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THE COPYRIGHT (AMENDMENT) ACT**No. 20 of 2019***Date of Assent: 18th September, 2019**Date of Commencement: 2nd October, 2019***AN ACT of Parliament to amend the Copyright Act, 2001****ENACTED** by the Parliament of Kenya, as follows—

1. This Act may be cited as the Copyright (Amendment) Act, 2019.

Short title.

2. Section 2 of the Copyright Act, 2001, in this Act referred to as the “principal Act” is amended in subsection (1)—

Amendment of section 2 of No. 12 of 2001.

- (a) in the definition of “author” by—
 - (i) inserting the word “dramatic” immediately after the word “musical” appearing in paragraph (a);
 - (ii) deleting the word “film” appearing in paragraph (d) and substituting therefor the word “work”;
 - (iii) deleting the word “working” appearing in paragraph (h) and substituting therefor the word “making”;
- (b) in the definition of “broadcast”, by deleting the word “broadcast” and substituting therefor the word “broadcasting”;
- (c) in the definition of “copy”, by inserting the word “audio” immediately before the words “or visual”;
- (d) in the definition of “copyright”, by inserting the words “related rights” immediately after the word “copyright”;
- (e) by deleting the definition of “folklore”;
- (f) in the definition of “infringing copy”—
 - (i) by deleting the word “manufacture” appearing in paragraph (a) and substituting therefor the word “making”;

(ii) by inserting the following new paragraph immediately after paragraph (a)—

(aa) the transmission of a work or live performance which constitutes an infringement of any rights protected by this Act through wire or wireless means to the public, including the 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;

(iii) by deleting paragraph (b) and substituting therefor the following new paragraph—

(b) where imported, a copy the making of which would have constituted an infringement of such rights if made in Kenya by the importer;

(g) by deleting the definition of “musical work” and substituting therefor the following new definition—

“musical work” means a work consisting of music, irrespective of musical quality, and includes a graphical notation of such work and works composed for musical accompaniment;

(j) by deleting the definition of “school” and substituting therefor the following new definition—

“school” means an institution registered or accredited under the Universities Act, 2012, the Basic Education Act, 2013 or the Technical and Vocational Education and Training Act, 2013”;

No. 42 of 2012.
No. 14 of 2013.

No. 29 of 2013.

(k) by deleting the definition of “work” and substituting therefor the following new definition—

“work” means literary, musical, artistic, dramatic work, audio visual work and sound

recordings and includes translations, adaptations, new versions, or arrangements of pre-existing works, and anthologies or collections of works which, by reason of the selection and arrangement of their content, present an original character:

Provided that the visually impaired persons work shall be limited to literary and artistic works whether published or made available in any media;

- (l) by deleting the definition of “technical measure” and substituting therefor the following new definition—

“technological protection measure” means any device, product or component incorporated into a work that effectively prevents or inhibits the infringement of any copyright or related right”;

- (m) by inserting the following new definitions in their proper alphabetical sequence—

“accessible format copy” means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including permitting the person to have access as feasibly and comfortably as a person without visual impairment or other print disability;

“art market professional” includes an auctioneer, owner or operator of a gallery, museum, an art dealer or any other person involved in the business of dealing in artworks;

“artwork” means an original work of visual art created by an artist or artists, or produced under their authority;

“authorized entity” means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis and includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations;

“beneficiary person” means a person who —

- (a) is blind;

- (b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or
- (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, regardless of any other disabilities;

“buyer” means a person to whom ownership is transferred in an artwork under commercial resale;

“commercial resale” means the subsequent re-transfer of ownership in artwork from one person to another for monetary consideration with the involvement of an art market professional;

“collective management organisation” means 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;

“Copyright Tribunal” means the tribunal established under section 48 of the Act;

“exclusive licence” means a licence in writing signed by or on behalf of an owner or prospective owner of copyright or related rights, authorizing the licensee to the exclusion of all other persons, including the person granting the licence, to exercise a right which by virtue of this Act would apart from the licence be exercisable exclusively by the owner of copyright or related rights;

“information system” means a system for generating, sending, receiving, storing, displaying or otherwise processing data and includes internet;

“information system services” includes the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data between or among points

specified by a user and the processing and storage of data, at the individual request of the recipient of the service;

“Internet Service Provider” means a person providing information system services or access software that provides or enables computer access by multiple users to a computer server including connections for, the transmission or routing of data;

“owner of the copyright” means the first owner, an assignee or an exclusive licensee, as the case may be, of the relevant portion of the copyright;

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

“performer” means an actor, singer, declaimer, musician or other person who performs a literary, musical work or a work of folklore and includes the conductor of the performance of any such work;

“public display” means the showing of original or a copy of a work—

- (a) directly;
- (b) by means of a film, slide, television image or otherwise on screen;
- (c) by means of any other device or process;
- (d) in the case of an audio-visual work, showing of individual images consequentially at a place or places where persons outside the normal circle of a family and its closest social acquaintances are or can be present irrespective of whether they are or can be present at the same place and time or at different places or times, where the work can be displayed without communication to the public;

“publication” means a work or a sound recording, tangible copies of which have been made available to the public in a reasonable quantity for sale, rental, public lending or for other transfer of the ownership or the possession of the copies:

