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**COPYRIGHT ENFORCEMENT AS AN ENABLER FOR
CREATIVE INDUSTRIES IN THE KINGDOM OF ESWATINI:
FOCUSING ON THE MUSIC INDUSTRY**

BY

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**A DISSERTATION PROPOSAL SUBMITTED IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF
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Abstract

The research mainly sought to analyse the role of copyright enforcement in enhancing the creative industry in the Kingdom of Eswatini mainly focusing on the music industry, with the main object of coming up with strategies for ensuring that copyright is recognized, supported and effectively utilized to achieve its intended benefit in the development of the country's economy. Acquiring a copyright over one's creative work is one-step towards achieving maximum economic and personal returns, however if this right cannot be effectively enforced it is of no value. Copyright enforcement is therefore one of the pillars of a healthy copyright system as such this paper looked at copyright enforcement in the Kingdom of Eswatini with the intention of exploring how it can be used to enhance the creative industry. The study used the economic theory in carrying out the research. In this regard, the international legal framework on copyright enforcement was discussed as well as the Eswatini legal and institutional framework for copyright enforcement in order to ascertain whether there were any shortcomings that negatively affect the industry. The researcher came across various constraints such as very poor response from informants, technical communication issues financial and time-constraints among others. However, despite these limitations, the paper managed meet the objectives of the study mainly with respect to analysing the copyright system of the country, ascertaining the level of knowledge and awareness on copyright in Eswatini as well as identifying the gaps on the Copyright legislation with respect to copyright enforcement. Copyright infringement was found to be the main obstacle for the music industry in the country, especially piracy. This was mainly attributed to the

failure to review the old Copyright Act for over a 100 years, Lack of copyright awareness among others. The paper further came up with recommendations in order to ensure the copyright enforcement pillar is effectively used to enhance the music industry. The main recommendations entail development of an IP policy, full implementation of the new Copyright Act, building capacity and awareness on copyright among others.

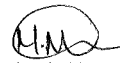
Key Words: Copyright, enforcement, economic theory, music-industry, legal-framework, institutional-framework, infringements, piracy

Declaration Page

I declare that this dissertation is my original work except where sources have been cited and acknowledged. The work has never been submitted, nor will it ever be submitted to another university for the award of a degree.

NOBUHLE LORRAINE MATSEBULA

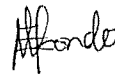
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Dedication Page

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List of Acronyms

ACESWA	Association of Christian Artists of Eswatini
ARIPO	African Regional Intellectual Property Organization
ERA	Eswatini Revenue Authority
ESWAMA	Eswatini Association of Music Artists
EBIS	Eswatini Broadcasting and Information Station
ENAC	Eswatini National Arts and Culture
ETVA	Eswatini Television Authority
MCIT	Ministry of Commerce Industry and Trade
MICT	Ministry of Information Communication and Technology
MSYC	Ministry of Sports, Youth and Culture
TRIPS	Trade Related Aspects of Intellectual Property
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

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CHAPTER 1: INTRODUCTION

1.1 Introduction

The global economy over the years has been transforming from agrarian and industrial economies to a knowledge-based economy, which has an impact in all spheres of economic and social life (Kotulic R et al (2020)). A number of economies aspire to be successful and competitive and therefore special attention is required to be paid on knowledge, its creation, transfer and preservation. The creative economy is understood to be the socio-economic potential of activities that have an impact on creativity, knowledge and information. It is globally recognized in a number of Governments and creative sectors as an important generator of jobs, wealth, and cultural engagement (British Council). The creative economy is seen as the commercialization of culture and creativity, as well as an attempt to identify creative elements in an economic system as a whole (Dauibarait U. 2014). According to WIPO copyright based or creative industries generate direct and indirect contributions to economic performance and development, as such they are considered to be of growing importance for the achievement of important national economic and social objectives (WIPO website). Studies have been conducted in a number of countries to determine the economic contribution of their copyright-based industries in terms of their gross domestic product, generation of employment and trade (WIPO website).

The primary purpose of copyright is to give creators the incentive and reward for sharing their original work as such creators can economically benefit from their copyrighted materials and receive proper recognition. Further, it empowers creators with the right to decide how their work may be reproduced, distributed, adapted, derived, aired, streamed or displayed and with exclusive rights, creators can be encouraged to come up with more creations to share

with the public. Thus, the public may also benefit from their work because it can be useful for the enrichment of their lives.

Since copyright gives owners exclusive rights to prevent unauthorised use of their work, the importance of an effective regulatory system is therefore of crucial importance in order to counter- copyright infringement which is a major challenge for creators in achieving their economic goals. Kenton W. (2020) defines copyright infringement as the use or production of copyright-protected material without the permission of the copyright holder as such it is a violation of the right holder's copyright commonly known as piracy or theft of someone's creation and gain economically at the expense of the original owner of the work.

This dissertation is intended to explore the role of copyright enforcement as an enhancer of creativity in Eswatini focusing on the music industry, with a view to provide the rationale for strengthening of copyright legal and institutional framework in support of the creative industry in the Kingdom of Eswatini as contributors to the national economy. This chapter will mainly present a brief background on the legal and institutional framework of copyright in the country, the problem statement, and justification for the study, methodology, delimitation and limitations of the study.

1.2 Background

The Kingdom of Eswatini is rich in creativity, culture, and traditional resources including handicrafts, pottery, music, dance, etc. The country became a member of WIPO through accession to the WIPO Convention on the 18th May 1988 and 10 years later acceded to the Berne Convention on the Protection of Literary and Artistic Works 1886 as amended in 1979 on the 14th December 1998 (WIPO website). The country is also a member of the World Trade Organization since the 1st January 1995 and is therefore bound by the Agreement on

Trade Related Aspects of Intellectual Property (TRIPS) (1995 as amended in 2017). This is in view of the fact that the TRIPS Agreement in Annex I C of the Agreement Establishing the World Trade Organization and part of the Multilateral Trade Agreements, which in terms of Article 2(2) of this Agreements are an integral part of this Agreement and therefore binding on all Members. With respect to the other international treaties on copyright the country is yet to ratify the WIPO Phonogram and Performers Treaty (WPPT), the Rome Convention, the WIPO Copyright Treaty (WCT), the Beijing Treaty, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled and more. At regional level, Eswatini is a member of ARIPO having joined the Organization in 1994.

Copyright in the country is administered in terms of the recently enacted the Copyright and Neighbouring Rights Act No. 2/2018, herein after referred to as “the new Act” after implementing the Copyright Act/1912 hereinafter referred to as “the old Act” for more than a 100 years. Despite enactment in 2018, the new Act became operational with effect from the 1st August 2021 in terms of Legal Notice. /2021. The implementation of the new Act is therefore at its infancy stage and yet to be tested. In terms of this Act, the Copyright Office and the Copyright and Neighbouring Rights Society are sought to be established for the first time in the country, otherwise there has always been an IP Office, which mainly dealt with industrial property administration and only limited to policy with respect to copyright. Both the legal and institutional framework for copyright administration will be dealt with in detail in chapter 2.

The music industry is one of the main creative industries in the country comprised mainly of two main organization namely the Eswatini Music and Arts Association (ESWAMA) and the Association of Christian Artists in Eswatini (ACESWA). According to WIPO, copyright-based industries generate direct and indirect contributions to economic performance and

development and as such, they are considered to be of growing importance for the achievement of national economic and social objectives (WIPO Website). Based on the WIPO guide on surveying the economic contribution of the copyright industries that was published in 2003 and revised in 2015 ‘the WIPO Guide’ a number of studies have been conducted in a number of WIPO Member States to look into the economic impact of copyright in these countries. The WIPO guide provides a summary of surveys in creative industries that operate based on copyright and related rights, as well as guidelines and recommendations, for consideration and application when conducting copyright economic surveys. It also establishes a basis for comparison for future studies from reliable data and common methodologies. The reports of some of the African countries in which these studies have been conducted namely Botswana, Malawi and South Africa will be considered for purposes of this research in order to find out how these countries have provided for copyright enforcement as one of the pillars for an effective copyright system.

1.3 Statement of the problem

Intellectual Property Rights (IPRs) are one of the principal means through which, creators, generate returns on their investment in knowledge and creation as such copyrights are a key incentive to creativity and improve consumer choice and job creation. However in order to fully play its role in promoting investment in innovation and growth, the copyright system needs to be balanced, efficient and properly enforced within our borders and internationally. Despite the rapid evolution of the IP system, the country has been implementing the colonial and outdated Copyright Act of 1912 for over 100 years. The failure to review the Copyright law for such a long time may be the reason why the music industry in the country, has over the past years been failing to reap the economic benefits attached to IP and creativity. As a result, the failure to effectively enforce their copyrights and a number of other challenges

require to be addressed as matter of urgency in order to ensure that the industry is compensated commensurate to their creativity and or creative products. Acquiring a copyright over one's creative work is one-step towards achieving maximum economic and personal returns, however if this right cannot be effectively enforced it is of no value. In this regard, the failure to review and repeal the long outdated Act has greatly compromised the effect enforcement of copyright in the country. This has resulted in a number of local music artists opting to cross the borders of Eswatini for recognition and better economic returns for their work. With the advent of COVID-19, the industry has been pressurizing the Government to address their challenges, as they are currently not able to do live performances, which is their main source of revenue. The need to address these challenges is long overdue taking into consideration that the country has been a Member of WIPO for more than 20 years now; as such immediate short-term to long-term strategies are pertinent. According to the country's Strategic Roadmap 2019-2022, the economic growth has stagnated and one of the Government's goals is to grow the economy and improve the living standards of the country's citizens. The role of copyright on the economy has been expressed in a number of studies conducted in a various WIPO Members States and yet it has not been exploited in the country nor has intellectual property (IP) been incorporated in any of the country's policies and or strategies. It is imperative that the music industry challenges especially with respect to enforcement are addressed, through ensuring that it is strengthened in order for copyright to be effectively used as an incentive for them to produce more creative goods through music, for the benefit of the public as well as contributing to the socio-economic growth and stability of the country. In this regard, it is the role of Government to provide an adequate legislative framework and institutional framework for the administration, management and enforcement of copyright and related rights failing which copyright and

related rights holders cannot function properly, compromising their potential to be creative and losing income.

The main aim of the research is therefore to evaluate the role of copyright enforcement in enhancing the creative industry/sector, focusing mainly on the music industry as a contributor to the country's economy.

1.4 Objectives of the Study

The aim of the study is to analyse the legal and institutional frameworks governing copyright protection and enforcement as a basis to propose interventions to enhance copyright enforcement in Eswatini. The main objectives of the study are therefore as follow;

1. To analyse the legal and institutional framework of copyright enforcement in Eswatini as one of the pillars for an effective copyright system
2. To assess the level of copyright knowledge and awareness in Eswatini.
3. Identify shortfalls in the copyright legal framework on enforcement.
4. To propose recommendations based on the findings.

1.5 Research Questions

1. How does the legal and institutional framework govern copyright enforcement in Eswatini?
2. To what extent is the level of knowledge and awareness of copyright protection and enforcement in the country?
3. What are the gaps in the copyright legal framework with respect to enforcement?
4. What measures should be taken to enhance copyright enforcement in Eswatini?

1.6 Assumptions

It is assumed that due to inadequate copyright enforcement in Eswatini the music industry is not reaping the full economic benefits from copyright possibly because the subject-matter is not well understood and appreciated in the country due to lack of knowledge on it resulting in the neglect of the creative industry as having a role in the economic development of the country. It is therefore anticipated that through this study there will be a better understanding on the importance and role of copyright enforcement in enhancing the creative industry in particular the music industry.

1.7 Significance of the Study

The main aim is to try to explore the role of copyright enforcement in enhancing the music industry in Eswatini with a view to provide solutions and strategies on how it may be strengthened in order to effectively contribute to the country's economy. The significance of the study is based on the fact that the country is currently in the process of developing strategies for the revival of the economy, as such the incorporation of copyright as one of the pillars of the economy in such strategies in particular the music industry is required to be incorporated.

The study will also seek to evaluate the new Copyright Act with respect to copyright enforcement in order to identify any loopholes or gaps and to propose possible improvements in order to align the law with the country's international obligations. The study will also come up with proposals on the regulations that will enable an effective implementation of, and or achievements of the objectives of the Act. The findings of the study will also be used to lobby and motivate the Government to appreciate the socio-economic impact on the role of the creative industry for the country's economic development. It is anticipated that the recommendations and proposed strategies of the study will be seriously taken into

consideration when formulating other policies that affect IP particularly copyright for the benefit of the creative industry, as well receive the necessary support from Government.

1.8 Delimitation of the Study

The research will focus on copyright as an enabler for creative industries in the music industry in Eswatini. The study will also look into the role of the music industry in the economy of Eswatini as a segment of the creative industry. The study will not however be comprehensive as per the WIPO guide (WIPO 2015 which prescribes certain rationale for studies on the economic impact of copyright).

1.9 Limitation of the Study

Time constraints in gathering information and in view of COVID- 19 restrictions accessibility of informants may prove difficult and a financial drain as technology may be required to meet participants. This may lead to limitations in terms of follow-up questions whenever further clarifications are required from informants. The study may also be limited by lack of an established copyright office and collective management organization for music the industry.

Summary

This chapter mainly covered a brief background on the subject matter of copyright focusing on the music industry, considered the problem statement of the research, the main objectives among other introductory topics such as significance of the study, limitations and delimitations of the study.

CHAPTER 2: REVIEW OF RELATED LITERATURE

2.1 Introduction

The World Intellectual Property (WIPO) (2008) defines Intellectual Property (IP) as referring to creations of the mind and categorizes same into two main categories namely, Industrial Property and Copyright. According to the WIPO handbook, the aim of IP law is to safeguard creators and other producers of intellectual goods and services by granting them specific duration to control the rights on the intellectual goods and services made. In this regard, WIPO further provides that the rationale for enhancing National IP Laws is to give statutory expression to the moral and economic rights of creators and the right of access to third persons.

Intellectual property rights are seen as an instrument to stimulate the production and dissemination of creative works. (Wunsch-Vincent 2013 p.2), Copyright laws are therefore of crucial importance in fostering human creativity and innovation through guaranteeing authors, artists and creators with recognition and fair economic reward as well as providing effective enforcement mechanisms of their rights. In turn, this also enhances the enjoyment, of culture, knowledge and global entertainment that stimulate economic and social development. (WIPO) publication No.450E).

The definition of creativity is not an easy one, however, a number of researchers have come to the conclusion that creativity involves the production of something new and suitable for a particular purpose or use (Corraza G.E 2016). Corraza therefore provides that the standard definition of creativity require both originality and effectiveness and it may be influenced by a number of factors including culture, nationality among other factors. WIPO defines Copyright as a branch of IP that relates to literary and artistic creations such as books, music, paintings, and sculptures, films and technology-based works such as computer programs

(WIPO publication No.909E). In this publication, the expression of copyright is said to refer to the act of copying an original work (literary or artistic work) which may only be done by the author alone or with permission. In this regard copyright enables the right holders in literary and artistic work to control the use of the works that is has an exclusive right to use or lend the work and authorize third parties to reproduce or adapt the work in exchange for commercial gain (WIPO 2017). According to this WIPO publication the creation of wealth and jobs results from creativity, skill and talent of literary and artistic creators as such copyright acts as an incentive to continue to create new work by compensating and rewarding creator's efforts. A number of studies have been done by WIPO in various Member States on the economic contribution of the Copyright industries and the findings show that these industries have made a significant contribution to the GDP and employment, in particular in countries such as Australia, Korea and the USA the studies have shown that these industries contribute over 10% on the GDP (WIPO 2013).

