



ARTICLE 19

# Kenya: Copyright (Amendment) Bill 2017

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September 2018

Legal analysis

## Executive summary

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In this legal analysis, ARTICLE 19 reviews the Copyright (Amendment) Bill, 2017, to amend the Copyright Act, 2001, for its compliance with international freedom of expression standards. The 2017 Bill was proposed largely in order to address copyright infringement online, which the 2001 Act did not cover; in particular, it introduced new procedures for copyright owners to address infringements on the Internet.

ARTICLE 19 notes that some aspects of the 2017 Bill are positive and consistent with relevant standards under international law and Kenya's Constitution. For instance, the Bill's Second Schedule reiterates 'fair use' protections for content utilised for scientific research, criticism or review, reporting, parody, education, and public artistic works. It also emphasises that Internet intermediaries have no obligation to monitor material transmitted on their services or actively seek out infringing content. We observe that if Internet intermediaries are expected to become copyright police on their own platforms, it would have a significant chilling effect on expression as intermediaries will tend to err on the side of censoring any content that could potentially be infringing. Finally, the 2017 Bill protects the privacy interests of users by requiring an order from a court before intermediaries are required to provide details about their users to investigators.

However, ARTICLE 19 is greatly concerned that the notice-and-takedown procedures introduced in the 2017 Bill are unnecessary and fall short of international standards on freedom of expression. The Copyright Act of 2001 already creates a procedure in Article 35(4) to petition a court and obtain relief in the form of damages and fair royalties following a court order. With respect to the notice-and-takedown procedures, we see the 2017 Bill as problematic for the following main reasons:

- **Lack of proportionality:** The 2017 Bill introduces criminal penalties on intermediaries for failure to take down content, which is a disproportionate response. While intermediaries face severe criminal sanctions for failing to take down content, they face no penalty at all for incorrectly taking down content, meaning that, in reality, intermediaries will err on the side of censoring content to protect themselves from liability. The result will be blocking of legitimate material, in clear breach of international freedom of expression standards.
- **Lack of clarity:** Key features of the notice-and-takedown procedure, particularly counter notice procedures, lack definition in the 2017 Bill. For instance, there is no clarity on what intermediaries are supposed to do in the event that an alleged infringer, subject to a takedown notice, files a counter notice. Intermediaries are instructed pursuant to Article 35B(4) that they "shall disable access" to the alleged infringing material "unless" they receive a counter notice. However, intermediaries still face liability for any damages for failure to take down a notice, so it is unclear how counter notices affect intermediary liability, if at all. Furthermore, there are no standards for how an intermediary adjudicates two competing notices and what rights, if any, both parties have after counter notices are filed.
- **Lack of due process:** The 2017 Bill makes no reference to the possibility for judicial review of takedown requests, or any opportunity for administrative appeals. Further, alleged infringers are provided very few, if any, meaningful due process rights. Article 35B(4) provides a mere 48 hours between the Internet Service Provider (ISP) receiving a takedown

notice and being required to takedown content. Notably, there is no requirement that the ISP notify the alleged infringer that a takedown notice has been received. The 48-hour window is already a very short period during which most content publishers would have extreme difficulty filing a counter notice or seeking legal advice to protect their rights. Together with the fact that no notification to content publishers is required, it is not clear how content publishers would even discover that a takedown notice has been issued before their content is removed.

- **Lack of transparency:** There is no requirement on part of the Kenya Copyright Board or of intermediaries to maintain records of takedown requests or provide to the public any logs documenting instances of takedown requests or takedowns of content. This information is important not only for content publishers to be able to assert their rights, but also vital to the public's right to receive information as well as the right of individuals to express themselves.
- **Severe sanctions:** Penalties for filing false or malicious takedown notices or counter notices under the 2017 Bill can lead to severe fines and criminal sanctions; while we note that deterring false takedown notices is an important objective, criminal sanctions is a disproportionate means of pursuing it.

Finally, we note with concern that some provisions appear to impose liability on intermediaries for material on their platforms when the "infringing nature of the material is apparent."

