.¹⁵

Generally, the test employed in determining substantiality in a broadcast is that of fact and degree which refers more to quality of what is taken than quantity.¹⁶ What is taken in this case is the content which perceptible and not the signal which is imperceptible. Additionally, what is communicated to the public in a broadcast must be something perceptible which must be images or sound. On the basis of the foregoing argument, it may be deduced that broadcast copyright in Kenya is content-based. This means that the subject matter of copyright protection is the content embodied into the broadcast signal designated for reception by the public.¹⁷ The Act does not

¹³ See *id*; see also *Joint Sports Claimants v The Copyright Board supra* note 11 (the Federal Court of Appeal of Canada held that, despite the high degree of planning in the performance of team sports, there is no copyright in a sporting contest because what transpires on the field is usually not what is planned); the movements and exploits of athletes are designed and aimed at the achievement of specific sporting results and that the athletes’ principal objective is not to express or communicate particular thoughts, ideas or feelings. Karol Kowalski, *The Right to TV Broadcast of Sports Events*, LLM Thesis, Lapland University (2015) at 25.

¹⁴ See Copyright Act s.29.

¹⁵ See *e.g.*, Hugh Laddie *et al The Modern Law of Copyright and Design* (3d ed. 2000) at Para. 8.15.

¹⁶ See *e.g.*, *Ladbroke (Football) Ltd v William Hill (Football) Ltd* (1964) 1 WLR 273 at 283.

¹⁷ See *infra* note 24 (the judgments of the Supreme Court and High Court of Kenya respectively indicated that the object of broadcast copyright was viewed from the prism of the images and sounds transmitted for reception by the public).

however, qualify the copyrightability or otherwise of the underlying content. Put differently, the Act does not state whether the content be a work of authorship or not in order to enjoy protection.

Conversely, the definition of the verb broadcast in the Kenya Copyright Act¹⁸ is consistent with the definition of broadcasting under the Rome Convention.¹⁹ Drawing upon the analogy of WIPO in relation to the term broadcasting in which it is inferred that it implicates a signal, it can be argued that broadcasting in Kenya also implies a signal.²⁰ The signal anticipated under the Act is that which is embodied with images and/or sound for the reception of the general public.²¹

It would appear that the interpretation of broadcast copyright in Kenya may take a dual approach. The first one is based on the underlying content which enjoys copyright protection irrespective of whether it is copyrightable or not. This is the approach adopted by the judiciary.²² The second approach is based on the signal in terms of the WIPO's interpretation of the broadcast. Kenya is a member of WIPO, the global norm setting institution, and therefore its interpretation may influence judicial and administrative thinking in Kenya. Since the judicial thinking in Kenya favours the first approach, then it reflects the law and practice in Kenya and therefore broadcast football is copyrightable. If the second approach is embraced in Kenya, it will alter the legal landscape by removing broadcast football from the ambit of copyright, because protection will revolve around the signal only. However, such football games may be protected, if before they are broadcast, they are recorded or reduced to material form and thereby becoming audio-visual works protected under copyright. However, the subsistence of copyright in football games in the form of audio-visual works is not a common practice because football is normally an ephemeral product which is valuable when broadcast live. Recorded football events are normally transmitted as highlights or repeat broadcasts or promotions and are always based on fixations

¹⁸ Copyright Act 2001 s.2 (1).

¹⁹ See *supra* note 6.

²⁰ See *supra* note 9.

²¹ See *id.*

²² The High Court at Nairobi ruled that simultaneous off-tube radio commentaries based on live telecast of a football games was tantamount to copyright infringement. The commentaries were anchored upon the underlying images of a football match and not on the entrepreneurial and technical contribution of the plaintiff. *Kenya Broadcasting Corporation v Royal Media Services Ltd* HCCC No. 36 of 2010, Nairobi (unreported).

and thus fit into audio-visual works. In most jurisdictions the subject matter of copyright protection is football fixations is not the matches themselves but the technical contribution of cameramen, film crew, and director.²³

The judiciary in Kenya has adopted the content-based approach as the basis of broadcast copyright protection. In its interpretation of the notion of a “broadcast,” the judiciary has handed down judgments in which broadcast copyright extends to the underlying content.²⁴ In reliance upon the judicial decisions, it can be argued that broadcast copyright in Kenya is content-based. The nature of exclusive rights enjoyable extends to the content. Exclusive rights individualise and monopolise the content. The content becomes private property. The content that is normally broadcast includes football events. The individualisation and monopolisation of content impedes access to the general public of broadcast football events when they constitute the underlying content.

8.1.1.1 Works that Interface Broadcast Copyright and Football in Kenya

The Kenya Copyright Act prescribes six categories of works eligible to copyright protection.²⁵ These six categories exclude performances that are protected elsewhere in the Act.²⁶ In examining the expressive forms which broadcast football may take, one is constrained to limit it to the outer boundaries set by the law. The obvious category into which broadcast football may be assimilated is “broadcasts.” The extent to which football events may be protected as broadcasts in Kenya is discussed under paragraph 8.1.1 above. Copyrighted works that may be incorporated in a broadcast are discussed in detail in chapter one of this study.

²³ The expression of football is not located in the underlying content or the rough-and-tumble on the field but in the activities of the director and cameramen; otherwise every activity or phenomenon existing in nature will be copyrightable once recorded. Melville Nimmer and David Nimmer, *Nimmer on Copyright* (2010) Para. 2-166; see also *National Basketball Association and NBA Properties Inc v Motorola Inc. DBA Sports Spotra* USA 105, F.3d 841(1997) (the Court of Appeal of the USA clarified that in a recorded sporting event the object of copyright protection is not the underlying content but the recording).

²⁴ *Communications Commission of Kenya and Others v Royal Media Services Ltd* (eKLR) para 243; *Kenya Broadcasting Corporation v Wananchi Group Ltd and Pan Africa Network Group (K) Ltd* HCCC No. 254 of 2014 at 4, Milimani, Nairobi (unreported).

²⁵ See supra note 3.

²⁶ See Copyright Act s.30 (1).

The other category under which football events may be protected is audio-visual works. Audio-visual works are among the works protected under the Act.²⁷ The protection of audio-visual works in Kenya is discussed in detail in chapter seven, paragraph 7.3.5 of this study. The findings in chapter seven about audio-visual work vis-à-vis football games is that recorded football games are transformed into audio-visual works upon fixation in accordance with the Copyright Act.²⁸ The exclusive rights that are conferred upon the right holders of audiovisual works pursuant to the copyright law include the right to control the reproduction, communication to the public, and the broadcasting of the fixed matches in form of audio-visual works. Audiovisual football games take the form of delayed transmissions based on global time differences or catch-up football programmes. The exclusive right of broadcasting of fixed football games has the effect of limiting or restricting the broadcasting or communication to the public of the events. The consequential effect of this restriction is the reduction of the ability of the general public to access the football transmission on television.

The other work which is protected is the broadcast. The concept of a broadcast was found to be an electromagnetic carrier embodied with images or sounds or the images and sounds. The protection of this carrier also extends to the content. The exclusive rights that broadcasters enjoy include the right of fixation of their broadcasts, the right of reproduction of the fixed broadcasts, and the right of communication of the broadcasts to the public. Because a signal is evanescent, the protection of a broadcast must be based on something perceptible and that is, the content it carries. The content may be audiovisual sporting events which evidently become an object of protection. The protection denies the public access to this popular sporting event.

Sound recordings of a football match may be protected under copyright. This protection may revolve around an audio broadcasting of a football match or interviews of footballers or fans. The sound recordings enjoy protection under copyright. The protection monopolizes the recorded football events which can only be released to the public at the option of the rightholder. The protection granted to the producers of such phonograms runs for fifty years from the end of the year in which the fixation took place.

²⁷ Copyright Act s.22 (1) (d).

²⁸ *See id.*

The remaining categories of copyrighted works, like artistic, literary, and dramatic works cannot directly fit into a football transmission. This finding is based on the analysis of the nature of copyright in football broadcasting in chapter seven, paragraphs 7.1.5 and 7.2.7. Football transmission cannot qualify as a performance under Section 30 of the Act because performances in Kenya are based upon pre-existing works.²⁹ Football playing is not based on any pre-existing work, and if any script is relied upon, the unpredictable counter-attack of the opposing team would throw it into disarray.³⁰ Team logos and the graphic designs that are embossed on the screens during the match transmission are protected as artistic works.³¹ And so is the signature tune or the club anthems which are protected as musical works. However, they are peripheral to the core of the football broadcasts themselves.

8.1.1.2 Impact of Broadcast Copyright on Public Access to Football in Kenya

First, owing to the individualisation nature of copyright, the price of broadcast rights shoots to levels that most broadcasters cannot afford. It was found out, for instance, that Kenya's public broadcaster, KBC could not afford to acquire the broadcast rights for the 2017, Africa Cup of Nations tournaments that took place in Gabon.³² The cost of the television rights assigned to Kenya based on its market size was US\$ 1.15 million.³³ Secondly, the nature of exclusive rights that broadcasters enjoy under the Copyright Act³⁴ gives them authority to control the fixation, communication to the public, rebroadcasting, reproduction, and taking of still photographs of the broadcast; have the effect of excluding the public. For instance, a right of communication to the

²⁹ Copyright Act s.30 (6) (defines a performance as a representation of a work by such action as dancing, playing, reciting, singing...).

³⁰ The Federal Court of Appeal held that unlike a dance, a sporting event is, in most part, a random series of events which lack in certainty and that the unpredictability in the game of football is so pervasive as to justify any form of copyright protection. *Joint Sports Claimants v Canada Copyright Board* (1991) 36 CPR 3D 483.