Provided that, in the case of a work, the making available to the public took place with the consent of the author or other owner of copyright, and in the case of a

sound recording, with the consent of the producer of the sound recording or his successor in title;

“public performance” means—

- (a) in the case of work other than an audio-visual work, the recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process;
- (b) in case of an audio-visual work, the showing of images in sequence and the making of accompanying sound audible; and
- (c) in the case of a sound recording, making the recorded sounds audible at a place or at places where persons outside the normal circle of the family and its closest acquaintances are or can be present, irrespective of whether they are or can be present at the same place and time, or at different places or times, and where the performance can be perceived without the need for communication to the public;

“record” means any device in which sounds or the representations of sounds are embodied which are capable of reproduction therefrom with or without the aid of another instrument;

“related rights” mean rights neighboring on copyright, including those subsisting under sections 27(2), 28, 29 and 30 of this Act;

“resale royalty right” means the right of an artist or group of artists or successors to receive resale royalty on commercial resale of an artwork;

“seller” means a person who transfers ownership of the artwork under commercial resale; and

“specialized formats” means Braille, audio, or digital text or any other media which is exclusively for use by visually impaired or other persons with disabilities, and with respect to print instructional materials, includes large print formats when such materials are distributed exclusively for use by visually impaired or other persons with disabilities.

(n) by deleting the definition of “competent authority”.

3. Section 5 of the principal Act is amended—

Amendment of section 5 of No. 12 of 2001.

- (a) in paragraph (c), by inserting the word “regional” immediately after the word “national”;
- (b) in paragraph (g), by inserting the words “and enforce” immediately after the word “administer”.

4. Section 6(1) of the principal Act is amended—

Amendment of section 6 of No. 12 of 2001.

- (a) in paragraph (k) by deleting the words “Permanent Secretary” and substituting therefor the words “Principal Secretary”;
- (b) in paragraph (m) by deleting the words “Commissioner of Police” and substituting therefor the words “Inspector-General of Police”;
- (c) in paragraph (n) by deleting the words “Permanent Secretary” and substituting therefor the words “Principal Secretary”; and
- (d) in paragraph (o) by deleting the words “Permanent Secretary” and substituting therefor the words “Principal Secretary”.

5. Section 11 of the principal Act is amended—

Amendment of section 11 of No. 12 of 2001.

- (a) by deleting subsection (1) and substituting therefor the following new subsection—

(1) There shall be an Executive Director of the Board who shall be appointed by the Board through a competitive process and whose terms and conditions of service shall be determined by the Board in the instrument of appointment or otherwise in writing from time to time.

- (b) by deleting subsection (2) and substituting therefor the following new subsection —

(2) A person shall qualify for appointment under this section if he or she—

- (a) is an advocate of the High Court of Kenya of not less than five years’ standing or has held judicial office in Kenya;

- (b) has at least five years managerial experience; and
 - (c) has at least five years' experience in matters relating to copyright and other related rights.
- (c) by inserting the following new subsection immediately after subsection (3) —
- (4) The Executive Director shall be appointed for a term of four years and shall be eligible for reappointment for one further term of four years.

6. Section 19 of the principal Act is amended—

- (a) in subsection (2) by deleting the words “Auditor General (Corporations) or to an auditor appointed under this section” appearing immediately after the words “submit to the” and substituting therefor the words “Auditor-General”;
 - (b) by deleting subsection (3) and substituting therefor the following new subsection—
- (3) The accounts of the Board shall be audited and reported in accordance with the provisions of the Public Audit Act.

Amendment of section 19 of No. 12 of 2001.

No. 34 of 2015.

7. Part III of the principal Act is amended in the heading by deleting the word “other”.

Amendment of Part III of No. 12 of 2001.

8. The principal Act is amended by repealing Section 21 and substituting therefor the following new section—

Repeal and replacement of section 21 of No. 12 of 2001.

Appeals.

21. A person aggrieved by the decision of the Board under this Act may, within sixty days from the date of the decision, appeal to the Copyright Tribunal.

(2) The Board shall provide written comments on any matter over which an appeal has been submitted to the Copyright Tribunal under this section upon request from the Copyright Tribunal.

(3) The Copyright Tribunal shall issue a decision on the appeal within thirty days from the date of an appeal.

9. Section 22 of the principal Act is amended in subsection (1) by—

Amendment of section 22 of No. 12 of 2001.

- (a) inserting the words “or related rights” immediately after the word “copyright”;
- (b) inserting the following new paragraph immediately after paragraph (c)—
 - (ca) dramatic works

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

Insertion of new section 22A in No. 12 of 2001.

Register of copyright works.

22A. (1) The Board shall keep and maintain a register of all works under this Act in such manner as may be prescribed.

(2) Without prejudice to the relevant provisions of this Act conferring Copyright, all works eligible for copyright may be entered on the Register on application in the prescribed format made by or on behalf of the author, owner, assignee or exclusive licensee of the work.

(3) The Register shall be *prima facie* evidence of particulars entered therein and documents, extracts or copies made there from if certified by the Board shall be admissible in evidence without further proof or production of the original.

(4) The register and the relevant details entered on application shall be available for search to the public on terms set by the Board.

11. Section 23 of the principal Act is amended—

Amendment of section 23 of No. 12 of 2001.

