

The Copyright (Amendment) Bill, 2017

Background

The Copyright (Amendment) Bill, 2017 (Bill) was published on 18 September 2017. The Bill proposes to amend various provisions of the Copyright Act No. 12 of 2001 (the Copyright Act) in a bid to:

- facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled;
- clarify the mandate of the Kenya Copyright Board (the Board) and;
- align the Copyright Act with the Constitution of Kenya, 2010.

We highlight the key proposed amendments to the Copyright Act that will have far reaching implications for copyright owners, legal practitioners in the area of IP and other relevant stakeholders.

The Amendments

Amendments that relate to the domestication of the Marrakesh Treaty

Kenya adopted the Marrakesh Treaty on 27 June 2013 which came into force on 2 September 2017 (the Treaty). Article 4 (1) of the Treaty provides that contracting jurisdictions must have copyright exceptions legislation in place to allow production of printed works in accessible formats without requiring permission from the copyright holder.

Bowmans was engaged on a pro bono basis to look into Kenya's readiness to implement the Treaty and to provide advice on the amendments to the current legislation to ensure that Kenya is able to comply with the provisions of the Treaty, and enable the Treaty to operate effectively in the Kenyan jurisdiction.

In an effort to ensure compliance with the provisions of the Treaty, the Bill seeks to introduce new definitions that are in line with the definitions provided for under the Treaty.

The Bill makes express provisions to provide for special but reasonable exemptions to visually impaired persons and persons with other disabilities. The Bill introduces a new section 26C which provides that it shall not be an infringement of copyright for:

- (a) an authorized entity to reproduce or to distribute copies or sound recordings of a previously published, literary work if such copies or sound recordings are reproduced or distributed in specialized formats exclusively for use by visually impaired or other persons with disabilities; or
- (b) to make, import, distribute, end or share accessible format copies by a beneficiary person or authorized entities or persons acting on behalf of a beneficiary person, including the circumventing any technical protection measures that may be in place, subject to the terms and conditions set out under regulations.

The Bill introduces an entire schedule, the second schedule, which makes provisions relating to fair dealing and the general exceptions and limitations provided for under section 26 of the Copyright Act. These amendments ensure that Kenya has effectively complied with the provisions of Article 4 of the Treaty and that Kenya has effectively domesticated the Treaty.

Protection of internet service providers

The Bill introduces provisions that seek to protect internet service providers from unfair and undue liability for infringement by users of internet services. For example, internet service providers shall not be liable for infringement for providing access to or transmitting content, routing or storage of content in ordinary course of business as long as it:

- (a) does not initiate transmission;
- (b) does not select the addressee; performs the functions in an automatic, technical manner without selection of the material;
- (c) does not modify the material contained in the transmission; and
- (d) does not in any way promote the content or material being transmitted.

These provisions heavily borrow from the provisions in other jurisdictions such as the USA and it is not clear yet whether these provisions may be suitable to the circumstances in Kenya. It will be interesting to see how these provisions will serve the Kenyan circumstances.

Takedown notice

An internet service provider shall disable access to the material within 48 hours, unless it receives a counter notice from the entity accused of infringement by making available the content fulfilling the requirements set out for a takedown notice and contesting the contents of the takedown notice.

Failure to take down or disable access when it receives a takedown notice makes the internet service provider liable for any loss or damages resulting from non-compliance to a takedown notice without a valid justification.

Internet service providers are required to designate an agent or other address for receiving such notices under its terms and conditions of service section.

Offences by a body corporate

The Bill seeks to introduce a new provision which is to the effect that where an offence under the Copyright Act has been committed by a body corporate, the body corporate and every person who at the time of the offence was committed was in charge of, or was responsible to the body corporate for the conduct of the business of the body corporate shall be deemed to be guilty of such offence and shall be liable to be proceeded against and punished accordingly.

Where it is proved that the offence was committed with the consent or connivance of any director, manager, secretary or other officer of the body corporate, such shall also be deemed to be guilty of that offence and shall be liable to prosecution.

The natural person shall not be held liable if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

Copyright Tribunal

The competent authority referred to in section 48 of the Copyright Act will now be referred to as the Copyright Tribunal and it shall consist of not less than three and not more than five persons, one of whom shall be an advocate of not less than seven years standing or a person who has held judicial office in Kenya as Chairperson, appointed by the Cabinet Secretary where any matters requires to be determined by the tribunal.

The roles of the Copyright Tribunal however appear to be the same as those of the competent authority provided for under the current Copyright Act. It has been argued by some few people that the membership provided for under the bill may result in additional costs in terms of salaries and allowances to be paid to the members. However, looking at the cost-benefit analysis, the benefits that will come from the proposed structure certainly outweigh and justify the costs to be incurred.

There may be need to enact regulations that will govern how members of the Copyright Tribunal conduct their affairs and related matters such as the seat of the Tribunal. Previously, the challenge that the competent authority faced was the lack of regulations to govern the affairs of the said competent authority.

Collective management organisations

Collecting societies will now be referred to as collective management organisations. A person is eligible to be elected as a director if he holds a certificate, a diploma or any other post-secondary qualification obtained after a period of at least more than one month of study. An elected director shall serve for a period of three years and shall be eligible for re-election for a further single term of three years.

The chairperson of a collective management organization shall hold office for a single term of three years and is not eligible for re-election, while the chief executive officer shall serve for a term of four years and is eligible for a second term of four years, but on approval from the board.

The bill proposes to give the executive director powers to cause an inspection to be made of any collective management organization, and of its books of accounts and records. A collective management organization found to be operating in contravention with the provisions of the Act shall be subject sanctions including suspension of the collective management organization.

The bill provides more detailed provisions as to the responsibilities of the board in supervising collective management organisations. It also gives more detailed provisions as to the sanctions the board may impose on non-compliant collective management organisations.

These amendments promote professionalism, ethics and good corporate governance in the artistic works sector. This will lead to better accountability and efficiency in collection and distribution of revenue.

The Kenya Revenue Authority or any other designated entity by the board shall collect royalties on behalf of collective management organizations licensed to represent performers and owners of sound recordings. It is not clear why the Kenya Revenue Authority has been charged with the responsibility of collecting royalties on behalf of collective management organizations licensed to represent performers and owners of sound recordings. This is a matter that should be deliberated to provide more insight as to why the Kenya Revenue Authority has been charged with such responsibilities.

Conclusion

The amendments to the Copyright Act will go a long way into achieving the provisions of Article 54 (1) of the Constitution which provide for the rights of persons with disabilities to access materials and

devices to overcome constraints arising from the person's disability. The amendments also ensure that Kenya has effectively domesticated the provisions of the Treaty.

The amendments will increase the efficiency in revenue collection and distribution and will result in the growth and development of the music, film and artistic industry. The amendments will also improve corporate governance in the Board and in collective management organisations.

For further assistance please contact [John Syekei](#), Partner and Head of Intellectual Property practice, or your relationship partner at Bowmans Kenya.