ARTICLE 19 Eastern Africa

Memorandum

Public Consultation on the Intellectual Property Bill, 2020

To: The Task Force on the Merger

Kenya: The Intellectual Property Office of Kenya Bill, 2020
15 May 2020

Executive Summary

ARTICLE 19 Eastern Africa (or **ARTICLE 19 EA**) presents this memorandum in response to the Intellectual Property Bill, 2020 (or **IPOK Bill, 2020**) currently being drafted by the Task Force on the Merger before being presented to Parliament.

ARTICLE 19 EA has analysed the IPOK Bill, 2020 for its compliance with international, regional and constitutional freedom of expression (or **FOE**), access to information, media freedom and privacy standards. ARTICLE 19 EA notes that various provisions of IPOK Bill, 2020 are positive and are consistent with relevant standards. Despite this, ARTICLE 19 EA is concerned that challenges which were magnified by stakeholders in response to the Copyright (Amendment) Bill, 2017 continue to be replicated during subsequent drafting processes affecting intellectual property in Kenya.

The IPOK Bill, 2020 imposes chilling restrictions on FOE and re-introduces 'constructive knowledge' requirements for internet service providers (or **ISPs**) to monitor material, references and/or links where their infringing nature is 'apparent' - despite their status as conduits (i.e., *intermediary liability*) - whilst simultaneously upholding a general prohibition curtailing the same intermediaries from 'actively seeking facts or circumstances indicative of infringing activities within its services.' Further, the IPOK Bill, 2020 replicates unclear provisions on notice-and-takedown procedures and imposes disproportionate liability.

Recommendations

1. The IPOK Bill, 2020 should clearly reference Kenya's obligations under its constitution, regional and international human rights standards to safeguard freedom of expression, access to information, press freedom, privacy and data protection.

2. We recommend transferring the annual report responsibility to the Intellectual Property Office of Kenya (or **IP Office**) from the Cabinet Secretary. The IP Office, ISPs and other intermediaries should be required to transparently disclose all takedown requests, counter notices and acquiescence or rejection of the same.
3. We recommend the deletion of any "*constructive knowledge*" requirements (e.g., in clause 238, IPOK Bill, 2020) which impose intermediary liability on ISPs, and urge the Task Force to make explicit reference to 'actual' knowledge, which should be obtained by a court order.
4. We recommend the elimination of the notice-and-takedown procedure. Where these provisions remain, ARTICLE 19 EA recommends the implementation of safeguards set out in ARTICLE 19's *Right to Share Principles* and *Dilemma of Liability* policy. In particular, internet intermediaries should be given at least seventy-two (72) hours to forward a notice of infringement to an alleged offender. Equally, content providers should be given sufficient time to respond, e.g. fourteen (14) days. The IPOK Bill, 2020 should set out a clear procedure once a counter-notice is issued to ensure clarity in the law.
5. We recommend replacing criminal penalties with civil ones. Where these provisions remain, ARTICLE 19 EA recommends the significant reduction of, at the very least, prison sentences.

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MATRIX PRESENTATION

Clause	Provision	Proposal	Justification
Clause 4	*Guiding Principles*	We propose the insertion of a new provision, clause 4 (g)	The guiding principles should make explicit reference to the Bill of Rights under the Constitution of Kenya, 2010, the Access to Information Act (2016), the Data Protection Act (2019), and regional and international human rights safeguards and clearly magnify the importance of protecting the rights to freedom of expression, access to information, privacy and due process.
Clause 6	*National Intellectual Property Strategy*	We recommend the deletion of clause 6 (4)(a)	It is not clear why the Cabinet Secretary, rather than the IP Office, is tasked with generating the annual report. This lack of clarity is further affected by the bestowing of delegation powers to the CS. ARTICLE 19 EA notes that CS' are generally too busy to prepare reports and will likely delegate the report obligation to third (3rd) parties, which will constitute an unnecessary use of public funds. Given the inevitable engagement by the IP Office with intellectual property rights and issues, ARTICLE 19 Eastern Africa

			recommends the transfer of this reporting obligation to the IP Office, and the subsequent presentation of the report to Parliament and the public by the CS. Crucially, this report, and the IPOK Bill, 2020 must give effect to the right to access information in Kenya. This necessitates the imposition of a mandatory requirement on the IP Office, ISPs and other intermediaries to transparently disclose all takedown requests, counter notices and acquiescence or rejection of the same. The report should also contain clear information enabling the public to access updated records of takedown requests or provide to the public any logs documenting instances of takedown requests or takedowns of content.
Clause 21 (5)	*Decisions of the Office*	We propose the deletion of this provision	In the interests of justice and to ensure that the rule of law continues to be upheld in Kenya, applicants should not bear the burden of rectifying administrative failures by state organs to make determinations on applications.

