

**COPYRIGHTS: CHALLENGES, POLICY AND LEGAL FRAMEWORK**

**CASE STUDY: SOUTH SUDAN**

**BY**

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REQUIREMENTS FOR THE AWARD OF THE BACHELOR DEGREE  
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**Declaration**

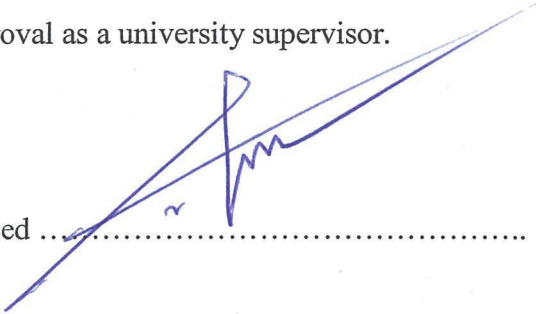
I, Deng Garang Atem, hereby declare that “Copyrights: Challenges; Policy and Legal framework: Case Study: South Sudan” is entirely my own original work, except where acknowledgement is made; that this work has never been produced before for any degree award in any other institution.

Signature.......... Date..........

**Approval**

This is to certify that this dissertation has been submitted for examinations with my approval as a university supervisor.

Signed .....



Name.....

Mr. Khandera Ismail

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7/08/2013

Supervisor

### **Dedication**

This work is dedicated to my beloved late dad Garang Atem, Mum Adhieu Alaak, my sisters: Abuk, Yar, Nyankiir, Arok and Aluel, brothers: late Yong, Mabior, Atem, Dengdit, Duot, my beloved nephews: Deng, Jurkuch, Akech, Garang, Lem, Garang Atem, Garang Arok; and nieces: Adhieu, Achol, Nyandeng, Akon, Abuk Atem, Aluel, Adau and Apajok, for all their supports financially, emotionally and morally.

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### Acronyms

ARIPO	-	Africa Regional Industrial Property Organization
AU	-	African Union
CPA	-	Comprehensive Peace Agreement
GATT	-	General Agreement on Tariffs and Trade
IGAD	-	Inter-governmental Authority on Development
IP	-	Intellectual Property
MoJ	-	Ministry of Justice
RSS	-	Republic of South Sudan
WIPO	-	World Intellectual Property Organization
SPLA/M	-	Sudan People Liberation Army/Movement
TRIPS	-	Agreement on Trade Related Aspects of Intellectual Property Rights
UCC	-	Universal Copyrights Convention
UK	-	United Kingdom
UN	-	United Nations
USA	-	United States of America

**Table of Statutes**  
**National and Sudan Laws**

Transitional Constitution, 2011, Republic of South Sudan

Ministry of Legal Affairs and Constitutional Organization Act, 2008,

Copyright Protection Act, 1974, Laws of Sudan

Copyright and Neighbouring Rights Act, 1996, Laws of Sudan

**International Instruments**

Berne Convention for the Protection of Literary and Artistic Works of 1886 as revised

Buenos Aires Treaty

Copyright Act, 1976, Laws of USA

Trade Related Aspects on Intellectual Property Rights Agreement

Universal Copyright Convention

World Intellectual Property Organization, WIPO Copyright Treaty (WCT)

WIPO Performance and Phonograms Treaty (WPPT)

### Table of Cases

University of London Press Ltd v University Tutorial Press Ltd (1916) 2 Ch 601

Exxon Corp. v Exxon Insurance Consultant Ltd (1896) 3 Ch 420

Ladbroke (Football) Ltd v William Hill (Football) Ltd (1964) 1 WLR273 at 291

Feist Publication Inc v Telephone Service Company (1991) 111 Sct 1282

Stephenson Jordan v Mc Donald & Evans (1951) 69 RPC 10 CA

Ah-Gen v Guardian Newspapers (No. 2/1988) All ER 545 at 645

Milpurruru & Ors v Indofun (PTY) Ltd

Melot v Mothercare (1987) FSR 358

Harman Pictures NV v Osborne,

## **Abstract**

Copyright is an integral part of intellectual property rights which requires better protection to enable its owners to exploit their rights exclusively without infringements by others. Doing so has not always been easy but come with challenges in regard to use of works, scope of protection, remedies available to the owners of works and limitation on protection. In South Sudan, there is no policy and legal framework yet in place to afford any protection to copyrights; thus this explained the dependency of this research on foreign jurisprudence to bridge the gap. This field of intellectual property is unexploited thus owners are subject of infringement in absence of legislation to protect and afford them exclusive rights to benefit from their property. Little effort is being made to save the owners from such unprecedented infringement. This research basically analyzes copyrights, current scope of protection, the challenges, policy and legal framework and makes recommendations to help in the lead to a new law in South Sudan. The research also took into consideration various aspects of this field of intellectual property that would need exploitation and protection by the law. It tries to understand copyrights challenges, policy and legal framework available in South Sudan.

## CHAPTER ONE

### 1.0 General Introduction of Law relating to Copyrights

#### 1.1 Introduction

Copyright is one of the important branches of intellectual property (IP) law which desperately requires protection from unauthorized use of owners' property for better exploitation of their rights exclusive of others. Article 2 provides copyright as literary and artistic works which include production in literary, scientific, books, musical compositions, lithographic; photography etc.<sup>1</sup>

Copyright law basically protects owners from infringement of their intellectual property. This underlined the need for the protection of copyrights from unauthorized use of owners' works without their permission.

South Sudan attained her independence in July, 2011 from the Sudan after 21 years of civil war that left the then regional institutions not functioning. The country's legal system is undergoing serious reforms from a scratch hence comprehensive legislation in copyright to enable proper exploitation. The Comprehensive Peace Agreement (CPA) negotiated under the auspices of Inter-governmental Authority on Development (IGAD) signed in the Kenyan Capital Nairobi on the 9<sup>th</sup> January 2005 between the Sudan Government and the Sudan People Liberation Movement/Army (now ruling Party RSS), provided the people of South Sudan the right to self-determination exercised in the

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<sup>1</sup> Berne Convention for the Protection of Literary and Artistic Works of 1886 as revised

Referendum on the 9<sup>th</sup> January, 2011 whose results confirmed the Independence of the Country.

