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THE COPYRIGHT (AMENDMENT) BILL, 2017

A Bill for

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, 2017.

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”—

(i) by deleting the word “film” appearing in paragraph (d) and substituting therefor the word “work”;

(ii) by 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 “forklore”;

(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 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, and includes any graphical notation of such work;
- (j) in the definition of “school”, by deleting the expression “Education Act” (Cap. 211) and substituting therefor the expression “Basic Education Act, 2013”;
- (k) by deleting the definition of “work” and substituting therefor the following new definition—

No. 14 of 2013.

“work” means literary, musical, artistic 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) in the definition of “technical measure”, by inserting the word “protection” immediately after the word “technical”;

- (l) 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;

“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” is any person providing information services, systems, or access software provider that provides or enables computer access by multiple users to a computer server including connections for, the transmission or routing of data;

“organisation” means a collective management 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;

“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;

“original work of art” includes batiks, carvings, ceramics, collages, drawings, engravings, fine art jewelry, glassware, lithographs, fashion design, paintings, photographs, pictures, prints, sculptures, graphics, weavings, or any other works as may be included by regulation:

Provided they are made by the artist himself or copies considered works of art in themselves;

“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 there from 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 artist or group of artists or successors to receive resale royalty on commercial resale of an artwork;

“seller” means the 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.

3. Section 5 of the principal Act is amended—

- (a) in paragraph (c), by inserting the word “regional” immediately after the word “national”;
- (b) by inserting the following new paragraph immediately after paragraph (f)—
- (fa) license all dealers of copyright works; and
- (c) in paragraph (g), by inserting the words “and enforce” immediately after the word “administer”.

Amendment of
section 5 of No.
12 of 2001.

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 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) in subsection (2) —

- (i) by deleting the expression “five years” appearing in paragraph (a) and substituting therefor the expression “seven years”;
- (ii) by deleting the expression “five years” appearing in paragraph (b) and substituting therefor the expression “seven years”; and
- (iii) by deleting the expression “three years” appearing in paragraph (c) and substituting therefor the expression “five years”;
- (iv) by inserting the following new paragraph immediately after paragraph (c) —

(d) holds a master of laws degree from a university recognised in Kenya in the field of intellectual property.

6. Section 19 of the principal Act is amended in subsection (2) by deleting the words “Auditor General

Amendment of section 19 of No. 12 of 2001.

(Corporations)” and substituting therefor the words “Office of the Auditor-General”.

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. Section 22 of the principal Act is amended in subsection (1), by inserting the words “or related rights” immediately after the word “copyright”.

Amendment of section 22 of No. 12 of 2001.

9. 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 therefrom 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.

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

11. 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, end or share accessible format copies by a beneficiary person or authorized entities or persons acting on behalf of a beneficiary person, including the circumventing any technical 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 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 sale net sale price on the commercial resale of an artwork and the seller, the art 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.

12. Section 28 of the principal Act is amended—

- (a) in subsection (3), by deleting the word “sale” and substituting therefor the words “manufacture or entry”;
- (b) by deleting subsection (4); and
- (c) by deleting subsection (5).

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

Amendment of
section 28 of No.
12 of 2001.

Repeal 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 there from.

14. 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).

15. 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 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 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 share to respective rights holders of the private copying remuneration shall be determined by the Board through a notice from time to time.

16. 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”.

17. 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) 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.

18. 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—

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

(2) A 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.

19. 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 the 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 the 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 35A(5) 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 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 disable access to the material within forty eight hours unless it receives a counter notice from the entity accused of infringement by making available the content fulfilling the requirements set out for a takedown notice and contesting the contents of the takedown notice.

(5) The 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.

(6) Any service provider which fails to disable or take down offending content on receiving a takedown notice commits an offence and shall, upon conviction, be liable to a fine not exceeding Kenya shillings five hundred thousand or to imprisonment for a term of five years, or to both

(7) 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 of five years, or to both.

(8) The 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.

(9) 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.

20. 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.

21. Section 38 of the principal Act is amended—

Amendment of section 38 of No. 12 of 2001.