The contribution of the creative industry in some countries in Africa such as Botswana the creative industry contributed 5,46% of the GDP and 2,66% on employment in 2019, in Kenya 5.31% GDP and 3.25% on employment in 2008, in Malawi, 3.5 % in GDP and 3.35% on employment in 2013 (ARIPO 2018) as fully appears in Table 1 below

Table 1: economic contribution of the Copyright industries

Source WIPO Studies on the Economic Contribution of Copyright-based Industries			
Country	Year	GDP	Employment
Australia	2009	10.3%	8%
*Botswana	2019	5.46%	2.66%
Colombia	2005	3.34%	5.80%
Hungary	2002	7.42%	7.41%
Jamaica	2005	4.8%	3%
Kenya	2008	5.31%	3.25%
Malawi	2013	3.5%	3.35%
Peru	2009	2.67%	4.50%
Singapore	2001	5.7%	5.8%
South Africa	2011	4%	4%
Ukraine	2008	2.85%	1.90%
USA	2004	11.01%	8.51%
Tanzania	2012	3.2%	2.6%

Source: ARIPO Consolidated Study on Copyright Laws of ARIPO Member States (2018)

This is a clear indication that the industry is indeed that copyright is key in shaping the country's economy as well as plays a pivotal role in alleviating poverty as such requiring Government support. According to WIPO (2017 Publication) the creative industries made a contribution to GDP of between 4 percent and 6.5 percent in three-quarters of countries surveyed using WIPO evaluation guidelines and that this is attributable to the awareness of the IP system, its efficiency as well as an effective protection of intellectual property rights. The supply of creative works in terms of quantity, quality or diversity has the potential to fall below a level that is socially desirable as creative works can be reproduced at low marginal costs and enjoyed by many consumers. This means that the fixed costs to produce content and the risks associated with financing the production, marketing and distribution of creative works may be high in many content sectors. (Wunsch Vincent). The establishment of a copyright system based on a conducive institutional regime that is effective, accountable with a legal system that adequately protects and strongly enforces intellectual property could be a solution to market failure (Al Asmadi H. 2013). According to Al Asmadi, a knowledge conducive economic regime should generally be one that has the minimal number of the price distortions.

The effectiveness of the copyright system is mainly dependant on three pillars namely

- i) **Administration** – entails ensuring that there is a clear policy, a strong legal and institutional framework
- ii) **Management** - entails exploitation through licensing to enable use and access to creative work and remuneration as well as policing by the right holders. As far as copyright is concerned, normally, individual authors do not have sufficient experience or sufficient negotiating powers to negotiate contracts on the exploitation of their works. Further, in respect of mass uses for example it is simply not possible to keep track of all

uses which take place, much less to negotiate royalties for those and the only way in which copyrights can be properly exploited is through mechanisms set up for that purpose.

iii) Enforcement - entails that right holders are afforded adequate protection for their work and According to WTO (WTO website) an efficient and effectively enforced intellectual property infrastructure is necessary to ensure the stimulation of investment in innovation and to avoid commercial-scale intellectual property rights infringements that results in economic harm.

As already stated in the previous chapter, the main aim of the paper is to explore the value of copyright enforcement in enhancing the music industry, it is worth noting that any discussion on enforcement requires the consideration of the other pillars of the system as these support each other, however the focus will be enforcement... Enforcement is the system of sanctions to be applied in case the rights under the intellectual property law are infringed (WIPO 2017). Such sanctions are needed in order to make the rights respected. Without a sufficiently efficient system, the temptation may simply be too great for many persons to violate the rights, something that is even more tempting because the possibility to make profit is so great. Without an appropriate system of sanctions, the law may be said to be of no force or effect. In the case of copyright music is one of the hardest hit by the lack of efficient enforcement mechanism, through piracy and with the advent of global technological changes, the internet offers new and increased possibilities to access to access material and exploit it without the consent of the right holder. In this regard, enormous profits that could be accruing to the creative industry are made from pirated films and music on the Internet and elsewhere and very much of the computer software distributed comes from illegal sources. An efficient copyright enforcement system mainly requires that sanctions are sufficiently severe to serve as a deterrent and secondly that the

system is construed in such a way that it works quickly mainly because it is so easy to close down and move piracy and counterfeiting activities somewhere else of the perpetrator' suspects that something is coming up. The legal framework must therefore contain sufficient provisional measures (WIPO report 2015)

In this chapter, we shall be considering the how the three pillars of the copyright system are structured in Eswatini, the international legal framework on copyright enforcement and in Eswatini, as well emerging issues on copyright.

2.2 Theoretical Framework

The study will be based on the economic theory, whereby the copyright branch of intellectual property will be analysed based on the view that market failure arises due to high initial creation costs and marginal distribution costs of intellectual property goods. An economic incentive therefore becomes a necessary motivation to create in order to avoid market failure (Du Bois M. 2018). In this regard, a balance is necessary between the interests of the creator as an incentive for creativity with those of the consumers through access to copyright works.

2.3 Significance of the Theory

The economic theory is significant for the study as the main aim is to exploit the economic impact of copyright enforcement with respect to the music industry as one of the sectors of the creative industry. This will be done in order to try to breach the gap between what is currently obtaining and the potential for development and growth of the industry for a meaningful contribution to the country's economy.

2.4 Background information on the Copyright System in Eswatini

In 2015, the country through technical assistance from WIPO developed the National Intellectual Property Development Plan (IPDP), which came up with a number of findings

and recommendations for the need to conduct a study on the economic contribution of the creative industry to the Eswatini economy (Dludlu C., Mengistie G, Strb S. 2015). In terms of the IPDP, it was found that there is lack of knowledge and awareness on the value of IP, inadequate protection of copyright and related rights, lack of incentives, lack of clear administrative structure responsible for creative and cultural industry, and lack of a collective management society. The report further (pg.30) highlights that there are no specific incentives for generation of IP as such a career as an artist is not respected in the country, exploitation by the media and lack of Government support are some of the challenges facing the creative industry. Piracy is also said to be rampant in the country, in particular Eswatini music and cultural products most of which are used in neighbouring countries without remuneration or recognition. Further, the IPDP found that because of the lack of knowledge and awareness of the value of IP, Eswatini artists tend to give their artistic works and performances without signing contracts. The creative industry also lacks the necessary skills to commercialize their IP assets, resulting in local concerts or performances receiving less attendance than those of foreign artists. The challenges of the creative industry have also been exacerbated by the COVID-19 pandemic and recently one of the Music Associations reported that about four of their members had committed suicide between March and August 2020 as a result of lack of financial income as they could not do live performances. This has been a wakeup call for the country that requires immediate action in order to counter-the adverse effects of the pandemic.

Subsequently in 2018, WIPO commissioned an IP needs assessment on the implementation progress of the country's IPDP 2015 with the main object of assessing the implementation progress of the IPDP. With respect to the creative sector, the report found that in as much as creativity is recognized in the country it is not rewarded; as such, there is exploitation of the creative sector, as they are not well compensated for their work. (Lesolobe B and Mboya R

2018). The assessment report also found that there is a low level of IP awareness and training among the artists and that the Ministry of Sports, Culture and Youth Affairs has put more resources in sports than culture, as well as that the country lacks the relevant policies such as on culture, ICT, content, rate card etc. Further, the report came up with a number of recommendations with respect to the creative industry such as:

- i) Evaluation of the creative industry;
- ii) Conducting a study on the economic contribution of the creative industry to the country's economy;
- iii) Strengthening the creative industry to become catalysts for promotion of copyright and exploitation of the enormous creative resources available to stimulate economic growth;
- iv) Fast-tracking the development of the Copyright Regulations and establishment of the CMO;
- v) Establishment of a fund to support the creative and cultural industries Moreover strengthening of the legal and institutional framework is not sufficient; a lot more is required to be done to address the challenges of the creative industry in the country as highlighted above.
- vi) Fiscal incentives may be required to encourage the creative industry in generating, commercializing, protecting and enforcing their IP products.

Further, the lack of IP awareness and information on the role of IP in enhancing the country's economy may be the reason why the country's policies have not incorporated IP as one of the indicators for socio-economic development and not much focus has been paid developing an effective legal and institutional IP framework in Eswatini. Enactment of the Copyright and Neighbouring Right Act No.4/2018, is a positive step towards addressing some of the

challenges identified by the above-mentioned IPDP, however this law is not yet operational as the Implementation Regulations are still at development stage.

2.5 Eswatini Copyright Institutional Framework

The Eswatini Government has put in place the new Copyright Act/2018, which empowers the Intellectual Property Office with the mandate to implement copyright administration for the first time in the country. The IP Office is a department under the Ministry of Commerce, Industry and Trade, however the mandate of the Office is currently limited to administration of industrial property, pending implementation of the above-mentioned new Copyright Act.

The Copyright Office is to be established for the first time in the country through the new Copyright Act, which also establishes a Collective Management Organization for the first time. The main functions of the Copyright Office in terms of Section 76(1) of the Act entails but is not limited to being responsible for all matters affecting copyright in the country, supervision of the CMO, maintaining a register of works, productions, and associations of authors and performers in the country, organizing outreach and awareness creation programmes to inform, educate and sensitize the public on matters relating to others.

The creative industry of Eswatini is currently registered through sector specific associations, under the Eswatini National Arts and Culture Council (Arts Council) which is a Government parastatal under the Ministry of Sports Youth and Culture (MSYC). With respect to the music industry there are two main music associations registered with the National Arts and Council namely the Eswatini Music and Arts Association (ESWAMA) and the Association of Christian Artists in Eswatini (ACESWA).

The Ministry of Sports, Youth and Culture is currently in the process of developing the Arts and Culture legislation, which seeks to formally establish the Arts Council and prescribe its mandate and functions. According to information from the Arts Council, the creative industry

in the country is comprised mainly of authors, publishers, music artists, film industry, and publishers, among others who are encouraged by the Council to be affiliated into sector specific groups such as the above music associations. According to the Council some creators are not affiliated nor registered with the council, as such there is a lot of creative work that is not accounted for.

2.6 The international legal framework for Enforcement of Copyright

The international treaties set minimum standards of protection in terms of which signatory countries are required to implement within their own copyright bounds, as such, they encourage reasonably coherent protection of copyright from country to country.

i) The Berne Convention

The legal basis for copyright is founded upon the Berne Convention for the Protection of Literary and Artistic Works 1886 (as amended in 1979). The Berne Convention is based on three main principles mainly;

a) Principle of "national treatment" in terms of Article 5(3), which means that works of authors originating in one of the Contracting States or works first published in such a State, must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals.

(b) Principle of "automatic" protection in terms of Article 5(2), which means that protection should not be conditional upon compliance with any formality, however protection is immediately upon fixation of the work

(c) Principle of "independence" of protection in terms of Article (5) which basically means that protection in one member state of the Union is independent of the existence of protection in the country of origin of the work provided. That as it may however, where a Contracting State provides for a longer term of protection than the minimum prescribed by

the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.

In terms of the Berne Convention, owners of copyright are granted exclusive economic and moral right, and with respect to economic rights, the following rights are provided:

- a) Making a collection of speeches, addresses and or other similar works in terms of Article 2bis (3)
- b) The right to translation in terms of Article 8
- c) Right to reproduction in any manner or form in terms of Article 9(1)
- d) The right to perform in public dramatic, dramatico-musical and musical works in terms of Article 11(1) (i) and the right to communicate to the public the performance of such works in terms of Article 11(1)(ii).
- e) The right to broadcast and any communication to the public by any means of wireless diffusion of signs, sounds or images in terms of Article 11bis(1)
 - (i), communication to the public by wire of broadcast and rebroadcast in terms of Article 11bis ((ii) and public communication of broadcasts by loudspeakers or other analogous instruments in terms of Article 11bis (1) (iii)
- f) The right to recite literary works in public in terms of Article 11ter (1)(i), Public communication of recitations of literary works in terms of 11ter (ii), public recitations and public communication of translations of literary works in terms of Article 11ter (2)

Right to adaptation, arrangement and other alterations in terms of Article 12

- g) The right to make cinematographic adaptations in terms of Article 14(1)(i), distribution of cinematographic adaptations and reproduction of works in terms of Article

14(1) (i), and public performance and communication to the public by wire of cinematographic adaptations reproductions in terms of Article 14(1)(ii)

With respect to moral rights, Article 6bis of the Convention provides that the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation. Moral rights may be classified as the right to paternity which enables authors to be acknowledged in their work and the right to integrity which allows authors to object to any alterations to their work, which could be prejudicial to their honour or reputation. (WIPO 2007) In terms of this article these moral rights granted to the author continue after his death, until after the expiry of the economic rights and are exercised by the author's heirs or institutions prescribed by law.

With respect to copyright enforcement, the Berne Convention only provides for general norms under Article 16 and 36 of the Agreement. Article 16 provides as follows

1. Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection.
2. The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected.
3. The seizure shall take place in accordance with the legislation of each country

Article 36 on the other hand provides as follows;

1. "Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.
2. It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention."

ii) The TRIPS Agreement on Enforcement

The Agreement on Trade Related Aspects of Intellectual Property (TRIPS) Agreement is administered by the World Trade Organization (WTO) and binding on all members of that Organization. This Agreement provides for different IPRs and additional copyright provisions and in terms of Article 2, it requires that Contracting Members to comply with the basic standards of the Berne Convention. In this regard, the TRIPS Agreement confirms obligations under the Berne Convention as well as clarifies and adds certain specific points. In particular, the TRIPS Agreement confirms the national treatment principle in Article 3 and further provides for the most favoured nation principle in terms of Article 4. The most favoured nation treatment principle requires that whatever advantage, favour, privilege or immunity is granted by a Contracting Member State with regard to protection of intellectual property be extended immediately and unconditionally to the nationals of all other Contracting Member States.