The major challenge in this field is the lacuna of copyright law to protect copyrights which is a result of a delineation of the bases for protection; as there must be connection between the legislating state and the author of a copyright material or both?<sup>2</sup>

The scope of protection is yet determined in current applicable legislation, however as a new member of the African Union (AU), South Sudan would need to ratify AFRIPO laws in order to apply them and submit to the jurisdiction. By the virtue of joining the world body such as the UN, South Sudan would also need to ratify International instruments such as the Berne Convention as revised, WIPO, and TRIPS Agreement on Intellectual property protection.

## **1.2 Background of the Study**

Copyright is an exclusive right to reproduce or authorized others to reproduce artistic, dramatic, literary, or musical works.<sup>3</sup>

The first copyright legislation globally provided authors of books the sole right and liberty of printing them for a period of 14 years; thus include books and other writings which were held to include musical compositions.<sup>4</sup>

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<sup>2</sup>Akol M. Tier, "*The Protection of Copyright Under the Sudanese Law*", Arab Law Journal Quarterly at 182

<sup>3</sup> Art. 2 n 2, 8; Jonathan Law and Elizabeth Martins (eds), *Oxford Dictionary of Law*, 7<sup>th</sup>ed (2009) at 134

<sup>4</sup> The Statute of Anne 1709, UK

The legislation formed the basis of protection and subsequent developments of law copyright laws that was later followed by numerous Acts including 1814, 1842, 1911 and the 1956 Copyright law of United Kingdom.

In the lead to a harmonized law in copyright law, the Berne Convention was enacted as the first international treaty on copyright thus accorded authors 50 years of protection.<sup>5</sup>

Sudan, a former colony of UK applied the laws of UK in force.<sup>6</sup> The Copyright Protection Act, 1974 became the first ever copyright legislation replacing the application of the doctrines of equity and good conscience by the courts in Sudan.

The said law remained in force until repealed by the Copyright and Neighboring Rights Protection Act, 1996. Prof. Akolda M. Tier said, “A comprehensive copyright legislation was the only realistic, given the failure of early attempts to seek copyright protection from the sources of law.” Both the old and new laws of Sudan provides for the link between the author or the subject of copyright or neighboring, protected works, work not protected, the rights conferred , ownership, registration of works, limitations of protection, transfer of copyrights, registration of works, infringements and remedies. The 1996 addresses neighboring rights.

The copyright laws applicable in South Sudan are the laws applicable in the Sudan by the virtue of Art. 200.<sup>7</sup> The application of the Sudan jurisprudence is one of the issues this research paper has considered.

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<sup>5</sup> Article 7 ibid

<sup>6</sup> Section 9 Civil Procedure Act, an Act that repealed the Civil Justice Ordinance 1929, which empowers the Sudan, courts to apply the principle equity and good conscience in absence of legislation.

The questions that remained are whether the applications are justified by the provisions of the Transitional Constitution of South Sudan. The above background explained why both jurisprudence of the UK and Sudan continued to apply in South Sudan, thus dependency on the borrowed laws under the common law countries to remedy its lacuna in the developing legal system.

Despite the above highlighted issues, the hope is institutional frameworks that currently accords minimal protection in South Sudan. The following are some of the institutional frameworks: the Registry under (MoJ), South Sudan Investment Authority, Ministry of Commerce, Industry and Investment, Directorate of Culture, Ministry Culture, Youth and sports.

### **1.3 Objectives of the Study**

The current challenges in copyrights in South Sudan posed great threat to business fraternity, individuals and the state. This can only be addressed by enacting a comprehensive legislation to remedy the lacuna in law hence underlined the aim of this research.

This study aimed at studying the protection accorded by the current laws vis-à-vis the old and the need to enact a harmonized law. The study particularly takes the following objectives:

- i) To analyze the challenges of law relating to copyrights;

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<sup>7</sup> The Transitional Constitution, 2011, Republic of South Sudan, requires all current laws of Southern Sudan to remain in force and all current institutions to continue performing their functions and unless new laws are taken in accordance with the provisions of this Constitution



- ii) To assess the application of law relating to copyright, policy and legal framework and their impacts in protecting the owners;
- iii) To identify the gap in law relating to copyright and the possible areas for reforms on policy and legal framework ; and
- iv) To recommends areas for policy formulation, research and legal framework development of a copyright bill in South Sudan.

#### **1.4 Statement of Problem**

South Sudan faces numerous challenges and these require a clear policy development and legal framework to protect the owners from infringements of their works.

The Sudan first law<sup>8</sup> did not address adequately the relationship between the authors and state granting protection. The rights of performers were not also recognized under that law and the new technological aspects of communication of ideas. The Copyrights and Neighboring Rights Act, 1996, Laws of Sudan addresses some issues which were not considered under the old law. However, the challenges relating to the law of copyright in South Sudan are affected by the Sudanese jurisprudence which is influenced by Islamic laws which formed sources of law especially the lack of criminal aspect in Act.

South Sudan does not only need to protect the individuals but also takes into consideration the business fraternity that loss million of Sudanese Pounds (SSP) as a result of infringement of copyrights.

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<sup>8</sup> Copyright Protection Act, 1974, Laws of Sudan

### **1.5 Justification of the Study**

South Sudan having recently attained her Independence from Sudan thus joined the UN and AU respectively in 2011.

As a leading market, for businesses in the neighbouring East African countries and even international, copyrights are subject of infringements.

This results from a lacuna in the legal regime to relating to copyrights protection. Some of those who are infringing copyrights are either aware of the vacuum in intellectual property law in general.

### **1.6 Hypothesis**

With the increase in the number of infringements both domestically and internationally, there is need for not only an appropriate but also an effective means for individuals and private sector protection in the society. This research paper examines law relating to Copyrights, challenges, policy and legal frameworks and recommends possible remedies available to the problem. It is premised on the notion that law relating to copyright protection is a crucial step to individuals, business, society and the state for better exploitation of intellectual property rights.

### **1.7 Scope of the Study**

This is research covers the law relating to copyrights, challenges, policy and legal framework in South Sudan. It explores briefly the application of Sudanese laws in South Sudan. This concentrates on law relating to copyrights, challenges, policy and legal frameworks in South Sudan.

## **1.8 Research Questions**

This research entails some questions which will act as a guide towards the attainment of the research objectives. To achieve the research objectives, the research is guided by the following questions:

1. Does the current law relating to Copyright law offers adequate protection?
2. What lessons should South Sudan learn from its neighbour Sudan in regard to the law relating to copyright in general?
3. What challenges should the law relating to copyrights, policy and legal frameworks addressed in South Sudan?
4. What are the key reforms that would be necessary for considerations in the new bill?

