Edward Sigei
Chief State Counsel
Kenya Copyright Board
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Nairobi, Kenya

Kenya Libraries and Information Services
Consortium (KLISC)
c/o University of Nairobi
P.O. Box 30197
Nairobi, Kenya

8th October 2015

Re: Invitation to Participate in Consultations on Legal Provisions Aimed at Curbing Online Piracy. Proposed Amendments to Provide Web Blocking Measures in Cases of Copyright Infringements Online

Dear Mr. Sigei,

The Kenya Library and Information Services Consortium (KLISC) is grateful for the opportunity to participate in consultations on the proposed legal provisions aimed at curbing online piracy. This is a joint submission with our partner EIFL (Electronic Information for Libraries).

Libraries are committed to freedom of access to information and freedom of expression while respecting copyright, privacy and data protection laws.

The proposed amendments provide a framework for shared responsibility between rights holders and internet service providers in responding to infringing activity in the digital environment.

Since libraries provide digital services, this is a subject of great interest to KLISC and EIFL. First, libraries provide Internet access to their users. Second, they provide indexes and other location tools to third party web sites. Libraries thus stand to benefit from 'safe harbours' that reduce their exposure to infringement liability. At the same time, it is essential that the safe harbours do not become instruments of censorship, facilitating the removal of lawful material because it is embarrassing or inconvenient.

Therefore it is important to recognise that service providers can encompass a range of public and private, commercial and non-commercial entities such as libraries, as well as cyber cafés and internet search engines.

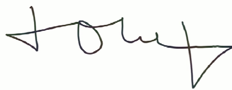
In general, the amendments appear to properly balance the competing interests of rights holders, service providers, and the public.

However the proposed Section 35A(5)IV, which would impose civil and criminal liability on a service provider, such as a library, just because it does not disable access upon receiving a notice from a rightsholder, completely undermines the careful balance established by the rest of the legislation.

If Section 35A(5)IV is not removed or significantly altered, Kenya's copyright law would be significantly out-of-step with that of many countries around the world to the detriment of libraries in Kenya, and the Kenyan public at large.

In the following section, we offer more detailed comments on the substance of the proposals, including the problematic Section 35A(5)IV.

Please do not hesitate to contact me if you have any questions.



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The Kenya Library and Information Services Consortium (KLISC) represents libraries in 110 public and private universities, research and tertiary institutions, special libraries, government agencies, and the National Library. KLISC provides leadership and synergy building in knowledge and information resources sharing through capacity building, advocacy, networking and collaborations. More information: http://klisc.org

EIFL (Electronic Information for Libraries) works with libraries to enable access to knowledge in developing and transition economy countries in Africa, Asia Pacific, Europe and Latin America. The EIFL Copyright and Libraries programme advocates for a fair copyright system, and supports librarians to become advocates for access to knowledge. More information: www.eifl.net

Comments by KLISC and EIFL

Kenya Copyright Board

Consultations on Legal Provisions
Aimed at Curbing Online Piracy (2015)

Proposed Amendments to Provide Web Blocking Measures
in Cases of Copyright Infringements Online

Section 2: Definition of Internet Service Provider

Comment: The definition of Internet service provider (ISP) appears broad enough to include libraries providing information services.

Section 35A(3): ISP Not Liable for Material Storage

Comment: Subsection I specifies the conditions under which the ISP is not liable for hosting infringing material. However, condition I(b) is unclearly worded.

Recommendation: Clarify the wording in 35A(3)I(b) to read "Is not aware of the facts or circumstances from which the infringing activity or the infringing nature of the activity is apparent."

Section 35A(4): Liability for Provision of Information Location Tools

Comment: Section 35A(4) provides an ISP with relief from damages liability arising from linking users to a webpage containing infringing material. This provision is narrower than similar provisions in other countries, such as the parallel provision in the U.S. Digital Millennium Copyright (DMCA)[1] in that it does not limit the injunctive relief available against the ISP. Section 512 of the DMCA provides that the injunctive relief against an ISP, such as a library linking to a website containing infringing material usually is limited to removing the link to the infringing material. A US court may consider a broader injunction such as removing links to the entire website only if it is "necessary to prevent or restrain infringement of copyrighted material" and "such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose[2]."

Recommendation: Introduce a limitation on injunctive relief, such as provided for in the DMCA.

[1] DMCA 17 U.S.C. §512(d)
[2] 17 U.S.C. § 512(j)(1)(A)(iii)

Comment: The condition for eligibility for this safe harbour in Section 35A(4)(b) is unclearly worded.

Recommendation: As with 35A(3)I(b) above, the text should be clarified to read, "Is not aware of the facts or circumstances from which the infringing activity or infringing nature of the material is apparent."

Section 35A(5): Take down Notice

Comment: Section 35A(5)II specifies what information must be included in the take-down notice. However, items d. ("the material subject to the alleged infringement") and e. ("the rights being infringed") are unclear and may not provide the ISP, such as a library, with sufficient information about what content should be removed.