With respect to enforcement, the TRIPS Agreement provides for a much more comprehensive regulation on the obligations concerning enforcement of rights (Chapter III Articles 41 to 64). The Agreement requires that Contracting Member States ensure that enforcement procedures are made available under national law in order to provide for an effective enforcement against any acts of infringement of intellectual property, that entail expeditious remedies to prevent infringement and remedies that constitute a deterrent to further infringement (Article 41). In terms of this article, procedures for enforcement of IP are to be fair and equitable. The Agreement further provides for different remedies

categorized into civil remedies, administrative remedies and criminal remedies described as follows;

- a)
- b) **Provisional Measures** - where it is likely that a delay in determining a matter may result to irreparable harm to the right holder, judicial officers are empowered to adopt provisional measures where appropriate. (Article 50).
- c) **Administrative remedies** – Member States are required to adopt procedures for the suspension by the customs authorities of the release into free circulation of goods where the right holder has valid grounds to suspect that the importation of counterfeit trademark or pirated goods is likely to take place. (Article 51) The competent authorities are also empowered in terms of Article 59 to order the destruction of infringing goods in accordance with the principles in Article 46.
- d) **Criminal remedies** – Member States are also required to provide for criminal procedures and penalties with respect to wilful copyright piracy on a commercial scale and remedies available include imprisonment and/or monetary fines sufficient to provide a deterrent and consistent with the level of penalties applied with respect to crimes of the same gravity. In some cases, the remedies will include seizure, forfeiture, and destruction of the infringing goods. (Article 61).

iii) The Rome Convention

The main objective of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organization (1961) is to provide for the protection of the rights of performers, producers of phonograms and broadcasting organizations. The treaty is of importance to African countries where various performers are making a living

out of both modern and traditional artistic performances where fixation may be done involuntarily by tourists or other people who are exposed to such performers and their acts. The Rome Convention like the Berne Convention only provides for general norms for enforcement under Article 26 (1) as follows;

“Each Contracting State undertakes to adopt, in accordance with its own Constitution, the measures necessary to ensure the application of this Convention”

iv) The WIPO Copyright Treaty (WCT)

The main objective for the treaty is to extend the scope of copyright protection to computer programs, of whatever mode or form of their expression (Article 4) and to compilations of data or other material in any form, which due to the selection or arrangement of their contents constitute intellectual creations (Article 5). With respect to rights of authors the treaty provides for the right to distribution (Article 6), the right to rental (Article 7) and the right to communication to the public (Article 8), all of which are exclusive an subject to limitations (Article 10) (WIPO 2009). With respect to enforcement, the treaty further requires in Article 11 that Contracting Parties provide legal protection and effective legal remedies against circumvention of effective technological measures used by authors in connection with the exercise of their rights under the treaty and the Berne Convention. The Kingdom of Eswatini has not yet acceded to this treaty; however, the new Act has to a certain extent adopted such measures (Section 100) in terms which criminal sanctions are prescribed with respect conduct related to the design of devices meant to circumvent copy protection.

v) The WIPO Performances and Phonograms Treaty(WPPT)

The main objective for the WIPO Performances and Phonograms Treaty (1996) as per the preamble (p.9) is:

- a) “ to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible;
- b) to provide for new international rules in order to provide for adequate solutions to the questions raised by economic, social cultural and technological developments.
- c) to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, in particular with respect to education, research and access to information.

The treaty like all the other treaties also provides for limitations and exception (Article 16) and requires Contracting Parties to provide adequate and effective legal remedies against infringements of the right holder's rights. The WPPT further requires Contracting Parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures used by performers or producers of phonograms in connection with the exercise of their rights under the treaty (Article 18). As such, it provides general norms for contracting Members for legal protection and effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights. Membership to the WPPT is therefore of crucial importance in the digital environment where making economic gains has increased as a result of the world integrating into a connected digital market and where creators do not normally benefit due to increased infringements through illegal copying and downloads. In this regard, the treaty grants performers and producers moral and economic rights in their performances fixed in phonograms and sound recording.

vi) Beijing Treaty

The rationale behind the Beijing Treaty is to modernize and update the protection of singers, musicians, dancers, and actors in audio-visual performances contained in the Rome Convention in the digital era. This treaty brings with it economic development, improvement of the status of audio-visual performers as well as protection of culture, folklore and cultural diversity (WIPO 2012). Enforcement under this treaty is provide for under Article 20, which provides as follows;

1. *“Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.*
2. *Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”*

2.6 Relevance of Copyright and Related Rights International Treaties

There are a number of benefits attached to membership to international agreements and the above-mentioned treaties are no exception. According to WIPO (WIPO website) adherence and implementation of the treaties offers a number of benefits for countries regardless of their stage of development. The international treaties:

- i) Provide important economic incentives to creative individuals and companies in the new digital environment
- ii) Provide a substantial legal basis for healthy electronic commerce

- iii) Sustain the national copyright industries taking into consideration that the future market of products and services protected by copyright and related rights will increasingly concern online sale and delivery of digitized contents. Legal adjustment through implementation of the treaties is crucial in providing full support to copyright industries taking into consideration the post COVID effects.
- iv) Attract investment both domestic and foreign, by providing greater certainty to businesses that their property can be safely disseminated there and
- v) Protect local creativity

2.7 The Copyright Legal Framework of Eswatini

The Constitution of the Kingdom of Eswatini (Act No.1/2005) hereinafter referred to as “the Constitution” which is the supreme law of the land does not have specific provision on IP, however as an intangible property it may be inferred same provided in that the Constitution guarantees citizens the right to own property. Section 19(1) provides as follows

“A person has a right to own property either alone or in association with others.” In addition, Section 19(2) further prohibits that a person be compulsorily deprived of property or any interest in or right over property.

As already stated in chapter 1 despite enactment of the new Copyright Act, in 2018 implementation of this legislation commenced in August 2021, mainly because the implementation regulations of the new law are still undergoing a development process and the Government requires a substantial budget to implement the Act. The financial implications for implementation of the new Act are with respect to establishment of the new Copyright Office within the IP Office, the establishment of the Copyright Society as well

preparation of a budget to cater for the payment of royalties by the national public broadcasters, ETV and EBIS both under the MICT.

The new Copyright Act is quite detailed and contains most of the recommended international treaty provisions on enforcement and any omitted provisions can be cured by either ratifying some of the treaties that have not yet been ratified or by amending the Principal Act as set out in the Eswatini Constitution. Currently the country has ratified the Berne Convention and the TRIPS Agreement and is yet to ratify the Rome Convention, the WCT, the WPPT, the Beijing treaty and other relevant copyright treaties.

With respect to enforcement, the Act seems to have adequately incorporated the provisions of the TRIPS Agreement in Part six of the Act, which provides for the following infringement and remedies sections namely;

Section 40 of the Act defines infringement and prescribes certain acts as infringement whereas section 41 of the Act entitles an owner of copyright with remedies for infringement such as damages, interdicts; attachment and such remedies are also provided and or extended to a licensee of copyright work in terms of Section 42 of the Act. Other remedies available are Anton pillar orders (Section 44) and the restriction on importation or exportation of infringing copies (Section 46). Another positive of the new Act is with respect to enforcement of copyright is the considerable increase on penalties relating to copyright infringement when compared to the old 1912 Copyright Act. In this regard, it is worth mentioning that the penalties provided for under the old Act for over a hundred years were non-existent in that nowadays there is nothing of that value. In terms, Section 13 on offences a person found guilty of infringement was made liable to pay a fine of E4.00 (equivalent to R4 in South African currency) for each infringing copy but not exceeding E100.00 in respect of the same transaction. Further, in terms of the old Act provided custodial sentence or

imprisonment only limited to second or subsequent offenders for a period not exceeding 2 months or such prescribed fine. These sanctions were no longer relevant in this era as they were not at all deterrent. In terms of the new Act various sanctions are provided for different types of infringements, however since the Act has not yet been tested, it remains to be seen whether the sanctions provided therein are sufficient. In terms of Section 45 of the new Act for example, a person who is found guilty of an offence under this section shall be liable to a fine not exceeding twenty thousand Emalangeni (E20 000) or to imprisonment for a period not exceeding three (3) years or to both such fine and such imprisonment in respect of each article to which the offence relates.

Criminal sanctions are provided for with respect to infringement of copyright (Section 45) and with respect to infringement of related rights or neighbouring rights (Section 64). The new Act also provides for criminal sanctions with respect to infringement of expressions of folklore, whereby in terms of Section 71(2), the act provides that it is an offence to import or distribute copies of expressions of folklore derived from Eswatini or copies of translations, adaptations arrangements or other transformation of such folklore made outside the country without the Minister's authority. Further, inasmuch as the country has not yet ratified both the WCT and the WPPT the new Act provides for the protection of technological measures and rights management information under general provisions (Section 101 -103). The new Act (Section 46) further provides a detailed procedure on the restriction of imported and exported infringing copies a provision, which was lacking in the old Act

2.7.1 Gaps in the New Act

Some of the provisions of the new Act that require review are Section 9 of the Act which, even though it contains most of the economic rights does not include the rights to control translation, arrangement, distribution and modification, further

Section 16 of the Act provides for fair dealing without provision for the specific allowable economic rights. The Act also does not provide for the rights of persons who are with print disabilities, neither does the Act empower the CMO to grant copyright licences.

2.8 Copyright Administration

The administration of Copyright mainly entails ensuring that there is a clear policy in place and as already indicated above an effective, a legal system that adequately protects and strongly enforces intellectual property is of crucial importance to counteract market failure. In formulating legislation, the above-mentioned international legal framework is important for a number of reasons namely that;

- a) It guarantees the protection of local content
- b) Provides national creators with economic rights to monetize their creativity in the global market, in particular taking into consideration that intellectual property protection is territorial. The national treatment provisions in the above-mentioned treaties guarantees such protection

- c) The internet treaties provide regulation for a level playing field for national creators and industry in view of easy access of works because of internet. (Lanteri P. 2017)

From the above analysis, it is therefore clear that being signatory to the international copyright treaties is imperative in ensuring an effective national legal system, and according to Lanteri WIPO provides countries with technical assistance in so doing. The Administration of copyright also entails ensuring that there is a strong institutional framework in place. Following enactment of the Copyright Act in 2018, the Copyright Office is in the process of being set up in accordance with this Act. The establishment of the Collective Management Organization is also in the process of

being set up and currently the Minister has appointed the Board for the Society and it is currently in the process of recruiting the required personnel to carry out the day-to-day functions. It is anticipated that by the end of 2022 both the Copyright Office and the Collective Management Organization will be fully set up and functional. In terms of the new Act, the Copyright Office will form part of the Intellectual Property Office within the Ministry, of Commerce, Industry and Trade.

2.9 Copyright Management

An effective legal system on its own is not sufficient, copyright and related rights require to be managed and effective management of copyright assets requires that they be identified, protected, cultivated and valued (WIPO Creative Industries booklet No. p.86.) Further Copyright like all other IPRs is valueless on its own however, it requires that those rights be exploited and in so doing the creator needs to understand the rights they own in the creative work, to ensure that they take all the necessary steps to identify themselves as the creator and rights holder. It is also important to put in place a plan for the exploitation of the IP including licensing and assignment of the rights as well as understanding the steps to take in the event of an infringement of their rights and the kind of compensation you can get (WIPO 2017). All these attributes require that copyright and related rights be effectively managed.

Copyright management may either be individually or collectively where individual management is not possible, however with respect to individual exercise of copyright it may be difficult, not feasible and expensive (Zhang Z. 2016 p.74). A large number of creators, artists and songs when matched with a large number of diverse users may result in prohibitive transaction costs for individual licensing between copyright owners and users resulting in market failure whereby both may lose out (Hviid M., Schroff S. and Street John 2016). In this regard, negotiating the terms with every user who intends to use their work may be difficult or even impossible for authors, monitoring costs could be very high and the cost of

enforcement may be higher than the royalty they could be receiving in the event they find infringement (Zhang). The main objective for collective management of copyright is therefore to effectively overcome the problem of high transaction costs for administering copyrights (Zhang) and also to reduce market failure resulting from the prohibitive licensing costs (Hviid M, Shroff S. and Street J.).

The main functions for CMOs include, monitoring and authorizing uses of copyright, collection and distribution of remuneration among owners of rights and this entails determining the basic structure of licensing in the field of collective management organization (WIPO 2003 p.100). Collective management of copyright therefore provides an efficient means to cure the problems brought by the public goods characteristics of copyright.

With respect to the institutional framework for copyright in Eswatini, the new Act provides for the establishment of the copyright office in terms of Section 73 whose main function shall be the administration of copyright. This includes overseeing the activities of the Copyright Society, maintaining an effective database on copyright matters and authors and their work, to maintain a register of works, productions and associations of authors and performers in the country and others.

The new Act further establishes the CMO in terms of Section 78, which provides that it shall be a non-profit making body corporate capable of suing and being sued in its corporate name and subject to the Act. The main functions of the Society in terms of Section 79 is to represent the interests of owners of copyright in the various categories of works protected in terms of the Act, to maintain a register of works, productions an associations of authors and performers, to put in place rules and regulations necessary to ensure the protection of the interests of its members, to help in preparation of standard forms of contracts of assignment of copyright or of license for the benefit of its members, to negotiate for grant of licenses as

agents for the members, to determine the rates of royalties to be levied in respect of registered works and more.

2.10 New Copyright Issues / Developments in Copyright

With the advent of new technologies, the conditions for creation, production and exploitation of literary and artistic works and other cultural and information products have undergone immense changes. This has also affected the requirements for protection, the exercise and enforcement of copyright and related rights (WIPO 2003 p.119). These new technological developments and the internet have also affected the creation, access and the mode of revenue generation of creative works of creators and copyright based industries (Wunsch-Vincent p.2). Digital technology, particularly the internet brought in a new breed of services such as streaming platforms (Amazon music, Spotify, deezer etc) as these differ from analogue users which only require territorial licenses, their services don not cross national borders and therefore they do not require licenses that extend further. (Hviid et el p.259) Hviid states however, that the internet (and digitalisation) creates the possibility of easy access to music irrespective of tariff barriers or broadcasting regulations and that any legal service seeking to exploit these possibilities requires multi-territorial licenses. To cater to this need, CMOs reacted first by offering Simulcasting agreements, providing cross-border licenses to internet radio.

Internet and digitalization presents a loophole with respect to easy access, despite imposition of tariff barriers or broadcasting regulations (Dingledy F. W. (2016 p.2), in fact according to Dingledy modern technology has made copying easier. As discussed in detail above the WCT and the WPPT commonly known as the internet treaties therefore came about because of the challenges of these technological developments with respect to protection and enforcement of copyright and related rights. The Ministry of Information Communication and Technology (MICT) has developed three pieces of legislation currently in Parliament which seek to

address some of these internet challenges namely the Data Protection Bill/2020, the Electronics Transaction Bill /2021 and the Computer Crime Bill/2020. In particular, Section 30 of the Computer Crimes Bill provides as follows;

“Any person who uses any computer or electronic device to violate any intellectual property rights protected under any law or treaty applicable to intellectual property rights in the Kingdom of Eswatini, commits an offence under this Act and shall be liable on conviction, in addition to any penalty or relief provided under the intellectual property law in question, to a fine not exceeding ten (10) million Emalangeni or to imprisonment for a period not exceeding ten (10) years or both”

Despite the challenges posed by digital technology and the internet, one of the findings of the preparatory work leading to the diplomatic conference, which adopted these treaties, was that nonetheless both also offer new and promising opportunities for traditional collective management organizations, which could be efficient and more attractive for both owners of rights and for users (WIPO 2004 p.120). Further, the development of new technology has also brought about digital rights management (DRM), which is technology that controls access to content on digital devices, which however has its pros and cons (Dingledy).

