



ARTICLE 19

ARTICLE 19 EASTERN AFRICA

MEMORANDUM ON THE COPYRIGHT (AMENDMENT) BILL 2021

TO:

**THE NATIONAL ASSEMBLY COMMITTEE ON COMMUNICATION,
INFORMATION AND INNOVATION**



ARTICLE 19 EASTERN AFRICA RESPONSE TO THE COPYRIGHT (AMENDMENT) BILL 2021

Introduction

ARTICLE 19 Eastern Africa (EA) welcomes the efforts of Parliament to engage in a multi-stakeholder process by holding this public comment consultation on the Copyright (Amendment) Bill 2021¹. ARTICLE 19 is committed to promoting the realisation of the right to freedom of expression and access to information in the digital age. Although we recognize the role of copyright in protecting artistic, literary works and other forms of expression we are concerned that copyright is being used to protect exclusive proprietary interest at the expense of wider public interest.

Therefore, this consultation is an important opportunity as the Bill seeks to repeal provisions on take down notices for internet service providers as well as set the rate for revenue sharing on ring back tunes. We appreciate the opportunity to provide the committee with our position and look forward to the discussion that will follow.

Summary and Recommendations

From our analysis, we welcome the efforts to eliminate the notice and Takedown procedure for Internet Service Providers for alleged copyright infringement. Since 2017, ARTICLE 19 EA has been concerned that the procedure as defined in the law imposes criminal and financial penalties on ISPs that encourage them to err on the side of caution and remove potentially infringing content even where such content is legitimate thus limiting free speech and access to information.

We are however concerned that the Amendment Bill also contains provisions that water down international standards on intermediary Immunity thus violating international standards of free speech and human rights.

We therefore recommend that:

1. Clause 5 of the Bill be amended to provide for notice to notice procedure in alternative to the Notice and Takedown Procedure. ARTICLE 19 EA has since 2017 expressed concern with the notice and takedown procedure under s35B as it imposes financial and criminal sanctions on ISPs for failing to take down content forcing ISPs to act cautiously and tend to takedown

¹ The Copyright (Amendment) Bill 2021 (December 2021)
< http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2021/TheCopyright_Amendment_Bill_2021.pdf >



potentially infringing content. Notice to notice procedure will ensure that ISPs only takedown content on orders of the Court or independent Body of tribunal.

2. Clause 6 of the Bill be deleted as it limits the gains made to safeguard the right to privacy and freedom of expression in the digital environment. This clause seeks to repeal S35C which provides for intermediary immunity and only allows ISPs to disclose information of subscribers who are allegedly infringing copyright to investigative agencies in compliance with a court order. ARTICLE 19 EA is concerned that to repeal this section would be akin to eliminating intermediary immunity it is highly likely that ISPS would actively monitor and police content to ensure it is not infringing speech which would lead to censorship.
3. Clause 7 of the Bill be deleted as it eliminates opportunity for a complainant to seek judicial remedies for copyright infringement and waters down international standards on intermediary liability. ARTICLE 19 believes that judicial authorities or an independent tribunal not private entities should make decisions on content. Section 35D affirms this position by stating that the High Court may issue an order to a web host or ISP to make infringing material inaccessible. This position complies with International standards on Intermediary Liability and International Human rights standards on free speech.



MATRIX REPRESENTATION
THE COPYRIGHT (AMENDMENT) BILL 2021

Clause	Provision	Proposal	Justification
5	<p>The principal Act is amended by repealing section 35B</p> <p>Section 35B -Take Down Notice</p>	<p>We recommend this clause be amended to allow for an alternative ‘notice to notice’ procedure where Internet Service Providers remove content pursuant to an order of the Court or other Independent Body.</p> <p>In the event that the notice takedown procedure is maintained, we recommend this procedure complies with ARTICLE 19’S principle on Filtering and blocking of Content Subject to Copyright².</p>	<p>1. Takedown procedure is open to abuse ARTICLE 19 EA is concerned that takedown procedures that impose financial or criminal liability on ISPs for failure to take down content, encourage ISPS to err on the side of caution and take down material even where it is legitimate and lawful. This imposes undue restrictions to freedom of expression and access to information and is open to abuse by both private and state actors.</p> <p>2. Private entities should not make decisions on Content In 2016, the Special Rapporteur on Freedom of Expression noted that Private intermediaries are ‘typically ill equipped to make determinations of content illegality as they lack the ability to interpret the law according to freedom of speech and international human rights standards’³. ARTICLE 19 EA also believes that decisions on content should as a matter of legal principle be made by an independent body and are concerned that private entities may be influenced by other competing interests⁴.</p> <p>3. Lack of Clarity and due process Safeguards As highlighted in our earlier submission⁵, ARTICLE 19 EA is concerned that section 34B does not provide for the procedure to be followed where an alleged infringer issues a counter notice.</p>