- (a) in subsection (2) by inserting the word “dramatic” immediately after the word “musical”;
- (b) in subsection (3) by inserting the word “dramatic” immediately after the word “musical”.

12. Section 24(1)(a) of the principal Act is amended by inserting the word “dramatic” immediately after the word “musical”.

Amendment of section 24 of No. 12 of 2001.

13. Section 25(2) of the principal Act is amended by inserting the word “dramatic” immediately after the word “musical”.

Amendment of section 25 of No. 12 of 2001.

14. The principal Act is amended by repealing section 26 and substituting therefor the following new section—

Repeal and replacement of section 26 of No. 12 of 2001.

Nature of copyright in literary, musical or artistic and audio-visual works.

26. (1) Copyright in a literary, musical, artistic or audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts—

- (a) the reproduction in any material form of the original work;
- (b) the translation or adaptation of the work;
- (c) the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement;
- (d) the communication to the public of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original;
- (e) the making available of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original; and
- (f) the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original.

(2) Copyright in a work of architecture shall also include the exclusive right to control the erection of any building which reproduces the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original; but the copyright in any such work shall not

include the right to control the reconstruction of a building to which that copyright relates in the same style as the original.

(3) The exclusive rights under this section shall be limited to the extent as provided for under the Second Schedule.

15. The principal Act is amended by inserting the following new sections immediately after section 26—

Insertion of new sections 26A, 26B, 26C and 26D in No. 12 of 2001.

Computer programmes.

26A. (1) A computer program shall be subject of fair dealing for the purposes of Part A of the Second Schedule.

(2) Notwithstanding the provisions of subsection (1), a person who is in lawful possession of a computer program may do any of the following acts without the authorization of the right holder whereby copies are necessary for the use of the computer program in accordance with its intended purpose—

- (a) to make copies of the program to the extent necessary to correct errors;
- (b) to make a back-up copy;
- (c) for the purpose of testing a program to determine its suitability for the person's use; or
- (d) for any purpose that is not prohibited under any license or agreement whereby the person is permitted to use the program.

(3) The authorization of the right holder of the program shall not be required to decompile the program, convert the program into a version expressed in different programming language, code, notation for the purpose of obtaining information needed

to enable the program to operate with other programs.

(4) Any copies made pursuant to this section shall be used only for the purpose for which it was made and shall be destroyed when the person's possession of the computer program ceases to be lawful.

Technological
protection measures.

26B. Circumvention of technological protection measures shall be permitted in limited circumstances as set out in the Second Schedule to this Act.

Visually impaired,
and persons with
other disabilities.

26C. (1) Notwithstanding the provisions of section 26, 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, lend or share accessible format copies by a beneficiary person or authorized entities or persons acting on behalf of a beneficiary person, including the circumvention of any technological protection measures that may be in place, subject to the terms and conditions set out under Regulations.

(2) Copies or sound recordings to which this section applies shall—

- (a) not be reproduced or distributed in a format other than a specialized format exclusively for use by visually impaired or other persons with disabilities;
- (b) bear a notice that any further reproduction or distribution in a

format other than a specialized format is an infringement; and

- (c) include a copyright notice identifying the copyright owner and the date of the original publication.

Artist resale right.

26D. (1) Artist resale right shall be valid as long as copyright continues to subsist in an original work of art.

(2) The artist resale right is absolutely inalienable and shall not be waived under any circumstances.

(3) Visual artists may form a collective management organization to manage the right under this section and in the absence of a registered collective management organization, the Attorney-General shall designate any registered collective management organization.

(4) The resale royalty shall be payable at the rate of five percent of the net sale price on the commercial resale of an artwork and the seller, the art market professional, the seller's agent and the buyer shall be jointly and severally liable to pay the resale royalty.

(5) If a mark or name purporting to identify a person as an artist of an artwork appears on the artwork, it shall be presumed in the absence of any other mark or evidence, that the person is the artist.

(6) There shall be no resale royalty payable on commercial resale of an artwork—

- (a) if the sale price is less than twenty thousand shillings;
- (b) if it concerns the resale of a building, or a drawing, plan or model of a building;
- (c) if it is an auction for charitable purposes;

- (d) if the works of fine art produced are of identical copies, or
- (e) if it concerns a manuscript of a literary, dramatic or musical work.

16. Section 27 of the principal Act is amended—

Amendment of section 27 of No. 12 of 2001.

- (a) in subsection (1) by inserting the word “dramatic” immediately after the word “musical”;
- (b) in subsection (2) by deleting the words “competent authority” appearing immediately after the words “determined by the” and substituting therefor the words “Copyright Tribunal”.

17. Section 28 of the principal Act is amended—

Amendment of section 28 of No. 12 of 2001.

- (a) in subsection (1) by inserting the following new paragraph immediately after paragraph (b)—
 - (ba) the making available of the sound recording in whole or in part either in its original form or in any form recognizably derived from the original.
- (b) by deleting subsection (3) and substituting therefor the following new subsection—
 - (3) The rights of an owner of a copyright in a sound recording are not infringed by the making of a single copy of the recording for the personal and private use of the person making the copy; and in respect of such use the owner of copyright in the sound recording shall have the right to receive fair compensation consisting of a royalty levied on audio recording equipment or audio blank tape suitable for recording and other media intended for recording, payable at the point of first manufacture or entry in Kenya by the manufacturer or importer for commercial purposes of such equipment or media.
- (c) by deleting subsection (4); and
- (d) by deleting subsection (5).