Summary

The studies that have been conducted on the economics of copyright show that the growing importance of copyright and related rights as one of the contributors to the global economy deserves further interrogation in order to appreciate and enable effective exploitation of same. The copyright system is one of the principal means through which creators generate returns on their investment in creativity. We have seen in this chapter that the value of creative industries depends mainly on how effectively it is used and that an efficient, well-designed

and balanced copyright system is a key lever to promote investment in creativity and growth. In this regard, it has been expressed that the three main pillars for an effective copyright system are mainly administration of copyright through legislation, management and enforcement. It is therefore important to ensure that the copyright legal framework maintains effective incentives for creators and all relevant stakeholders, in particular in view of the challenges brought about by new technologies and the internet. The international legal framework provides minimum standards for development of national legislations, and they guarantee a global protection for creators. The new Copyright Act was also evaluated, and gaps identified with respect to conformity with the international standards as provided by the international legal framework. It also became apparent in a chapter that Eswatini has not yet ratified some of the important WIPO treaties however that a process is underway for the country to accede to these treaties especially the internet treaties.

CHAPTER 3: METHODOLOGY:

3.1 Introduction

A mixed research method will be used for the study using both qualitative and quantitative methods. This will assist in ascertaining previous and current earnings for the creative sector and possibly come up with projections once the Copyright Office and CMO are established and operational.

With respect to the qualitative method, focus groups will be picked from the population of a particular sector to ascertain the level of IP and copyright awareness from different IP stakeholders, the level of knowledge and understanding of the new copyright law by the creative sector and users, ascertain how the different creative industries in the country are organized and/or affiliated as well as ascertain how they are currently remunerated for their work. Further, a comparative study of other jurisdictions through literature review has been considered. The respondents were personally contacted through conference calls, phone calls, emails and interview questionnaires for the interviews with respect to this method. A questionnaire with respect to the quantitative method was also electronically sent to the target groups. This method was also used to come up with projections on contribution to the country's economy.

3.2 The Research Design

The data that was required in order to address the research questions sought to be addressed from the preceding paper mainly consisted of information from the different music industry sectors available in the country, how they are affiliated, level of knowledge of IP, how they manage their work, challenges they encounter, revenue they create currently make with

respect to their work, as well as enforcement of their copyright. Taking into consideration that Eswatini is a small country the research was not confined to a particular place as such information was sourced randomly. The main sources of information will be the singers, producers of music, Government Ministries and institutions relevant to copyright administration, selected members of the society and users of copyright.

3.3 Population and Sampling

The quantitative method will be used to collect data using the selective sampling technique from selected sectors of the music industry mainly composers, publishers, singers, the police, customs officials, the judiciary and specific institutions and or organizations relevant to copyright.

3.4 Data Collection Instruments

The researcher will use a questionnaire, literature checklist as well as interview guidelines in order to ascertain the required information. The findings will be critically analysed and recommendations made in response thereto.

3.5 Data Collection Procedure

Data will be collected using both primary and secondary sources and with respect to primary methods through written questionnaires and interviews, either physically or through the internet or phone calls depending on the possible mode in view of the current COVID 19 restrictions. With respect to secondary methods, the research will conduct a literature review through do desk research from books, journals articles, internet, and legal instruments.

The data collection process will entail application for information with structured questionnaires that were sent electronically and followed up telephonically as well as through face-to-face interviews. The age and geographical location was not taken into consideration for purposes of achieving the objectives for the research mainly because these were not relevant for the study.

3.6 Analysis and Organization of Data

The data collected will be recorded in a table from the different creative industry sectors mainly music, and authors.

3.7 Ethical Considerations

The research will ensure voluntary consent from participants who will be requested to provide information on certain matters of the research. This will be done through ensuring that the informants are made aware of the purpose and objective of the research as well as guarantee confidentiality with respect to information provided whenever required and requested by the informant.

Summary

In this chapter the research methodology was stated which entails detailing how the research will be conducted the research instruments to be used, how the data will be presented and analysed as well as ethical consideration.

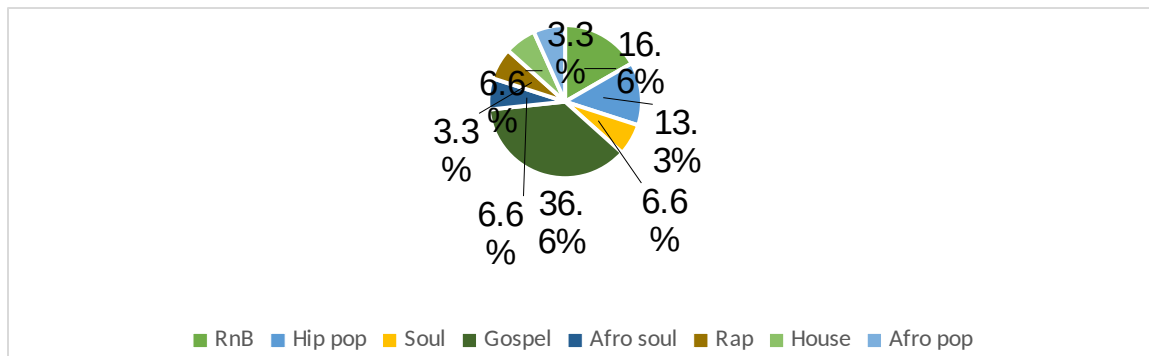
CHAPTER 4: DATA PRESENTATION, ANALYSIS AND INTERPRETATION

4.1 Introduction:

The main aim of the research as provided in chapter 1 is mainly to explore the role of copyright in enhancing the music industry in the Kingdom of Eswatini with a view to provide solutions and strategies on how it may be strengthened in order to effectively contribute to the country's economy. In this regard, the research questions were indicated whose main objective was to reach a conclusion on the objectives for the research. Further, in the preceding chapter 3 the methodology for the research has been presented, whereby the main sources for the research were stated, how data was collected, analysed and presented. In this regard primary data was collected from the music industry itself mainly the artists, copyright enforcement agencies such as the police, the judiciary, customs, the main music associations such as ESWAMA and ACESWA, copyright and or music industry institutions such as the ENAC, events management companies, as well as Government departments relevant to the administration of copyright such as MCIT, MICT and MSYC.

The music industry in Eswatini is diverse and most of the respondents have been in the music industry for more than 10 years, and the various music genres are expressed in **Figure 1** below.

Figure 1: Types of Music performed in Eswatini

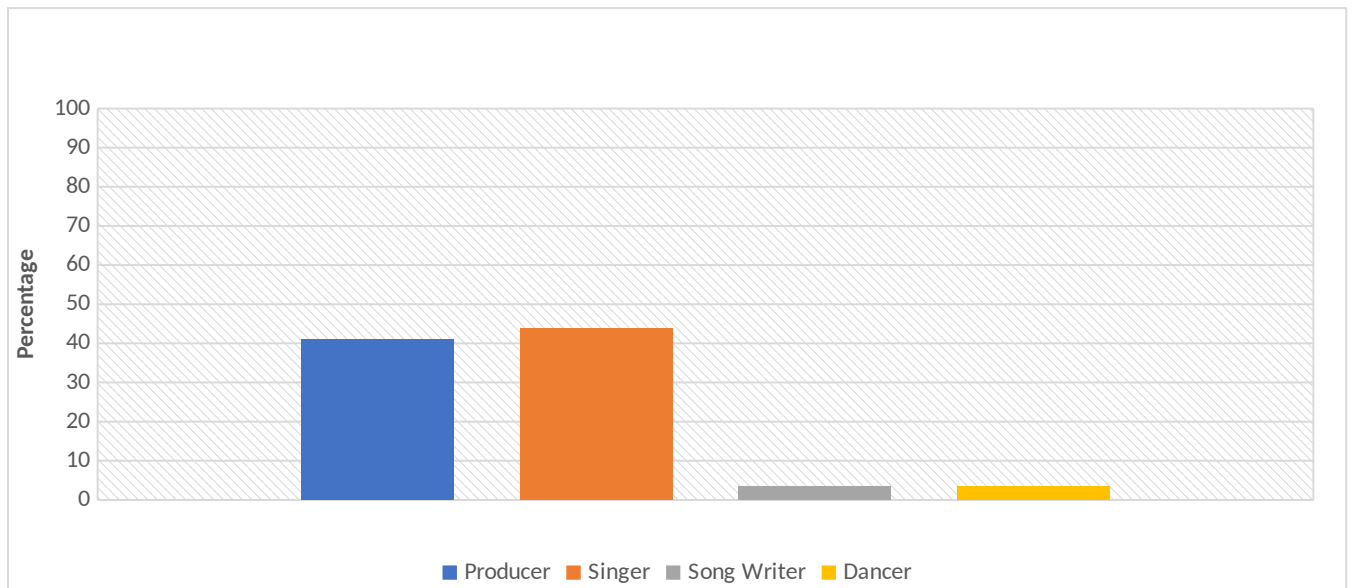


Source: Research Data

Typically, artists are heavily inspired by regional and international musical genres to create local music that are directly targeted at the local Market. Eswatini local market is saturated by gospel genre consumers as Eswatini is a Christian Country; Most of the artists in Eswatini as such are Gospel singers with 36.6% followed by RnB singers with 16.6 % and the least being Rap and Afro Pop with 3.3% each as reflected in figure 1 above. The music industry in Eswatini has been there for a long time but Eswatini economic interests do not always favour artist who, fearing piracy and aware of the poor performance of local collection systems, frequently seek to release their work in South Africa.

The music industry comprises of a number of different types of music artist and as presented in **Figure 2** below, the main respondents for the study ranged from producers, singers, song writers and dancers, vocalist and back up vocalist, dancers, song writer/composer and bass player/ instrumentalist (a player on a musical instrument). Furthermore, the research established that most artists are singers in Eswatini with 46.7% followed by producers with 43.3% and songwriters and dancers sharing the same percentage of 3.3%,

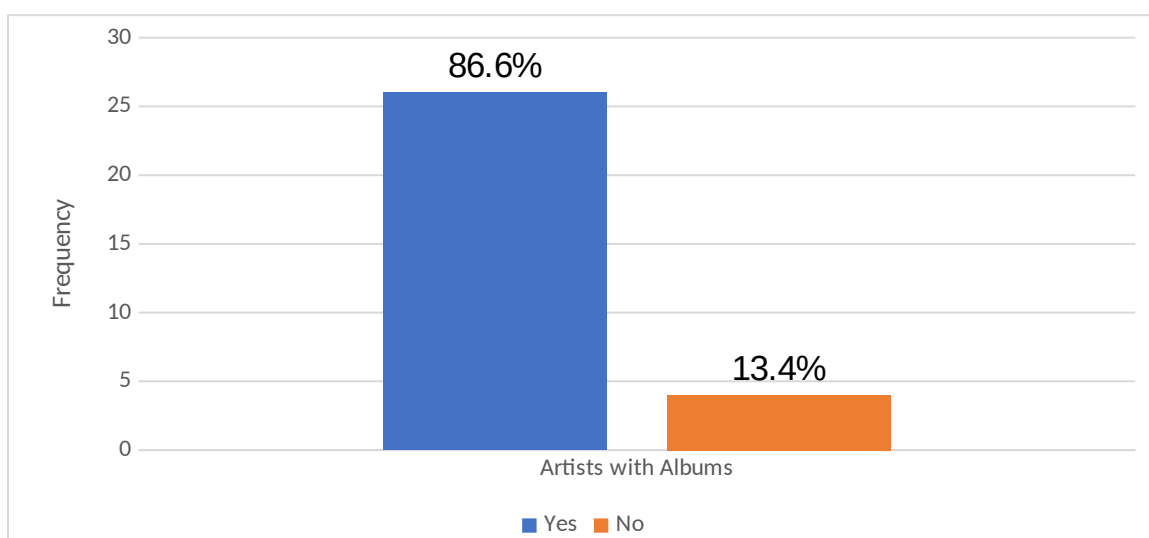
Figure 2: Kind of artists in Eswatini



Source: Research Data

As fully, appear in the graph below, 86.6% artists have recorded albums whilst 13.4. Percentage have not yet recorded albums. There are factors that may contribute to the recording or not recording the albums, for example, in terms of recording production, urban environments with adequate economic, infrastructure and population thresholds are necessary for the emergence of viable recording industry. Finances are also required to pay the studio hours to come up with an album.

Figure 3: Artists with recorded albums



Source: Research Data

4.2 Data Presentation and Analysis

This section presents the data solicited from the targeted research units using the research approach, methodology and data collection instruments outlined in chapter 3 of this research. The results are presented and analysed using tables, figures and or percentages as well as narratives to answer the questions sought to be addressed in this research.

4.2.1 Enforcement of copyright in Eswatini

The main copyright enforcement agencies interviewed in order to evaluate the adequacy of the of copyright enforcement system in the country were mainly the police, customs officials, the judiciary and the music industry themselves.

- ii) **The police** as the organ responsible for receiving complaints against copyright infringers and also empowered to prosecute such cases indicated that there is a serious challenge in enforcing copying right in the country and stated the following
 - a) Failure to review the old Act for a very long time was the main reason for the high rate of copyright infringement as the low fine and penalties against infringers in that law were not deterrent
 - b) High rate of piracy yet very low penalties has waters is a stumbling block as the police are discouraged to effect arrests and prosecute offenders who in turn get non-deterrent penalties. This is viewed as a waste of Government resources as enforcement of copyright cases is almost none existent
 - c) Lack of knowledge and capacity on IP and copyright
 - d) The new Act is not yet known in as much as they have heard about it as such they felt they needed to be sensitized about it and capacitated on its implications with respect to enforcement as it is still new and has not yet been tested as it only became operational for less than a year now
- ii) **Customs officials** when interviewed indicated that they encounter a number of counterfeit and pirated goods on the market in the streets and in various shops including music products. Dealing with such infringements is not easy for them mainly because stated that even though their law, the Customs and Excise Act /1971 (Section 113(1) (d)) prohibits

the unlawful reproductions of any work if such reproductions are prohibited from importation under any law relating to copyright, in practice this provision was found to be inadequate for them to effectively enforce as its application was mainly dependant upon the copyright Act and collaboration with the IP Office. Customs therefore stated this was a serious problem in the area of copyright enforcement on their part mainly due to the lack of the required grounds for the customs authorities to take ex officio actions to detain, seize and destroy counterfeit and pirated goods at the border or in free trade zones. They further expressed that strengthening customs cooperation relations with South Africa and Mozambique for instance, would be desirable to improve their border enforcement regimes substantially. Customs further attributed their limitation to effectively enforce copyright cases due to lack of knowledge and awareness on IP and copyright; it was not easy for them.

- iii) **The Judiciary** information ascertained from the judiciary is that, apart from the High Court that has unlimited Jurisdiction, one of the determining factors for the jurisdiction of the lower Magistrate Courts in the country is the monetary value of a claim or fine. In this regard, the study found that there were no copyright infringement cases on record from the high court and this was mainly attributable to the low fines and penalties provided under the old Act, which rendered lower magistrate court the appropriate courts to deal with these cases. It was further reported that copyright infringement cases were last dealt with over 10 years ago mainly because the police were no longer prosecuting such cases owing to the weak and outdated old Act. The Judiciary however stated that in view of the enactment of the new Act there was a possibility that these cases may re-surface as the penalties and sentences under the new Act seemed to be more stringent and could be effective in deterring copyright infringers. The Judiciary however,

recommended taking into consideration that intellectual property is a technical field the judiciary would require to be capacitated in this field as well as taken through the new Act and its implications on enforcement

A majority of the artists that were interviewed did not agree that copyrights protect them (90%), and only three of them felt that copyrights help to protect their work as expressed in **Table 2 below**. Some of the artists said their protection is to a certain degree in territories that have functioning CMOs, as some have registered with SAMRO based in South Africa. A majority of them expressed the view that in the current digital era, it is virtually impossible to protect their work mainly because the law has been long overdue and yet there has been drastic technological changes over a number of years. A majority of them have had their work pirated (25) except for five (5) of them who stated otherwise. In addition, they feel their work is not protected, as fines are low and insufficient to deter infringement of their copyrights. Another reason why artists feel they are not protected in Eswatini is because they have tried to involve law enforcement agencies yet nothing is done to offenders, however they indicated that this could be because the law itself is not sufficient as the low fines are deterrent as such making it not worthwhile to prosecute infringement cases. This has resulted in the artists doing nothing in terms legal enforcement about piracy and instead opt for confronting and negotiating with the offenders which leads to no solutions at the end as it is not effective.

