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TWELFTH PARLIAMENT – SIXTH SESSION

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND
INNOVATION

REPORT ON-

THE CONSIDERATION OF THE COPYRIGHT (AMENDMENT) BILL, 2021

(NATIONAL ASSEMBLY BILLS NO. 44 OF 2021)

*Approved for tabling
23/2/22
DSMP*

DIRECTORATE OF DEPARTMENTAL COMMITTEES
CLERK'S CHAMBERS
PARLIAMENT BUILDINGS
NAIROBI

FEBRUARY, 2022

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LIST OF ABBREVIATIONS AND ACRONYMS

A19EA	ARTICLE 19 Eastern Africa
CODE-IP	Content Development and Intellectual Property Trust
FIAPF	International Federation of Film Producers Associations
IFPI	International Federation of the Phonographic Industry
IPA	International Publishers Association
ISP	Internet Service Providers
KAMP	Kenya Association of Music Producers
KECOBO	The Kenya Copyright Board
KPA	Kenya Publishers Associations
LATL	Liberty Africa Technologies Limited
MCSK	Music Copyright Society of Kenya
MK	Multichoice Kenya
PAP	Partners Against Piracy
PRISK	Performers Right Society of Kenya
SORC	Sports Right Owners Coalition (SORC)
UEFA	Union of European Football Associations
XML	Xpedia Management Limited
CSP	Content Service Provider
PRSP	Premium Rate Service Providers

ANNEXTURES

- Annexure 1 Copy of the report adoption list of Members
- Annexure 2 Copies of minutes on proceedings
- Annexure 3 Copy of public participation advertisement in local dailies
- Annexure 4 Copies of written Memoranda
- Annexure 5 Copies of the attendance registers for the public hearing

CHAIRPERSON'S FOREWORD

This report contains proceedings of the Departmental Committee on Communication, Information and Innovation on its consideration of the Copyright (Amendment) Bill, 2021 (*National Assembly Bill No 44 of 2021*), sponsored by the Hon. Gladys Wanga M.P. which was published on 22nd October, 2021.

The Bill underwent First Reading on 24th November 2021 and subsequently referred to the Departmental Committee on Communication, Information and Innovation for review and report to the House pursuant to Standing Order 127(1) of the National Assembly Standing Orders.

The Bill has eight clauses it seeks to amend the Copyright Act, 2001 to provide for a fair formula for sharing revenue from ring back tunes amongst the artist/copyright holders, premium rate service providers and the telecommunications companies. The Bill further seeks to repeal the provisions on takedown notices and requirements, the role of internet service providers and application for injunction intended to remove the ambiguity in the role of the internet service provider.

Following the placement of an advertisement in the print media on 11th December, 2021 requesting for comments from public and the relevant stakeholders pursuant to Article 118(1)(b) of the Constitution and Standing Order 127(3), the Committee received nineteen written submissions from stakeholders. These were:- the Joint Committee of the Kenya Copyright Board, the Kenya Film Commission, the Kenya Film Classification Board and the Communications Authority of Kenya; Xpedia Management Limited; Kenya Association of Music Producers (KAMP); Performers Right Society of Kenya (PRISK) and the Music Copyright Society of Kenya (MCSK); Multichoice Kenya; Liberty Africa Technologies Limited; ARTICLE 19 Eastern Africa; Partners Against Piracy; Safaricom; Sports Right Owners Coalition (SORC); International Federation of the Phonographic Industry (IFPI); Union of European Football Associations (UEFA); Creative Economy Working Group; Kenya Publishers Associations; artiste and International Publishers Association. The Committee considered the Bill with the stakeholders on Tuesday 15th February, 2022 at County Hall Mini Chamber, Parliament Buildings

The Sponsor of the Bill Hon. Gladys Wanga, MP appeared before the Committee on Tuesday 15th February, 2022 and informed the Members that the main aim of Clauses 1, 2 3 and 4 of the Bill was to provide for a fair formula sharing of revenue from ring back tunes between the artist and the telecommunications companies to ensure that the artiste gets a greater share of the revenue. She further stated that she had dropped clauses 5, 6 and 7 of the Bill. The clauses had proposed repeal of sections 35B, 35C and 35D of the Copyright Act which provisions are on takedown notices and requirements on copyright infringing material, the role of Internet Service Providers and application to the High Court for injunction.

While considering the Bill, the Committee noted that most stakeholders were against clauses 5, 6 and 7 of the Bill because the proposals to repeal Sections 35B, 35C and 35D of the Copyright Act would reverse the gains made since the enactment of the Copyright (Amendment) Act (No. 20 of 2019).

On behalf of the Departmental Committee on Communication and Innovation and pursuant to the provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the report of the Committee on the Copyright (Amendment) Bill, 2021 (National Assembly Bill No 44 of 2021).

The Committee is grateful to the offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee further wishes to thank all stakeholders who submitted their comments on the Bill. Finally, I wish to express my appreciation to the Honourable Members of the Committee and the Committee Secretariat who made useful contributions towards the preparation and production of this report.

It is my pleasure to report that the Committee has considered the Copyright (Amendment) Bill, 2021 (National Assembly Bill No. 44 of 2021) and has the honour to report back to the House with the recommendation that the Bill should be proceeded with subject to recommendations as proposed by the Committee

Hon. Jane Njiru M.P

Chairperson, Departmental Committee on Communication, Information and Innovation

CHAPTER ONE

1.0 PREFACE

1.1 ESTABLISHMENT OF THE COMMITTEE

1. The Departmental Committee on Communications, Information and Innovation is established under Standing Order 216 whose mandate pursuant to the Standing Order 216 (5) is as follows;
 - a. Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;
 - b. Study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;
 - c. Study and review all legislation referred to it;
 - d. Study, assess and analyse the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
 - e. Investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
 - f. Vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);
 - (fa) examine treaties, agreements and conventions;
 - g. make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
 - h. consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
 - i. Examine any questions raised by Members on a matter within its mandate

1.2 MANDATE OF THE COMMITTEE

2. In accordance with Second Schedule of the Standing Orders, the Committee is mandated to oversee Communication, Information, media and broadcasting (except for broadcast of parliamentary proceedings), Information Communications Technology (ICT) development and advancement of technology and modernization of production strategies.
3. In executing its mandate, the Committee oversees the following Departments;
 - a. State Department of Broadcasting and Telecommunications
 - b. State Department of ICT & Innovation

1.3 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Communication, Information and Innovation was constituted by the House in December 2017 and comprises of the following Members-

Chairperson

Hon. Jane Njiru , M.P
Embu County
Jubilee Party

Vice-Chairperson

Hon. (Eng.) Mark Nyamita Ogola, MP
Constituency
Orange Democratic Party

Hon. George Theuri, MP
Embakasi West Constituency
Jubilee Party

Hon. Gertrude Mbeyu , MP
Kilifi County
Orange Democratic Party

Hon. Alfah O. Miruka, MP
Bomachoge Chache Constituency
Kenya National Congress

Hon. Anthony Kiai, MP
Mukurweini Constituency
Jubilee Party

Hon. Annie Wanjiku Kibeh, MP
Gatundu North Constituency
Jubilee Party

Hon. Gathoni Wamuchomba
Kiambu County
Jubilee Party

Hon. Joshua Kimilu, Kivinda, MP
Kaiti Constituency
Wiper Democratic Party

Hon. Victor Munyaka, MP
Machakos Town Constituency
Jubilee Party

Hon. Marwa Kitayama Maisori, MP
Kuria East Constituency
Jubilee Party

Hon. Erastus Nzioka Kivasu, M.P.
Mbooni
New Democrats Party

Hon. Mwambu Mabongah, MP
Bumula Constituency
Independent

Hon. Innocent Momanyi Obiri, MP
Bobasi Constituency
People's Democratic Party

Hon. Maritim Sylvanus, MP
Ainamoi Constituency
Jubilee Party

Hon. Godfrey Osotsi Atieno, MP
Nominated
African National Congress

Hon. Mwangaza Kawira, MP
Meru County
Independent

Hon. Anthony, Tom Oluoch, MP
Mathare Constituency
Orange Democratic Party

Hon. Jonah Mburu, MP
Lari Constituency
Jubilee Party

1.4 COMMITTEE SECRETARIAT

5. The Committee secretariat comprises -

Head of the Secretariat

Ms. Hellen Kina
Clerk Assistant I

Ms. Ella Kendi
Clerk Assistant II

Mr. Salem Lorot
Legal Counsel I

Ms. Winnie Kulei
Research Officer II

Mr. Thomas Ogwel
Fiscal Analyst II

CHAPTER TWO

2.0 OVERVIEW OF THE COPYRIGHT (AMENDMENT) BILL, 2021

1. The object of the Bill is to amend the Copyright Act (No. 12 of 2001) to provide for fair formula for sharing revenue from ring back tunes between the artists/copyright holders, telecommunications companies, and premium rate service providers. The Bill provides that the artist should get a greater share of the revenue at fifty two (52%) percent.
2. The Bill also proposes to repeal the provisions on takedown notices and requirements, the role of Internet Service Providers and application for injunction in order to remove ambiguity in the role of the internet service provider.

2.1 ANALYSIS OF THE BILL

3. **Clause 1** of the Bill contains the short title.
4. **Clause 2** of the Bill sets out the definition of the terms Registry, ring back tunes and telecommunication operator. It defines the terms as follows:

“Registry means the National Rights Registry established under section 34A;

“ring back tune” means subscription music or a tone which is played by a telecommunication operator to the originator of a call;

“telecommunication operator” has the meaning assigned to it under the Kenya Information and Communications Act, 1998

5. **Clause 3** sets out the formula for sharing of revenue from ring back tunes between the telecommunication provider, the premium service rate provider and the copyright holder. The clause proposes that the net revenue from the sale of ring back tunes is to be shared at seven (7%) percent for the premium rate service provider; sixteen (16%) percent for the telecommunication operator and fifty two (52%) percent for the artist or copyright holder.

Party	Percentage
Premium rate service provider	7%
Telecommunication operator	16%
Artist/copyright holder	52%

6. **Clause 4** provides for the establishment of the National Rights Registry as an office within the Kenya Copyright Board. It provides for the functions of the Registry as:
 - (a) digital registration of right holders;
 - (b) digital registration of copyright works;
 - (c) authentication and authorization of consumers of copyright works;
 - (d) media monitoring of registered copyright works;
 - (e) tracking, monitoring and dissemination of data or logs related to access of registered copyright works;
 - (f) any other functions as may be assigned by the Board.

7. **Clause 4** also provides for voluntary registration to the National Rights Registry. Authors of copyright works or copyright holders may register their work on an online portal developed and maintained by the Board. It also provides for inspection of the Registry on payment of the prescribed fees.

8. **Clause 5** provides for a repeal of section 35B which deals with take down notices issued to Internet Service Providers requiring them to remove infringing content.

9. Section 35B of the Copyright Act provides as follows—
 - 35B. Takedown notice*
 - (1) A person whose rights have been infringed by content to which access is being offered by an Internet Service Provider may request, by way of a takedown notice, that Internet Service Provider removes the infringing content.*
 - (2) A takedown notice issued under subsection (1) shall—*
 - (a) be in writing and addressed by complainant or his agent to the Internet Service Provider or their designated agent;*
 - (b) contain the full names and telephone, physical and email address of the complainant;*
 - (c) be signed by the complainant or his authorized agent;*
 - (d) describe in specific detail the copyright work subject to the alleged infringement or sought to be removed;*

(e) identify the rights being infringed;

(f) set out the content sought to be removed with details of where the content is contained;

(g) attach an affidavit or any other declaration attesting to claim of ownership, validity of the rights, good faith and setting out any efforts to have entities responsible for making the content available to remove the content;

(h) be copied to the Board, Communication Authority and the recognized umbrella association of service providers.

(3) A takedown notice shall be deemed delivered on the next business day following physical delivery at its registered offices or two days following the day it is sent by registered post or immediately it is sent by electronic communication to a designated address of the Internet Service Provider or its designated agent.

(4) An Internet Service Provider shall, upon receipt of a valid takedown notice, notify the person responsible for making available the alleged infringing content and provide them with a copy of the notice as soon as is practicable.

(5) An Internet Service Provider shall disable access to the material within forty eight business hours unless it receives a counter notice fulfilling the requirements set out for a takedown notice and contesting the contents of the takedown notice.

(6) An Internet Service Provider which fails to take down or disable access when it receives a takedown notice shall be fully liable for any loss or damages resulting from non-compliance to a takedown notice without a valid justification.

(7) An Internet Service Provider which contravenes the provisions of subsection (4) commits an offence and shall, upon conviction, be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years, or to both.

(8) Any person who falsely or maliciously lodges a takedown notice or a counter notice under this section commits an offence and shall, upon conviction, be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years, or to both.

(9) A person responsible for such misrepresentation under subsection (7) shall, in addition to the penalty provided under that subsection, be liable for any damages resulting from such false or malicious misrepresentation.

(10) An Internet Service Provider shall not be liable for wrongful takedown in response to a valid takedown notice.

10. **Clause 6** provides for the repeal of Section 35C of the Act which relates to the role of an Internet Service Provider in taking down content alleged to be an infringement of copyright. Section 35C of the Copyright Act provides as follows—

35C. Role of Internet Service Provider

(1) An Internet Service Provider may be required—

(a) to provide information to investigative agencies regarding identity of the subscribers of their services suspected to be engaging in infringement of content on orders of the court upon application by the copyright owner whose rights have been subject of a takedown notice;

(b) to designate an agent or electronic or other address for receiving such notices under its terms and conditions of service section.

(2) Notwithstanding the provisions of subsection (1), there shall be no general obligation on the Internet Service Provider to—

(a) monitor the material transmitted, stored or linked; or

(b) actively seek facts or circumstances indicative of infringing activity within its services.

11. **Clause 7** provides for the repeal of section 35D which relates to the application for an injunction where there is a copyright infringement Section 35D of the Copyright Act provides as follows—

35D. Application for injunction

(1) A person may apply to the High Court for the grant of interim relief where he or she has reasonable grounds to believe that his or her copyright is being or may be infringed by a person situated in or outside Kenya.

(2) The High Court may, upon application under subsection (1), grant an order requiring—

(a) a person enabling or facilitating the infringement of copyright, or whose service is used by another person to infringe copyright, to cease such enabling or

facilitating activity or disable that person's access to its service for the infringing purpose;

(b) a person hosting or making available an online location, service or facility situated in or outside Kenya which is used to infringe copyright or which enables or facilitates the infringement of copyright, to disable access to such online location, service or facility as replaced, amended or moved from time to time; or

(c) an internet service provider to prevent or impede the use of its service to access an online location, service or facility situated in or outside Kenya that is used to infringe copyright as replaced, amended or moved from time to time.

12. **Clause 8** provides for powers of the Cabinet Secretary to prescribe the following—

- (a) the fees for accessing the National Rights Registry;
- (b) the format for registrations of the respective copyright works;
- (c) the type of copyright works that are registerable with the National Rights Registry;
- (d) anything necessary for the performance of the functions of the National Rights Registry.

CHAPTER THREE

3.1 PUBLIC PARTICIPATION/STAKEHOLDER CONSULTATION

6. Pursuant to Article 118(1) (b) of the Constitution and Standing Order 127(3), which provide that the Parliament shall facilitate public participation, the Committee placed an advertisement in the local dailies on Saturday 11th December, 2021 inviting the public to submit their views to the Clerk of the National Assembly on or before Tuesday 28th December, 2021.
7. In processing the Bill, the Committee took into account the memoranda received from the public and its deliberations. These were the Joint Committee of the Kenya Copyright Board, the Kenya Film Commission, the Kenya Film Classification Board and the Communications Authority of Kenya; Xpedia Management Limited; Kenya Association of Music Producers (KAMP); Performers Right Society of Kenya (PRISK) and the Music Copyright Society of Kenya (MCSK); Multichoice Kenya; Liberty Africa Technologies Limited; ARTICLE 19 Eastern Africa; Partners Against Piracy; Safaricom; Sports Right Owners Coalition (SORC); International Federation of the Phonographic Industry (IFPI); Union of European Football Associations (UEFA); CODE-IP Trust, Creative Economy Working Group; Kenya Publishers Associations; and International Publishers Association.

3.1.1 MEMORANDA ON SPECIFIC AMENDMENTS

8. Stakeholders submitted the following amendments on specific clauses of the Bill:

Clause 2

9. **CODE – IP Trust** submitted that the clause sets out the definition of the term Registry, ring back tone and telecommunication. In their justification they submitted that amending an Act of Parliament to insert a digital registry was erroneous. The National Rights Registry is already provided for in section 5(f) and 22A of the Copyright Act. The stakeholder further submitted that there was no solid justification for mutilating an Act of Parliament to recognize a digital version of an existing function.

10. **CODE-IP Trust** further submitted that the definition “Registry” be amended to mean the National Rights Registry at the Board. In their justification, the stakeholder stated that this was to delink the establishment of the registry from its day-day implementation details.
11. **Creative Economy Working Group** submitted that the definition “Registry” be amended to mean the National Rights Registry at the Board. In their justification, the stakeholder stated that this was to delink the establishment of the registry from its day-day implementation details.
12. **CODE-IP Trust** proposed amendments to the definition “ring back tune” in either of the following ways: one, to define “ring back tune” but also define all plausible copyrightable works uses; or two, delete the definition and proposed amendments thereunder. The justification for the proposed amendment is two-fold: one, applying the adage, “to name is to exclude”; and two, defining “ring-back tune” equally requires that every plausible use of all copyrightable works by telecommunications companies be defined.
13. **Creative Economy Working Group** similarly proposed amendments to the definition “ring back tune” in either of the following ways: one, to define “ring back tune” but also define all plausible copyrightable works uses; or two, delete the definition and proposed amendments thereunder. The justification for the proposed amendment is two-fold: one, applying the adage, “to name is to exclude”; and two, defining “ring-back tune” equally requires that every plausible use of all copyrightable works by telecommunications companies be defined.

Committee Observations and recommendations on Clause 2

The Committee made the following observations:

- (a) Section 5(f) of the Copyright Act (No. 12 of 2001) provides for one of the functions of the Kenya Copyright Board (KECOBO) as to maintain an effective data bank on authors and their works;
- (b) Section 22A of the Copyright Act (No. 12 of 2001) provides for the register of copyright works; further, under subsection (1), it provides that the Board shall keep and maintain a register of all works under the Act in such manner as may be prescribed;

- (c) The Copyright Act (No. 12 of 2001) does not define a register but the import of section 22A (1) by the words “in such manner as may be prescribed” in relation to the register may be construed to mean that regulations can prescribe the form of the register, including a digital one;
- (d) Clause 2 of the Bill proposes to provide for a definition “Registry” to mean the National Rights Registry established under section 34A;
- (e) The definition “Registry” is linked to clause 4 of the Bill that proposes the establishment of the National Rights Registry; therefore, in order to retain the definition or propose its deletion, consideration of the merits of clause 4 was important;
- (f) There was need to define “artiste” and “premium rate service provider”.

The Committee recommended that:

- (a) The definition “registry” be amended to make a correct cross-reference to its amendment in clause 4 placing it immediately after section 22A of the Act;
- (b) The clause be amended to insert new definitions “artiste” and “premium rate service provider”.

Clause 3

14. **Safaricom Limited** proposed deletion of the clause citing that the proposal attempts to regulate the sharing of revenues for a specific type of technological innovation without regard to the commercial considerations that determine the commercial viability of the products. In their justification, the company indicated that the innovation around ring back tunes as defined under the proposed Bill has allowed content owners to benefit from their craft by creating an alternative source of revenue. The company warned that the proposed clause shall lead to a reduction in the investment in innovation around ring back tunes and may lead to the shutdown of the service as a result of intrusive regulation that fails to consider the commercial viability of products like dial back tunes. Further, they pointed out that there are several other content aggregation services available in the country that are not subject to any revenue share regulations and it was their submission that the proposed clause unfairly targets one specific type of innovation and that the clause places an unfair regulatory burden on dial back tunes.

15. **Safaricom Limited** further submitted that corporations invest in the development and maintenance of innovations like dial back tunes and adverse regulatory actions like in the proposed cause shall lead to the demise of technological innovations that have positively impacted the livelihoods of artistes and copyright holders especially in the pandemic era where there are fewer avenues for revenue generation due to restrictions on mass interactions like live performances which previously provided a steady source of income.

16. **Safariom Limited** submitted additional memoranda on the clause in which they highlighted the following:

- i. Over the years, Safaricom has progressively worked to increase the share of revenues that go to the content aggregators (and therefore the artistes). They have progressively raised the amount from an initial 22% in 2009 to 30% in 2017 and to the current 40%.
- ii. In order to start earning from the Skiza platform, content creators and artistes must first register with one of 116 Content Service Providers (CSPs), who take up the responsibility of sourcing, formatting and uploading digital content on Skiza. CSPs act as middle men between Safaricom and content creators or artistes, and all revenues are paid to artistes through respective CSPs who then pay the musicians in accordance with the contracts they have signed and in line with the Kenya Information Communication (Amendment) Act which provides the regulatory framework for content. So far, Safaricom has paid out over Kshs 1.2 billion to the creative industry through Skiza. This amount is typically disbursed by the 20th of each month.
- iii. A tax of 16% is deducted and the balance is shared as follows:-
 - a) 40% paid to Content Creators through Content Service Providers (CSPs) who receive funds on behalf of rights holders. This amount is net of taxes.
 - b) 60% Split between Safaricom, Technology Partners and Taxes Commercial dependencies include operational costs such as Licence Fees, 24/7 System Maintenance and Customer Care, Research and Development, Human Capital, Network Use, Marketing and other overheads. Technology Partner at 10.4% and 49.6% for Operational costs and profit margin (the ratio appropriation of which varies depending on commercial dependencies). This totals to 100%

- iv. **The Cost Breakdown for the Ksh 1.50 is as follows;** - tax 16% (0.21) amount to share is Kshs. 1.29, content partners (40%) gets Kshs. 0.52, technology partners (10.4%) gets Kshs.0.14 while Safaricom (49.6%) gets Kshs. 0.64.
- v. **On standard Contracts for Skiza Tunes between Copyrights Holders and the CSPs,** Safaricom has previously in conjunction with industry players assisted in the development of Contract Templates for Skiza Tunes. This was undertaken to address the issue of lack of clarity by rights owners on the content of contracts with their respective CSP's. Safaricom shall continue to support initiatives that create clarity on the payments and frequently conducts legal clinics to raise awareness for artistes on their rights in this regard.
- vi. **On breakdown of 40% Payments made through CSPs,** Safaricom has no visibility over the contractual agreements between copyrights holders and the CSP's and this information may be received through the regulator. Safaricom firmly believes that the implementation of the National Rights Registry will ensure that disputes regarding payments will be alleviated.
- vii. On penalties for Delayed Payments, Safaricom is sympathetic to the plight of rights owners who fail to receive payments from their respective CSPs. As mentioned Safaricom issues monthly payments to the CSPs by the 20th of each month.
- viii. The Bill proposes a National Rights Registry which Safaricom believes can be configured as a standard portal to track the utility of the works of copyrights owners and in extension the requisite payments that should be made for the use of the copyrights.
- ix. Commercial pricing decisions should be left in the hands of stakeholders involved in the product lifecycle based on dynamic platform economic models. An adverse regulatory intervention could negatively impact the investments in the development and maintenance of current and future technologies.

17. **CODE – IP Trust** submitted that the formula for sharing of revenue from ring back tunes between the telecommunication provider, the premium service rate provider and the copyright holder should be prescribed in regulations and not an Act of Parliament. The stakeholder further submitted that Parliament passes an Act with a framework for a policy idea or law leaving implementation details to subsequent delegated legislation to fill out the precise details of the law as governed by the Statutory Instruments Act (No. 23 of 2013). Furthermore,

revenue from ring back tunes is a subset of copyrights property rights which begs the question on revenues share formulae for the balance of copyright Works transmitted through the telecommunications companies.

18. **CODE-IP Trust** gave an example of the Kenya Information and Communications (Broadcasting) Regulations, 2009 made pursuant to section 46K of Kenya Information and Communications Act on requirements for local content quotas on broadcasting stations which provides:

The Minister may, in consultation with the Commission, make regulations generally with respect to all broadcasting services and without prejudice to the generality of the foregoing, with respect to—

- (a) the facilitation, promotion and maintenance of diversity and plurality of views for a competitive marketplace of ideas;
- (b) financing and broadcast of local content;
- (c) mandating the carriage of content, in keeping with public interest obligations, across licensed broadcasting services;
- (d) prescribing anything that may be prescribed under this Part.

19. **CODE-IP Trust** further submitted that the regulations should provide an alternative for the artist to enter into “willing buyer and willing seller” contractual agreements with telecommunications companies.

20. **IFPI** submitted that introduction of statutory licensing scheme for ring back tunes in the bill would unreasonably interfere with the exclusive rights of right holders including the exclusive making available to the public right and reproduction right as well with the freedom of contract. Parties involved in the provision of ring back tunes (service providers, telecommunication operators and right holders) should be free to negotiate the commercial terms for the use of their recordings.

21. **Xpedia Management Ltd and Liberty Africa Technologies Ltd** proposed that the Committee considers changes to remove ambiguity and protect existing contractual arrangements. There is need to have the amounts adding up to a hundred percent (100%) to

make it clear the net is the new full amount. They proposed that the Committee takes cognizance of the existing valid contractual arrangements in place between the telecommunication companies, content service providers and content owners. A provision should be inserted to avoid litigation.

22. **Creative Economy Working Group** submitted that while they welcome prescribing ringtones revenues sharing formula (but in regulations and not body of the Act), the sum-total of the individual percentages must add up to 100 per centum. They pointed out that in the Bill, they total to 75% which raises the question as to who exactly will end up taking the undisclosed 25% balance of revenue.

23. **Joint Committee of the Kenya Copyrights Board, Kenya Film Commission, Kenya Film Classification Board and Communications Authority of Kenya** submitted that there was need to have the amounts in the net adding up to a hundred percent and protect existing valid contractual arrangements in place between the telecommunication companies, content service providers and content owners or creators.

24. They therefore proposed that the clause be amended to read as follows:

30C. Without prejudice to section 30B, in the case of ring back tunes, the parties shall subject to subsisting contracts share the revenue net of tax from the sale of ring back tunes as follows:

- a) *the premium rate service provider at nine percent;*
- b) *the telecommunication operator at twenty one percent;*
- c) *the artist or copyright holder at seventy percent.*

25. **The artistes** that appeared before the Committee submitted that music industry in Kenya was affected by many technical and technological issues that led to collapse of the business in the last two decades. The music shops that sold videos, cassettes, Compact Discs and music albums are no longer sustainable. The industry has moved into digital space and the only available income for the musicians now is from the ring back tunes. The proposal from Kenyan Artistes was that a clear formula of Skiza revenue sharing should be anchored in the copyright law.

26. The artistes further submitted that Article 2(6) of the Constitution of Kenya 2010 states that any treaty or international conventions ratified by Kenya shall form part of the laws of Kenya. This includes the WIPO Copyright Treaty. Article 11(2) and (3) of the Constitution states that the government shall promote and protect all forms of cultural expressions, arts, communication and cultural heritage and that Parliament shall enact a legislation to ensure the collection of royalties for the use of cultural expressions and cultural heritage.

27. **The Artistes** agreed with the proposed amendment on revenue sharing formula which will ensure that the artistes get a greater share of the revenue. They further submitted that currently under Safaricom Ltd, the skiza tunes charges are Kshs. 1.50 per ring back tune and the government issued a ten percent excise tax exemption to skiza. The artistes' share went up while the PRSP share remained the same as indicated in the table below; -

Details	Current Revenue Distribution	Current Revenue Distribution	Annual Revenue @Kshs.1.00
Gross Revenue	1.00	1.50	5B
PRSP Share	0.07	0.10	352.8M
Telco Share (52%)	0.52	0.77	2.62B
KRA Taxes	0.16	0.24	806.4M
Excise Tax	0.09	0.14	453.6M
Artist Share	0.16	0.24	806.4M

28. With the proposed amendment, the gross revenue will increase to 7.56B while the artistes' share will increase to 4.63B from the current 806.4M annually.

Committee observations and recommendations on Clause 3

The Committee made the following observations and recommendations;

- (a) The proposed new section 30C provides for the sharing of the net revenue from the sale of ring back tunes but the percentages do not add up to 100% hence there is a need to amend the percentages to rectify this;
- (b) There was need to amend the proposed new section 30C to address subsisting contracts;

The Committee therefore recommended that clause 3 of the Bill be amended in the proposed new section 30C to provide as follows:

- (i) Premium rate service provider- eight-point five percent (8.5%);
- (ii) The telecommunication operator- thirty-nine-point five percent (39.5%);
- (iii) Artiste or copyright holder- fifty two percent (52%)

Further, the Committee recommended that clause 3 of the Bill be amended to address subsisting contracts.

