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The Kenyan national anthem: A copyright uncertainty



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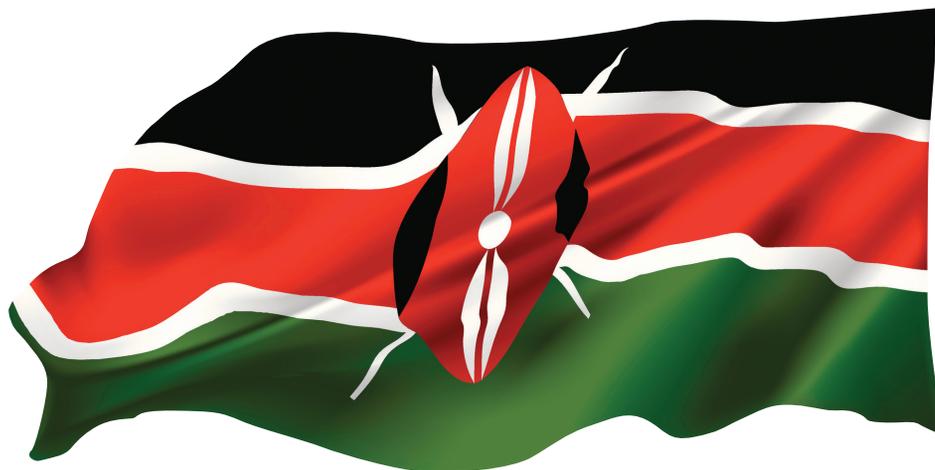
In February 2019, a story broke that the Kenyan national anthem had been copyrighted by a British company. An online user had composed a work and attempted to post it on video site YouTube, upon which his video was stuck out for copyright infringement. There was a further claim that the video had been copyrighted by the foreign organization which was then monetizing it to the exclusion of Kenyans. Such an alarmist outlook of intellectual property matters is misguided, and a closer dissection of the copyright framework is necessary.

COPYRIGHT PROTECTION

Copyright exists to give the owner of a work the exclusive right to control how their work is used, communicated and distributed in any medium. In copyright law, protection of a creative work lasts for the lifetime of the author and an extra fifty to seventy years after death. After this period the work goes into a commonly shared space called the Public Domain, where anyone can freely use the work in any manner (including commercially) without having to ask for any permissions.

With regards to Government works, this varies jurisdictionally. In Kenya, per the present Copyright Act, 2001 (Section 25) the copyright for a Government commissioned musical work lasts for fifty years from the date of first publication.

The national anthem is protected under the Constitution (Chapter 2, Article 9) as one of the national symbols of the Republic of Kenya. The national anthem, derived from a folk song Pokomo lullaby, was composed by a five man team in 1963. After fifty years, the copyright in the national anthem expired in 2013 and thus became public domain material and free for anyone to use.



YOUTUBE ISSUE

YouTube is a social media site enabling the upload and sharing of original video content by the public under the slogan “broadcast yourself”. When one uploads a video with copyright content belonging to another, the YouTube algorithm through content identification is set to take down the entire video; after scanning its database of copyright works, even though the copyright contentious clip is only a few seconds long. This YouTube take down procedure is intended to protect the copyright content owned by others on the platform. Although rather harsh, this mechanism means that after three such strikes the account will be disabled and all videos will be removed.

At first instance, a copyright owner will submit a copyright complaint to get certain content taken down for infringement of their copyright. The receiver of the notice will after viewing the claim have the opportunity to counter the notice so that the content is put back up citing various copyright law exceptions and limitations like fair use and public domain use.

NATIONAL ANTHEM

The British company uploaded a video of a compilation of various national anthems. In copyright law, a derivative work is one that is based on an existing work such that if musical, copyright would only extend to the new aspects of the work and not to the copyrighted portions or elements of the work which are in the public domain. Such works will be protected as original works due to the special arrangement or new composition, but, only if the work is sub-

stantially original or if furthered by a new additional element. They owner gains copyright in the new derivative work and can license it.

A similar issue arose in 2013 when Sony claimed the rights to a YouTube compilation which included the Greek national anthem, and was faced with the same national furore for copyrighting content that rightly belonged to the nation.

Russian born Igor Stravinsky was no stranger to copyright when his 1944 rendition of the American national anthem “The Star Spangled Banner” got him in trouble with the police for tampering with the national anthem (although in the public domain).

CONCLUSION

Although, the Kenyan national anthem is in the public domain, the different arrangement in a new work which incorporates it is entitled to copyright protection as a derivative work. This will and should not prevent others who want to use certain portions of the national anthem in their own works from freely doing so. It certainly means that the British company does not own copyright to the Kenyan national anthem, just the rights to the full arrangement of its new compilation.

YouTube from July, 2019 announced a review of its terms to enable time stamping on any copyright infringement claim so that the exact infringing portion is blocked and not an entire video.

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