			Secondly, this provision shifts the IP office's administrative mandate to applicants, whilst adding onerous and unnecessary time and financial costs. Thirdly, the IP Tribunal's mandate is restricted to dispute resolution and appeals, and it is not clear what *orders* an affected applicant will request the Tribunal to grant, following the IP office's failure to make any decision on a matter before it.
Clause 53	*Information Prejudicial to Defence of Kenya or safety of public*	We recommend amendments to this provision	ARTICLE 19 EA reiterates that the Access to Information Act (2016) takes precedence over other legislation. This provision should be amended to provide the Director General with powers to restrict or prohibit the publication of information, in line with the permissible restrictions under the Access to Information Act (2016) and Article 35, Constitution of Kenya (or **CoK, 2010**).
Clause 118	*Rights conferred by registration of industrial designs, etc*	We recommend amendments to clause 118 (3)	Clause 118, IPOK 2020 read with clause 131, IPOK 2020 should strike a balance between an individual patent right and the right to information under Article 35, CoK, 2010.

			ARTICLE 19 EA encourages the Taskforce to ensure that the rights granted to a registered owner of an industrial design to '*institute court proceedings against any person...who performs acts which make it likely that infringement will likely occur*' do not (in)advertently criminalise the journalistic freedom to publish information.
Clause 183	*Security for costs*	We recommend the deletion of this provision	This provision is likely to affect indigent applicants and should be removed. ARTICLE 19 EA magnifies that provisions requiring applicants to give security for costs during proceedings limits access to justice for economically disadvantaged people.
Clause 238	*Protection of Internet Service Providers*	We recommend the deletion of clause 238 (a) (v), clause 238 (d) (ii) and clause 238 (e) (ii), IPOK Bill, 2020; Clause 238 (c) (a), IPOK Bill, 2020 should make explicit	This provision provides ISPs with protection from liability where they are unaware of 'facts and circumstances unless the infringing nature of the material is apparent.' Notably, this provision conflicts with the general prohibition on monitoring and the lack of a general obligation on ISPs to "actively seek facts or circumstances indicative of infringing activity within its services" under section 240 (2), IPOK Bill, 2020.

		reference to 'actual' knowledge.	ARTICLE 19 EA draws attention to the fact that this provision imposes an arbitrary 'constructive knowledge' requirement on ISPs, whose role as conduits prevents them from engaging keenly and deeply with material. ARTICLE 19 EA recommends the complete deletion of any similar 'constructive knowledge' requirements in the IPOK Bill, 2020. By contrast, explicit reference should be made to 'actual' knowledge in Clause 238 (c) (v).
Clause 53	*Information Prejudicial to Defence of Kenya or Safety of Public*	We recommend amendments to this provision	This provision should be amended in its entirety and adhere to the provisions in the Access to Information Act (2016), which takes precedence over other pieces of legislation.
Clause 239	*Takedown Notice*	We recommend the deletion of this provision. In our view, actual knowledge should be obtained by a court order. If our proposal is followed, references to takedown	The takedown notice procedure provided in section 239, IPOK Bill, 2020 does not adhere to regional and international standards on freedom of expression, affects other provisions in IPOK Bill, 2020 and will impose chilling restrictions on the right to free expression for the following reasons:

		notices should be removed in clause 238. If a notice-and-takedown approach is maintained, we recommend implementing the safeguards set out in ARTICLE 19's *Right to Share Principles* and *Dilemma of Liability* policy. In particular, internet intermediaries should be given at least seventy-two (72) hours to forward a notice of infringement. Equally, content providers should be given sufficient time to respond, e.g. fourteen (14) days. The IPOK Bill, 2020 should set out the procedure once a counter-notice is issued. Finally, criminal	1. **Removal and disabling of access - proportionality challenges** This provision constitutes one (1) ground mandating an ISP -, under sections 238 (c)(v) and d (iii) - to 'remove or disable access once it receives a takedown notice' and to 'remove or disable access to references/links about infringing content/activity.' Takedown notices encourage "intermediaries to err on the side of caution by over censoring any *potentially* unlawful content," including legitimate material or references/links. Secondly, the failure to take down notices encourages intermediaries to censor content without recourse to judicial review, and instead rely on counter notices. **2. Lack of due process safeguards:** Section 239, IPOK Bill, 2020 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. Section 239 (5), IPOK Bill, 2020 provides a mere forty-eight (48) hours between the ISP receiving a takedown notice and being required to takedown

		penalties should be replaced with civil ones. At the very least, prison sentences should be significantly reduced.	content. Additionally, the notification period for an alleged offender to file their counter-notice is not distinguished from the fixed forty-eight (48) hour period necessitating action from the ISP. Instructively, this period does not allow alleged offenders enough time to file a counter notice or seek legal advice to protect their rights. **3. Lack of clarity and disproportionate criminal sanctions:** The notice-and-takedown procedure, and counter-notice procedures, are not sufficiently defined in the IPOK Bill, 2020. This lack of clarity is exacerbated by various challenges: section 239 (5), IPOK Bill, 2020 denies alleged offenders an appropriate format to craft their counter-notice, given the assumption that counter-notices and takedown notices will be formatted in the same manner; 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. Despite this lack of clarity, section 239 (6), IPOK Bill, 2020 continues to expose intermediaries to full civil liability following