18. The principal Act is amended by repealing section 29 and substituting therefor the following section—

Repeal and replacement of section 29 of No. 12 of 2001.

Nature of copyright in broadcasts.

29. Copyright in a broadcast shall be the exclusive right to control the doing in Kenya of any of the following copyright acts—

- (a) the fixation of the whole or a substantial part of the broadcast;
- (b) the rebroadcasting of the whole or a substantial part of the broadcast;
- (c) the communication to the public of the whole or a substantial part of a television broadcast either in its original form or in any form recognizably derived from the original;
- (d) retransmission of the broadcast over any network;
- (e) decrypting in any way or form any encrypted broadcast; or
- (f) any adaptation or modification by way of commentaries, or any unauthorised expropriation of the broadcast or pre-broadcast signal meant for reception by another broadcaster;

Provided that—

- (i) the provisions of the Second Schedule in respect of general exceptions and limits and paragraph 1(c) with regard to education institutions shall apply *mutatis mutandis* to the copyright in a broadcast; and
- (ii) the copyright in a television broadcast shall include the right to control the taking of still photographs therefrom.

19. Section 30 of the principal Act is amended—

Amendment of
section 30 of No.
12 of 2001.

(a) by deleting subsection (6) and substituting therefor the following new subsection—

(6) The rights of an owner of a copyright in a fixation of their performance are not infringed by the making of a single copy of the performance for the personal and private use of the person making the copy and in respect of such use the owner of a related right in the performance shall have the right to receive fair compensation consisting of a royalty levied on audiovisual recording equipment or audio-visual blank media suitable for recording and other media intended for recording, payable at the point of first manufacture or entry in Kenya by the manufacturer or importer for commercial purposes of such equipment or media.

(b) by deleting subsection (7); and

(c) by deleting subsection (8).

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

Insertion of new
section 30B of
No. 12 of 2001.

Collection and
payment of royalty.

30B. (1) Subject to the provisions of sections 28 and 30 of this Act, 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.

(2) All claims for compensation under this section shall be made through the collective management organizations representative of performers and producers of sound recordings.

(3) The level of the royalty payable shall be agreed between the collective management organization representative of performers and producers of sound recordings and the organization representative of manufacturers and importers of audio recording equipment, audio blank tape and media intended for

recording or failing such agreement by the Board.

(4) The Board shall determine and, by notice in the *Gazette*, publish the share of the private copying remuneration applicable to the respective rights holders.

21. Section 33 of the principal Act is amended—

Amendment of section 33 of No. 12 of 2001.

- (a) in subsection (2), by inserting the word “license” immediately after the word “assignment”;
- (b) in subsection (3), by deleting the words “and the written assignment of copyright shall be accompanied by a letter of verification from the Board in the event of an assignment of copyright works from outside Kenya”; and
- (c) by inserting the following subsection immediately after subsection (3) —

(3A) An assignment under subsection (3) shall not be valid unless it is lodged at the Board and a certificate of recordal issued to the applicant and entry made in the Assignment Register.

- (d) in subsection (7), by deleting the word “assignment” wherever it appears and substituting therefor the word “license”.

22. Section 33A of the principal Act is amended—

Amendment of section 33A of No. 12 of 2001.

- (a) in subsection (1), by deleting the words “competent authority” and substituting therefor the word “Board”; and
- (b) in subsection (2) by deleting the words “competent authority” appearing immediately after the words “conditions as the” and substituting therefor the word “Board”;
- (c) by deleting subsection (3) and substituting therefor the following new subsection—

(3) Where two or more persons make an application in respect of the same work, the license shall be granted to the applicant who in the opinion of the Board would best serve

the interests of the general public upon proof of refusal of license and subject to the terms set by the Board in its regulations.

23. Section 35 of the principal Act is amended—

Amendment of section 35 of No. 12 of 2001.

(a) by deleting subsection (1) and substituting therefor the following new subsection—

(1) Copyright or related rights shall be infringed by a person who, without the license of the owner of the copyright or related rights—

- (a) does, or causes to be done, an act the doing of which is controlled by the copyright or related rights; or
- (b) imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy.

(b) by inserting the following new subsection immediately after subsection (2)—

(2A) The rights of a producer of sound recordings shall be infringed by a person who without the consent of the producer—

- (a) does or causes to be done, any act specified in section 28(1); or
- (b) imports or causes to be imported, otherwise than for his private use, an article which he knows would have been made contrary to section 28(1) had it been made in Kenya by the importer.
- (c) in subsection (3) by deleting the word “technical” wherever it appears and substituting therefor the words “technological protection”;
- (d) in subsection (9) by inserting the word “dramatic” immediately after the word “literary”;
- (e) in subsection (11) by inserting the word “dramatic” immediately after the word “musical.”

24. The principal Act is amended by inserting the following new section immediately after section 35—

Insertion of new sections 35A, 35B and 35C in No. 12 of 2001.

Protection of Internet
Service Provider.