Clause 4

29. **Kenya Copyright Board (KECOBO)** recommended shifting the proposals in clause 4 to after section 22A of the Copyright Act which deals with voluntary registration of copyright that closely follows or relates to the subject of the National Rights Registry. This will require the amendment of the proposed sections and the proposed amendments to the Interpretation provisions under Clause 2 of the Bill.

30. **KECOBO** provided for the justification to their proposal. They indicated that section 34 of the Copyright Act under which the provision is proposed to be anchored has the title 'Rights of Action and Remedies of Exclusive Licensee and Sub-licensee'. The inclusion of the sections on the National Rights Registry under that section may therefore cause confusion.

31. **CODE- IP Trust** submitted that they were opposed to the proposed establishment of the National Rights Registry and the functions of the registry. The stakeholder observed that the clause provides for voluntary registration. Further, the stakeholder indicated that amending an Act of Parliament to insert a digital registry was erroneous. Further, the Act going to the

extent of legislating on registry staff, was overburdening the Act. The stakeholder proposed that the clause be deleted and saved for subsidiary legislation. The justification for the proposed deletion was that legislative custom excludes the principal Act from directing implementing institutions on operational, procedural and administrative details. These fall within the domain of subsidiary legislation (regulations).

32. **CODE-IP Trust** proposed that clause 4 of the Bill be amended in the proposed new section 34C (1) by inserting the words “the voluntary” immediately after the words “online portal for” and deleting the words “to be known as the National Rights Registry”. Their justifications were as follows: (1) to align the purpose of the proposed new section to the marginal note; (2) the “portal” is not the actual registry; (3) the principal Act avoids encroaching on Statutory Instruments Act mandate on administrative tools and procedures; (4) Maintaining the recommended text compels the Board’s transparency to copyright owners and supporting public access to information as a fundamental right.

33. **CODE-IP Trust** proposed that clause 4 of the Bill be amended in the proposed new section 34C (2) by inserting the words “bona fide” immediately after the words “copyright works or” for the provision to read as follows:

*(2) The author of copyright works or a **bona fide** holder of a copyright may register his or her works on the National Rights Registry.*

The justification for the proposed amendment was that the law avoids involvement of disputes between copyright owners and copyright assignees; avoids presuming that the portal is “the registry”; and the use of simple and clear language specific to the objective.

34. **CODE-IP Trust** was opposed to subclause (3) of the proposed new section 34C in clause 4. The clause 4 of the Bill be amended in the proposed new section 34C (2). They stated that the words “Subject to such conditions as may be prescribed by the Board” delegates Parliament’s legislative mandate to the Board. Further, as currently drafted, KECOBO, the copyright regulator, assumes Collective Management Organisation (CMO) royalties collection function. Thus, KECOBO would derive unjust income from the access of bona fide copyright owners’ creative labours. Further, merely publishing copyright registration information online cannot be fairly justified as the basis of imposing new “access fees”. Lastly, withholding copyright

registration information negates fundamental right of access to information. Therefore, the stakeholder proposes that summary copyright registration information should be freely accessible to everyone.

35. **Creative Economy Working Group** proposed that clause 4 of the Bill should be deleted and be provided for in subsidiary legislation. The justification was that legislative custom excludes the principal Act from directing implementing institutions on operational, procedural and administrative details. These are in the domain of subsidiary legislation (regulations).

36. **Creative Economy Working Group** proposed that clause 4 of the Bill be amended in the proposed new section 34C (1) by inserting the words “the voluntary” immediately after the words “online portal for” and deleting the words “to be known as the National Rights Registry”.

37. **Creative Economy Working Group** submitted that despite their view that the operationalization of proposed “National Rights Registry” should be under subsequent regulations (rather than the body of the Act), their four concerns on clause 4 were as follows:

- (i) A more elaborate and functional copyright rights registry already exists under the Kenya Copyright Board. Any interested rights holders (including “ring back tunes”, book authors, software developers, fashion designers, artistes, visual artists, filmmakers, comedians, dancers, architects, photographers, and all other bona fide (literally, artistic, audiovisual and software, et cetera) creative workers copyright can and already do voluntarily register their rights. What is the Bill seeking to remedy?
- (ii) KECOBO’s independence as the copyright regulator would be compromised by the proposal, “Subject to such conditions as may be prescribed by the Board and upon payment of the prescribed fees, any person may access the copyright works through the National Rights Registry,” considering that:
 - (a) One of its proposed new functions would be to collect royalties from any person accessing private copyright works in their possession as an entrusted, independent, public service institution and not a private members royalties’ collecting management organization;

- (b) The proposed new access to registration information restriction (currently freely published to the public) erodes right to access information fundamental right guaranteed by the Constitution of Kenya;
- (c) The Board should not be granted blanket legal authority to “prescribe” conditions of access over and above the fees determined thereof;

(iii) The proposal that, “The Cabinet Secretary may prescribe anything necessary for the performance of the functions of the National Rights Registry,” is not only asking Parliament to delegate its legislative mandate to and grant the Cabinet Secretary carte blanche legal authority to “prescribe anything” the Cabinet Secretary so desired while guaranteed protections by law.

38. **Joint Presentation by Kenya Association of Music Producers (KAMP), the Performers Rights Society of Kenya (PRISK), and the Music Copyright Society of Kenya (MCSK)** submitted that the proposed new section 34B in clause 4 of the Bill on functions of the Registry such as authorization of consumers of copyright works, media monitoring of registered copyright works, tracking, monitoring and dissemination of data logs related to access of registered copyright works are all duties that fall squarely under the mandate of Collective Management Organization.

39. They proposed that clause 3 of the Bill should be amended by deleting the proposed new section 34B in clause 4 of the Bill specifically paragraphs (a), (b) and partially (c) as having it will bring about duplicity of roles between the registry and collective management organizations.

40. **The artistes** that appeared before the Committee supported clause 4 of the Bill that proposes the establishment of the National Rights Registry.

Committee observations and recommendations on Clause 4

41. The Committee made the following observations and recommendations;

- (a) Clause 4 of the Bill should have been rightly placed either within or after section 22A of the Copyright Act since the section relates to the register of copyright works;
- (b) Clause 4 of the Bill needed to be amended in the proposed new section 34C (1) by inserting the words “the voluntary” immediately after the words “online portal for” to align the provision to the marginal note;
- (c) Section 5(b) and (f) of the Copyright Act provides for the functions of the Kenya Copyright Board as to license and supervise the activities of collective management societies as provided for under the Act; and to maintain an effective data bank on authors and their works;
- (d) The Copyright Act defines “collective management organisation” to mean an organisation approved and authorized by the Board which has as its main object, or one of its main objects, the negotiating for the collection and distribution of royalties and the granting of licenses in respect of the use of copyright works or related rights;
- (e) Section 46C (1) of the Copyright Act provides authors, producers, performers, visual artists and publishers may form a collective management organization to collect, manage and distribute royalties and other remuneration accruing to their members;
- (f) Section 49(2) (a) (ix) of the Copyright Act provides that one of the aspects to be provided for in regulations shall be a system for the identification of copyright works and monitoring of payment, collection and distribution of royalties;
- (g) The proposed new section 34B in clause 4 is not in conflict with the roles of collective management organisations.

The Committee recommended that Clause 4 of the Bill should be amended so that the proposed new sections should be inserted immediately after section 22A of the Act for logical flow.

Clauses 5,6 and 7

42. **Safaricom Limited** supported the proposed clauses. They indicated that currently there are onerous takedown responsibilities given to Internet Service Providers that create a claw back to the intermediary liability safeguards given to ISPs under Section 35A of the Copyright Act. Takedown clauses should exist without unfair burdens to ISPs that are akin to making ISP's responsible for policing the internet.
43. **IFPI** advised against repealing Section 35B, 35C and 35D. The sections provide the essential balance between the rights and responsibilities under the safe harbour provisions. Without these sections, the safe harbour provisions in the Copyright Act will fail to fulfil their primary objective which is to ensure the protection of copyright while fostering the development of online infrastructure services. Repealing these provisions would furthermore result in Kenya falling far below the international standard.
44. **CODE – IP Trust** submitted that repealing the sections of the copyright Act will take away fundamental rights based on protections introduced into the Copyright Act. Throughout the world, including the African Union, the principle of intermediary protection requires that in order not to unconstitutionally censor the internet, it is important that internet service providers be protected from being held liable for content of which they are only acting as a mere conduit or transmitter. ISPs are to be expressly exempted from any general obligation to monitor the content passing through their networks. A workable notice and takedown system would be to monitor all content which in any case is technically impossible with encrypted content , ISPs take action on any content that may violate copyright laws once they have been notified through a formal process of notice and takedown .The proposed repeal of the three sections proposes to take away these two pillars that were introduced into the Copyright Law in 2019 and to put Kenya back on the dubious list of countries that do not guarantee the privacy and freedom of online content .
45. **Mr. Mike Strano, on behalf of Partners Against Piracy (PAP)** raised concern on the proposal to repeal Sections 35B, 35C and 35D of the Act stating that the sections are game-changing provisions in Kenya and the first of its kind in Africa. The provisions protect the creative industry in Kenya by providing incentives and a legal basis for better co-operation from Internet Service Providers (ISPs) to support rights holders in their fight against piracy.

PAP proposed that Parliament should rather consider changes that would make the law clearer and more effective in full co-operation with the ISPs thus ensuring the sustainability of the Kenya creative industry and safety of the country against such crimes. Further, the repeal of the sections will continue to abet the illegal operations involved in offering pirated content online including crimes like tax evasion, identity theft, data ransom, money laundering and fraud. The provision ensuring the swift takedown of illegal content benefits the ISPs who are now becoming owners and platforms themselves and that such repeal would result in those ISPs not being able to recoup their investments, as online piracy steals 99% of potential revenue.

46. **MultiChoice Kenya Limited** stated that the provisions are aimed at addressing the prevalent and brazen infringement of copyright protected works online. The sections established a framework by which copyright owners and ISPs could share responsibility for dealing with online copyright infringement. These frameworks are the most used means of enforcement in respect of online piracy as they interrupt access to infringers' sites. MultiChoice appealed to Parliament to retain the sections.

47. **Sports Rights Owners Coalition** opposed the proposals citing that take-down notices enable copyright holders and related rights holders to control their work and the ability to make it available on online platforms. Take-down notice is one of the effective remedies against digital piracy available to right holders and are an international concept to safeguard the intellectual property rights of copyright holders in their works. The ability to remove unauthorized content is crucial in protecting the value of live sport for sports rights owners. Further, the European policy makers are strengthening the effectiveness of take-down notices particularly in the live environment and the proposals will be effective in the first half of 2022. They urged the Committee to urgently reconsider the proposals so as not to harm Kenyan consumers and threaten the availability of sports and entertainment content in Kenya.

48. **Union of European Football Associations** opposed the proposed amendments. They cited that as a result of the commercial rights in UEFA's competitions being exploited and managed on a centralised basis through UEFA, the vast majority of revenues generated are redistributed to the various related UEFA stakeholders, ranging from UEFA's member national

associations and the teams participating in a particular competition to non-participating teams on a solidarity basis and specifically football development and grass root investment throughout Europe. They warned that piracy, if left uncontrolled, will fundamentally threaten the viability of the commercial model of football (and sport as a whole) and therefore, threaten the funding upon which football's solidarity model is based.

49. **Joint Committee of the Kenya Copyright Board, Kenya Film Commission, Kenya Film Classification Board and Communications Authority of Kenya** submitted that clauses 5, 6, and 7 of the Bill seek to repeal Sections 35B, 35C and 35D of the Copyright Act on takedown notices, role of the internet provider and application for an injunction respectively. The Kenya copyright legal framework as it now exists provides for safe harbours for internet Service Providers and a procedure for notice and takedown in line with international standards and specifically the WIPO internet treaties. The provisions represented a milestone in the copyright law. This demonstrated the government's intent to forge ahead as regards copyright and the internet. Having been enacted recently, the implementation of these provisions is yet to be fully realized. They further recommended that the repeal of the intermediary proposals be removed.

50. **Association of Music Producers (KAMP), the Performers Rights Society of Kenya (PRISK), and the Music Copyright Society of Kenya (MCSK)** submitted that repealing section 35B leaves the right holders exposed to online infringement of their work which has become rampant with increased use and development of technology. A takedown notice is a tool for copyright holders to get user-uploaded material that infringes their copyrights taken down on websites. The proposed amendment will create room for online piracy.

51. They submitted that repealing section 35C removes any form of obligation on the part of Internet Service Providers in dealing with infringement of copyrighted works. The rationale for repealing this section is untenable. By implication internet service given the role they play in providing a platform for availing material online should equally be held accountable to ensure that none of the material is infringing on the copyright holders.

52. They further submitted that repealing the section would leave the copyright holders exposed as their remedy under the Act would be no more. A copyright owner may seek a preliminary injunction to prevent or restrain future or ongoing infringement. Therefore, it was of paramount importance to retain the section.
53. **ARTICLE 19 Eastern Africa** submitted that clause 5 of the Bill should be amended to provide for notice procedure in alternative to the Notice and takedown procedure. They expressed concern with the notice and takedown procedure under Section 35B as it imposes financial and criminal sanctions on ISPs for failing to take down content forcing ISPs to act cautiously and tend to takedown potentially infringing content. Notice to notice procedure will ensure that ISPs only takedown content on orders of the Court or independent body of tribunal.
54. **Article 19 Eastern Africa** submitted that clause 6 of the Bill should be deleted as it limits the gains made to safeguard the right to privacy and freedom of expression in the digital environment. This clause seeks to repeal Section 35C which provides for intermediary immunity and only allows ISPs to disclose information of subscribers who are allegedly infringing copyright to investigative agencies in compliance with a court order. There is a concern that repealing this section would be akin to eliminating intermediary immunity. It is highly likely that ISPs would actively monitor and police content to ensure it is not infringing speech which would lead to censorship.
55. **Article 19 Eastern Africa** submitted that Clause 7 of the Bill should be deleted as it eliminates opportunity for a complainant to seek judicial remedies for copyright infringement and waters down international standards on intermediary liability. Article 19 Eastern Africa expressed their belief that judicial authorities or an independent tribunal, not private entity, should make decisions on content. Section 35D affirms this position by stating that the High Court may issue an order to a webhost or ISP to make infringing material inaccessible. This position complies with international standards on Intermediary Liability and International Human rights standards on free speech.

56. **The International Publishers Association (IPA)** submitted that provisions to repeal Sections 35B, 35C and 35D of the Kenyan Copyright Act should be immediately rejected and removed from the Copyright (Amendment) Bill (National Assembly Bill No. 44 of 2021). The provisions are of key importance, setting out minimum standards for online enforcement in Kenya. Nevertheless, the Bill proposes to repeal them, therefore eliminating legal mechanisms on notice and takedown procedures and provisions establishing ISPs liability, while also repealing the section that enables copyright owners to file injunctions to deter infringement of their rights. If the Bill is approved as it stands, there will be no defense against online infringement of copyright in Kenya.

57. **IPA** further submitted that the proposal to repeal these sections is not based on an impact assessment of the needs of creative industries, nor does it present a reason for eliminating existing online enforcement provisions, shortly after their introduction in 2019. Online piracy remains a serious problem in Kenya, affecting its creative industries' ability to secure the investments required to develop and maintain digital business models. The 2019 review was seen by creative industries as an important step in creating the necessary conditions for a fair digital marketplace in Kenya. Repealing the provisions at stake will cause irreparable damage to creative industries. Without appropriate enforcement mechanisms, Kenyan publishers will see their opportunities to enter the global digital marketplace completely undermined and will have to suffer the disastrous effects of an unbearable level of risk derived from copyrights no longer being enforceable against online infringement in Kenya.

58. **International Federation of Film Producers Associations** submitted that deletion of sections 35B 35C and 35D would bear considerable prejudice to the Kenyan creative sectors and their ability to conduct productive trade with audiovisual content producers in third world countries. The current proposal to remove such provisions from Kenya's Copyright Act entirely would have a calamitous impact on Kenya's audiovisual sector and its cultural industries at large, by removing a strategic set of legal tools in the fight against piracy and unauthorized uses. It would also have the effect of discouraging international co-production and foreign direct investment into Kenya's film production and distribution infrastructure, resulting in stunted growth in the sector, with attendant negative effects on job creation, contribution to the national fiscus and export earnings.

59. **The Creative Economy Working Group** recommended that clauses 5,6,7 of the Bill should be deleted. They justified their position for the following reasons:

- (i) Contrary to what is stated in the Memorandum of Objects and Reasons of the Bill, the Bill actually proposes to limit fundamental rights and freedoms;
- (ii) Article 33 of the Constitution of Kenya guarantees the freedom of expression which is defined to include “freedom to seek, receive and impart information or ideas” and “freedom of artistic creativity”
- (iii) The only limits to that right are set out in the same Article as propaganda for war, incitement to violence and hate speech;
- (iv) This principle has its strongest foundations in freedom of expression which is a right guaranteed both by the Constitution of Kenya as well as regional and international law;
- (v) The internet is one of Kenya’s foremost tools in facilitating freedom of expression and artistic creativity; it has democratized access to information and ideas and the right to express and disseminate information; it functions as a site for the stimulation of the imagination and creativity, and it is an economic engine for many of our SMEs and youth;
- (vi) Throughout the world, including the African Union, the principle of intermediary protection requires that in order not to unconstitutionally censor the internet, it is important that Internet Service Providers be protected from being held liable for content of which they are only acting as a mere conduit or transmitter;
- (vii) It is also recognized that the two fundamental pillars of the principle of intermediary protection are that:
 - (a) ISPs are to be expressly *exempted from any general obligation to monitor the content* passing through their networks. This is both for practical purposes;
 - (b) There ought to be a workable *notice and takedown system*. Rather than monitor all content (which in any case is technically impossible with encrypted content) ISPs take action on any content that may violate copyright law once they have been notified through a formal process of notice and takedown;
- (viii) The proposed repeal of the three sections proposes to take away these two pillars that were introduced into the Copyright Law in 2019 and to put Kenya back on the

dubious list of countries that do not guarantee the privacy and freedom of online content.

Committee observations and recommendation on Clause 5, 6 and 7

The Committee made the following observations and recommendations:

- (a) Clauses 5,6,7 of the Bill proposed to repeal section 35B, section 35C, and section 35D of the Copyright Act;
- (b) Section 35B of the Copyright Act deals with take down notices issued to Internet Service Providers requiring them to remove infringing content;
- (c) Section 35C of the Copyright Act provides for the role of an Internet Service Provider in taking down content alleged to be an infringement of copyright;
- (d) Section 35D of the Copyright Act provides for the application to the High Court for an injunction where there is a copyright infringement;
- (e) Sections 35B, 35C, and 35D are fairly recent inserted sections to the Copyright Act; the Copyright (Amendment) Act (No. 20 of 2019) amended the Copyright Act, 2001 and it was through this Act that the sections came into operation on 2nd October, 2019;
- (f) The Committee had considered the then Copyright (Amendment) Bill, 2017 (now an Act of Parliament: the Copyright (Amendment) Act (No. 20 of 2019)) which contained sections 35B, 35C, and 35D. In the Bill's memorandum of objects and reasons, it was stated that the sections "outline provisions on protection of Internet Service Providers (ISPs) from liability for infringing material displayed by their subscribers. The new sections further provide for the rights and obligations of copyright holders with regard to takedown procedures of infringing material by ISPs and the obligation of ISPs to provide information to investigative agencies on the identity of subscribers suspected of copyright infringement.";
- (g) The sponsor of the Bill agreed to delete clauses 5,6,7 of the Bill, noting that the proposed repeal of section 35B, section 35C, and section 35D of the Copyright Act will negate the main object of the Bill which was to improve the welfare of artistes;

(h) Sections 35D, 35C, and 35D of the Copyright Act were important, progressive provisions that are fairly recent in need of implementation and they should therefore be retained.

Recommendation

The Committee recommended that clause 5,6 and 7 of the Bill be deleted.

Clause 8

60. **CODE-IP Trust** proposed the deletion of clause 8 of the Bill. The justification for the proposed deletions were that the Cabinet Secretary would be acting as an agent obstructing fundamental right to access to information. Further, paragraph (b) should be deleted in order to defer it to subsidiary legislation (regulations). Paragraph (c) should be deleted in order to defer it to subsidiary legislation (regulations) and that the Cabinet Secretary should justify why only some types of copyright works qualify as registrable while the rest do not qualify. Paragraph (d) should be deleted because the words “may prescribe anything necessary” are not only carte blanche but very dangerous delegation of Parliament’s legislative authority.

Committee observations and recommendations on Clause 8

61. The Committee observed that clause 8 of the Bill is proper as it provides for power of the Cabinet Secretary to prescribe matters in regulations. The items listed as those to be prescribed in regulations are not unreasonable as they are those that the Bill contemplates. However, there was need to amend section 49 (2) of the Act by inserting the paragraphs in subsection 2(a) instead of providing for it as a substantive subclause.

62. The Committee therefore recommended that the Bill be amended by deleting clause 8 and substituting therefor the following new clause—

Amendment of section 49 of No. 12 of 2001.

8. The principal Act is amended in section 49(2) in paragraph (a) by inserting

the following subparagraphs immediately after subparagraph (iv)—

“(iva) the fees for accessing the National Rights Registry;

(ivb) the format for registrations of the respective copyright works;

(ivc) the type of copyright works that are registrable with the National Rights Registry;

(ivd) anything necessary for the performance of the functions of the National Rights Registry;”

CHAPTER FOUR

4.0 COMMITTEE RECOMMENDATIONS

The Committee, having considered the Copyright (Amendment) Bill, 2021 (National Assembly No. 44 of 2021) recommends, that the House **approves the Bill with amendments** as proposed in the schedule.

5.0 SCHEDULE OF PROPOSED AMENDMENTS

CLAUSE 2

THAT, Clause 2 of the Bill be amended—

- (a) In the definition “Registry” by deletion the words “section 34A” and substituting therefor the words “section 22B”;
- (b) In the definition “ring back tune” by deleting the word “it” and substituting therefor the word “is”;
- (c) By inserting the following new definitions in their proper alphabetical sequence—
“artiste” means a singer, declaimer, musician or other person whose work constitutes a ring back tune;
“premium rate service provider” means a person authorized by the Communications Authority of Kenya to provide content services which includes ring back tunes and is delivered over electronic communications networks and services;

Justification:

The proposed amendments seek to make a correct cross-reference to the provision seeking to establish the National Rights Registry arising from the proposed amendment to Clause 4 of the Bill. Further, it corrects a typographical error and provides for the definitions “artiste” and “premium rate service provider” since they have been used in Clause 3 of the Bill.

CLAUSE 3

THAT, the Bill be amended by deleting Clause 3 and substituting therefor the following new Clause—

Insertion of new section 30C in
Cap. 12 of 2001.

3. The principal Act is amended by inserting the following new section immediately after section 30B—

Payment of ring back
tune revenue.

30C. (1) Without prejudice to section 30B, in the case of ring back tunes, the parties shall share the net revenue from the sale of ring back tunes, as follows—

(a) the premium rate service provider at eight point five percent;

(b) the telecommunication operator at thirty nine point five percent;

(c) the artiste or owner of the copyright at fifty two percent.

(2) Despite subsection (1), all contracts between premium rate service providers and artistes or owners of the copyright existing before the

commencement of this Act shall apply until their expiry, and subsequent contracts shall conform to this provision.

Justification:

The proposed amendment seeks to amend the proposed new section 30C to provide for the sharing of the net revenue from the sale of ring back tunes and to change the percentages to add up to 100%. Further, the proposed amendment seeks to address subsisting contracts between artistes or owners of copyright and premium rate service providers.

CLAUSE 4

THAT, the Bill be amended by deleting Clause 4 and substituting therefor the following new Clause—

Insertion of new sections in Cap. 12 of 2001.

4. The principal Act is amended by inserting the following new sections immediately after section 22A—

National Rights Registry.

22B. (1) There is established a National Rights Registry which shall be an office within the Board.

(2) The staff of the Registry shall be the staff of the Board.

Functions of the Registry.

22C. The functions of the Registry shall be—

- (a) digital registration of right holders;
- (b) digital registration of copyright works;

- (c) authentication and authorization of consumers of copyright works;
- (d) media monitoring of registered copyright works;
- (e) tracking, monitoring and dissemination of data or logs related to access of registered copyright works;
- (f) any other functions as may be assigned by the Board.

Voluntary registration on the National Rights Registry.

22D. (1) Without prejudice to the generality of section 22C, the Board shall cause to be developed and maintained an online portal for registration of copyright works to be known as the National Rights Registry.

(2) The author of copyright works or an owner of copyright may register his or her works on the National Rights Registry.

(3) Subject to such conditions as may be prescribed by the Board and upon payment of the prescribed fees, any person may access the

copyright works through the
National Rights Registry.

Justification:

The proposed amendment seeks to amend clause 4 to insert the proposed new sections immediately after section 22A of the Act for logical flow. Section 22A provides for the register of copyright works.

CLAUSE 5

THAT, Clause 5 of the Bill be deleted.

Justification:

The justifications for the proposed deletion are as follows:

- (a) Section 35B of the Act is an important, progressive provision that is fairly recent in need of implementation and it should therefore be retained;
- (b) Section 35B of the Copyright Act deals with take down notices issued to Internet Service Providers requiring them to remove infringing content;
- (c) The sponsor of the Bill agreed to delete clauses 5,6,7 of the Bill, noting that the proposed repeal of section 35B, section 35C, and section 35D of the Copyright Act will negate the main object of the Bill which was to improve the welfare of artistes.

CLAUSE 6

THAT, Clause 6 of the Bill be deleted.

Justification:

The justifications for the proposed deletion are as follows:

- (a) Section 35C of the Act is an important, progressive provision that is fairly recent in need of implementation and it should therefore be retained;
- (b) Section 35C of the Copyright Act provides for the role of an Internet Service Provider in taking down content alleged to be an infringement of copyright;

- (c) The sponsor of the Bill agreed to delete clauses 5,6,7 of the Bill, noting that the proposed repeal of section 35B, section 35C, and section 35D of the Copyright Act will negate the main object of the Bill which was to improve the welfare of artistes.

CLAUSE 7

THAT, Clause 7 of the Bill be deleted.

Justification:

The justifications for the proposed deletion are as follows:

- (a) Section 35D of the Act is an important, progressive provision that is fairly recent in need of implementation and it should therefore be retained;
- (b) Section 35D of the Copyright Act provides for the application to the High Court for an injunction where there is a copyright infringement;
- (c) The sponsor of the Bill agreed to delete clauses 5,6,7 of the Bill, noting that the proposed repeal of section 35B, section 35C, and section 35D of the Copyright Act will negate the main object of the Bill which was to improve the welfare of artistes.

CLAUSE 8

THAT, the Bill be amended by deleting Clause 8 and substituting therefor the following new Clause—

Amendment of section 49
of No. 12 of 2001.

- 8.** The principal Act is amended in section 49(2) in paragraph (a) by inserting the following subparagraphs immediately after subparagraph (iv)—
- “(iva) the fees for accessing the National Rights Registry;
 - (ivb) the format for registrations of the respective copyright works;
 - (ivc) the type of copyright works that are registrable with the National Rights Registry;

(ivd) anything necessary for the performance of the functions of the National Rights Registry;”

Justification:

The proposed amendment seeks to amend clause 8 for logical flow.

SIGNED  DATE 21/02/2022

**HON.JANE NJIRU, M.P
CHAIRPERSON
DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND
INNOVATION**

ANNEX 1

COPY OF THE ADOPTION LIST

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND
INNOVATION



12TH PARLIAMENT – SIXTH SESSION (2022)

ATTENDANCE REGISTER

Date : 21/02/2022 Venue : 2nd Floor Continental House

Time Started:.....12:00pm.....Time Ended:.....