³¹ See J. Gordon Hylton, *The Overprotection of Intellectual Property Rights in Sports in the United States and Elsewhere*, Marquette University Law School, Faculty Publications, Paper 583 (2011) at 49.

³² See Albert Wandera, AFCON: Nyamweya Decries TV Blackout, Standard Digital Jan. 24, 2017. Online available at www.standardmedia.co.ke/sport/article/2000231022/afcon-nyamweya-decries-tv-blackout. Last accessed on March 25, 2017.

³³ *See id.*

³⁴ *See supra* note 14 (the Section provides that copyright in a broadcast shall be the exclusive right to control the doing in Kenya of any of the following acts, namely, the fixation and the rebroadcasting of the whole or substantial part of the broadcast and the communication to the public of the whole or a substantial part of the a television broadcast either in its original form or in any form recognizably derived from the original. The original in a television broadcast shall include the right to control the taking of still photographs therefrom).

public of the broadcasts ensures that broadcast football cannot be shown in public places by any means or in form.³⁵ Thus, a broadcaster, in exercise of the right of communication to the public, may obtain an injunctive relief against pubs, halls, restaurants and other public places permitting without authority members of the public to assemble thereat and watch any telecast football match.

The Copyright Act of Kenya protects the circumvention of technological protection measures (TPMs) and the use of electronic rights management information.³⁶ In the broadcasting field, the TPMs are used in Kenya by pay television channels in order to encase content. The pay television subscription services include Multichoice/Supersport service, StarTimes, and Zuku Satellite service.³⁷ The Multi-choice/Supersport service is the most dominant and sport-centric pay television subscription service in Kenya.³⁸ TPMs lock-up copyrighted content being transmitted regardless of established copyright balancing tools that strive to reconcile the right holders' interest and the public interest.³⁹ The copyright exceptions and limitations granted under the Copyright Act are the most important legislative balancing tools.⁴⁰ However, such exceptions and limitations are ineffective in the face of the TPMs whose blockade is absolute and total. Exceptions and limitations in broadcast copyright are discussed in detail in chapter five, paragraph 5.2 of this study. TPMs, once deployed in a broadcast service, do not distinguish between infringing and non-infringing access to and use of copyright protected works.⁴¹ Since broadcast copyright in Kenya is content-based; any football events which are encrypted enjoy copyright protection against any form of decryption and subsequent use. It can be argued that TPMs are the most effective technical devices that impede public access to broadcast football unless decrypting passwords are given. The situation is compounded in Kenya by the non-existence of anti-siphoning legislation or any government policy or legal framework which

³⁵ *See id.*

³⁶ Copyright Act of Kenya s. 35 (3).

³⁷ Boniface Otieno "Azam's Game Plan to Break Satellite TV's Dominance" *The East African Business Times*, March 28, 2015 at 26-27.

³⁸ Pius John Onung *Strategies Adopted by Multichoice (K) Ltd in Response to Information Communication Convergence*, MBA Thesis, University of Nairobi (2009) at 4.

³⁹ Tobias Schonwetter and Caroline Ncube "New Hope for Africa? Copyright and Access to Knowledge in the Digital Era" *Info*, Vol. 13 Issue:3 (2011) at 2.

⁴⁰ *See* Copyright Act of Kenya ss. 26(1) and 29(a).

⁴¹ *See supra* note 28 at 10.

supports public access to football broadcast. In the UK, the Broadcasting Act⁴² provides for sporting events that must be telecast on FTA outlets that cover more than ninety five per cent of the UK population. This statutory protection guarantees access to the largest segment of the UK population of sporting events of national importance and significance.

8.1.2 Interface between broadcast Copyright and Football in South Africa

The research findings reveal that programme-carrying signals and broadcasts are protected under the South Africa copyright law.⁴³ In terms of substance, there is no material difference between a programme-carrying signal and a broadcast except that the former is transmitted via satellite and the latter over the air assisted by transmitters located on the earth surface. The broadcasts in South Africa are defined as a “telecommunication service of transmission comprising images, sounds, signs or signals which:- (a) takes place by means of electronic waves of frequencies of lower than 3000GHz transmitted in space without an artificial conductor and (b) is intended for reception by the public or sections of the public, and including the emitting of programme-carrying signals to a satellite, and, when used as a verb shall be construed accordingly.”⁴⁴ The definition confines broadcasts to free-to-air transmissions and excludes other transmissions guided by artificial conductors like internet or cable-based transmissions. Additionally, a broadcast is qualified as a point to multipoint transmission which is intended for reception by the public or sections of the part. In the case of a programme-carrying signal, it only becomes a subject of protection at a down-link stage after passage through the satellite.⁴⁵ The term transmission in the definition of broadcasts suggests that a signal is the object of protection in broadcast copyright.

The definition of the term “broadcasts” starts with the opening words “telecommunication service” which implicates the service of information and entertainment to the public.⁴⁶ A broadcast is, therefore, the dissemination of information and entertainment material in form of

⁴² See Broadcasting Act 1996 s. 98(2)(3).

⁴³ See Copyright Act No. 98 of 1978 s. 2(1) (f).

⁴⁴ See *id* s.1 (1).

⁴⁵ See *id*.

⁴⁶ Service includes performing a duty, a job or business by a person to the public or to an individual. Macmillan English Dictionary (2006) at 1295.

sounds, images, signs and/or signals for the reception of the public. On the other hand, the exclusive rights granted to broadcasters in South Africa include the direct or indirect reproduction of the broadcast in any manner or form including making of a still photograph therefrom or in case of a programme-carrying signal the direct or indirect distribution of the signal to the public.⁴⁷ The nature of exclusive rights enjoyable by broadcasters goes beyond the signal *per se*. The exclusive rights extend and dovetail into the content itself. The act of reproduction or taking still photograph envisages content and not a signal which is imperceptible. The right over the making of still photographs of a telecast touches on the images of a broadcast.

The definition of broadcasts in the copyright legislation refers to a telecommunication service which implies that such service could involve content. Therefore the term broadcast in South Africa could as well refer to the ensemble of the signal and the content constituting a transmission. However, it is not clear whether any programme material which is not copyrightable can automatically attract copyright by a mere act of transmission. It is also not clear-cut where originality of the copyrightable transmission could reside and how it would be determined. This argument is drawn from the requirement in the copyright law in South Africa that all works eligible to copyright must be original.⁴⁸ Originality criterion based on the signal alone would be difficult to locate because the signal is not perceptible. Additionally, should broadcast originality be based on copyrighted programme content, it would be superfluous for the work enjoys copyright protection upon its creation before it is broadcast.

In spite of want of felicity in the object of protection in broadcasts and programme-carrying signals in South Africa, courts have handed down decisions which imply that broadcast copyright extends to content.⁴⁹ Unlike the Kenyan cases most of which revolve around broadcast football, the *SAMRO* cases in South Africa hinge upon musical works which were broadcast and performed in public. Musical works are original works of authorship and thus fulfil the originality requirement. The judiciary in South Africa has never been invited to determine

⁴⁷ Copyright Act ss. 10 and 11.

⁴⁸ Copyright Act s.2 (1).

⁴⁹ See the two *SAMRO* cases whose brief facts are given in chapter seven paragraph 7.2.5. *SAMRO Ltd v Ssev Mills Fabrics (Pty) Ltd* (1983) 1 SA 608; *SAMRO v Trust Butcher (Pty)* (1978) 1 SA 1052(E).

copyrightability in a live football transmission. It is however, predictable that extending copyright to live football matches will be in accord with the copyright law of South Africa.

However, a recorded football match would qualify for copyright protection as cinematograph film under the South African copyright law.⁵⁰ The extent and manner of copyright protection in cinematograph films is discussed in detail in chapter seven, paragraph 7.2.5. It was, however, observed that football games are transient and ephemeral products that are valuable when “consumed” live. In this context, the protection accorded under cinematograph film is based on the fixation of the broadcasts and live transmission of football games is not based on any fixation. However, delayed or deferred games or repeats, or promotions and/or highlights of matches are based on fixations and can be protected as cinematograph film.

8.1.2.1 Works that Interface Broadcast Copyright and Football in South Africa

Just like in Kenya, the categories under which broadcast football may be protected in South Africa are derived from the copyright law itself.⁵¹ This is because copyright is positive law and territorial in its characterisation. One of the works protected is the broadcast itself. It was observed that even if the object of protection is not defined in the copyright Act, it is agreed that it is the signal that carries programmes. However, the signal is an electromagnetic impulse which is ephemeral and therefore cannot form the basis of protection in a broadcast. The protection of a broadcaster must be based a tangible phenomenon known, namely, the programme. It was therefore observed that courts in South Africa have extended broadcast copyright to the underlying content embodied in the signal. However, the two South African *SAMRO* cases⁵² revolved around copyrighted musical works and not football games. On the other hand, the nature of exclusive rights that broadcasters enjoy in South Africa imply that the object of protection in a broadcast extend to the underlying content regardless of whether or not it is work of authorship. In that context, live football broadcasts may be protected as broadcasts and programme-carrying signals.

⁵⁰ See Copyright Act s. 8.

⁵¹ Copyright Act s.2 (1).

⁵² See *supra* note 49.

On the other hand, a broadcast football event based on a fixation can be protected as a cinematograph film. It was observed that the protection of cinematograph film is not dependent upon the copyrightability of the fixed material.⁵³ However, football transmission is more valuable when it is watched live than when it is deferred or repeat-broadcast. The excitement generated by and the unpredictability of any sporting event ends with the public knowledge of its outcome.⁵⁴ This does not mean that recorded football matches are not important. There are instances when an international match may take place in a country at a time when it is past midnight in another country and this makes recording necessary for viewing when the audience is awake. Catch-up football programme is based on a fixation of a broadcast and so are other non-linear football broadcast services.

