REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – SIXTH SESSION

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION

REPORT ON-

THE CONSIDERATION OF THE COPYRIGHT (AMENDMENT) BILL, 2021

(NATIONAL ASSEMBLY BILLS NO. 44 OF 2021)

Approved for tabling
23/2/22
DSNP

DIRECTORATE OF DEPARTMENTAL COMMITTEES
CLERK'S CHAMBERS
PARLIAMENT BUILDINGS
NAIROBI

FEBRUARY , 2022

Table of Contents

LIST OF ABBREVIATIONS AND ACRONYMS

A19EA	ARTICLE 19 Eastern Africa
CODE-IP	Content Development and Intellectual Property Trust
FIAPF	International Federation of Film Producers Associations
IFPI	International Federation of the Phonographic Industry
IPA	International Publishers Association
ISP	Internet Service Providers
KAMP	Kenya Association of Music Producers
KECOBO	The Kenya Copyright Board
KPA	Kenya Publishers Associations
LATL	Liberty Africa Technologies Limited
MCSK	Music Copyright Society of Kenya
MK	Multichoice Kenya
PAP	Partners Against Piracy
PRISK	Performers Right Society of Kenya
SORC	Sports Right Owners Coalition (SORC)
UEFA	Union of European Football Associations
XML	Xpedia Management Limited
CSP	Content Service Provider
PRSP	Premium Rate Service Providers

ANNEXTURES

Annexure 1	Copy of the report adoption list of Members
Annexure 2	Copies of minutes on proceedings
Annexure 3	Copy of public participation advertisement in local dailies
Annexure 4	Copies of written Memoranda
Annexure 5	Copies of the attendance registers for the public hearing

CHAIRPERSON'S FOREWORD

This report contains proceedings of the Departmental Committee on Communication, Information and Innovation on its consideration of the Copyright (Amendment) Bill, 2021 *(National Assembly Bill No 44 of 2021),* sponsored by the Hon. Gladys Wanga M.P. which was published on 22nd October, 2021.

The Bill underwent First Reading on 24th November 2021 and subsequently referred to the Departmental Committee on Communication, Information and Innovation for review and report to the House pursuant to Standing Order 127(1) of the National Assembly Standing Orders.

The Bill has eight clauses it seeks to amend the Copyright Act, 2001 to provide for a fair formula for sharing revenue from ring back tunes amongst the artist/copyright holders, premium rate service providers and the telecommunications companies. The Bill further seeks to repeal the provisions on takedown notices and requirements, the role of internet service providers and application for injunction intended to remove the ambiguity in the role of the internet service provider.

Following the placement of an advertisement in the print media on 11th December, 2021 requesting for comments from public and the relevant stakeholders pursuant to Article 118(1)(b) of the Constitution and Standing Order 127(3), the Committee received nineteen written submissions from stakeholders. These were:- the Joint Committee of the Kenya Copyright Board, the Kenya Film Commission, the Kenya Film Classification Board and the Communications Authority of Kenya; Xpedia Management Limited; Kenya Association of Music Producers (KAMP); Performers Right Society of Kenya (PRISK) and the Music Copyright Society of Kenya (MCSK); Multichoice Kenya; Liberty Africa Technologies Limited; ARTICLE 19 Eastern Africa; Partners Against Piracy; Safaricom; Sports Right Owners Coalition (SORC); International Federation of the Phonographic Industry (IFPI); Union of European Football Associations (UEFA); Creative Economy Working Group; Kenya Publishers Associations; artiste and International Publishers Association. The Committee considered the Bill with the stakeholders on Tuesday 15th February, 2022 at County Hall Mini Chamber, Parliament Buildings

The Sponsor of the Bill Hon. Gladys Wanga, MP appeared before the Committee on Tuesday 15th February, 2022 and informed the Members that the main aim of Clauses 1, 2 3 and 4 of the Bill was to provide for a fair formula sharing of revenue from ring back tunes between the artist and the telecommunications companies to ensure that the artiste gets a greater share of the revenue. She further stated that she had dropped clauses 5, 6 and 7 of the Bill. The clauses had proposed repeal of sections 35B, 35C and 35D of the Copyright Act which provisions are on takedown notices and requirements on copyright infringing material, the role of Internet Service Providers and application to the High Court for injunction.

While considering the Bill, the Committee noted that most stakeholders were against clauses 5, 6 and 7 of the Bill because the proposals to repeal Sections 35B, 35C and 35D of the Copyright Act would reverse the gains made since the enactment of the Copyright (Amendment) Act (No. 20 of 2019).

On behalf of the Departmental Committee on Communication and Innovation and pursuant to the provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the report of the Committee on the Copyright (Amendment) Bill, 2021 (National Assembly Bill No 44 of 2021).

The Committee is grateful to the offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee further wishes to thank all stakeholders who submitted their comments on the Bill. Finally, I wish to express my appreciation to the Honourable Members of the Committee and the Committee Secretariat who made useful contributions towards the preparation and production of this report.

It is my pleasure to report that the Committee has considered the Copyright (Amendment)Bill, 2021(National Assembly Bill No. 44 of 2021) and has the honour to report back to the House with the recommendation that the Bill should be proceeded with subject to recommendations as proposed by the Committee

Hon. Jane Njiru M.P
Chairperson, Departmental Committee on Communication, Information and Innovation

CHAPTER ONE

1.0 PREFACE

1.1 ESTABLISHMENT OF THE COMMITTEE

1. The Departmental Committee on Communications, Information and Innovation is established under Standing Order 216 whose mandate pursuant to the Standing Order 216 (5) is as follows;
   a. Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;
   b. Study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;
   c. Study and review all legislation referred to it;
   d. Study, assess and analyse the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
   e. Investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
   f. Vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);
   (fa) examine treaties, agreements and conventions;
   g. make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
   h. consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
   i. Examine any questions raised by Members on a matter within its mandate

1.2 MANDATE OF THE COMMITTEE

2. In accordance with Second Schedule of the Standing Orders, the Committee is mandated to oversee Communication, Information, media and broadcasting (except for broadcast of parliamentary proceedings), Information Communications Technology (ICT) development and advancement of technology and modernization of production strategies.