### Summary of key recommendations

- Criminal penalties for non-commercial copyright infringement are never proportionate and should be eliminated in favour of civil remedies;
- The 2017 Bill should reference Kenya's obligations under regional and international human rights standards to safeguard freedom of expression;
- While deterring malicious takedown requests is a legitimate aim, imposing criminal penalties instead of civil remedies is a disproportionate response. The criminal penalty provisions for filing "false or malicious" takedown notices or counter notices should be stricken;
- The notice-and-takedown procedure should be eliminated and the existing court procedures for obtaining relief should be relied on. If, however, the notice-and-takedown provisions remain, the procedure should be amended to incorporate the minimum due process safeguards laid down in ARTICLE 19's *Right to Share Principles*;
- Article 35A(1)(c)(ii), which imposes liability on intermediaries for content on their platforms if the "infringing nature of the material is apparent," should be stricken entirely. We recommend that any "constructive knowledge" requirements such as these be eliminated.
- Article 21(a)(ii)(i) should be stricken. The provision criminalises the circumvention of technical protection measures or the manufacture of devices to circumvent technical protections, which threatens to prevent individuals from using copyrighted works in a way that should ordinarily be protected under fair use.

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# Introduction

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In this legal analysis, ARTICLE 19 reviews the Copyright (Amendment) Bill, 2017 of Kenya (the 2017 Bill), that amended the Copyright Act, 2001. The 2017 Bill was mainly proposed to address copyright infringement online, which the 2001 Act did not cover.<sup>1</sup> The analysis focuses on the compliance of the 2017 Bill with international human rights standards, as well as the standards provided in the Kenya Constitution.

Copyright regulations have significant implications for freedom of expression and the right to access and receive information. Internet access has increased exponentially in Kenya in recent years, which in turn, creates new challenges and raises the stakes for protecting intermediaries from liability.<sup>2</sup> Internet intermediaries, in particular, play a vital role as gatekeepers of the Internet and facilitators of the free exchange of information and ideas online. Because of their important role in realising freedom of expression today, it is vital that procedures and regulations that implicate them—such as through copyright—do not impose liability or create incentives for intermediaries to censor content.

Under the original Copyright Act of 2001 and the 2017 Bill, copyright holders in Kenya have two main remedies at their disposal where they believe their rights have been infringed by online content.

- First, copyright holders can file a suit against an alleged infringer in court under Article 35(4) of the 2001 Act. This suit can lead to relief normally available before the courts, including damages and injunctions.
- Second, and introduced in the 2017 Bill, copyright holders can file a takedown notice with Internet Service Providers (ISPs). This new procedure is analysed in detail below.

ARTICLE 19 is available to help in further clarification, assistance, or guidance as necessary. We also stand ready to support the stakeholders in Kenya to bring the copyright legislation to full compliance with international human rights standards.

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<sup>1</sup> Kenya Institute for Public Policy Research and Analysis, [Copyright Infringement and Piracy Threats to Creativity](#), 12 February 2018.

<sup>2</sup> Alice Munyua, Grace Githaiga and Victor Kapiyo, [Intermediary Liability in Kenya](#), research paper, commissioned by Association for Progressive Communication, October 2012.

# International human rights standards

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## The protection of freedom of expression under international law

The right to freedom of expression is protected by a number of international human rights instruments, in particular, Article 19 of the **Universal Declaration of Human Rights (UDHR)**<sup>3</sup> and Article 19 of the **International Covenant on Civil and Political Rights (ICCPR)**.<sup>4</sup> Of additional relevance to Kenya is the African Charter on Human and Peoples' Rights, which guarantees freedom of expression in Article 9.<sup>5</sup> Additional guarantees to freedom of expression are provided in the 2002 Declaration of Principles on Freedom of Expression in Africa (African Declaration).<sup>6</sup>

Additionally, **General Comment No 34**,<sup>7</sup> adopted by the UN Human Rights Committee (HR Committee) in September 2011, explicitly recognises that Article 19 of the ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and Internet-based modes of expression.<sup>8</sup> In other words, the protection of freedom of expression applies online in the same way that it applies offline. State parties to the ICCPR are also required to consider the extent to which developments in information technology, such as Internet and mobile-based electronic information dissemination systems, have dramatically changed communication practices around the world.<sup>9</sup> The legal framework regulating the mass media should take into account the differences between the print and broadcast media and the Internet, while also noting the ways in which media converge.<sup>10</sup>

Similarly, the four special mandates for the protection of freedom of expression have highlighted in their **Joint Declaration on Freedom of Expression and the Internet** of June 2011 that regulatory approaches in the telecommunications and broadcasting sectors cannot simply be transferred to the Internet.<sup>11</sup> In particular, they recommend the development of tailored approaches for responding to illegal content online, while pointing out that specific restrictions for material disseminated over the Internet are unnecessary. They also promote the use of self-regulation as an effective tool in redressing harmful speech.