35A. (1) An Internet Service Provider shall not be liable—

- (a) for infringement for providing access to or transmitting content, routing or storage of content in ordinary course of business as long as it—
 - (i) does not initiate transmission;
 - (ii) does not select the addressee;
 - (iii) performs the functions in an automatic, technical manner without selection of the material;
 - (iv) does not modify the material contained in the transmission;
 - (v) does not in any way promote the content or material being transmitted:

Provided that the acts of transmission, routing, and of the provision of access referred to in subsection (1) shall include automatic, intermediate and transient storage of the content.

- (b) for infringement for the automatic, intermediate and temporary storage of that content, where the purpose of storing such content is to make onward transmission of the data more efficient to other recipients of the service upon their request as long as the Internet Service Provider—
 - (i) does not modify the material;
 - (ii) complies with conditions on access to the material;
 - (iii) complies with rules regarding updating the cache in conformity with generally accepted standards within the service sector;

- (iv) does not interfere with the lawful use of technology to obtain information on the use of the material;
 - (v) removes or disables access once it receives a takedown notice as provided in section 35B(1) or where the original material has been deleted or access disabled on orders of a competent court or otherwise on obtaining knowledge of unlawful nature of the cached material.
- (c) for damages arising from material stored at the request of the recipient of the services, as long as it—
- (i) does not have actual knowledge that the content or activity related to the material is infringing the rights of a third party;
 - (ii) is not aware of the facts or circumstances of the allegedly infringing activity unless the infringing nature of the material is apparent;
 - (iii) upon the receipt of a takedown notice acts to remove or to disable access to the allegedly infringing content in the manner provided under section 35A (5) within forty eight business hours:

Provided that the exemption shall not apply if the recipient of the service is acting under the authority or control of the Internet Service Provider.

- (d) for damages incurred by a person if the service provider refers or links users to a webpage containing

infringing material or facilitates infringing activity, by using information location tools including a directory, index, reference, pointer or hyperlink where the Internet Service Provider—

- (i) does not have actual knowledge that the material is infringing the rights of that person;
- (ii) is not aware of the facts or circumstances from which the allegedly infringing activity or infringing nature of the material is not apparent;
- (iii) removes or disables access to, the reference or link to the content or the infringing activity after being informed that the content or the activity infringes rights of a person.

Takedown notice.

35B. (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 recognised 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.

Role of Internet
Service Provider.

35C. (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.

Application for injunction.

35D. (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.

25. Section 36 of the principal Act is amended by inserting the following new subsection immediately after subsection (8)—

Amendment of section 37 of No. 12 of 2001.

(9) The Court upon conviction of a person under this section shall order for the destruction of the material seized.

26. Section 37(1) of the principal Act is amended by deleting the words “competent authority” wherever they appear and substituting therefor the words “Copyright Tribunal”.

Amendment of section 37 of No. 12 of 2001.

27. Section 38 of the principal Act is amended—

Amendment of section 38 of No. 12 of 2001.

(a) by deleting subsection (1) and substituting therefor the following new subsection—

(1) A person who, at a time when copyright or the right of a performer or producer subsists in a work, knowingly—

- (a) makes for sale or hire an infringing copy;
- (b) sells or lets for hire or, by way of trade, exposes or offers for sale an infringing copy;
- (c) distributes infringing copies;
- (d) possesses otherwise than for his private and domestic use, an infringing copy;
- (e) imports into Kenya otherwise than for his or her private and domestic use an infringing copy;
- (f) makes or has in his or her possession a contrivance used or intended to be used for the purpose of making an infringing copy;
- (g) causes a broadcast to be rebroadcast or transmitted in a diffusion service, knowing that copyright subsists in the broadcast and that such rebroadcast or transmission

constitutes an infringement of the copyright;

- (h) causes a program carrying signals to be distributed by a distributor for whom they were not intended, knowing that copyright subsists in the signals and that such distribution constitutes an infringement of the copyright;
- (i) circumvents a technological protection measure or manufactures or distributes devices designed for circumventing technological protection measures; or
- (j) removes or alters rights management information or imports or distributes, or makes available to the public a copy of a work from which electronic rights management information has been removed or altered,

commits an offence.

- (b) in subsection (2) by deleting the words “unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright would or might be infringed.”
- (c) by deleting subsection (4) and substituting therefor the following new subsection—

(4) A person convicted of an offence under subsection (1) (a), (b), (c), (d) or (e) shall be liable to—

- (a) in the case of a first conviction, a fine of five times the market value of the legitimate work or one thousand shillings for each infringing copy whichever is higher or to imprisonment for a term not exceeding ten years, or to both; and
- (b) in any other case to a fine of ten times the market value of the legitimate work or two thousand shillings for each infringing copy, whichever is

higher or imprisonment for a term not exceeding twenty years, or to both

- (d) by deleting subsection (5) and substituting therefor the following new subsection—

(5) A person convicted of an offence under subsection (1) (f), (g), (h), (i) or (j) shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years or to both.

- (e) by deleting subsection (6);

- (f) by deleting the words “Any person guilty” appearing in subsection (7) and substituting therefor the words “A person convicted”

- (g) by inserting the following new subsection immediately after subsection (10) —

(11) Any complaint alleging a breach of this section may be lodged by a licensed collective management organization where such rights are managed collectively.

28. The principal Act is amended by inserting the following new section immediately after section 38—

Insertion of new section 38A in No. 12 of 2001.