- (a) in subsection (1) —
 - (i) by inserting the words “or producer” immediately after the word “performer”;
 - (ii) by inserting the following paragraphs immediately after paragraph (f) —
 - (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 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 technical protection measure or manufactures or distributes devices designed for circumventing technical protection measures commits an offence;
 - (j) removes or alters rights management information or imports or distributes, or makes available to the public copies of works from which electronic rights management information has been removed or altered,
- (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) Any person guilty of an offence under subsection (1) (a), (b), (c), (d) or (e) shall be liable to a fine of five times the market value of the legitimate work or one thousand shillings for each infringing copy whichever is higher.
- (d) by deleting subsection (5) and substituting therefor the following new subsection—
- (5) Any person guilty 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) in subsection (6)(b), by deleting the words “not exceeding eight hundred thousand shillings” and substituting therefor the words “of ten times the

market value of the legitimate work or two thousand shillings for each infringing copy, whichever is higher”; and

- (f) 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.

22. 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 an offence under this Act has been committed by a body corporate, the body corporate and every person who at the time of the offence was committed was in charge of, or was responsible to the body corporate for the conduct of the business of the body corporate shall be deemed to be guilty of such offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing in this subsection shall render any person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Despite anything contained in subsection (1) of this section, where an offence under this Act has been committed by a body corporate and it is proved that the offence was committed with the consent or connivance of, any director, manager, secretary or other officer of the body corporate, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to prosecution.

(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.

23. 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.

24. 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 shorter period 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 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) The Board shall cause the organisation to be de-registered only after a written notice delivered or sent by registered post to the organisation at its last known address, requesting the organisation to make written representations, within a period of twenty one days from the date of the notice, with respect to any such failure to be detailed in the notice.

(11) 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.

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

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

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

46B. (1) A member of the collective management organization shall be eligible for election as a director if he holds a certificate, a diploma or any other post secondary qualification obtained after a

period of at least more than one month of study.

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

(3) A director elected as a chairperson of a collective management organization shall hold office for a single term of three years and shall not be eligible for re-election as a chairperson.

(4) A chief executive officer of a collective management organization shall hold office for a single non-renewable term of four years and in the case of a newly established collective management organization, he shall be eligible for a second term of four years on approval from Kenya Copyright Board.

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.

Inspection
control
collective
management
organisations.
and
of

46D. (1) The Executive Director of the Board may at any time and from time to time, cause an inspection to be made by any person authorized by it in writing, of collective management organization, and of its books of accounts and records.

(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) Any failure 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) A person making the inspection shall submit his report to the Board, and the report shall draw attention to any breach or non-observance of the requirements of this Act and any regulations, any irregularity in the manner of conduct or the business of the organization or any apparent mismanagement or lack of management skills in that organization and any other matter revealed or discovered in the course of the inspection warranting, in the opinion of the person making the inspection, remedial action or 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 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 an organization to account for monies to a significant number of its members;
 - (c) failure by an organization to offer an account of the exploitation of the copyright works assigned or licensed to it;
 - (d) where an organization has acted beyond its powers in administering the rights to which it is assigned or licensed;
 - (e) where an 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 an organization has persistently failed to adhere to its set administrative budget without a reasonable course ; or
 - (g) where an organisation has failed to comply with request for information or records.

Directions and orders of the Board.

46E. (1) Where the Kenya Copyright Board determines through the results of an audit or inspection report finds that an 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.

Issuance of Rules.

46F. The Board may make Regulations on—

- (a) presentation of annual financial statements by appointed auditors;
- (b) control of annual and special general meetings of the organizations;
- (c) representation of women and marginalized groups on the Board;
- (d) establishment of complaint handling procedures;
- (e) ratios of distributable income to administrative costs including deductions;
- (f) approval of distribution rules;
- (g) manner of approvals of cash reserves; and
- (h) approval of membership to collective management organizations.

Agenda and minutes of the organisation.

46G. The agenda and the minutes of a committee and Board of Directors meetings of an organization shall be submitted as soon as the meetings are over and a representative of the Board may from time to time attend Board of Directors meetings of an organization to advise where matters affecting member's interests are being discussed.

26. 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.

27. Section 48 of the principal Act is amended—

Amendment of
section 48 of No.
12 of 2001.