## Limitations on the right to freedom of expression

While the right to freedom of expression is a fundamental right, it is not guaranteed in absolute terms. Restrictions on the right to freedom of expression must be strictly and narrowly tailored and may not put in jeopardy the right itself. The determination whether a restriction is narrowly tailored is often articulated as a three-part test. Restrictions must:

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<sup>3</sup> UN General Assembly Resolution 217A(III), adopted 10 December 1948.

<sup>4</sup> GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc.

<sup>5</sup> Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>6</sup> African Commission on Human and Peoples' Rights, ACHPR /Res.62(XXXII)02: Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002), 23 October 2002, Article II.

<sup>7</sup> [General Comment No 34](#), CCPR/C/GC/3, adopted on 12 September 2011.

<sup>8</sup> *Ibid*, para 12.

<sup>9</sup> *Ibid*, para.17.

<sup>10</sup> *Ibid*, para. 39.

<sup>11</sup> [Joint Declaration on Freedom of Expression and the Internet](#), June 2011.

- **Be prescribed by law:** this means that a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.<sup>12</sup> Ambiguous, vague or overly broad restrictions on freedom of expression are therefore impermissible;
- **Pursue a legitimate aim:** exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR as respect of the rights or reputations of others, protection of national security, public order, public health or morals. As such, it would be impermissible to prohibit expression or information solely on the basis that they cast a critical view of the government or the political social system espoused by the government;
- **Be necessary and proportionate.** Necessity requires that there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest. Proportionality requires that a restriction on expression is not overly-broad and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result.<sup>13</sup>

The same principles apply to electronic forms of communication or expression disseminated over the Internet.<sup>14</sup>

## The protection of intellectual property under international law

With the sole exception of Article 17(2) of the EU Charter of Fundamental Rights, intellectual property is protected only indirectly under international human rights law. In *Anheuser-Busch Inc. v. Portugal*,<sup>15</sup> for example, the European Court of Human Rights (European Court) recognised that intellectual property fell within the scope of Article 1 of Protocol No. 1 to the ECHR (protection of property).

At the same time, the value of a diverse array of ideas and information has been recognised under international law. For example, Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its application, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.<sup>16</sup>

In addition, intellectual works are extensively protected by a number of international treaties that are administered by the World Intellectual Property Office (WIPO), including the Berne Convention for the Protection of Literary and Artistic Works,<sup>17</sup> the Rome Convention for the

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<sup>12</sup> HR Committee, *L.J.M de Groot v. The Netherlands*, No. 578/1994, UN Doc. CCPR/C/54/D/578/1994 (1995).

<sup>13</sup> HR Committee, *Velichkin v. Belarus*, No. 1022/2001, UN Doc. CCPR/C/85/D/1022/2001 (2005).

<sup>14</sup> General Comment 34, *op.cit.*, para. 43.

<sup>15</sup> European Court, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, 11 January 2007.

<sup>16</sup> The Committee on Economic, Social and Cultural Rights has published General Comment nos. 17 and 21 in respect of Article 15 ICESCR. The [Committee's General Comments](#) provide authoritative guidance on the meaning of Article 15. See also Article 27 of the Universal Declaration on Human Rights which is drafted in very similar terms to Article 15 ICESCR.

<sup>17</sup> Berne convention for the protection of literary and artistic works, of September 9, 1886, completed at Paris on



Protection of Performers, Producers of Phonograms and Broadcasting Organisations<sup>18</sup> and the WIPO Copyright Treaty.<sup>19</sup>

## Online content regulation

The principles on freedom of expression in online environment (see above) have been endorsed and further explained by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on FOE) in two reports in 2011 as well as a 2016 report.<sup>20</sup>

In the September 2011 report, the Special Rapporteur also clarified the scope of legitimate restrictions on different types of expression online.<sup>21</sup> He also identified three different types of expression for the purposes of online regulation:

- Expression that constitutes an offence under international law and can be prosecuted criminally;
- Expression that is not criminally punishable but may justify a restriction and a civil suit; and
- Expression that does not give rise to criminal or civil sanctions, but still raises concerns in terms of tolerance, civility and respect for others.<sup>22</sup>

In particular, the Special Rapporteur on FOE clarified that the only exceptional types of expression that States are required to prohibit under international law are:

- child pornography;
- direct and public incitement to commit genocide;
- hate speech; and
- incitement to terrorism.