Offence by body corporate.

38A. (1) Where a body corporate is convicted of an offence under this Act, every person who at the time the offence was committed was in charge of or was responsible to the body corporate for the conduct of its business and affairs is also deemed to have committed the offence and shall be liable to prosecution.

(2) Where it is proven that a body corporate committed an offence under this Act with the consent, connivance or willful lack of due diligence by a person in charge of or responsible to the body corporate for the conduct of its business and affairs, the person shall be guilty of the offence.

(3) For the purposes of this section—

- (a) “body corporate” includes a firm or other association of persons; and

- (b) “director” in relation to a firm includes the partner in the firm.

29. Section 43(1) of the principal Act is amended by deleting the words “Attorney-General” and substituting therefor the words “Director of Public Prosecutions”.

Amendment of section 43 of No. 12 of 2001.

30. Section 46 of the principal Act is amended—

Amendment of section 46 of No. 12 of 2001.

- (a) in subsection (1) by deleting the words “collecting society” and substituting therefor the words “collective management organisation”;
- (b) in subsection (2) by deleting the words “collecting societies” and substituting therefor the words “collective management organisations”;
- (c) in subsection (3) by deleting the words “collecting society” and substituting therefor the words “collective management organisation”;
- (d) by inserting the following new subsection immediately after subsection (3)—

(3A) Where the collective management organization has not submitted a complete application or where administrative shortfalls are apparent, the Board may issue a provisional license for a period not exceeding six months and such provisional license shall be counted as part of the complete license if the license is subsequently issued.

- (e) in subsection (4), by deleting the words “collecting society” and substituting therefor the words “collective management organisation”;
- (f) in subsection (5), by deleting the words “collecting society” wherever they appear and substituting therefor the words “collective management organisation”;
- (g) in subsection (6), by deleting the words “collecting society” and substituting therefor the words “collective management organisation”;
- (h) by deleting subsection (7);
- (i) by deleting subsection (8);

(j) in subsection (9) by—

- (i) inserting the words “and two daily newspapers of national circulation” immediately after the word “*Gazette*”;
- (ii) deleting the words “collecting society” wherever they appear and substituting therefor the words “collective management organisation”.

(k) by inserting the following new subsections immediately after subsection (9)—

(10) Before deregistering a collective management organization, the Board shall notify the organization in writing and invite it and any of its members to make written representations against deregistration within twenty one days from the date of the notice.

(11) If, after consideration of any written representations made in terms of subsection (10), the Board is of the opinion that the failure in question on the part of the organisation is materially prejudicing or has materially prejudiced its members, the Board may withdraw the registration thereof or otherwise sanction members of the Board of Directors or Management of the organization as set out under this Act.

(12) Any person who purports to collect royalties from users as provided for under this section without authority of the Board commits an offence and shall be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment to a term not exceeding four years, or both.

31. The principal Act is amended by inserting the following new sections immediately after section 46A—

Qualification and tenure of Directors and Chairpersons of collective management organizations.

46B. (1) (1) A member of a collective management organization shall be eligible for election as a director if he holds a post-secondary qualification recognized in Kenya.

Insertion of new sections 46B, 46C, 46D, 46F, 46E, 46F and 46G in No. 12 of 2001.

(2) A director elected under this section shall serve for a term of three years and shall be eligible for re-election for one further term.

(3) A director elected as a chairperson of a collective management organization shall hold office for a term of three years and shall be eligible for re-election for one further term.

(4) A chief executive officer of a collective management organization shall hold office for a term of four years and shall be eligible for reappointment for one further term upon satisfactory performance as evaluated by the directors.

Role and types of collective management organizations.

46C. (1) 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.

(2) Any new collective management organization to deal with rights not provided for under subsection (1) may be approved by the Kenya Copyright Board as may be necessary.

(3) The designated extent of operation shall be set by Regulations made under this Act.

Submission and publication of information royalties.

46D. (1) A collective management organization shall submit to the Board information on its total collection and distribution of royalties annually.

(2) The Board shall, by notice in the Gazette, publish information submitted under subsection (1).

Inspection and control of collective management organisations.

46E. (1) The Executive Director may authorize a person, in writing, to inspect the books of accounts and records of a collective management organization.

(2) When an inspection is made under subsection (1), the collective management organisation concerned and every officer and employee thereof shall produce and make available to the person making the inspection all the books, accounts, records and other documents of the organization as the person making the inspection may require and within seven days or such longer times as he may direct in writing.

(3) A person who wilfully fails to produce any books, accounts, records document, correspondence, statements, returns or other information within the period specified in the direction under subsection (2) commits an offence under the provisions of this Act and shall on conviction be liable to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding three months or to both.

(4) The person authorized to inspect a collective management organization shall report to the Board on—

- (a) any breach or non-observance of the requirements of this Act or regulations;
- (b) any irregularity in the manner of conduct of the business of the organization;
- (c) any apparent mismanagement or lack of management skills in the organization; or
- (d) any other matter warranting remedial action or a forensic audit.

(5) The Executive Director of the Kenya Copyright Board shall, by notice in writing, and after giving the collective management organization reasonable opportunity of being heard, require the

inspected organization to comply by such date or within such period as may be specified therein, with such directions as he considers necessary in connection with any matter arising out of a report made under this section.