- (a) in subsection (1), by deleting the words “competent authority” and substituting therefor the words “Copyright Tribunal”;
- (b) by inserting the following new subsections immediately after subsection (1) —

(1A) 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 Cabinet Secretary where any matters requires to be determined by the Tribunal.

(1B) 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.

- (c) in subsection (2), by deleting the words “competent authority” and substituting therefor the words “Copyright Tribunal”;
- (d) in subsection (2)(a), by deleting the words “collecting society” and substituting therefor the word “collective management organisation”;
- (e) in subsection (2)(c), by deleting the words “collecting society” and substituting therefor the word “collective management organisation”;
- (f) in subsection (2)(d), by deleting the words “collecting society” and substituting therefor the word “collective management organisation”;
- (g) in subsection (2)(e)—
 - (i) by deleting the words “competent authority” wherever they appear and substituting therefor the words “Copyright Tribunal”; and
 - (ii) by deleting the words “collecting society” wherever they appear and substituting

therefor the word “collective management organisation”.

- (h) in subsection (3), by deleting the words “competent authority” wherever they appear and substituting therefor the words “Copyright Tribunal”;
- (i) by deleting subsection (4); and
- (j) by deleting subsection (5).

28. Section 49 of the principal Act is amended—

Amendment of
section 49 of No.
12 of 2001.

- (a) by deleting the word “Cabinet Secretary” wherever it appears and substituting therefor the words “Attorney-General”; and
- (b) in paragraph (c), by inserting the following proviso—

Provided that it belongs to or 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.

29. 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 act 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.

MEMORANDUM OF OBJECTS AND REASONS

Clause 1 of the Bill sets out the short title of the proposed Act.

Clause 2 of the Bill proposes to amend section 2 of the Act by incorporating new provision for the domestication of Marrakesh Treaty, ISP Liability and Resale Royalty right. It also amends some definitions in alignment with the new proposals.

Clause 3 of the Bill further amends section 5 of the Act by clarifying the mandate of the Board.

Clause 4 of the Bill contains amendments to section 6 of the Act to align it with the Constitution.

Clause 5 of the Bill proposes to amend section 11 of the Act of the Act to provide for the appointment of the Executive Director by the Board and further enhances the qualifications for appointment to be appointed to the position of Executive Director.

Clause 6 of the Bill amends section 19 of the Act by providing for the Office of the Auditor -General in line with the Constitution

Clause 7 of the Bill further amends the heading in Part III for clarity.

Clause 8 of the Bill proposes to amend 22(1) of the Act by inserting the words "or related rights" immediately after the word "copyright" for clarity.

Clause 9 of the Bill further proposes to introduce a new section 22A into the Act to provide for voluntary registration of copyright by the owner(s), author(s), assignee(s) or exclusive licensee(s) and for the Board to keep records of such persons in a publicly available register subject to such terms to be determined by the Board.

Clause 10 of the Bill proposes to repeal section 26 and replace it with a new section that expands and clarifies the extent of fair dealing in respect to copyright material in literary, musical or artistic and audio-visual works.

Clause 11 of the Bill amends the Act by inserting new sections 26A to 26D to provide for an artist resale right for visual artists.

Clause 12 of the Bill proposes to amend section 28 of the Act to clarify and facilitate the operationalization of blank tape fee in respect to copyright in sound recordings.

Clause 13 of the Bill further proposes to repeal section 29 of the Act and rephrases the nature of copyright in broadcasts for clarity.

Clause 14 of the Bill proposes to amend section 30 as a consequential amendment.

Clause 15 of the Bill contains proposals to amend the Act by inserting a new section 30b in relation to collection and payment of royalties.

Clause 16 of the Bill proposes to amend section 33 to provide for assignments and their validity under the Act.

Clause 17 of the Bill proposes to amend section 33A for clarity.

Clause 18 of the Bill proposes to amend section 35 to address—

- (a) the right of performers by introducing new wording in order to facilitate collection of blank levy fee;
- (b) assignments and licenses in order to facilitate the compulsory license provision; and
- (c) infringements by clarifying the Rights due.

Clause 19 of the Bill amend the Act by introducing new sections 35A, 35B and 35C to provide for the protection of Internet Service Providers (ISP) through provisions dealing with ISP liability, safe harbor, takedown and the resultant offences.