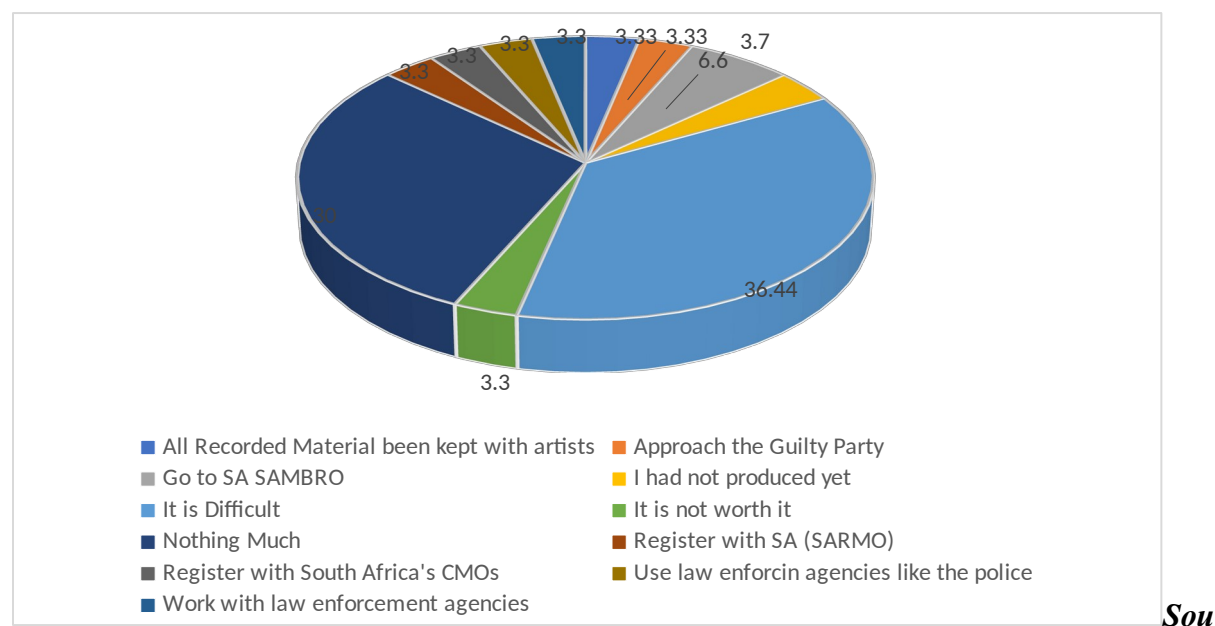
Table 2: Copyright protection

Response	Frequency	Percentage %
Yes	3	10 %
No	27	90%
Total	30	100%

Source: Research Data

With respect to enforcement of their copyright work the respondents deal with this issue in different ways with a majority of the artists found it difficult to deal with enforcement of copyrights work already produced (36.67%). Not only that, 30% of them indicated that they do nothing to enforce copyrights because they feel it is not worth it, taking into consideration that the infringement fines and sentences are very low and therefore not effective to deter offenders. Only a few stated that they use law agencies or register with South Africa's CMOs and some stated that they resort to negotiation with the offenders which is not an effective enforcement mechanism as that does not guarantee that the offender will desist from infringing the law. **Figure 4** below presents the artists responses on this question of copyright enforcement.

Figure 4: Dealing with Copyright infringements



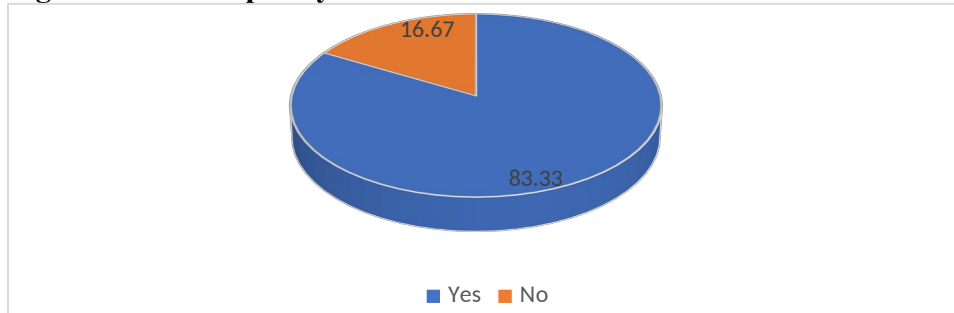
With respect to copyright enforcement challenges encountered in the music industry most artists claimed that they have encountered so many challenges in enforcing copyrights as 80% of them agreed to encountering challenges, while 20% indicated that they have not yet encountered any challenges.

The following are the main challenges stated by the artists namely that:

- i) Despite enactment of the new copyright act, the Government only operationalized the Act towards the end of 2021 and they have not used it 26
- ii) Due to lack of knowledge of copyright artists are not aware how to enforce their copyrights neither do they know the relevant institutions dealing with copyright administration and enforcement - 3
- iii) There is lack of Government support with respect to enforcement – 10
- iv) High rate of piracy -27
- v) Penalties are low - 26
- vi) Not able to effectively enforce one's copyright as the fines and sentences for infringements are currently very low and non-detering - 26
- vii) It is not easy to prove ownership - 8
- viii) No effect when reporting the cases as the law enforcement agencies are also reluctant to prosecute offenders due to low fines and sentences for infringements - 25

Those who have not faced any challenges in enforcing copyright stated that they are not well informed on the topic as they lack the knowledge to understand the subject matter (4) and some have not yet released songs with the fear of their work being copied. (1). A majority of them when asked whether they have encountered the piracy challenge responded to the affirmative with 83.33% and only 16.67 had not yet encountered the piracy problem as appear in the chart below.

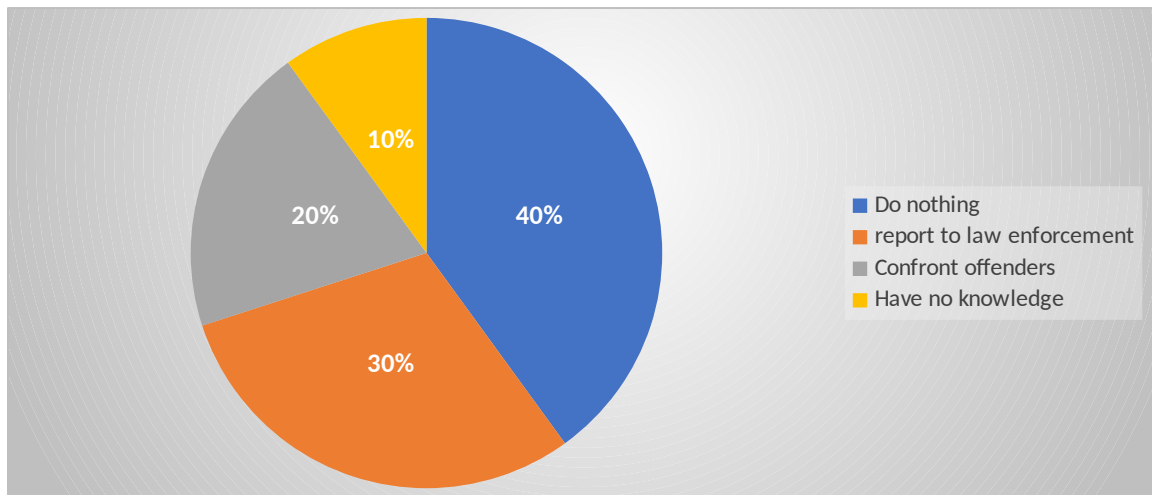
Figure 5: level of piracy



Source: Research Data

As already, indicated in **Figure 5** above a majority of the artists have been victims of piracy with a percentage of 83.3% and a small percentage of 16% stated that they had not yet been victims of piracy. The artists were asked to further state how they dealt with the challenge of piracy and most of them indicated that they did nothing at all (40%) because they felt the law was not effective, while others decided to confront the offenders (30%) with no effect as this does not deter offenders, while only 20 % of them took the courage to report it to law enforcement which they also felt was not effective because the police for instance were reluctant to pursue piracy cases due to the non deterrent fines. A few of the artists stated that they were not aware of how to deal with the challenge of piracy and these were 10% of the respondents. In overall, the artists felt the law was not effective due to the low fines imposed in terms of the 1912 Act, which took too long to be reviewed, and the new act has taken long to be operationalized. **Figure 6** below presents the artist responses on how they deal with the challenge of piracy.

Figure 6: How artists deal with piracy



Source: Research Data

4.2.1 Dissemination of Information on IP and Copyright by Government.

One of the objectives of the dissertation is ascertain the level of awareness on IP and copyright in the country as such it is imperative to first ascertain how the Government disseminates such information to the relevant stakeholders and the public at large. The MCIT as the ministry responsible for the policy direction for copyright administration was the first source of information whereby information with respect to the question of how the Government disseminates information on IP and copyright was requested from the Ministry. In response, the Ministry highlighted a number of challenges experienced by the Intellectual Property Department summarized as follows;

i) Limited Human Resource

The Intellectual property Office has over the years been mainly administering and registering industrial property and providing advisory services with respect to copyright issues as such there has been no specific unit or posts for the administration of copyright within the Office. The Ministry further highlighted that even with respect to industrial property the department fell short of the required human resource to effectively carry out its mandate in this area of IP. In this regard, one Officer responsible for industrial property is currently designated to provide advisory services to the public and the Government on copyright matters and copyright policy respectively. This challenge was worsened by the retirement of the substantive Registrar at the end of 2017 a position that was only filled at the beginning of June 2021 and the current Assistant Registrar has retired at the beginning of August 2021. Further, there are only two technical positions for Examiner of Trademarks and Examiner of patents both of which are also vacant, and lastly seven positions for support staff who are currently executing functions of the technical positions. In as much as the some of the support staff has over some years acquired experience through executing technical work within the IP Office in terms of Government policy with respect to promotions a number of other

considerations are taken into account over and above acquisition of experience in particular if the nature of the work is technical. In such a case Government policy requires that a certain level of academic qualification is required and most if not all do not meet this requirement. The Ministry of Commerce, has however requested the Ministry of Public Service to provide them with in service training in order for them to acquire the required qualification for consideration for promotion, as this will enable the Ministry to retain the skills and experience already acquired for continuity of the Office.

ii) Lack of Capacity

The country currently does not have enough people with expertise in IP and especially copyright. The Ministry currently mainly relies on WIPO and ARIPO to provide technical assistance and capacity building as well as from information sharing with other WIPO and ARIPO Member States. The issue of capacity is also exacerbated by the challenge of limited human resources in that despite the available platforms to provide technical assistance and capacity building there is currently insufficient human resources to be provided with such technical assistance. The main enforcement agencies namely the police and customs officials when interviewed also indicated that there is a serious lack of capacity with respect to copyright enforcement to enable them to effectively deal with copyright infringement. The police in particular further stated that in order for enforcement of the law to be effective, the Government should capacitate them on the new Act, as well as the general public and other enforcement agencies especially since its implementation has already commenced.

iii) Financial Constraints

As already indicated above there is a need to establish the Copyright Office Unit and a Copyright Society following enactment of the new copyright Act, however the enactment of this law was in 2018 a year in which the Government was going through a financial crisis. In

this regard in that year the Government started implementing strategies that sought to minimize Government expenditure and this included freezing of creation of new posts, filling of vacant posts and or recruitment of personnel in the civil service and this has been a major blow for the Ministry on implementing the Act. With respect to the Society as it is at the development stage, it is expected that the Government will provide subventions for the first few years to enable the society to collect and distribute royalties.

iv) Failure to Implement New Act

Based on the challenges stated above the it has taken the Ministry 3 years to commence the implementation of the new Act owing to the fact that the implementation requires that certain systems which have financial implications are developed and put in place such as human resources, office space for the copyright office and for the society, training of human resource, awareness campaigns and more. Such activities require a budget by not only the MCIT but also other relevant ministries such as the MICT with respect to payment of royalties by the two main national broadcasters namely the Eswatini TV (ETV) and the Eswatini Broadcasting and Information Service (EBIS). With the advent of the COVID -19 pandemic, the creative industry in particular the music industry has been putting a lot of pressure on the Government to implement the new Act and requesting to be capacitated on it as well as on IP and copyright mainly due to the fact that there have been lockdowns resulting in the banning of public gatherings and yet they depend mainly on public performances resulting in huge financial loss. The delayed implementation of the new Act has greatly compromised the effectiveness of copyright enforcement in the country and this is a huge financial blow for the music industry as their work is highly exposed to copyright infringements negatively affecting their financial investments. The Ministry in collaboration with the MSYC and the MICT have since been directed by Cabinet to prepare a presentation highlighting the role of IP focusing on copyright with respect to the country's economic

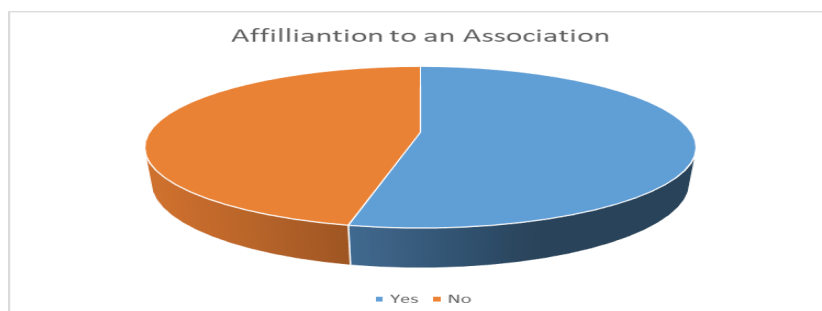
development and what is required for the Government in order to ensure compliance with the Act.

From the above-mentioned challenges, it therefore becomes clear that the Government has not been in a position to disseminate information and build capacity on IP and copyright to all stakeholders of copyright that is the artists, enforcements agents, the users of copyright. As well as the general public

4.2.2 Management of Copyright for the music industry in Eswatini.

As already indicated in chapter 2 the Collecting Society sought to be established by the new Copyright Act is yet to be fully established and operationalized following the recent appointment of the Board of the Society. Information from the ENAC with respect management of the music industry is that currently the music industry is managed through artist private managers while most of them are affiliated with music associations such as ESWAMA, ACESWA, Choral Music Association, umbholoho (traditional music). The research found that a majority of the respondents were not affiliated to any organizations and both the affiliated and unaffiliated artists provided their reasons for opting for either of the options. The following **Figure 7** shows the number of affiliated and the number of unaffiliated artists and the reasons provided for their choices.