## **1.9 Research Methodology**

This study relied on desk research as a primary source vide; internet search and written materials such as books, on-line journals, news articles, reports, policy documents and legal instruments which included regional, international and domestic documents on law relating to Copyrights.

## **1.10 Research Design**

The research design used qualitative approach as it relied on the quality provided by instruments, reports, articles and institutional frameworks and policies.

## 1.11 Literature Review

The research has widely examined a number of writings by renowned writers and academia in the field of copyrights law and critiques for the same.

This research analyzes the law relating to copyrights, challenges, policy and legal framework. It considered writing of scholars on copyrights legislation applicable; makes recommendations on the challenges, policy and legal framework.

According to Professor Akolda M. Tier, in his book “*the Protection of Copyright under the Sudanese Law*”<sup>9</sup> evaluates the law on copyright beginning with the Copyright Act, 1974 and the Copyright and Neighbouring Rights Act, 1996 with both strengths and weaknesses. According to Prof. Tier, the Copyright Protection, 1974 failed to protect neighbouring rights as it never contained a single provision on neighbouring rights instead it only concentrated on copyrights. He noted that both 1974 Act and the Copyrights and Neighbouring Rights Act, 1996 shared some weaknesses such as an infringement of a protected work not being a criminal offence but a civil in nature. He further identified limitation of civil remedies to copyright in both Acts. However, the research was conducted in 1991 and therefore it is now 22 years, which renders professor Akolda’s findings to be out dated. Therefore, the research is to look at the current trends relating to copyrights law in south Sudan.

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<sup>9</sup>6 Arab Law Quarterly, 52 (1991).

According to Adams & Adams, in an Article "*the Status of Intellectual property rights law protection in South*", proprietors and practitioners alike are expressing concern about the protection of IP rights in the recently constituted territory of the Republic of South Sudan.

This article is a brief report on the existence of IP related laws and institutions in South Sudan. It analyses the current state of the law relating to intellectual protection in general.

The article noted Article 200 of the Transitional Constitution of the Republic of South Sudan, 2011 which came into force on the 9<sup>th</sup> July, 2011, which provides that "all current laws of Southern Sudan shall remain in force and all current institutions shall continue to perform their functions and duties, unless new actions are taken in accordance with the provisions of this Constitution".

The report further analyses the "new actions" reserved to in Article 200 as probably envisaging the promulgation of domestic intellectual property laws by the South Sudanese Legislature, which consists of the National Legislative Assembly and the Council of States. It also noted the "current laws", in South Sudan as probably referring to the laws which were in force in the territory when the Transitional Constitution came into force, which would include the Sudanese Copyright and Neighbouring Rights Act, 1996 and the Trade Marks Act, 1969 and regulations.

According to the authours, if the analysis is correct, it would appear that intellectual property rights in South Sudan are currently regulated and protected in terms of the Copyright and Neighbouring Rights Act, 1996 and the Trade Marks Act, 1969 and regulations.

It would also appear that the Registry, which falls under the then Ministry of Legal Affairs and Constitutional Development (currently Ministry of Justice), is indeed allowing the filling of trademarks applications, but merely follows a deposit system whereby a certificate issued on settlement of official fees.

However, it is not clear whether this is being done under the auspices of the Trademarks and its regulations or other legislation, because the process appears to be contrary to the requirements of this Act.

However, what is becoming increasingly clear is that the registration secured with the Registry in Khartoum, Sudan are only now valid in North Sudan and it is unlikely that there will be any priority given when filling fresh applications in South Sudan.

It is difficult to be certain regarding the regulatory framework to obtain trade mark protection until associated rules, processes and systems have been formalized.

This article was written two years ago and was supposed to be updated according to the authors to reflect further changes in law relating to intellectual property in South Sudan. The report has been useful to this research in IP field of copyright given that the status has not changed unlike a trademark which has a Bill in place now.

### **1.12 Chapterization**

Chapter one gives general introduction of the law relating to copyrights. The chapter divides the research into smaller sections to wit: introduction, background of the study, statement of purpose, objectives, and justification of the study, hypothesis, and scope of the study, research questions, methodology, research design, literature review and chapterization, chapter two postulates the historical background of copyrights law in South Sudan, chapter three mainly deals with the critical analysis of the law relating to copyrights law in South Sudan looking at the past and present laws, chapter four offers analysis of the policy development and legal framework of copyright law.

The lessons learnt based on comparison between neighboring country legal framework available to build on and chapter five considers challenges faced in copyrights, gives conclusions and recommendations to identified challenges in the current affairs of copyright; policy and legal frameworks for a comprehensive legislation.

## CHAPTER TWO

### 2.0 Historical Background of Copyrights law in South Sudan

#### 2.1 Introduction

From the ancient time of civilization there has always been a need to protect works from exploitation. Copyright as a branch of intellectual property was originally intended to protect authors, artists and composers but not individual designers or engineers.<sup>10</sup>

The Sudan Copyright legislation does not adequately define copyright instead mentioned it to include moral and economic rights.<sup>11</sup> However, the world copyright clearly defines copyright as literary and artistic works that include production in literary, scientific, books musical compositions, lithographic, photography.<sup>12</sup>

Section 5 of the Copyrights and Neighboring Rights Act specified works that are eligible for copyrights protection and include written works such as books, magazines, periodicals, works of fine arts, drawing, dramatic works, musical, and audio-works, photographic etc.

Copyright has been argued as a property right thus this led to the enactment of the world first copyright legislation.

The global recognition of copyright necessitated the formation of world harmonized copyright law (Berne Convention on Copyright 1886), which was aimed to promote copyright law and grant its owners protection in all member states.

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<sup>10</sup> Robin Jacob; Daniel Alexander: *Guide to Intellectual Property: Patents, Trademarks, Copyrights and Designs*, 4<sup>th</sup> edn (1993), Sweet & Maxwell.

<sup>11</sup> Section 3 1996 Copyright and Neighbouring Act

<sup>12</sup> Article 2 Berne Convention



In essence, copyright exists to protect the interests of owners thus courts have made no considerations for any plagiarisms as held in the landmark case of *University of London Press Ltd v University Tutorial Press Ltd*,<sup>13</sup> where court stated:

*“There remains the rough practical test that what is worth copying is worth protecting”.*

It follows therefore, that works which results from any mechanical labor and no relevant skill used would be accorded protection.