Clause 20 of the Bill proposes to amend section 36 of the Act by introducing a new subsection dealing with destruction of any material seized upon order of the Court wherein a charged person is convicted.

Clause 21 of the Bill amends section 38 of the Act by creating new offences and provides for an objective criteria for sentencing upon infringement.

Clause 22 of the Bill proposes to amend the Act by inserting a new section 38A to provide for copyright offences committed by corporate bodies.

Clause 23 of the Bill amends the Act by assigning the conduct of prosecution for offences to the Director of Public Prosecutions line with the Constitution.

Clauses 24, 25 and 26 of the Bill address the collective administration of copyright by introducing provisions on the title for the organizations reflecting current system/position. The provisions also address corporate governance requirements for the collective organizations and vest an oversight role for the collective organizations on the Board.

Clause 27 of the Bill amends section 48 of the Act by introducing provisions relating to the Copyright Tribunal, its composition and disqualification of specified person(s) from being members of the Tribunal.

Clause 28 of the Bill amends section 49 of the Act that deals with Regulations and Extension of Application of the Act by introducing provisions clarifying the level of reciprocal obligations for Copyright Protection.

Clause 29 of the Bill further proposes to amend the Act by introducing the Second Schedule that provides further clarity on the extent of fair dealing under section 26 of the Act

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill does not limit fundamental rights and freedoms neither does it delegate any legislative power.

Statement on whether the Bill concerns county governments

The Bill does not directly affect the functions and powers of the county governments set out in the Fourth Schedule to the Constitution.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution.

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 11th September, 2017.

ADEN DUALE,
Leader of the Majority Party, National Assembly.

Section 2 of No. 12 of 2001 which it is intended to amend—**2. Interpretation**

In this Act, unless the context otherwise requires—

“author”, in relation to—

- (a) a literary, musical or artistic work, means the person who first makes or creates the work;
- (b) a photograph, means the person who is responsible for the composition of the photograph;
- (c) a sound recording, means a person by whom the arrangements for the making of the sound recording were made;
- (d) audio-visual works, means the person by whom the arrangements for the making of the film were made;
- (e) a broadcast, means the first broadcaster;
- (f) a published edition, means the publisher of the edition;
- (g) a literary, dramatic, musical or artistic work or computer program which is computer generated, means the person by whom the arrangements necessary for the creation of the work were undertaken; and
- (h) a computer programmer, means the person who exercised control over the working of the program;

“broadcast” means the transmission, by wire or wireless means, of sounds or images or both or the representations thereof, in such a manner as to cause such images or sounds to be received by the public and includes transmission by satellite;

“copy” means a reproduction of work in any manner or form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium, by computer technology or any other electronic means;

“copyright” means copyright under this Act;

“folklore” means a literary, musical or artistic work presumed to have been created within Kenya by an unidentified author which has been passed from one generation to another and constitutes a basic element of the traditional cultural heritage of Kenya and includes—

- (a) folk songs and instrumental folk music;
- (b)
- (c) folktales, folk poetry and folk riddles;

- (d) folk dances and folk plays; and
- (e) the production of folk art, in particular drawings, paintings, sculptures, pottery, woodwork, metalware, jewellery, handicrafts, costumes and indigenous textiles;

“infringing copy” means—

- (a) a copy, the manufacture of which constitutes an infringement of any rights protected by this Act; or
- (b) where imported, a copy the manufacture of which would have constituted an infringement of such rights if manufactured in Kenya by the importer;

“Minister” means the Minister for the time being responsible for matters relating to copyright and related rights;

“musical work” means any musical work, irrespective of musical quality, and includes works composed for musical accompaniment;

“school” has the meaning assigned to it by the Education Act (Cap. 211);

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

“work” 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;

Section 5 of No. 12 of 2001 which it is intended to amend—

The functions of the Board shall be to—

- (c) devise promotion, introduction and training programs on copyright and related rights, to which end it may co-ordinate its work with national or international organisations concerned with the same subject matter;
- (g) administer all matters of copyright and related rights in Kenya as provided for under this Act and to deal with ancillary matters connected with its functions under this Act.