The sound recordings of a match may also be protected. Sound recording is common radio commentaries, interviews and other audio fixations of a match. They may form part of archival material for subsequent or repeat radio broadcasting. The sound recordings of a football match are, however, copyright protected. They are commoditised and monopolized by the producer and can only be released to the public at his whim. It is argued that the recording of a football event has cost implications. However, the encryption of such games and the extended period of protection cannot be justified by the dictates of commerce.

It has been argued that football games should be protected as performances. Such protection should, it is further argued, be extended to other ancillary activities as celebratory dances of players as well as the ritualistic activities of fans at the stadium terraces. It was however, observed that a performance must be based on pre-existing works like literary, artistic and musical works. To that extent, this element of works protected under copyright has little or no influence in curtailment of public access to football matches.

⁵³ See European Audiovisual Observatory, *Audiovisual Sports Rights Between Exclusivity and Right to Information, IRIS Plus 2006-2* at 11; Pascal Kamina "The Subject-matter of Film Protection in Europe" in (Estelle Derclaye ed.) *Research Handbook on the Future of the EU Copyright* (2009) at 96.

⁵⁴ Football in particular and sports in general have two unique characteristics. First, it is ephemeral and therefore value when consumed live. Secondly it is not in the sport participants' interest to eliminate their rivals. Michael Beloff et al, *Sports Law* (2d ed. 2012) at 165.

The protection of football transmission may not directly take form of the remaining categories of copyright in South Africa. For instance, football transmission cannot be protected as literary works which constitute the expressive form of ideas or concepts taking the shape of numerals or letters or signs. However, it may be argued that simultaneous messages scrolled on the screen during transmission may be protected as literary work but the fact that they do not exist in a stable or permanent medium reduces that possibility. Neither can football transmission take the form of dramatic works which must have a theme or storyline. On the other hand team logos and graphics that accompany the transmission of a football game may be protected as artistic work. But such works are peripheral to the game itself.

8.1.2.2 Impact of Broadcast Copyright on Access to Football in South Africa

Just like in Kenya, broadcast copyright individualises both the content and the signal that distributes that content.⁵⁵ The individualisation of the content is made possible by the exercise of exclusive rights that broadcasters enjoy under the copyright law. The individualisation creates monopolies which stifle competition. Unregulated monopolies overprice the rights for football transmission. In exercise of the exclusive rights, broadcasters control the fixation of the broadcasts including taking still photographs. Additionally, broadcasters control the distribution of the programme-carrying signals to the public as well as the reproduction and rebroadcasting of the broadcasts.⁵⁶ This power to control the use or the exploitation of the broadcast undermines that ability of the public to access broadcast football games.

In South Africa, the access limitation created by copyright over broadcast football is complimented by technological protection measures (TPMs). The application of TPMs in South Africa is much broader than in Kenya.⁵⁷ In the latter, TPMs protect copyrighted works under the copyright law while in the former they protect digital data under the Electronic Communications and Transactions (ECT) Act. Copyright in a digital environment may qualify as data and therefore TPMs may apply to digitised copyrighted works in South Africa. On the other hand, TPMs operate in the digital and not the analogue world. Therefore encrypted or scrambled

⁵⁵ John Bing *Intellectual Property Exclusive Access Right and Some Policy Guidelines*, Stockholm Institute for Scandinavian Law (1957-2009) at 20.

⁵⁶ David Bainbridge *Intellectual Property* (5th ed. 2002) at 53.

⁵⁷ Cf Copyright Act of Kenya 2001 s. 35(3) and the ECT Act 25 of 2002 s.86 (1).

broadcast matches are protected in South Africa under the ECT Act. The Act however, provides criminal sanctions against anybody who intentionally and unlawfully accesses or intercepts any data without permission. The Act does not create any civil liability for any infraction.⁵⁸ The criminal sanctions are sufficient deterrence against public access to broadcast football events.

The TPMs are employed by the dominant pay television services in South Africa to control and encase broadcast content and thereby limit the public access to and use of the content. The dominant pay television service is run by Multichoice Africa which broadcasts sporting events across Africa through its affiliate, Supersport.⁵⁹ Top TV follows Multichoice Africa in the cue of the delivery of broadcast subscription service in South Africa. It was however, observed that Supersport controls broadcast rights for most football tournaments in South Africa including PSL football competitions.⁶⁰ It was further observed that pay television penetration in South Africa is forty seven. The limited geo-penetration of pay television service in South Africa whose access is conditioned upon payment of subscription makes the service a rich man's service.⁶¹ The majority of South Africans cannot afford the service and therefore access to the premium football events on the part of the public is restricted.

8.2 Impact of Globalisation of Football on Access to Broadcast Football

Research question three sought to investigate whether the globalisation of football restricts access to football in Kenya and South Africa. The research question is intertwined with objective number three and research question number five of the study. Objective three attempts to determine the role of new media technology and platforms in the globalisation of football; and their impact on the access to broadcast football by the public. Research question number seeks to determine whether denial or restriction of access of broadcast football impinges upon the constitutional right or cultural claim to the sporting event. This paragraph, therefore addresses the thematic issues simultaneously. It was observed that globalisation and commercialisation of

⁵⁸ See ECT Act, id.

⁵⁹ See OECD, *Policy Roundtables: Competition Issue in Television and Broadcasting* (2013) at 277. Online available at <http://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf>. Last accessed on August 13, 2017.

⁶⁰ See id.

⁶¹ WIPO, *Study on the Socio-Economic Dimension of the Unauthorised Use of Signals-Part 11: Unauthorised Access to Broadcast Content, Cause and Effects: A Global View*, SCCR/20/2/REV, May 10, 2010 at 76.

football is underpinned by four major pillars. They operate interdependently to constrict access of football to the public in the two jurisdictions under study. The first pillar is intellectual property rights; the second one is communication and broadcasting technologies; the third is the organisation and governance of football; and the fourth is the migration of professional footballers across the globe.

8.2.1 Intellectual property Rights (IPRs)

It was observed that intellectual property rights underpin the globalisation and commoditisation of football. Intellectual property rights are negative rights that prescribe strong private property rights which grant exclusive rights to right holders. The exclusive rights create monopolies and greater control that push the prices of the service or products that are so protected. The intellectual property works which may be embodied directly or indirectly into football transmissions include, trade marks which may take the form of logos, club names, signatures of players, club anthems and colours.⁶² Besides trade marks, patents are also used in football accessories like football boots, football studs.⁶³ Additionally, football transmission equipment like cameras, satellites, and transmitters are inventions that are underpinned by patent. Encryption and other technical means that are used by broadcasters to encase content are patent protected.⁶⁴ Copyright also constitutes part of the intellectual property works that may be embodied into football. Copyright works which may be embodied into broadcast football include broadcasts, programme-carrying signal, audio-visual works, cinematograph film, and artistic works.

Relevant to this study are copyright works that may be embodied into broadcast football and thereby impact on public access to underlying sporting event. The impact of copyright on access to broadcast football in Kenya and South Africa is discussed in breadth in paragraph 8.2 above. However, the broadcast copyright protection is internationalised by the Rome Convention and the Satellites Convention. Additionally, these rights are harmonised at the global level under the auspices of the TRIPs Agreement of 1994. The TRIPs Agreement is administered by WTO and

⁶² Mark James, *Sports Law* (2d ed. 2013) at 292.

⁶³ Jochem Schaefer, Sports, Sports Goods and Sports Business, *WIPO Magazine* 5/2 (Nov., 2013) at 11 .

⁶⁴ *See id.*

the other two instruments by WIPO. The elevation of broadcast rights to the international level gives the object of protection a global character which impacts on both Kenya and South Africa.

8.2.2 Communication and Broadcasting Technologies

It was observed in chapter three that communication and broadcasting technologies are the ones that have evolutionarily globalised football transmission. The globalisation has been occasioned by the conflation and convergence of telecommunication technologies, internet and broadcasting. The most salutary telecommunication breakthrough was the invention of satellite technology in the 1950s. Satellite broadcasting broke the national frontiers and compressed the world into a global village in which football broadcasts can reach the national and trans-national audience in real time. Satellite transmission responds to the physical inadequacy of the stadia.⁶⁵ Through satellite broadcasting, different communities of the world are constructed in one with the world. Football and technology are the means by which this social and cultural connectedness is realised.⁶⁶ One geostationary communication satellite can beam football matches over a wide footprint that may be transcontinental. In contemporary globalisation, transnational football events happen instantaneously and simultaneously across the globe through the instrumentality of new technologies.⁶⁷ These technical capabilities make football a global culture, a global language, and a global community of play.

Besides satellite broadcasting, transmission has developed beyond the traditional and analogue over the air signal distribution to encompass digital recording and transmission equipment. New platforms and means of delivery have been invented that includes mobile broadcasting, cable transmission, internet broadcasting, as well as broadcasting by encryption. In South Africa, ICASA created a regulatory framework in 2013 for IPTV and VOD. In this connection, South Africa would soon start IPTV and VOD interactive services.⁶⁸ Additionally, Multichoice Africa employs digital broadcasting in its DSTV pay television broadcasting. In 2010, during the FIFA World Cup which took place in South Africa, SABC was designated as the official signal

⁶⁵ Tom Martelanc, *Social and Cultural Impact of Satellite-based Television* (1974) at 32.