			'any loss or damages resulting from non-compliance to a takedown notice without a valid justification.' Further, the imposition of criminal liability on ISPs for failing to provide an alleged offender with a copy of the takedown notice under section 239 (7), IPOK Bill, 2020 places an unnecessary burden on ISPs, and impugns the right to FOE. ARTICLE 19 EA notes that the use of disproportionate responses in this section is exacerbated by the lack of a similar offense following an *erroneous* take-down in response to an *invalid* takedown notice. Additionally, ARTICLE 19 EA urges the deletion of criminal penalties for 'false or malicious' takedown or counter notices. Notably, civil remedies often amount to a sufficient and proportionate deterrent which pays homage to the right of FOE. Lastly, this section fails to provide intermediaries with adjudication options following its receipt of two (2) competing take down notices and what rights, if any, both parties have after counter notices are filed.

			Crucially, placing intermediaries in a position where taking down content is a more preferable option, will result in arbitrary and disproportionate restrictions being imposed on FOE in Kenya, with limited safeguards. Despite the foregoing, ARTICLE 19 EA encourages the Taskforce to incorporate the minimum due process safeguards laid down in ARTICLE 19's *Right to Share Principles*, where the notice-and-takedown procedure is maintained.
Clause 240	*Role of Internet Service Providers*	We recommend amendments to clause 240 (1)(a)	ARTICLE 19 EA notes that this provision is poorly worded, and shifts the burden of applying for a court order to the copyright owner, rather than the investigative agency. Crucially, any requests for subscribers' identities by an investigative agency must be accompanied by a court order, *sought by the person seeking this information*, in line with the provisions in the Data Protection Act (2019). Crucially, this provision should clearly specify that requests to the court for subscribers' personal information must set out the *specific information* required, the *objective* which they seek to attain with

			the information, and be necessary and proportionate to achieve the objective.
Clause 256	*Powers of Inspectors*	We recommend the deletion of this provision	Inspectors under IPOK Bill, 2020 possess excessively wide powers to infringe on a person's right to privacy, without sufficient judicial recourse. Instructively, inspectors possess powers of entry, seizure and arrest without a court warrant, in instances where obtaining a warrant *does not defeat* the object of entry or arrest. Additionally, sections 256 (5), IPOK Bill, 2020 does not abide by Kenya's Constitutional, regional and international human rights standards. Crucially, human rights are underpinned by the need to ensure that duty-bearers provide rights-holders with sufficient clarity about restrictions on their rights. These restrictions must be: provided by law, pursue a legitimate aim and be necessary and proportionate to that aim. Further, sections 256 (5), IPOK Bill, 2020 provides inspectors with excessively broad powers to '*investigate any offence related or connected to counterfeit or infringing notwithstanding that such an offence is not expressed as such under the provisions*' of IPOK Bill,

			2020. ARTICLE 19 EA firmly notes that this wide provision is not reasonable, cannot be practically implemented or contested, and exposes natural and legal persons to instances of unchecked abuse by rogue inspectors, which must be rejected and stricken from IPOK Bill, 2020.

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About ARTICLE 19 EASTERN AFRICA

ARTICLE 19 Eastern Africa is a regional human rights organisation duly registered in 2007 as a non-governmental organisation in Kenya. It operates in fourteen (14) Eastern Africa countries and is affiliated to ARTICLE 19, a thirty (30) year old leading international NGO that advocates for freedom of expression collaboratively with over ninety (90) partners worldwide. ARTICLE 19 Eastern Africa leads advocacy processes on the continent on behalf of, and with, our sister organisations ARTICLE 19 West Africa and ARTICLE 19 Middle East and North Africa.

Over the past 10 years, we have built a wealth of experience defending and promoting digital rights at the local, regional, and international levels. We have contributed to several Internet Freedom Policies, Data Protection, Cybercrime Bills and TV White Space Frameworks including Uganda's Data Protection and Privacy Act (2019), Uganda's Draft TV White Space Guidelines (2018), Kenya's Data Protection Bill(s) (2018/2019), the Kenya Cybercrime and Computer Related Crimes Bill 2014, the Tanzania Cybercrime Act, 2015, the Huduma Bill (2019), among many others. We were also part of the Inter-Agency Technical Committee of the Ministry of ICT that developed the Kenya Cybercrime Bill, 2016 and the Kenya Data Protection Bill, 2018.

If you would like to discuss this analysis further, please contact us at kenya@article19.org - with Mugambi Kiai (mugambikiai@article19.org) in copy - or +254 727 862 230.