AGENDA Adoption of the Report on Copyright Amendment Bill, 2021

	HON. MEMBER	SIGNATURE
1.	Hon. Jane Wanjuki Njiru MP (Chairperson)	
2.	Hon.(Eng).Mark Nyamita Ogolla MP (Vice Chairperson)	Virtual
3.	Hon.Alfah, O. Miruka, M.P.	—
4.	Hon. Annie Wanjiku Kibeh, M.P.	Virtual
5.	Hon. Joshua Kimilu, Kivinda, M.P.	Virtual
6.	Hon.Marwa Kitayama Maisori, M.P	Virtual
7.	Hon.Mwambu Mabongah, M.P.	Virtual
8.	Hon.Maritim Sylvanus, M.P.	Virtual
9.	Hon.Mwangaza Kawira, M.P.	Virtual
10.	Hon. Jonah Mburu, M.P.	Virtual
11.	Hon. Gertrude Mbeyu Mwanyanje,M.P	Virtual
12.	Hon. George Theuri , M.P.	—
13.	Hon. Victor Munyaka , M.P.	Virtual
14.	Hon. Anthony Githiaka Kiai , M.P.	Virtual
15.	Hon. Erastus Nzioka Kivasu, M.P.	
16.	Hon. Godfrey Osotsi, Atieno , M.P.	—
17.	Hon. Innocent Momanyi, Obiri, M.P.	—
18.	Hon.Anthony, Tom Oluoch, M.P.	Virtual
19.	Hon. Gathoni Wamuchomba,MP	—

Submitted by: Ms. Hellen M. Kina Signature:  Date: 22/02/22

Approved by: _____ Signature: _____ Date: _____
Director, Directorate of Departmental Committees

ANNEX 2

MINUTES ON THE PROCEEDINGS

MINUTES OF THE 8TH SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION & INNOVATION HELD IN SECOND FLOOR CONTINENTAL HOUSE ON 21ST FEBRUARY, 2022 AT 12.00PM

PRESENT

1. Hon. Jane Wanjuki Njiru, M.P. – **Chairperson**
2. Hon. (Eng.). Mark Nyamita, M.P – **Vice- Chairperson**
3. Hon. Jonah Mburu, M.P
4. Hon. Anthony Githiaka Kiai, M.P
5. Hon. Erastus Nzioka Kivasu, M.P
6. Hon. Maritim Sylvanus, MP
7. Hon. Mwangaza Kawira, M.P
8. Hon. Marwa Kitayama Maisori, M.P
9. Hon. Gertrude Mbeyu Mwanyanje, M.P
10. Hon. Victor Munyaka, MP
11. Hon. Mwambu Mabongah, M.P
12. Hon. Anthony Oluoch, M.P.
13. Hon. Annie Wanjiku Kibeh, M.P
14. Hon. Joshua Kimilu Kivinda, M.P

APOLOGIES

1. Hon. George Theuri, M.P
2. Hon. Alfah O. Miruka, M.P
3. Hon. Innocent Momanyi Obiri, M.P
4. Hon. Gathoni Wamuchomba MP
5. Hon. Godfrey Osotsi Atieno, M.P

THE SECRETARIAT

1. Ms. Hellen Kina - Clerk Assistant I
2. Ms. Ella Kendi - Clerk Assistant II
3. Mr. Salem Lorot - Legal Counsel 1
4. Ms. Winnie Kulei - Research Officer II
5. Mr. Nimrod Ochieng - Audio Officer

Agenda

1. Prayers
2. Communication from the Chairperson
3. Confirmation of the Minutes
4. Adoption of the report on the consideration of the Copyright (Amendment) Bill, 2021
5. Any Other Business
6. Adjournment

MIN.NO/NA/CII/2022/049: PRELIMINARIES

The Chairperson called the meeting to order at twenty minutes past twelve o'clock followed by a word of prayer. The agenda was adopted unanimously.

MIN.NO/NA/CII/2022/050: CONFIRMATION OF THE MINUTES OF THE PREVIOUS SITTING

The agenda was deferred to the next sitting.

MIN.NO/NA/CII/2022/051: ADOPTION OF THE REPORT ON THE COPYRIGHT (AMENDMENT) BILL, 2021

The Committee considered the draft report on the consideration of the Copyright (Amendment) Bill, 2021 and adopted it having been proposed by Hon.Erastus Kivasu, MP and seconded by Hon. Annie Kibeh,MP. The Committee recommended that the House approves the Bill with the following amendments; -

CLAUSE 2

THAT, Clause 2 of the Bill be amended—

- (a) In the definition “Registry” by deletion the words “section 34A” and substituting therefor the words “section 22B”;
- (b) In the definition “ring back tune” by deleting the word “it” and substituting therefor the word “is”;
- (c) By inserting the following new definitions in their proper alphabetical sequence—
 - “artiste” means a singer, declaimer, musician or other person whose work constitutes a ring back tune;
 - “premium rate service provider” means a person authorized by the Communications Authority of Kenya to provide content services which includes ring back tunes and is delivered over electronic communications networks and services;

CLAUSE 3

THAT, the Bill be amended by deleting Clause 3 and substituting therefor the following new Clause—

Insertion of new section 30C in
Cap. 12 of 2001.

3. The principal Act is amended by inserting the following new section immediately after section 30B—

Payment of ring back
tune revenue.

30C. (1) Without prejudice to section 30B, in the case of ring back tunes, the parties shall

share the net revenue from the sale of ring back tunes, as follows—

(a) the premium rate service provider at eight point five percent;

(b) the telecommunication operator at thirty nine point five percent;

(c) the artiste or owner of the copyright at fifty two percent.

(2) Despite subsection (1), all contracts between premium rate service providers and artistes or owners of the copyright existing before the commencement of this Act shall apply until their expiry, and subsequent contracts shall conform to this provision.

CLAUSE 4

THAT, the Bill be amended by deleting Clause 4 and substituting therefor the following new Clause—

Insertion of new sections in Cap. 12 of 2001.

4. The principal Act is amended by inserting the following new sections immediately after section 22A—

National Rights Registry. **22B.** (1) There is established a National Rights Registry which shall be an office within the Board.

(2) The staff of the Registry shall be the staff of the Board.

Functions of the Registry. **22C.** The functions of the Registry shall be—

(a) digital registration of right holders;

(b) digital registration of copyright works;

(c) authentication and authorization of consumers of copyright works;

(d) media monitoring of registered copyright works;

(e) tracking, monitoring and dissemination of data or logs related to access of registered copyright works;

(f) any other functions as may be assigned by the Board.

Voluntary registration on **22D.** (1) Without prejudice to the generality of section 22C,

(ivb) the format for registrations of the respective copyright works;
(ivc) the type of copyright works that are registrable with the National Rights Registry;
(ivd) anything necessary for the performance of the functions of the National Rights Registry;”

MIN. NO/ NA/CII/2022/052: ANY OTHER BUSINESS

The Committee was informed that the Cabinet Secretary, Ministry of ICT, Innovation and Youth Affairs had been invited to appear before the Committee on Monday 28th February, 2022 to respond to a Question asked by Hon. Godfrey Osofi, MP. Members were urged to attend the said meeting

MIN.NO/NA/CII/2022/053: ADJOURNEMENT

There being no other business to deliberate on, the meeting was adjourned at thirty minutes past one. The next meeting to be held on notice.

SIGNED.......... DATE..... 21/02/2022.....

HON. JANE NJIRU , MP - CHAIRPERSON

the National Rights Registry. the Board shall cause to be developed and maintained an online portal for registration of copyright works to be known as the National Rights Registry.

(2) The author of copyright works or an owner of copyright may register his or her works on the National Rights Registry.

(3) Subject to such conditions as may be prescribed by the Board and upon payment of the prescribed fees, any person may access the copyright works through the National Rights Registry.

CLAUSE 5

THAT, Clause 5 of the Bill be deleted.

CLAUSE 6

THAT, Clause 6 of the Bill be deleted.

CLAUSE 7

THAT, Clause 7 of the Bill be deleted.

CLAUSE 8

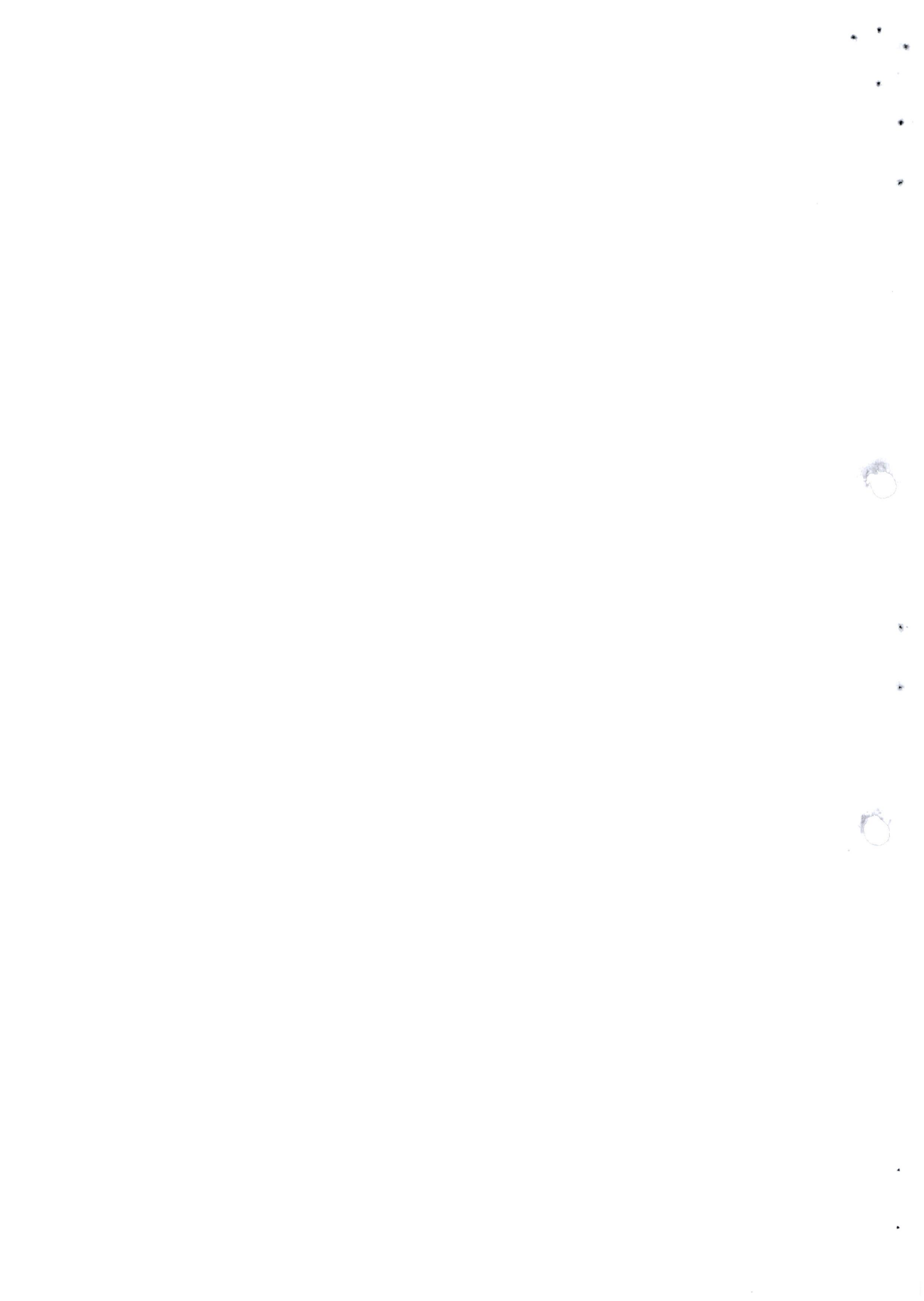
THAT, the Bill be amended by deleting Clause 8 and substituting therefor the following new Clause—

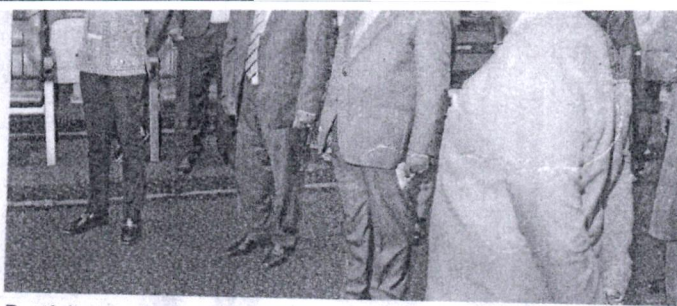
Amendment of section 49 of No. 12 of 2001.

8. The principal Act is amended in section 49(2) in paragraph (a) by inserting the following subparagraphs immediately after subparagraph (iv)—
“(iva) the fees for accessing the National Rights Registry;

ANNEX 3

COPY OF THE PUBLIC PARTICIPATION ADVERTISEMENT IN THE LOCAL DAILIES





Participants during the official opening of the Kusi Ideas Festival in Accra, Ghana, yesterday. PHOTO | POOL



The Ghana Dance Ensemble performs a dance depicting the impact of Covid-19 on Africa yesterday. PHOTO | POOL

to look at what the two years (of the pandemic) have taught us," Dr Kiboro said.

"Then, we were told that Africa was going to be wiped out by Covid-19. And here we are, resilient than any other continent. We have survived better than the naysayers."

In the last two years, the continent has also witnessed a boom in ideas and innovation as countries tried to work around the fears of the pandemic to keep their economies running and afloat.

"We witnessed a boom in innovation. Ghana and Rwanda were collecting samples with drones. Uganda had its biggest coffee sales. Kenya's Revitalise firm based in Kilifi became the continent's largest producer of syringes," Dr Kiboro added.

"In 2020, they did over 70 million syringes. We saw innovation by students in Africa. From ventilators to hospital beds and such. That is the spirit of Kusi Ideas."

The continent has also been challenged to push its own ideas and stories, as this will help fight stereotypes against it by western media.

Opportunities

"For the next two days, we shall have panellists discuss the Africa's infrastructure and the opportunities we must improve. We shall also see discussions touching on intra-African trade, politics of Covid vaccines, vaccination apathy, technology, innovation. All this will be done to enable Africa to create African wins in the next century," Dr Kiboro said.

He added: "The return of the African diaspora is also an important area of discussion this year, given the huge intellectual and financial capital they bring, which Africa needs to tap. Finally, we shall also talk about the open borders, and why it is important for the continent to grow. Let us invent the Africa we want tomorrow. We need to see our continent take its place in the international community."

Neo-colonialism

Speaking at the festival, Wamkele Mene, secretary general of the African Continental Free Trade Area (AfCFTA) Secretariat, castigated western countries for turning the continent's big-

gest public health crisis into a political chess game in the last two weeks.

Mr Mene termed the current vaccine politics modern-day colonialism and apartheid.

"What we are seeing around the world is exactly what the apartheid regime in South Africa did. These restrictions are imposed because we are Africans," Mr Mene said.

"This points now that we must accelerate our ability to manufacture and produce vaccines, generic drugs to improve public health, and position ourselves for industrial development capacity and ensure that we rely less on others to improve our public health."

Mr Mene appealed to African countries to diversify their markets post-Covid-19, adding that the Kusi Ideas Festival offers a good chance to see how the continent transforms.

"When global supply chains are interrupted, the continent suffers immensely," he said.

"And the pandemic has shown that with our dependence on Asia, mostly China and India, the continent is at a weak position.

"We see most of the food, pharmaceutical imports, and in 2019-20 period, we saw the continent struggle, as it sought to manage the pandemic," Mr Mene said.

Africa has now been chal-

lenged to accelerate industrial development through regional value chains.

"We have developed a private sector strategy focusing on agro-processing, automotive sector, pharmaceutical, and transport and logistic sectors, based on potential of import substitution and existing value chains.

"These value chains have the potential to contribute \$11 billion in production and \$5 billion in trade, creating almost a million jobs. This strategy will help in improving investments on the continent, and guiding the private sector where to invest," Mr Mene said.

aoling@ke.nationmedia.com

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY TWELFTH PARLIAMENT - FIFTH SESSION

In the Matter of Article 118 (1)(b) of the Constitution
and

In the Matter of Consideration by the National Assembly of the Penal Code (Amendment) Bill, 2021 (National Assembly Bill No. 40 of 2021), Penal Code (Amendment) Bill, 2021 (National Assembly Bill No. 47 of 2021), the Whistleblower Protection Bill, 2021 (National Assembly Bill No. 50 of 2021) and the Copyright (Amendment) Bill, 2021 (National Assembly Bill No. 44 of 2021)

INVITATION FOR PUBLIC PARTICIPATION (SUBMISSION OF MEMORANDA)

Article 118(1) (1) (b) of the Constitution provides that "Parliament shall facilitate public participation and involvement in the legislative and other businesses of Parliament and its Committees". National Assembly's Standing Order 127(3) provides that "the Departmental Committee to which a Bill has been committed shall facilitate public participation and take into account the views and recommendations of the public when the Committee makes its report to the House".

The Penal Code (Amendment) Bill, 2021 (National Assembly Bill No. 40 of 2021) seeks to amend the Penal Code, Cap 63, to enhance punishment for livestock theft by imposing a death sentence. The Bill also seeks to amend the principal Act to provide for the enhancement of punishment for handling stolen livestock or livestock produce.

The Penal Code (Amendment) Bill, 2021 (National Assembly Bill No. 47 of 2021) seeks to amend the Penal Code Cap 63 to repeal section 182, which provides for the offence of idle and disorderly conduct. The Law enforcers have often applied this section to harass innocent members of the public.

The Whistleblower Protection Bill, 2021 (National Assembly Bill No. 50 of 2021) principally seeks to set out procedures for disclosing information on improper conduct within the public or private sectors and in this regard, to provide for the protection of whistleblowers.

The Copyright (Amendment) Bill, 2021 (National Assembly Bill No. 44 of 2021) principally seeks to amend the Copyright Act to provide for a fair formula for sharing of revenue from ring back tunes between artists/copyright holders and the telecommunication companies.

The Bills were read a First Time on Wednesday 24th November, 2021 and committed to Departmental Committees for consideration as follows:-

S.No.	Title of the Bill	Departmental Committee
1.	The Penal Code (Amendment) Bill, 2021 (National Assembly Bill No. 40 of 2021)	Justice and Legal Affairs
2.	The Penal Code (Amendment) Bill, 2021 (National Assembly Bill No. 47 of 2021)	Justice and Legal Affairs
3.	The Whistleblower Protection Bill, 2021 (National Assembly Bill No. 50 of 2021)	Justice and Legal Affairs
4.	The Copyright (Amendment) Bill, 2021 (National Assembly Bill No. 44 of 2021)	Communication, Information, and Innovation

Now Therefore, in compliance with Article 118 (1) (b) of the Constitution and National Assembly Standing Order 127(3), the Clerk of the National Assembly hereby invites the general public and stakeholders to submit memoranda on the said Bills.

Copies of the Bills are available at the National Assembly Table Office, or on www.parliament.go.ke/the-national-assembly/house-business/bills.

The memoranda may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to clerk@parliament.go.ke; to be received on or before Tuesday, 28th December, 2021 at 5.00 p.m.

MICHAEL R. SIALAI, CBS
CLERK OF THE NATIONAL ASSEMBLY
11th December 2021

ANNEX 4

COPIES OF THE WRITTEN MEMORANDA



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Mr. Kuna, CAT
Pse. Mubanga
10/1/22

DD/DC
29/12/21



ARTICLE 19 EASTERN AFRICA

NATIONAL ASSEMBLY
RECEIVED
20 DEC 2021
CLERK'S OFFICE
P.O. BOX 2100, NAIROBI

MEMORANDUM ON THE COPYRIGHT (AMENDMENT) BILL 2021

TO:
THE NATIONAL ASSEMBLY COMMITTEE ON COMMUNICATION,
INFORMATION AND INNOVATION

DIRECTOR
RECEIVED
04 JAN 2022
Directorate of Departmental Committees

ARTICLE 19 EASTERN AFRICA RESPONSE TO THE COPYRIGHT (AMENDMENT) BILL 2021

Introduction

ARTICLE 19 Eastern Africa (EA) welcomes the efforts of Parliament to engage in a multi-stakeholder process by holding this public comment consultation on the Copyright (Amendment) Bill 2021¹. ARTICLE 19 is committed to promoting the realisation of the right to freedom of expression and access to information in the digital age. Although we recognize the role of copyright in protecting artistic, literary works and other forms of expression we are concerned that copyright is being used to protect exclusive proprietary interest at the expense of wider public interest.

Therefore, this consultation is an important opportunity as the Bill seeks to repeal provisions on take down notices for internet service providers as well as set the rate for revenue sharing on ring back tones. We appreciate the opportunity to provide the committee with our position and look forward to the discussion that will follow.

Summary and Recommendations

From our analysis, we welcome the efforts to eliminate the notice and Takedown procedure for Internet Service Providers for alleged copyright infringement. Since 2017, ARTICLE 19 EA has been concerned that the procedure as defined in the law imposes criminal and financial penalties on ISPs that encourage them to err on the side of caution and remove potentially infringing content even where such content is legitimate thus limiting free speech and access to information.

We are however concerned that the Amendment Bill also contains provisions that water down international standards on intermediary immunity thus violating international standards of free speech and human rights.

We therefore recommend that:

1. Clause 5 of the Bill be amended to provide for notice to notice procedure in alternative to the Notice and Takedown Procedure. ARTICLE 19 EA has since 2017 expressed concern with the notice and takedown procedure under s35B as it imposes financial and criminal sanctions on ISPs for failing to take down content forcing ISPs to act cautiously and tend to takedown

¹ The Copyright (Amendment) Bill 2021 (December 2021)
< http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2021/TheCopyrightAmendmentBill_2021.pdf >

potentially infringing content. Notice to notice procedure will ensure that ISPs only takedown content on orders of the Court or independent Body of tribunal.

2. Clause 6 of the Bill be deleted as it limits the gains made to safeguard the right to privacy and freedom of expression in the digital environment. This clause seeks to repeal S35C which provides for intermediary immunity and only allows ISPs to disclose information of subscribers who are allegedly infringing copyright to investigative agencies in compliance with a court order. ARTICLE 19 EA is concerned that to repeal this section would be akin to eliminating intermediary immunity it is highly likely that ISPS would actively monitor and police content to ensure it is not infringing speech which would lead to censorship.
3. Clause 7 of the Bill be deleted as it eliminates opportunity for a complainant to seek judicial remedies for copyright infringement and waters down international standards on intermediary liability. ARTICLE 19 believes that judicial authorities or an independent tribunal not private entities should make decisions on content. Section 35D affirms this position by stating that the High Court may issue an order to a web host or ISP to make infringing material inaccessible. This position complies with International standards on Intermediary Liability and International Human rights standards on free speech.



MATRIX REPRESENTATION
THE COPYRIGHT (AMENDMENT) BILL 2021

Clause	Provision	Proposal	Justification
5	<p>The principal Act is amended by repealing section 35B</p> <p>Section 35B -Take Down Notice</p>	<p>We recommend this clause be amended to allow for an alternative '<i>notice to notice</i>' procedure where Internet Service Providers remove content pursuant to an order of the Court or other Independent Body.</p> <p>In the event that the notice takedown procedure is maintained, we recommend this procedure complies with ARTICLE 19'S principle on Filtering and blocking of Content Subject to Copyright².</p>	<p>1. Takedown procedure is open to abuse</p> <p>ARTICLE 19 EA is concerned that takedown procedures that impose financial or criminal liability on ISPs for failure to take down content, encourage ISPs to err on the side of caution and take down material even where it is legitimate and lawful. This imposes undue restrictions to freedom of expression and access to information and is open to abuse by both private and state actors.</p> <p>2. Private entities should not make decisions on Content</p> <p>In 2016, the Special Rapporteur on Freedom of Expression noted that Private intermediaries are 'typically ill equipped to make determinations of content illegality as they lack the ability to interpret the law according to freedom of speech and international human rights standards'³. ARTICLE 19 EA also believes that decisions on content should as a matter of legal principle be made by an independent body and are concerned that private entities may be influenced by other competing interests⁴.</p> <p>3. Lack of Clarity and due process Safeguards</p> <p>As highlighted in our earlier submission⁵, ARTICLE 19 EA is concerned that section 34B does not provide for the procedure to be followed where an alleged infringer issues a counter notice.</p>

² 'The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age' (ARTICLE 19, 2013)

< <https://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf>>

³ Report on the UN Special Rapporteur on Freedom of Expression, A/HRC/32/38, 11 May 2016, Para 44 < [*1607644 \(icnl.org\)](https://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf)>

⁴ 'Internet Intermediaries: Dilemma of Liability' (ARTICLE 19, 2013) pg 14 < [*Intermediaries_ENGLISH.pdf \(article19.org\)](https://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf)>

⁵ Legal Analysis, 'Kenya: Copyright (Amendment) Bill 2017 (ARTICLE 19 EA, September 2018)

< <https://www.article19.org/wp-content/uploads/2018/10/Analysis-Kenya-September-2018-Final.pdf>>

			<p>Secondly, an ISP is required to takedown content within 48 hours which may not be sufficient time for the alleged infringer to challenge the takedown notice before their content is taken down thus open to abuse.</p> <p>In light of the above, ARTICLE 19 EA Recommends Kenya adopts the Notice to Notice procedure.</p> <p>As explained in detail under our policy⁶, this procedure allows the complainant to send a notice of infringement to the host. The notice must contain: the name of the complainant, legal basis for the claim including why the content is wrong and time when the wrongdoing was committed.</p> <p>The host would within a set time example 72 hours inform the alleged infringer of the complainant who would either takedown the infringing material or issue a counter notice within set time e.g. 14 days. The host would forward the counter notice to the complainant who would decide to forward the complaint to the court or an independent body.</p> <p>Where an alleged infringer fails to comply with a notice or respond by counter notice, the host will lose immunity from liability and need to determine whether to remove the material or not.</p>
6	The Principal Act is amended by repealing section 35C 35c- Role of Internet Service Provider	We recommend this clause be deleted as it waters down internal human rights standards on Intermediary Liability for Internet Service Providers thus limiting freedom of expression and the right to privacy.	<p>1. The Right to Privacy</p> <p>Section 35C 1(a) allows ISPS to provide information about subscribers suspected to be infringing on content to investigative agencies only on the order of Court. This ensures such determination is made by an independent third party therefore safeguarding privacy rights of subscribers and to repeal this section would be to eliminate these gains.</p>

⁶ 'Internet Intermediaries: Dilemma of Liability' (ARTICLE 19, 2013) pg 14 <*>Intermediaries_ENGLISH.pdf (article19.org)>

			<p>Protection from Intermediary Liability</p> <p>S35C (2) states ISPs are not required to monitor material stored or linked or actively seek facts or circumstances indicative of infringing activity within its service.</p> <p>In 2011, four special rapporteurs on Freedom of expression recommended that ‘No one should be Liable for content produced by others when providing technical services and Liability should only be incurred if the intermediary has specifically intervened in the content which is published online’⁷.</p> <p>ARTICLE 19 firmly believes ISPS should be immune from liability for third party content where they have not been involved in modifying the content. These enhance international standards on free speech and intermediary liability. ARTICLE 19 EA is concerned that to repeal this section would be akin to eliminating intermediary immunity and will water down protections to free speech. It is highly likely that ISPS would actively monitor and Police content to ensure it is not infringing speech which would lead to censorship.</p>
<p>7</p>	<p>The Principal Act is amended by repealing section 35D</p> <p>35D-Application for Injunction</p>	<p>We recommend this clause be deleted as it eliminates opportunity for a complainant to seek judicial remedies.</p>	<p>As stated before, ARTICLE 19 believes that judicial authorities or an independent tribunal not private entities should make decisions on content. Section 35D affirms this position by stating that the High Court may issue an order to a web host or ISP to make infringing material inaccessible. This position complies with International standards on Intermediary Liability and International Human rights standards on free speech.</p> <p>Likewise in 2011, the Joint Declaration on Freedom of Expression and the Internet recommended that⁸:</p> <p>‘ISPS and other Intermediaries should only be required to takedown</p>

⁷ The 2011 Joint Declaration on Freedom of Expression and the Internet, June 2011, <[http:// www.article19.org/data/files/press/docs/press/internationalmechanisms-for-promoting-freedom-of-expression.pdf](http://www.article19.org/data/files/press/docs/press/internationalmechanisms-for-promoting-freedom-of-expression.pdf)>

⁸ As above



			content following a court order, contrary to the practice of notice and takedown.
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About ARTICLE 19 Eastern Africa

ARTICLE 19 Eastern Africa is a regional human rights organisation duly registered in 2007 as a non-governmental organisation in Kenya. It operates in fourteen (14) Eastern Africa countries and is affiliated to ARTICLE 19, a thirty three (33) year old leading international NGO that advocates for freedom of expression collaboratively with over ninety (90) partners worldwide. ARTICLE 19 Eastern Africa leads advocacy processes on the continent on behalf of, and with, our sister organisations ARTICLE 19 West Africa and ARTICLE 19 Middle East and North Africa.

Over the past 14 years, we have built a wealth of experience defending and promoting digital rights at the local, regional, and international levels. We have contributed to several Internet Freedom Policies, Data Protection, Cybercrime Bills and TV White Space Frameworks including Kenya’s Copyright (Amendment) Bill 2017, The Intellectual Property Office of Kenya Bill 2020, Uganda’s Data Protection and Privacy Act (2019), Uganda’s Draft TV White Space Guidelines (2018), Kenya’s Data Protection Bill(s) (2018/2019), the Kenya Cybercrime and Computer Related Crimes Bill 2014, the Tanzania Cybercrime Act, 2015, the Huduma Bill (2019), among many others. We were also part of the Inter-Agency Technical Committee of the Ministry of ICT that developed the Kenya Cybercrime Bill, 2016 and the Kenya Data Protection Bill, 2018.