⁶⁶ David Rowe, *Sports, Culture and Media: The Unholy Trinity* (2d ed. 2008) at 30.

⁶⁷ Rajesh Shrestha, *Geo-stationary Satellite and its Uses* (2007) at 2.

⁶⁸ Ellipsis Regulatory Solutions, *Regulations of IPTV and VOD in South Africa, June 25, 2013*. Online available at www.ellipsis.co.za/wp-content/uploads/2013/6. Last visited on May 13, 2017.

distributor for the event across the world and it relied upon satellite broadcasting to execute the mandate.⁶⁹

In Kenya, satellite technology is used to receive in real time live football events propagated through communication satellites. For instance, the World Cup, 2016 which took place in Brazil was broadcast live by the free over the air, KBC and the DSTV pay TV networks in reliance upon satellites.⁷⁰ Cable television operators, IPTV and mobile are gaining ground in Kenya.

8.2.3 Governance and Organisation of Football

Globally, FIFA is the global football governing body. At the continental level, there are six confederations that are affiliated to FIFA.⁷¹ The continent of Africa is represented by the CAF. There exist also sub-continental associations like COSAFA in the Southern African region which administers association football in the region.⁷² At the national levels, exist national federations that organise and oversee football competitions in their areas of competence. All the football organisations are structured in a hierarchical manner and administer football in their areas of competence in pursuance of the FIFA Statutes. Therefore FIFA has created a world game of football organised and regulated in accordance with the FIFA rules.⁷³ Football has captured the minds and hearts of many fans across the world by connecting them through a common sporting event.

Broadcast media rights for football transmissions are owned by the organisers.⁷⁴ In the case of FIFA-organised tournaments, FIFA owns the rights, confederations own the rights for events they organise in their areas of competence and so are national federations. The confederations' primary objectives include the improvement and promotion of the game of football within their specific geographical areas, maintain a working relationship with FIFA, draw up regulations and provisions related to its activities, and protect the integrity of the game and its competitions.

⁶⁹ SABC, The Annual Report of the SABC 2010 at 32.

⁷⁰ Edith R.N. Njeru, Kenya Broadcasting Corporation: Bridging the Digital Divide in Kenya through Wireless Radio and Television Signal Distribution, March 3, 2005 at 14.

⁷¹ See <http://www.fifa.com/associations>. Last visited on Dec.6, 2016.

⁷² Phillip Chiyangwa, Press Briefing in Johannesburg, April 7 2017.

⁷³ See FIFA Statutes, 2015 Edition at 57.

⁷⁴ See Beloff *et al supra* note 54.

Having become international business, football is driven and facilitated on a global scale through FIFA institutional frameworks, confederations, and federations. To that end, international exploitation of football is to a large extent attributed the role of FIFA and its affiliated federations and confederations.

8.2.4 International Migration of Footballers

The movement of footballers from country to country and continent to continent is a by-product of the current global economic and political relations of the world football.⁷⁵ The globalisation of football has witnessed international migration of footballers. Most football clubs have become enterprises that attract the best footballers from across the world. Most established football clubs like Manchester United FC in England and Real Madrid FC in Spain are found in Europe.⁷⁶ These clubs draw players from other European countries, Africa, and Latin America. The migratory path between Africa and Europe is attributed to poor Africa domestic economies that cannot absorb outstanding professional players.⁷⁷ In other instances, socio-political crises as well as post-colonial ties have triggered the migration. This club cosmopolitanism in Europe draws footballers of different nationalities and culture. Additionally the migration of footballers brings about global culture besides globalisation.⁷⁸

The cosmopolitan nature of European clubs attracts audience from different parts of the world. This gives football a global character. It creates interrelationship of transnational footballing identities and diasporic audience with unique identities. Globalisation is therefore constructed by diverse background of migrant players, their cultural practices and identities. The globalisation engendered by migration of professional and semi-professional footballers operates in complementarity with communication and broadcasting technologies, intellectual property rights, and global football governance structure which act in combination to curtail the access of broadcast football to the public. South Africa and Kenya, on their part, attract players from other

⁷⁵ Matthew Taylor, *Football Migration and Globalisation: The Perspective of History* (2007) at 9

⁷⁶ Darby et al, African Football Labour Migration to Europe and the Role of the Academies, *Journal of Sport and Social Issues* 31(2) (2007) at 156; Raffaele Poli, *The Migration of African Football Players to Europe* (2010) at 3.

⁷⁷ Eirik Solberg, *The Contours and Impacts of African Football Migration in South Africa*, MA Thesis, University of Stellenbosch (2008) at 30.

⁷⁸ *See id.*

Africa countries.⁷⁹ These players do not only embrace the local culture but also bring and infuse their culture into the receiving community.

8.3 Cultural Implications in Kenya and South Africa of Restricted Access to Football

This paragraph addresses the findings relating to objective number four and research question four and the cultural aspect thereof. It was observed that in both Kenya and South Africa, football plays a pivotal politico-cultural role. Both countries enjoy football as a colonial legacy inherited from the British colonial rulers.⁸⁰ Although it has the vestiges of colonialism, football enjoys the greatest appeal to the black masses. Historically, in South Africa in particular, football constituted a rallying call that raised the consciousness of the black people against the cruelty and abhorrence of the apartheid system.⁸¹ Post-apartheid football in South Africa evokes the euphoria, jubilation, and solidarity of the ensemble of the people of South Africa.

On the other hand, in Kenya post-independent governments pitted different ethnic communities against each other and thereby heightening tribal animosity across the country. The post-electoral violence that engulfed the country in 2007/2008, in which 1500 people were killed, was largely blamed on ethnic hate.⁸² Kenya is increasingly becoming an ethnicised geographical expression. Sport and football can constitute a rallying point that brings about national cohesion and collective consciousness among the different ethnic communities.

Against the above historical and contemporary realities in both South Africa and Kenya, on- and-off-the-field football events can act as a social and cultural bridge by which social cohesion can be canalised. It was observed in chapter four, paragraph 4.4.2 and chapter seven paragraphs 7.2.4. and 7.3.4 that football has the power to inspire and unite the people. Football promotes cultural citizenship by reawakening the collective consciousness and belonging embedded in a

⁷⁹ See e.g., *supra* note 77.

⁸⁰ Arnold Pannesburg, *Football in Africa: Observation About Political, Financial, Cultural and Religious Influences* (2010) at 48.

⁸¹ Peter Alegi, *African Soccerscape: How a Continent Changed the World's Game* (2010) at 108.

⁸² A. Ohanga, *Kenya's Post-Election Violence in 2007(2014)*. Online available at www.mobile.repository.ueab.ac.ke/kenya-post-election. Last accessed on March 30, 2017.

community.⁸³ Through cultural citizenship, the public connection of a people is raised which is necessary in the building of a nation.⁸⁴

Being countries that are agro-based, Kenya and South Africa need labour drawn from the people who are healthy. Sport and by extension football contributes to the attainment of a healthy society that can be mobilised towards nation building not only in agriculture but also in all other sectors of the economy. It was further observed that participation in and watching of football events work in complementarity.⁸⁵

In light of the foregoing, denial of or restricted access to football undermines the national efforts toward nation-building and national cohesion and reconciliation. It compromises the use of football to connect the people and raise their collectiveness consciousness. Additionally, denial or limitation of public access to broadcast football by way copyright and related barriers would break the link between the pre-independence role of football and post-apartheid South Africa. Besides, it dilutes the entertainment value of football which is a sport of the common people for the common people.

8.4 Constitutional Implication of Limited Access to football in Kenya and South Africa

Research objective four and research question five seek to investigate the implication of restricted public access to broadcast football in South Africa and Kenya on the constitutionally-guaranteed right of access to information. It was observed that in Kenya and South Africa, there is no right bestowed on the public to watch football. However, such rights can be inferred from the relevant international instruments like the Universal Declaration of Human Rights, Convention of the Right of the Child (CRC)⁸⁶, and Convention on the Right of persons with Disabilities (CRPD).⁸⁷ These international instruments underscore the centrality of human rights

⁸³ Tom Evens *et al Political Economy of Television Sports Rights* (2013) at 96.

⁸⁴ *See id.*

⁸⁵ Peter Dawson and Paul Downward, *Participation, Sponsorship and Media Coverage in Sport*, Bath University Economics Research Paper No 24/09 (2009) at 22.

⁸⁶ *See* CRC art. 31.

⁸⁷ CRPD art. 30 (the Article enjoins member states to take appropriate measures to ensure that persons with disabilities (a) enjoy equal access to cultural materials in accessible formats (b) enjoy access to places for

not only in relation to participation in leisure, cultural and sport but also in relation to accessing sports venues or watching such events on media outlets. However, such international instruments are more aspirational and have no enforcement mechanisms.⁸⁸ Therefore, there are not legislative frameworks in Kenya and South which specifically prescribe a right to sport.

Additionally, the Constitutions of Kenya and South Africa give a constitutional framework in which a general right to sport is implicated. A right to “receive and impart information and ideas” under Section thirty two of the South African Constitution and Articles thirty five and thirty three of the Kenyan Constitution could, by analogy, cover information and content embodied in a football broadcast. It was further observed that broadcast football is constructed as a narrative event. Broadcasting transforms football events into stories that are informational assets. Football as a spectator sport is therefore communicative and expressive and therefore contributes to the democratic sphere because the football narratives not only form a body of knowledge but also forms a basis for subsequent discussions and analysis on various forums including interactive networks. To that end, any denial of or restricted access to broadcast football by the public would amount to the violation of right to information under Section thirty two subsection one of the South Africa Constitution and Articles thirty five sub article one and thirty three sub article one of the Constitution of Kenya.