The Special Rapporteur on FOE further made clear that even legislation criminalising these types of expression must be sufficiently precise, and there must be adequate and effective safeguards against abuse or misuse, including oversight and review by an independent and impartial tribunal or regulatory body.<sup>23</sup> In other words, these laws must also comply with the three-part test outlined above. For example, legislation prohibiting the dissemination of child pornography over the Internet through the use of blocking and filtering technologies is not immune from those requirements.

In his 2016 report on freedom of expression in the private sector, the Special Rapporteur on FOE reiterated the need in the communication technology context for any demands, requests,

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May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967.

<sup>18</sup> A full list of the treaties and other international agreements administered by the WIPO is available at <http://www.wipo.int/treaties/en/>.

<sup>19</sup> *Ibid.*

<sup>20</sup> Reports of the UN Special Rapporteur on Freedom of Expression, A/17/27, 17 May 2011 and A/66/290, 10 August 2011.

<sup>21</sup> *Ibid.*, para. 18.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, para. 22.



or similar measures related to the take down of content or accessing customer information to satisfy the three-part test under ICCPR Article 19(3).<sup>24</sup> He emphasised that states should set out to transparently implement regulations and policies. He also observed that service shutdowns are a “particularly pernicious means of enforcing content regulations.”<sup>25</sup>

### **Intermediary liability and content removal under international standards**

International bodies have also commented on the compliance with international standards on freedom of expression of ‘notice-and take-down’ procedures, which have been adopted in a number of countries for web hosting services to remove allegedly unlawful material.<sup>26</sup>

For example, a recent OSCE report on Freedom of Expression on the Internet highlights that:<sup>27</sup>

Liability provisions for service providers are not always clear and complex notice and takedown provisions exist for content removal from the Internet within a number of participating States.

Also, the UN Special Rapporteur on freedom of expression noted:<sup>28</sup>

42. [W]hile a notice-and-takedown system is one way to prevent intermediaries from actively engaging in or encouraging unlawful behaviour on their services, it is subject to abuse by both State and private actors. Users who are notified by the service provider that their content has been flagged as unlawful often have little recourse or few resources to challenge the takedown. Moreover, given that intermediaries may still be held financially or in some cases criminally liable if they do not remove content upon receipt of notification by users regarding unlawful content, they are inclined to err on the side of safety by overcensoring potentially illegal content. Lack of transparency in the intermediaries’ decision-making process also often obscures discriminatory practices or political pressure affecting the companies’ decisions. Furthermore, intermediaries, as private entities, are not best placed to make the determination of whether a particular content is illegal, which requires careful balancing of competing interests and consideration of defences.

Accordingly, the four special rapporteurs on freedom of expression recommended in their 2011 Joint Declaration on Freedom of Expression and the Internet that:

- i. No one should be liable for content produced by others when providing technical services, such as providing access, searching for, or transmission or caching of information;
- ii. Liability should only be incurred if the intermediary has specifically intervened in the content, which is published online;
- iii. ISPs and other intermediaries should only be required to take down content following a court order, contrary to the practice of notice and takedown.<sup>29</sup>

Similarly, the UN Special Rapporteur on freedom of expression has stated that:

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<sup>24</sup> Report of the UN Special Rapporteur on Freedom of Expression, A/HRC/32/38, 11 May 2016, para. 85.

<sup>25</sup> *Ibid*, para. 48.

<sup>26</sup> See e.g. the E-commerce Directive in the EU and the Digital Copyright Millennium Act 1998 in the USA.

<sup>27</sup> OSCE report, [Freedom of Expression and the Internet](#), July 2011, p. 30.

<sup>28</sup> See UN Special Rapporteur on Freedom of Expression report, *op.cit.*, para. 42.

<sup>29</sup> See UN Special Rapporteur on Freedom of Expression report, *op. cit.*

Censorship measures should never be delegated to a private entity, and that no one should be held liable for content on the Internet of which they are not the author. Indeed, no State should use or force intermediaries to undertake censorship on its behalf.<sup>30</sup>

He has further recommended that in order to avoid infringing the right to freedom of expression and the right to privacy, intermediaries should:<sup>31</sup>

[O]nly implement restrictions to these rights after judicial intervention; be transparent to the user involved about measures taken, and where applicable to the wider public; provide, if possible, forewarning to users before the implementation of restrictive measures; and minimize the impact of restrictions strictly to the content involved.