If you would like to discuss this analysis further, please contact us at kennya@article19.org - with Mugambi Kiai (mugambikiai@article19.org) in copy - or +254 727 862 230



Memorandum

For consideration by: The National Assembly of Kenya,
Departmental Committee of Justice & Legal Affairs

From: International Federation of Film Producers Associations

Concerns: The Copyright (Amendment) Bill 2021 (National Assembly Bill no. 50 of 2021)

Email to: clrk@parliament.go.ke

Dear Honourable Members of the National Assembly;

The Private Member's Copyright (Amendment) Bill 2021 (National Assembly Bill no. 50 of 2021) [thereafter "the Amendment Bill"] ostensibly seeks to "amend the Copyright Act to provide for a fair formula for sharing revenue from ring back tones between artists/ copyright holders and the telecommunications companies".

However, *the Bill also proposes to delete sections 35 B, 35 C and 35 D of the Kenyan Copyright Act 2001. These clauses represented a laudable intention by Kenyan legislators to equip local and international rights holders with legal tools to stave off online piracy of copyright content and constituted a step forward in aligning Kenya's Copyright Law with the international standard in treaties and conventions such as the WIPO Copyright Treaty (WCT) and the WTO's Trade Related Aspects of Intellectual Property (TRIPS).*

We, the International Federation of Film Producers Associations [FIAPF] wish to express considerable alarm at the prospect of the removal of Sections 35 B, C and D of the current Act. We believe this deletion would bear considerable prejudice to the Kenyan creative sectors and their ability to conduct productive trade with audiovisual content producers in third countries. We urge the Honourable Members to reconsider the proposed deletion and to enter into a dialogue with stakeholders in the Kenyan film and TV industries with a view to establishing a stable and pragmatic regime to help protect copyright works online and establish sound principles for ISP responsibility.

FIAPF is the only global private sector organisation representing film and TV content producers from throughout the world. Currently, our membership is made up of 32 nationals

film and TV producers' organisations from 29 different countries, including India, China, the United States, Nigeria, and many EU Member States. Additionally, FIAPF has developed productive informal working relationships with producers' communities in many other countries with growing audiovisual production capability.

Everywhere in the world, the film and TV industry relies on enabling laws and regulations for its continuous growth and its contribution to national GDPs,. ***The protection of audiovisual works through exclusive rights enshrined in international copyright treaties and conventions, combined with meaningful enforcement, constitutes the principal incentive for this high-risk cultural industry to become sustainable*** and play its part fully as a driver of economic growth.

The Kenyan film and TV sector is a beacon of the local and regional economy. Films from Kenya made in local languages and in Ki-Swahili and other Eastern African languages are popular not only at home but in surrounding countries, including Uganda, Tanzania, Rwanda and Burundi, while the vast Kenyan diaspora in countries such as the United States and the United Kingdom also generate international demand. Kenya's TV content industry is also dynamic, with audiences tuning in to popular shows, be they reality based, drama or comedies. Beyond the cultural and social cohesion dividend, Kenyan audiovisual content is also an asset for the local economy. According to data published in Kenya's 2020 version of the Draft National Film Policy, the sector contributed fully 4.5% of all jobs in the formal economy in 2019.

One of the most salient aspects of Kenya's recent development has been the spectacular growth in recent years of its Internet infrastructure and services, both fixed and mobile. According to *Internetworldstats.com*, there were 48.8 million Internet users in the country by December 2020, for a penetration rate of 85.2% and an eye-watering growth curve of 23,335% since the year 2000.

However, this spectacular growth in Internet usage has also meant the very rapid migration of copyright content piracy and unauthorised uses from physical media (e.g. VCD and DVD) to online. The result has been copyright content piracy on a vast scale, depriving the content creation and production sector of vast potential revenues that could help fuel further growth in local original production, job creation and attendant fiscal benefits.

In 2019, the Kenyan legislature amended the 2001 Copyright Act to update the exclusive rights of authors and to introduce much needed content protection and enforcement measures, including notice-and-take-down provisions and a measure of IPS responsibility. In doing so, the Honourable Members of the National Assembly took an important step towards harmonising Kenya's domestic copyright law with international norms, for the benefit of Kenyan cultural production and its trade relationships with third countries.

Kenya's legislative direction over the past decade has been to bring its copyright law to the WIPO Copyright Treaty standard. The current proposal to delete Sections 35 (B), (C) and (D), if enacted, would constitute a step backwards: Article 14(2) of the WCT holds that *"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.” Although the Treaty is not prescriptive on the legal means of achieving this international legal standard, the high growth of Internet as a copyright content distribution system in the twenty five years since WCT was adopted, has resulted in most national legislatures introducing provisions to enable notice-and-take-down action to combat the tidal wave of online infringement as well as provisions establishing the responsibility of Internet Service Providers (ISP) in helping prevent piracy. Although they offer incomplete protection and would require further improvement in order to be fully effective, the similar provisions adopted by Kenya’s legislators were a step in the right direction. They lay the foundation for an extremely important legal form of recourse by rights holders in their efforts to protect their copyright content online and to incentivise users to consume their content from legal platforms rather than illegal sites.

We respectfully submit that ***the current proposal to remove such provisions from Kenya’s Copyright Act entirely would have a calamitous impact on Kenya’s audiovisual sector and its cultural industries at large, by removing a strategic set of legal tools in the fight against piracy and unauthorised uses. It would also have the effect of discouraging international coproductions and foreign direct investment*** into Kenya’s film production and distribution infrastructure, resulting in stunted growth in the sector, with attendant negative effects on job creation, contribution to the national fiscus and export earnings.

We urge the Honourable Members to reconsider the proposal to delete Sections 35(B),(C) and (D) and to consider carefully the implications on the current welfare and future growth potential of one of Kenya’s flagship industries.

The International Federation of Film Producers remains at the disposal of the Honourable Members of the National Assembly should you wish to consult with us on this legislative proposal and hear our concern regarding its potential impact on the sustainability of local film and TV production and on Kenya’s international trade in audiovisual content.

24.12.2021

FIAPF | FILM PRODUCERS
WORLDWIDE



Geneva, December 23, 2021

Ref: Copyright (Amendment) Bill 2021 – National Assembly Bill n. 44 of 2021

To the attention of the Honorable Members of the Kenyan National Assembly

Dear Madams and Sirs,

The International Publishers Association (IPA) is the world's largest federation of national, regional and specialist book publishers' associations. Established in 1896, our membership comprises 86 organisations from 71 countries around the world, including the Kenyan Publishers Association. The IPA is based in Geneva and is an accredited observer at the World Intellectual Property Organization as well as an accredited non-governmental organisation (NGO) enjoying consultative relations with the United Nations.

The copyright framework is and always has been the foundation of the publishing industry. Adequate copyright protection entails a combination of enforceable exclusive rights and carefully calibrated exceptions and limitations, which must be guided by the Berne Convention's 3-step test to preserve the integrity of copyright protection as a key condition for publishers' investments. Enforceable exclusive rights are fundamental to incentivize authors, publishers and other copyright owners to create, invest in, and make available to the public original and valuable works of authorship. Through these works, publishers drive inspiration, entertainment, education, and significantly contribute to both local and global economies.

We are grateful for the opportunity to provide comments on the National Assembly Bill n. 44 of 2021 (the Bill). In doing so, we believe it is important to recall the essential role of copyright to support and reward creativity as a driver for copyright policy and law in Kenya. Economic studies by the World Intellectual Property Organization (WIPO) provide evidence that a strong copyright protection and enforcement framework is of key importance to sustain creative industries' contribution to local economies and is a necessary condition of investment in those industries.

Appropriate enforcement provisions are key to making copyright protection actionable and effective

Kenya concluded a review of its Copyright Law in 2019. Among other amendments, the review aimed at establishing online enforcement mechanisms for the first time. The 2019 review was a first step towards Kenya becoming a Contracting Party to the WIPO Copyright Treaty. Moreover, as online piracy remains a serious problem in Kenya, affecting its creative industries' ability to secure investments required to develop and maintain digital business models, the 2019 review was seen by creative industries and stakeholders as an important step to create the necessary conditions for a fair digital marketplace.

Although the 2019 review was a step in the right direction, important issues remained to be addressed regarding appropriate legal mechanisms to incentivize cooperation between internet service providers (ISPs) and rights holders. Notably, Kenyan Copyright Law can still be refined to establish appropriate secondary liability principles and balanced safe harbors. Other aspects requiring review are removing onerous requirements of notice and takedown procedures, notably by enabling electronic notices, and adopting provisions to ensure expeditious takedown of infringing materials. Kenyan law also lacks provisions on repeat infringer policies, which should be a

requirement for ISPs to avail themselves of safe harbors, in addition to repeat infringers being subject to enhanced sanctions.

Instead of addressing these aspects that still require attention, the Bill proposes to repeal the provisions that set out the minimum standards for online enforcement in Kenya. In addition to eliminating legal mechanisms on notice and take down procedures and provisions establishing ISP's liability, the Bill also proposes to repeal the section that enables copyright owners to file injunctions to deter infringement of their rights.

While the Bill is not based on a careful impact assessment of the needs of creative industries, nor does it present a reason for eliminating existing online enforcement provisions, it is hard to understand how it could be justified. If approved, the Bill will undermine Kenya's policies to advance the sustainable development of its creative industries and will counter KECOBO's copyright enforcement efforts. It will also jeopardize Kenya's efforts to bring its national law to the standards required to implement and accede to the WIPO Copyright Treaty, an important step for Kenya's international copyright and trade policies. The legal uncertainty generated by repealing online enforcement provisions will surely undermine national and foreign investments in Kenya's creative industries, as it weakens defenses against infringement to an unacceptable level.

The IPA respectfully submits the provisions to repeal S. 35 B, C and D of the Kenyan Copyright Act should be rejected and removed from the Bill.

Kenya has been taking important legislative and regulatory steps towards enhancing protection and enforceability of copyright to face the challenges brought by increased digital piracy. KECOBO has been doing a commendable work to raise awareness on the importance of copyright protection for Kenyan SMEs and creators, and to coordinate enforcement efforts to combat piracy of copyrighted works. The current Bill, if approved, will reverse fundamental gains in this area, much to the detriment of Kenyan creators and publishers, and jeopardize the important efforts developed by Kenyan regulatory and judiciary authorities to establish a fair marketplace for copyrighted works.

Setting policy priorities to support Kenyan creative industries: implementing and acceding to the WIPO Copyright Treaty

Implementing and acceding to the WIPO Copyright Treaty is an important step to create the necessary conditions for Kenyan creative industries to thrive in the digital age and to establish a fair digital marketplace in Kenya.

To achieve this objective, we kindly invite Kenyan authorities and legislators to consider enhancing online enforcement mechanisms by reflecting the following principles in a future review of Kenyan Copyright Law:

- In line with international best practice, ISPs shall be liable for infringement, except when the following **cumulative requirements** are fulfilled:

(i) Remove infringing content or disable access to it in 48 hours upon a notification served by electronic means by copyright owners, in accordance with reasonable requirements that do not impose undue burdens on rightsholders.

For example, under the U.S. DMCA, takedown notices must include the signature of the copyright owner or its representative agent, in physical or electronic form, and identification of the (i) copyrighted work(s) infringed (ii) the infringing activity and (iii) the location of the infringing activity (e.g. providing the URL).

With regard to burden of proof, recent decisions by China's Supreme People's Court and the National Copyright Administration of the People's Republic of China regarding future criminal procedures eases the burden of proof for copyright owners by considering the copyright statement on the works sufficient as evidence of ownership, absent counter-evidence. A similar rule could be adopted by Kenya for notice and take down procedures.

(ii) Apply, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which copyright owners have provided the service providers with the relevant and necessary information through a system of notice and take down.

In the European Union, article 17 of the 2019 EU DSM Directive¹ establishes that ISPs must apply, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which copyright owners provided notice.

(iii) Apply effective repeat infringer policies in a reasonable manner, including through closing accounts of repeat infringers in appropriate circumstances.

The US DMCA is a good example: only ISPs that have applied repeat infringement policies can avail themselves of limitation of liability under safe harbor provisions.

(iv) A clarification that the limitation of liability can only be invoked by technical, automatic and purely passive intermediaries who have adopted measures to ensure that infringing content stays down upon notice from rightsholders. Safe harbors should only apply to the truly technical, automatic and passive activities of intermediaries that provide hosting or caching services or/and when they act as mere conduits for transmissions between third parties. This is not the case with providers who, through their own systems, have knowledge or control of the copyrighted works or other protected subject matter that is made available to the public or stored on its service, including but not limited to optimizing the presentation or promotion of content made available on their platforms, or when platforms aim at making available user uploaded content to the public.

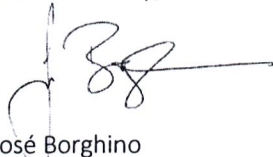
- Set out rules for **dynamic injunctions** allowing copyright owners to seek **site blocking** of copyright infringing websites, despite changes in URLs.

In addition to dynamic injunctions, several countries implemented fast-track administrative mechanisms and specialized police authorities to ensure that infringements are stopped as swiftly as possible. The United Kingdom has successfully implemented policies towards establishing a centralized crime unit to investigate IP crime, in addition to a robust legal framework supporting site-blocking injunctions. In Italy, Portugal, Brazil, Russia, China, and most recently, in the bills currently in legislative process in Nigeria, administrative authorities are entitled to issue site blocking orders. We suggest consideration is given to inserting similar provisions in Kenyan law.

- **Establish adequate protection for Rights Management Information (RMI) and technological protection measures (TPM)**, notably by either not adopting exceptions or adopting only very narrow exceptions and maintaining criminal and civil liability in case of violation, in line with international standards.

We thank you for your time and consideration and remain available for any additional information that you may require.

Yours sincerely,



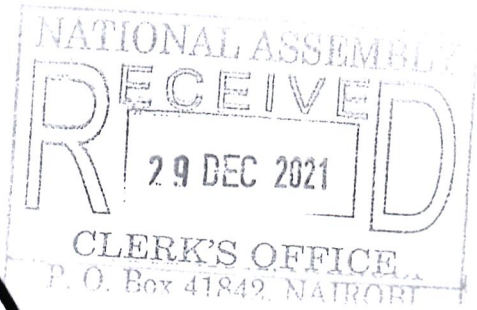
José Borghino
Secretary General

CC: Kenyan Publishers Association and Kenyan Copyright Board.

¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market.



Film Kenya... Capture Africa!



DD/DC 29/12/21

JOINT MEMORANDUM ON THE COPYRIGHT AMENDMENT BILL, 2021

**PRESENTED TO THE DEPARTMENTAL COMMITTEE ON COMMUNICATION,
INFORMATION AND INNOVATION OF THE NATIONAL ASSEMBLY**

SUBMITTED TO CLERK OF THE NATIONAL ASSEMBLY

PO BOX 41842-00100, NAIROBI

**IN THE MATTER OF CONSIDERATION BY THE DEPARTMENTAL COMMITTEE
ON COMMUNICATION, INFORMATION AND INNOVATION: THE COPYRIGHT
(AMENDMENT) BILL, 2021.**

*Ms. Kinia
Pse. Dept
DD/DC
9/1/22*

21st DECEMBER 2021

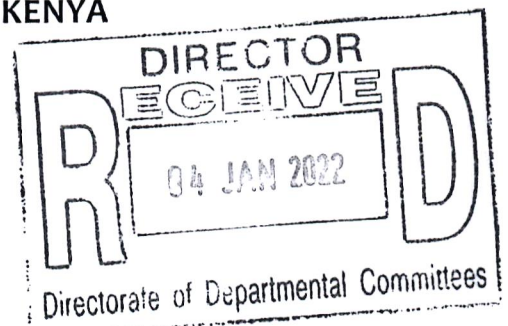
SUBMITTED BY THE JOINT COMMITTEE OF:

THE KENYA COPYRIGHT BOARD;

KENYA FILM COMMISSION;

KENYA FILM CLASSIFICATION BOARD AND

COMMUNICATIONS AUTHORITY OF KENYA



1.0. INTRODUCTION

The Kenya Copyright Board (KECOBO) is a State Corporation under by the **Copyright Act, Cap 130 of the Laws of Kenya** to administer and enforce copyright and related rights in literary, musical and artistic works, audio-visual works, sound recordings and broadcasts.

The Kenya Film Commission (KFC) is a State Corporation duly established under **Legal Notice No. 147 of 2015** to develop a vibrant and sustainable local film industry and market Kenya as a preferred filming destination for wealth and job creation.

The Kenya Film Classification Board(KFCB) is a State Corporation established under the **Films and Stage Plays Act, Cap 222 of the Laws of Kenya** to regulate the creation, possession, broadcast, exhibition and distribution of films and broadcast content in the country.

Communications Authority of Kenya is a statutory body established under the Kenya Information and Communication Act 1998 to license and regulate the Information, Communication and Technology sector.

2.0. BACKGROUND/ CONTEXT

The **Copyright (Amendment) Bill**, published on 22nd October 2021 as a Private Member's Bill, was presented to the National Assembly for deliberation by the Hon. Ms. Gladys Wanga, the Member of Parliament for Homa Bay County.

Of particular concern to the entities are the following key proposals:

1. The amendment of the Principal Act by inserting a new Section (30C) as regards payment of ring back tune revenues; and
2. The amendment of the Principal Act to repeal Section 35B, 35C and 35D on takedown notice and the Internet Service liability provisions.

With regard to the key proposals, it is important to note that Kenya has a diverse and robust creative economy. According to the 2019 Economic Survey, the creative sector in Kenya generated close to 130,000 direct jobs. The sector is projected to employ 2million people by 2025.

To guarantee sustained growth of the local creative economy, it is important to ensure artistes and other creatives earn a fair return from their works. In this regard, the Intellectual Property Rights (IPRs) of artistes and other creatives need to be protected from infringement through piracy in line with the provisions of the local copyright laws. Most importantly, H.E. President Uhuru Kenyatta has expressed himself on this matter, and directed the relevant Government agencies to intervene to ensure that the creative sector thrives and that artistes and other creatives received what is justly owed to them. Of the key

and urgent interventions needed is curbing piracy and strengthening the legal framework on Intellectual Property Rights.

It is notable that the Creative Economy Business Environment Reform Report of 2016 recommended policy and regulatory review with a view to reducing piracy. It is, therefore, an inescapable fact that the relevant policy, regulatory and legal frameworks governing these fields facilitate artistic creation, cultural diversity, and business activities in the creative economy.

It is against this backdrop, and as the key state agencies vested with regulatory oversight on the creative sector, that we hereby submit our joint memorandum as follows:

3.0. THE ISSUES

3.1. Clause

Clause 3 provides for the insertion of Section 30C.

Observations:

While the joint Committee had initial concerns about fixing ring back income as it is much easier to amend regulations from time to time as circumstances may demand as opposed to the Act, it will no longer contest the proposal.

However, there is need to have the amounts in the net adding up to a hundred percent and protect existing valid contractual arrangements in place between the telecommunication companies, Content Service Providers, and content owners/ creators.

Recommendation:

As such we wish to propose the text as follows:

30C. Without prejudice to section 30B, in the case of ring back tunes, the parties shall subject to subsisting contracts share the revenue net of tax from the sale of ring back tunes, as follows —

(a) the premium rate service provider at seven percent; (Amend to read 9%)

(b) the telecommunication operator at sixteen percent; (Amend to read 21%)

(c) the artist or copyright holder at fifty-two percent. (Amend to read 70%)

3.2. Clause

Clauses 5 to 7 of the Bill seek to repeal Sections 35B, 35C and 35D on takedown notices, role of an Internet Service Provider and application for an Injunction, respectively.

Observations:

Copyright law, in any jurisdiction, seeks to protect original works of authorship such as literary, musical or artistic works. The medium in which these works are presented has evolved over time. This includes the premise of the internet which lies in its infinite capacity to disseminate information. In this current day and age, the internet is a tool that promotes freedom of expression as well the right to information; two key provisions of our Kenyan Constitution. In this regard, artistic freedom is celebrated and as such, there is a richness and diversity in the content disseminated online. The possibilities, therefore, are endless.

Despite digitization and the benefits thereof, the ease in which content can be duplicated online has been enhanced. In circumstances such as infringement of one's right to privacy and even in extreme situations where dissemination of unlawful content occurs, such as child pornography, it is incumbent that the government intervene.

Further, the overarching need to protect the creative economy is paramount. One of the major hindrances to growth of the creative sector is piracy. In the Creative Economy UNESCO report of 2018 dubbed "*Investing in Creativity*", it was noted that the cultural and creative industries generate annual global revenues of US \$2,250 Billion and make up of up to 10% of GDP in some countries.

Locally, during the period of 2007-2009, as reported in the Creative Economy Business Environment Reform Report of 2016, it was noted that the country's creative sector earnings was approximately Kshs 85 Billion representing 5.3% of the GDP. In the age of digitization, unfortunately the revenue portrayed does not depict the revenue lost due to piracy. As far back as 2011, Microsoft reported that only 20 percent of Kenyans used genuine software. This is merely one portion of the economic pie that has been unjustly devoured.

In regard to piracy, the report (i.e. the Creative Economy Business Environment Reform Report, 2016) recommended that the legislative framework be strengthened with regard to copyright laws, reprimand systems and the overall enforcement.

Typically, Internet intermediaries or internet service providers as are popularly referred to as, simply play a seemingly neutral role without being actively involved in the creation of online content, presumably having no knowledge of, or authorial control over, the nature of the content that they provide access to or store. Therefore, calling for their description as 'passive' intermediaries. Yet, given the design of the Internet, no other entity, as the intermediary is better suited to control the transmission and storage of unlawful online content. Hence the efficacy of a legislative framework pronouncing the importance of takedown notices and the general responsibilities of such intermediaries. The introduction of takedown notices has greatly enhanced the legislative framework on the infringement of intellectual property rights in the creative economy.

Further, this notion of takedown notices has greatly aided the government in safeguarding and essentially maintain the national aspirations and cultural diversities and sensitivities of the Kenyan people. Through a working relationship with the world's largest intermediary, Google, unsuitable content has been pulled down through the implementation of the proposed section to be repealed; Section 35B of the **Copyright (Amendment) Act, 2019**.

While Kenya enacted its first Internet era copyright law in 2002, it took the country 17 years to incorporate provision on intermediary liability as espoused by the **WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty** commonly referred to as the "**WIPO Internet Treaties**"; a framework created by the World Intellectual Property Organization (WIPO).

Apart from restating old rights and providing new rights fit for the digital age, the WIPO internet Treaties set down international norms aimed at preventing unauthorised access to and use of creative works on the Internet or other digital networks.

The WIPO Internet Treaties therefore, set out the manner countries could prevent infringement of Copyright in the cyberspace by providing in their laws the protection of author and work information (Rights Management Information) and access and copy measures (Technical Protection Measures). The two Treaties were intended to guard integrity of information regarding Copyright Works and prevent circumvention of technical measures by virtual pirates.

The WIPO Internet Treaties also require that states provide effective enforcement measures to protect the rights in Copyright and other Intellectual Property Rights.

It is therefore a commendable feat that the Kenyan Copyright legal framework as it now exists, provides for safe harbours for Internet Service Providers and a procedure for notice and takedown in line with international standards, and specifically, the WIPO Internet Treaties, therefore being one of the premiere countries in Africa to achieve this.

It should be noted and appreciated that infringement of Copyright through hard copies is fairly uncommon thus rendering the same almost non-existent. This is because such infringements have shifted online. Consequently, intermediary liability comes in handy. Many Kenyans who use the internet understand the difficulty in restraining the misuse by the public from the misuse of Copyright works accessible online.

Therefore, when the **Copyright (Amendment) Bill** with the aforementioned proposed repeal provisions was passed and signed by the President in 2019, it represented a milestone in the Copyright law. This demonstrated the government's intent to forge ahead as regards copyright and the internet. As such, in the digital era, the provision on intermediary liability is a basic essential requirement in a Copyright legislation. To this end, having been enacted so recently, the implementation of these provisions is yet to be fully realized.

In the global context, various countries have successfully embedded into their legal framework the concept of internet service liability provisions which include takedown notices and roles and responsibilities of internet service providers as espoused in the WIPO Internet Treaties.

As a practical step, countries looked at entities that act as intermediaries in the digital environment by introducing intermediary liability laws. Some of the most prominent intermediary liability legislations are the **Digital Millennium Copyright Act (DMCA)** and the **E-Commerce Directive** in the United States of America and the European Union respectively.

Within the African context, our South African counterparts, through the **Electronic Communications and Transactions Act**, have codified the concept of takedown notices. Specifically, Section 77 of the Act provides for the procedure for takedown notifications. The Internet Service Providers Association, an industry organization of recognized internet service providers, have embraced the legal provision with the takedown procedures done through the aforementioned Association.

RECOMMENDATION

We do recommend that the repeal of the Intermediary proposals be removed. In the meantime, KECOBO shall take lead in consultation with stakeholders in this sector to clear any issues on the provision and propose the necessary changes (if any) through a separate memorandum.

4.0. CONCLUSION

The Government has an obligation to protect the interests of content creators and the larger creative economy. This, while further placing responsibility on intermediaries, would go a long way in enhancing the creative economy and growing the general economy of the country whilst preserving the rights that citizens have conferred to the government.

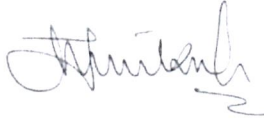
Accordingly, it is the view of the foregoing that KECOBO, KFC and KFCB, as the government agencies mandated to deal with issues related to the creative sector, urge the honorable Members of Parliament to allow time for the full implementation of this Act that was enacted in 2019. We further entreat the House to allow for the agencies tasked with implementation of the provisions do so. The repeal of the provisions of the internet service provider liabilities would negatively impact an already struggling economy.

Additionally, we humbly request the House to consider our recommendation as it pertains to the fixing of the ring back tunes' income, that the same be codified in regulations rather than in the text of the Act.

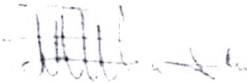
We hereby so submit.



Mr. Edward Sigei
Executive Director, Kenya Copyright Board



Mr. Christopher Wambua
Ag. Chief Executive Officer, Kenya Film Classification Board



Mr. Timothy Owase
Chief Executive Officer, Kenya Film Commission



Mr. Ezra Chiloba
Director General, Communications Authority of Kenya



KENYA FILM CLASSIFICATION BOARD

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KFCB/HQS/RD/13 Vol. IV

28th December 2021

Clerk of the National Assembly
Main Parliament Building
P O Box 41842-00100
NAIROBI

D/DC
② 29/12/21

COPYRIGHT (AMENDMENT) BILL, 2021 (NATIONAL ASSEMBLY BILL NO. 44 OF 2021)

Referenced is made to the above subject matter.

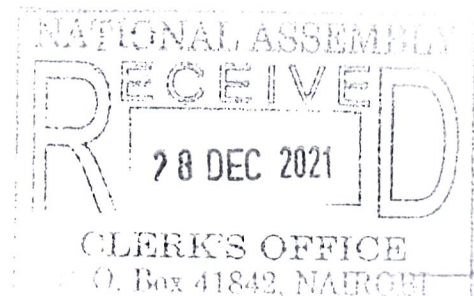
Attached is the Memorandum on the Copyright Amendment Bill, 2021 jointly prepared by Kenya Copyright Board, Kenya Film Classification Board, Kenya Film Commission and Communications Authority of Kenya. Forwarded to the National Assembly for consideration.

Thank you for your continued support.

Petronilla Mueni
For: Ag. CHIEF EXECUTIVE OFFICER

② Hellen Kuni
Please deal

29/12/21



General
Exhibition

Parental
Guidance
Recommended

Protecting Children from Exposure to Harmful Content

16

Not suitable for
persons under
16 years

18

Restricted to
Adult Only



Film Kenya...Capture Africa!



JOINT MEMORANDUM ON THE COPYRIGHT AMENDMENT BILL, 2021

**PRESENTED TO THE DEPARTMENTAL COMMITTEE ON COMMUNICATION,
INFORMATION AND INNOVATION OF THE NATIONAL ASSEMBLY**

SUBMITTED TO CLERK OF THE NATIONAL ASSEMBLY

PO BOX 41842-00100, NAIROBI

**IN THE MATTER OF CONSIDERATION BY THE DEPARTMENTAL COMMITTEE
ON COMMUNICATION, INFORMATION AND INNOVATION: THE COPYRIGHT
(AMENDMENT) BILL, 2021.**

21st DECEMBER 2021

SUBMITTED BY THE JOINT COMMITTEE OF:

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KENYA FILM COMMISSION;

KENYA FILM CLASSIFICATION BOARD AND

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To guarantee sustained growth of the local creative economy, it is important to ensure artistes and other creatives earn a fair return from their works. In this regard, the Intellectual Property Rights (IPRs) of artistes and other creatives need to be protected from infringement through piracy in line with the provisions of the local copyright laws. Most importantly, H.E. President Uhuru Kenyatta has expressed himself on this matter, and directed the relevant Government agencies to intervene to ensure that the creative sector thrives and that artistes and other creatives received what is justly owed to them. Of the key

and urgent interventions needed is curbing piracy and strengthening the legal framework on Intellectual Property Rights.