### **2.3 Copyrights in South Sudan**

Copyright developed from Statute of Anne of 1710, 1911 Copyright, and the 1956 of UK Copyrights laws; applied to Sudan by the way of ordinance through the doctrines of equity and good conscience as applied by the courts of law.

In Sudan, the Copyright Protection Act, 1974 was the first legislation that replaced the application of UK laws on copyrights in the country and remained in force until its repeal by the current law enacted in 1996 (Copyright and Neighbouring Rights Act).

The laws of Sudan are applicable in South Sudan under Article 200,<sup>14</sup> that provides for the continuity of laws and institutions to remain in force until new actions are taken in accordance with the constitution and any other law. The application of foreign legislation

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<sup>13</sup> (1916) 2 Ch 601 at 610

<sup>14</sup> Transitional Constitution, 2011 of South Sudan

justified this research as South Sudan lacks its own law relating to copyright, policy and legal framework to regulate this field of intellectual. However; it is hoped that for time being, the gap can be filled by continued application of the existing laws from such other jurisdictions stated hereinabove.

The Ministry of Justice, Republic of South Sudan is responsible for copyrights matters in the country among other relevant institutions that partner with the Ministry and include Ministry of Commerce, Industry and Investment which also collaborate with MoJ in this in regard, Ministry of Youth and Culture; South Sudan Chamber of Commerce and South Sudan Investment Authority.

#### **2.4 Work Eligible for Protection**

Copyright is not available for every piece of work but only such work that has been reduced to a form or expressed. According to Berne Convention, an idea is not protected under copyright until it is expressed that it can be accorded necessary protection.

It is essential, when considering any copyright problem, first to decide whether the material which is being copied is within one of categories of work set out in the Act.

The case of *Tavener Rutledge Ltd v Trexapalm*,<sup>15</sup> illustrates the essential principle that copyright can only exist in a work which can be brought within one of the categories defined in the Act.

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<sup>15</sup> (1977) RPC 275

Section 4 of the Copyright and Neighbouring Rights Act, 1996 adopts a classification of protected works as of literature, arts or science and includes literary, dramatic, artistic, musical works etc. However, it should be noted it is only architectural works of artistic craftsmanship which require any artistic quality in order to fall within the definition and they rest do not.

In the case *Melot v Mothercare*<sup>16</sup> the court held that a cape designed to be worn by a baby was a work of craftsmanship and was therefore not protected in the way of copyright. Walton J held that the test as to whether something is a work of craftsmanship was to establish whether or not artist craftsman intended to create a work of art.

There are criteria needed for copyright protection which are permanent form and originality. In the case of *University of London press v University Tutorial Press Ltd*,<sup>17</sup> the court in holding the *de minimis* principle held that the word “EXXON” could not be classified as an original literary work.

The term originality refers to the manner in which the work is reduced to a material form and not to the originality of the idea upon which the work is based.<sup>18</sup>

In the case of *Ladbroke (Football) Ltd v William Hill (Football) Ltd*,<sup>19</sup> where it was stated that original requires:

*“Only that the work should not be copied but should originate from the author”.*

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<sup>16</sup> (1984) FSR 358

<sup>17</sup> *ibid* n. 20

<sup>18</sup> Flint Michael F, *A User Guide to Copyright*, 3<sup>rd</sup> ed (1990), Butterworth & Co Publisher Ltd

<sup>19</sup> (1964) 1 WLR 273 at 291

That means for a work to become eligible for copyright protection, a work would require reasonable amount of skill and effort in the creation it.<sup>20</sup>

This clearly underlined the doctrine of sweat of the brow which emphasizes copyright as a reward to hard work needed in compiling works. Notably, works exhibiting minimal creativity such as maps and such other compilations or collections of facts, were entitled to copyright as a reward for the labor involved.

However, Supreme Court in *Feist Publications v Rural Telephone Service Company*,<sup>21</sup> (1911) 111 Sct 1282 supra, rejected the sweat of the brow doctrine and held that originality is a *sine qua non* copyright, regardless of author's efforts in collecting and assembling facts.

On the other hand, tangibility is another prerequisite and requires the work to be reduced to some material form. The Berne Convention on copyright grants protection to works that have been reduced to material form such as films, sound recording etc.

However, with poetry, a work may not necessarily need to be in a tangible form thus the poet may recite a poem from the memory without reducing it to form.<sup>22</sup>

There is no copyright in real events, before they are reduced to writing, or some material form such as the record of telling of a story. No copyright in the way in which they are resolved into writing however. In the case of *Harman Pictures NV v Osborne*,<sup>23</sup> it was held that although the events contained in a book by Cecil Woodham-Smith, entitled

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<sup>20</sup> Feist Publication Inc v Telephone Service Company (1991) 111 Sct 1282

<sup>21</sup> Ibid

<sup>22</sup> Article 2 (2) Berne Convention as revised

<sup>23</sup> (1967) All ER 324

“The Reason why (which was an account of the charge of the Light he the Brigade and the events leading up it) were common to both that book and John Osborne’s screenplay, there was nevertheless,an infringement of copyright in a book by the screen play who used the same characters and incidents in much the same characters and arrangement as appeared in the book.

## **2.5 Ownership of Copyright**

Because copyright arises upon creation of work, its ownership is not complicated as opposed to other branches of intellectual property such as patent, here the ownership rest with the creator.

According to section 9, initial ownership of copyright is vested in the natural person or person who created the works.<sup>24</sup>

With literary, dramatic, musical and artistic works, first ownership rests in the authour or co-authours unless the exception concerning employment applies.<sup>25</sup>

However, for all types of work under consideration, an employer becomes the initial owner of the copyright if it is made by his employee in the course of employment and in absence of contrary agreement.

A senior executive in a firm of management consultants wrote public lectures about budgetary control of firms, and he was entitled to the copyright in them.<sup>26</sup>

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<sup>24</sup> Sudan Copyright and Neighboring Rights Act, 1996

<sup>25</sup> Section 11 Copyright, Design and Patent Act1988 of UK

<sup>26</sup> Stephenson Jordan v Mc Donald & Evans (1951) 69 RPC 10 CA

Similarly, in the context of copyright ownership Denning L.J suggested that the old test of whether the person contracting for work could exercise control over how it was done became obsolete; the question ought rather to be whether the person performing it was doing so as an integral part of the business.<sup>27</sup> Where there is contrary agreement to or an informal agreement or other circumstance that gives rise to fiduciary obligation, and then may have the effect in equity that the author from the onset holds the copyright in trust.