Recommendation: It is important that the provisions are sufficiently clear for librarians and others who are responsible for implementing the law on a daily basis. We recommend replacing items d. and e. in Section 35A(5)II with language that more clearly explains the required elements of a notice. For example, "identification of the copyrighted work claimed to have been infringed" and "identification of the material that is claimed to be infringing…and that is to be removed…and information reasonably sufficient to permit the service provider to locate the material." (Section 512(c)(3) of the DMCA).

Comment: Section 35A(5)III provides that an ISP must disable access to the allegedly infringing material within 36 hours. While in many cases 36 hours would provide an ISP sufficient time to respond to a notice, in some instances 36 hours would be inadequate. For example, if the notice was transmitted over a weekend or a public holiday, an ISP such as a library might not have sufficient staffing to respond within 36 hours. Moreover, 36 hours might not be enough time to assess the validity of the claim of infringement. While in many cases the ISP could quickly determine that the identified use is likely to be infringing, in other cases the ISP might need additional time to consider possible exceptions permitting the use especially if there is a need to call in legal or technical expertise.

Recommendation: Accordingly, the statute should not specify an exact time frame for response. Instead it should use the existing standards in Section 35A(3)I(c) ("expeditiously") or Section 35A(4)(c) ("within a reasonable time").

Comment: Section 35A(5)IV states that an ISP which "fails to disable access shall be guilty of an offence and upon conviction shall be liable to a jail term of six months or to a fine of Ksh. 50,000 or both." This is by far the most problematic provision of the proposed law.

Presumably the provision means that the ISP is guilty of an offence if it fails to disable access within 36 hours of receiving a notice. Thus, this provision would impose civil and

criminal liability on an ISP, such as a library, simply for its failure to respond to a rights holder's allegation in the absence of any judicial determination of infringement.

Under such a system, the ISP would have every incentive to disable access as soon as it received the notice, regardless of the plausibility of the claim of infringement and the user's possible defences. Such a provision could place KLISC and its members, who strive to provide access to knowledge and information, in an invidious position with regard to their public interest role as libraries and in properly serving their users.

The user's only recourse would be to convince a court that the person who lodged the take-down notice did so falsely or maliciously, which could take years. In short, Section 35A(5)IV could easily be abused to censor political or artistic speech by causing content to disappear from the Internet without judicial determination.

If adopted, Kenya's copyright law would be significantly out-of-step with other countries around the world. ISP safe harbour provisions in Australia, Canada, Chile, Malaysia, Peru, Singapore, and the US do not have such a provision. Nor do the ISP safe harbours in Japan or the EU. The EU E-Commerce Directive, for example, refers to "the exemptions from liability established in this Directive…." (Recital 42).

In all these jurisdictions, the safe harbours are true safe harbours. If the ISP follows the requirements of the law, it is free from copyright liability. If it chooses not to follow their requirements, it loses the safe harbour, but it incurs infringement liability only if its actions otherwise qualify as infringement. It does not incur liability simply by virtue of failure to respond to a notice.

Moreover, the DMCA contains a counter-notice provision, which acts as a safeguard against potential rightsholder abuse. Under Section 512(g), once an ISP removes content in response to a rightsholder's notice, the user within 14 days can request the ISP to replace the removed content if the rightsholder has not sued the user for infringement. The proposed amendments to Kenya's copyright law do not contain such a counter-notice provision.

<u>Recommendation:</u> Accordingly, we believe that Section 35A(5)(IV) should be removed and replaced with a provision that creates a counter-notice procedure. To the extent that a rightsholder is harmed by an ISP's failure to disable access to infringing content in response to a notice, it can seek an injunction pursuant to Section 35A(6)III to block access to the infringing material.

While we have serious concerns about Section 35A(5)(IV), we support Sections 35A(5)(V) and (VI). These sections impose liability on a person who falsely or maliciously lodges a take-down notice.

In this context, it should be noted that the U.S. Court of Appeals recently ruled that a rightsholder had to consider fair use before sending a take-down notice. Failure to do so

could mean that the rightsholder's assertion in the take-down notice that he had a good faith belief that the use was unlawful was a misrepresentation[3].

Section 35A(6): ISP Obligation

Comment: Section 35A(6)I properly makes clear that the ISP has no obligation to monitor the material transmitted or stored, nor to actively seek facts or circumstances indicative or infringing activity.

Section 512(m) of the DMCA and Article 15 of the EU's E-Commerce Directive contain similar provisions. For example, Article 15 of the E-Commerce Directive provides that Member States shall not impose a general obligation on ISPs "to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."

Recommendation: However, the obligation in Section 35A(6)I(a) not to monitor should be broadened also to apply to the material linked to by the ISP i.e. the ISP should have no obligation to monitor the material to which it links.

[3] Court of Appeals for the Ninth Circuit Lenz v. Universal Music Corp