Figure 7: Affiliation to an organisation



Source: Research Data

A majority of the artists indicated that they were affiliated to either ACESWA or ESWAMA with 51.6% while a minority of 45.2% indicated that they were not affiliated to any music association as expressed in **Table 3** below.

Table 3: Affiliation vs Non-affiliation

Responses	Frequency	Percentage %
Yes	16	51.6
No	14	45.2

Source: Research Data

The artists further provided reasons why they either were affiliated or not affiliated to an association for music and **Table 4**, below, is a reflection of some of the reasons that were provided by the artists.

Table 4: Reasons for affiliation and non-affiliation provided by the Artists

Stated reasons by artists who are affiliated to organizations	Stated reason by artists why they are not affiliated to any organization
<ul style="list-style-type: none">• A member to SAMRO thus I receive royalties• Able to report and express challenges faces• don't trust the labels• get invited for workshops, topics and financial support• help find greener pastures• help with funding• help with marketing through festive	<ul style="list-style-type: none">• prefer to be independent• there is no need for affiliation• I joined one but did not see the benefit• I see no need for membership• limited organization that share our vision• not yet convinced of benefits of affiliation• not yet understand the importance of

<ul style="list-style-type: none"> • I get the opportunity to participate in association festive • visible results 	being affiliated
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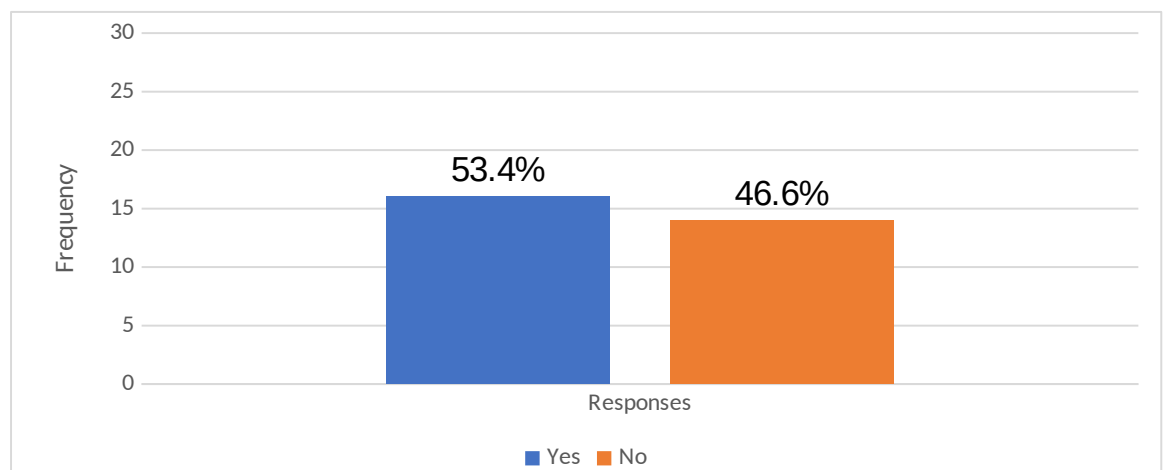
Source: Research Data

4.2.3 Other Challenges of the Music Industry

a) **Lack of knowledge on IP and Copyright** – one of the main challenges for the music industry was found to be limited knowledge on IP and copyright and in this regard various questions were asked ranging from level of understanding of IP, Copyright, on the country’s IP legislation, copyright legislation, on copyright management and the following findings were ascertained;

i) With respect to Knowledge of Intellectual Property more artists indicated that they were knowledgeable on IP with 53.4% compared to 46.6% of those that indicated that they were not clear on what IP entails as expressed in **Figure 8** below

Figure 8: Knowledge of IP

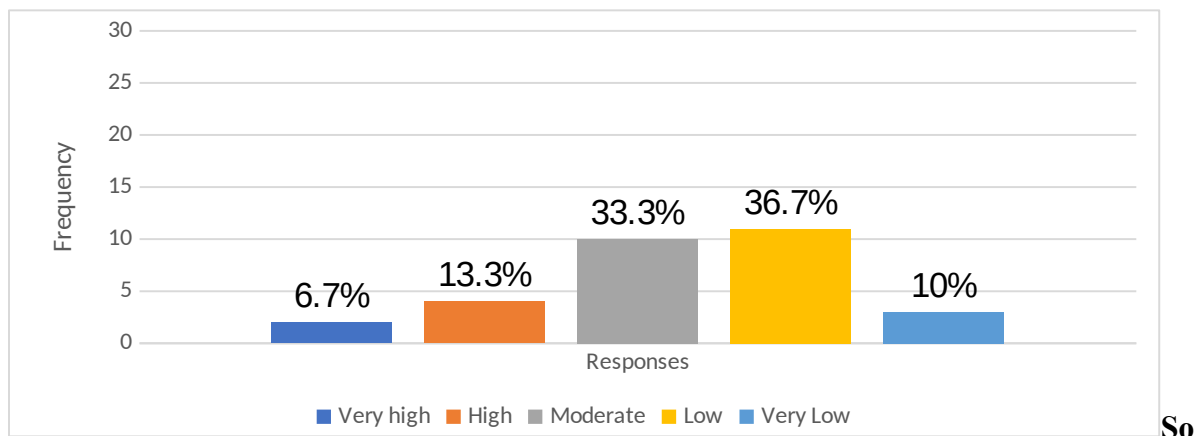


Source: Research Data

A majority of the participants rated themselves as having a low level of understanding of IP with 36.7 % followed closely by those that rated themselves as having moderate knowledge

at 33% and these were followed by those that rated themselves with a high level of understanding at 13%, subsequently 10% with a very low level of understanding and lastly 6.7% of those that had a very high level of understanding. These rates were tested further in subsequent questions to assess their accuracy.

Figure nine Level of Understanding of IP



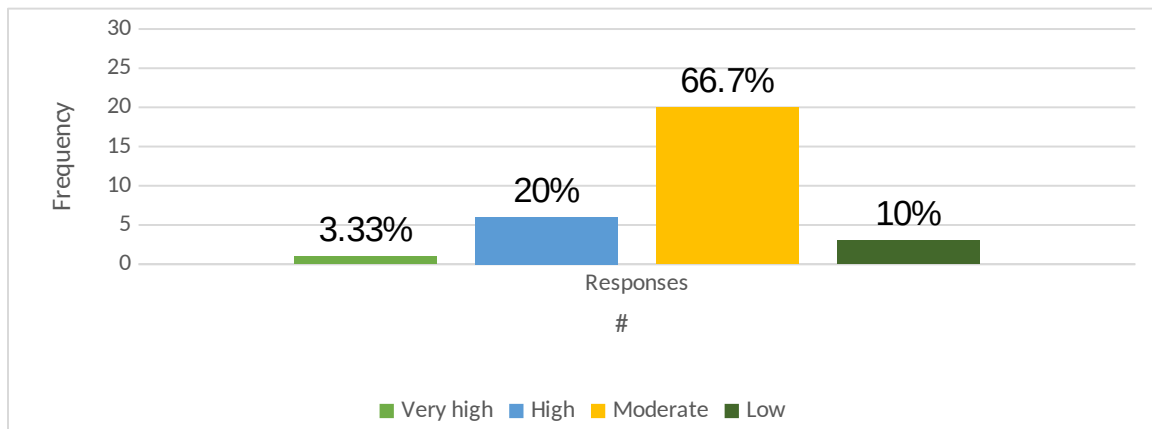
Source: Research Data

When asked to elaborate further on their understanding of IP, their responses varied, with some stating that IP relates to content developed by someone to have rights over it, that it is intangible but valuable property, some that it relates to protection of music for the composer and authors, some that it is ownership of one's own creation, that it is the translation of an idea from intangible to tangible, that whatever you create requires protection and more.

- i) With respect to their Level of understanding of Copyright a majority of the respondents were found to have moderate understanding of copyright with 66% followed closely by those that had a high level of understanding at 20%, 10% were found to have a low level and lastly only 3.3 % had a high level of

understanding of copyright as expressed in **Figure 10** below

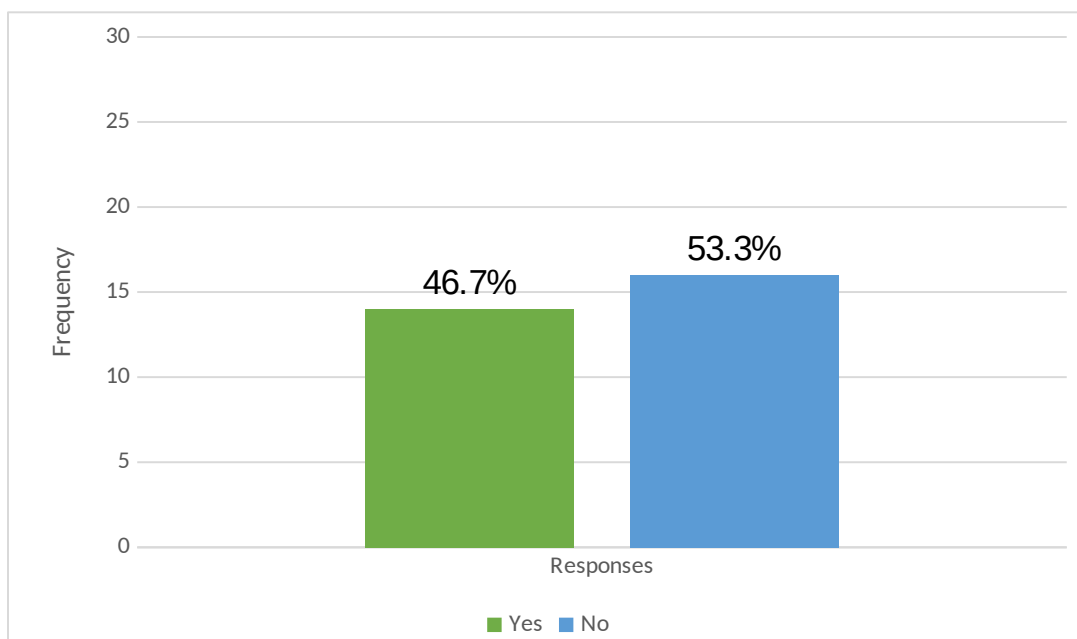
Figure 10: Level of understanding of Copyrights



Source: Research Data

The respondents were also asked to indicate whether they are knowledgeable on collective management and how they think it would be beneficial to their industry. The research found that a number of the artists, 53.3% did not know anything about collective management whereas a few 46,7% did know about it as presented in table **Figure 11:** below

Figure 11: Knowledge about collective management

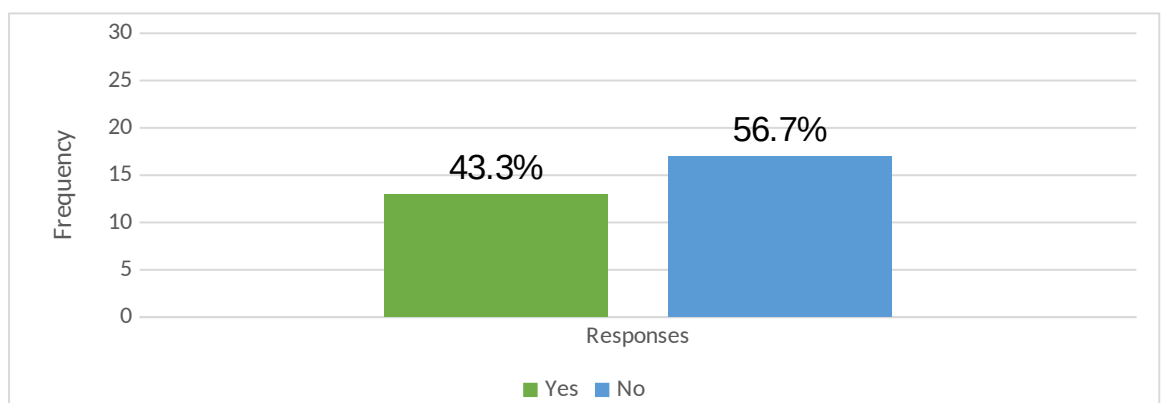


Source: Research: Data

The artists that were knowledgeable on collective management provided a number of benefits for collective management, such as poverty alleviation, contribution to the country's revenue and taxes, that it will enhance collection and distribution of royalties that would help artist gather skills, experience and resources to enhance their careers, that it would help in assisting artists in licensing, help in recording of their creative work to avoid disputes, Improve the country's economy as copyrights will ensure sustainability, promote working together with government and making it easy to succeed in the music industry, as well as provide representation of artist's rights.

- ii) With respect to their knowledge on the country's IP laws, quite a number of the artists (56.7 %) did not know anything about the country's IP laws whereas 43.3 had knowledge of the said laws as presented in **Figure 12**. Below

Figure 12: Knowledge on IP laws of Eswatini



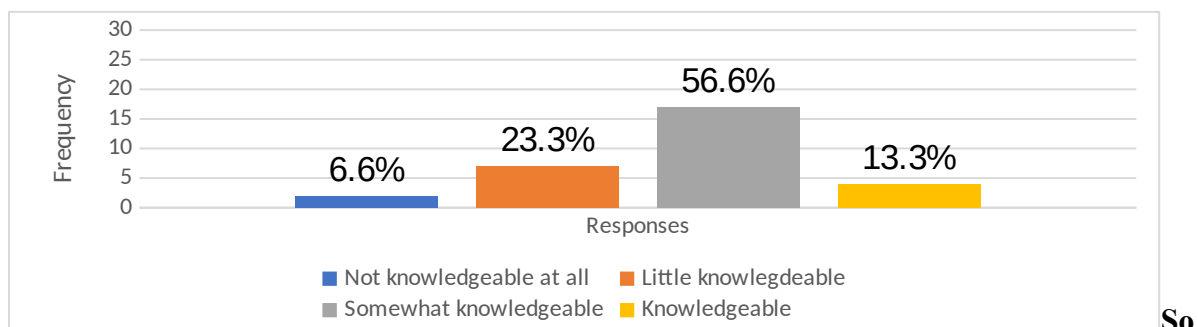
Source: Research Data

In their responses, the artists indicated that they know there are IP laws and that there is a copyright Act however, they have not read it and those that have read it do not understand it. They further indicated that these laws are outdated as they felt there is no protection of their rights and these were those that were not aware of the amendments of the Copyright Act in

particular. The research also found that most of the people in Music industry have no knowledge of the country's IP laws as they clearly stated that they know that there is a copyright act but need clarity on the act. Some expressed that they have no interest in the country's IP laws as they are out-dated in particular the copyright act of 1912 as it does not provide adequate enforcement of copyright.

With respect to their knowledge of the country's copyright legislation a majority of the respondents had somewhat knowledge of the law at 56.6%, followed by 23% who had little knowledge, subsequently 13% were knowledgeable and lastly 6.6% who were not knowledgeable at all as expressed in **Figure 13** below.