3. In executing its mandate, the Committee oversees the following Departments;
   a. State Department of Broadcasting and Telecommunications
   b. State Department of ICT & Innovation

1.3 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Communication, Information and Innovation was constituted by the House in December 2017 and comprises of the following Members-

Chairperson
Hon. Jane Njiru , M.P
Embu County
Jubilee Party

Vice-Chairperson
Hon. (Eng.) Mark Nyamita Ogola, MP
Constituency
Orange Democratic Party

Hon. George Theuri, MP
Embakasi West Constituency
Jubilee Party

Hon. Gertrude Mbeyu , MP
Kilifi County
Orange Democratic Party

Hon. Alfah O. Miruka, MP
Bomachoge Chache Constituency
Kenya National Congress

Hon. Anthony Kiai, MP
Mukurweini Constituency
Jubilee Party

Hon. Annie Wanjiku Kibeh, MP
Gatundu North Constituency
Jubilee Party

Hon. Gathoni Wamuchomba
Kiambu County
Jubelee Party

Hon. Joshua Kimilu, Kivinda, MP
Kaiti Constituency
Wiper Democratic Party

Hon.Victor Munyaka, MP
Machakos Town Constituency
Jubilee Party

Hon. Marwa Kitayama Maisori, MP
Kuria East Constituency
Jubilee Party

Hon. Erastus Nzioka Kivasu, M.P.
Mbooni
New Democrats Party

Hon. Mwambu Mabongah, MP
Bumula Constituency
Independent

Hon. Innocent Momanyi Obiri, MP
Bobasi Constituency
People's Democratic Party

Hon. Maritim Sylvanus, MP
Ainamoi Constituency
Jubilee Party

Hon. Godfrey Osotsi Atieno, MP
Nominated
African National Congress

Hon. Mwangaza Kawira, MP
Meru County
Independent

Hon. Anthony, Tom Oluoch, MP
Mathare Constituency
Orange Democratic Party

Hon. Jonah Mburu, MP
Lari Constituency
Jubilee Party

1.4 COMMITTEE SECRETARIAT

5. The Committee secretariat comprises -

Head of the Secretariat
Ms. Hellen Kina
Clerk Assistant I

Ms. Ella Kendi
Clerk Assistant II

Mr. Salem Lorot
Legal Counsel I

Ms. Winnie Kulei
Research Officer II

Mr. Thomas Ogwel
Fiscal Analyst II

CHAPTER TWO

2.0 OVERVIEW OF THE COPYRIGHT (AMENDMENT) BILL, 2021

1. The object of the Bill is to amend the Copyright Act (No. 12 of 2001) to provide for fair formula for sharing revenue from ring back tunes between the artists/copyright holders, telecommunications companies, and premium rate service providers. The Bill provides that the artist should get a greater share of the revenue at fifty two (52%) percent.

2. The Bill also proposes to repeal the provisions on takedown notices and requirements, the role of Internet Service Providers and application for injunction in order to remove ambiguity in the role of the internet service provider.

2.1 ANALYSIS OF THE BILL

3. **Clause 1** of the Bill contains the short title.

4. **Clause 2** of the Bill sets out the definition of the terms Registry, ring back tunes and telecommunication operator. It defines the terms as follows:

   "Registry means the National Rights Registry established under section 34A;

   "ring back tune" means subscription music or a tone which is played by a telecommunication operator to the originator of a call;

   "telecommunication operator" has the meaning assigned to it under the Kenya Information and Communications Act, 1998

5. **Clause 3** sets out the formula for sharing of revenue from ring back tunes between the telecommunication provider, the premium service rate provider and the copyright holder. The clause proposes that the net revenue from the sale of ring back tunes is to be shared at seven (7%) percent for the premium rate service provider; sixteen (16%) percent for the telecommunication operator and fifty two (52%) percent for the artist or copyright holder.

Party	**Percentage**
Premium rate service provider	7%
Telecommunication operator	16%
Artist/copyright holder	52%

6. **Clause 4** provides for the establishment of the National Rights Registry as an office within the Kenya Copyright Board. It provides for the functions of the Registry as:
   (a) digital registration of right holders;
   (b) digital registration of copyright works;
   (c) authentication and authorization of consumers of copyright works;
   (d) media monitoring of registered copyright works;
   (e) tracking, monitoring and dissemination of data or logs related to access of registered copyright works;
   (f) any other functions as may be assigned by the Board.

7. **Clause 4** also provides for voluntary registration to the National Rights Registry. Authors of copyright works or copyright holders may register their work on an online portal developed and maintained by the Board. It also provides for inspection of the Registry on payment of the prescribed fees.

8. **Clause 5** provides for a repeal of section 35B which deals with take down notices issued to Internet Service Providers requiring them to remove infringing content.

9. Section 35B of the Copyright Act provides as follows—

35B. Takedown notice

(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 recognized 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, upon receipt of a valid takedown notice, notify the person responsible for making available the alleged infringing content and provide them with a copy of the notice as soon as is practicable.

(5) An Internet Service Provider shall disable access to the material within forty eight business hours unless it receives a counter notice fulfilling the requirements set out for a takedown notice and contesting the contents of the takedown notice.

(6) An 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.

(7) An Internet Service Provider which contravenes the provisions of subsection (4) commits an offence and shall, upon conviction, be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years, or to both.

(8) 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 not exceeding five years, or to both.

(9) A 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.

(10) An Internet Service Provider shall not be liable for wrongful takedown in response to a valid takedown notice.

10. **Clause 6** provides for the repeal of Section 35C of the Act which relates to the role of an Internet Service Provider in taking down content alleged to be an infringement of copyright. Section 35C of the Copyright Act provides as follows—

35C. Role of Internet Service Provider
(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.

11. **Clause 7** provides for the repeal of section 35D which relates to the application for an injunction where there is a copyright infringement Section 35D of the Copyright Act provides as follows—

35D. Application for injunction
(1) A person may apply to the High Court for the grant of interim relief where he or she has reasonable grounds to believe that his or her copyright is being or may be infringed by a person situated in or outside Kenya.
(2) The High Court may, upon application under subsection (1), grant an order requiring—
(a) a person enabling or facilitating the infringement of copyright, or whose service is used by another person to infringe copyright, to cease such enabling or

facilitating activity or disable that person's access to its service for the infringing purpose;

(b) a person hosting or making available an online location, service or facility situated in or outside Kenya which is used to infringe copyright or which enables or facilitates the infringement of copyright, to disable access to such online location, service or facility as replaced, amended or moved from time to time; or

(c) an internet service provider to prevent or impede the use of its service to access an online location, service or facility situated in or outside Kenya that is used to infringe copyright as replaced, amended or moved from time to time.

12. **Clause 8** provides for powers of the Cabinet Secretary to prescribe the following—
    (a) the fees for accessing the National Rights Registry;
    (b) the format for registrations of the respective copyright works;
    (c) the type of copyright works that are registerable with the National Rights Registry;
    (d) anything necessary for the performance of the functions of the National Rights Registry.

CHAPTER THREE

3.1 PUBLIC PARTICIPATION/STAKEHOLDER CONSULTATION

6. Pursuant to Article 118(1) (b) of the Constitution and Standing Oder 127(3), which provide that the Parliament shall facilitate public participation, the Committee placed an advertisement in the local dailies on Saturday 11th December, 2021 inviting the public to submit their views to the Clerk of the National Assembly on or before Tuesday 28th December, 2021.

