

23rd October, 2015

Kenya Copyright Board
NHIF Building, 5th Floor
P.O. Box 34670-00100
Nairobi, Kenya

**RE: COMMENTS ON DRAFT PROPOSALS FOR ISP LIABILITY FOR ONLINE
COPYRIGHT INFRINGEMENT**

Definition of ISP:

It is not clear from the proposed definition whether “ISP” is meant to include Internet Service Providers (e.g., infrastructure providers such as telecoms) as well as *Online* Service Providers (e.g., non-infrastructure providers such as search engines), or only the former. This should be clarified.

Furthermore, the proposed definition is incomplete as it includes certain terms which are not defined such as "data", "information system" and "information system services". In addition, it would be prudent to define the term "Internet" as it is an integral part of the term Internet Service Provider (ISP).

Therefore, the following definitions are proposed:

"data" means electronic representations of information in any form;

"information system" means a system for generating, sending, receiving, storing, displaying or otherwise processing data and includes the 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" means the interconnected system of networks that connects computers around the world using the TCP/IP and includes future versions thereof.

Definition of Electronic Copy:

The proposed new definition of “electronic copy” does not specify that a copy is in electronic form. In any case Section 2 of the Act already defines “copy” as follows:

“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”

It is submitted that this definition is sufficiently broad to cover “electronic copy” as proposed by KECOBO. Accordingly the proposed new definition of “electronic copy” should be deleted.

Mere Conduit:

All mentions of the word “material” in this proposed section 35A(1) should be replaced with the word “data” so as to be consistent with the definition of ISP as proposed above.

It is submitted that the paragraph directly after part (d) should be limited to the automatic, intermediate and transient storage of the information transmitted insofar as this takes place as follows:

- (i) for the sole purpose of providing the access, transmitting, routing or storage in the information system;
- (ii) in a manner that makes it ordinarily inaccessible to anyone other than anticipated recipients; and
- (iii) for a period no longer than is reasonably necessary for the access, transmitting, routing or storage.

This proposed section 35A(1) should also provide that a court may order an ISP whose liability is otherwise limited under the mere-conduit limitation not to provide access to the subscriber or account holder using the ISP’s services to engage in infringing activity.

Finally, this proposed section should provide that the mere conduit limitation is applicable to an ISP that has designated an agent to receive notifications of infringement and has provided through its services, including on its websites in locations accessible to the public, the name, address, phone number and e-mail of the agent.

Caching:

All mentions of the word “material” in this proposed section 35A(1) should be replaced with the word “data” so as to be consistent with the definition of ISP as proposed above.

It is submitted that the last paragraph on removal or disabling access to cached copies requires further amendments. First, the ISP under this paragraph must be compelled to take all reasonable steps to expeditiously remove or disable access to cached copies. Second, in addition to the takedown notice and order of a competent court, the ISP should also be required to remove or disable access to cached copies upon obtaining knowledge of the unlawful nature of the cached material.

Material Storage:

All mentions of the word “material” in this proposed section 35A(3) should be replaced with the word “data” so as to be consistent with the definition of ISP as proposed above.

In addition, this proposed section should provide that the material storage limitation is applicable to an ISP that has designated an agent to receive notifications of infringement and has provided through its services, including on its websites in locations accessible to the public, the name, address, phone number and e-mail of the agent.

Information Location Tools:

All mentions of the word “material” in this proposed section 35A(4) should be replaced with the word “data” so as to be consistent with the definition of ISP as proposed above.

Take Down Notice:

All mentions of the word “material” in this proposed section 35A(5) should be replaced with the word “data” so as to be consistent with the definition of ISP as proposed above.

It is submitted that where the proposed offence 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 or, 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.

Final Statements:

There are no provisions for dealing with anonymous postings of infringing materials. Although such illegal actions are difficult to prosecute, there should be provisions in the law for the same.

Finally, these regulations do not address the “Right to be Forgotten” (recognized most recently in a European Court of Justice case in May 2014, involving Google as an ISP). The Kenyan law should explicitly endorse or deny such protection.

Sincerely,
CIPIT