Figure 13: Knowledge on Copyright law of Eswatini

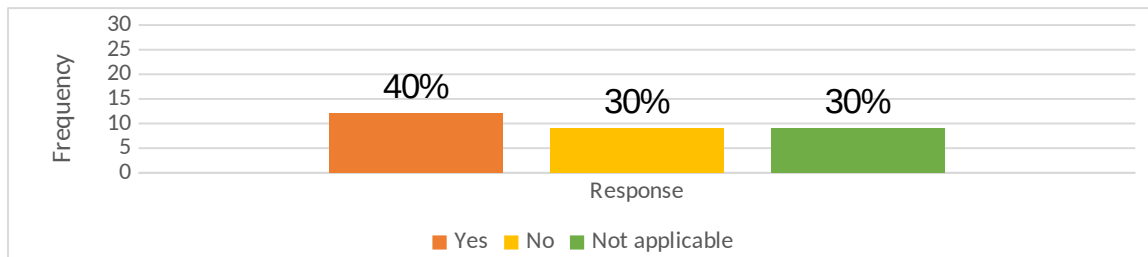


urce: Research Data

When asked to indicate what they know about the copyright law of the country, 6 stated that they know that there is a new copyright law but that it has not yet started working, 4 musicians indicated that they know the law but not the content of the law and also another 4 indicated that they know that there is a new copyright law that was passed down in 2018 which seeks to establish a copyright collective management organization which will be responsible for collection and distribution of their royalties however they had not taken time to read and understand the Act. **Figure 14** below shows the participant's responses when they

were asked whether they thought the new Copyright Act is adequate to address copyright matters in the country

Figure 14: Adequacy of the new copyright Act



Source: *Research Data*

There are those who felt the new copyright Act is adequate with 40% but failed to justify their stand as only two (2) out of the twelve (12) who said yes, justified their stand. The two musicians felt the new copyright Act is adequate in that it establishes the copyright collective society, which will be responsible for the collection of royalties if implemented by the competent institution. They also stated that the enforcement has been greatly improved in the new law as it now provides for stiffer penalties sufficient to deter infringers of copyright. Thirty (30%) of the sample felt that the new copyright law is not adequate however without pointing out the deficiencies of the Act. This group mainly indicated that since the law had not yet been tested it was not easy to specifically identify its loopholes and that the law should be implemented first for them to be in a position to know exactly if it is adequate or not.

As such, for them the non-implementation of the law made it inadequate in that they were not benefiting from the law despite enactment in 2018. Another 30% of the sample could not express themselves on the adequacy of the law mainly because they were not knowledgeable when it comes to the law as they had not read it and those that had read expressed that they

need to be taken through and certain principles explained for them to make an informed decision.

b) Financial constraints (non-payment of royalties)

Through the study, it was discovered that in Eswatini Copyright protection exists only in a name taking into consideration that the old outdated copyright law is still applicable and does not provide sufficient protection. The main challenge is that Eswatini artists are not receiving paid royalties locally, survive through festivals, and live performances because there is no collective management organization nor does the old copyright Act currently applicable provide for the collection and distribution of royalties. This challenge has further been exacerbated by the COVID 19 pandemic lockdowns and restrictions limiting the artist's main source of income through live performances and festivals. The issue of piracy also compromises their efforts and a serious threat to their other source of income through sale of their albums, which are found in the streets illegally sold to the public, and they have nothing to protect themselves, as the law is outdated and not effective in deterring copyright infringements.

c) Lack of Ressources / Infrastructure

With respect to the question relating to the availability and accessibility of music studios 66.7% of the artists agree that music studios are available and accessible in Eswatini however 33.3% artists find that studios are not easily available and accessible to them as fully appear in **Table 5** below.

Table 5 availability and accessibility of studios

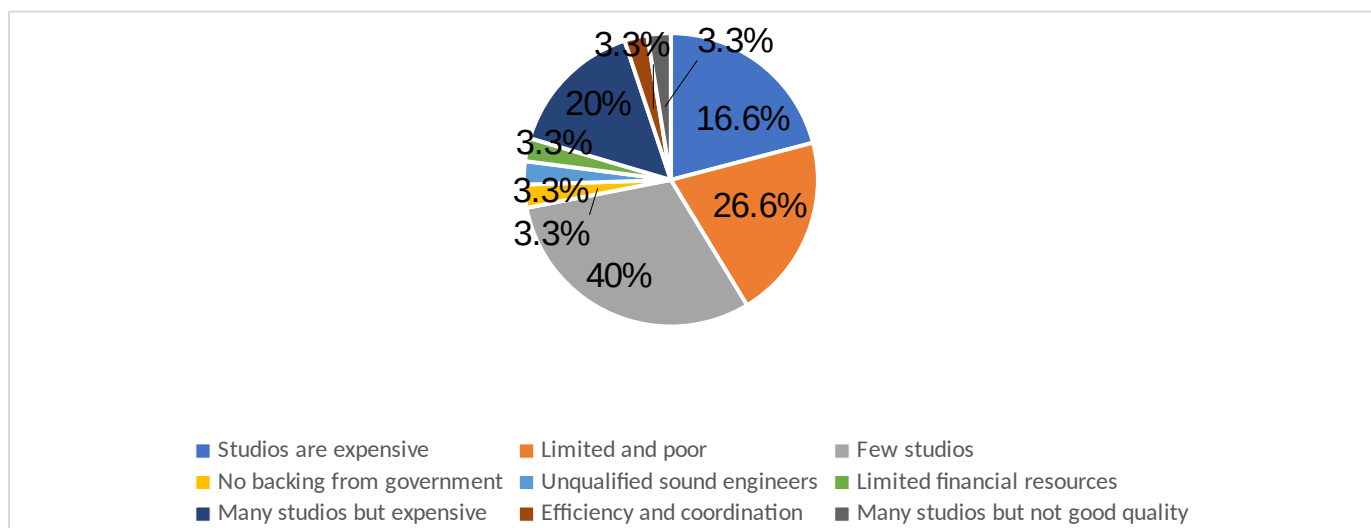
Response	Frequency	Percentage %
Yes	20	66.7
No	10	33.3

Source: Research Data

The 33% that felt that studios are not accessible in Eswatini because they are of the view that studios are very few and very expensive, as such could not afford them, some also felt that those available did not provide good quality production of music. The artists were also asked to qualify their responses as to why they say studios were available and accessible or not in Eswatini. In response divergent views were presented with a majority of 40% saying there were few studios in the country followed by 26% saying studios are limited and poor and those that felt studios are expensive at 16% with a few that said that there was lack of Government support at 3.3% and some that said that studios were many in the country and that as it may the quality was not so good that the country lacked qualified sound engineers.

Figure 15 and table below show the responses of the artists in both percentages and numbers.

Figure 25: Artists view on availability and accessibility of music studios in Eswatini



Source: Research Data

Table 6 below further shows the frequency in numbers on the various reasons why the artists felt studios are not easily available and accessible as well as the frequency in numbers for each response

Table 6: availability and accessibility of music studios

<u>View/response</u>	<u>frequency</u>
Studios are expensive	5
Limited and Poor quality	8
Few studios	12
No backup from government	1
Unqualified sound engineers	1
Limited financial resources	1
Many studios but expensive	6
Efficiency and easy coordination	1
Many studios but not good quality	1

Source: Research Data

As a result of the challenges faced by artists in the country a majority of them record outside the country mainly in neighbouring South Africa and these constitute 70% of the respondents while only 30% of them record in Eswatini as presented in **Table 7 Below**. When asked why, most of them prefer to record outside the country their response was that the studios in South Africa produce good quality music when compared to local studios and some reiterated that studios in Eswatini are few and hard to access while others complain about poor quality. The artists stated that recording outside the country is a huge financial drain for them that greatly hinders their capacity to produce more creative work.

Table 7: Number of artists recording outside the country

Response	Frequency	Percentage %
Yes	21	70
No	9	30
Total	30	100

Source: Research Data

4.2.4 Gaps in the Law/Policy

From the literature review in chapter 2 a number of gaps were identified in the new copyright Act and the respondents were also requested to address the question on whether there are any gaps in the new copyright Act. Further, in response to this question 63.3% of the artists felt that there were no gaps in the law that would require amendment, whereas 36.7% felt that even though the Act is new it does require amendment as provided in **Table 8** below.

Table 8: Need for amendment of new Copyright Act or no need

Response	Frequency	Percentage %
Yes	11	36.7
No	19	63.3

Source: Research Data

The latter group recommended that the new Act requires amendment with respect to the composition of the copyright collective management association in particular they felt that the association needs to be composed more of representatives of the creative industry as opposed to government officials. Further, that it should provide for stiffer infringement penalties and sentences to help limit piracy, and most importantly full implementation of the new copyright act. However, some had difficulties in recommending as they felt that it was not easy to say as the new law is not yet operational and that its loopholes will be more apparent once implemented.

4.3 Discussions and Interpretations of Data

4.3.1 IP and Copyright Awareness

The findings with respect to the artist's level of understanding suggest that most of the artists in Eswatini know about intellectual property but their level of understanding is quite low and moderate as indicated in the pie chart above. Most of the artists selected their level of

understanding to be low with 36.7 % and only 6.7 % of the sample said their level of understanding when it comes to IP is very high. On further engagement with the artists it became apparent that even those few artists that said their level of understanding was high could not adequately explain the concept of IP and copyright, some did not even know about collective management. Further, with respect to the level of knowledge on copyright, when interrogated further, it became apparent that some of the artists wanted to appear knowledgeable with the subject-matter and the new copyright Act and yet they could not provide adequate responses to some of the questions such as collective management, knowledge on specific sections of the Act despite indicating their level of understanding to be high

4.3.2 Management

In terms of management, a majority of the artists indicated that they are not affiliated to any of the music associations and opted to be managed by personal managers. When probed further they indicated that they did not see any benefit in being affiliated. Those that are affiliated saw the benefit of exposure in that by virtue of their membership to either ACESWA or ESWAMA, it is easy to get recognition through festivals organized by the associations, which subsequently lead to more invitations for paid live performances. The Associations were said to provide seminars in order to provide capacity with respect to their industry, however the Associations were said to be also requiring capacity and in this regard, the artists felt that Government has a role to provide such capacity in particular on the new copyright Act. Further, the artists expressed their need to have a local collective management organization as the mandate of the Associations was said to be limited in that they are not empowered to collect royalties on their behalf.

4.3.3 Challenges

As already stated above it is clear that the music industry is experiencing a number of diverse challenges ranging from lack of awareness of IP and copyright, financial constraints, poor enforcement of copyright among others. Most of the challenges are exacerbated by the non-implementation of the copyright act, as the new law seeks to addresses most of the challenges highlighted above, such as the issue of enforcement in that it provides for an effective enforcement mechanism, the establishment of a collective management organization that will be responsible for the payment royalties and more. In this regard, the artists felt neglected and were of the view that the Government did not recognize the creative industry as a career or a business like all other businesses as such the music industry lacked the required support from the Government. This challenge was made worse by the fact that there was no CMO in place

to represent their interests and collect royalties for them. In this regard, they felt that their work was being exploited without remuneration and the law was not sufficient to protect their rights. Due to lack of recognition, most of them indicated that it was not easy to get financing from financial institutions

The artists were further requested to propose strategies that may be put in place in order to address the highlighted challenges and the following proposals were made namely;

- i) Recognition and support of creative industries from the Government through providing technical and financial support. In this regard, they felt that Government should organize seminars to teach them on IP and copyright. In particular they felt a strong need to be thought about the new Act and its implications for them;
- ii) That Government should endeavour to use available media platforms to provide awareness on IP and copyright to the general public and mainly specific users of copyright, as they felt that this could minimize the problem of piracy
- iii) Creative arts require recognition and equal treatment as other industries and fields such as sport and therefore should also receive yearly Government subvention to financially sustain their industry
- iv) Creative arts should be introduced at primary level at schools up to tertiary level and recognized as a career
- v) Implementation of the new copyright act in order to operationalize the CMO and effectively safeguard the copyrights of the music industry and minimize the high prevalence of piracy as that demoralizes the industry
- vi) Government should invest in building studios and have qualified and dedicated people to manage them, as well as invest in performance venues in all the four regions of the country, as these are very expensive and those available are not of good quality

4.3.4 Gaps in the Law

From the data presented above the main concern raised by the artists was with respect to non- implementations of the new copyright law, which made it difficult for them to appreciate any shortfalls in the Act, as it had not yet been put to the test. It is worth mentioning however that due to lack of knowledge and understanding of copyright and the new Act the artists were not in a position to make an informed opinion on whether there are any gaps in the new Act that require to be reviewed. Some of the artists were recommending for stiff penalties, collection of royalties and convening of seminars on the new law, and this was a clear indication that they were not privy to the new Act as it covers these areas. Those that had read the Act confined themselves to the composition of the collective management board whereby they were of the view that it should be comprised more of the artists as opposed to Government officials.

4.4 Summary

This chapter mainly presented the findings from the research questionnaires that were presented mainly to the music industry artists, copyright stakeholders as well as some Government departments relevant in the implementation of copyright policy as well as its administration. Thereafter the chapter analysed the data and literature using the adopted research methodology as elaborated in chapter 3, in an endeavour to achieve the four research objectives and the arising research questions. The aim of the analysis was to evaluate the extent of the level of copyright protection and enforcement awareness in the country, to understand the challenges that the music industry is encountering as well as come up with what strategies that may be explored in order to try to address these challenges.

CHAPTER 5: SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The main aim of this chapter is to present a summary of the study taking into consideration the research problem, the objectives and findings as well as present the conclusion, implications, recommendations and suggestions for further research.

5.2 Summary

The main objective of the study was to explore the role of the copyright enforcement in enabling the music industry make meaningful contribution to the economic growth of the country. In so doing, the study analysed the copyright enforcement system of the country, the legal and institutional framework of copyright. The paper also assessed the level of copyright knowledge and awareness in the country, the main causes for violations, discussed the challenges with a view to understand the reasons behind such violations as well as analysed and identified shortfalls in the copyright legal framework among others. The aim was mainly to come up with recommendations based on the findings of the study in order to ensure that the objectives are met. In so doing a number of artists, enforcement agents and music associations and institutions participated in providing the required information seeking to address the research questions that ranged from ascertaining how Government disseminates information, how the music industry is managed, whether the new copyright Act is adequate for copyright administration in the country or not.

In this regard, the main objectives of the study were met in that information with respect to the level of copyright infringements, the adequacy of existing enforcement mechanisms as well as the reasons behind challenges copyright enforcement and the level of copyright awareness was ascertained. From the findings it became with a clear indication that a lot is

still required to be done in order to ensure that copyright enforcement is strengthened as one of the main pillars to ensuring that the industry is enhanced. A number of challenges were identified ranging from financial constraints, limited resources such as studios performance venues, lack of recognition of the industry in the country, none-implementation of the new copyright Act, high prevalence of piracy, poor and or inadequate enforcement of, lack of a clear copyright legal and institutional framework. Having identified the challenges, a number of strategies were proposed by the industry on how copyright may be strengthened in the country. A number of artists emphasized on the need for Government to recognize the music industry as a career and to provide them with the required support ranging from financial support, technical and capacity building support in particular on the new copyright act.

