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Mr. Edward Sigei, Executive Director
Kenya Copyright Board
5th Floor, NHIF Building
Ragati Road/Ngong Road
Nairobi, Kenya

27th October 2017

Re: Comments relating to the Copyright (Amendment) Bill, 2017¹

Dear Mr. Sigei,

EIFL (Electronic Information for Libraries) would like to take the opportunity to submit comments on The Copyright (Amendment) Bill, 2017. The comments are supported by our partner, the Kenya Library and Information Services Consortium (KLISC).

Libraries are committed to freedom of access to information in the public interest while respecting copyright law and the rights of copyright owners.

Our comments relate to three areas: disability (implementing the Marrakesh Treaty for persons with print disabilities), libraries and educational institutions, and Internet Service Providers.

Our recommendations seek to provide clarity, iron out ambiguities and with regard to provisions implementing the Marrakesh Treaty, ensure that the benefits of the treaty are maximized.

Please do not hesitate to contact me if there are any questions.

Teresa Hackett
EIFL Copyright and Libraries Programme Manager

cc: Japhet Otike, Janegrace K.Kinyanjui, Dr. Roselyne Mang'ira (KLISC)

¹ Kenya Gazette Supplement No. 142 (National Assembly Bills No. 33). Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2017/Copyright__Amendment_Bill_2017No33.pdf

Visually impaired, and persons with other disabilities: definitions and Section 26C(1)

We appreciate the new provisions that seek to implement the Marrakesh Treaty for persons with print disabilities².

However, we feel that the draft legislation is narrower than the treaty in several respects, and contains some language that could be confusing. We believe some modest amendments would address these issues.

Comments

1. In the new definition of “work,” there is a proviso for the “visually impaired persons work” (p.784). This term does not appear to be used again.

It also appears inconsistent with the scope of the exception for people with print disabilities in new Section 26C(1)(a). Section 26C(1)(a) applies to published literary works, while the proviso encompasses literary and artistic works.

2. The definition of “authorized entity” (p.785) may be narrower than in the Marrakesh Treaty.

The treaty’s definition makes it clear that non-profit entities that provide services to beneficiary persons are authorized entities even if they aren’t authorized or recognized by the government³. In contrast, here it appears that the entity must be approved or recognized by the government.

3. In the new Section 26C (p.792), the distinction between paragraphs (1)(a) and (1)(b) is unclear.

Further, paragraph (1)(a) refers to “specialized formats,” as do paragraphs (2)(a) and (b), while paragraph (1)(b) uses the term “accessible format copy.” The term “specialized format” is narrower than the treaty’s term, accessible format copy.

Additionally, the scope of (1)(a) is narrower than the treaty, in that it applies only published literary works, while the treaty applies to literary and artistic works in the form of text, notation, and related illustrations, whether published or otherwise made publicly available.

Paragraph (1)(b) does not appear to follow from the chapeau of paragraph (1): “it shall not be an infringement of copyright for--... to make, import, distribute, end (sic), or share....”

We assume “end” should read “send”.

² Entered into force in Kenya on 2 September 2017

³ Marrakesh Treaty Article 2(c) (specifically the second sentence)

4. The European Union Directive (2017) implementing the Marrakesh Treaty contains a provision that overrides contractual restrictions that would prevent the exercise of the rights under the treaty. This “contractual override” provision is particularly important with respect to digital products, which typically are distributed under a licence.

Recommendations

We believe these ambiguities could be eliminated if the relevant provisions were amended as follows:

- 1) The visually impaired work proviso is removed from the definition of work (p.784);
- 2) The definition of “specialized format” is removed (p.788);
- 3) The definition of “authorized entity” is worded as one of the following options:

“authorized entity” means a government institution or nonprofit organization that an entity that is authorized or recognized by the government to provides 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 beneficia persons as one of its primary activities or institutional obligations;

or

“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 also 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;

- 4) Paragraph 26C(1)(a) is deleted, and the rest of Section 26C is worded as follows:

26C (1) Notwithstanding the provisions of section 26, it shall not be an infringement of copyright for ~~(b) to make, import, distribute, end or share accessible format copies by a beneficiary person or an authorized entity,ies or persons acting on behalf of a beneficiary person, to make, import, distribute, send or share accessible format copies, or to 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 only in a format other than a specialized format-exclusively for use by visually impaired or other persons with disabilities~~ persons or authorized entities;

- (b) bear a notice that any further ~~reproduction or distribution~~ shall be limited to beneficiary persons or authorized entities ~~to 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.
- (3) The exception provided in this section cannot be overridden by contract.

Libraries and Archives: Section 26(1)(d) and Section C.1.(a)

Our comments on libraries and archives relate to two issues: distribution right (exhaustion) and exceptions and limitations for libraries and archives.

1. Distribution right: Section 26(1)(d)

Comment

It appears that the distribution right in Section 26(1)(d) (p. 791) does not contain an “exhaustion” provision that indicates that the distribution right in a particular copy is exhausted after the sale of that copy. In the absence of such an exhaustion provision, the circulation of books and other materials by a library could be considered an infringement of the distribution right.