(6) The powers conferred by subsection (1) may be exercised in the following circumstances—

- (a) where a petition for inspection has been made by not less than forty five percent of the membership specifying breach of instruments establishing the entity, the regulations or the Act;
- (b) failure by a collective management organization to account for monies to at least twenty percent of its members;
- (c) failure by a collective management organization to offer an account of the exploitation of the copyright works assigned or licensed to it;
- (d) where a collective management organization has acted beyond its powers in administering the rights to which it is assigned or licensed;
- (e) where a collective management organization has altered its memorandum or other internal rules to exclude a section of its members in participating in its affairs or as to alter its core business;
- (f) where a collective management organization has persistently failed to adhere to its set administrative budget without a reasonable cause; or
- (g) where a collective management organisation has failed to comply

with a request for information or records from its members or the Board.

Directions and orders
of the Board.

46F. (1) Where the Kenya Copyright Board determines through the results of an audit or inspection report that a collective management organization conducts its business in a manner contrary to the provisions of this Act or of any regulations or any other Act or in any manner detrimental to or not in the best interests of its members, the Board may—

- (a) recommend the suspension or removal of any officer or employee of the organization who, in the opinion of the Board, has contributed or caused the contravention of any law.
- (b) issue directions regarding measures to be taken to improve the management of the organization or to secure or improve compliance with the requirements of this Act, any regulations or any other written law or regulations;
- (c) require the organization to reconstitute its board of directors;
- (d) demand for a plan to resolve all deficiencies to the satisfaction of the Board;
- (e) appoint a person as the chairperson who is suitably qualified and competent in the opinion of the Board to advise and assist the organization in developing and implementing a corrective action plan and the person appointed shall regularly report to the Board on the progress of the implementation plan;

- (f) issue an order placing the organization under statutory management;
- (g) order for the revocation of the collection license;
- (h) order for the convening of a special general meeting by the organization;
- (i) order the organization to take such other action that the Board may deem necessary to rectify the deficiency, or issue such administrative directives as it may deem necessary.

Record keeping and attendance of meetings by Board representatives.

46G. (1) The directors of a collective management organization shall cause minutes of all resolutions and proceedings of their meetings to be entered and updated in books kept for that purpose.

(2) The Board may, through a designated representative, attend and advise a meeting of the directors of a collective management organization where matters affecting members' interests are proposed for discussion.

32. Section 47 of the principal Act is amended by deleting the words "a collecting society" wherever it appears and substituting therefor the words "a collective management organisation".

Amendment of section 47 of No. 12 of 2001.

33. The principal Act is amended by repealing section 48 and substituting therefor the following new section—

Repeal and replacement of section 48 of No. 12 of 2001.

Appointment and duties of Copyright Tribunal.

48. (1) There shall be a Copyright Tribunal appointed by the Chief Justice for the purpose of exercising jurisdiction under this Act where any matter requires to be determined by such Tribunal.

(2) The Copyright Tribunal 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 Chief Justice where any matters requires to be determined by the Tribunal.

(3) No person shall be appointed under this section, nor shall any person so appointed act as a member of the Copyright Tribunal, if he, his partner, his employer body (whether statutory or not) of which he is a member has a pecuniary interest in any matter which requires to be determined by the Tribunal

(4) Subject to subsection (5), the Copyright Tribunal shall have jurisdiction to hear and determine—

- (a) a dispute over registration of copyright; and
- (b) an appeal against—
 - (i) the Board's refusal to grant a certificate of registration to a collective management organization;
 - (ii) imposition of unreasonable terms or conditions by the Board for the grant of a certificate of registration;
 - (iii) unreasonable refusal by a collective management organization to grant a licence in respect of a copyright work; or
 - (iv) imposition of unreasonable terms or conditions by a collective management organization for the grant of a licence in respect of a copyright work;

(5) Before determining a matter referred to it under this section, the Copyright Tribunal shall, in accordance with

such procedure as may be prescribed, give both parties an opportunity to present their respective cases, either in person or through representatives, both orally and in writing.

(6) The Copyright Tribunal may order the grant of a certificate of registration or the grant of a license in respect of a copyright work subject to the payment of the applicable fees.

34. The Principal Act is amended by repealing section 49 and substituting therefor the following new section—

Repeal and replacement of section 49 of No. 12 of 2001.

Regulations.

49. (1) The Cabinet Secretary may make regulations generally for the better carrying into effect of the provisions of this Act, including the extension of its application.

(2) Without prejudice to the generality of subsection (1) the regulations made under this section may—

(a) prescribe—

- (i) the audit of collective management organizations;
- (ii) the annual and special general meetings of collective management organizations;
- (iii) guidelines on the gender representation and participation of persons with disability and other marginalized groups on the boards of collective management organizations;
- (iv) the procedure of handling complaints made to the Board;
- (v) ratios of distributable income to administrative costs including deductions applicable to collective management organizations;