It is notable that the Creative Economy Business Environment Reform Report of 2016 recommended policy and regulatory review with a view to reducing piracy. It is, therefore, an inescapable fact that the relevant policy, regulatory and legal frameworks governing these fields facilitate artistic creation, cultural diversity, and business activities in the creative economy.

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Further, this notion of takedown notices has greatly aided the government in safeguarding and essentially maintain the national aspirations and cultural diversities and sensitivities of the Kenyan people. Through a working relationship with the world's largest intermediary, Google, unsuitable content has been pulled down through the implementation of the proposed section to be repealed; Section 35B of the **Copyright (Amendment) Act, 2019**.

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The WIPO Internet Treaties therefore, set out the manner countries could prevent infringement of Copyright in the cyberspace by providing in their laws the protection of author and work information (Rights Management Information) and access and copy measures (Technical Protection Measures). The two Treaties were intended to guard integrity of information regarding Copyright Works and prevent circumvention of technical measures by virtual pirates.

The WIPO Internet Treaties also require that states provide effective enforcement measures to protect the rights in Copyright and other Intellectual Property Rights.

It is therefore a commendable feat that the Kenyan Copyright legal framework as it now exists, provides for safe harbours for Internet Service Providers and a procedure for notice and takedown in line with international standards, and specifically, the WIPO Internet Treaties, therefore being one of the premiere countries in Africa to achieve this.

It should be noted and appreciated that infringement of Copyright through hard copies is fairly uncommon thus rendering the same almost non-existent. This is because such infringements have shifted online. Consequently, intermediary liability comes in handy. Many Kenyans who use the internet understand the difficulty in restraining the misuse by the public from the misuse of Copyright works accessible online.

Therefore, when the **Copyright (Amendment) Bill** with the aforementioned proposed repeal provisions was passed and signed by the President in 2019, it represented a milestone in the Copyright law. This demonstrated the government's intent to forge ahead as regards copyright and the internet. As such, in the digital era, the provision on intermediary liability is a basic essential requirement in a Copyright legislation. To this end, having been enacted so recently, the implementation of these provisions is yet to be fully realized.

In the global context, various countries have successfully embedded into their legal framework the concept of internet service liability provisions which include takedown notices and roles and responsibilities of internet service providers as espoused in the WIPO Internet Treaties.

As a practical step, countries looked at entities that act as intermediaries in the digital environment by introducing intermediary liability laws. Some of the most prominent intermediary liability legislations are the **Digital Millennium Copyright Act (DMCA)** and the **E-Commerce Directive** in the United States of America and the European Union respectively.

Within the African context, our South African counterparts, through the **Electronic Communications and Transactions Act**, have codified the concept of takedown notices. Specifically, Section 77 of the Act provides for the procedure for takedown notifications. The Internet Service Providers Association, an industry organization of recognized internet service providers, have embraced the legal provision with the takedown procedures done through the aforementioned Association.

RECOMMENDATION

We do recommend that the repeal of the Intermediary proposals be removed. In the meantime, KECOBO shall take lead in consultation with stakeholders in this sector to clear any issues on the provision and propose the necessary changes (if any) through a separate memorandum.

4.0. CONCLUSION

The Government has an obligation to protect the interests of content creators and the larger creative economy. This, while further placing responsibility on intermediaries, would go a long way in enhancing the creative economy and growing the general economy of the country whilst preserving the rights that citizens have conferred to the government.

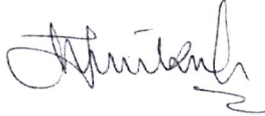
Accordingly, it is the view of the foregoing that KECOBO, KFC and KFCB, as the government agencies mandated to deal with issues related to the creative sector, urge the honorable Members of Parliament to allow time for the full implementation of this Act that was enacted in 2019. We further entreat the House to allow for the agencies tasked with implementation of the provisions do so. The repeal of the provisions of the internet service provider liabilities would negatively impact an already struggling economy.

Additionally, we humbly request the House to consider our recommendation as it pertains to the fixing of the ring back tunes' income, that the same be codified in regulations rather than in the text of the Act.

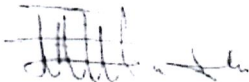
We hereby so submit.



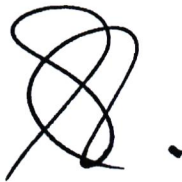
Mr. Edward Sigei
Executive Director, Kenya Copyright Board



Mr. Christopher Wambua
Ag. Chief Executive Officer, Kenya Film Classification Board



Mr. Timothy Owase
Chief Executive Officer, Kenya Film Commission



Mr. Ezra Chiloba
Director General, Communications Authority of Kenya



REPUBLIC OF KENYA

KENYA COPYRIGHT BOARD
OFFICE OF THE ATTORNEY GENERAL AND
DEPARTMENT OF JUSTICE



KENYA COPYRIGHT BOARD

KECOBO/AMENDMENT/12/236/2021.VOL.V

20TH DECEMBER 2021

Ref:

Date:

Mr. Michael Sialai, EBS

Clerk of the National Assembly

NAIROBI

Dear Sir,

✓ DDC
20/12/21

RE: CONSIDERATION OF COPYRIGHT AMENDMENT BILL 2021

I refer to the public notice placed in the Saturday newspapers on 11th December 2021 calling for comments on the above Private Members Bill that will be coming before the Departmental Committee on Communications, Information, and Innovation.

This is to submit the attached Memorandum as advertised and express readiness to appear if before the Committee if required.

Yours faithfully,

Edward Sigei

Executive Director

KENYA COPYRIGHT BOARD

CC

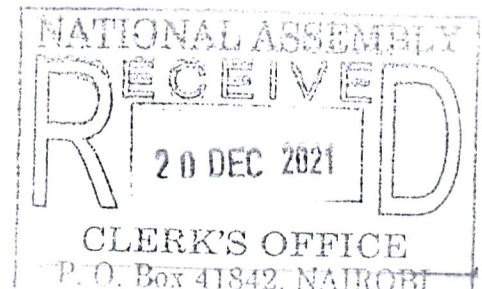
Mr. Joe Mucheru, EGH

Cabinet Secretary,

Ministry of ICT, Innovation and Youth Affairs

Ms. Hellen Kina

Pls. TNA. 21/12/2021



“Protecting Copyright, Encouraging Creativity”
ISO 9001: 2015 Certified

**MEMORANDUM ON THE COPYRIGHT AMENDMENT BILL, 2021
SUBMITTED BY THE KENYA COPYRIGHT BOARD**

SUBMITTED TO:

CLERK OF THE NATIONAL ASSEMBLY

**IN THE MATTER OF CONSIDERATION BY THE DEPARTMENTAL
COMMITTEE ON INFORMATION, COMMUNICATION, AND
INNOVATION ON THE MATTER OF THE COPYRIGHT (AMENDMENT)
BILL, 2021**

20TH DECEMBER 2021

(b) the telecommunication operator at sixteen percent. Amend to read 21%

(C) the artist or copyright holder at fifty two percent. Amend to read 70%

1.2. CLAUSE 4 OF THE BILL

Clause 4 provides for the establishment of the National Rights Registry (NRR) by inserting thereof three new sections 34A, 34B and 34 C.

Observations

KECOBO supports the entrenchment of the National Rights Registry into the Act. Section 34 of the Copyright Act under which the provision is proposed to be anchored has the title 'Rights of Action and Remedies of Exclusive Licensee and Sub-licensee'.

RECOMMENDATION

The inclusion under that section may therefore cause confusion. This is therefore to recommend shifting the proposals after section 22A which deals with voluntary registration of Copyright that closely follow or related to the subject of National Rights Registry. This will require the amendment of the proposed sections and the proposed amendments to the Interpretation provisions under Clause 2 of the Bill, therefore.

1.3 CLAUSES 5, 6 and 7

Clauses 5 to 7 of the Bill seek to repeal Sections 35B, 35C and 35D on takedown notices, role of an Internet Service Provider and application for an Injunction, respectively.

Observations

Copyright law in any authority, Kenya being no exception, seeks to protect original works of authorship such as literary, musical, or artistic works. The medium in which these works are presented has evolved over time. This includes the premise of the internet which lies in its infinite capacity to disseminate information. In this current day and age, the internet is a tool that promotes freedom of expression as well the right to information; two key provisions of our Kenyan Constitution. In this regard, artistic freedom is celebrated and as such, there is a richness and diversity in the content disseminated online. The possibilities, therefore, are endless.

Despite the digitization and the benefits thereof, the ease in which content can be duplicated is a matter of concern. In circumstances such as infringement of one's right to privacy and even in extreme situations where dissemination of unlawful content occurs, such as child pornography, it is incumbent that the government intervene.

Further, the overarching need to protect the creative economy is paramount. One of the major hindrances to growth of the creative sector is piracy. In the Creative Economy UNESCO report of 2018 dubbed *“Investing in Creativity”*, it was noted that the cultural and creative industries generate annual global revenues of US \$2,250 Billion and make up of up to 10% of GDP in some countries.

Locally, during the period of 2007-2009, as reported in the Creative Economy Business Environment Reform Report of 2016, it was noted that the country’s creative sector earnings was Kshs. 85 billion representing 5.3% of the GDP. In the age of digitization, unfortunately the revenue portrayed does not depict the revenue lost due to piracy. As far back as 2011, Microsoft reported that only 20 percent of Kenyans used genuine software. This is merely one portion of the economic pie that has been unjustly devoured.

In the same report (Creative Economy Business Environment Reform Report, 2016) the problem of piracy was also addressed. It was thereby recommended that the legislative framework be strengthened about copyright laws, reprimand systems and the overall enforcement.

Typically, Internet intermediaries or internet service providers as are popularly referred to play a neutral role as, simply without being actively involved in the creation of online content, having no knowledge of, or authorial control over, the nature of the content that they provide access to or store. Therefore, calling for their description as ‘passive’ intermediaries. Yet, given the design of the Internet, no other entity, as the intermediary is better suited to control the transmission and storage of unlawful online content. Hence the efficacy of a legislative framework pronouncing the importance of takedown notices and the general responsibilities of such intermediaries. The introduction of takedown notices has enhanced the legislative framework as regards the infringement of intellectual property rights in the creative economy.

Further, this notion of takedown notices has aided the government in safeguarding and maintain the national aspirations and cultural diversities and sensitivities of the Kenyan people. Through a working relationship with the world’s largest intermediary, Google, unsuitable content has been pulled down through the implementation of the proposed section to be repealed; Section 35B of the *Copyright (Amendment) Act, 2019*.

While Kenya enacted its first Internet era copyright law in 2002, it took the country 17 years to incorporate provision on intermediary liability as espoused by the *WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty* commonly referred to as the *“WIPO Internet Treaties”*; a framework created by the World Intellectual Property Organization (WIPO).

Through the WIPO internet Treaties, WIPO set down international norms aimed at preventing unauthorised access to and use of creative works on the Internet or other digital networks.

It is therefore essential that the Kenyan Copyright legal framework provides for safe harbours for Internet Service Providers and a procedure for notice and takedown in line with international standards, and specifically, the WIPO Internet Treaties since Copyright Infringements infringements have shifted online. As such, in the digital era, the provision on intermediary liability is a basic essential requirement in a Copyright legislation. To this end, having been enacted so recently, the implementation of these provisions is yet to be fully realized.

Therefore, when the *Copyright (Amendment) Bill* with the proposed the ISP Liability provisions was signed by the President in 2019, it represented a milestone in the Copyright law. This demonstrated the government's intent to forge ahead as regards copyright and the internet.

In the global context, various countries have successfully embedded into their legal framework the concept of internet service liability provisions which include takedown notices and roles and responsibilities of internet service providers as espoused in the WIPO Internet Treaties.

Two of the most prominent intermediary liability legislations are the *Digital Millennium Copyright Act (DMCA)* and the *E-Commerce Directive* in the United States of America and the European Union, respectively.

Within the African context, our South African counterparts, through the *Electronic Communications and Transactions Act*, have codified the concept of takedown notices. Specifically, Section 77 of the Act provides for the procedure for takedown notifications. The Internet Service Providers Association, an industry organization of recognized internet service providers, have embraced the legal provision with the takedown procedures done through the Association.

RECOMENDATION

KECOBO strongly recommends that the proposed repeal of the Intermediary Liability provisions contained in clause 5, 6 and 7 of the Bill should be removed from the Bill for the following reasons:

- a. Repeal will cause loss and damage to copyright sector by exposing their content to online piracy.*
- b. No substitute remedy is provided for the sector.*
- c. No substantive reason(s) has provided for the proposed repeal.*
- d. Represents a regression in the development of the Copyright Framework.*
- e. Neither the Copyright Board nor the sector have been consulted nor approve of this proposal.*

f. Action is an affront to the provisions of Article 11 and Article 40 of the Constitution of Kenya

KECOBO shall take lead in consultation with stakeholders in this sector to clear any issues on the provision and propose changes including by way of Regulations at a later date.

2.0. CONCLUSION AND RECOMMENDATION

The need to protect the interests of content creators and the larger creative economy is a role of the government. The responsibility on intermediaries, would go a long way in enhancing the creative economy and growing the general economy of the country whilst preserving the rights conferred to the citizens under article 11 and 40 of the Constitution of Kenya.

Accordingly, it is the view of the foregoing that KECOBO urge the honorable Members of Parliament to allow for the full implementation of this Act that was enacted in 2019 as the same has not had sufficient time to be implemented as the repeal of the provisions of the internet service provider liabilities would negatively impact an already struggling economy.

KECOBO remains ready and available to appear before the committee and offer clarifications as may be required.

Signed by



Mr. Edward Sigei
Executive Director,
Kenya Copyright Board (KECOBO)

Xpedia Management Ltd



② Hellen Keri
Deal appropriately
25/12/21

20th DECEMBER 2021

To
THE CLERK OF THE NATIONAL ASSEMBLY
PO BOX 41842-00100,
NAIROBI

② D/D C 23/12/21

Dear Sir,

RE: MEMORANDUM ON THE COPYRIGHT AMENDMENT BILL, 2021 BEFORE THE DEPARTMENTAL COMMITTEE ON INFORMATION, COMMUNICATION, AND INNOVATION ON THE MATTER OF THE COPYRIGHT (AMENDMENT) BILL, 2021

About Xpedia Management Limited

Xpedia Management Limited is a leading Content Service Provider. It has been in operation since 2012 and has successfully partnered with telecommunication companies such as Safaricom to provide Ring Back Tunes including on the Skiza Platform. We currently have approximately 17,000 artists/content creators signed to us.

Comments on the Bill

The **Copyright (Amendment) Bill**, published on 22nd October 2021, a Private Member's Bill was presented to the National Assembly for deliberation by the Honorable Member of Parliament, Ms. Gladys Wanga.

On 11th December 2021, the National Assembly put out a notice in the Saturday Nation calling for comments on the Bill.

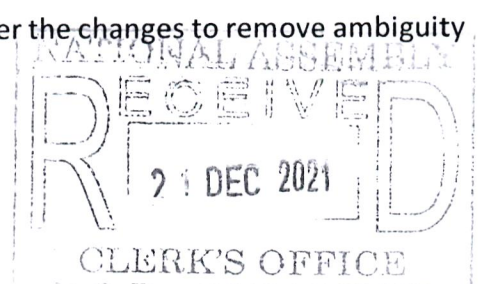
The amendment of the Principal Act by inserting a new Section (30C) as regards payment of ring back tune revenues amongst other proposals which is a matter that concerns my company.

Comment and proposal

Xpedia Management Limited supports the enactment of the provision into the Copyright Act. This is because it will safeguard the interest of all parties who earn a living on the platform.

However, I would like to propose that the Committee consider the changes to remove ambiguity and protect existing contractual arrangements.

My proposals are as follows:





Xpedia Management Ltd

- a. there is need to have the amounts adding up to a hundred percent (100%) to make it clear the net is the new full amount.
- b. The committee take cognisance of the existing valid contractual arrangements in place between the telecommunication companies, Content Service Providers, and content owners. A proviso should therefore be inserted to avoid litigation.

I would be happy to appear in person before the committee to further elucidate.

This is therefore to humbly request the Committee to consider our recommendation on the matter above and review the text of the Copyright Amendment Bill 2021 accordingly.

Yours faithfully,


Olive Wambui Githongo

XPEDIA MANAGEMENT LTD.
P.O. Box 12911 - 00400
NAIROBI

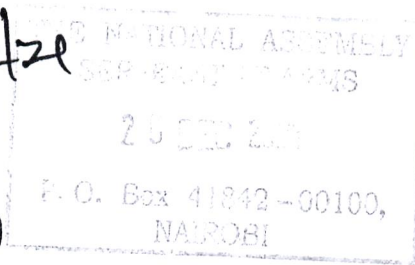


OUR REF: KAMP/PRISK/MCSK/NATIONAL ASSEMBLY/28/12/2021
YOUR REF: TBA

28th December, 2021

Mr. Michael R. Sialai, CBS
Clerk of the National Assembly
Office of the Clerk
Main Parliament Buildings
P.O. Box 41842 – 00100
NAIROBI

② Hellen Kina
ZNA
29/12/21
D/DC
① 29/12/21



Dear Sir,

RE: KAMP-PRISK-MCSK SUBMISSIONS OF MEMORANDA ON THE COPYRIGHT (AMENDMENT) BILL, 2021 (NATIONAL ASSEMBLY BILL NO. 44 OF 2021)

The Kenya Association of Music Producers (KAMP), the Performers Rights Society of Kenya (PRISK), and the Music Copyright Society of Kenya (MCSK) are licensed collective management organizations (CMOs). They administer, exercise and enforce the exploitation of performances in public places, broadcasting and communication to the public rights in sound recordings, dramatic works, and mechanical reproduction rights of copyrighted musical works. The CMOs derive their respective mandates under Article 40(5) of the Constitution of Kenya and the Copyright Act no 12 of 2001.

In reference to the above subject and pursuant to a Public Notice published in the Daily Nation edition of 11th December 2021, we are pleased to submit memoranda on the Copyright (Amendment) Bill, 2021 (National Assembly Bill No. 44 of 2021). It is our hope that these submissions will be taken into consideration when the Committee makes its report to the House.

We look forward to a positive feedback. Additionally, the Tripartite Board of Directors would wish to be given an opportunity to make oral submissions should there be a provision of the same.

With our best wishes, please accept the renewed assurance of our highest consideration and esteem.

Yours faithfully,

For & on Behalf of KAMP, PRISK & MCSK,

DR. MBUGUA NJOROGE
CEO - KAMP

MR. JOSEPH NJAGIH
CEO – PRISK
MR. PETER ENYENZE
AG. CEO - MCSK

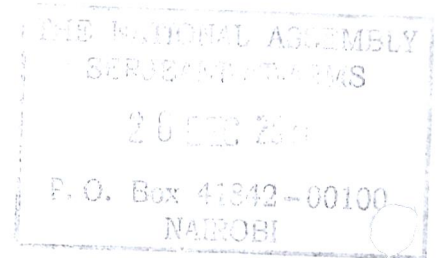


Music Copyright Society of Kenya

MEMORANDUM ON THE COPYRIGHT (AMENDMENT), BILL, 2021

PRESENTED TO

THE NATIONAL ASSEMBLY
THE TWELFTH PARLIAMENT (FIFTH SESSION)



SUBMITTED TO

CLERK OF THE NATIONAL ASSEMBLY P.O. BOX 41842-00100, NAIROBI

28TH DECEMBER 2021

IN THE MATTER OF CONSIDERATION BY THE COMMUNICATION INFORMATION AND INNOVATION;
THE COPYRIGHT (AMMENDMENT) BILL, 2021 (NATIONAL ASSEMBLY BILL NO.44 OF 2021).

SUBMITTED BY:

KENYA ASSOCIATION OF MUSIC PRODUCERS
PERFORMERS RIGHTS SOCIETY OF KENYA
MUSIC COPYRIGHT SOCIETY OF KENYA



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Music Copyright Society of Kenya

1.0 INTRODUCTION

The Kenya Association of Music Producers (KAMP), the Performers Rights Society of Kenya (PRISK), and the Music Copyright Society of Kenya (MCSK) are licensed collective management organizations (CMOs). They administer, exercise and enforce the exploitation of performances in public places, broadcasting and communication to the public rights in sound recordings, dramatic works, and mechanical reproduction rights of copyrighted musical works. The CMOs derive their respective mandates under Article 40(5) of the Constitution of Kenya and the Copyright Act No 12 of 2001. The CMOs represent not less than 20,000 Right Holders' with over one million combined repertoire of Sound Recordings, Audio Visual works and Musical works both national and foreign.

1.1 Mission of Collective Management Organizations

Kenya Association of Music Producers (KAMP): KAMP is a company limited by guarantee. The company is mandated by both resident and non-resident producers of sound recording to administer, exercise and enforce the exploitation of performances in public places, broadcasting and communication to the public rights in sound recordings in their catalogue and repertoire.

Performers Rights Society of Kenya (PRISK): PRISK is a company limited by guarantee. The Company is mandated by both resident and non-resident performers of copyrighted works to administer, exercise and enforce the exploitation of performances in public places, broadcasting and communication to the public rights of fixations of their performances in their catalogue and repertoire.

Music Copyright Society of Kenya (MCSK): MCSK is a company limited by Guarantee. Both resident and non-resident authors, composers, arrangers and publishers of musical works mandate the company. The society administers exercises and enforces the exploitation of performances in public places, broadcasting, communication to the public and mechanical reproduction rights of copyrighted musical works in their catalogue and repertoire.

2.0 BACKGROUND

The National Assembly through a notice published in the Daily Nation edition of Saturday 11 December 2021 invited public to submit their views and comments on the proposed Copyright (Amendment) Bill, 2021.

The object of the Bill is to amend the Copyright Act, to provide for fair formula for sharing of revenue from ring back tunes between the artists/copyright holders and the telecommunications companies. The Bill provides that the artist should get a greater share of the revenue at **fifty two percent**. The Bill also proposed to repeal the provisions on **takedown notices and requirements**, the role of **internet service providers and application for injunction**. It seeks to remove the ambiguity in the role of internet service provider. Further, it is to align the Act as there are already legal remedies provided for.

3.0 MEMORANDUM BY THE TRIPARTITE BOARD



Music Copyright Society of Kenya

The CMOs take this opportunity to thank the National Assembly for the opportunity to submit out comments to the proposed Amendments. With certain important adjustments, the proposed amendments by National Assembly could go a long way in ensuring that the creative sector in Kenya is vibrant and responsive to the needs and expectation of CMOs members, users of copyrighted works. We have incorporated our suggested amendments in this memorandum.

The Tripartite Board has reviewed and considered proposals contained in the amendment. The CMOs are dedicated to enhancing their contribution and that of its directors and management to the members' interests, growth and development agenda.

Our views are informed by public dialogue forums that KAMP, PRISK and MCSK convened with the members and on thematic discussions on constitutional, legal, and policy reform proposals in the copyright sector. Our observations are premised on the fact that some of the proposed amendments are geared towards the growth of right holders who are our members through earning a larger percentage of royalties from ring back tunes, however, some of the sections will be to the detriment of the same right holders as their works will be subjected to online piracy without a remedy in law.

4.0 THE OBSERVATIONS, COMMENTS AND SUGGESTIONS

NO.	MARGINAL NOTE	SECTION	ISSUE OF CONCERN	JUSTIFICATION
1.	Interpretation	S. 2 (New)	"Registry" means the National Rights Registry.	It is the function of the Board to keep and maintain a register of copyright works. Therefore, this is a welcome addition save for some of the roles that are already under the mandate of the CMOs.
			"Ring back tone" means subscription music or a tone which is played by a communication	Previously, the law had not provided for ring back tone, thus, the right holders were governed by private contract thus; most of them were unfairly exploited.
			"Telecommunication operator" has the meaning assigned to it under the Kenya Information and Communication Act, 1998.	This is a welcome development.
2.	Payment of ring back tune	S.30C	Sets out the formula for sharing of revenue from	The formula provided is a welcome addition as it ensures that the

	revenue	(New)	ring back tunes between the telecommunication provider, the premium service rate provider and the copyright holder.	copyright holder gets the lion's share from the ring back tune revenue.
2.	Functions of the Registry	S. 34 B	Among the functions listed such as authorization of consumers of copyright works, media monitoring of registered copyright works, tracking, monitoring and dissemination of data logs related to access of registered copyright works are all duties that fall squarely under the mandate of Collective Management Organizations.	This sections should be deleted specifically subsection (a), (b) and partially (c) as having it will bring about duplicity of roles between the registry and Collective Management Organizations.
3.	Takedown notice	S.35B (To be repealed)	Repealing the section leaves the right holders exposed to online infringement of their work, which has become rampant with increased use and development of technology.	A takedown notice is a tool for copyright holders to get user-uploaded material that infringes their copyrights taken down on websites. The process entails the copyright owner (or the owner's agent) sending a takedown notice to a service provider requesting the provider to remove material that is infringing their copyright(s). A service provider can be an internet service provider, website operator, search engine, a web host or other type of online site-operator. The proposed amendment will create room for on-line piracy.

4.	Role of Internet Service Provider	35C (To be repealed)	Repealing this section removes any form of obligation on the part of Internet Service Providers in dealing with infringement of copyrighted works.	The rationale for repealing this section is untenable. By implication Internet service given the role they play in providing a platform for availing material online, should equally be held accountable to ensure that none of the material is infringing on the copyright holders.
5.	Application for injunction	S.35D (To be repealed)	Repealing this section leaves the copyright holders exposed, as their remedy under the Act would be no more.	A copyright owner may seek a preliminary or permanent injunction to prevent or restrain future or ongoing infringement. Therefore, it is of paramount importance to retain the section.

5.0 CONCLUSION

Considering the above observations, we Kenya Association of Music Producers (KAMP), Performers Rights Society of Kenya (PRISK) and Music Copyright Society of Kenya (MCSK) acknowledge that the Copyright (Amendment) Bill, 2021 has presented important reform questions on issues of law. Save for the sections that we have highlighted and given our justifications on, we opine that the changes will make a significant change to the creative industry. We therefore support amendments save for section 34B, 35B, 35C, 35D which would be prejudicial to the interests of right holders.