Thus illustrated in *Spy catcher case, the ex-MI5 officer*, who wrote memoirs in flagrant breach of confidence owed to the Crown, was said by members of the House the Lords to be under such an obligation.<sup>28</sup>

## 2.6 Duration of Copyright

Copyright protection of authors' has been categorized according to economic and moral rights of the author. According to section 3 (1) of the Copyright and Neighbouring Rights Act, 1996, an author of a copyright works is accorded protection for the moral rights during his life time. However, copyright for the economic right of the author last during his lifetime and 50 years after his death (subsection2) supra. The protection for other works such as photographic pictures and cinematographic films, audio visual, works publish for the first time after the death of the author especially where it consists of several parts or volumes so that each part or volume shall be published separately.

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<sup>27</sup> Stephenson Jordan case supra n.28 above

<sup>28</sup> Ah-Gen v Guardian Newspapers (No.2/1988) 3 All ER 545 at 645 (Lord Keith) at 647 (Lord Bright man; cf at 604 (Lord Goff) Note, in context of good faith, moral right of privacy in certain photographs and films.

However, where the work has been co-authored, the period shall run from the death of the last surviving author.<sup>29</sup>

Assignment and transfer of copyright has been illustrated in the case of *Novello & Co. Ltd v Hinrichsen Edition*,<sup>30</sup> questions arose whether certain copyrights had been owned by the enemies during the period after September 3, 1939.

Wynn-Parry J held that on the death of a foreign owner of English copyrights, the copyrights in question vested in the President of the Probate Divorce and Admiralty Division of the High Court or in the Crown; being liable to be diverted on an administrator of the estate being appointed in England.

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<sup>29</sup> Section 13 (4) of Sudanese Statute of 1996 on Copyright

<sup>30</sup> (1951) Ch 595

## CHAPTER THREE

### 3.0 A critical analysis of the law relating to copyrights in South Sudan.

#### 3.1 Introduction

Copyright is the bundle of exclusive legal rights concerned with the protection of literary and exclusive works. The aims of the copyright are to award authors for the intellectual effort and at the same time permits science culture and Art. In South Sudan it is regulated by Copyright and Neighboring Rights Act 1996, which repealed and replaced the Copyright Act, 1974. It is the set exclusive rights granted to the author upon creation of an original work, including the right to copy distribute and adopt work<sup>31</sup>.

#### 3.2. Copyright and related rights form major branch of intellectual property

Copyright protects the rights of an author to prevent the unauthorized copying or modification of work of authorship including literary works such as books or computer programs, dramatic works such as plays Musical works, audio works of visual art such as movies or videos and works of musical works, technical drawings, maps and photographs.

Closely related to the copyright is the area related to the rights or Neighboring rights which protect right of performers, producers of phonograms (sound recording) and Broadcasting organizations to prevent the authorized recording of broadcast of performances and authorized copying of such recording<sup>32</sup>.

The Law of Copyright is applicable to works created by Sudanese citizens or Residents works first published in Sudan irrespective of authours nationality, works created by

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<sup>31</sup> Prof. Akolda Tier Implementation of Copyright in Sudan

<sup>32</sup> "Prof. Akolda Tier Implementation of Copyright in Sudan



national residents in Sudan, ARIPO, WIPO and UNESCO. Sections 4 of the Act of work first published in member states of TRIPS.

It is the regime of the Law that protects literary works musical and artistic works, broadcasts and related works which intends primarily for the protection of author's arts and composers are paid for their work.

The objective of copyright law in Sudan was intended, to address international standards and is manifestly set out in the Act<sup>33</sup>. This has updated the law on copyright to bring it into line with international standards by repealing of the out dated copyright Protection, Act 1974.

### **3.3 A critical analysis of the main provisions of Copyright Law in South Sudan**

#### **3.3.1 Definition of Copyright.**

Since copyright plays an important role in the socio-economic development of South Sudan.

It exists to prevent persons from taking unfair advantage of authours creative efforts. In

**University of London press Ltd v University Tutorial press Ltd<sup>34</sup>**, the court held that what is worth copying is prima facie worth protecting.

#### **3.3.2 Definition of Neighboring Rights.**

“Neighbouring rights” include rights of performing artistes in their performances, rights of producers and music publishers and rights of broadcasting companies in their programmes and others as is provide, under Part VI;

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<sup>33</sup> Copyright and Neighboring Rights Act 1996

<sup>34</sup> (1916)2 ch.601

### **3.4 Work eligibility for Copyrights**

Works eligible for copyright include literary works, musical Works, artistic works,

Cinematography films, gramophone records and broadcasts. This is provided in S.5 (1) of the Copyright and Neighbouring Rights Act,

For such works to become eligible for copyright, sufficient effort must have been expended to make the work original in character and the work must have been written down, recorded or otherwise reduced to material form with or without consent or be a work which is intended to be used by the author as a model or pattern to be multiplied by any industrial process. As per Section 4(1) of the Copyright and Neighbouring Rights Act, 1996.

Copyright is conferred under Section 4 of Copyrights Act and Neighbouring Rights, on authors who are Sudanese citizens or are domiciled /resident in Sudan or a listed country or on a Corporation incorporated in Sudan or a listed country. A work, other than a broadcast, which is first published in Sudan or a listed country and has not been the subject of a copyright by virtue of nationality or residence, is also eligible. Copyright may also be enjoyed by Government or a prescribed international body in respect of an eligible work made by or under its direction or control.

The duration of a copyright is generally fifty years as per section 13 of the copyright and Neighboring Rights Act.

### **3.5 Need for Reform of the copyright law**

A major weakness of the existing law is that infringement of a copyright is not a crime,

civil action for damages and injunction being the only remedies (Prof. Akolda 1991).

Secondly, there is no legal requirement for the copyrights to be registered, which makes enforcement difficult in comparison with other intellectual property such as Trade Marks (Prof. Akolda 1991)

### **3.6 Consequences of Copyright.**

The owner of a copyright is entitled to the exclusive right to control or do in South Sudan or other country the distribution of copies; public performance for payment in the case of literary, musical or artistic works; public exhibition for payment in the case of films; public communication in the case of broadcasts and broadcasting in respect of all the works. This is captured under Sections 9, 10 Copyrights Act and Neighbouring Rights Act.