Recommendation

To provide clarity, we believe an exhaustion provision should be added as follows:

Notwithstanding Section 26(1)(d), the owner of the original or any copy of the work that has been made with the authorization of the copyright owner or the law is entitled to sell, display or otherwise dispose of the original or copy.

2. Exceptions and Limitations: Second Schedule C. Libraries and Archives

Comment

The Copyright (Amendment) Bill, 2017 moves the existing library exception, Section 26(1)(h)⁴, to new Second Schedule Section C (p.816).

Section C.1.(a) appears the same as existing Section 26(1)(h), with the addition of archives.

The scope of the term “public library” is unclear. Does it include libraries within institutions, such as universities and schools? Does it include special libraries, such as those within non-governmental institutions and organizations? For the avoidance of doubt, and make the exception as effective as possible, the term “public” should be removed.

We appreciate the new section C.1.(b) that allows for situations where a book is not available in Kenya. However, the utility of the new provision might be diminished because the language in some aspects is unclear, and the scope is somewhat restricted in places.

For example, the meaning of the phrase “for the use of the library” is unclear. Does this mean that the copy must remain the property of the library, but the library can lend it to its users? The provision could also usefully specify the purposes for the making of the copy.

In addition, a public library may have works in its collection that are worthy of being archived and preserved. The preservation function under this section should therefore not be limited to archives.

As well as books (and the other listed material), a library’s collection contains other works, such as sound recordings and motion pictures. We believe such other works should be included in the scope of the exception.

Limiting the exception to the making of not more than one copy is difficult to implement in the digital environment. For example, in the course of making a digital preservation copy of a work, numerous intermediate copies in various formats may be made. Thus, best practice guidelines for preservation state that as many copies as reasonably necessary for preservation purposes should be allowed. With respect to replacement copies, the exception should allow the creation of a temporary, incidental copies as reasonably necessary to result in one end-use copy.

Finally, to increase its practical benefit, the condition that the book is not be available in Kenya could usefully be amended to that the book is not be available for purchase in Kenya at a reasonable price. Further, this condition should apply only to replacement copies, not preservation copies.

Importantly, it should be clarified that this condition applies only to C.1.(b) and not the existing exception, C.1(a).

4 The Copyright Act, 2001 (Chapter 130) (Revised Edition 2014)

Recommendation

Accordingly, we recommend that C.1.(b) is reworded as follows:

- (b) a public library or archives making a copy of a work to replace a copy in its collection that is damaged, deteriorating, lost, stolen, fragile, or in an obsolete storage format, provided that a replacement copy can not be obtained in Kenya at a reasonable price;
- (c) a public library or archives making copies of the works in its collection as reasonably necessary for preservation and security.

Additionally, the word “public” should be removed from every reference to “public library” in C.1.

Educational Institutions: Second Schedule B.

Comment

We appreciate the exception for educational institutions in Second Schedule Section B.1.(d) that permits the broadcasting of a work for the purpose of systematic instruction activities. Section 2 defines broadcasting as the transmission of sounds and images by wire or wireless means. However, often it is necessary to reproduce a work in order to broadcast it, for example, to digitize a work required for instruction activities. Accordingly, Schedule B should be amended to permit this reproduction. Such an amendment would facilitate universities in Kenya that are establishing distance and e-learning programmes.

Recommendation

A Section B.1.(e) should be added as follows:

“the reproductions necessary to enable a broadcast referred to in the preceding paragraph;”

Internet Service Providers: Sections 35A, 35B, 35C

We appreciate that the safe harbour provisions for Internet service providers in new sections 35A, 35B, and 35C (p.798-803) have improved over earlier versions⁵. We also appreciate the other technical changes made to eliminate ambiguities.

The improvements include provision for a counter-notice (in Section 35B(4)), and liability is imposed on the service provider only if the provider fails to disable access “without valid justification” (in Section 35B(5)).

Comments

Nonetheless, the structure of the provisions still strongly incentivizes the service provider to remove content in response to every notice, regardless of whether it appears ill-founded, because the service provider would not know whether its doubts would meet the “valid justification” standard.

This is particularly the case because Section 35B(4) requires response within 48 hours of receiving a notice. While 48 hours certainly is an improvement over the 36 hours in the previous version, it remains more stringent than safe harbours in other countries.

The conditions in Section 35A(1)(c) (for storing infringing material) and Section 35A(1)(d) (for linking to infringing material) are not worded in a parallel manner. The different wording could lead to confusion and inconsistent results. For example, Section 35A(1)(c)(ii) refers to situations where the “infringing nature of the material is apparent,” while Section 35A(1)(d)(ii) refers to situations where the “infringing nature of the material is *not* apparent.”

Recommendations

Accordingly, the statute should avoid specifying an exact time frame for response. Instead it should use the standards in Section 35A(3)(c) (“expeditiously”) or Section 35A(4)(c) (“within a reasonable time”).

The conditions in Section 35A(1)(c) and (d) should be made more parallel.

END

⁵ Proposed Amendments to Provide Web Blocking Measures in Cases of Copyright Infringements Online (2015)