22nd December 2021

Mr. Michael Sialai, EBS
The Clerk of the National Assembly
Parliament Buildings
Harambee Avenue
Nairobi



Dear Sir,

RE: Submissions on the Copyright (Amendment) Bill, 2021

- 1 We refer to the above matter.
- 2 MultiChoice Kenya Limited is grateful for the opportunity to comment on the Copyright (Amendment) Bill, 2021 ("the Bill").
- 3 MultiChoice Kenya has serious concerns relating to the Bill, particularly the intention to repeal sections 35B (Takedown Notice), 35C (Role of Internet Service Provider) and 35D (Application for injunction) of the Copyright Act, 2001 ("the Act").
- 4 Sections 35B, 35C and 35D are recent and much needed additions to our copyright law (through the Copyright (Amendment) Act, 2019), and are aimed at addressing the prevalent and brazen infringement of copyright protected works online.
- 5 Although the increase in internet penetration in our country has had a positive impact on our lives and our economy, it has also resulted in more frequent and costly copyright infringement that is difficult to monitor and prevent. Rights holders in our country bear the brunt of online piracy of their works. They continue to lose revenue through the unlawful viewing, streaming, downloading, copying, sharing and distribution of their work. Parliament, in its wisdom, introduced sections 35B, 35C and 35D to ensure quick and effective protection of copyright online.
- 6 Online piracy is the fastest growing form of copyright infringement globally. Live channel and sports broadcasts, software, video games, movies and television shows are continuously pirated on the internet.
 - 6.1 According to a survey by Irdeto recent data shows that there are more than 600 million visitors to the top 500 linking sites each month. Furthermore, users in five major African countries¹ made 17.4 million visits to the top 10 identified piracy sites on the internet. This traffic forms part of the 345.4 million total visits worldwide by users of the piracy sites from June 2021 to August 2021. Of the African territories tracked during the piracy survey, visits from IP addresses in Kenya



¹ These countries are Kenya, South Africa, Ghana, Nigeria and Tanzania

MultiChoice Kenya Ltd
Jamhuri Road
Next to ASK Ground, Nairobi
P.O. Box 60406 - 00200 Nairobi, Kenya
Tel: +254 (20) 4236444/ 07 11 066444, Fax: +254 (20) 4446768
Directors: N.Y Bilal A. Opondo S. Isaboke N. Matimu H. Visser*
REG. NO. 063473 PIN, P.O. BOX 48701, VAT 0100199H1 South Africa

reflected the largest number of users of pirated content, with 7 million visits during this period."²

- 6.2 In 2019, it was reported that almost 1 million Kenyans watched the boxing match between Britain's Anthony Joshua and Mexican Andy Ruiz Jr through unauthorised channels. Kenya was the second on the list of audiences by country.³
- 6.3 A 2019 Muso and GumGum Sports study found that Kenya was among the top five countries in the world illegally streaming English Premier League (EPL) soccer games.⁴
- 7 Everyone in the creative industry is suffering from the onslaught of online piracy. In the television industry, writers, screenwriters, artists, actors, musicians, producers, broadcasters and other service providers lose revenue due to online piracy. The high levels of online piracy threaten the livelihoods of everyone in the creative industry. They also hinder the development and growth of our broadcasting and creative industry. Worldwide, the revenue lost to video pirate operations was estimated to exceed \$61 billion in 2020 and \$67 billion worldwide by 2023."⁵
- 8 In Kenya, piracy has cost the creative industry losses of KES 106 billion per year, which includes KES 24 billion loss in taxes and revenue to the government and KES 41 billion losses to thousands of local Kenyan content creators, such as actors, animators, comedians, dancers, filmmakers, musicians, podcasters, publishers, television producers, writers due to local content streaming piracy.
- 9 In 2019, the Attorney General Kihara Kariuki highlighted that the creative industries' contribution to our country's economy is estimated to be 5.3% of GDP.⁶ In order to continue making this contribution to our economy, our creative industries need to be protected from piracy. Piracy negatively impacts on the economic growth of the country.
 - 9.1 Investors are reluctant to invest in countries if they cannot earn a decent return because of competition from pirates who have no costs.
 - 9.2 Piracy impairs the development of local content production and job creation in the sector.
 - 9.3 Pirates are usually not licensed and are broadcasting or distributing content that has not been authorised for distribution in the country.

² <https://www.tvbeurope.com/media-delivery/piracy-is-threatening-the-new-normal-way-of-life>

³ <https://www.theeastafrican.co.ke/tea/news/east-africa/almost-1m-kenyans-used-pirated-channels-to-watch-joshua-v-ruiz-fight-1419678>

⁴ <https://allafrica.com/stories/201907120142.html>

⁵ <https://www.tvbeurope.com/media-delivery/piracy-is-threatening-the-new-normal-way-of-life>

⁶ <https://www.standardmedia.co.ke/counties/article/2001329381/how-copyright-creative-works-can-boost-gdp>

- 9.4 Pirates don't pay taxes. Our government loses revenue that are channelled for schools, housing, health care or even encouraging further growth in the communications sector.
- 9.5 Broadcasters and independent producers are harmed the most by piracy as they don't have the economies of scale of international broadcasters or distributors and are heavily reliant on revenue generated by sale and the exploitation of their intellectual property rights.
- 10 In addition, the live unauthorized streams of sports events globally across the internet is one of the most critical threats facing sports rights' owners currently. The sale of broadcast rights represents a substantial source of revenue to sports rights owners who invest and distribute this revenue throughout their organizations, from grassroots to professional leagues and clubs. It is a core component of what makes them sustainable. For example, in 2020, the Football Kenya Federation (FKF) signed a seven-year deal worth Kenya Shillings 110 million annually with a broadcaster. Sports associations and bodies receive no compensation from any pirated re-broadcast of their events, whereas those providing the pirated live data stream profit from advertising embedded on the website or the software client.
- 11 Furthermore, the organisations offering pirated content online are involved in crimes of tax evasion, identity theft, unauthorised sale of personal data and money laundering; and these same organised criminals are also involved in the human trafficking, organs, drugs, weapons and much more.
- 12 In addition, most of the popular files / streams on pirate websites plant viruses and other malicious software on users' devices. Piracy is therefore also harmful to users.
- 13 Internet Service Providers (ISPs) are companies that make it possible for people to communicate over the internet - they provide the means or channel of making content available to the public over the internet. Given that they make it possible for content to be made available online, they are ideally situated to stop piracy and play a key role in the fight against online piracy.
- 14 Sections 35B, 35C and 35D established a framework by which copyright owners and ISPs could share responsibility for dealing with online copyright infringement. These frameworks are the most used means of enforcement in respect of online piracy, as they interrupt access to infringers sites. Similar frameworks have worked well for many years in many countries including Australia, China, Japan, South Africa, the United Kingdom and the United States. The framework is particularly effective because—
- 14.1 they provide copyright holders with relatively inexpensive and speedy online copyright enforcement methods to protect their works;
- 14.2 it does not require ISPs to monitor content or actively seek facts or circumstances indicative of infringing activity;

- 14.3 it provides ISPs who follow the takedown procedures with immunity from liability for infringement of copyright; and
- 14.4 it allows the person who put the infringing content online to file a counter notification if they believe in good faith that they have a legal right to publish the material online.

This framework therefore strikes a fair balance between the copyright holders, website owners and the ISPs.

- 15 These sections have already yielded positive results. We have issued take down notices to ISPs in terms of section 35B of the Act. On 26 November 2020, the High Court⁷ issued a temporary order in terms of s35D(2) of the Act, which ordered two ISPs to pull down and disable 141 sites that infringed on our copyright, pending the hearing of our suit against the ISPs, for failure to act on the takedown notice that we issued to them. The sites that have been disabled include, among others, sports streaming sites which allow people to view unauthorised content live and/or on demand.
- 16 The framework established in s35B, 35C and 35D of the Act has therefore already proven to be an effective means of protecting copyright online. We therefore appeal to Parliament to retain these sections in the Act.
- 17 We look forward to further engagements on the Bill.

Yours faithfully



Nancy Matimu
Managing Director

⁷ Multichoice Kenya Limited v Safaricom Plc & another; Kenya Copyright Board & another (Interested Parties) (Miscellaneous Civil Application No. E567 of 2019)



Liberty Afrika Technologies Ltd

Liberty Afrika Technologies Ltd,
19th floor, View Park Towers, Utalii Street,
P.O. Box 20000 - 00100, Nairobi, Kenya.
Office Line: 0720720720 / 020 374 2000
020 374 2100.
Email: info@libertyafrika.co.ke
Website: www.libertyafrika.co.ke

Friday, December 17, 2021

REF: LAT/0172021

To
THE CLERK OF THE NATIONAL ASSEMBLY
PO BOX 41842-00100,
NAIROBI

Dear Sir,

RE: MEMORANDUM ON THE COPYRIGHT AMENDMENT BILL, 2021 BEFORE THE
DEPARTMENTAL COMMITTEE ON INFORMATION, COMMUNICATION, AND
INNOVATION ON THE MATTER OF THE COPYRIGHT (AMENDMENT) BILL, 2021

About Liberty Afrika Limited

Liberty Afrika Limited is a Content Service Provider. It provides services to telecommunication companies including Skiza Platform.

Comments on the Bill

The *Copyright (Amendment) Bill*, published on 22nd October 2021, a Private Member's Bill was presented to the National Assembly for deliberation by the Honorable Member of Parliament, Ms. Gladys Wanga.

On 11th December 2021, the National Assembly put out a notice in the Saturday Nation calling for comments on the Bill.

The amendment of the Principal Act by inserting a new Section (30C) as regards payment of ring back tune revenues amongst other proposals which is a matter that concerns my company.

Comment and proposal

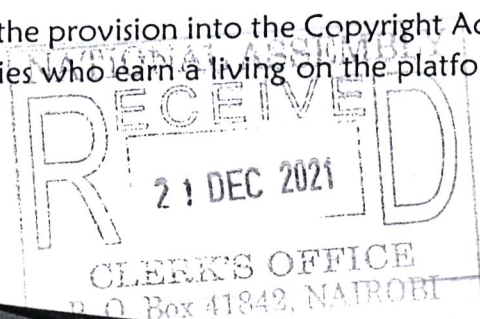
Liberty Afrika Limited supports the enactment of the provision into the Copyright Act. This is because it will safeguard the interest of all parties who earn a living on the platform.

② Kina
T.N.A.

28/12/21

D/DC

① 23/12/21



However, I would like to propose that the Committee consider the changes to remove ambiguity and protect existing contractual arrangements.

My proposals are as follows:

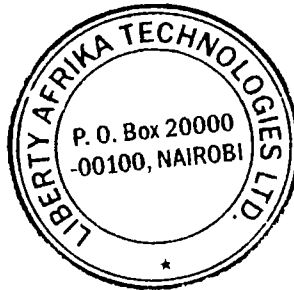
- a. there is need to have the amounts adding up to a hundred percent (100%) to make it clear the net is the new full amount.
- b. The committee take cognisance of the existing valid contractual arrangements in place between the telecommunication companies, Content Service Providers, and content owners. A proviso should therefore be inserted to avoid litigation.

This is therefore to humbly request the Committee to consider our recommendation on the matter above and review the text of the Copyright Amendment Bill 2021 accordingly.

Yours faithfully,



Sidney Wachira

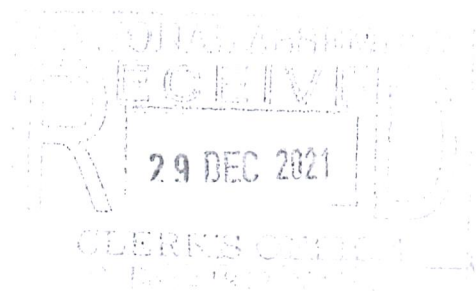


Mike Strano

From: Mike Strano <mike.strano@phatafrica.com>
Sent: 28 December, 2021 4:53 PM
To: 'clerk@parliament.go.ke'
Cc: 'ip@phatafrica.com'
Subject: PAP_Memorandum on the Copyright Amendment Bill 2021_001_281221
Attachments: PAP_Memorandum on the Copyright Amendment Bill 2021_001_281221.pdf;
PAP_Estimated Annual Losses to Piracy in Kenya_003_281221.pdf

② Ms. Kina, CAII
Pse deal
Mutegeya
12/1/22

Importance: High



Clerk of the National Assembly,
P.O. Box 41842-00100,
Nairobi, KENYA.

28th December, 2021

Dear Sir,

RE: Submission of Memorandum on the Copyright (Amendment) Bill 2021
[National Assembly Bill No.44 of 2021]

DDAC
29/12/21

**PIRATED CONTENT COSTS THE CREATIVE INDUSTRY OF KENYA,
AND THE GOVERNMENT, KES 92 BILLION ANNUALLY!
PARTNERS AGAINST PIRACY REJECT CALLS TO REPEAL ISP RELATED PROVISIONS
IN THE COPYRIGHT (AMMENDMENT) ACT 2019.,**

On 11th December 2021, The National Assembly published an Invitation for Public Participation on the Copyright (Amendment) Bill 2021 [National Assembly Bill No.44 of 2021].

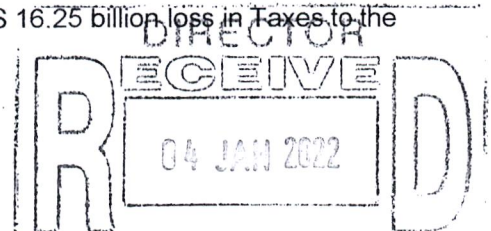
Partners Against Piracy (PAP) - a multi-sectoral Coalition, of local and international Associations, Societies and Companies, representing the interests of thousands of Creatives in Kenya and the World, reacts as follows.

We welcome the Invitation for Public Participation because, on behalf of the thousands of Creatives we represent, we are gravely concerned about the Proposal to repeal Sections 35B, 35C and 35D of the Copyright (Amendment) Act 2019, via the Copyright (Amendment) Bill 2021 currently in Parliament.

Assented into Law by President Uhuru Kenyatta, in October 2019, Sections 35B, 35C and 35D are game-changing provisions for Kenya, and the first of its kind in Africa (but common Internationally). These provisions protect the Creative Industry in Kenya by providing incentives and a legal basis for better co-operation from Internet Service Providers (ISPs) to support Rights Holders in their fight against Piracy.

In fact, the proposed Copyright (Amendment) Bill 2021 [National Assembly Bill No.44 of 2021] contravenes Provisions of the Constitution of Kenya, which affirms that Intellectual Property Rights are akin to any other Proprietary Rights, whereby the State has a fundamental responsibility and promises to safeguard Intellectual Property Rights of the people of Kenya (see 1 in Fact Sheet enclosed).

Piracy is currently devastating the Creative Industry of Kenya. PAP estimates (see 2 in Fact Sheet enclosed) that Piracy is costing the Industry KES 92 billion per year. This includes a KES 16.25 billion loss in Taxes to the



Government and KES 14.31 billion losses to Thousands of local Content Creators, like Actors, Animators, Authors, Cartoonists, Comedians, Composers, Dancers, Filmmakers, Game Developers, Graphic Designers, Illustrators, Musicians, Music Producers, Photographers, Podcasters, Publishers, Television Producers, Videographers, Writers, etc.

With the Creative Industry of Kenya ravaged by the COVID-19 pandemic, the ISP related Provisions in the Copyright (Amendment) Act 2019 are an opportunity to help our Creatives quickly recover, attract local & foreign investment and create jobs for thousands of unemployed youths.

Furthermore, the Repeal of these important Provisions will continue to abet the illegal operations involved in offering Pirated content Online, including crimes like Tax Evasion, Identity Theft, Data Ransom, Money Laundering and Fraud. These same Crime Groups are also involved in Trafficking of Humans, Organs, Drugs, Weapons and more, as well as Terrorism, Contract Killing, Counterfeiting, etc (see 3 in Fact Sheet enclosed).

Instead of Repealing these important Provisions, our Parliament should rather consider Changes to make the Law clearer and more effective, in full co-operation with the ISPs, thus ensuring the Sustainability of the Kenya Creative Industry and the Safety of our Country from such Crimes.

Furthermore, the Provisions ensuring the swift Takedown of illegal Content, also benefit the ISPs, who are now becoming Owners of Content and Platforms themselves. Such a Repeal will result in those ISPs not being able to Recoup their Investments, as Online Piracy steals upto 99% of potential Revenue.

Partners Against Piracy appeals to Honourable Wanga and the Twelfth Parliament, to please Remove the Repeal of Sections 35B, 35C and 35D from the Copyright (Amendment) Bill 2021, to Avoid further Losses to the Creative Industry and the Government – after all, the Creative Industry has Suffered for Decades from the Unfair Competition from Piracy, so now Deserves better Protection, especially to Recover from COVID-19.

Let us remember that Piracy killed our Music Industry in the early 1980s – until then, Nairobi was the Headquarters for international Labels in Africa and Benga was the Root of many Genres across the Continent that have seen immense Success.

Let's please Return the Creative Industry of Kenya to her former glory and beyond!

Please note that this Memoranda, and the enclosed Data, has been Compiled in Consultation with Experts from our local and international Coalition, as Partners Against Piracy (PAP).

These same Experts can also Avail themselves In-person and/or via Video Call for any further Consultations with Parliament.

^+ your Service,

Mike Strano
Convenor

Partners Against Piracy (PAP)





P.O. Box 14454 – 00800, Nairobi, KENYA

Clerk of the National Assembly,
P.O. Box 41842-00100,
Nairobi, KENYA.

28th December, 2021

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**RE: Submission of Memorandum on the Copyright (Amendment) Bill 2021
[National Assembly Bill No.44 of 2021]**

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 Bernsoft
LITERARY & ENTERTAINMENT



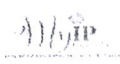
 CRIMSON
MULTIMEDIA LTD

 IPO
INTELLECTUAL
PROPERTY OWNERS
ASSOCIATION
OF KENYA

 ADVOCATE



 KENYA
PUBLISHERS
ASSOCIATION





P.O. Box 14454 – 00800, Nairobi, KENYA

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At your Service,

Mike Strano
Convenor
Partners Against Piracy (PAP)



FACT SHEET (28.12.21)

1), Contravention of the Constitution of Kenya

The proposed Copyright (Amendment) Bill 2021 [National Assembly Bill No.44 of 2021] contravenes Provisions of the Constitution of Kenya, which affirms that Intellectual Property Rights are akin to any other Proprietary Rights, whereby the State has a fundamental responsibility and promises to safeguard Intellectual Property Rights of the people of Kenya.

Article 11.

(1) This Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

(2) The State shall:

(a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;

b) recognise the role of science and indigenous technologies in the development of the nation; and

(c) promote the intellectual property rights of the people of Kenya.

(3) Parliament shall enact legislation to:

(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and

(b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

Article 40 - Right to Property

40 (2)

Parliament shall not enact a law that permits the State or any person:

(a) to arbitrarily deprive a person of property.

(b) to limit or in any way, restrict the enjoyment of any right under this Article, on the basis of any of the grounds specified or contemplated in Article 27 (4).

40 (3)

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description.

FACT SHEET (28.12.21)

3), Evidence of Piracy abetting Organised Crime and Terrorism, thus making Kenya unsafe

Organized-Crime Group	Base Location	Film Piracy	Counterfeiting	Racketeering	Human Smuggling	Money Laundering/ Illegal Transfers	Illegal Gambling	Loan-Sharking	Narcotics Trafficking	Prostitution	Weapon Trafficking	Contract Killing	Document Forgery Services
Big Circle Boys	Canada	x		x	x	x	x	x	x	x	x	x	x
Yi Qing	USA	x		x		x	x	x	x				
Jah Organization	USA	x	x			x							x
Cockle-picker Gangmaster	England	x	x		x								
Lotus Trading Company	England	x	x		x								
Madrid Human Smuggling Ring	Spain	x			x								x
Camorra Mafia	Italy	x	x	x	x	x	x	x	x	x	x	x	x
Wo Shing Wo Triad	Hong Kong	x	x	x	x	x	x	x	x	x	x	x	x
San Yee On Triad	Hong Kong	x	x	x	x	x	x	x	x	x	x	x	x
Ang Bin Hoey Triad	Malaysia	x	x	x	x	x	x	x	x	x	x	x	x
Barakat Network	Paraguay	x	x	x		x	x		x		x		x
PIRA/RIRA	N. Ireland	x	x	x					x		x		
UDA/UFF/UVF	N. Ireland	x	x	x					x		x		
D-Company	Pakistan	x	x	x		x			x		x	x	
Tarantsev/Orehovsko-Medvedkovsky	Russia	x	x			x						x	
Los Ambulantes/Tepito	Mexico	x	x	x	x	x			x	x	x		x
Yamaguchi-gumi/Yakuza	Japan	x	x	x	x	x	x	x	x	x	x	x	x

Source: https://www.rand.org/pubs/research_briefs/RB9417.html

Other Studies: <https://rusi.org/explore-our-research/projects/piracy-and-organised-crime>
<https://www-forbes-com.cdn.ampproject.org/c/s/www.forbes.com/sites/michalgromek/2021/11/30/sweden-up-to-600000-iptv-users-support-human-trafficking-every-month/amp/>
<https://www.ojp.gov/pdffiles1/nij/grants/208384.pdf>



Mike Strano

From: Mail Delivery System <MAILER-DAEMON@progateway6.mail.pro1.eigbox.com>
Sent: 28 December, 2021 7:28 PM
To: mike.strano@phatafrica.com
Subject: Undelivered Mail Returned to Sender
Attachments: details.txt; Undelivered Message Headers.txt

Flag Status: Flagged

This is the mail system at host progateway6.mail.pro1.eigbox.com.

I'm sorry to have to inform you that your message could not be delivered to one or more recipients. It's attached below.

For further assistance, please send mail to postmaster.

If you do so, please include this problem report. You can delete your own text from the attached returned message.

The mail system

<clerk@parliament.go.ke>: host mx-in01.parliament.go.ke[197.254.58.133] said:
451 4.3.0 <mike.strano@phatafrica.com>: Temporary lookup failure (in reply
to RCPT TO command)

Mr. Michael R. Sialai, CBS
The Clerk of the National Assembly
Parliament Buildings
Harambee Avenue
Nairobi (Kenya)

DD cut-off
8
15/2/22

Madrid February 8, 2022

Hand delivery and advanced by electronic mail

Dear Mr. Sialai,

Re: Submissions on the Copyright (Amendment) Bill 2021

Hellen Kuna
pls facilitate
15/2/22

We, Liga Nacional de Fútbol Profesional (hereinafter "LaLiga"), in accordance with article 2.2 of the Spanish Royal Decree-Law 5/2015, of April 30th, on urgent measures in relation to the commercialization of the rights of exploitation of audiovisual contents of professional football competitions, are the actual right holders with the faculty to market the exploitation rights of the audiovisual content regarding the Spanish Football First and Second Division Competitions (hereinafter the "Competitions"), and producers of such audiovisual content, in accordance with article 7.1 of the mentioned Royal Decree.

In accordance with the above mentioned, we have been informed of some proposed highly damaging changes to the Copyright Act contained in the Copyright Amendment Bill published by the National Assembly on 22 October 2021. We are extremely concern of the proposed repeal of sections 35B, 35C and 35D of the Copyright Act and the effective annulment of Take-Down Notices.

In this regard, the Sports Rights Owner Coalition (hereinafter "SROC"), of which we are active members, has informed you of the devastating consequences that those changes could have. Accordingly, and by means of this letter, LaLiga want to reinforce the content of the letter sent by the SROC on 28 December 2021, which is attached as Annex I.

We respectfully urge that this submission of LaLiga and the SROC letter are considered by the authorities in the interest of ensuring the appropriate and effective protection of Intellectual Property rights in Kenya.

Yours faithfully,



Mr. Melcior Soler i Sala
Audiovisual Director
LIGA NACIONAL DE FÚTBOL PROFESIONAL

CC: The Honourable Cabinet Secretary Amina Mohamed – Ministry of Sport



Calle Torrelaguna 60 | 28043 Madrid
T +34 912 055 000 | LaLiga.es





Mr Michael R. Sialai, CBS
 The Clerk of the National Assembly
 Parliament Buildings
 Harambee Avenue
 Nairobi

Brussels, 28 December 2021

Dear Mr Sialai,

Re: Submissions on the Copyright (Amendment) Bill 2021

The **Sports Rights Owner Coalition (SROC)** is composed of more than 50 international, European and national sport bodies. Individually and collectively, we represent some of the world leading sport competitions which attract millions of spectators each year.

Our events are widely available and accessible to consumers across a growing variety of broadcasting and Internet platforms. Throughout the world, these broadcasts are protected by copyright legislation in accordance with universally accepted norms, including in Kenya.

In particular, the World Intellectual Property Organisation (WIPO) passed the WIPO Internet Treaties in 1996, aimed at preventing unauthorised access to and use of creative works on the Internet or other digital networks and their subsequent piracy. Kenya adopted the provisions of these treaties in its enactment of the 2019 Copyright Amendment Bill, since when they have become an essential pillar in the protection of digital content and the fight against digital piracy.

SROC members are therefore **extremely concerned to learn of the proposed changes to the Copyright Act** contained in the Copyright Amendment Bill published by the National Assembly on 22 October 2021, and **in particular of the proposed repeal of sections 35B, 35C and 35D** of the Copyright Act and the effective annulment of Take-Down Notices.

Take-Down Notices enable copyright holders and related rights holders to control their work and the ability to make it available on online platforms. Indeed, they are one of the **few effective remedies against digital piracy available to rights holders**. Far from being unique to Kenya, they are an **international concept to safeguard the intellectual property rights** of copyright holders in their works. They are particularly important for sports rights owners, where the ability to remove unauthorised content immediately is crucial in protecting the value of live sport.



w:www.sroc.info • e:sportsrights@sroc.info

As you may be aware, and in contrast to the proposed legislative changes in Kenya, **European policy makers are moving in the opposite direction**, in order to **strengthen the effectiveness of Take-Down Notices**, particularly in the live environment. The European Parliament recently overwhelmingly adopted a resolution on the '**Challenges of sport events' organisers in the digital environment**' and has asked the European Commission to legislate accordingly. New proposals to protect live content more effectively in Europe are expected in the first half of 2022.

Were the Copyright Amendment Bill to be enacted, it could have **devastating consequences for both the Kenyan economy and Kenyan consumers**. Rights holders from sport and other creative industries are extremely unlikely to license their content in a jurisdiction that effectively legitimises piracy. **Consumers would therefore be deprived from watching their favourite sports and television shows**, and leave Kenya isolated on the global copyright stage.

SROC members would therefore respectfully request that the proposed legislative measures be **urgently reconsidered so as not to harm Kenyan consumers and threaten the availability of sports and entertainment content in Kenya**.

Yours sincerely,



Mark Lichtenhein
Chairman of the Sports Rights Owners Coalition

SROC
SPORTS RIGHTS OWNERS COALITION

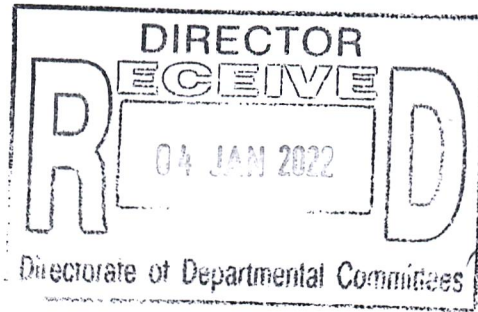
w: www.sroc.info • e: sportsrights@sroc.info



representing the recording industry worldwide

27 December 2021

Mr. Michael R. Sialai, CBS
Clerk of the National Assembly
P.O Box 41842-00100
Main Parliament Buildings
Nairobi
Kenya



Handwritten notes: 2 Ms. Kuna, CASI, Pse. Ochieng, Muteta, 12/1/22

Sent by email: clerk@parliament.go.ke

Handwritten note: 1 D/DC 29/12/21

Dear Mr. Sialai,

COPYRIGHT (AMENDMENT) BILL, 2021 (NATIONAL ASSEMBLY BILL NO. 44 of 2021)

IFPI is the voice of the recording industry worldwide, representing over 8,000 record company members across the globe. We work to promote the value of recorded music, campaign for the rights of record producers and expand the commercial uses of recorded music around the world. The IFPI Sub-Saharan Regional Office is based in Nairobi, Kenya.

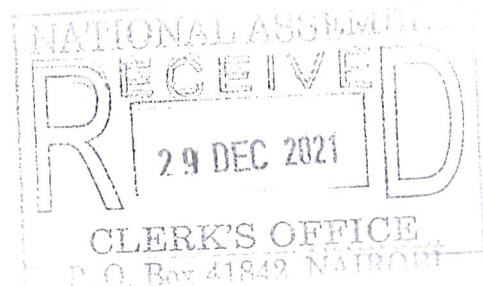
We understand that the Copyright (Amendment) Bill, 2021 (National Assembly Bill No. 44 of 2021) (Bill) is intended to amend the current Copyright Act, Act No. 12 of 2001. We are extremely concerned about the following provisions in the Bill: (i) the introduction of a statutory licensing scheme for ring back tones in section 30C; and (ii) the repeal of the internet service provider (ISP) liability provisions in sections 35B, 35C, and 35D.

Further, we note that section 34C of the Bill proposes voluntary registration of copyright works in the National Rights Registry, this is keeping with the Berne Convention and other international treaties, including the WIPO Performances and Phonogram Treaty (WPPT), which prohibit formalities on the enjoyment and exercise of rights. However, we recommend that the general presumption of ownership in infringement proceedings in section 35 of the current Copyright Act is maintained.

We thank the Government of Kenya for the opportunity to provide comments on the proposed amendments in the Bill. Our key recommendations are set out below.

1. Removal of section 30C providing a statutory licensing scheme for ring back tunes.

We advise against the introduction of a statutory licensing scheme for ring back tunes in section 30C of the Bill.



IFPI Secretariat
7 Air Street
London W1B 5AD
United Kingdom

Tel: +44 (0)20 7878 7900
Fax: +44 (0)20 7878 7950
e-mail: info@ifpi.org
website: www.ifpi.org

While we appreciate the aim of ensuring an appropriate remuneration for artists and/or right holders, a statutory provision setting out the rates for ring back tunes and the share of revenues amongst parties (service providers, telecommunication operators and right holders) is not the correct way of achieving that goal. Instead, artists and/or right holders should be allowed to freely negotiate fair commercial terms for the use of their recordings, on the back of strong exclusive rights and effective measures to enforce their rights.

The proposed section 30C would unreasonably interfere with the exclusive rights of right holders, including the exclusive making available to the public right and reproduction right, as well with the freedom of contract. Parties involved in the provision of ring back tunes (service providers, telecommunication operators and right holders) should be free to negotiate the commercial terms for the use of their recordings.