7. In processing the Bill, the Committee took into account the memoranda received from the public and its deliberations. These were the Joint Committee of the Kenya Copyright Board, the Kenya Film Commission, the Kenya Film Classification Board and the Communications Authority of Kenya; Xpedia Management Limited; Kenya Association of Music Producers (KAMP); Performers Right Society of Kenya (PRISK) and the Music Copyright Society of Kenya (MCSK); Multichoice Kenya; Liberty Africa Technologies Limited; ARTICLE 19 Eastern Africa; Partners Against Piracy; Safaricom; Sports Right Owners Coalition (SORC); International Federation of the Phonographic Industry (IFPI); Union of European Football Associations (UEFA); CODE-IP Trust, Creative Economy Working Group; Kenya Publishers Associations; and International Publishers Association.

3.1.1 MEMORANDA ON SPECIFIC AMENDMENTS

8. Stakeholders submitted the following amendments on specific clauses of the Bill:

Clause 2

9. **CODE – IP Trust** submitted that the clause sets out the definition of the term Registry, ring back tune and telecommunication. In their justification they submitted that amending an Act of Parliament to insert a digital registry was erroneous. The National Rights Registry is already provided for in section 5(f) and 22A of the Copyright Act. The stakeholder further submitted that there was no solid justification for mutilating an Act of Parliament to recognize a digital version of an existing function.

10. **CODE-IP Trust** further submitted that the definition "Registry" be amended to mean the National Rights Registry at the Board. In their justification, the stakeholder stated that this was to delink the establishment of the registry from its day-day implementation details.

11. **Creative Economy Working Group** submitted that the definition "Registry" be amended to mean the National Rights Registry at the Board. In their justification, the stakeholder stated that this was to delink the establishment of the registry from its day-day implementation details.

12. **CODE-IP Trust** proposed amendments to the definition "ring back tune" in either of the following ways: one, to define "ring back tune" but also define all plausible copyrightable works uses; or two, delete the definition and proposed amendments thereunder. The justification for the proposed amendment is two-fold: one, applying the adage, "to name is to exclude"; and two, defining "ring-back tune" equally requires that every plausible use of all copyrightable works by telecommunications companies be defined.

13. **Creative Economy Working Group** similarly proposed amendments to the definition "ring back tune" in either of the following ways: one, to define "ring back tune" but also define all plausible copyrightable works uses; or two, delete the definition and proposed amendments thereunder. The justification for the proposed amendment is two-fold: one, applying the adage, "to name is to exclude"; and two, defining "ring-back tune" equally requires that every plausible use of all copyrightable works by telecommunications companies be defined.

Committee Observations and recommendations on Clause 2

The Committee made the following observations:

(a) Section 5(f) of the Copyright Act (No. 12 of 2001) provides for one of the functions of the Kenya Copyright Board (KECOBO) as to maintain an effective data bank on authors and their works;

(b) Section 22A of the Copyright Act (No. 12 of 2001) provides for the register of copyright works; further, under subsection (1), it provides that the Board shall keep and maintain a register of all works under the Act in such manner as may be prescribed;

(c) The Copyright Act (No. 12 of 2001) does not define a register but the import of section 22A (1) by the words "in such manner as may be prescribed" in relation to the register may be construed to mean that regulations can prescribe the form of the register, including a digital one;

(d) Clause 2 of the Bill proposes to provide for a definition "Registry" to mean the National Rights Registry established under section 34A;

(e) The definition "Registry" is linked to clause 4 of the Bill that proposes the establishment of the National Rights Registry; therefore, in order to retain the definition or propose its deletion, consideration of the merits of clause 4 was important;

(f) There was need to define "artiste" and "premium rate service provider".

The Committee recommended that:

(a) The definition "registry" be amended to make a correct cross-reference to its amendment in clause 4 placing it immediately after section 22A of the Act;

(b) The clause be amended to insert new definitions "artiste" and "premium rate service provider".

Clause 3

14. **Safaricom Limited** proposed deletion of the clause citing that the proposal attempts to regulate the sharing of revenues for a specific type of technological innovation without regard to the commercial considerations that determine the commercial viability of the products. In their justification, the company indicated that the innovation around ring back tunes as defined under the proposed Bill has allowed content owners to benefit from their craft by creating an alternative source of revenue. The company warned that the proposed clause shall lead to a reduction in the investment in innovation around ring back tunes and may lead to the shutdown of the service as a result of intrusive regulation that fails to consider the commercial viability of products like dial back tunes. Further, they pointed out that there are several other content aggregation services available in the country that are not subject to any revenue share regulations and it was their submission that the proposed clause unfairly targets one specific type of innovation and that the clause places an unfair regulatory burden on dial back tunes.

15. **Safaricom Limited** further submitted that corporations invest in the development and maintenance of innovations like dial back tunes and adverse regulatory actions like in the proposed cause shall lead to the demise of technological innovations that have positively impacted the livelihoods of artistes and copyright holders especially in the pandemic era where there are fewer avenues for revenue generation due to restrictions on mass interactions like live performances which previously provided a steady source of income.

16. **Safariom Limited** submitted additional memoranda on the clause in which they highlighted the following:

    i. Over the years, Safaricom has progressively worked to increase the share of revenues that go to the content aggregators (and therefore the artistes). They have progressively raised the amount from an initial 22% in 2009 to 30% in 2017 and to the current 40%.

    ii. In order to start earning from the Skiza platform, content creators and artistes must first register with one of 116 Content Service Providers (CSPs), who take up the responsibility of sourcing, formatting and uploading digital content on Skiza. CSPs act as middle men between Safaricom and content creators or artistes, and all revenues are paid to artistes through respective CSPs who then pay the musicians in accordance with the contracts they have signed and in line with the Kenya Information Communication (Amendment) Act which provides the regulatory framework for content. So far, Safaricom has paid out over Kshs 1.2 billion to the creative industry through Skiza. This amount is typically disbursed by the 20th of each month.

    iii. A tax of 16% is deducted and the balance is shared as follows:-

        a) 40% paid to Content Creators through Content Service Providers (CSPs) who receive funds on behalf of rights holders. This amount is net of taxes.

        b) 60% Split between Safaricom, Technology Partners and Taxes Commercial dependencies include operational costs such as Licence Fees, 24/7 System Maintenance and Customer Care, Research and Development, Human Capital, Network Use, Marketing and other overheads. Technology Partner at 10.4% and 49.6% for Operational costs and profit margin (the ratio appropriation of which varies depending on commercial dependencies). This totals to 100%

iv. **The Cost Breakdown for the Ksh 1.50 is as follows;** - tax 16% (0.21) amount to share is Kshs. 1.29, content partners (40%) gets Kshs. 0.52, technology partners (10.4%) gets Kshs.0.14 while Safaricom (49.6%) gets Kshs. 0.64.

v. **On standard Contracts for Skiza Tunes between Copyrights Holders and the CSPs,** Safaricom has previously in conjunction with industry players assisted in the development of Contract Templates for Skiza Tunes. This was undertaken to address the issue of lack of clarity by rights owners on the content of contracts with their respective CSP's. Safaricom shall continue to support initiatives that create clarity on the payments and frequently conducts legal clinics to raise awareness for artistes on their rights in this regard.