8.5 The Role of International Instruments Curtailment of Access to Football

Objective five and the corresponding research question sought find the role of the relevant international instrument in the proprietisation and subsequent curtailment of public access to broadcast football. It was observed the advent of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organization. For the first time, the Convention granted exclusive rights to broadcasting organizations to run parallel with the copyright in the underlying content. The Convention in other words granted protection to

cultural performances, films, theatre, and other cultural activities in accessible formats (c) enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, sports and tourism services).

⁸⁸ Danielle Ireland-Piper and Kim Weinert, “Is There a Right to Sport?” *Sports Law eJournal*, Bond University 11(2014) at 9 (In spite of existence of international instruments which implicitly grant a right to sport, there is little judicial intervention globally in order to proclaim a right to sport. There is neither evidence of existence of a express right to sport in the World).

broadcasts which hitherto never enjoyed copyright protection. The broadcasts are understood to comprise the electromagnetic impulses which carry programmes. The protection of this evanescent phenomenon called broadcast also extends to the content thereby creating a second layer of protection of content. The protection of broadcasting organizations was also boosted by the Satellites Convention which protects programme-carrying signals propagated via satellite from unauthorized distribution. In 1996, the WPPT and WCT introduced the notion of protection of copyright-aided technological protection measures. The protection of the technical measures was designed to cover unauthorized access to works as well as carrying out of certain other acts in relation to works. Because broadcasts and programme-carrying signals are protected works in Kenya and South Africa, they fall under the ambit of protection if they are encrypted. However, in Kenya and South Africa, the technical measures cover both authorized and unauthorized thereby creating a total blockade of works. This reduces the sphere of public domain and undermines the doctrine of fair dealing. Additionally, the technical measures also introduced a third layer of right called a right of access to encrypted football games and other content.

The copyright protection of broadcasts as well as the possibility of total encasement of live or recorded football matches under the doctrine of fair dealing by which the public could access the games. It is evident that encryption of football games is a business model preferable by pay TV service and other non-linear operator but this model ignores to accommodate the exceptions and limitations. Besides, football contents are believed to a cultural product which should be accessible to the public. The stadia and other venues which host football contests are known to be funded by the public who should enjoy this popular sport.

8.6 Economic Rights Versus Limitations and Exceptions

It has been argued that the economic rights that football organizers or broadcasters enjoy over broadcasts are counterbalanced by the exceptions and limitations granted under the copyright law. The economic rights are intended to encourage innovation and creativity so that the football organizers and broadcaster can create new forms of football entertainment and thereby spur development in the sports industry. The public access is realized through the exceptions and limitations which are designed to ensure access to information and knowledge. The limitations and exceptions limit or minimise the barrier of access to football entertainment and access to

information. The barrier is created by the exclusive rights which create a monopoly and anti-competitive proclivity. The exceptions and limitations cover, *inter alia*, the fair dealing doctrine, private use, and ephemeral recording of broadcasts.

It was observed that, firstly, exclusive rights granted to broadcasters are mandatory and technology-neutral vis-à-vis exceptions which are granted on a discretionary basis thereby granting broadcasters and other authors a predominant position. Secondly, exceptions and limitations granted under the copyright laws in Kenya and South Africa do not apply to works that are protected by the copyright-assisted technical measures. This means that the technical measures that protect works cannot be circumvented for an authorized use or that permitted by the law. Additionally, the limitations and exceptions in vogue in Kenya and South Africa do not cover all situations and segments in society. For instance, they do not cover people with disability or transformative works.

In conclusion, the exclusive rights that broadcasters enjoy give them a predominant position over the users who mainly rely on exception and limitations to copyright. When such exclusive rights are assisted by technical measures, they negate and neutralize the counterbalancing role that exceptions and limitations play. The public, therefore, does not enjoy the full benefits of the access to football envisaged by the limitations.

8.7 Statutory and Policy Framework in Kenya and South Africa

In obedience of objective seven and research question six, this paragraph analyses the statutory and policy frameworks in vogue in Kenya and South Africa designed to promote public access to live football transmission. The analysis looks at the findings in each country separately.

8.7.1 Kenya

The Kenya Sports Act of 2013 defines sports in such a broad language as to include or implicate football.⁸⁹ The purpose of the Act is set out in the preamble as to harness sports development, encouragement and promotion of drug-free sports and recreation; to provide for the establishment of sports institutions, facilities, administration, and management of sports in the

⁸⁹ Sports Act 2013 s. (2) (sport includes all forms of physical or mental activity which, through casual or organised participation, or through training activities, aims at expressing or improving physical and mental well-being, forming social relationship or obtaining results in competition at all levels...).

country. The Act does not talk about exploitation or broadcasting or accessibility of either sporting events in general or football in particular.

The Sports Policy of 2002 which was operationalised by parliament in 2005 by the Sessional Paper No. 3 of 2005 is silent about public access to broadcast sporting events.⁹⁰ Its main purpose is to streamline and harmonise all aspects of sports by acting as a reference point and guideline by outlining the procedures in the planning, organisation and management of sports.

On the other hand, the Kenya Information and Communications (KIC) Act of 2013 creates the Communications Commission of Kenya (CAK) which regulates telecommunication and broadcasting services.⁹¹ Sections 46(B), 46(1), and 46(K) provide respectively for the classifications of broadcasters, responsibilities of broadcasters, and the regulation of broadcasting services. Nowhere does the Act mention or talk about football or sports broadcasting. Neither does the Act provide for any anti-siphoning framework in relation to football events of any character. The Act does not also provide for the structure and manner of exploiting football broadcasting rights either at the upstream or downstream levels or at all. The market segmentation of broadcast rights for football events is not provided for in the Act. Nor does the Act give any classification of football events which are of national interest and must be available on free over the air broadcast networks.

However, the Kenya Information and Communications (Broadcasting) Regulations, 2009⁹² prohibit commercial free-to-air broadcasters from acquiring exclusive rights for non-commercial broadcast of national events identified to be of public interest by the CAK. The Regulation does not clarify as what “non-commercial broadcast” of national events embody and mean. Whatever that might mean, it cannot imply football transmissions which are highly commercialised and commoditised.

⁹⁰ Weldon Korir, Impact of Sports on Economic Development in Kenya, 3 *International Journal of Advanced Research* 1427-1430 (2015) (the Kenya National Sports Policy of 2002 is charged with the responsibility of developing, promoting and providing technical advice on matters relating to sports and recreational activities).

⁹¹ Kenya Information and Communications Act 2013 s. 3.

⁹² KIC (Broadcasting) Regulations 2009 Reg. 12(e).

To sum up, Kenya does not have in place any regulatory or policy guideline on public access to broadcast football. This is notwithstanding the fact that football and indeed sports broadcasting plays a pivotal socio- cultural and political role that sport plays in Kenya.

8.7.2 South Africa

Sport in South Africa is anchored upon elaborate policy documents geared towards the development, participation in and access to various sporting events including football. Among the policy guidelines is the White Paper on Sport and Recreation for South Africa of 2013. This policy framework underscores greater access to and exposure on television of sporting activities for socio-economic transformation.⁹³ It proposes that ICASA Sports Broadcasting Services Regulation be modified and updated to cater for emerging broadcast issues.⁹⁴ Additionally, the Transformation Charter for South African Sport, 2012 also places strong emphasis on access to and participation in sporting activities in order to attain a socially and culturally-transformative agenda.⁹⁵

Broadcasting in South Africa is regulated by ICASA through several statutes and subsidiary legislations. Broadcasting is regulated under the Broadcasting Act.⁹⁶ However, sport broadcasting is regulated under the Electronic Communication (EC) Act of 2005. Section Sixty sub section one of the EC Act provides that pay television services may not acquire exclusive rights that prevent or hinder free-to-air broadcasting of national sports events as identified in the interest of the public from time to time by ICASA after consultation with the minister for sports and in accordance with the regulations prescribed by ICASA. In April 2010, the Sports Broadcasting Services Regulations were gazetted. Among their relevant provisions is Regulation four sub regulation one which gives the criteria for listing sporting events of public interest. ICASA has since listed the following football events, *inter alia*, as national sports events, FIFA World Cup, Africa Cup of Nations tournaments, COSAFA Cup, CAF Confederations, Telkom Charity Cup, Nedbank Cup, and MTN Supa 8 Cup.

⁹³ White Paper and Recreation for South Africa, 2012 at 15.

⁹⁴ See id at 42.

⁹⁵ See the preamble of the Transformation Charter for South African Sport 2012 at 4.

⁹⁶ Broadcasting Act No. 4 of 1999.

The Broadcasting Regulations⁹⁷ further provide that any subscription broadcaster who acquires rights for any of the listed events are obliged to inform the free-to-air licensee within five days of acquiring such rights of the opportunity to tender for the same. Listed events may be broadcast live, delayed live or delayed by the free-to-air broadcaster.

Unlike Kenya, South Africa has a legislative framework against anti-siphoning of football events. The legislative framework is the Electronic Communication (EC) Act 36 of 2005.⁹⁸ This is a laudatory gesture having regard to the socio-cultural and political importance of football. The efficacy or non-efficacy of this legal framework will be discussed as part of the conclusion and recommendations in the next chapter. The foregoing analysis of findings informs the conclusion and recommendations in the next chapter.

⁹⁷ See Sports Broadcasting Services Regulation 4(1).