Section 6 of No. 12 of 2001 which it is intended to amend—

(1) The Board shall consist of—

- (k) the Permanent Secretary in the Ministry for the time being responsible for matters relating to broadcasting or his representative;

- (m) the Commissioner of Police or his representative;
- (n) the Permanent Secretary in the Ministry for the time being responsible for matters relating to home affairs, heritage and Sports or his representative;
- (o) the Permanent Secretary to the Treasury or his representative;

Section 11 of No. 12 of 2001 which it is intended to amend—

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

(2) No person shall be appointed under this section unless such person—

- (a) is a person qualified as an advocate of the High Court of Kenya of not less than five years' standing or has held judicial office in Kenya; or
- (b) has at least five years' experience in matters relating to copyright and other related rights; or
- (c) has served in a senior position in a copyright office for at least three years.

Section 19 of No. 12 of 2001 which it is intended to amend—

(2) Within a period of four months from the end of each financial year, the Board shall submit to the Auditor General (Corporations) or to an auditor appointed under this section, the accounts of the Board together with—

Section 22 of No. 12 of 2001 which it is intended to amend—

(1) Subject to this section, the following works shall be eligible for copyright—

Section 28 of No. 12 of 2001 which it is intended to amend—

(3) Subject to subsections (4) and (5), 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 sale in Kenya by the manufacturer or importer for commercial purposes of such equipment or media.

(4) The level of the royalty payable under subsection (3) shall be agreed between organizations representative of producers of sound recordings and of manufacturers and importers of audio recording equipment, audio blank tape and media intended for recording or failing such agreement by the competent authority appointed under section 48.

(5) All claims for compensation under this section shall be made through an organization representative of producers of sound recordings and the compensation shall be collected by the Board and distributed to the respective copyright collecting society registered under section 46.

Section 29 of No. 12 of 2001 which it is intended to amend—

Copyright in a broadcast shall be the exclusive right to control the doing in Kenya of any of the following acts, namely, the fixation and the rebroadcast of the whole or a substantial part of the broadcast and 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, but—

- (a) paragraphs (a), (f), (e) and (k) of section 26(1) shall apply *mutatis mutandis* to the copyright in a broadcast; and
- (b) the copyright in a television broadcast shall include the right to control the taking of still photographs therefrom.

Section 30 of No. 12 of 2001 which it is intended to amend—

(6) Subject to subsections (7) and (8), 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 audio-visual recording equipment or audio-visual blank media suitable for recording and other media intended for recording, payable at the point of first sale in Kenya by the manufacturer or importer for commercial purposes of such equipment or media.

(7) The level of the royalty payable under subsection (6) shall be agreed upon between organizations representative of performers, manufacturers and importers of any audio-visual recording equipment and media intended for recording, or failing such agreement, by the Copyright Tribunal.

(8) The claims for compensation under this section shall be made through an organization representative of performers.

Section 33 of No. 12 of 2001 which it is intended to amend—

(2) An assignment or testamentary disposition of copyright may be limited so as to apply only to some of the acts which the owner of the

copyright has the exclusive right to control, or to a part only of the period of the copyright, or to a specified country or other geographical area.

(3) No assignment of copyright and no exclusive licence to do an act the doing of which is controlled by copyright shall have effect unless it is in writing signed by or on behalf of the assignor, or by or on behalf of the licensor, as the case may be 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.

(7) Where an agreement for assignment of copyright does not specify the period of assignment, the assignment shall terminate after three years.

Section 33A of No. 12 of 2001 which it is intended to amend—

(1) The competent authority may upon application by any person grant a licence for works not made available in the Kenyan market during the term of copyright where the owner of the copyright in the work —

(3) Where two or more persons make an application in respect of the same work, the licence shall be granted to the applicant who in the opinion of the competent authority would best serve the interests of the general public.

Section 35 of No. 12 of 2001 which it is intended to amend—

(1) Copyright shall be infringed by a person who, without the licence of the owner of the copyright—

(a) does, or causes to be done, an act the doing of which is controlled by the copyright; 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.

Section 38 of No. 12 of 2001 which it is intended to amend—

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

(2) Any person who causes a literary or musical work, an audio-visual work or a sound recording to be performed in public at a time when copyright subsists in such work or sound recording and where such performance is an infringement of that copyright shall be guilty of an offence 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.

