Book Review: Copyright, CMOs and Competition in Africa and Kenya as Hotbed of Crisis and Reforms in Collective Management Regulation

By:

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A few months ago, on 24th August 2021, the Kenya Copyright Board (KECOBO) announced its unprecedented decision to revoke the licenses of all the collective management organizations (CMOs) in Kenya citing non-compliance with sections 46(9) to 46(12) of the Copyright Act. In the same breath, KECOBO indicated that it would commence public consultations geared at reforming the collective management sector in Kenya. Enter Desmond Oriakhogba's 2021 book: "Copyright, CMOs and Competition in Africa" with an entire chapter devoted to the regulatory landscape in Kenya that is both timely and extremely relevant for KECOBO, policy-makers and copyright stakeholders as they chart the way forward for the operation and regulation of CMOs in Kenya.

Chapter 6 of Oriakhogba's book focuses on collective management of copyright in Kenya. The chapter has four main parts starting with the emergence of collective management in Kenya which is closely followed by a keen look at the legislative history of the regulation of collective management in Kenya. Thereafter, the chapter delves into the institutional framework for regulation of collective management in Kenya and then a critical analysis of the regulation of collective management based on the interrelationships between CMOs and KECOBO, copyright owners, users as well as CMOs amongst themselves.

Oriakhogba traces the evolution of collective management from Kenya's colonial and post-colonial period with the transition from the United Kingdom (UK) Performing Rights Society to the establishment of the first CMOs in Kenya in the early 1980s. From the 1980s to 2001, Oriakhogba notes that Kenya's CMOs operated under a non-regulatory system which he argues made it difficult for the CMOs to collect royalties. In this regard, he offers a novel interpretation of one of the earliest reported cases in collective management namely the 'Klub House' case where the court held that the Music Copyright Society of Kenya (MCSK) had failed to establish that it was the sole licensing body in Kenya mandated by rights holders to represent them.

Prior to 2001, Oriakhogba observes that the only form of regulation for CMOs was the 1992 Amendment of the Copyright Act which introduced the Competent Authority. This Authority established for the sole purpose of determining matters relating to the licenses granted by CMOs to users. The author therefore posits that the limited powers of the Competent Authority necessitated the establishment of KECOBO, with express powers to regulate CMOs, which was done through a revision of the Copyright Act in 2001. As Oriakhogba demonstrates, KECOBO's role as CMO regulator has not been without its challenges. In the '*Kisumu Bar Owners Association*' case, KECOBO's power to license CMOs was successfully challenged on the basis that it's Board of Directors was not duly constituted as provided in the enabling legislation. Similarly, in the '*Laban Toto*' case, the author notes that KECOBO's power to register CMOs was successfully challenged on the grounds that the regulator had not complied with the Fair Administrative Action Act which gives effect to Article 47 of the Kenyan Constitution.

In the Kenyan context, Oriakhogba clarifies that the Competition Authority established under the Competition Act plays a role in the regulation of collective management. This is significant considering the gaps the author identifies in the copyright framework for regulation of the relationships between CMOs and other copyright stakeholders. However, the author notes that certain agreements or practices relating to collective management may be specifically exempted from the application of competition law in terms of the Competition Act.

The highlight of this book is Oriakhogba's masterful examination of the nuts and bolts of the regulation of CMOs in Kenya which kicks off from page 152. Starting with the definition of a CMO under Kenyan law, the author opines that CMOs clearly undertake functions that may be described as public in nature. This interpretation is supported by the example cited by the author of the *R v KAMP* case where the litigants unsuccessfully sought orders of judicial review orders of certiorari, prohibition and mandamus against CMOs in Kenya.

Regarding KECOBO's power to register CMOs in Kenya, Oriakhogba points out that the 12-month validity period of a CMO license to operate is not only problematic for the CMO itself but it presents administrative concerns with respect to KECOBO's ability to properly assess CMOs. In this regard, the author notes that the introduction of provisional licenses is useful as it allows KECOBO and CMOs to address any administrative shortfalls relating to applications by CMOs. Another important fact astutely noted by the author is the practical challenge posed to users by registering more than one CMO per class of rights and category of works by KECOBO. In the Kenyan context, the author demonstrates, using the *R v KAMP* case, that having more than one CMO in the music industry has resulted in confusion and uncertainty as to tariffs and licensing conditions. In this connection, the author notes that the introduction of section 46A of the Copyright Act may offer a solution as it prohibits CMOs from imposing or collecting royalties on the basis of tariffs not approved and gazette by the Cabinet Secretary (Minister) in charge of copyright matters.

The Cabinet Secretary in charge of copyright matters also happens to be the Registrar of Companies in Kenya. As Oriakhogba rightly notes, CMOs in Kenya, in their capacity as companies limited by guarantee without share capital, are subject to the regulatory framework under the Companies Act, which plays an

important role in governing the relationship between CMOs and their members. In this regard, the CMOs have certain obligations with respect to registration of members. In addition, CMOs are required to observe the rights of members of a company under the Companies Act, which include the rights to receive notices of, attend and vote at, the company's general meetings and to withdraw membership, among other rights.

Throughout the chapter, Oriakhogba carefully explains how the provisions in the recently published 2020 Collective Management Regulations have been aligned with existing administrative practices by KECOBO in carrying out its function of licensing and supervision of CMOs. One such practice is the imposition of the 30:70 cost-royalty ratio whereby KECOBO requires CMOs to deduct only 30 per cent of collected royalties as a management fee and distribute the remaining 70 per cent to the copyright owners. Another such practice relates to the requirements for periodic reporting and audits of CMOs.

The regulation of the relationship between CMOs and users in Kenya has been the subject of both judicial and executive scrutiny in the recent past. Oriakhogba unpacks in a clear and concise manner the licensing and tariff-setting practices of CMOs in Kenya against the backdrop of amendments to the Copyright Act and the recent Collective Management Regulations. In this regard, the author clearly outlines the interplay between the Copyright Tribunal, the courts, the Cabinet Secretary and KECOBO in ensuring that the tariff-setting process is not only transparent but inclusive and consultative.

According to Oriakhogba, there appears to be a gap in the regulation of the relationship between CMOs in Kenya. For instance, there are no express provisions prohibiting a CMO from engaging in conduct that has the effect of preventing another CMO from undertaking its functions. Additionally, the author suggests elsewhere in his book, that regulatory provisions may be useful to deter CMOs from concerted practices aimed at obtaining high tariffs from users or controlling the copyright market.

The author's selection of Kenya for comparative analysis alongside creative economy powerhouses Nigeria and South Africa demonstrates the East African nation's growing visibility and prominence as a hub for legislative and regulatory developments in the domain of intellectual property generally and

copyright in particular. To Oriakhogba's credit, his dissection of Kenya's collective management sector reveals not only the tumultuous journey in the regulation of CMOs but the sophistication and innovation of copyright stakeholders in confronting the multi-faceted challenges posed by the administration of copyright and related rights.

From a Kenyan perspective, Oriakhogba's book will undoubtedly serve as a reference point for scholars and practitioners in the copyright sector for years to come. The author offers a nuanced view of the recently published Collective Management Regulations which, if properly implemented, will shape future developments in the oversight and supervision of CMOs in Kenya.

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