vi. **On breakdown of 40% Payments made through CSPs,** Safaricom has no visibility over the contractual agreements between copyrights holders and the CSP's and this information may be received through the regulator. Safaricom firmly believes that the implementation of the National Rights Registry will ensure that disputes regarding payments will be alleviated.

vii. On penalties for Delayed Payments, Safaricom is sympathetic to the plight of rights owners who fail to receive payments from their respective CSPs. As mentioned Safaricom issues monthly payments to the CSPs by the 20th of each month.

viii. The Bill proposes a National Rights Registry which Safaricom believes can be configured as a standard portal to track the utility of the works of copyrights owners and in extension the requisite payments that should be made for the use of the copyrights.

ix. Commercial pricing decisions should be left in the hands of stakeholders involved in the product lifecycle based on dynamic platform economic models. An adverse regulatory intervention could negatively impact the investments in the development and maintenance of current and future technologies.

17. **CODE – IP Trust** submitted that the formula for sharing of revenue from ring back tunes between the telecommunication provider, the premium service rate provider and the copyright holder should be prescribed in regulations and not an Act of Parliament. The stakeholder further submitted that Parliament passes an Act with a framework for a policy idea or law leaving implementation details to subsequent delegated legislation to fill out the precise details of the law as governed by the Statutory Instruments Act (No. 23 of 2013). Furthermore,

revenue from ring back tunes is a subset of copyrights property rights which begs the question on revenues share formulae for the balance of copyright Works transmitted through the telecommunications companies.

18. **CODE-IP Trust** gave an example of the Kenya Information and Communications (Broadcasting) Regulations, 2009 made pursuant to section 46K of Kenya Information and Communications Act on requirements for local content quotas on broadcasting stations which provides:

    The Minister may, in consultation with the Commission, make regulations generally with respect to all broadcasting services and without prejudice to the generality of the foregoing, with respect to—

    (a) the facilitation, promotion and maintenance of diversity and plurality of views for a competitive marketplace of ideas;
    (b) financing and broadcast of local content;
    (c) mandating the carriage of content, in keeping with public interest obligations, across licensed broadcasting services;
    (d) prescribing anything that may be prescribed under this Part.

19. **CODE-IP Trust** further submitted that the regulations should provide an alternative for the artist to enter into "willing buyer and willing seller" contractual agreements with telecommunications companies.

20. **IFPI** submitted that introduction of statutory licensing scheme for ring back tunes in the bill would unreasonably interfere with the exclusive rights of right holders including the exclusive making available to the public right and reproduction right as well with the freedom of contract. Parties involved in the provision of ring back tunes (service providers, telecommunication operators and right holders) should be free to negotiate the commercial terms for the use of their recordings.

21. **Xpedia Management Ltd and Liberty Africa Technologies Ltd** proposed that the Committee considers changes to remove ambiguity and protect existing contractual arrangements. There is need to have the amounts adding up to a hundred percent (100%) to

make it clear the net is the new full amount. They proposed that the Committee takes cognizance of the existing valid contractual arrangements in place between the telecommunication companies, content service providers and content owners. A provision should be inserted to avoid litigation.

22. **Creative Economy Working Group** submitted that while they welcome prescribing ringtones revenues sharing formula (but in regulations and not body of the Act), the sum-total of the individual percentages must add up to 100 per centum. They pointed out that in the Bill, they total to 75% which raises the question as to who exactly will end up taking the undisclosed 25% balance of revenue.

23. **Joint Committee of the Kenya Copyrights Board, Kenya Film Commission, Kenya Film Classification Board and Communications Authority of Kenya** submitted that there was need to have the amounts in the net adding up to a hundred percent and protect existing valid contractual arrangements in place between the telecommunication companies, content service providers and content owners orcreators.

24. They therefore proposed that the clause be amended to read as follows:

30C. Without prejudice to section 30B, in the case of ring back tunes, the parties shall subject to subsisting contracts share the revenue net of tax from the sale of ring back tunes as follows:

a) *the premium rate service provider at nine percent;*
b) *the telecommunication operator at twenty one percent;*
c) *the artist or copyright holder at seventy percent.*

25. **The artistes** that appeared before the Committee submitted that music industry in Kenya was affected by many technical and technological issues that led to collapse of the business in the last two decades. The music shops that sold videos, cassettes, Compact Discs and music albums are no longer sustainable. The industry has moved into digital space and the only available income for the musicians now is from the ring back tunes. The proposal from Kenyan Artistes was that a clear formula of Skiza revenue sharing should be anchored in the copyright law.

26. The artistes further submitted that Article 2(6) of the Constitution of Kenya 2010 states that any treaty or international conventions ratified by Kenya shall form part of the laws of Kenya. This Includes the WIPO Copyright Treaty. Article 11(2) and (3) of the Constitution states that the government shall promote and protect all forms of cultural expressions, arts, communication and cultural heritage and that Parliament shall enact a legislation to ensure the collection of royalties for the use of cultural expressions and cultural heritage.

27. **The Artistes** agreed with the proposed amendment on revenue sharing formula which will ensure that the artistes get a greater share of the revenue. They further submitted that currently under Safaricom Ltd, the skiza tunes charges are Kshs. 1.50 per ring back tune and the government issued a ten percent excise tax exemption to skiza. The artistes' share went up while the PRSP share remained the same as indicated in the table below; -

Details	**Current Revenue Distribution**	**Current Revenue Distribution**	**Annual Revenue @Kshs.1.00**
Gross Revenue	1.00	1.50	5B
PRSP Share	0.07	0.10	352.8M
Telco Share (52%)	0.52	0.77	2.62B
KRA Taxes	0.16	0.24	806.4M
Excise Tax	0.09	0.14	453.6M
Artist Share	0.16	0.24	806.4M

28. With the proposed amendment, the gross revenue will increase to 7.56B while the artistes' share will increase to 4.63B from the current 806.4M annually.

Committee observations and recommendations on Clause 3

The Committee made the following observations and recommendations;

(a) The proposed new section 30C provides for the sharing of the net revenue from the sale of ring back tunes but the percentages do not add up to 100% hence there is a need to amend the percentages to rectify this;
(b) There was need to amend the proposed new section 30C to address subsisting contracts;

The Committee therefore recommended that clause 3 of the Bill be amended in the proposed new section 30C to provide as follows:

(i) Premium rate service provider- eight-point five percent (8.5%);
(ii) The telecommunication operator- thirty-nine-point five percent (39.5%);
(iii) Artiste or copyright holder- fifty two percent (52%)

Further, the Committee recommended that clause 3 of the Bill be amended to address subsisting contracts.