⁹⁸ Section 60(1) of EC Act obliges subscription broadcast services not to acquire on exclusive basis broadcast rights or hinder or prevent FTA broadcasting of sporting events identified as national sports events by ICASA in consultation with the minister of sports. In order to give effect to this statutory role, ICASA promulgated on April 7, 2010 the Sports Broadcasting Services Regulations in which a range of sporting events were designated national sports events.

CHAPTER NINE

CONCLUSION AND RECOMMENDATIONS

9.0 Introduction

This chapter constitutes a wrap up of the study supported by recommendations that may be instituted to address deficiencies or inadequacies identified by the study. The conclusion and recommendations are inextricably intertwined with the research objectives, research questions, and the overall statement of the study problem.

Throughout this study an attempt has been made at showing the nexus between the broadcasting of football events and copyright and its overall impact upon the access of the events to the general public. In the study, the copyright relating to or connected with football transmission is characterised as broadcast copyright. The broadcast copyright was examined in the context of football transmission and the categories of works that can be embodied into a football broadcast. Additionally, broadcast copyright was analysed within the context of the broader copyright doctrines and philosophies, technological protection measures as well as the Kenyan and South African copyright laws.

The core of the study revolved upon the implication of copyright-based controlled access to the public on the constitutional right to information guaranteed under Section 32(1) of the South African Constitution and Articles 35(1) and 33(1) of the Kenyan Constitution. Football transmission is constructed as a narrative, discursive event transformed into stories by way of commentaries and analysis. It is therefore, an informational asset eligible to constitutional protection. The constitutional protection of transmission football is also underpinned by various international treaties. Among the international instruments is the Convention on the Right of Persons with Disabilities (CRPD) which espouses the human rights of persons with disabilities not only a right to participate in sporting activities but also a right to access sports venues or

watch such events on media outlets.¹ Also the International Charter on Physical Education and Sport (ICPES) gives sports a human rights perspective by stating that: “Every human being has a fundamental right of access to physical education and sport....”Although ICPES emphasises on sports participation, there is empirical complementarity between sports participation and the viewing of sport either live or via media as live or recorded activities.²

Additionally, the study has examined the implications of restriction of public access to broadcast football on the socio-cultural fabric and lives of the people of South Africa and Kenya. It has been seen that football is the cultural expression and embodiment of the people. It promotes the collective consciousness of the people—it is an expression of the people by the people and defines a community and its lifestyle. Sport in general, and football in particular, gives the community a sense of meaning and belonging by connecting and bringing people together. Therefore any controlled access to on-the-pitch or off-the-pitch football violates and undermines these socio-cultural attributes of football. Modernity has, however, transformed this cultural activity into a commodity which has been individualised by football federations, clubs and media conglomerates. Football has now become a mediated event and multi-million dollar business. It is in light of the foregoing context that this chapter is grounded.

9.1 Conclusion

From the findings and comparative analysis in the preceding chapters, the following conclusive remarks become appropriate:

9.1.1 Scope and Nature of Broadcast Copyright and Access to Football

In relation to objective and research question one; it was observed that broadcast copyright is integral to football broadcasting. In Kenya and South Africa, the copyright laws do not define the subject-matter of protection in a broadcast. The laws do not also define the outer boundaries of a broadcast for the purposes of copyright protection. Although the object of copyright protection in a broadcast is neither defined at the international nor national level, it was observed that the

¹ See CRPD of 2006 art. 30; United Nations, *The Conventions on the Rights of Persons with Disabilities No. 19 (2014)* at 7.

² Peter Drawson and Paul Downward, *Participation, Sponsorship and Media Coverage in Sports, Bath Economic Research Papers No. 24/09, University of Bath* at 21.

predominant view is that the subject matter of protection in broadcasts is a signal embodied with programmes intended for public reception. This view is implicated in Article 3(f) of the Rome Convention which defines the term broadcasting. Additionally, the Rome Convention did not set originality and creativity as preconditions of protection.

Clearly, therefore, the elements which constitute the subject of protection in a broadcast are vectors or electromagnetic impulses which transport information. This position raises a legal question as to how possibly would copyright attach in a broadcast or what would constitute substantiality in a broadcast for the purpose of copyright or infringement thereof? Evidently, a broadcast is not a tangible substance, but a dissemination of information through the transmission of electromagnetic energy or impulses. However, a signal is not a legal concept but a term familiar in the field of electronic and telecommunication area. Transposing the term into a legal phenomenon will lead to confusion. It was further observed that copyright cannot subsist in an action of dissemination because signals are transient, evanescent, and imperceptible. Any rights over signal would be ineffectual. Copyright must therefore subsist in that which is perceptible and tangible. Therefore, copyright in a broadcast copyright or its infringement must be determined by the work which incorporated into the signal or that which is taken away.

The Section 2(1) of the Copyright Act of South Africa provides that broadcasts and programme-carrying signals must be original before they enjoy copyright. It was observed that locating originality in a broadcast or programme-carrying signal which is intangible for the purposes of copyright is difficult. Judicial interventions in South Africa have tended to raise the bar of originality higher than in Kenya and it is doubtful if a live football event *per se* can be copyright protected in the former. Originality is not a requirement in Kenya and therefore broadcast copyright is based on entrepreneurial efforts of the broadcasters concerned. In Kenya, unlike South Africa, it would be easier to protect, under copyright, a live broadcast of a match because originality is not a requirement. Similarly it was observed that a recorded telecast or sound broadcasts can be protected as audiovisual /cinematograph works and sounds recordings, respectively, in Kenya and South Africa.

The copyright protection of broadcasts or programme-carrying signals individualizes the broadcasts themselves; and it becomes an infringement to view or listen to broadcasts on a receiving set in public places or communicate them to the public without authority of the transmitting broadcasters. Aided by technical measures, broadcast copyright reduces the public sphere and thereby impinges upon access to the public of football games.

Unlike South Africa, statutory and judicial authorities in Kenya tend to favour copyright protection for live football broadcasts, such position is not in tandem with the European Union or American jurisprudence where a live sporting event cannot be construed as a work of authorship. Additionally, the copyright protection of live football broadcasts in Kenya does not sit favourably with the copyright doctrines of originality and tangibility; a live football event is devoid of the two elements. Besides, in both Kenya and South Africa, courts have not critically interrogated, analysed the object of copyright protection in a broadcast which would form a basis of separating content from the signal. Thus, it can be concluded that there are no convincing doctrinal or philosophical justification for subsistence or introduction of copyright protection in live football broadcasts in Kenya and South Africa.

9.1.2 Access to Broadcast Football and Copyright in Kenya and South Africa

Objective two and the corresponding research question sought to examine whether access to broadcast football is dependent on copyright in Kenya and South Africa. It was observed that in South Africa live broadcasts of a football may not enjoy copyright protection because it would not meet the threshold of originality. This observation was informed by, *inter alia*, the Supreme Court of Appeal ruling in *Waylite Diary CC v First National Bank Ltd* (1998) 2 SA 965 (SCA) that designing, formatting and composing field diaries complete with appointment pages, names of months, weeks and days did not constitute copyright for want of originality. However, other works incorporated into a live football broadcasts would enjoy separate protection. Such works would include any musical clips, club anthems, pre-recorded audiovisual fixations of previous matches and artistic works like graphics and logo artworks.

Additionally, the broadcasting of pre-recorded matches as either telecasts or audio-broadcasting would be protected as cinematograph works and sound recordings respectively. On the other

hand, in Kenya live and deferred broadcasts are copyright protected. The protection also extends to the content like musical works, artistic works or any pre-match performances otherwise than the actual events and ancillary activities in the stadium. Originality is not a pre-condition for subsistence of broadcast copyright under Section 22(3) of Copyright Act of Kenya. Pre-recorded matches also enjoy copyright protection in form of either audiovisual works or sound recordings. Thus not all elements of copyright cited in the Act may be incorporated in a football broadcast. However, those works incorporated into a broadcast impact negatively on access of football games to the public. The control becomes even greater when technical measures are deployed in aid of these rights. However, other factors like physical facilities were observed as contributing to lack of public access to broadcast football. Such facilities include the penetration of TV sets, broadband and internet.

9.1.3 Globalization and New Technologies and Impact on Access

This sub-heading highlights conclusions based on the objective three and research question three in relation to the effects of globalisation and new technologies on public access to broadcast football in Kenya and South Africa. It was observed that football has become a global phenomenon. Globally, FIFA and its affiliated confederations and federations organize professional football. FIFA has created institutions and rules which regulate association football competition and the migration and transfer of players from one region to another. The convergence of telecommunication technologies, internet and broadcasting has fuelled the globalisation of football. Satellite broadcasting has compressed the world into a global village in which huge diasporic audience watches football matches off the field in real time. The commercialisation and commoditisation of professional football is underpinned by intellectual property rights more particularly broadcast copyright.

Under the auspices of WIPO, the broadcast copyright is underpinned by the Rome Convention and other neighbouring rights-related instruments. In particular, the WPPT and WCT introduced the global protection of copyright-assisted technological measures which have been replicated in South Africa and Kenya. The combined global realities demonstrated by the global application of intellectual property rights in combination with the use of technical measures in furtherance of the interests of global media conglomerates and football organizers have compromised the public

domain and access to major football games. In Kenya and South Africa, it was observed that the dominance of Pay TV service providers like DSTV Multichoice underpinned by the use of technical measures has constricted the ability of the public to access football matches.