² ‘The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age’ (ARTICLE 19, 2013)

< <https://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf>>

³ Report on the UN Special Rapporteur on Freedom of Expression, A/HRC/32/38, 11 May 2016, Para 44 < [*1607644 \(icnl.org\)](#)>

⁴ ‘Internet Intermediaries: Dilemma of Liability’ (ARTICLE 19, 2013) pg 14 <[*Intermediaries_ENGLISH.pdf \(article19.org\)](#)>

⁵ Legal Analysis, ‘Kenya: Copyright (Amendment) Bill 2017 (ARTICLE 19 EA, September 2018)

< <https://www.article19.org/wp-content/uploads/2018/10/Analysis-Kenya-September-2018-Final.pdf>>



			<p>Secondly, an ISP is required to takedown content within 48 hours which may not be sufficient time for the alleged infringer to challenge the takedown notice before their content is taken down thus open to abuse.</p> <p>In light of the above, ARTICLE 19 EA Recommends Kenya adopts the Notice to Notice procedure. As explained in detail under our policy⁶, this procedure allows the complainant to send a notice of infringement to the host. The notice must contain: the name of the complainant, legal basis for the claim including why the content is wrong and time when the wrongdoing was committed.</p> <p>The host would within a set time example 72 hours inform the alleged infringer of the complainant who would either takedown the infringing material or issue a counter notice within set time e.g. 14 days. The host would forward the counter notice to the complainant who would decide to forward the complaint to the court or an independent body.</p> <p>Where an alleged infringer fails to comply with a notice or respond by counter notice, the host will lose immunity from liability and need to determine whether to remove the material or not.</p>
6	<p>The Principal Act is amended by repealing section 35C</p> <p>35c- Role of Internet Service Provider</p>	<p>We recommend this clause be deleted as it waters down internal human rights standards on Intermediary Liability for Internet Service Providers thus limiting freedom of expression and the right to privacy.</p>	<p>1. The Right to Privacy Section 35C 1(a) allows ISPS to provide information about subscribers suspected to be infringing on content to investigative agencies only on the order of Court. This ensures such determination is made by an independent third party therefore safeguarding privacy rights of subscribers and to repeal this section would be to eliminate these gains.</p>

⁶ 'Internet Intermediaries: Dilemma of Liability' (ARTICLE 19, 2013) pg 14 <[*](http://*Intermediaries_ENGLISH.pdf(article19.org))>



			<p>Protection from Intermediary Liability S35C (2) states ISPs are not required to monitor material stored or linked or actively seek facts or circumstances indicative of infringing activity within its service.</p> <p>In 2011, four special rapporteurs on Freedom of expression recommended that ‘No one should be Liable for content produced by others when providing technical services and Liability should only be incurred if the intermediary has specifically intervened in the content which is published online⁷’</p> <p>ARTICLE 19 firmly believes ISPS should be immune from liability for third party content where they have not been involved in modifying the content. These enhance international standards on free speech and intermediary liability. ARTICLE 19 EA is concerned that to repeal this section would be akin to eliminating intermediary immunity and will water down protections to free speech. It is highly likely that ISPS would actively monitor and Police content to ensure it is not infringing speech which would lead to censorship.</p>
7	<p>The Principal Act is amended by repealing section 35D</p> <p>35D-Application for Injunction</p>	<p>We recommend this clause be deleted as it eliminates opportunity for a complainant to seek judicial remedies.</p>	<p>As stated before, ARTICLE 19 believes that judicial authorities or an independent tribunal not private entities should make decisions on content. Section 35D affirms this position by stating that the High Court may issue an order to a web host or ISP to make infringing material inaccessible. This position complies with International standards on Intermediary Liability and International Human rights standards on free speech.</p> <p>Likewise in 2011, the Joint Declaration on Freedom of Expression and the Internet recommended that⁸: ‘ISPS and other Intermediaries should only be required to takedown</p>

⁷ The 2011 Joint Declaration on Freedom of Expression and the Internet, June 2011, <[http:// www.article19.org/data/files/pdfs/press/internationalmechanisms-for-promoting-freedom-of-expression.pdf](http://www.article19.org/data/files/pdfs/press/internationalmechanisms-for-promoting-freedom-of-expression.pdf)>

⁸ As above



			content following a court order, contrary to the practice of notice and takedown.
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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 three (33) 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 14 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 Kenya's Copyright (Amendment) Bill 2017, The Intellectual Property Office of Kenya Bill 2020, 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