

The Copyright Act No. 12 of 2001 (Amendment Bill, 2018)

This article examines the detailed provisions sought in the amendments to the Act to deal with digital piracy. The act in question is, **The Copyright Act No. 12 of 2001**.

FAIR DEALING FOR SOFTWARE

Computer Programs, protected as literary works, shall now be subject to fair dealing. The bill provides that a person in lawful possession of software may be allowed to do the following without permission of the right holder where he needs copies for use of the computer programme; to make copies to correct errors; make a backup copy, for program testing and any other purpose not prohibited under the license or agreement.

Further, the authorization of the right holder of the programme shall not be required to decompile program, convert the program into a version expressed in different programming languages, code or notation for the purpose of obtaining information needed to enable the program to operate with other programs.

Moreover, the exclusive rights granted to a rights holder shall not include the right to control any acts by way of fair dealing for the purposes of scientific research, private use, criticism or review or the reporting of current events. Additionally, the incidental inclusion of such programme in an artistic work, sound recording, audio visual work or broadcast, shall be permissible.

INTERNET SERVICE PROVIDERS

If passed, Internet Service Provider (ISPs) will not be liable for infringement for providing access to or transmitting content in the ordinary course of business as long as they do not: Initiate the transmission; select the address; perform the functions in an automatic, technical manner without selecting the material; modify the material in the transmission or; in any way promote the material or content being transmitted

EXEMPTION FROM LIABILITY

The section further provides that the ISP will not be liable for infringement for the automatic intermediate and temporary storage of the content where the purposes of the storage is to make onward transmission of the data more efficient to others upon their request. However, this is only guaranteed as long as the ISP; does not modify the material; complies with conditions on access to the material; complies with rules regarding the cache conforming to generally accepted standards in the service sector and does not interfere with lawful use of technology to obtain information on the use of material. The ISP is also not liable if it removes or disables access once it receives a takedown notice.

The ISP will also not be liable for damages arising out of an infringement as long as it can demonstrate that; it did not know that the material or content was infringing a third party's rights; was not aware of the facts or circumstances of the alleged infringement unless the infringing is apparent and that upon the receipt of a takedown notice it acts to remove or to disable access to the allegedly infringing content within 48 hours.

It allows anyone whose rights have been infringed by content to which access is being offered by an ISP to request, by way of a takedown notice, that the ISP removes the infringing content. The proposed amendment provides the manner and form in which the take down notice should take.

The law says that takedown notice shall be in writing and addressed by complainant or his agent to the ISP or their designated agent. It should contain full name and address of the complainant, describe the work subject to the alleged infringement and be signed by the complainant. It should identify the rights being infringed, attach an affidavit attesting to ownership of the right and be copied to the relevant bodies like KECOBO or Communications Authority.

The law will give the ISPs 48 hours to disable access to the information failure to which it shall be fully liable for any damages or loss arising out of the infringement.

False or malicious lodging of a takedown notice will be deemed to be an offence and the sanctions include a fine of not more than Sh500,000 or imprisonment for a five year term or both. The ISP will, however, not be liable for wrongful takedown in response to a valid takedown notice. The law places the onus on the ISP to provide information to the investigating agencies regarding identity of any of their customer suspected of infringing.

The ISPs, however, are not obligated to monitor material transmitted, stored or linked or actively seek facts or circumstances indicative of infringing activity, within their service.

TECHNICAL PROTECTION MEASURES

The current law provides that the circumvention of any effective technical measure designed to protect work would amount to infringement. The proposed law now seeks to allow the circumvention of such

measures in limited circumstances. These include for purposes of scientific research, private use, criticism or review, or the reporting of current events.

DIGITAL RIGHTS MANAGEMENT

In order to protect creatives, the Act broadens the scope to include information systems which means any system for generating, sending, receiving, storing, displaying or otherwise processing data and includes internet.

In consideration of the ease of infringing on works in the age of digital communications, the Board proposes to expand the scope of the infringing works to not only manufacturing of a copy but the making of an infringing copy of any work.

LIVE PERFORMANCES

A performance means the representation of a work by such action as dancing, playing, reciting, singing, declaiming or projecting to listeners by any means whatsoever.

The transmission of a work or live performance through wire or wireless means to the public, including making available of a work or a live performance to the public in such a way that members of the public may access the work or live performance from a place and at such a time individually chosen by them is now deemed to be the making of an infringing copy of a work.

This law is timely and suitable for the current digital environment. It is in line with KECOBO's mandate to organise the legislation on copyright and related rights and propose other arrangements in order to ensure proper administration of copyright and related rights in Kenya.

Part of this article was adopted from the Kenya Copyright Board ([KECOBO](#)) and edited [Muthurwa.com](#) staff.

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