9.1.4. Interface between copyright and Broadcasting

According to objective four and the corresponding research question and hypothesis the study sought to investigate the interaction between copyright and broadcasting and their impact on access to broadcast football by the public in Kenya and South Africa. It was observed that copyright springs up at the stage of transmission of a football event. The broadcasting transforms a football game into stories and mediated events. Football broadcasting is converted into ritualistic events which include traditional dances, paintings, celebratory moves, and footages of actual football events and other ancillary events. Whereas on-the-field football games do not enjoy copyright protection, however, once such events are transformed into a broadcast, they are protected as broadcasts or programme-carrying signals. If the broadcasts are based on a fixation, then they would be audiovisual works or sound recordings. Other elements incorporated into the signal will be independently protected if they meet the copyright threshold.

The protection of a broadcast will not enjoy copyright protection unless it is intended for reception by the public. A transmission which is based on a point-point transmission is not broadcasting and cannot be copyright protected. Therefore, it is the act of broadcasting of a football game that triggers a series of copyright-related rights over the broadcasts. These rights at this point become eligible for protection by any effective technical measures designed to protect works. All these acquired exclusive rights individualize broadcast football and restrict its access to the public.

9.1.5. International Instruments that Impact on Access to football in Kenya and South Africa

It was observed that three major international instruments shaped the evolution and development of the neighbouring rights of broadcasting organizations. They are the Rome Convention, the Satellite Convention, and the WPPT. It was noted that the Rome Convention introduced the neighbouring rights of broadcasting organizations, otherwise known as broadcast rights.

Broadcasts rights grant broadcasters exclusive rights over the content they broadcast and thus creating an additional layer of rights. This second layer of rights makes the content more expensive besides creating a second destination of rights clearance. Evidently, this dual arrangement compromises the public and reduces the capacity of the public to access content. Football broadcasts, becomes expensive to access.

The Rome Convention was complemented by the Satellite Convention which places a defensive wall against unauthorized distribution of programme-carrying signals that are propagated via satellite. The obligation of stopping unauthorized distribution of programme-carrying signals is not vested on broadcasters but on members States as a matter of public international law; thus the Convention does not give broadcasters any exclusive rights. Besides the Satellite convention was the WPPT which introduced the protection of technological protection measures that are designed to protect works. The application of the technical measures in support of the rights which broadcasters enjoy in Kenya and South Africa has been as dramatic as it imposes a total and absolute blockade on content. With the advent of the protection of technical measures, broadcasters enjoy a two-tier protection. The first protection is granted by the exclusive rights that broadcasters enjoy under copyright and the second one against the circumvention of the technical measures protecting the broadcasts. The duality in content protection tilts the balance of interest against the general public.

9.1.6. Broadcast Activities in Kenya and South Africa that Inhibit Access

It was observed that in Kenya and South Africa, the media landscape has been liberalised since 1990s given the fact that broadcasting promotes and sustains a free and democratic society. Traditional linear TV channels and radio outlets dominate the two jurisdictions. Internationally, however, an emergence of new, modern signal delivery means and platforms was observed that render non-linear broadcast services possible. Such services include video on demand (VOD), internet protocol television (IPTV), and over-the-top (OTT) transmissions. Linear broadcast services include the free over the air digital terrestrial broadcasting offered by SABC and KBC and other free-to-air commercial stations in Kenya and South Africa. Linear broadcast services also cover satellite subscription services offered by Multichoice-DSTV in Kenya and South

Africa as well as other smaller Pay Tv service providers in the two countries. Radio broadcasting services mostly operate on FM platforms.

It was further observed that Multichoice-DSTV is the dominant pay TV service provider in Kenya and South Africa. Owing to its dominant position, it controls most of the sporting rights in Kenya and South Africa. The free-to-air broadcasters cannot favourably compete with this pay TV service provider which simultaneously offers a wide choice of sports channels in real time. It was, however, observed that access to these sports broadcast services is restricted, first, by high access cost, and secondly, by limited penetration of the service. Additionally, in Kenya and South Africa, the penetration of non-linear transmissions like OTT and IPTV is handicapped by both the limited broadband and technology absorption incapacity.

9.1.7. Regulatory, Policy or Legal Frameworks in Kenya and South Africa

This sub-heading highlights the regulatory and legal frameworks in Kenya and South Africa that guarantee the public access to sporting events in general and football in particular. It was observed that in Kenya, the Kenya Information and Communication (Amendment) Act of 2013 which creates the Communications Authority of Kenya (CAK) is silent on sports and sports broadcasting. CAK is the regulator of the broadcasting and telecommunications sector in Kenya. The Broadcasting Regulations of 2009 do not specifically talk of broadcasting of sporting activities. Neither does the sports Act of Kenya of 2013 talk of broadcasting of sports events. It was therefore concluded that Kenya does not have any legal or regulatory framework on sports broadcasting and access by the public to sports events of national importance.

It was however observed that South Africa regulates the broadcasting of sports events including football. This role is played by both ICASA and the Minister of Sport under Section 60(1) of the EC Act which prohibits pay TV services to acquire on an exclusive basis broadcast rights over sports events designated by ICASA in consultation with the ministers as national sports events. It was further observed that ICASA promulgated in 2010 the Sports Broadcasting Service Regulations in which the identification criteria of the national sports events were set. It was however, noted that the legal requirements under the Act and Regulations could be circumvented in a number of ways. First, the obligations imposed on pay TV service providers under Section

60(1) of EC Act were not crafted in a mandatory language. Secondly, the Broadcasting Regulations promulgated under the EC Act have inherent weakness and contradictions which may thwart the attainment of the intended purposes, namely, public access to national sports events.

9.1.8 Economic Rights of Broadcasters versus Exceptions and Access

It was observed that broadcasters in Kenya enjoy certain exclusive or economic rights over their broadcasts. The exclusive rights place the control of the broadcasts in the hands of broadcasters to determine how and when to exploit them and at what cost. By virtue of the exclusive rights, the broadcasters can also control the use the content. The content may be a football match or any other programme lined up for transmission. In exercise of the rights, the broadcasters control access and certain uses by the public of their broadcasts. The broadcasters may choose to encrypt the broadcasting of football games and thereby absolutely lock out the public from accessing the games unless access code is given. The exceptions and limitations granted by the copyright law permit the public to access the content and make certain uses, but the scope of exceptions is limited. They do not cover all situations and, besides, they are impotent in the face of technical measures that encrypt football games and other content. Pay TV channels in Kenya and South Africa lock out most potential customers and therefore deny their access to broadcast football games and other content.

9.1.9 Recommendations

Arising from the entire study and the findings in chapter eight of this study and more particularly in response to the objectives and problem statement of the study, recommendations that seek to solve the problem identified in chapter one and discussed throughout this study become appropriate. The recommendations cover the following specific issues and pervasive themes, which are relevant to the study:

1. The protection of sport broadcast under copyright law;
2. Introduction of more exceptions in anti-circumvention legislations in Kenya and South Africa;
3. Introduction of anti-siphoning legislation in Kenya and revamp of the South African one
4. Formulation of guidelines on the marketing and selling of football rights at both the upstream and downstream levels by both Kenya and South Africa;

5. Attending to non-technical factors that militate against public access to football broadcasts in both jurisdictions; and
6. Engaging other structural and technical factors that hinder access to broadcasts for the developing countries generally and the two jurisdictions in particular.

The content and possible practicality of each of the above outlined recommendations is elaborated upon immediately below.

9.1.10 Sport Broadcasts not to be protected under Copyright

In Keeping with the global development in relation to the rights of broadcasting, it is recommended that live broadcasting of sporting events should not enjoy copyright protection because they are not works of authorship. The IP type of protection for live sports events does not sit well with the doctrine and philosophy of copyright. The most obvious one is the doctrine of originality which underpins copyrightability. In a live football match, the contours of broadcasting are difficult to fix for the purposes of copyright. It is too simplistic to argue that such contours must be based on the signal generated by the broadcasters. However, the signal is an abstraction which is above all transient and evanescent to form the basis of copyright protection. Additionally, the nomenclature of copyright would be at variance with the signal-based protection; for instance, it would be difficult for courts to determine substantial part of a broadcast measured against signal. The alternative is to base the protection of a broadcast on the underlying content. This will also create an originality problem. Whose originality would be used, for instance, if the underlying content is a work of authorship? Would there be two-tier originality? This arrangement would create an overlapping of rights and undermine the development of football. Live football broadcasting could be given a *sui generis* sort of protection or may be protected under telecommunication law on the basis of the signal.

In Kenya, where originality and fixation are not legal requirements for copyrightability of broadcasts the situation is different and thus a live broadcast can enjoy copyright protection. This begs the question as to whether elements which are neither original nor reduced to a material form should after all be protected under copyright. What qualities do they have which entitle them to copyright? It was noted that originality and a work are intertwined and without

originality there is no work. It is on this basis that it is recommended that live broadcasting of sporting events should not be protected by copyright.

9.1.11 Introduction of Exceptions in Anti-Circumvention Legislations in Kenya and South Africa

Technological protection measures (TPMs) are designed to prevent or restrict acts that are not authorised by the copyright holder. In order to achieve this objective, the TPMs and the digital rights management systems (DRMs) are protected against unauthorised circumvention of any effective technical measures that are used by authors to secure their works. In order to mitigate the rigours of TPMs that encase broadcast football absolutely, anti-circumvention legislations in both Kenya and South Africa should provide for exceptions. The TPMs have the potential to block absolutely both types of access and/or use in the two jurisdictions unless access code is granted by the encrypting entity. Since the blockade is absolute and total, it does not distinguish fair dealing from copyright infringement. The South Africa's Electronic Communications and Transactions (ECT) Act under which TPMs are protected provides absolute and total prohibition of both circumvention and trading in circumventing devices.