5.3 Conclusions

As alluded to in chapter 2 and as expressed in the various WIPO studies on the economic contribution of copyright, there is room for improvement in Eswatini for copyright to provide a meaningful contribution to the country's economy. The study has established that in Eswatini the enforcement pillar of the copyright enforcement system is inadequate mainly due to a number of reasons such failure to review the law for a very long time. Further that despite being home to many talented musicians, the music industry in Eswatini has limited knowledge on copyright and lacks the necessary capacity and financial independence to enable the industry to provide meaningful contribution to the economy. The study further established that the problem of copyright awareness and capacity also extends to the Government thus compromising its effort in supporting and or effectively coordinating services for strengthening and capacitating the industry, has contributed to the failure to strengthen the copyright legal and institutional framework. This was also viewed as being one of the reasons for failure to review the law for such a long time. This developed a bad

perception of Government by the music industry, which views Government as neglecting their industry and failing to recognize and support them. It has also been established that the music industry of Eswatini is experiencing a variety of other challenges as a result of inadequate copyright legal and institutional framework, which may also be held accountable for the inadequacy in the enforcement thus posing a serious threat to their ability to be creative and productive in their industry.

Consequently, for many years Eswatini artists have played a minimal role in the country's economic development. That as it may however, all is not lost as the country seems to be on the track to addressing the challenges affecting the creative industry and the political will is highly committed to ensuring the effective administration of copyright in the country. In conclusion therefore despite the challenges identified in the study there is room for improvement if certain strategies and policies are put in place and all relevant parties coordinate and collaborate in ensuring that the music industry is strengthened in order to effectively contribute to the country's economy.

5.4 Implications

Despite the wide range of challenges identified in the study the implications for facilitating a collaborate effort between the Government, the music industry, the different copyright enforcement and the public is imperative. This can be achieved through building capacity for all parties and coming up with relevant strategies for improving the industry is that indeed the industry can contribute to the country's economy while also enhancing the industry and encouraging creativity in the sector. The delayed implementation of the new copyright Act further implies that using copyright enforcement as an enabler of the creative industry, specifically the music industry cannot to achieved as the new law now provides for a much

more effective copyright enforcement mechanism through providing stiffer penalties and sentences for copyright infringements which could be deterrent enough . The new Act further establishes the country's CMO which will be responsible to support and strengthen the industry and the Copyright Office which will be responsible for the administration of copyright and providing awareness on copyright as well as facilitate that the various copyright stakeholders are capacitated through assistance from WIPO and ARIPO. This will go a long way in encouraging the demoralized music industry to be more creative and produce more work.

5.6 Recommendations

Having ascertained the gaps between the music industry and the policy direction, the level of copyright awareness for the industry, their main challenges as well as the gaps in the copyright legal and institutional framework, the research has come up with the following recommendations some of which were proposed by the industry.

5.6.1 Development of a National Intellectual Property Policy

A national IP policy and strategy is imperative to guide and promote utilization of the IP system in a way that will support the country's development objectives. There are a number of challenges that impede effective use of the IP system in particular the copyright protection and enforcement mechanisms in the country and these have a negative impact in meeting the country's development goals as such the lack of a national IP policy. The policy is imperative to provide guidance with respect to addressing issues such as, insufficient awareness on copyright protection and enforcement, inadequate enforcement of IPRs, inadequate copyright administrative framework and weak Institutional capacity,

inadequate integration of intellectual property into national and sectoral development policies, Inadequate institutional mechanism to ensure policy coherence and coordination, inadequate generation of IP assets, and inadequate protection of IP assets. This can be done through defining policy goals; objectives and strategies, setting institutional arrangements as well as defining monitoring and evaluation framework and providing a five year implementation plan.

5.6.2 Full Implementation of the Copyright Act

The main challenges expressed by the artists mainly relate to the failure to review the old Act and failing to implement of the new Act in particular this Act brings in a much more clearly defined copyright enforcement mechanism as well as stiffer penalties for copyright infringements that will have an impact in deterring offenders. The establishment of the Copyright Society and payment of royalties, which is also provided for in the new Act, will also ensure that the music industry challenges are adequately addressed. As the Act is still new and yet to be put to the test, implementation regulations are imperative for effective implementation of the Act, as such fast-tracking the process of enactment of the implementation regulations is therefore one of the main recommendations of the study. The full implementation of the Act can be done in stages in order to cater for those sections that have financial implications and cannot be implemented immediately, such those on the payment of royalties as that requires the Ministry of ICT to prepare a budget for the national radio and television stations. The recent appointment of the Copyright Society Board by the Minister is a milestone in as far as implementation of the new Act is concerned, however more is still outstanding such as the appointment of the Director and staff for purposes of operationalizing the CMO, the establishment of the Copyright Office, appointment and or recruitment of personnel for that Office as well. This will require the Ministry to prepare a

budget to cater for salaries for the CMO staff, additional positions for the copyright office, board fees for the CMO as well as for premises and office equipment. The implementation of the Act will effectively strengthen the copyright institutional framework with respect to copyright enforcement.

5.6.3 Building Capacity on IP and copyright

As already ascertained from the findings in the previous chapter that there is a gap in terms of knowledge on IP and in particular copyright from policy makers, copyright enforcement agencies, stakeholders, the creative industry and the users themselves, a lot needs to be done by the Ministry of Commerce, Industry and Trade in building capacity in this area. It also appeared from the findings that in as much as the existence of the new Act is known, some have not seen and read it and those that have read it do not understand it, that is, its implications and how it will be implemented. Further taking into consideration that the Copyright Unit is yet to be established and personnel recruited, it therefore follows that once appointed the new personnel will also require to be capacity on IP and copyright issues. This is so, especially in view of the fact that they will take a lead in ensuring creating awareness on IP and copyright as well as facilitating that all copyright stakeholders are provided with the necessary capacity. The music industry, copyright stakeholders, enforcement agencies also require to be capacitated on IP and Copyright and in particular on the new copyright Act. In the meantime, the IP Office may provide such capacity through technical assistance from both WIPO and ARIPO.

5.6.4 IP Awareness Creation

The research also found that a number of people including artists, enforcement agencies, the users and some copyright stakeholders require more knowledge on the subject matter of IP

and copyright in particular, understanding the new copyright Act and its implications on the industry, the role of the IP Office and the importance and or relevance of IP for economic development. Taking into consideration that the implementation of the new Act will now require a number of entities to start paying royalties sensitizing the various copyright stakeholders this law in particular with respect to copyright protection and enforcement is imperative. This will minimize the high rate of piracy in the country, as it will prepare the various users of copyright and to serve as a warning to infringers as the new penalties are now stiffer than in the old Act. Enforcement agencies will also require awareness in particular on the implications of new Copyright Act with respect to copyright protection and enforcement. It is the role of the Copyright Office in terms of Section 76(g) of the new Copyright Act, to organise outreach and awareness creation programmes to inform, educate and sensitize the public on matters relating to copyright and once capacitated the Office will be expected to effectively carryout this function. In the meantime, however the starting point would be to develop a website for the Office as a way to reach out to the public on the role of the Office, on copyright generally, the country's legal framework and more. Acquiring a slot in both the national radio and TV station for IP as well as on the local newspapers to provide information on IP, the new Copyright Act and its implications can help create awareness and build capacity to the nation. The office can also take advantage of the toolkits developed by ARIPO such as the Awareness Raising Guide.

5.6.5 Close Gaps in the Law

Despite recent enactment of the copyright Act, a number of gaps were identified that impact on the effectiveness of copyright enforcement in the country, as such these require special consideration for incorporation into the Act. Taking into consideration the fact that the consumption of creative products is international and yet copyright enforcement limited to

territorial application ratifying or Acceding to and domesticating some of the of the WIPO treaties will have a positive impact with respect to enhancing copyright enforcement in the country. In particular, the WIPO internet treaties namely the WCT and WPPT, the Rome Convention, the Marrakesh treaty, the Beijing treaty and more, may also benefit the country's music industry in that it would ensure that the Eswatini copyright enforcement law is in pace with technological changes that have rendered the enforcement of copyright quite difficult. Such a move will ensure that local artist are provided with protection against piracy in the area of computer programmes and databases within and outside the borders of the country.

5.6.7 Suggestions for Further Research

The contribution of the copyright based industries to the economy of Eswatini has not yet been researched and yet such a study would enable the Government to understand the role and importance of the industry on the country's economy. Based on the findings of WIPO's studies in various countries on measuring the size of copyright to the effect that they generate direct and indirect contribution to economic performance and development and create jobs, the Ministry of Commerce, Industry and Trade is encouraged to utilize the technical assistance provided by WIPO to a undertake this study. This is based on the fact that such studies provide reliable evidence based on the 2015 WIPO Guide on surveying the economic impact of copyright-based industries. In this regard, the studies look at the size of the copyright-based industries and consider the economic contribution in terms of their share of GDP, employment generation and trade.

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Appendix 1: Questionnaire Questionnaire for Institutional Data Request



NYANGA, ROAD, MUTARE, ZIMBABWE.

COLLEGE OF BUSINESS, PEACE, LEADERSHIP AND GOVERNANCE

My name is Nobuhle Loraine Matsebula, a Master's in Intellectual Property (MIP) student from **Africa University** and I am carrying out a study on **COPYRIGHT AS AN ENABLER FOR THE CREATIVE INDUSTRY IN ESWATINI – FOCUSING ON THE MUSIC INDUSTRY INFORMED CONSENT GUIDE**

I am kindly requesting that you participate in this study by answering and or filling in the attached questionnaire.

The purpose of the study is **evaluate the role and importance of copyright in enabling the music industry in the country** You were selected for the study because **of your experience in the music industry as an artist and or involvement of your organization / role in the music industry and I will be interviewing at least 150 or more other relevant participants**

Procedures and duration

If you decide to participate you will **be expected to fill in the attached questionnaire and or be available for an interview**. It is expected that this will take about **30 minutes to fill the questionnaire and about 10-15 minutes interview**.

Benefits of the Study

The research is intended to provide insight on the role and importance of copyright for the music industry of the Kingdom of Eswatini and the information required is meant to assist the researcher understand the gaps that need to be addressed in order for the copyright system to effectively strengthen the music industry. As such, the findings of the study will benefit the country from the Policy making level, the artists and the users as it is anticipated that of the

research will come up with recommendations strategies and policies that are required to ensure that the copyright system can effectively enhance the music industry in order to be economically and socially productive.

Confidentiality

Kindly be advised that any information that is obtained in the study that can be identified with the participant will not be disclosed without your permission.

Voluntary participation

Participation in this study is voluntary. If participant decides not to participate in this study, their decision will not affect their future relationship with the researcher and if they chose to participate, they are free to withdraw their consent and to discontinue participation without penalty.

Offer to answer questions

Before you sign this form, please ask any questions on any aspect of this study that is unclear to you. You may take as much time as necessary to think it over.

Authorisation

If you have decided to participate in this study, please sign this form in the space provided below as an indication that you have read and understood the information provided above and have agreed to participate.

Name of Research Participant (please print)

Date

Signature of Research Participant or legally authorised representative

Signature of Researcher

Q#	Questionnaire	Response
Section A: IPR and Copyrights		
1.	Do you know anything about intellectual property? If yes please elaborate	<input type="checkbox"/> Yes <input type="checkbox"/> No
2.	What is your level of understanding of intellectual Property. Please tick one	<input type="checkbox"/> Very high <input type="checkbox"/> High <input type="checkbox"/> Moderate <input type="checkbox"/> Low <input type="checkbox"/> Very low
3.	What is your level of understanding of copyright. Indicate by ticking one of the following options	<input type="checkbox"/> Very high <input type="checkbox"/> High <input type="checkbox"/> Moderate <input type="checkbox"/> Low <input type="checkbox"/> Very low
4.	Do you think copyright is relevant or relates to what you do? If yes please explain how (e.g. policymaker, artist, user etc)	<input type="checkbox"/> Yes <input type="checkbox"/> No artist
5.	Do you know anything about collective management If your answer is yes in 5 kindly indicate how you think collective management will benefit the music industry in the country I	<input type="checkbox"/> Yes <input type="checkbox"/> No
Section B: Copyright Policy and Legislation:		

6.	Do u know anything about the country's IP laws If your answer is yes please elaborate	<input type="checkbox"/> Yes <input type="checkbox"/> No
7.	How knowledgeable are you about the country's copyright legislation?	<input type="checkbox"/> Not knowledgeable at all <input type="checkbox"/> little knowledgeable <input type="checkbox"/> somewhat knowledgeable <input type="checkbox"/> knowledgeable <input type="checkbox"/> very knowledgeable
8.	Kindly indicate what you know about the copyright law of the country.	
9.	Is the new copyright Act adequate in addressing copyright issues in the country?	<input type="checkbox"/> Yes <input type="checkbox"/> No
10.	If not what would you recommend be included in the Act that is missing?	
SECTION C: Music Industry		
11.	How long have you been in the music industry?	
12.	What kind of music do you perform?	
13.	What kind of music artist are you?	<input type="checkbox"/> Singer <input type="checkbox"/> Song writer <input type="checkbox"/> Dancer <input type="checkbox"/> Back up Singer
14.	Have you recorded any work (music) yet? If yes, how many albums or singles	<input type="checkbox"/> Yes <input type="checkbox"/> No

15.	Do you record in Eswatini or outside If outside please indicate why	<input type="checkbox"/> Yes <input type="checkbox"/> No
16.	Are music studios available and easily accessible Please explain your answer	<input type="checkbox"/> yes <input type="checkbox"/> No
17.	Who are the main users of your creative work?	<input type="checkbox"/> Buyers of CDs <input type="checkbox"/> DJs & Music Clubs <input type="checkbox"/> Radio and TV Stations <input type="checkbox"/> Other (specify)
18.	Do you feel your copyrights as a musician are protected? Please explain your answer	<input type="checkbox"/> Yes <input type="checkbox"/> No
19.	Do you know the specific sections of the copyright act that protects your copyrights as a musician If yes please state which one(s)	<input type="checkbox"/> Yes <input type="checkbox"/> No
20.	Do you think there is anything more that could be done to improve copyrights in the country? Please explain	<input type="checkbox"/> Yes <input type="checkbox"/> No
21.	What do you think are the main challenges affecting the music industry in the country with regard to copy rights?	
22.	Do you think the music industry could benefit from improved copyright laws Please explain your response?	<input type="checkbox"/> Yes <input type="checkbox"/> No

23.	How do you deal with enforcement of your copyright work that you have produced so far	
24.	Are there any copyright enforcement challenges that you encounter? Please explain	<input type="checkbox"/> Yes <input type="checkbox"/> No
25.	Has your work ever been pirated: If yes how did/do you deal with it?	<input type="checkbox"/> Yes <input type="checkbox"/> No
26.	Are the current infringement fines sufficient to deter non compliance with the pirating of your works? Please explain your answer	<input type="checkbox"/> Yes <input type="checkbox"/> No
27.	Are there amendments you would recommend with respect to copyright infringement in the law? If yes, what would those amendments be?	<input type="checkbox"/> Yes <input type="checkbox"/> No
28.	What strategies would you recommend be put in place in order to promote and strengthen copyrights in the country?	
29.	Are you affiliated to any organization? If yes what are the benefits? If not why?	<input type="checkbox"/> Yes <input type="checkbox"/> No
30.	Which criteria of royalty distribution would you recommend be adopted?	

Appendix 2 AUREC Request for Ethical Review Clearance