2. Maintain important ISP liability provisions in sections 35B (Takedown notice), 35C (Role of Internet Service Provider) and 35D (Application for injunction).

We strongly advise against the proposed repeal of sections 35B, 35C and 35D of the current Copyright Act.

These important provisions concern ISP liability, and specifically address the following:

- takedown notices (section 35B);
- the role of internet service providers (section 35C); and
- the provision of a legal basis for injunctive relief against third parties involved in copyright infringement (section 35D).

Together these sections provide the essential balance between the rights and responsibilities under the safe harbour provisions. Without these sections the safe harbour provisions in the Copyright Act will fail to fulfil their primary objective, which is to ensure the protection of copyright while fostering the development of online infrastructure services. Repealing these provisions would furthermore result in Kenya falling far below the international standard.

The proposed repeal of these provisions would have a particularly negatively impact on the legitimate music market in Kenya, which would suffer even further from the free availability of unlicensed music.

This is particularly important considering the high piracy levels in Kenya where illegal download sites and stream ripping sites are major concerns. For example, the pirate site *Tubidy.mobi* is the 14th most popular website of any kind in Kenya. Based on data from internet monitoring company Similarweb, we estimate that this site has received a total of 93.4 million visits from Kenya in the last 12 months. The same applies to the stream ripping site *Y2mate*, which is the 53rd most popular website in Kenya with an estimated 89.4 million visits in the last 12 months.

Our specific comments on sections 35B, 35C and 35D are as follows:

- **Kenya would fall below the international standard.** Repealing sections 35B, 35C and 35D would result in Kenya falling below the international standard (such as the US DMCA

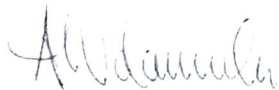
Section 512, or the EU E-Commerce Directive Articles 12 to 15). Notice and takedown procedures similar to those envisaged in section 35B exist in countries around the world including in the US, the EU, and in countries in Latin America, Asia and also on the African continent. The same applies for the right of information in section 35C(1)(a) and the legal basis for injunctions in section 35D. It follows that the proposed repeal would be problematic for Kenya's trade relations as ISP safe harbour provisions are a standard feature in major Free Trade Agreements.

- **The proposed deletion of section 35B addressing takedown notices would dramatically and unfairly alter the balance of the "safe harbour" provisions.** The deletion of section 35B would totally undermine the purpose and effectiveness of section 35A of the current Copyright Act which includes the so-called "safe harbour" for ISPs and, crucially, refers to the takedown procedure in section 35B. The amendment would mean that ISPs could claim to be covered by the "safe harbour" in section 35A without the need to takedown copyright infringing content following a takedown notice. This would completely change the conditions for ISP liability privileges, and the way these provisions are meant to work.
- **Intermediary injunctions are an important remedy when direct infringers are unknown or otherwise difficult to sue.** Operators of pirate services usually go to lengths to hide their true identities. In such cases, it is crucial to have the ability to ask for a court to order an intermediary such as an internet access provider to block access to the infringing service. So called website blocking injunctions, which are possible under section 35D, are available in at least 36 countries around the world (including in the EU, Australia, Canada, India, Indonesia, Peru, Russia etc.) and have proven to be very effective in protecting right holders' copyrights online. ISPs have been ordered to implement website blocks in relation to over 3,700 infringing websites containing music. Maintaining section 35D would therefore be a significant and positive step towards tackling piracy and supporting the growth of a thriving digital music market in Kenya.
- **Right of information is crucial to identify direct infringers.** Section 35C(1)(a) provides for a right of information against ISPs to provide details regarding direct infringers. If such a right is repealed, right holders would have no possibility of finding out who is behind an infringing service. This, in combination with the repeal of the provision providing for injunctive relief, would result in right holders being without meaningful remedies against online piracy.
- **Repeal is counterproductive – improvements are instead needed.** While repealing section 35B would be counterproductive, section 35B could be improved to make it clearer and more effective. To this effect, we recommend amending section 35B to include the following: (i) a *notice and stay down* procedure, i.e. the obligation requiring the ISP, upon receipt of a notice of infringement, to remove all copies of the copyright work that is subject of the notice, and to prevent future infringements of the same content; (ii) a repeat infringer policy; and (iii) improving the deadlines for content to be taken down – the current Copyright Act requires that infringing content is taken down following 48 hours, allowing ISPs 48 hours to act upon notice opens the law to abuse whereby services could take advantage of the 48 hours period knowingly to operate infringing services. This long deadline is particularly harmful as it affects right holders'

ability to expeditiously remove recordings that have been made available without authorisation before official release dates (so called pre-release content). Such pre-release content is time-sensitive, and its availability can cause substantial economic harm to right holders, as it goes viral. In our experience and in light of the international standard, it is advisable to avoid specific timeframes, and instead to adopt a flexible approach requiring ISPs to “expeditiously” or “promptly” take down content. Further, in order to speed up the takedown procedure and to make it clearer, we recommend that an ISP should be obligated to take down the alleged infringing content before engaging with the uploader of said content.

We therefore respectfully urge the Government of Kenya to consider our recommendations to ensure the sustainable and balanced development of the Kenyan digital content market generally, and in particular to ensure the future growth of the vibrant Kenyan music industry. We stand ready to assist with any further information as required.

Yours sincerely,



Angela Ndambuki
Regional Director Sub-Saharan Africa

For enquires, clarifications and further information, please contact:

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Abbas Lightwalla, Acting Director of Legal Policy: abbas.lightwalla@ifpi.org



Hellen Kiua
~~Samuel Kibuka~~

pk facilitate
11/2/22

The Clerk of the National Assembly
Parliament Buildings
Harambee Avenue
Nairobi
Republic of Kenya

For the attention of Mr. Michael R. Sialai, CBS

cc:

- Honourable Cabinet Secretary Amina Mohamed – Ministry of Sports

V D/D C
11/2/22

Our reference
DDAB

Date
9 February 2022

Submissions on the Copyright (Amendment) Bill 2021

Dear Mr Sialai,

UEFA (Union of European Football Associations) is the governing body for football in Europe with a membership comprising 55 national football associations. Its objectives are, among others, to deal with all questions relating to European football, to promote football in a spirit of unity, solidarity, peace, understanding and fair play, without any discrimination on the part of politics, race, religion, gender or any other reason.

UEFA's concerns and interest regarding copyright protection and the piracy threat is largely self-evident when considered against the context of UEFA's responsibilities and mission as the governing body for association football in Europe, which (as set out in its Statutes) include, to:

- "...organise and conduct international football competitions and tournaments at European level..."
- "...redistribute revenue generated by football in accordance with the principle of solidarity and to support reinvestment in favour of all levels and areas of football, especially the grassroots of the game..."
- "...safeguard the overall interests of Member Associations..."
- "...act as a representative voice for the European football family as a whole..."

UEFA is also the owner and organiser of many of Europe's (and the World's) largest and most successful football competitions and sporting events, such as the UEFA Champions' League, UEFA Europa League, UEFA Europa Conference League, the UEFA European Football Championships, UEFA Nations League and European Qualifiers.

As a result of the commercial rights in UEFA's competitions being exploited and managed on a centralised basis through UEFA, the vast majority of revenues generated are redistributed to the various related UEFA stakeholders, ranging from UEFA's member national associations and the teams participating in a particular competition to non-participating teams on a solidarity basis and specifically football development and grassroots investment throughout Europe.

Piracy, if left uncontrolled, fundamentally threatens the viability of this commercial model of football (and sport as a whole) and, therefore, threatens the funding upon which football's solidarity model is based.

We welcome the fact that Kenya adopted certain provisions in its enactment of the 2019 Copyright Amendment Bill aimed at preventing unauthorised access to, and use of, creative works by means of the Internet. These have become an essential pillar in the protection of digital audiovisual content and in the fight against audiovisual piracy.

However, as already stated in our collective letter sent by SROC (Sports Rights Owners Coalition) dated 28 December 2021 (enclosed at Appendix 1 for ease of reference), we are concerned to learn of the proposed changes to the Copyright Act contained in the Copyright (Amendment) Bill published by the National Assembly on 22 October 2021 and, in particular, the proposed repeal of Sections 35B, 35C and 35D.

To avoid unnecessarily repeating the information and views previously provided, we would kindly ask that you consider again the content of the SROC letter mentioned above and appended hereto.

UEFA would also, therefore, respectfully request that the proposed legislative changes are reconsidered to ensure a healthy and safe intellectual property environment which protects the interests of both rights owners and Kenyan consumers.

Yours sincerely,

UEFA



Simon Parry
Head of Media Rights Legal Services

Enclosure(s)

- SROC Letter (Submissions on the Copyright (Amendment) Bill 2021 – Dated: 28 December 2021

cc (with enclosures)

- Honourable Cabinet Secretary Amina Mohamed – Ministry of Sports

"CONFIDENTIAL"



SUBMISSION OF MEMORANDA FROM SAFARICOM PLC

TO

① DD/DC
29/12/21

THE CLERK OF THE NATIONAL ASSEMBLY

② Ms. Kina, CA11
Pse Deal
Muboga
DD/DC
14/1/22

WITH REGARD TO

COPYRIGHT (AMMENDMENT) BILL, 2021 (NATIONAL ASSEMBLY BILL NO 44 OF 2021)

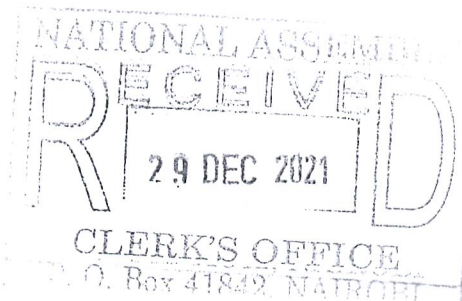
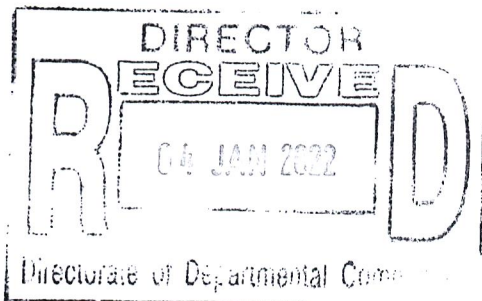




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Introduction

1.1 Background: Safaricom PLC

Safaricom is a communications service provider in Kenya.

Founded in 1997 as a division within Telkom Kenya, in 2000 Safaricom became a public limited company with the Government currently holding 35% shareholding.

Safaricom's purpose is to Transform Lives. We are an information and communications technology company providing a range of integrated telecommunications services including voice, data, financial services and enterprise solutions for a range of subscribers, small businesses and Government, using a variety of platforms. As a critical communications company in East and Central Africa, we delight over 39.9 million subscribers.

In addition, we have pioneered other technological innovations that have greatly impacted the lives of our customers and partners that are not only unique to Kenya but also enable our communities to benefit from the increasing use of mobile technologies.

Amongst these innovations is the *Skizu* platform, which has contributed to the growth of the creative industry in Kenya.

1.2 Safaricom's responses to clauses the Copyright (Amendment) Bill,2021 (National Assembly Bill No 44 Of 2021)

No	Specific section	Safaricom's Proposal	Justification
1.	Section 3 (Proposed insertion of new section 30C in Cap 12 of 2001. The section proposes to regulate the sharing of net revenues from the sale of ring back tunes.	Safaricom proposes a deletion of section 3 of the Copyright (Amendment) Bill.	<p>The proposed clause attempts to regulate the sharing of revenues for a specific type of technological innovation without regard to the commercial considerations that determine the commercial viability of the products. The innovation around ring back tunes as defined under the proposed Bill have allowed content owners to benefit from their craft by creating an alternative source of revenue.</p> <p>The proposed clause shall lead to a reduction in the investment in innovation around ring back tunes and may lead to the shut down of the service as a result of intrusive regulation that fails to consider the commercial viability of products like dial back tunes.</p>

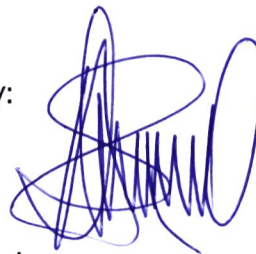
			<p>Further, there are several other content aggregation services available in the country that are not subject to any revenue share regulations and it is our submission that the proposed clause unfairly targets one specific type of innovation and that the clause places an unfair regulatory burden on dial back tunes.</p> <p>Corporations invest in the development and maintenance of innovations like dial back tunes and adverse regulatory actions like in this proposed clause shall lead to the demise of technological innovations that have positively impacted the livelihoods of artistes and copyrights holders especially in the pandemic era where there are fewer avenues for revenue generation due to restrictions on mass interactions like live performances which previously provided a steady source of livelihoods for copyrights holders. It is our position that commercial decisions should be left in the hands of stakeholders involved in the product lifecycle based on dynamic platform economic models and that any adverse regulatory intervention shall negatively impact the investments in the development and maintenance of current and future technologies.</p>
	<p>Sections 5, 6 and 7 of the Bill that propose the deletion of 35B, 35C and 35D respectively.</p>	<p>The clauses should be maintained as suggested in the Bill.</p>	<p>There are currently onerous take-down responsibilities given to Internet Service Providers that create a claw back to the intermediary liability safeguards given to ISP's under the in clause 35(A) of the Copyrights Act. Take down clauses should exist however without unfair burdens to ISP's that are akin to making ISP's responsible for policing the internet.</p>

The Copyright (Amendment) Bill, 2021
Submission of Memorandum
Prepared by the CODE-IP Trust
Box 75474-00200
Nairobi

Submitted to:
The Departmental Committee Communications, Information and Innovation
The National Assembly, Twelfth Parliament of Kenya
Nairobi

Presented on: 15 February, 2022

By:

A handwritten signature in blue ink, consisting of several overlapping loops and a series of vertical lines at the end, positioned to the right of the word 'By:'.

Alex Gakuru
Executive Director,
Content Development & Intellectual Property (CODE-IP) Trust

EXECUTIVE SUMMARY:

This Memorandum consists of two sections. The first part delves on the Copyright Amendment Bill 2021's own-contradiction on violating fundamental rights and freedoms constitutional guarantees.

The second part indulges on the Copyright Amendment Bill 2021's encroachment onto Statutory Instruments Act's legal mandate. Under this section, we hold the view that Parliament's role is to pass an Act with a framework for a policy idea or law then expect Statutory Instruments under delegated legislation to subsequently to fill out the precise details of the law - and its implementation thereafter.

Avoiding cluttering Principal Acts with miniscule implementation directives that shorten the law's longevity and saving Parliament from turning into an agency implementing its own enactments. Otherwise, among the resultant consequences include persistent conflicts with the Executive's Regulatory Agencies (SAGAs), disputatious mandates, burdening the Judiciary with additional lawsuits, culminate public distrust in and apathy of the law and, inevitably, further burdened parliament's own legislative agenda managing detailed implementation guidelines, procedures, protocols, governance, administration, performance, hiring and firing, and more.

Therefore, we hold the view that law implementation instruments (regulations) are the Just, Fair and Reasonable tools to actualise

Whereas its Memorandum of Objects and Reasons, the Copyright Amendment Bill 2021 statement on delegation of legislative powers and limitation of fundamental rights and freedoms states that, "*The Bill does not delegate legislative powers to the Cabinet Secretary. It does not limit fundamental rights and freedoms,*" the body of the Bill oppositely;-

(a) limits three(3) fundamental rights and freedoms,

- (i) freedom to seek, receive and impart information or ideas
- (ii) freedom of artistic creativity
- (iii) access to information

(b) delegates, ***carte blanche***, legislative powers to the Cabinet Secretary. The law should be stable, predictable and reliable and applied uniformly/blindly. Coding undefined —special circumstances creates room for legal uncertainties and unpredictability.

Notwithstanding our view that the operationalisation of proposed "National Rights Registry" (hereafter "Registry") should be under subsequent Regulations (rather than the body of the Act), the four concerns on this sections are:-

(1) a more elaborate and functional copyright rights registry already exists and the Kenya Copyright Board. Any interested rights holders (including "ring back tones," book authors, software developers, fashion designers, artistes, visual artists, filmmakers, comedians, dancers, architects, photographers, and all other **bona fide** (literally, artistic, audiovisual and software, *et cetera*) creative workers copyright can and already do voluntarily register their rights¹.

Therefore, raising the question, what mischief the Copyright Amendment Bill 2021 seeks to remedy in regards?

(2) KECOBO's independence as the copyright regulator would be compromised by the proposal, "*Subject to such conditions as may be prescribed by the Board and upon payment of the prescribed fees, any person may access the copyright works through the National Rights Registry,*" considering that:-

(a) one of its proposed new functions would to collect royalties from any person accessing private copyright works in their possession as an entrusted, independent, public service institution and NOT a private members royalties Collecting Management Organisation,

(b) the proposed new access to registration information restriction (currently freely published to the public) erodes Right to Access Information fundamental right guaranteed by the constitution.

(c) the Board should not be granted blanket legal authority to "prescribe" conditions of access over and above the fees determined thereof

(3) The proposal that, "*The Cabinet Secretary may prescribe anything necessary for the performance of the functions of the National Rights Registry,*" is not only asking parliament to delegate its legislative mandate to and grant the Minister **carte blanche** legal authority "**to prescribe anything**" the Minister so desired while guaranteed protection by the law.

(4) While welcome the prescribing of ringtones revenues sharing formula (but on Regulations not body of the Act), the sum total of the individual fractions must add up to 100 per centum. At present they total to 75% which raises the question as to who exactly will end up taking the undisclosed 25% balance of revenues?

(c) The Memorandum of Object- and Reasons further states that the Copyright Amendment Bill 2021, "*is intended to remove the ambiguity in the role of internet service provider.*"

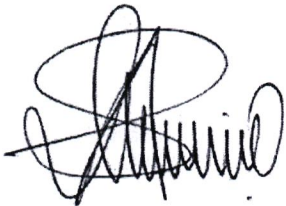
1 <https://nrr.copyright.go.ke/signup> Registration | explainer video <https://youtu.be/lrXKfkbkFnQ>

As a fundamental principal, new legislation should only repeal provisions already provided for on earlier legislation if, and only if, the proposed repeal are now accommodated in law elsewhere. To repeal such prior enacted provisions absent their legal accommodation elsewhere not only wastes all their prior considered legislative justification, re-introduces legal lacunae/uncertainties.

Therefore, the statement that the Bill *is intended to remove the ambiguity in the role of internet service provider* is materially incorrect.

The below detailed comments **PART I: Proposed Repeal of Sections 35B,35C and 35D** and **PART II: Proposed Registry and Legislative Delegation** below delve deeper into proposed Copyright Amendment Bill 2021 proposals

Signed,



Alex Gakuru
Executive Director
Content Development & Intellectual Property (CODE-IP) Trust

Intervention Explainer:

The courts interpret unambiguous Acts of Parliament applying the literal rule. Under this rule the judge considers what the statute actually says, rather than what it might mean. In order to achieve this, the judge will give the words in the statute a literal meaning, that is, their plain ordinary everyday meaning, even if the effect of this is to produce what might be considered as an otherwise unjust or undesirable outcome.

The literal rule says that the intention of Parliament is best found in the ordinary and natural meaning of the words used. As the legislative democratic part of the state, Parliament must be taken to want to effect exactly what it says in its laws. If judges are permitted to give an obvious or non-literal meaning to the words of parliamentary law, then the will of Parliament, and thereby the people, is being contradicted.

The use of this rule can sometimes lead to absurdities and loopholes which can be exploited by an unmeritorious litigant. Judges have tended to over-emphasise the literal meaning of statutory provisions without giving due weight to their meaning in a wider context. Placing emphasis on the literal meaning of words assumes an unobtainable perfection in draftsmanship.

Reinforcing reasons why parliament clearly pronounced itself on an Act are respective Bills **Memoranda of Objects and Reasons**. Therefore, the Copyright Amendment Bill, 2021's **Memorandum of Objects and Reasons** assumes the entry point for our Memorandum of Views. Juxtaposing **Memoranda of Objects and Reasons** with **the proposals on the Bills** clauses simply illustrates our arguments and therefore our recommendations.

Start:

The Bill's **Memorandum of Objects and Reasons** introductory paragraph states;-

"**[1]** The object of the Bill is to amend the Copyright Act, to provide for fair formula for sharing of revenue from ring back tunes between the artists/copyright holders and the telecommunications companies. **[2]** The Bill provides that the artist should get a greater share of the revenue at fifty two percent. **[3]** The Bill also proposed to repeal the provisions on takedown notices and requirements, the role of internet service providers and application for injunction. **[4]** It is intended to remove the ambiguity in the role of internet service provider. **[5]** Further, it is to align the Act as there are already legal remedies provided for." **[Emphasis mine]**

Comments:

[1] "The object of the Bill is to amend the Copyright Act, to provide for fair formula for sharing of revenue from ring back tunes between the artists/copyright holders and the telecommunications companies."

Comments:

Parliament passes an Act with a framework for a policy idea or law leaving implementation details to subsequent delegated legislation to fill out the precise details of the law governed by the Statutory Instruments Act (No. 23 of 2013). Furthermore, revenue from ring back tunes is subset of copyrights property rights which begs the question on revenues share formulae for the balance of copyright Works transmitted through the telecommunications companies.

Example:

Consider the Kenya Information and Communications Act on requirements for local content quotas on broadcasting stations. Section 46K on KICA, *Regulations on broadcasting* (1 of 2009, s. 16.) states:-

The Minister may, in consultation with the Commission, make regulations generally with respect to all broadcasting services and without prejudice to the generality of the foregoing, with respect to—

(a) the facilitation, promotion and maintenance of diversity and plurality of views for a competitive marketplace of ideas;

(b) financing and broadcast of local content;

(c) mandating the carriage of content, in keeping with public interest obligations, across licensed broadcasting services;

(d) prescribing anything that may be prescribed under this Part.

Recommendation:

Rather than encoding the revenue share on the body of the Act, the bill should merely provide for subsequent Regulations indulge into the revenue share formulae. (with public participation under Statutory Instruments Act oversight).

- [2] The Bill provides that the artist should get a greater share of the revenue at fifty two percent.

Recommendation:

Further to the above argument, and recommendation - in addition to the regulations pronouncing themselves on the desired revenue shares, the same regulations should provide an alternative for the artist to enter into "willing buyer and willing seller" contractual agreements with telecommunications companies.

- [3] The Bill also proposed to repeal the provisions on takedown notices and requirements, the role of internet service providers and application for injunction.

Comments:

In a bid to create a framework to bring back the control of copyright works placed online, the World Intellectual Property Organisation (WIPO) passed the WIPO Internet Treaties in 1996. The treaties set down international norms aimed at preventing unauthorised access to and use of creative works on the Internet or other digital networks.

The WIPO Internet Treaties set the framework for countries to incorporate in their laws the protection of author and work information (Rights Management Information) and access and copy measures (Technical Protection Measures) to guard the integrity of information regarding copyright works and prevent circumvention of technical measures by pirates.

While Kenya enacted its first internet era copyright law in 2002, it took the country 17 years to incorporate provision on intermediary liability. The Copyright Act now provides safe harbours for ISPs and a procedure for notice and takedown in line with international standards.

It has only been two years since the substantive copyright law amendments were undertaken through broad stakeholders consultations. This period could hardly be described as sufficiently adequate to test the law's implementation and fully identify mischief requiring further Primary Act's legislative remedies consideration.

Recommendation:

DO NOT repeal any **BUT RATHER** save all the existing provisions on takedown notices and requirements, the role of internet service providers and application for injunction.

[4] It is intended to remove the ambiguity in the role of internet service provider.

Comments:

Nowhere on the Bill is this demonstrated. On the contrary, by proposing [3] above, the Bill achieves the complete opposite considering that their roles legal guidance under sections 35B, 35C and 35D will be repealed.

As a fundamental legislative principle, a earlier provision of law is only repealed if, and only if, that mischief which it prior remedied is overtaken by events, often through new legislation which properly, and if better, accommodating the repealed provisions.

Recommendation:

Reinstate internet service provider roles as currently provided for by the Act.

[5] Further, it is to align the Act as there are already legal remedies provided for.

As argued on [4] above this is factually incorrect. Furthermore, repealing Sections 35B, 35C, and 35D oppositely derails (not aligns) the Act. When prior existing legal provisions are repealed without their remedies being accommodated by law elsewhere, the results are deliberately newly established a *non liquet* ("**legal lacuna**").

Recommendation:

Reinstate Sections 35B, 35C, and 35D for the copyright Act to remain aligned to Article 2(5)(6) of the Constitution *Supremacy of this Constitution* which state,

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

Here in regard to Kenya's obligations under WIPO and WTO

Juxtaposed clauses:

Clause 1 of the Bill provides the short title.

No Comment

Clause 2 sets out the definition of the terms Registry, ring back tune and telecommunication operator.

Comments:

Amending an Act of Parliament to insert a digital registry is erroneous. First of all, the NRR is already provided for in sections 5(f) and 22A of the Copyright Act. There is no solid justification for mutilating an Act of Parliament just to recognize a digital version of an existing function. The entire system has already been captured in the Copyright Act as it is.

Clause 3 sets out the formula for sharing of revenue from ring back tunes between the telecommunication provider, the premium service rate provider and the copyright holder.

Comments:

Discussed on **[1]** above.

Clause 4 provides for establishment of the National Rights Registry and the functions of the registry. It also provides for voluntary registration.

Comments:

Discussed on comments under **Clause 2** above. Furthermore, the Act going to the extent of legislating on Registry staff is overburdening the Act.

Clause 5 provides for repeal of section 35B which relates to take down notices.

Clause 6 of the Bill provides for repeal of section 35C which relates the role of the internet service provider taking down content, which is alleged to be infringement of copyright.

Clause 7 provides for repeal of section 35D which relate to the application for an injunction where there is copyright infringement.

Comments

Consolidated for Clauses 5, 6 and 7

The Proposed repeal of Sections 35B, 35C and 35D of the Copyright Act will take away Fundamental-Rights-based protections introduced into the Copyright Act in 2019

- Contrary to what is stated in the Memorandum of Objects and Reasons, the Copyright Amendment Bill 2021 actually proposes to limit fundamental rights and freedoms
- The Constitution of Kenya Article 33 guarantees the freedom of expression which is defined to include “freedom to seek, receive and impart information or ideas” and “freedom of artistic creativity”.
- The only limits to that right are set out in the same Article as propaganda for war, incitement to violence and hate speech.

- This principle has its strongest foundations in freedom of expression which is a right guaranteed both by the Constitution of Kenya as well as regional and international law.
- The Internet is one of Kenya's foremost tools in facilitating freedom of expression and artistic creativity. It has democratized access to information and ideas and it is an economic engine for many of our SMEs and youth.
- Throughout the world, including in the African Union, the ***principle of Intermediary Protection*** requires that in order not to unconstitutionally censor the internet, it is important that Internet Service Providers be protected from being held liable for content of which they are only acting as a mere conduit or transmitter.
- It is also recognized the two fundamental pillars of the principle of Intermediary Protection are that;
 1. ISPs are to be expressly exempted from any general obligation to monitor the content passing through their networks. This is both for practical purposes: (Imagine if we asked the post office to open every letter to see if it contained hate speech - it would violate our privacy and take ages to receive our paper mail. The same thing for ISPs, it would violate our online privacy and take ages for your email to be delivered!
 2. A workable notice and takedown system. Rather than monitor all content (which in any case is technically impossible with encrypted content) ISPs take action on any content that may violate copyright law once they have been notified through a formal process of notice and takedown.
- The proposed repeal of the three sections proposes to take away these two pillars that were introduced into the Copyright Law in 2019 and to put Kenya back on the dubious list of countries that do not guarantee the privacy and freedom of online content.

Recommendation

- The Copyright Amendment Bill 2021 should be amended by deleting sections 5, 6 and 7 so that sections 35B, 35C, 35D of the Copyright Act are not repealed but retained.

FURTHER ELABORATION

Who are intermediaries and why protect them from liability for user-generated content?

- Internet intermediaries is a broad term which includes different kinds of business models critical to both the internet and the small and medium business ecosystem - website hosting companies, internet service providers (ISPs), information search and retrieval service providers, social media platforms - who play a crucial role in enabling people to access the internet and in transmitting third-party content.
- Internet intermediaries are distinct from 'content producers', who are responsible for producing information in the first place and posting it online. Intermediaries simply provide the infrastructure for the sharing of content and have nothing to do with the content itself.
- Throughout the world, including in the African Union, the general principle that intermediaries should not be liable for their user's content, and that therefore they should not have any general legal obligation to monitor user content or be responsible for its accuracy, its maintenance and its annotating, has been recognised. This principle has its strongest foundations in freedom of expression and individual privacy, which are rights guaranteed both by the Constitution of Kenya as well as regional and international law.