In Kenya, the Copyright Act absolutely prohibits the circumvention of TPMs designed to protect works as well as the dealing in circumventing devices. In other words, the anti-circumvention laws should not apply to acts that are permitted by the copyright law or any other law under which technical measures are protected. This would allow access to or use by the public of broadcasts of football which are encrypted. This would permit events that are listed as football events of national importance and which must be available on free-to-air channels to be accessed by free over the air broadcasters for retransmission.

9.1.12 Introduction of Anti-Siphoning Legislation in Kenya and Updating the South African One

Given the importance of football broadcasting in building national cohesion and cultural citizenship as well as national identity and consciousness it is recommended that Kenya introduce a legal and regulatory frameworks by which certain football and other sporting events as designated sports events of national importance. Such events should available live on free

over the air broadcast channels. These frameworks will circumvent the threat of migration of major football events from free-to-air channels to pay television services. In order to secure availability of these sporting events on free over the air channels, a number of countries have introduced anti-siphoning legislations and regulations. The free-on-air telecasting of major sporting events will guarantee their access to the biggest segment of the public. Among those countries that have introduced rigorous anti-siphoning law are the UK, Australia and Italy.

On its part, South Africa has an anti-siphoning legislation, the legislation is, however, not effective in ensuring that the public access football events of national interest in a number of ways. First, the free-to-air viewers continue to have only limited access to coverage of national sporting events. Secondly, compliance with Section 60(1) of EC Act is not mandatory on the part of the subscription service providers. Thirdly, the FTA broadcasters are not obliged to broadcast live the listed events. This goes against the grain of the consumer or viewer preference for live sporting events. Fourthly, the law obliges subscription broadcasters who acquire sports right to give FTA broadcasters the opportunity to tender for the same. This legal requirement, if unchecked, would give rise to unintended consequences should the reserve price for the rights be too high. Fifthly, the law does not set a threshold of coverage and reception of the FTA broadcasters in relation to the geographical territory of South Africa. For instance, the corresponding UK law provides that the FTA channels should be those received by more than ninety five per cent of the UK population. In light of the foregoing the South African anti-siphoning legislation should be revamped and modified along the United Kingdom anti-siphoning law. Additionally, the criteria of the free over the air channels that are obliged to broadcast the listed football events should be pegged upon the South African population which receives or is capable of receiving their broadcasts.

9.1.13 Formulation of Football Exploitation Guidelines

Kenya and South Africa should formulate guidelines on the marketing and selling of football rights at both the upstream and downstream levels. The market segmentation in relation to football rights as well as the mode and platform of exploitation would create certainty in the industry. In addition, the guidelines must reflect the interface between competition law and

football exploitation market. In particular the guidelines should be based, among other things, upon market definition, competition, and mode of selling or purchasing of rights.

9.1.13.1 Market Definition and Segmentation

The proper market definition is critical in the commercial exploitation of football or any other sport. Market definition consists in the identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of supplier. At the level of the European Union the Audio-visual Media Services Directive provides for a two-tier regulation of advertising and sponsorship in relation to broadcasts, according to whether the audio-visual media service is a television broadcasting service or an on-demand service. The Directive also permits a member state to take measures to ensure that broadcasters under its jurisdictions do not broadcast on an exclusive basis events which are regarded by that member state as being of major importance for society in such a way as to deprive a substantial proportion of the public in that member state the possibility of following such events via live coverage or deferred coverage on free television. The upstream exploitation of football events would cover live deferred television coverage while downstream exploitation would not only cover on-demand transmission but would also cover merchandising and other forms of downstream exploitation.

Additionally rights for football events regularly played throughout every year where national teams participate should be identified. Upon identification, they should be differentiated from those football events that do not take place regularly where national teams participate. The market definition would maximise not only the revenue base but also availability of the sporting events across the board. It is in this context that Kenya and South Africa should define their own market depending on their needs and circumstances. Kenya and South Africa do not have rules and policy guidelines on market definition and segmentation for football events.

9.1.13.2 Competition Law

Competition law and rules have a significant impact on the relationship between media operators and sporting bodies and the financing and organisation of sport. In order to subject sport to competition law and rules, the EU has designated all broadcasting organisations, including public

television broadcasting organisations as undertakings and that the acquisition and sub-licensing of broadcasting rights and the sale of advertising slots constitute economic activities in terms of the competition law. Competition law would protect the market for football rights against predatory and disruptive market practices that undermine free competition or stifle the freedom to pursue economic interest on the free market that would sustain access of broadcast sporting events to the public. Additionally, the competition law would not only prevent the abuse of dominance but would also guarantee the integrity of the sporting events. It is in light of the foregoing that it is recommended that the competition law be extended to cover commercial exploitation of football and other sporting events in the two jurisdictions. Currently, it was observed that the application of competition law is limited in the two jurisdictions.

9.1.13.3 Mode of Sale of Football Rights

Globally, football broadcast rights may be sold or purchased collectively or individually. Collective selling of broadcast rights entails the clearance of those rights from a centralised point. From purely a competition point of view, such a practice has a tendency to stifle competition. League teams act as cartels that control the market and inflate prices at both upstream and downstream levels. Collective selling of broadcasting rights reduces the number of individual rights available on the market for other broadcasters and thereby limits consumer choice.

However, central marketing of sports broadcasting rights has been found to enhance efficiency by reducing transaction costs on the part of football clubs and media operators. Besides, it helps media products achieve a wider distribution. In *Re Televising Premier League Football Matches* (2000) EML 78, the High Court held that the benefits to the consumers of collective and exclusive selling arrangements outweighed any potentially anti-competitive disadvantages. Central marketing of broadcasting of sports rights has been embraced by most countries in the European Union and the USA. Individual selling of sports broadcasting rights by individual clubs is a less popular system because it will jeopardise the financial situation of the less successful clubs. A clear polarisation effect is evident, in countries like Spain where individual sale of such rights has been in vogue, in which only most popular clubs are capable of generating high incomes.

In light of the foregoing analysis, it is evident that the collective marketing of football broadcasting rights is widespread and more amenable not only to the development of football but also in securing access to the public across the platforms over which transmission is possible. Kenya and South Africa should create legal or policy guideline on the appropriate model of marketing of football broadcasting rights. This study recommends the collective selling of football broadcasting rights because it is proven in the UK, Australia and USA to be more beneficial than individual marketing of the rights.

9.1.14 Attending to Non-Technical Factors that Impede Public Access to Football in Kenya and South Africa

Besides copyright and technical measures, there are other factors that impede public access to football. The first one is the availability over the satellite and other interactive channels of foreign leagues matches which are better packaged and promoted like the English Premier League and the Spanish La Liga. There is now apparent migration of viewership from local and regional African tournaments to the European club broadcast games. According to Goal Com Africa, the obsession of African fans with European football has progressed to a point of damaging many local domestic championships. Many fans are “willing to spend money and time in front of television sets watching the European favourites rather than sitting under the scorching sun at a national stadium cheering on a local outfit.”

According to BBC, satellite broadcasting of European football league matches has rendered most stadia in Africa virtually empty. The above examples demonstrate the negative impact that foreign league matches telecast by satellite have on the development of football in Kenya and South Africa. In light of the foregoing, research should be carried out to find out the impact of such viewership migration otherwise characterised as “electronic colonialism” on the viewership of local matches. The migration of viewership from local tournaments to foreign leagues matches undermines the efforts geared toward promoting national cultural heritage. Such foreign leagues bring about foreign culture that may undermine local national values and ethos. The fact that no country in Africa has devised solutions towards alleviating this phenomenon does not mean that

Kenya or South Africa cannot undertake a research in order to determine the impact of this phenomenon on local broadcast football.

9.1.15 Social, Technical and Structural Factors that Hinder Access to Broadcasts

Kenya and South Africa being developing countries face other structural and technical factors that hinder access to broadcasts. According to the study undertaken by WIPO, Africa is predominantly an FTA market characterised with low television penetration. Only South Africa enjoys a TV penetration of 79.5 per cent of the South African population. Forty seven per cent of the households in South Africa subscribe to pay television service. In Kenya, pay TV penetration accounts for 16 per cent while broadband penetration accounts for 1 per cent. Besides, in 2014, only 11million Kenyans out of a total population of 50million people owned working television sets. Based upon the above statistical analysis, the geographical reach of television services is not universal in both Kenya and South Africa. The lack of geographical universality impinges upon access to not only football broadcast but also to other programme content.

Other access barriers to broadcast football include the exclusivity of the football broadcast rights that characterise the acquisition of sports rights. This exclusivity reduces competition between platforms and operators and thus creating just a few pay TV operators—Multi-choice Africa dominates the pay TV sectors in Kenya and South Africa. Besides, the cost of access to pay television services in South Africa is exorbitant. The average monthly cost of access to pay television services is US\$ 75 per bouquet carrying premium football content. Related to the cost of access is the cost of hardware and its installation which is exorbitant relative to the low disposable incomes of most South Africans and Kenyans. The cost of hardware and installation, though a one-time cost, accounts on average, for 13 per cent of the gross domestic product of each individual country under the study. Such exorbitant costs prevent most people in Kenya and South Africa from accessing subscription-based broadcasts which in most cases carry football events.

9.2 Areas for Further Research

In the course of this study, a number of areas that did not directly relate to the study but which impact on access to broadcast football were identified and call for further study by other researchers in future. The areas include:

1. The Impact of transmission of European and other foreign leagues matches on accessibility and viewing of local football matches;
2. The extent of penetration of electronic media service in Kenya and South Africa and access to football broadcasting service;
3. The extent to which socio-economic factors impact upon access to broadcast football in Kenya and South Africa

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