The copyright is, however, limited in that it does not apply to the distribution, performance and broadcasting: for purposes of criticism, review or the reporting current events if such public use is accompanied by an acknowledgement of title and authorship; by way of parody, pastiche or caricature; for inclusion in a film/broadcast of an artistic work located in a place where it can be viewed by the public; involving the incidental inclusion of an artistic work in a film or broadcast; involving the inclusion of not more than two short passages of the work where the collection is designed for use in educational institutions and carries an acknowledgement of the title and author of the work; involving the use of the work for purposes of instruction in educational institutions; involving the distribution of sound recording of a published literary or musical work for which fees have been paid to the copyright holder.

### **3.7 Ownership of Copyright**

The incidents of ownership of a copyright are the rights to: have the copyright vest in the author; assign ownership, and license the copyright.

The infringement of the copyright entitle the owner to damages for the loss arising from the infringement, an injunction to restrain further infringement and an injunction requiring the delivery up to the court and destruction or other disposal of copies or articles directed by the Court.

With regard to licensing, the Minister may intervene to grant a license in respect of the use of a copyright if the license has been unreasonably withheld by the owner or has been granted on unreasonable terms, ibis is fortified by Section 14 of Copyrights and Neighboring Rights Act.

### **Conclusion**

This chapter discussed ,Copyright and related rights form major branch of intellectual property, A critical analysis of the main provisions of Copyright Law in Sudan, Work eligibility for Copyrights, Need for Reform of the existing copyright law in South Sudan, Consequences of Copyright and Ownership of Copyright<sup>35</sup>.

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<sup>35</sup> Article 200 of Transitional Constitution of the Republic of South Sudan provides for the application of all the existing laws in South Sudan

## CHAPTER FOUR

### 4.1 Overview of Policy and Legal Frameworks relating to Copyrights in South Sudan

#### 4.1.1 Historical Background of Copyrights in South Sudan

Copyright came about with the invention of the printing press and with wider public literacy. As a legal concept, its origins in Britain were from a reaction to printers' monopolies at the beginning of 18<sup>th</sup> Century.<sup>36</sup> In South Sudan, copyright is regulated by the Copyright and Neighbouring Rights Act, 1996 laws of Sudan.

### 4.2 International Instruments relating to Copyrights

#### 4.2.1 Berne Convention for the Protection of Literary and Artistic Works

The Berne Convention recognized copyrights among the sovereign nations automatically rather than bilaterally. Therefore, copyright for creative works do not have to be declared hence an author does not need to register or apply for copyright in countries adhering to Berne Convention as they are entitled to the same protection in other countries just like home.

For South Sudan, the convention applied to it under the provision of the Constitution as an existing law.<sup>37</sup>

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<sup>36</sup> [www.wikipedia.org/wiki/copyright#history](http://www.wikipedia.org/wiki/copyright#history) assessed on 30/07/2013 at 10:00pm

<sup>37</sup> Article 200 of Transitional Constitution, 2011

However, the major issue is not all the existing laws or institutions which south automatically submit to or implement their applications as it has authority to accept or reject them.

#### **4.2.2 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)**

The TRIPS Agreement promote international trade by ensuring that effective and adequate protection of intellectual property rights as well as measures and procedures to enforce intellectual property rights do not become barriers to legitimate trade.<sup>38</sup>

According to Article 9 of the Agreement, members are obliged to comply with the provisions of the Berne Convention particularly Articles 1 and 21 of (1971).

Notwithstanding that South Sudan is a growing market to the global trade especially the new technological aspects, it has not submitted yet to the TRIPS Agreement to regulate and promote; with clear procedures for enforcement and redress in rising cases of copyrights within the country and beyond (however Article 200 of Transitional Constitution on existing laws and institution continuity).

#### **4.2.3 Buenos Aires Convention**

The treaty apply to North and South American countries hence allows for protection of creative works as long they contain a notice informing that the creator claims copyright on it. The Buenos Aires Convention instituted the *rule of shorter term*, where the length

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<sup>38</sup>Objectives as set out in the Preambular paragraphs to TRIPS Agreement

of the copyright term for the work in a country was which was shorter- the length of the term in the source country, or the protecting country of the work.<sup>39</sup>

#### **4.3 Key Policy Issues and Legal Frameworks relating to Copyrights in South Sudan**

At independence in July, 2011 South Sudan inherited the existing Sudan system on copyright, including the whole pieces of legislation. The transitional period beginning from July, 2011 to 2015 is a challenging time for the country to put in place a clear policy and legal framework relating to copyright protection.<sup>40</sup>

##### **4.3.1 Legal Frameworks relating to Copyright in South Sudan**

Apart from the then existing laws of Sudan, there are few laws that alternatively provide for legal framework in South Sudan hence the following:

###### **a) Transitional Constitution of the Republic of South Sudan, 2011**

The Constitution as the supreme law of the Republic of South Sudan provides to the effect that all other laws in the land to be in conformity with its provisions; thus any law other that is inconsistent with it; shall to the extent of inconsistency be declared null and void.<sup>41</sup>

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<sup>39</sup> All the Buenos Aires countries are members of the Berne Convention

<sup>40</sup> The country is struggling financially from closure of oil production which account for nearly 98% of income; and on the hand lack manpower is another serious issue hampering process for speedy reforms as the Ministry of Justice responsible for legal framework and policy development depends on foreign draftsmen; hence lawyers are Arabic pattern when the country's official language is English.

<sup>41</sup> Supremacy of the Constitution Article 3 (1)

Under the Transitional Constitution, property right is among other recognized rights hence Article 28 (1) provides:

*“Every person shall have the right to own or acquire property as regulated by law”*

Such provision encompasses intellectual property rights.

**b) Ministry of Legal Affairs and Constitutional Development Organization Act, 2008**

The Act was enacted to regulate the then Ministry of Legal Affairs and Constitutional Development currently Ministry of Justice. Section 12 establishes and mandates the Registry to register patents, trademarks and all intellectual property rights in South Sudan.<sup>42</sup> The Act only provides for registration; however it is silent on enforcement or remedies in cases of a dispute pertaining copyrights.

By the virtue of the mandate, the Registry undertakes copyright and other intellectual property rights registration but without proper procedure on the rights enforcements.