Intermediaries have positive value for the society (culture, education, freedom of expression)

- Internet allows anyone, anywhere to instantly connect with billions of people around the world. Through a variety of online services -- search engines, social networks, video sites, blogging tools, auction services, and many others -- we are able to create content, find information published by one other, communicate, and buy and sell goods and services. Platforms and services that help users interact with another are often called 'intermediaries,' and as the Internet evolves, so too do intermediaries.
- Internet has democratized creativity as well as it has democratized access to culture and knowledge, everyone can be a creator today, and more content (including positive and educational content) is produced than ever before.
- These amateur creators become professionals and find global audience thanks to the intermediary platforms that blossomed in the framework of legal certainty and intermediary liability protection.
 - Services like Viusasa, ShowMax, Netflix, YouTube, would never exist in the if there wasn't a legal certainty and protection from intermediary liability.

The need for protection

- When intermediaries are exposed to the risk of criminal or civil liability for content on their networks, this creates a legal barrier to market entry for entrepreneurs using the intermediary business model. It also incentivises them to control or police this content, and this has a chilling effect on the free flow of information, which is the lifeblood of the new information society and information economy. [Source: APC Report: *The Liability of Internet Intermediaries in Nigeria, Kenya, South Africa and Uganda: An uncertain terrain*, Alex Komninos, 2002]
- The risk that intermediaries face legal action for facilitating access to user-generated content and by prescribing a high compliance effort they need to make to be considered exempt from liability, can influence the size and vibrancy of the Internet start-up and hence the e-commerce ecosystem [*The Economic Impact of Safe-Harbours in Internet Intermediary Start-ups - Oxera Study, 2015*]

What kind of protection would be adequate?

In order to serve this broad purpose, an ideal law on intermediary liability protection would meet the following criteria:

- Removal obligations should pertain to illegal content
- Intermediaries should have **no general monitoring or filtering obligation** for illegal content;
- Instead, any removal requirements should be part of a well-balanced **notice and takedown system**; and
- Fair process and protections against abusive removals - including meaningful requirements for what constitutes a valid removal request (e.g., clearly identifying the content at issue by URL; a clear statement of the basis of the legal claim); a robust ability for both users and service providers to contest such requests.

RECOMMENDATION

The proposed repeal of the three sections proposes to take away fundamental pillars in the protection of intermediaries/ISPS that were introduced into the Copyright Law in 2019 and to put Kenya back on the dubious list of countries that do not guarantee the privacy and freedom of online content.

- *Recommendation: The Copyright Amendment Bill 2021 be amended by deleting sections 5, 6 and 7 so that the Copyright Act sections 35B, 35C, 35D are not repealed but retained.*

Clause 8 of the Bill provides for powers of the Cabinet Secretary to prescribe fees and the formats for registration of copyright works.

Whereas its Memorandum of Objects and Reasons, the Copyright Amendment Bill 2021 statement on delegation of legislative powers and limitation of fundamental rights and freedoms states that, "The Bill does not delegate legislative powers to the Cabinet Secretary. It does not limit fundamental rights and freedoms," the body of the Bill oppositely;-

(a) limits three(3) fundamental rights and freedoms,

- (i) freedom to seek, receive and impart information or ideas
- (ii) freedom of artistic creativity
- (iii) access to information

(b) delegates, *carte blanche*, legislative powers to the Cabinet Secretary. The law should be stable, predictable and reliable and applied uniformly/blindly. Coding undefined —special circumstances creates room for legal uncertainties and unpredictability.

(c) The Bill is conflicting with Article 2 of the constitution

-. Seeks to establish an exclusive ("ringtones") Registry, whereas a registry for all copyright holders already exists at the Kenya Copyright Board appointee

-. Delegates ***carte blanche*** legislative authority to Cabinet Secretary

-. Conflates the roles of statutory copyright regulator with those of a collecting

5. opens avenues to illegitimate collection and unaccountable misuse of copyright royalties

7. (i) whereas facially appealing to ringtones copyright owners, the Bill's revenue share formula quietly equates proposed new registry collecting agency those same rights. This means that the "new" collecting agency may collect all high percentage revenues - but only share a small fraction to the ***bona fide*** ring tones copyright holders. (ii) Be that as it may, leave room for contracts

IN CONCLUSION, internet censorship through overzealous copyright enforcement is now back as a real and far-reaching freedom of expression threat to the citizens

On our 2019 Memorandum of Views to this Committee on extra safeguards - when in agreement with Intermediary Liability protection , we wrote ;-

--begin quote--

Infringement Section35B(4)

Recommendation

Rephrase 35B(4) to:

—An Internet Service Provider shall disable access to the material expeditiously and within expeditiously with a role for the Competent Authority to adjudicate, considering the circumstances of the case unless it receives a counter notice from the entity

accused of infringement or any other person exercising a legal right by making available the content fulfilling the requirements set out for a takedown notice and contesting the contents of the takedown notice.

Justification:

1. Requiring take down within 48 hours is unfair and unworkable for ISPs. There's need to consider the complexity of the take-down requests: The ISP needs more time to assess whether the content is actually lawful. Some content may require language translation, some notices may be sent during non-working days. Each take-down request needs to be considered on its own unique circumstances.

A 48 hr notice would mean ISPs may not have enough time and they will tend to remove content automatically, which will lead to a form of censorship.

This will also hurt ISPs business, because in order to comply they will need to dedicate a lot of resources for dealing with take-down notices within a short time. The short time-line will incentivize people who may not have a proper basis to file take down requests, leading to a vicious cycle raising the compliance burden for ISPs.

2. It is should not be the case that only a person who has been accused of infringement can file a counter-notice. Sometimes the person filing the takedown notice could be wrong about who the uploading/infringing party is; or the uploaded content may be subject to a joint ownership; or the copyright to it may have been assigned. It may also be that the content may be in the public domain or owned by the government and therefore many parties may exercise a public-interest right to counter the takedown notice.

Ensure due process and rational safeguards in copyright enforcement and protect from censorship through copyright balancing with access to information which is a fundamental right.

--end quote--

Among known institutions opposed to the Bill include,

Government:

Kenya Copyright Board,
Communications Authority of Kenya
Kenya Film Classification Board
Kenya Film Commission

Creative Sector:

Kenya Publishers Association
Creative Economy Working Group (more than 20 local creative industries entities)
International Publishers Association

Human Rights

Article 19
CODE-IP Trust

See Annex II for more elaborate recommendations

PART II: Proposed Registry and Legislative Delegation

Issue	Title	Section	Proposes	Recommendation	Rationale
1.	Interpretation	2	"Registry" means the National Rights Registry established under section 34A;	"Registry" means the National Rights Registry at the Board	Delink the establishment of The Registry from its day-to-day implementation details(see below)
2.		2	"ring back tune" means subscription music or a tone which it played by a telecommunication operator to the originator of a call;	(i) Yes, define "ring back tune" but also define all plausible copyrightable works uses or (ii) delete the definition and proposed amendments therein under	(i) Applying the addage "to name is to exclude" (ii) defining "ring back tune" equally requires that every plausible use of all copyrightable works by telecommunications companies be defined
3.	National rights registry	34A (1&2)	(1) There is established a National Rights Registry which shall be an office within the Board. (2) The staff of the Registry shall be staff of the Board.	Delete entire section from the Principal Act (save it for subsidiary legislation)	Legislative custom excludes The Principal Act directing implementing institutions on operational, procedural and administrative details. Such are in the domain of subsidiary legislation (Regulations). For example: Neither <u>The Supreme Court Act</u> nor <u>The Judicature Act</u> ventures into <u>Courts Registries Operations</u> which are left to <u>The Supreme Court Rules and High Court (Organization and Administration)</u> . Subsidiary Legislations respectively. And Land Electronic Regulations NOTIFICATION OF REGULATORY IMPACT STATEMENT ON THE PROPOSED LAND TRANSACTIONS (ELECTRONIC) REGULATIONS, 2020

	Voluntary registration on the National Rights Registry.	34C(1)	Without prejudice to the generality of section 34B, the Board shall cause to be developed and maintained an online portal for registration of copyright works to be known as the National Rights Registry.	Without prejudice to the generality of section 34B, the Board shall cause to be developed and maintained an online portal for the voluntary registration of copyright works to be known as the National Rights Registry.	<p>PURSUANT to section 8 of the Statutory Instruments Act (No. 23 of 2013), the Cabinet Secretary, Ministry of Lands and Physical Planning, in consultation with the Cabinet Secretary, the National Treasury and the National Land Commission hereby notifies the general public that a Regulatory Impact Statement on the proposed Land Transactions (Electronic) Regulations, 2020 has been prepared to assess the impact of the Regulations on the community and businesses.</p> <p>The proposed Statutory Instruments includes, <i>inter alia</i>, Land Registration (Electronic Transactions) Regulations, 2020</p> <p>https://lands.go.ke/electronic-regulations/</p>
4.					<p>(a) add the words “the voluntary” registration of copyright works... aligns the purpose of the section to the Title of the section.</p> <p>(b) delete the words “be known as the National Rights Registry” considering:-</p> <p>(i) the “portal” is not the actual registry</p> <p>(ii) avoid introducing confusion on what exactly constitutes “the National Rights Registry”</p> <p>(iii) Principal Act avoids encroaching on Statutory Instruments Act mandate on administrative tools and procedures</p> <p>(iv) maintaining the recommended text compels the Board’s transparency to copyright owners and supporting public Access to Information Fundamental Right</p>

5.		34C(2)	The author of copyright works or a holder of a copyright may register his or her works on the National Rights Registry.	Bona fide copyright holders may register their works at the online portal.	<p>(i) the law avoids involvement on disputes between copyright owners and copyright assignees</p> <p>(ii) avoids presuming that the portal is “the registry”</p> <p>(iii) use of simple and clear language specific to the objective</p>
6.		34C(3)	Subject to such conditions as may be prescribed by the Board and upon payment of the prescribed fees, any person may access the copyright works through the National Rights Registry.	Summary copyright registration information shall be freely accessible to everyone	<p>(i) carte blanche “Subject to such conditions as may be prescribed by the Board” delegate Parliament’s legislative mandate to the Board.</p> <p>(ii) as currently drafted, KECOBO – the Copyright Regulator, assumes Collective Management Organisation(CMO) royalties collection function</p> <p>(iii) KECOBO would derive unjust income from the access of bona fide copyright owners creative labours</p> <p>(iv) merely publishing copyright registration information online cannot be fairly justified as the basis of imposing new “access fees”</p> <p>(v) Notwithstanding, withholding copyright registration information negates Fundamental Right of Access to Information</p>
7.	Amendment of section 49 of No. 12 of 2001	8(2A) (a)	The Cabinet Secretary may prescribe the fees for accessing the National Rights Registry;	Delete	The Cabinet Secretary would be acting as an agent obstructing fundamental Right to Access Information
8.		(b)	The Cabinet Secretary may prescribe the format for registrations of the respective copyright works;	Delete	Defer to Subsidiary Legislation (Regulations)

9.	(c)	The Cabinet Secretary may prescribe the type of copyright works that are registrable with the National Rights Registry;	Delete	(i) Defer to Subsidiary Legislation (Regulations) (ii) The Cabinet Secretary should justify why only some types of copyright works qualify as registrable while the rest do not qualify.
10.	(d)	The Cabinet Secretary may prescribe anything necessary for the performance of the functions of the National Rights Registry. [emphasis mine]	delete	The words, " may prescribe anything necessary " are not only carte blanche but very dangerous delegation of parliament legislative authority.



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MEMORANDUM ON THE COPYRIGHT (AMENDMENT) BILL 2021

BY THE CREATIVE ECONOMY WORKING GROUP

EXECUTIVE SUMMARY

This Memorandum consists of two sections. The first part delves on the Copyright Amendment Bill 2021 and how it violates the fundamental rights and freedoms guaranteed by the Constitution of Kenya.

The second part engages the Copyright Amendment Bill 2021 and how it encroaches on the legal mandates of statutory instruments. Under this section, we hold the view that Parliament's role is to pass an Act within the framework of policy or law then provide space for Statutory Instruments under delegated legislation to subsequently fill out the precise details of the law – and its implementation thereafter.

It is important to avoid cluttering the Principal Acts with miniscule implementation directives that shorten the law's longevity. This would save Parliament from turning into an agency implementing its own enactments. Among the resultant consequences of the overload would include persistent conflicts with the Executive's Regulatory Agencies (SAGAs), disputatious mandates, and burdening the judiciary with additional lawsuits. The cluttering could culminate in public distrust in and apathy of the law and, inevitably, further burden parliament's own legislative agenda of managing detailed implementation guidelines, procedures, protocols, governance, administration, performance, hiring and firing, and more.

Therefore, we hold the view that law implementation instruments (regulations) are the Just, Fair and Reasonable tools to actualise the Act.

Whereas its Memorandum of Objects and Reasons, the Copyright Amendment Bill 2021 statement on delegation of legislative powers and limitation of fundamental rights and freedoms states that "*The Bill does not delegate legislative powers to the Cabinet Secretary. It does not limit fundamental rights and freedoms,*" the body of the Bill in reality;-

- (a) limits three(3) fundamental rights and freedoms,
 - (i) freedom to seek, receive and impart information or ideas
 - (ii) freedom of artistic creativity
 - (iii) access to information

(b) delegates, *carte blanche*, legislative powers to the Cabinet Secretary. The law should be stable, predictable and reliable and applied uniformly/blindly. Coding undefined—special circumstances creates room for legal uncertainties and unpredictability.

Notwithstanding our view that the operationalisation of proposed “National Rights Registry” (hereafter “Registry”) should be under subsequent Regulations (rather than the body of the Act), the four concerns on this sections are;-

(1) a more elaborate and functional copyright rights registry already exists under the Kenya Copyright Board. Any interested rights holders (including “ring back tunes,” book authors, software developers, fashion designers, artistes, visual artists, filmmakers, comedians, dancers, architects, photographers, and all other *bona fide* (literally, artistic, audiovisual and software, *et cetera*) creative workers copyright can and already do *voluntarily* register their rights¹.

What is the Copyright Amendment Bill 2021 seeking to remedy?

(2) KECOBO’s independence as the copyright regulator would be compromised by the proposal, “*Subject to such conditions as may be prescribed by the Board and upon payment of the prescribed fees, any person may access the copyright works through the National Rights Registry,*” considering that;-

(a) one of its proposed new functions would to collect royalties from any person accessing private copyright works in their possession as an entrusted, independent, public service institution and NOT a private members royalties’ Collecting Management Organisation,

(b) the proposed new access to registration information restriction (currently freely published to the public) erodes Right to Access Information fundamental right guaranteed by the Constitution of Kenya.

(c) the Board should not be granted blanket legal authority to “prescribe” conditions of access over and above the fees determined thereof

(3) The proposal that, “*The Cabinet Secretary may prescribe anything necessary for the performance of the functions of the National Rights Registry,*” is not only asking parliament to delegate its legislative mandate to and grant the Minister *carte blanche* legal authority “**to prescribe anything**” the Minister so desired while guaranteed protection by the law.

(4) While we welcome prescribing of ringtones revenues sharing formula (but on Regulations not body of the Act), the sum total of the individual fractions must add up to 100 per centum.

1 <https://nrr.copyright.go.ke/signup> Registration | explainer video <https://youtu.be/lrXKfkbkFnQ>

At present they total to 75% which raises the question as to who exactly will end up taking the undisclosed 25% balance of revenue?

(a) The Memorandum of Objects and Reasons further states that the Copyright Amendment Bill 2021, "*is intended to remove the ambiguity in the role of internet service provider.*"

As a fundamental principal, new legislation should only repeal provisions already provided for on earlier legislation if, and only if, the proposed repeals are now accommodated in law elsewhere. To repeal such prior enacted provisions without their legal accommodation elsewhere not only wastes all their prior considered legislative justification, re-introduces legal lacunae/uncertainties.

Therefore, the statement that the Bill *is intended to remove the ambiguity in the role of internet service provider* is materially incorrect.

The detailed comments below delve deeper into proposed Copyright Amendment Bill 2021 proposals.

Signed



Prof. Kimani Njogu
Chair,
Creative Economy Working Group.

About The Creative Economy Working Group (CEWG)

The Creative Economy Working Group (CEWG) was founded by thirteen institutions working in the culture and creative sector in 2012 in order to explore how a facilitative policy and legislative framework could be developed for the advancement of culture, arts and media in Kenya. Previously, members of the Working Group had been actively involved in entrenching rights related to artistic and cultural expression in the Constitution of Kenya. At that time the group met as the Consultative Committee on Culture and the Constitution and worked closely with the Ministry of Culture. With the promulgation of the Constitution in 2010, the Committee was disbanded and some members reconvened to form the Creative Economy Working Group to focus mainly on policy and legislative issues related to the creative sector in Kenya and within the East African Community through advocacy, knowledge sharing forums, publications and partnership building.

The following institutional members of the Creative Economy Working Group endorse the Memorandum

Institutions:

1. Twaweza Communications
2. Content Development & Intellectual Property Trust
3. The GoDown Arts Centre
4. Kenya Scriptwriters Guild
5. The Creative Garage
6. Book Bunk Trust
7. The Orature Collective
8. GoSheng Services
9. Docubox – EADFF
10. Content House
11. The Nest Collective
12. Buni Media
13. CINE Arts Afrika
14. PAWA 254
15. TICAH
16. Nairobi Film Festival
17. Bloggers Association of Kenya

PART I: Proposed Repeal of Sections 35B,35C and 35D

SUMMARY

The Proposed repeal of Sections 35B, 35C and 35D of the Copyright Act will take away fundamental-rights-based protections introduced into the Copyright Act in 2019

- Contrary to what is stated in the Memorandum of Objects and Reasons, the Copyright Amendment Bill 2021 actually proposes to limit fundamental rights and freedoms
- The Constitution of Kenya Article 33 guarantees the freedom of expression which is defined to include “freedom to seek, receive and impart information or ideas” and “freedom of artistic creativity”.
- The only limits to that right are set out in the same Article as propaganda for war, incitement to violence and hate speech.
- This principle has its strongest foundations in freedom of expression which is a right guaranteed both by the Constitution of Kenya as well as regional and international law.
- The Internet is one of Kenya’s foremost tools in facilitating freedom of expression and artistic creativity. It has democratised access to information and ideas and the right to express and disseminate information. It functions as a site for the stimulation of the imagination and creativity, and it is an economic engine for many of our SMEs and youth.
- Throughout the world, including in the African Union, the *principle of Intermediary Protection* requires that in order not to unconstitutionally censor the internet, it is important that Internet Service Providers be protected from being held liable for content of which they are only acting as a mere conduit or transmitter.
- It is also recognized the two fundamental pillars of the principle of Intermediary Protection are that;
 - a. ISPs are to be expressly exempted from any general obligation to monitor the content passing through their networks. This is both for practical purposes: (Imagine if we asked the post office to open every letter to see if it contained hate speech - it would violate our privacy and take ages to receive our paper mail. The same thing for ISPs, it would violate our online privacy and take ages for your email to be delivered).
 - b. There ought to be a workable notice and takedown system. Rather than monitor all content (which in any case is technically impossible with encrypted content) ISPs take action on any content that may violate copyright law once they have been notified through a formal process of notice and takedown.
- The proposed repeal of the three sections proposes to take away these two pillars that were introduced into the Copyright Law in 2019 and to put Kenya back on the dubious list of countries that do not guarantee the privacy and freedom of online content.

Recommendation

- The Copyright Amendment Bill 2021 should be amended by deleting sections 5, 6 and 7 so that sections 35B, 35C, 35D of the Copyright Act are not repealed but retained.

FURTHER ELABORATION

Who are intermediaries and why protect them from liability for user-generated content?

- Internet intermediaries is a broad term which includes different kinds of business models critical to both the internet and the small and medium business ecosystem - website hosting companies, internet service providers (ISPs), information search and retrieval service providers, social media platforms - who play a crucial role in enabling people to access the internet and in transmitting third-party content.
- Internet intermediaries are distinct from 'content producers', who are responsible for producing information in the first place and posting it online. Intermediaries simply provide the infrastructure for the sharing of content and have nothing to do with the content itself.
- Throughout the world, including in the African Union, the general principle that intermediaries should not be liable for their user's content, and that therefore they should not have any general legal obligation to monitor user content or be responsible for its accuracy, its maintenance and its annotation, has been recognised. This principle has its strongest foundations in freedom of expression and individual privacy, which are rights guaranteed both by the Constitution of Kenya as well as regional and international law.

Intermediaries have positive value for the society (culture, education, freedom of expression)

- Internet allows anyone, anywhere to instantly connect with billions of people around the world. Through a variety of online services – search engines, social networks, video sites, blogging tools, auction services, and many others -- we are able to create content, find information published by one other, communicate, and buy and sell goods and services. Platforms and services that help users interact with another are often called 'intermediaries,' and as the Internet evolves, so too do intermediaries.
- Internet has democratized creativity as well as access to culture and knowledge. Everyone can be a creator today, and more content (including positive and educational content) is produced than ever before.
- These amateur creators become professionals and find global audiences thanks to the intermediary platforms that blossomed in the framework of legal certainty and intermediary liability protection.
- Services like ViuSasa, ShowMax, Netflix, YouTube, would never exist if there wasn't a legal certainty and protection from intermediary liability.

The need for protection

- When intermediaries are exposed to the risk of criminal or civil liability for content on their networks, this creates a legal barrier to market entry for entrepreneurs using the intermediary business model. It also incentivizes them to control or police this content, and this has a chilling effect on the free flow of information, which is the lifeblood of

the new information society and information economy. [Source: APC Report: *The Liability of Internet Intermediaries in Nigeria, Kenya, South Africa and Uganda. An uncertain terrain*, Alex Komninos, 2002]

- The risk that intermediaries face legal action for facilitating access to user-generated content and by prescribing a high compliance effort they need to make to be considered exempt from liability, can influence the size and vibrancy of the Internet start-up and hence the e-commerce ecosystem [*The Economic Impact of Safe-Harbours in Internet Intermediary Start-ups - Oxera Study, 2015*]

What kind of protection would be adequate?

In order to serve this broad purpose, an ideal law on intermediary liability protection would meet the following criteria:

- Removal obligations should pertain to illegal content
- Intermediaries should have **no general monitoring or filtering obligation** for illegal content;
- Instead, any removal requirements should be part of a well-balanced **notice and takedown system**; and
- Fair process and protections against abusive removals – including meaningful requirements for what constitutes a valid removal request (e.g., clearly identifying the content at issue by URL; a clear statement of the basis of the legal claim); a robust ability for both users and service providers to contest such requests.

RECOMMENDATION

The proposed repeal of the three sections proposes to take away fundamental pillars in the protection of intermediaries/ISPS that were introduced into the Copyright Law in 2019 and to put Kenya back on the dubious list of countries that do not guarantee the privacy and freedom of online content.

- ***Recommendation:*** *The Copyright Amendment Bill 2021 be amended by deleting sections 5, 6 and 7 so that the Copyright Act sections 35B, 35C, 35D are not repealed but retained.*

PART II: Proposed Registry and Legislative Delegation

Issue	Title	Section	Proposes	Recommendation	Rationale
1.	Interpretation	2	"Registry" means the National Rights Registry established under section 34A;	"Registry" means the National Rights Registry at the Board	Delink the establishment of The Registry from its day-to-day implementation details(see below)
2.		2	"ring back tune" means subscription music or a tone which it played by a telecommunication operator to the originator of a call;	(i) Yes, define "ring back tune" but also define all plausible copyrightable works uses or (ii) <i>delete the definition and proposed amendments thereinunder</i>	(i) Applying the addage "to name is to exclude" (ii) defining "ring back tune" equally requires that every plausible use of all copyrightable works by telecommunications companies be defined
3.	National rights registry	34A (1&2)	(1) There is established a National Rights Registry which shall be an office within the Board. (2) The staff of the Registry shall be staff of the Board.	Delete entire section from the Principal Act (save it for subsidiary legislation)	Legislative custom excludes The Principal Act directing implementing institutions on operational, procedural and administrative details. Such are in the domain of subsidiary legislation (Regulations). For example: Neither The Supreme Court Act nor The Judicature Act ventures into Courts Registries Operations which are left to The Supreme Court Rules and High Court (Organization and Administration) <i>Subsidiary Legislations</i> respectively.

					<p style="text-align: center;">And Land Electronic Regulations NOTIFICATION OF REGULATORY IMPACT STATEMENT ON THE PROPOSED LAND TRANSACTIONS (ELECTRONIC) REGULATIONS, 2020 PURSUANT to section 8 of the Statutory Instruments Act (No. 23 of 2013), the Cabinet Secretary, Ministry of Lands and Physical Planning, in consultation with the Cabinet Secretary, the National Treasury and the National Land Commission hereby notifies the general public that a Regulatory Impact Statement on the proposed Land Transactions (Electronic) Regulations, 2020 has been prepared to assess the impact of the Regulations on the community and businesses. The proposed Statutory Instruments includes, <i>inter alia</i>, Land Registration (Electronic Transactions) Regulations, 2020 https://lands.go.ke/electronic-regulations/</p>
4.	Voluntary registration on the National Rights Registry.	34C(1)	Without prejudice to the generality of section 34B, the Board shall cause to be developed and maintained an online portal for registration of copyright works to be known as the National Rights Registry.	Without prejudice to the generality of section 34B, the Board shall cause to be developed and maintained an online portal for the <i>voluntary</i> registration of copyright	<p>(a) add the words “<i>the voluntary</i>” registration of copyright works.... aligns the purpose of the section to the Title of the section.</p> <p>(b) delete the words “ be known as the National Rights Registry” considering:-</p>

ANNEX 5

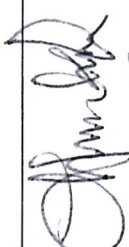






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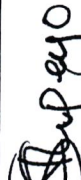


12TH PARLIAMENT - SIXTH SESSION (2022)

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION

WITNESS ATTENDANCE | 5th February, 2022.

NO.	NAME	DESIGNATION	CONTACT	SIGNATURE
1.	Christopher Wambua	Ag CEO KFCB	07296287	
	LOICE SHAWAKHA	SENIOR LEGAL OFFICER	0721-300095	
2.	WAMBUA JOEL	Manager Licensing & Compliance	0722332446	
3.	Alexander Mavcos Masiga	Film Registration Officer	0718812403	
4.	David Muthara	PA, CEO-KFCB	0721887113	
5.	Philip Wahome	MultiChoice Kenya Corporate Affairs Manager	0722393222	
6.	Nancy Matimu	MultiChoice Kenya Managing Director	0713600713	

	NAME	DESIGNATION	CONTACT	SIGNATURE
7.	MWENDWA MAUNDU	HEAD OF REGULATORY MULTIMEDIA	0722-977893	
8.	Prof. Khamu Njogu Creative Economy Working Group CHAIR	CREATIVE ECONOMY WORKING GROUP, UTAKE	0729 892999	
9.	ALEX GAKURU	EXECUTIVE DIRECTOR CODE-IP TRUST	0722 739100	
10	SUZANNE SILANTOI	AFRICA PRACTICE/ NETFLIX	0720988213	
11	Rosemary Koech-Kimwani	Safaricom PLC	0718181644	
12	Kui King'anyi	Safaricom PLC	071 626543	
13	Daniel Ndaba	Safaricom PLC	0727540870	
14	SINBOY WACHARA	Liberty Africa	0722 841068	

15	Olive Githongo	Xpedia Management Limited	0713862414	
16	Nathan Chemon	Jamii Telecommunication Limited	0717128103	
17	Joel Gutunga	Lozi Productions	0722379018	
18	Dr. Mbugu Njoroge	CEO - KAMP	0721489665	
19	Angela Ndambuki	IFPI - Regional Director Sub-Saharan Africa	0722811715	Abdullahi
20	GEORGE GICHUMIA	MUSIC COMPOSERS ASSOCIATION	0721580126	
21	CHARITY NASHIPAE	ARTIST	0716843337	
22	MARTIANNE NAIPASO' TUJUMPA	GOSPEL ARTIST	0720135108	
23	DANIEL-TONKEI MAKAU	GOSPEL ARTIST	0724513850	
24	Celestine Itambui	Artist (Gospel)	0726919780	Cellupjazz
25				

26	GILBERT MBEVO	GOSPEL ARTIST	0720 203614	
27	Joseph Ojwang'o CURTIS	Churchgo Artist	0720 915559 0720 915559	
28	Elizabeth Mwangi	Artist	0725672287	
29	LINCOLN MWANVICI	Artist	0722562566	
30	JAMES KAMAU COO JAMES	ARTIST	072297888	
31	BEM GITHEA	ARTIST	0721327625	
32	RICHARDS SANINGO	Artist	0728719591	
33	Catherine Muya	ARTICLE 19 Eastern Africa	0725 963109	
34				
35				