- (vi) the manner of approval of distribution rules;
 - (vii) the manner of approval of cash reserves;
 - (viii) the manner of approval of membership to a collective management organization;
 - (ix) a system for the identification of copyright works and monitoring of payment, collection and distribution of royalties; and
 - (x) anything required by this Act to be prescribed;
- (b) extend the application of this Act in respect of any or all of the works referred to in section 22 (1)—
- (i) to individuals or bodies corporate who are citizens of, domiciled or resident in or incorporated under the laws of Kenya or a country which is a party to a treaty to which Kenya is also a party and which provides for the protection of copyright and related rights in works to which the application of this Act extends;
 - (ii) to works, other than sound recordings, first published in Kenya or a country which is a party to a treaty to which Kenya is also a party and which provides for the protection of copyright and related rights in works to which the application of this Act extends; or
 - (iii) to sound recordings made or published in Kenya or a

country which is a party to a treaty to which Kenya is also a party and which provides for the protection of copyright and related rights in works to which the application of this Act extends; and

- (c) restrict the right to control the translation or the reproduction of a work up to the extent permitted by any Copyright Convention for the time being in force in Kenya:

Provided that the work belongs to or is first published or first made in or first made available to the public by individuals or bodies corporate who are citizens of, domiciled or resident in or incorporated under laws of a country which is a party to a treaty, convention or international agreement which Kenya is a party to and which provides for the protection of copyright and related rights as Kenya.

(3) For the purposes of Article 94 (6) of the Constitution—

- (a) the purpose and objective of delegation under this section is to enable the Cabinet Secretary to make regulations to provide for the better carrying into effect of the provisions of this Act and to enable the Board to discharge its functions more effectively;
- (b) the authority of the Cabinet Secretary to make regulations under this Act will be limited to bringing into effect the provisions of this Act and to fulfil the objectives specified under this section;
- (c) the principles and standards applicable to the regulations

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made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act, 2013.

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No. 23 of 2013

35. The principal Act is amended by inserting the following new Schedule immediately after the First Schedule—

Insertion of the
Second Schedule
in No. 12 of 2001.

SECOND SCHEDULE s. 26(3)**A. General exceptions and limitations**

1. The exclusive rights under section 26 shall not include the right to control—

- (a) the doing of any of those acts by way of fair dealing for the purposes of scientific research, private use, criticism or review, or the reporting of current events;
- (b) the doing of any of the aforementioned acts by way of parody, pastiche or caricature;
- (c) right to quote;
- (d) any use made of a work for the purpose of a judicial proceeding or of any report of any such proceeding;
- (e) the reproduction and distribution of copies or the inclusion in an audiovisual work or broadcast, of an artistic work situated in a place where it can be viewed by the public;
- (f) the incidental inclusion of a copyright work in an artistic work, sound recording, audio visual work or broadcast;
- (g) the reading or recitation in public or in a broadcast by one person of any reasonable extract from a published literary work if accompanied by a sufficient acknowledgement of the author.

2. The above exceptions and limitations shall be subject to acknowledgement of the author(s).

B. Educational Institutions

1. The exclusive rights under section 26 shall not include the right to control—

- (a) the inclusion in a collection of literary or musical works of not more than one page from the work in question if the collection is designed for use in a school or any university established by or under any written law and includes an acknowledgement of the title and authorship of the work;
- (b) the reprographic reproduction, for teaching in education institutions the activities of which do not serve direct or indirect commercial gain, of published articles, other short works or short extracts of works, to the extent justified by the purpose, provided that the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions, and there is no collective licence available, offered by a collective management organisation of which the educational institution should be aware, under which such reproduction can be made;

- (c) the source of the work reproduced is sufficiently acknowledged;
- (d) the broadcasting of a work if the broadcast is intended to be used for purposes of systematic instructional activities;
- (e) the reproduction of a broadcast referred to in the preceding paragraph and the use of that reproduction in a school or any university established by or under any written law for the systematic instructional activities of any such school or university.

2. Notwithstanding the above provisions, where there exists a licensed collective management organisation for reprographic rights, a reprographic license shall be obtained for any use over and above the limits set out herein and the tariff shall be agreed with users and published from time to time in accordance with section 46A.

C. Libraries and Archives

1. The exclusive rights under section 26 shall not include the right to control—

- (a) the reproduction of a work by or under the direction or control of the Government, or by such public libraries or archives, non-commercial documentation and scientific institutions as may be prescribed, where the reproduction is in the public interest and no revenue is derived there from;
- (b) the making of not more than one copy of a book (including a pamphlet, sheet music, map chart or plan) by or under the direction of—
 - (i) the person in charge of a public library for the use of the library; or
 - (ii) the archives for purposes of archiving and preservation,

where such book is not available in Kenya.

D. Broadcasting

The exclusive rights under section 26 shall not include the right to control—

- (a) the reproduction of a work by or under the direction or control of a broadcasting station where the reproduction or copies thereof are intended exclusively for broadcast by that broadcasting authority authorized by the copyright owner of the work and are destroyed before the end of the period of six calendar months immediately following the making of the reproduction or such longer period as may be agreed between the broadcasting authority and the owner of the relevant part of the copyright in the work:

Provided that any reproduction of a work made under this paragraph may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcasting authority, but, subject to the provisions of this Act, shall not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work;

- (b) the broadcasting of a literary, musical or artistic work or audio-visual works already lawfully made accessible to the public with which no licensing body referred to under section 46 is concerned:

Provided that subject to the provisions of this paragraph, the owner of the broadcasting right in the work receives fair compensation determined, in the absence of agreement, by the Copyright Tribunal.