**c) The Sudan Copyrights and Neighbouring Rights Act, 1996**

The Act is divided into Eight Parts: Part I Preliminary Provisions; Part II Scope of Copyright Protection; Part III Ownership of Copyright; Part IV; Transfer of Ownership of Copyright (both moral and economic rights); Part V Registration of works and Contracts (Registrar’s Office responsible for registration); Part VI Protection of Neighbouring

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<sup>42</sup> The Act provides for the administration of copyrights



Rights (Rights of Performers); Part VII deals with enforcement mechanisms of copyrights and legal consequences thereof; deals with final provisions such as duration of neighbouring rights protection.

This Act protects the rights of individual in literary works, artistic works, cinematography works, gramophone records, and broadcasts. It applied to works of Sudanese authors or works of aliens published or made available for the first time in Sudan; as well as works of Sudanese nationals published in a foreign country.<sup>43</sup> The owner has exclusive rights to the distribution of copies, public performance for payment and broadcasting of work.<sup>44</sup> The remedies available for infringement include damages and injunction.<sup>45</sup>

The major weakness under the law relating to copyright is that infringement is not a crime. Only a civil action can be filed in order to obtain damages or an injunction. This makes it difficult to enforce copyright as opposed to trademarks.

#### **d) Judicial Decisions and other Administrative Decisions**

There is a body of case law contained in the law reports consisting of judgments of copyright cases. The cases dealing with the copyright as it existed before Copyright Act came into force are of particular important, for example when determining what constitute plagiarism and where judgments on a matter of degree.

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<sup>43</sup> S. 4, 1996 Statute

<sup>44</sup> S.5, 6,,7,8, 9 & 10 , 1996 Statute

<sup>45</sup> S. 37 & 38, 1996 Statute

Under Part of the 1996 Sudan Statute, the courts are empowered to decide on a dispute in regards to copyrights issues where any aggrieved party has by an application instituted a suit redress.<sup>46</sup>

The Act also recognizes other administrative structures to handle dispute and they includes Police, Registry, Chamber of Commerce and Investment.

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<sup>46</sup> Section 3 of 1996 Act

## **CHAPTER FIVE**

### **5.1 Challenges of the Law relating to Copyright, Policy and Legal Frameworks, Conclusions and Recommendations**

This chapter discusses the challenges of the law relating to copyrights, policy and legal frameworks and presents the conclusions and recommendations to the findings.

The 1974 Copyright law was repealed in order to conform to international treaty where its intention particularly shifted to the Berne Convention for Literary and Artistic Works of 1886. This was so because the great talent to which a treaty has provided for copyright was not fulfilled by the law.

Another key issue that necessitated the repeal of the law was its lack of the provision for technological aspects such the internet and also its failure to regulate neighbouring rights.

### **5.2 Copyrights Challenges**

Some the challenges facing copyrights in include such acts in relation to copyright work, which if done without the authorization of the owner, and whether or not the person doing the act knows that the act is in breach of a restricted act, constitute an infringement of copyright (Flint, 1990).

#### **5.2.1 Copping**

Copyright in a work may be infringed by coping it, issuing copies of it to the public or by making adaptation of it, coping work so far concerns it literary, and dramatic, musical and artistic copyright means of reproducing the work in material form.

Some of the material forms are specifically listed and include; (1) storing the work in any medium by electronic means which clearly covers computer storage and presumably extend to the incorporation of the work in record or film, (2) converting a two dimensional artistic work into three dimension and versa visa.

### **5.2.2 Issuing copies, rental and lending**

Issuing copies of the work to the public is a form of primary infringement which relates to the first releases of copies into circulation. This is one of the key challenges faced by copyright owners in South Sudan.

### **5.2.3 Dealing with copies**

Infringement of all forms of copyright may be committed by the defendant concerned in the commercial exploitation, if he knows or has reasons to believe that the copies were infringements when they were made. In the cases of imported copies, these include a notional infringement that is copies that would have infringed if they had been made or would have constituted a breach of exclusive licences, agreement relating to that work<sup>47</sup> .

### **5.2.4 Fair dealing**

The requirement of substantial taking prevents the owner from objecting to minor borrowing from his own copyright work. There are three most important exceptions to the act of fair dealing and include the research or private study that is covering purposes

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<sup>47</sup> Section 27 Copyright , Design, Patent Act 1988 Laws of England

of research or private study which now applies to the copyright in literary , dramatic, musical and artistic works and public editions.

### **Reporting current news**

The second dealing permits all works other than photographs to be used for current news. Photographs have been differently treated in order to preserve a full value of holding a unique visual report of all person or event.

### **Criticism and review**

The third dealing is allowing works to be used for criticism or review of themselves or another work one pre-condition of fairness being other than the source should be sufficiently acknowledged.<sup>48</sup>

### **5.2.5 Lack of Provision on Teaching of Copyright**

The law relating to copyright is inadequate for the need of educational institutions, libraries and archives.

In the United States, for example, section 108 of the Copyright Act, 1976 permits Libraries and Archives to produce not more than one copy of the work.

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<sup>48</sup> Section 30 Copyright , Design, Patent Act 1988 Laws of England

Educational photocopying of entire copyright works is desirable since, as so often happens; teaching materials are in short supply or lost through wear and tear if such is the case in USA which allows reproduction of one copy, then the argument is all stronger in a Country such as South Sudan which allows small evaluation only.<sup>49</sup>

Section 9 (3) of the Copyright and Neighbouring Rights Act, 1996 provides for the right to copy short quotations from works already published and the right to reproduce drawing photograph, design, inspection or map.

This provision can be summed up as providing for fair use which necessitates carefulness to avoid infringement. The law does not specify what exactly amount to a fair use.

The Act is however silent on digital learning or e-learning services which is the high-tech learning through distance medium of communication such as the internet.

#### **5.2.6 Freedom of expression as contained in the political speeches**

The freedom of expression enshrined in the Constitution also may include political speeches which in most cases construed a public privilege or domain; thus making it hard to be regulated by law.

#### **5.2.7 Government and Judicial Proceedings**

Government or judicial proceedings posed greater challenge which the law does not protect since Hansards (records of parliamentary Proceedings) are made available for public domain.

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<sup>49</sup> S.9 (3) of the Copyright and Neighbouring Rights Act, 1996

### **5.2.8 Judicial decisions of courts of law**

The law relating to copyright does not protect judicial decisions and therefore they are available for the general public access and use; hence sometimes subject of infringement in absence of regulation by law. They can be quoted or referred to without permission. Now, the question is whether the extent of fair use can justify the availability of judicial decisions to the general public domain.