Clause 4

29. **Kenya Copyright Board** (KECOBO) recommended shifting the proposals in clause 4 to after section 22A of the Copyright Act which deals with voluntary registration of copyright that closely follows or relates to the subject of the National Rights Registry. This will require the amendment of the proposed sections and the proposed amendments to the Interpretation provisions under Clause 2 of the Bill.

30. **KECOBO** provided for the justification to their proposal. They indicated that section 34 of the Copyright Act under which the provision is proposed to be anchored has the title 'Rights of Action and Remedies of Exclusive Licensee and Sub-licensee'. The inclusion of the sections on the National Rights Registry under that section may therefore cause confusion.

31. **CODE- IP Trust** submitted that they were opposed to the proposed establishment of the National Rights Registry and the functions of the registry. The stakeholder observed that the clause provides for voluntary registration. Further, the stakeholder indicated that amending an Act of Parliament to insert a digital registry was erroneous. Further, the Act going to the

extent of legislating on registry staff, was overburdening the Act. The stakeholder proposed that the clause be deleted and saved for subsidiary legislation. The justification for the proposed deletion was that legislative custom excludes the principal Act from directing implementing institutions on operational, procedural and administrative details. These fall within the domain of subsidiary legislation (regulations).

32. **CODE-IP Trust** proposed that clause 4 of the Bill be amended in the proposed new section 34C (1) by inserting the words "the voluntary" immediately after the words "online portal for" and deleting the words "to be known as the National Rights Registry". Their justifications were as follows: (1) to align the purpose of the proposed new section to the marginal note; (2) the "portal" is not the actual registry; (3) the principal Act avoids encroaching on Statutory Instruments Act mandate on administrative tools and procedures; (4) Maintaining the recommended text compels the Board's transparency to copyright owners and supporting public access to information as a fundamental right.

33. **CODE-IP Trust** proposed that clause 4 of the Bill be amended in the proposed new section 34C (2) by inserting the words "bona fide" immediately after the words "copyright works or" for the provision to read as follows:

    (2) The author of copyright works or ***a bona fide*** *holder of a copyright may register his or her works on the National Rights Registry.*

    The justification for the proposed amendment was that the law avoids involvement of disputes between copyright owners and copyright assignees; avoids presuming that the portal is "the registry"; and the use of simple and clear language specific to the objective.

34. **CODE-IP Trust** was opposed to subclause (3) of the proposed new section 34C in clause 4. Tha clause 4 of the Bill be amended in the proposed new section 34C (2). They stated that the words "Subject to such conditions as may be prescribed by the Board" delegates Parliament's legislative mandate to the Board. Further, as currently drafted, KECOBO, the copyright regulator, assumes Collective Management Organisation (CMO) royalties collection function. Thus, KECOBO would derive unjust income from the access of bona fide copyright owners' creative labours. Further, merely publishing copyright registration information online cannot be fairly justified as the basis of imposing new "access fees". Lastly, withholding copyright

registration information negates fundamental right of access to information. Therefore, the stakeholder proposes that summary copyright registration information should be freely accessible to everyone.

35. **Creative Economy Working Group** proposed that clause 4 of the Bill should be deleted and be provided for in subsidiary legislation. The justification was that legislative custom excludes the principal Act from directing implementing institutions on operational, procedural and administrative details. These are in the domain of subsidiary legislation (regulations).

36. **Creative Economy Working Group** proposed that clause 4 of the Bill be amended in the proposed new section 34C (1) by inserting the words "the voluntary" immediately after the words "online portal for" and deleting the words "to be known as the National Rights Registry".

37. **Creative Economy Working Group** submitted that despite their view that the operationalization of proposed "National Rights Registry" should be under subsequent regulations (rather than the body of the Act), their four concerns on clause 4 were as follows:

    (i) A more elaborate and functional copyright rights registry already exists under the Kenya Copyright Board. Any interested rights holders (including "ring back tunes", book authors, software developers, fashion designers, artistes, visual artists, filmmakers, comedians, dancers, architects, photographers, and all other bona fide (literally, artistic, audiovisual and software, et cetera) creative workers copyright can and already do voluntarily register their rights. What is the Bill seeking to remedy?

    (ii) KECOBO's independence as the copyright regulator would be compromised by the proposal, "Subject to such conditions as may be prescribed by the Board and upon payment of the prescribed fees, any person may access the copyright works through the National Rights Registry," considering that:

        (a) One of its proposed new functions would be to collect royalties from any person accessing private copyright works in their possession as an entrusted, independent, public service institution and not a private members royalties' collecting management organization;

(b) The proposed new access to registration information restriction (currently freely published to the public) erodes right to access information fundamental right guaranteed by the Constitution of Kenya;

(c) The Board should not be granted blanket legal authority to "prescribe" conditions of access over and above the fees determined thereof;

(iii) The proposal that, "The Cabinet Secretary may prescribe anything necessary for the performance of the functions of the National Rights Registry," is not only asking Parliament to delegate its legislative mandate to and grant the Cabinet Secretary carte blanche legal authority to "prescribe anything" the Cabinet Secretary so desired while guaranteed protections by law.

38. **Joint Presentation by Kenya Association of Music Producers (KAMP), the Performers Rights Society of Kenya (PRISK), and the Music Copyright Society of Kenya (MCSK)** submitted that the proposed new section 34B in clause 4 of the Bill on functions of the Registry such as authorization of consumers of copyright works, media monitoring of registered copyright works, tracking, monitoring and dissemination of data logs related to access of registered copyright works are all duties that fall squarely under the mandate of Collective Management Organization.

39. They proposed that clause 3 of the Bill should be amended by deleting the proposed new section 34B in clause 4 of the Bill specifically paragraphs (a), (b) and partially (c) as having it will bring about duplicity of roles between the registry and collective management organizations.

40. **The artistes** that appeared before the Committee supported clause 4 of the Bill that proposes the establishment of the National Rights Registry.

Committee observations and recommendations on Clause 4

41. The Committee made the following observations and recommendations;

(a) Clause 4 of the Bill should have been rightly placed either within or after section 22A of the Copyright Act since the section relates to the register of copyright works;
(b) Clause 4 of the Bill needed to be amended in the proposed new section 34C (1) by inserting the words "the voluntary" immediately after the words "online portal for" to align the provision to the marginal note;
(c) Section 5(b) and (f) of the Copyright Act provides for the functions of the Kenya Copyright Board as to license and supervise the activities of collective management societies as provided for under the Act; and to maintain an effective data bank on authors and their works;
(d) The Copyright Act defines "collective management organisation" to mean an 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;
(e) Section 46C (1) of the Copyright Act provides 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;
(f) Section 49(2) (a) (ix) of the Copyright Act provides that one of the aspects to be provided for in regulations shall be a system for the identification of copyright works and monitoring of payment, collection and distribution of royalties;
(g) The proposed new section 34B in clause 4 is not in conflict with the roles of collective management organisations.

The Committee recommended that Clause 4 of the Bill should be amended so that the proposed new sections should be inserted immediately after section 22A of the Act for logical flow.

