

## **CLIENT ALERT: COPYRIGHT AMENDMENT ACT, 2019.**

The Copyright Amendment Bill first published by the Kenya Copyright Board (KECOBO) in 2017 was assented into Law by the President on 19th September, 2019 as the Copyright (Amendment) Act, 2019. The amendments introduce a variety of changes to the Copyright Act No. 12 of 2001 (the Act) bringing it in harmony both with international law and technological advances. Administrative changes to KECOBO have also been effected such as reorganization of the KECOBO and the establishment of the Copyright Tribunal. Some of these substantive substantial changes to the Act include:

### **Scope of Copyright Protection**

Section 22 of the Act has been expanded in scope to include copyright related work and specifically, dramatic works. The scope of musical works has been expanded to include graphical notation and works composed for musical accompaniment.

### **Register of Copyright Works**

Section 22 A, the Board shall keep and maintain a Register of all works.

### **Fair Dealing**

The nature of copyright and the provisions of fair dealing limiting these exclusive rights have been clarified under Section 26 of the Act as well as the Second Schedule. The notable changes clarifying the scope of fair dealing in Kenya are:

A. General exceptions subject to acknowledgement of the Author(s):

- (i) Acts of parody, pastiche or caricature,
- (ii) Right to quote;

B. .As relates educational institutions where:

- (i) Inclusion in a collection of literary or musical works of not more than one page from the work in question;
- (ii) Reprographic reproduction for teaching activities which do not serve a direct or indirect commercial gain where such reproduction is an isolated one and of repeated it is on separate unrelated occasions and there is no collective license available;
- (iii) Sufficient acknowledgement of the source of the work;

Where there exists a licensed Collective Management Organization for reprographic rights a reprographic license shall be obtained for any use over and above the limits set but the schedule;

C. For library and archivers, the making of not more than one copy by or under the direction of the person in charge of a public library for the use of the library or archivers for purposes of preservation and archiving where such book is not available in Kenya.

**Computer programs** have also been subjected to the general exceptions of fair dealing as outlined in the Part A of the Second Schedule in additions to the specific exceptions relating to computer programs.

## **Visually Impaired and Persons with Disabilities**

In line with the principle of inclusivity, under the newly introduced Section 26C of the Act, adaptation of copyright work to specialized format for the exclusive use of the visually impaired or other persons with disabilities does not amount to infringement of copyright. Such adaptation must be within the provisions of the Act and any Regulations thereunder.

## **Artist Resale Right**

Section 26D introduces the concept of artist resale right under the Kenyan copyright regime. This right is absolutely inalienable and shall not be waived and remains valid as long as the copyright in the work subsist. Commercial resale is defined as subsequent re-transfer of ownership in artwork from one person to another for monetary consideration with the involvement of an art market professional. The resale royalty is payable at the rate of five (5%) of the net sale price on the commercial resale of an artwork that meets the conditions set out at section 26D (6). The seller, the art market professional, the seller's agent and the buyer are jointly and severally liable to pay the resale royalty.

It must be noted that manuscripts of a literary, dramatic, or musical work are exempt from resale royalty on commercial resale.

## **Blank Media Levy**

The Act has amended sections 28 and 29 by a new proviso under section 30B. It operationalizes the Blank Tape Levy provisions currently not being collected as required.

## **Internet Service Providers**

The 2019 amendments introduce provisions at Sections 35A to 35D on Internet Service Providers (ISPs). The provisions cover a wide area including the obligations and liabilities of ISPs, a Take Down Regime as well as related offences.

Section 35A (1) makes provisions for a safe harbor for ISPs exempting them from infringement liability and liability for damages for being mere hosts, conduits, making available infringing material and automatic, intermediate or transient storage of infringing contents.