### **5.3 Major Challenges for law relating to copyrights, Policy and Legal Frameworks in South Sudan**

The following are some of the major challenges faced in policy frameworks implementation but not limited to those discussed herein under:

#### **5.3.1 Financial Constraints**

The Government of the Republic of South Sudan is generally operating under austerity measures due to the lost of oil revenues from a closure of production in January, 2012 over pipeline fees dispute with Sudan to transport oil to the international market at Port Sudan.

The ministry of Justice, responsible for policy formulation and development of legal framework lacks funds needed to finance drafting of new Bills; thus it cannot also employ experts to draft the law. Besides, the other factor facing MoJ is that the Gazette Department is not well staffed with qualified Gazette Officers because the officials went

for further studies leaving the Ministry to appoint other new staff members to do the work without relevant skills.

### **5.3.2 Inadequate Man-Power**

The Government institutions responsible for the management of copyright such as the Registry at the Ministry of Justice lacks staff with specialized skills in drafting or handling of copyright. For example, the Directorate of Legislation, Gazette, Publications and Printing lack personnel to help in Gazetting, printing and publications of the laws. The ministry at large is staffed with majority of Arabic pattern lawyers who only conversant in Arabic language yet the Constitution provides for English as the official language of the draftsman.

Unless such issues are addressed, the law relating to copyright, policy and legal framework is still a challenge to offers any meaningful protection to owners.

### **5.3.3 Lack of Proper Coordination between Partners to ensure Copyrights.**

There is usually lack of coordination between the development partners offering technical support to the line institutions of Government such as MoJ. The World Bank (WB) Group International Financial Corporation (IFC) branch offers technical support on drafting of commercial laws to the Ministry of Justice (Registry) and Legislation Directorates; however IFC (WB) find it hard to initiate any technical support or assistance needed by the Ministry due to reluctance in coordination.



The chain of coordination between the Ministry of Justice; where the Bills are initiated and forwarded to the Cabinet (Council of Ministers), Parliament and the Office of the President where the Bill finally goes for President's Assent are sometimes not properly coordinated.

#### **5.3.4 Weak or Outdated Laws in South Sudan**

One of the major problems facing South Sudan is the prevalent of mostly weak or outdated laws under the pretext of existing laws or continuity of institutions provided by the Constitution. An example is the Judiciary which still adheres to some old practices under the Sudan laws that are constrained by sharia laws. It has to be noted that there is no legal requirement for one to register a copyright; in other words not compulsory for one to do so. There is also reluctance on the side of enforcing agencies where copyright has been infringed.

#### **5.3.5 Inadequate Information (on the law relating to Copyright)**

The rates of illiteracy in the Country accounts for nearly 80% of the general population and as such majority of the people do not generally understand the basic rights and obligations under the law. The few technical personnel could not help the general public who are ignorant to know or understand the law relating to copyright.

The Registry under the Ministry of Justice does little within sensitizing the general public given that they are not autonomous in nature.

It is one of the mandates of the Ministry of Justice; to translate the laws into such other languages for the people to understand them with ease. This has not happened yet.

The recently established South Sudan Law Reform Commission has not even initiated any single Bill in this particular area of IP or another, but citing lack of funds as their biggest stumbling block in this regard.

### **5.3.6 Lack of Expertise on Copyright**

In South Sudan, the lawyers or legal practitioners have the passion of handling only two areas of Civil (commercial) and Criminal and no specialists in specific areas of legal practice. The advocates generally overlooked areas such as copyrights that hardly brings money in terms of litigation due to lack of cases currently. Lack of specialization in copyright is understandable given the fact that Juba University (main law school in the country) does not really provide for law relating to copyright on its syllabus as a compulsory subject.

South Sudan, unlike Uganda where IP law is offered at the bar course (of Law Development Centre) LDC for those other students who did not do it at law degree level.<sup>50</sup>

There is no bar course available in the country to offer an alternative to copyright where students never come across the course unit at their bachelors level.

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<sup>50</sup> J. Axwire, Current intellectual property policy issues in Uganda, Uganda Living Law Journal) 2003 P.21

The Registry at MoJ has shortage of expertise in the field of copyright as only lawyers who are conversant in Arabic pattern and not technical personal handle copyright.

This explains why the law relating to copyright, policy and legal framework is not formulated in the country instead there are attempts on trademark Bill as a result of technical support by the World Bank. (IFC Group).

## 5.4 Conclusions

The research set out to explore the law relating to copyright, challenges, policy and legal framework in South Sudan. It has revealed that South Sudan has no law relating copyright or policy and legal framework of its own to regulate this branch of IP instead depended on existing laws of Sudan.

This research noted that the institutional framework provided by the Ministry of Justice (Registry), failed to provide clear mechanisms for copyright enforcements as well as policy and legal frameworks. In an interactive discussion with the Director of Legislation Gazette, Publications and Printing, MoJ who is responsible for drafting of the Bills; he indicated that no attempts yet to develop or initiate a comprehensive policy and legal framework to regulate the law relating to copyright soon. The Director attributed so to financial constraints and lack of expertise in the new field of copyright.<sup>51</sup>

The research also indicated that the South Sudan Law Reform Commission is not playing active in spearheading reforms in intellectual property law citing lack of finances to facilitate their work. There was an indication of lack of coordination among the key institutions responsible for intellectual property management which is a key to any success.

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<sup>51</sup>Discussion with Hon. Lako Loggale Legge , Director for Legislation, Gazette, Publications and Printing, Ministry of Justice, Republic of South Sudan

## **5.5 Recommendations**

With the challenges facing law relating to copyright, policy and legal framework development in South Sudan, this research recommends the following:

There should be adequate allocation of resources to the line institutions to help them speed up the processes of reforms in policy and legal frameworks development for copyright regulation in the country. It is hoped that when resources are provided and monitoring is done to ascertain the level of process; the end result can be achievable within a given time frame.

That any new policy have to consider the current challenges and come with a comprehensive policy that addresses all the issues identified such as weak laws or outdated, inadequate enforcement mechanisms in place. The research also recommends drawing a comparison from the current Sudanese laws and includes any area that has been left in that law.

This research further encourages a conduct of IP research from a national strategic perspective to facilitate national debate and policy formulation in South Sudan; and to provide IP researchers with opportunities to publish their work, both at the national and international level.

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