Clauses 5,6 and 7

42. **Safaricom Limited** supported the proposed clauses. They indicated that currently there are onerous takedown responsibilities given to Internet Service Providers that create a claw back to the intermediary liability safeguards given to ISPs under Section 35A of the Copyright Act. Takedown clauses should exist without unfair burdens to ISPs that are akin to making ISP's responsible for policing the internet.

43. **IFPI** advised against repealing Section 35B, 35C and 35D. The sections provide the essential balance between the rights and responsibilities under the safe harbour provisions. Without these sections, the safe harbour provisions in the Copyright Act will fail to fulfil their primary objective which is to ensure the protection of copyright while fostering the development of online infrastructure services. Repealing these provisions would furthermore result in Kenya falling far below the international standard.

44. **CODE – IP Trust** submitted that repealing the sections of the copyright Act will take away fundamental rights based on protections introduced into the Copyright Act. Throughout the world, including the African Union, the principle of intermediary protection requires that in order not to unconstitutionally censor the internet, it is important that internet service providers be protected from being held liable for content of which they are only acting as a mere conduit or transmitter. ISPs are to be expressly exempted from any general obligation to monitor the content passing through their networks. A workable notice and takedown system would be to monitor all content which in any case is technically impossible with encrypted content , ISPs take action on any content that may violate copyright laws once they have been notified through a formal process of notice and takedown .The proposed repeal of the three sections proposes to take away these two pillars that were introduced into the Copyright Law in 2019 and to put Kenya back on the dubious list of countries that do not guarantee the privacy and freedom of online content .

45. **Mr. Mike Strano, on behalf of Partners Against Piracy (PAP)** raised concern on the proposal to repeal Sections 35B, 35C and 35D of the Act stating that the sections are game-changing provisions in Kenya and the first of its kind in Africa. The provisions protect the creative industry in Kenya by providing incentives and a legal basis for better co-operation from Internet Service Providers (ISPs) to support rights holders in their fight against piracy.

PAP proposed that Parliament should rather consider changes that would make the law clearer and more effective in full co-operation with the ISPs thus ensuring the sustainability of the Kenya creative industry and safety of the country against such crimes. Further, the repeal of the sections will continue to abet the illegal operations involved in offering pirated content online including crimes like tax evasion, identity theft, data ransom, money laundering and fraud. The provision ensuring the swift takedown of illegal content benefits the ISPs who are now becoming owners and platforms themselves and that such repeal would result in those ISPs not being able to recoup their investments, as online piracy steals 99% of potential revenue.

46. **MultiChoice Kenya Limited** stated that the provisions are aimed at addressing the prevalent and brazen infringement of copyright protected works online. The sections established a framework by which copyright owners and ISPs could share responsibility for dealing with online copyright infringement. These frameworks are the most used means of enforcement in respect of online piracy as they interrupt access to infringers' sites. MultiChoice appealed to Parliament to retain the sections.

47. **Sports Rights Owners Coalition** opposed the proposals citing that take-down notices enable copyright holders and related rights holders to control their work and the ability to make it available on online platforms. Take-down notice is one of the effective remedies against digital piracy available to right holders and are an international concept to safeguard the intellectual property rights of copyright holders in their works. The ability to remove unauthorized content is crucial in protecting the value of live sport for sports rights owners. Further, the European policy makers are strengthening the effectiveness of take-down notices particularly in the live environment and the proposals will be effective in the first half of 2022.They urged the Committee to urgently reconsider the proposals so as not to harm Kenyan consumers and threaten the availability of sports and entertainment content in Kenya.

48. **Union of European Football Associations** opposed the proposed amendments. They cited that as a result of the commercial rights in UEFA's competitions being exploited and managed on a centralised basis through UEFA, the vast majority of revenues generated are redistributed to the various related UEFA stakeholders, ranging from UEFA's member national

associations and the teams participating in a particular competition to non-participating teams on a solidarity basis and specifically football development and grass root investment throughout Europe. They warned that piracy, if left uncontrolled, will fundamentally threaten the viability of the commercial model of football (and sport as a whole) and therefore, threaten the funding upon which football's solidarity model is based.

49. **Joint Committee of the Kenya Copyright Board, Kenya Film Commission, Kenya Film Classification Board and Communications Authority of Kenya** submitted that clauses 5, 6, and 7 of the Bill seek to repeal Sections 35B, 35C and 35D of the Copyright Act on takedown notices, role of the internet provider and application for an injunction respectively. The Kenya copyright legal framework as it now exists provides for safe harbours for internet Service Providers and a procedure for notice and takedown in line with international standards and specifically the WIPO internet treaties. The provisions represented a milestone in the copyright law. This demonstrated the government's intent to forge ahead as regards copyright and the internet. Having been enacted recently, the implementation of these provisions is yet to be fully realized. They further recommended that the repeal of the intermediary proposals be removed.

50. **Association of Music Producers (KAMP), the Performers Rights Society of Kenya (PRISK), and the Music Copyright Society of Kenya (MCSK)** submitted that repealing section 35B leaves the right holders exposed to online infringement of their work which has become rampant with increased use and development of technology. A takedown notice is a tool for copyright holders to get user-uploaded material that infringes their copyrights taken down on websites. The proposed amendment will create room for online piracy.

51. They submitted that repealing section 35C removes any form of obligation on the part of Internet Service Providers in dealing with infringement of copyrighted works. The rationale for repealing this section is untenable. By implication internet service given the role they play in providing a platform for availing material online should equally be held accountable to ensure that none of the material is infringing on the copyright holders.

52. They further submitted that repealing the section would leave the copyright holders exposed as their remedy under the Act would be no more. A copyright owner may seek a preliminary injunction to prevent or restrain future or ongoing infringement. Therefore, it was of paramount importance to retain the section.

53. **ARTICLE 19 Eastern Africa** submitted that clause 5 of the Bill should be amended to provide for notice procedure in alternative to the Notice and takedown procedure. They expressed concern with the notice and takedown procedure under Section 35B as it imposes financial and criminal sanctions on ISPs for failing to take down content forcing ISPs to act cautiously and tend to takedown potentially infringing content. Notice to notice procedure will ensure that ISPs only takedown content on orders of the Court or independent body of tribunal.

54. **Article 19 Eastern Africa** submitted that clause 6 of the Bill should be deleted as it limits the gains made to safeguard the right to privacy and freedom of expression in the digital environment. This clause seeks to repeal Section 35C which provides for intermediary immunity and only allows ISPs to disclose information of subscribers who are allegedly infringing copyright to investigative agencies in compliance with a court order. There is a concern that repealing this section would be akin to eliminating intermediary immunity. It is highly likely that ISPs would actively monitor and police content to ensure it is not infringing speech which would lead to censorship.