(4) Any person guilty of an offence under paragraph (a), (c), (e) or (f) of subsection (1) shall be liable to a fine not exceeding four hundred

thousand shillings or to imprisonment for a term not exceeding ten years or to both.

(5) Any person guilty of an offence under paragraph (b) or (d) of subsection (1) shall be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

(6) A person convicted of an offence under this section shall be liable—

(b) in any other case, to a fine not exceeding eight hundred thousand shillings, or to imprisonment for a term not exceeding ten years, or to both.

Section 43 of No. 12 of 2001 which it is intended to amend—

(1) The Attorney-General may, pursuant to the provisions of the Criminal Procedure Code (Cap. 75), appoint public prosecutors for the purposes of cases arising under this Act.

Section 46 of No. 12 of 2001 which it is intended to amend—

(1) No person or association of persons shall commence or carry on the business of a copyright collecting society except under or in accordance with a certificate of registration granted under this section.

(2) Applications for registration as collecting societies shall be made to the Board accompanied with the prescribed fees and the Board, by a *Gazette* notice is empowered to declare a body which has applied for registration a collecting society, for all relevant copyright owners of for such classes of relevant copyright owners as are specified in the notice.

(3) Every certificate issued to a collecting society shall be in the prescribed form and shall unless cancelled be valid for a period of twelve months from the date of issue.

(4) The Board may approve a collecting society if it is satisfied that—

(5) The Board shall not approve another collecting society in respect of the same class of rights and category of works if there exists another collecting society that has been licensed and functions to the satisfaction of its members.

(6) The Board may, where it finds it expedient, assist in establishing a collecting society for any class of copyright owners.

(7) There shall be a transitional registration period not exceeding six months from the date of commencement of this Act:

Provided that the Minister may extend the period upon application by a collecting society.

(8) All collecting societies that are presently registered under any other written law in Kenya, shall within the period specified in subsection (7), apply for and obtain a certificate under this Act.

(9) The Board may by notice in the *Gazette* de-register a collecting society if its satisfied that the collecting society—

Section 47 of No. 12 of 2001 which it is intended to amend—

(1) A collecting society shall, as soon as reasonably practicable after the end of each financial year, submit to the Board—

(2) This section shall apply without prejudice to the obligations of a collecting society under the provisions of the Companies Act (Cap. 486).

Section 48 of No. 12 of 2001 which it is intended to amend—

(1) There shall be a competent authority appointed by the Minister for the purpose of exercising jurisdiction under this Act where any matter requires to be determined by such authority.

(2) Subject to subsection (3), in any case where it appears to the competent authority that—

- (a) the Board is unreasonably refusing to grant a certificate of registration in respect of a collecting society; or
- (b) the board is imposing unreasonable terms or conditions on the granting of such a certificate; or
- (c) a collecting society is unreasonably refusing to grant a licence in respect of a copyright work; or
- (d) a collecting society is imposing unreasonable terms or conditions on the granting of such a licence; or
- (e) the competent authority may direct that as respects the doing of any act relating to work with which the collecting society is concerned or with respect to the granting of a certificate to operate as a collecting society, a licence or a certificate shall be deemed to have been granted by the collecting society or the Board at the time the act is done or the application is made, provided the appropriate fees are paid or tendered before the expiration of such period or periods as the competent authority may determine.

(3) Where a dispute has been referred to the competent authority under this section, the competent authority 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.

(4) In this section—

“**collecting society**” means an organisation 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 copyright works or performer’s rights; and

“**competent authority**” means an authority of not less than three and not more than five persons, one of whom shall be a person qualified as an advocate of the High Court of Kenya of not less than seven years’ standing or a person who holds or has held judicial office in Kenya who shall be the chairman, appointed by the Minister for the purpose of exercising jurisdiction under this Act where any matter requires to be determined by such authority.

(4) No person shall be appointed under this section, nor shall any person so appointed act as a member of a competent authority, 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 authority.

Section 49 of No. 12 of 2001 which it is intended to amend—

(1) The Minister may make regulations generally for the better carrying out of the provisions of extension of the Act and, without prejudice to the generality of the application of the doing, the Minister may in such regulations—

(c) restrict the right of an author to control the translation or the reproduction of his work up to the extent permitted by any Copyright Convention for the time being in force in Kenya;