Finally, the Special Rapporteur has emphasised the need for effective remedies for affected users, including the possibility of appeal through the procedures provided by the intermediary and by a competent judicial authority.<sup>32</sup>

Based on these international standards and comparative best practices, ARTICLE 19's Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age (Right to Share Principles) recommend the following:

10.3 Intermediaries should not be required to monitor their services to prevent copyright infringement.

10.4 Laws governing the liability of intermediaries in respect of infringing content must contain due process safeguards sufficient to protect freedom of expression and the right to privacy. In principle, intermediaries should only be required to remove infringing content if the measure is provided by law and ordered by a court, tribunal or other independent adjudicatory body in accordance with the rule of law.

10.5 Intermediary liability provisions, known as 'notice-and-takedown', which give an incentive to hosting services to remove content without proper notice or evidence of actual infringement, have a chilling effect on freedom of expression. Insofar as such provisions are already in place, they should be interpreted in a way that is maximally compatible with the requirements of the right to freedom of expression, including:

- a) Only copyright owners or their authorised representatives should be allowed to file notices of alleged infringement;
- b) Copyright in the allegedly infringing content must be established;
- c) The notice of complaint must be specific, including details of each act of infringement, location of the infringing material and date and time of the alleged infringement;
- d) The alleged infringer should be informed of the copyright notice;
- e) A right of counter-notice should be provided and clearly explained;
- f) Effective remedies should be available to challenge improper takedowns, including through clearly accessible internal appeals mechanisms and/or through the courts;
- g) Abusive or negligent copyright notices should be penalised and compensation paid to the injured party.

10.7 Because unjustified content removals affect the public's right to receive information as well as the right of individuals to express themselves, takedown requests and decisions

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<sup>30</sup> *Ibid.*, para. 43.

<sup>31</sup> *Ibid.*, para. 47.

<sup>32</sup> *Ibid.*

should be transparently documented and available to challenge by both the content publisher and members of the public.

10.8 Consideration should be given to adopting rules, such as notice-and-notice, which only require intermediaries to pass on complaints about copyright infringement to the alleged infringing party without taking down the material at issue upon notice.<sup>33</sup>

## Right to information

The scope of Article 19 of the ICCPR encompasses freedom of information (the right of access to information). This has been widely recognised, including by the HR Committee in the General Comment 34 and by special mandates on freedom of expression.<sup>34</sup> For example, the 2004 Joint Declaration of special mandates stated:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.<sup>35</sup>

The 2006 Joint Declaration also highlighted that exceptions to the principle of maximum disclosure of information should be subject to the “harm” and “public interest” tests as follows:

- Public bodies, whether national or international, hold information not for themselves but on behalf of the public and they should, subject only to limited exceptions, provide access to that information;
- International public bodies and inter-governmental organisations should adopt binding policies recognising the public’s right to access the information they hold. Such policies should provide for the proactive disclosure of key information, as well as the right to receive information upon request;
- Exceptions to the right of access should be set out clearly in these policies and access should be granted unless (a) disclosure would cause serious harm to a protected interest and (b) this harm outweighs the public interest in accessing the information;
- Individuals should have the right to submit a complaint to an independent body alleging a failure properly to apply an information disclosure policy, and that body should have the power to consider such complaints and to provide redress where warranted.<sup>36</sup>

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<sup>33</sup> ARTICLE 19, [The Right to Share Principles: Principles on Freedom of Expression and Copyright in the Digital Age](#), 2013.

<sup>34</sup> See the [2006 Joint Declaration](#) of UN Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 20 December 2006; and the [2004 Joint Declaration](#) of the UN Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004.

<sup>35</sup> *Ibid.*, the 2004 Joint Declaration.

<sup>36</sup> The 2006 Joint Declaration, *op.cit.*

The content of the right to freedom of information has been elaborated in greater detail in The Public's Right to Know: Principles on Freedom of Information Legislation in 1999<sup>37</sup>, as well as in numerous reports of the Special Rapporteur on FOE.<sup>38</sup>

## **The Constitution of Kenya**

Article 33 of the 2010 Constitution of Kenya guarantees freedom of expression, including the freedom to seek, receive or impart information or ideas. Some exceptions to the right to freedom of expression exist, including propaganda for war, incitement to violence, hate speech, and advocacy of hatred on grounds of ethnic incitement. Furthermore, Article 31 of Kenya's Constitution protects the right to privacy, and Article 35 protects the right of access information.

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<sup>37</sup> ARTICLE 19, [The Public's Right to Know: Principles on Freedom of Information Legislation](#), 1999.

<sup>38</sup> See, e.g. A/HRC/14/23, paras. 30-39; A/HRC/7/14, paras. 21-31; E/CN.4/2005/64, paras. 36-44; E/CN.4/2004/62, paras 34-64; E/CN.4/2000/63, paras 42-44, Annex II: The Public's Right to Know: Principles on Freedom of Information Legislation.

# Analysis of the Copyright (Amendment) Bill 2017

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## General comments

Under the original Copyright Act of 2001 and the 2017 Bill, copyright holders have two main remedies at their disposal where they believe their rights have been infringed by online content.

- First, copyright holders can file a suit against an alleged infringer in court under Article 35(4) of the 2001 Act. This suit can lead to relief normally available before the courts, including damages and injunctions.
- Second, and introduced in the 2017 Bill, copyright holders can file a takedown notice with Internet Service Providers (ISPs). This procedure is analysed more in detail below.

ARTICLE 19 would like to make some general observations about the Bill prior to analysing the new notice-and-takedown procedure in detail.

First, we observe that the 2017 Bill has the following **positive features**:

- **Fair use provisions:** the Second Schedule to the 2017 Bill includes ‘fair use’ protections for content utilised in scientific research, criticism or review, news reporting, parody, quotes, education, and public artistic works. These protections are consistent with Principle 6 of the *Right to Share Principles*, and upholding them promotes freedom of expression. ARTICLE 19 would further suggest that these protections include the right to personal enjoyment of cultural goods, in accord with Principle 7 of the *Right to Share Principles*;
- **Privacy protections:** Article 35C(1)(a) only requires ISPs to provide identity information of users of their platforms to investigative agencies in response to “orders of the court.” In this way, the amendment preserves the privacy of potentially legitimate users of content on platforms;
- **No obligation for ISPs to monitor content:** Article 35C(2) stipulates that ISPs have no obligation to monitor the material transmitted on their services or “actively seek” infringing content. We note that this is consistent with Principle 10.3 of the *Right to Share Principles*. Imposing an active obligation to monitor materials necessarily encourages providers to censor their platforms in order to comply; and
- **Deterring malicious takedown requests.** Provisions in Article 35B penalise the filing of false or malicious takedown requests. ARTICLE 19 is concerned about the severity of these penalties and the fact that the Bill creates criminal sanctions for such conduct, which is addressed below. However, the objective of deterring abusive content takedown requests is consistent with the *Right to Share Principles*.

However, the 2017 Bill has a number of **serious problems** that raise concerns from a freedom of expression perspective:

- **Criminal penalties:** The 2017 Bill establishes criminal penalties for ISPs who do not takedown content in response to private requests, as well as criminal penalties for filing false notices or counter notices. As noted in the *Right to Share Principles*, criminal penalties for non-commercial copyright infringement are never proportionate and should be replaced with civil remedies;
- **No reference to international safeguards.** The 2017 Bill does not contain references to international safeguards for freedom of expression, nor to Kenya's obligations under regional or international human rights standards.

#### **Recommendations:**

- Criminal penalties for non-commercial copyright infringement are never proportionate and should be eliminated in favour of civil remedies;
- The Bill should reference Kenya's obligations under regional and international human rights standards to safeguard freedom of expression.

#### **Notice-and-takedown procedure**

Copyright holders who believe their rights have been infringed by online content can file a takedown notice with ISPs. The intermediary must "remove or disable access" to the infringing content after receiving a notice, unless it receives a counter-notice from the alleged infringer. Article 35B sets forth these procedures, and subsection (2) provides for the required form of the takedown notice, which must:

- be in writing and contain basic information about the complainant;
- describe in specific detail the copyright work subject to alleged infringement;
- attach an affidavit or declaration attesting to a claim of ownership, good faith, and any efforts to remove the content; and
- copy the Kenya Copyright Board.

The ISP is required to "disable access" to the alleged infringing material within forty-eight hours unless it receive a counter notice from the alleged infringer. There is no requirement in Article 35B for the ISP to notify the alleged infringer, or for the complainant to do so, so it is unclear how the alleged infringer receives notice in order to submit a counter notice.

Article 35A provides that an ISP will not be liable for losses or damages incurred by infringing content on its platform provided that the ISP does not "in any way promote the content or material being transmitted." However, an ISP *will* be liable for losses and damages if it fails to take down or disable access to alleged infringing content after receiving a takedown notice. In addition, failure to comply with a takedown notice exposes the ISP to criminal liability of up to 5 years imprisonment and/or a fine of 500,000 shillings. An ISP faces no liability for *wrongfully* taking down content in response to a validly submitted request.

Article 35B(7) provides that any person who "falsely or maliciously" submits a takedown notice or counter notice commits a criminal offence and is also subject to up to 5 years imprisonment and/or a fine of 500,000 shillings.

In its *Right to Share Principles*, ARTICLE 19 makes the following general observations about



notice-and-takedown provisions:

10.5 Intermediary liability provisions, known as ‘notice-and-takedown’, which give an incentive to hosting services to remove content without proper notice or evidence of actual infringement, have a chilling effect on freedom of expression. Insofar as such provisions are already in place, they should be interpreted in a way that is maximally compatible with the requirements of the right to freedom of expression, including:

- a) Only copyright owners or their authorised representatives should be allowed to file notices of alleged infringement;
- b) Copyright in the allegedly infringing content must be established;
- a. (c) The notice of complaint must be specific, including details of each act of infringement, location of the infringing material and date and time of the alleged infringement;
- c) The alleged infringer should be informed of the copyright notice;
- d) A right of counter-notice should be provided and clearly explained;
- e) Effective remedies should be available to challenge improper takedowns, including through clearly accessible internal appeals mechanisms and/or through the courts;
- f) Abusive or negligent copyright notices should be penalised and compensation paid to the injured party.

In this respect, ARTICLE 19 notes some features of the 2017 Bill’s notice-and-takedown procedure conform to these stipulations. Specifically, the notices must generally conform to elements (a) through (c) in that only a copyright owner can file a notice, the copyright in the allegedly infringing content must be established, and the grounds for complaint must be stated with particularity.

In ARTICLE 19’s view, this procedure fails to comply with international standards on freedom of expression for the following reasons:

- **Proportionality:** Criminal penalties on ISPs for failing to take down content are a disproportionate response. As described in Article 12.1 of the *Right to Share Principles*, criminal penalties for non-commercial copyright infringement “have a chilling effect on the free flow of information and ideas and as such are a disproportionate interference with the right to freedom of expression. They should be abolished in their entirety and replaced by civil remedies where appropriate.” Here, the fact that ISPs face severe criminal sanctions for failing to take down content, while facing no penalty at all for incorrectly taking down content, means that ISPs will err on the side of censoring content to protect themselves from liability. The result will be blocking of legitimate material, in clear breach of international standards.
- **Lack of clarity:** Key features of the notice-and-takedown procedure lack definition in the 2017 Bill. For instance, there is no clarity what ISPs are supposed to do in the event that an alleged infringer subject to a takedown notice files a counter notice. ISPs are instructed pursuant to Article 35B(4) that they “shall disable access” to the alleged infringing material “unless” they receive a counter notice. However, other provisions such as in the paragraph (5) that follows indicate that the ISP faces liability for any damages for failure to take down a notice, and there is no apparent exception from this liability based on a counter notice being lodged. There is also little clarity as to the procedure that is required for ISPs to follow in response to a counter notice.
- **Lack of due process safeguards:** The 2017 Bill makes no reference to the possibility for judicial review of takedown requests, nor to any opportunity for administrative appeals.



Further, alleged infringers are provided very few, if any, meaningful due process rights. Article 35B(4) provides a mere forty eight hours between the ISP receiving a takedown notice and being required to takedown content. Notably, there is no requirement that the ISP actually notify the alleged infringer that a takedown notice has been received. The 48-hour window is already a very short period during which most content publishers would have a very difficult time filing a counter notice or seeking legal advice to protect their rights. Together with the fact that no notification is required, it is not clear how content publishers would even discover that a takedown notice has been issued. This is particularly troubling for legitimate users who are targeted by requests in bad faith - those users would have no way of challenging the takedown notice before their legitimate content is censored. ARTICLE 19's *Right to Share Principles* clearly set out what we consider to be the minimum due process safeguards required in order for notice-and-takedown procedures to comply with international standards on freedom of expression.