55. **Article 19 Eastern Africa** submitted that Clause 7 of the Bill should be deleted as it eliminates opportunity for a complainant to seek judicial remedies for copyright infringement and waters down international standards on intermediary liability. Article 19 Eastern Africa expressed their belief that judicial authorities or an independent tribunal, not private entity, should make decisions on content. Section 35D affirms this position by stating that the High Court may issue an order to a webhost or ISP to make infringing material inaccessible. This position complies with international standards on Intermediary Liability and International Human rights standards on free speech.

56. **The International Publishers Association (IPA)** submitted that provisions to repeal Sections 35B, 35C and 35D of the Kenyan Copyright Act should be immediately rejected and removed from the Copyright (Amendment) Bill (National Assembly Bill No. 44 of 2021). The provisions are of key importance, setting out minimum standards for online enforcement in Kenya. Nevertheless, the Bill proposes to repeal them, therefore eliminating legal mechanisms on notice and takedown procedures and provisions establishing ISPs liability, while also repealing the section that enables copyright owners to file injunctions to deter infringement of their rights. If the Bill is approved as it stands, there will be no defense against online infringement of copyright in Kenya.

57. **IPA** further submitted that the proposal to repeal these sections is not based on an impact assessment of the needs of creative industries, nor does it present a reason for eliminating existing online enforcement provisions, shortly after their introduction in 2019. Online piracy remains a serious problem in Kenya, affecting its creative industries' ability to secure the investments required to develop and maintain digital business models. The 2019 review was seen by creative industries as an important step in creating the necessary conditions for a fair digital marketplace in Kenya. Repealing the provisions at stake will cause irreparable damage to creative industries. Without appropriate enforcement mechanisms, Kenyan publishers will see their opportunities to enter the global digital marketplace completely undermined and will have to suffer the disastrous effects of an unbearable level of risk derived from copyrights no longer being enforceable against online infringement in Kenya.

58. **International Federation of Film Producers Associations** submitted that deletion of sections 35B 35C and 35D would bear considerable prejudice to the Kenyan creative sectors and their ability to conduct productive trade with audiovisual content producers in third world countries. The current proposal to remove such provisions from Kenya's Copyright Act entirely would have a calamitous impact on Kenya's audiovisual sector and its cultural industries at large, by removing a strategic set of legal tools in the fight against piracy and unauthorized uses. It would also have the effect of discouraging international co-production and foreign direct investment into Kenya's film production and distribution infrastructure, resulting in stunted growth in the sector, with attendant negative effects on job creation, contribution to the national fiscus and export earnings.

59. **The Creative Economy Working Group** recommended that clauses 5,6,7 of the Bill should be deleted. They justified their position for the following reasons:

(i) Contrary to what is stated in the Memorandum of Objects and Reasons of the Bill, the Bill actually proposes to limit fundamental rights and freedoms;

(ii) Article 33 of the Constitution of Kenya guarantees the freedom of expression which is defined to include "freedom to seek, receive and impart information or ideas" and "freedom of artistic creativity"

(iii)The only limits to that right are set out in the same Article as propaganda for war, incitement to violence and hate speech;

(iv)This principle has its strongest foundations in freedom of expression which is a right guaranteed both b the Constitution of Kenya as well as regional and international law;

(v) The internet is one of Kenya's foremost tools in facilitating freedom of expression and artistic creativity; it has democratized access to information and ideas and the right to express and disseminate information; it functions as a site for the stimulation of the imagination and creativity, and it is an economic engine for many of our SMEs and youth;

(vi) Throughout the world, including the African Union, the principle of intermediary protection requires that in order not to unconstitutionally censor the internet, it is important that Internet Service Providers be protected from being held liable for content of which they are only acting as a mere conduit or transmitter;

(vii) It is also recognized that the two fundamental pillars of the principle of intermediary protection are that:

(a) ISPs are to be expressly *exempted from any general obligation to monitor the content* passing through their networks. This is both for practical purposes;

(b) There ought to be a workable *notice and takedown system*. Rather than monitor all content (which is any case is technically impossible with encrypted content) ISPs take action on any content that may violate copyright law once they have been notified through a formal process of notice and takedown;

(viii) The proposed repeal of the three sections proposes to take away these two pillars that were introduced into the Copyright Law in 2019 and to put Kenya back on the

dubious list of countries that do not guarantee the privacy and freedom of online content.

Committee observations and recommendation on Clause 5, 6 and 7

The Committee made the following observations and recommendations:

(a) Clauses 5,6,7 of the Bill proposed to repeal section 35B, section 35C, and section 35D of the Copyright Act;
(b) Section 35B of the Copyright Act deals with take down notices issued to Internet Service Providers requiring them to remove infringing content;
(c) Section 35C of the Copyright Act provides for the role of an Internet Service Provider in taking down content alleged to be an infringement of copyright;
(d) Section 35D of the Copyright Act provides for the application to the High Court for an injunction where there is a copyright infringement;
(e) Sections 35D, 35C, and 35D are fairly recent inserted sections to the Copyright Act; the Copyright (Amendment) Act (No. 20 of 2019) amended the Copyright Act, 2001 and it was through this Act that the sections came into operation on 2nd October, 2019;
(f) The Committee had considered the then Copyright (Amendment) Bill, 2017 (now an Act of Parliament: the Copyright (Amendment) Act (No. 20 of 2019)) which contained sections 35D, 35C, and 35D. In the Bill's memorandum of objects and reasons, it was stated that the sections "outline provisions on protection of Internet Service Providers (ISPs) from liability for infringing material displayed by their subscribers. The new sections further provide for the rights and obligations of copyright holders with regard to takedown procedures of infringing material by ISPs and the obligation of ISPs to provide information to investigative agencies on the identity of subscribers suspected of copyright infringement.";
(g) The sponsor of the Bill agreed to delete clauses 5,6,7 of the Bill, noting that the proposed repeal of section 35B, section 35C, and section 35D of the Copyright Act will negate the main object of the Bill which was to improve the welfare of artistes;

(h) Sections 35D, 35C, and 35D of the Copyright Act were important, progressive provisions that are fairly recent in need of implementation and they should therefore be retained.

Recommendation

The Committee recommended that clause 5,6 and 7 of the Bill be deleted.

Clause 8

60. **CODE-IP Trust** proposed the deletion of clause 8 of the Bill. The justification for the proposed deletions were that the Cabinet Secretary would be acting as an agent obstructing fundamental right to access to information. Further, paragraph (b) should be deleted in order to defer it to subsidiary legislation (regulations). Paragraph (c) should be deleted in order to defer it to subsidiary legislation (regulations) and that the Cabinet Secretary should justify why only some types of copyright works qualify as registrable while the rest do not qualify. Paragraph (d) should be deleted because the words "may prescribe anything necessary" are not only carte blanche but very dangerous delegation of Parliament's legislative authority.

Committee observations and recommendations on Clause 8

61. The Committee observed that clause 8 of the Bill is proper as it provides for power of the Cabinet Secretary to prescribe matters in regulations. The items listed as those to be prescribed in regulations are not unreasonable as they are those that the Bill contemplates. However, there was need to amend section 49 (2) of the Act by inserting the paragraphs in subsection 2(a) instead of providing for it as a substantive subclause.