Section 35B introduces a takedown regime upon request by a person whose rights are infringed by access offered by the ISPs. The ISPs are required to notify the person responsible for making available the alleged infringing content of the takedown notice as soon as is practicable. The takedown notice should be complied with within Forty-Eight (48) business hours of receipt of the request. An ISP is not liable for a wrongful takedown in response to a valid takedown notice.

Section 35C although not imposing an obligation to monitor the material transmitted, stored or linked or to actively seek facts or circumstances indicative of infringing activity, ISPs are required to:

- (i) Provide information to investigating agencies regarding the identity of subscribers suspected of engaging in infringement on the orders of the Court upon application by the copyright owner whose rights have been subject of a takedown notice; and
- (ii) Designate an agent or electronic or other address for receiving such notices under its terms and conditions of service.

Section 35D allows for the grant of an Injunction by the High Court of Kenya where one has reasonable belief that their copyright is being or may be infringed by a person in or outside Kenya.

## **Criminal Offences Under Copyright**

Section 38 of the Copyright Act, 2001 is amended to include secondary infringement of copyright within the scope of criminal offences under the Act. The following are now criminal offences under the Act;

- (i) Causing to be re-broadcast or transmitted a work which copyright subsist;
- (ii) Causing to be distributed program carrying signals to be distributed by a distributor for whom they were not intended;
- (iii) Circumventing technological protection measures or distributing devices to circumvent technological protection; and
- (iv) Removing or altering rights management information or importing, distributing, or making available to the public a copy of work from which the electronic management information has been removed or altered.

Further, the fines upon conviction of primary infringement offences are based on the market value of the legitimate work. For secondary infringement, upon conviction, one is liable for a fine not exceeding One Million Shillings and/or imprisonment for a term not exceeding five years.

Where the copyright offences are committed by corporate bodies criminal liability falls on the persons in charge of or responsible to the body corporate for the conduct of its business affairs.

## **Conduct of Prosecution**

In line with the Constitution of Kenya, 2010 the power and mandate to prosecute offences under the Act is vested on the Director of Public Prosecution as opposed to the Attorney-General.

### Reforming the Collective Management Organizations (CMOs)

Along with the change of name from Collecting Society to CMOs, the amendments have introduced new compliance requirements by CMOs by KECOBO. For instance, the qualifications and tenure of the CMOs Directors, Chairperson and executive officer are outlined under Section 46B of the Copyright Act, 2001. The Directors of the CMOs are required to keep a record all meetings and resolutions. CMOs are now required to submit to KECOBO and publish the information on royalties. Further, the CMO's Executive Director may authorize inspection of the CMO's books of accounts and records and such inspection may be done upon the petition of the members as provided under Section 46E (6).

KECOBO, upon such inspection, and the result is that the CMO conducts its business in a manner contrary to the provisions of the Act, may make orders or other directions to remedy the same. Such orders may include; removal or suspension of any officer or employee of the CMO, requiring the CMO to reconstitute its Board of Directors, demand a plan to resolve all deficiencies or revocation of the license among other orders and directions.

### The Copyright Tribunal

The Copyright Act 2001 provided for a competent authority. This Authority has been replaced by the Copyright Tribunal established under Section 48 of the Act. The Tribunal has jurisdiction over copyright registration disputes, disputes relating to licensing of CMOs by KECOBO and disputes relating to the issuance of licenses by CMOs.

For feedback or any questions in relation to this alert, kindly contact our Intellectual Property Division on the below contacts:-



#### **Simba & Simba Advocates**

*6<sup>th</sup> Floor, Finance House, Loita Street*

*P. O. Box 10312-00100*

*Nairobi, Kenya*

*T: +254 20 2219401/ 2221933/ 2241927*

*+254 751603166/ 746622396*

*[www.simba-advocates.com](http://www.simba-advocates.com)*



#### **Perpetua N. Mwangi**

*Partner and Head of IP Division*

*T: + 254 727457743*

*E: [perpetua@simba-advocates.com](mailto:perpetua@simba-advocates.com)*