- **Lack of transparency:** There is no requirement on part of the Board or of ISPs to maintain records of takedown requests or provide to the public any logs documenting instances of takedown requests or takedowns of content. This information is important not only for content publishers to be able to assert their rights, but also vital to the public's right to receive information as well as the right of individuals to express themselves.

More generally, we question the necessity of a notice-and-takedown procedure given that copyright holders already have remedies under the 2001 Copyright Act, which provides in Article 35(4) an opportunity for relief and the ability to obtain damages and fair royalties following a court order.

#### **Recommendations:**

- Although deterring malicious takedown requests is a legitimate aim, imposing criminal penalties instead of civil remedies is a disproportionate response. Therefore, the criminal penalty provisions for filing "false or malicious" takedown notices or counter notices should be stricken.
- Notice-and-takedown procedures have a chilling effect on freedom of expression since intermediaries tend to err on the side of caution by over-censoring *any* potentially unlawful content. Hence, the notice-and-takedown procedure should be eliminated and instead, the existing court procedures should be relied on for obtaining relief.
- If the notice-and-takedown provisions remain, the procedure should be amended to incorporate the minimum due process safeguards laid down in ARTICLE 19's *Right to Share Principles*.

#### **Intermediary liability provisions**

As already discussed above, ARTICLE 19 is deeply concerned about the scope of provisions providing for criminal penalties for ISPs which do not adhere to takedown requests. Criminal sanctions are never a proportional response in this situation. We further observe that Article 35A(1)(c)(ii) provides protection from liability for damages for ISPs as a result of storing infringing content, so long as the ISP is "not aware of the facts or circumstances" of the allegedly infringing content, "unless the infringing nature of the material is apparent."

ARTICLE 19 is concerned about the breadth of a constructive knowledge requirement in the form of requiring ISPs, that merely serve as conduits for information, to ascertain whether alleged infringement is "apparent." This conflicts with Article 35C(2) of the Bill which

specifically frees ISPs from any obligation to monitor content. As written, the “apparent” language provides ISPs a strong incentive to actively monitor and filter information on their services in order to locate infringing material. In this way, “constructive knowledge” clauses are deeply inimical to freedom of expression and the free flow of information on the Internet.

**Recommendations:**

- Article 35A(1)(c)(ii), which imposes liability on intermediaries for content on their platforms if the “infringing nature of the material is apparent,” should be stricken entirely. Any “constructive knowledge” requirements, such as these, should be eliminated.

**Circumventing copyright protection**

Article 21(a)(ii)(i) amends into the Copyright Act of 2001 and its definition of infringement, anyone who “circumvents a technical protection measure or manufactures or distributes devices designed for circumventing technical protection measures commits an offence.” This creates an offense of up to ten years in prison for this conduct.

ARTICLE 19 is concerned that this provision may be used to prosecute individuals or companies producing, distributing, selling or otherwise circulating software used to break Digital Management Rights systems (DRM). DRM systems are a type of technology principally used by hardware manufacturers, publishers and copyright holders to control how digital content may be used after sale. DRM systems are controversial from a freedom of expression perspective, as the legitimacy of copyright holders exercising in perpetuity absolute control over the sharing of information is strongly contested. For example, DRM systems prevent individuals from engaging in trivial and non-commercial acts of copyright infringement such as transferring data between their own electronic devices; they can also prevent individuals from using copyrighted works in a way that is ordinarily protected by the defence of “fair use.” As noted in Principle 12.3 of the *Right to Share Principles*,

The criminalisation of circumvention of digital rights management software is an unjustified restriction on freedom of expression and should be abolished.<sup>39</sup>

**Recommendations:**

- Article 21(a)(ii)(i) should be stricken. The provision criminalises the circumvention of technical protection measures or the manufacture of devices to circumvent technical protections, which threatens to prevent individuals from using copyrighted works in a way that should be protected under fair use.

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<sup>39</sup> *Op.cit.*

## About ARTICLE 19

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ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at <https://www.article19.org/law-and-policy>.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at [legal@article19.org](mailto:legal@article19.org). For more information about the work of ARTICLE 19 in Kenya, please contact Henry Maina, Director of ARTICLE 19 Kenya and East Africa at [henry@article19.org](mailto:henry@article19.org).