62. The Committee therefore recommended that the Bill be amended by deleting clause 8 and substituting therefor the following new clause—

Amendment of section 49 of No. 12 of 2001.

8. The principal Act is amended in section 49(2) in paragraph (a) by inserting

the following subparagraphs immediately after subparagraph (iv)—

"(iva) the fees for accessing the National Rights Registry;

(ivb) the format for registrations of the respective copyright works;

(ivc) the type of copyright works that are registrable with the National Rights Registry;

(ivd) anything necessary for the performance of the functions of the National Rights Registry;"

CHAPTER FOUR

4.0 COMMITTEE RECOMMENDATIONS

The Committee, having considered the Copyright (Amendment) Bill, 2021 (National Assembly No. 44 of 2021) recommends, that the House **approves the Bill with amendments** as proposed in the schedule.

5.0 SCHEDULE OF PROPOSED AMENDMENTS

CLAUSE 2

THAT, Clause 2 of the Bill be amended—

(a) In the definition "Registry" by deletion the words "section 34A" and substituting therefor the words "section 22B";

(b) In the definition "ring back tune" by deleting the word "it" and substituting therefor the word "is";

(c) By inserting the following new definitions in their proper alphabetical sequence—

"artiste" means a singer, declaimer, musician or other person whose work constitutes a ring back tune;

"premium rate service provider" means a person authorized by the Communications Authority of Kenya to provide content services which includes ring back tunes and is delivered over electronic communications networks and services;

Justification:

The proposed amendments seek to make a correct cross-reference to the provision seeking to establish the National Rights Registry arising from the proposed amendment to Clause 4 of the Bill. Further, it corrects a typographical error and provides for the definitions "artiste" and "premium rate service provider" since they have been used in Clause 3 of the Bill.

CLAUSE 3

THAT, the Bill be amended by deleting Clause 3 and substituting therefor the following new Clause—

Insertion of new section 30C in Cap. 12 of 2001.

3. The principal Act is amended by inserting the following new section immediately after section 30B—

Payment of ring back tune revenue.

30C. (1) Without prejudice to section 30B, in the case of ring back tunes, the parties shall share the net revenue from the sale of ring back tunes, as follows—

(a) the premium rate service provider at eight point five percent;

(b) the telecommunication operator at thirty nine point five percent;

(c) the artiste or owner of the copyright at fifty two percent.

(2) Despite subsection (1), all contracts between premium rate service providers and artistes or owners of the copyright existing before the

commencement of this Act shall apply until their expiry, and subsequent contracts shall conform to this provision.

Justification:

The proposed amendment seeks to amend the proposed new section 30C to provide for the sharing of the net revenue from the sale of ring back tunes and to change the percentages to add up to 100%. Further, the proposed amendment seeks to address subsisting contracts between artistes or owners of copyright and premium rate service providers.

CLAUSE 4

THAT, the Bill be amended by deleting Clause 4 and substituting therefor the following new Clause—

Insertion of new sections in Cap. 12 of 2001.

4. The principal Act is amended by inserting the following new sections immediately after section 22A—

National Rights Registry.

22B. (1) There is established a National Rights Registry which shall be an office within the Board.

(2) The staff of the Registry shall be the staff of the Board.

Functions of the Registry.

22C. The functions of the Registry shall be—

(a) digital registration of right holders;

(b) digital registration of copyright works;

(c) authentication and authorization of consumers of copyright works;

(d) media monitoring of registered copyright works;

(e) tracking, monitoring and dissemination of data or logs related to access of registered copyright works;

(f) any other functions as may be assigned by the Board.

Voluntary registration on the National Rights Registry.

22D. (1) Without prejudice to the generality of section 22C, the Board shall cause to be developed and maintained an online portal for registration of copyright works to be known as the National Rights Registry.

(2)) The author of copyright works or an owner of copyright may register his or her works on the National Rights Registry.

(3) Subject to such conditions as may be prescribed by the Board and upon payment of the prescribed fees, any person may access the

copyright works through the National Rights Registry.

Justification:

The proposed amendment seeks to amend clause 4 to insert the proposed new sections immediately after section 22A of the Act for logical flow. Section 22A provides for the register of copyright works.

CLAUSE 5

THAT, Clause 5 of the Bill be deleted.

Justification:

The justifications for the proposed deletion are as follows:

(a) Section 35B of the Act is an important, progressive provision that is fairly recent in need of implementation and it should therefore be retained;

(b) Section 35B of the Copyright Act deals with take down notices issued to Internet Service Providers requiring them to remove infringing content;

(c) The sponsor of the Bill agreed to delete clauses 5,6,7 of the Bill, noting that the proposed repeal of section 35B, section 35C, and section 35D of the Copyright Act will negate the main object of the Bill which was to improve the welfare of artistes.

CLAUSE 6

THAT, Clause 6 of the Bill be deleted.

Justification:

The justifications for the proposed deletion are as follows:

(a) Section 35C of the Act is an important, progressive provision that is fairly recent in need of implementation and it should therefore be retained;

(b) Section 35C of the Copyright Act provides for the role of an Internet Service Provider in taking down content alleged to be an infringement of copyright;

(c) **The sponsor of the Bill agreed to delete clauses 5,6,7 of the Bill, noting that the proposed repeal of section 35B, section 35C, and section 35D of the Copyright Act will negate the main object of the Bill which was to improve the welfare of artistes.**

CLAUSE 7

THAT, Clause 7 of the Bill be deleted.

Justification:

The justifications for the proposed deletion are as follows:

(a) **Section 35D of the Act is an important, progressive provision that is fairly recent in need of implementation and it should therefore be retained;**

(b) **Section 35D of the Copyright Act provides for the application to the High Court for an injunction where there is a copyright infringement;**

(c) **The sponsor of the Bill agreed to delete clauses 5,6,7 of the Bill, noting that the proposed repeal of section 35B, section 35C, and section 35D of the Copyright Act will negate the main object of the Bill which was to improve the welfare of artistes.**

CLAUSE 8

THAT, the Bill be amended by deleting Clause 8 and substituting therefor the following new Clause—

Amendment of section 49 of No. 12 of 2001.

8. The principal Act is amended in section 49(2) in paragraph (a) by inserting the following subparagraphs immediately after subparagraph (iv)—

"(iva) the fees for accessing the National Rights Registry;

(ivb) the format for registrations of the respective copyright works;

(ivc) the type of copyright works that are registrable with the National Rights Registry;

(ivd) anything necessary for the performance of the functions of the National Rights Registry;"

Justification:

The proposed amendment seeks to amend clause 8 for logical flow.

SIGNED ..... **DATE** 21/02/2022.

HON.JANE NJIRU, M.P
CHAIRPERSON
DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION