

KENYA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Kenya be placed on the Watch List in 2021.¹

Executive Summary: In 2019, Kenya's Attorney General Kihara Kariuki highlighted the creative industries' contribution to Kenya's economy, citing a study estimating the contribution to be 5.3% of GDP and stating, "The protection of the copyrights will essentially put money into the pockets of authors, producers and all creators."² Yet Kenya's copyright legal and enforcement frameworks remain deficient, and piracy, particularly online, remains a significant barrier for the creative industries in Kenya. While the Government of Kenya has indicated its intention to ratify the WIPO Internet Treaties (WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT)), it has yet to do so. Kenya's 2019 Copyright Act amendment was intended to address some of the challenges of the digital age, but Kenya's copyright framework remains deficient in a number of significant respects. A 2020 draft Intellectual Property Bill (IP Bill), which largely incorporated 2019 amendments to the Copyright Act, failed to address many of these deficiencies, and included additional provisions that fall short of Kenya's international obligations and best practices.

The Government of Kenya should take the necessary steps to update Kenya's copyright legal and enforcement regimes, and improve its marketplace for legitimate digital trade in copyright protected materials. IIPA is hopeful that trade agreement negotiations between the U.S. and Kenya will result in a high-level agreement that is truly built for the digital age, including much-needed copyright protections and enforcement provisions. This would serve both as a model for the regional Africa agreement, while also improving the market in Kenya for the continued growth of the American and Kenyan copyright industries. As Kenya's Attorney General recognized, Kenya should incentivize its own creative industries and foster economic growth and stability by improving the effectiveness of its intellectual property law and enforcement mechanisms. In support of such efforts, at a minimum, any trade agreement with Kenya should reflect global best practices for copyright protection in the digital era.

PRIORITY ACTIONS REQUESTED IN 2021

- Ratify and fully implement the WIPO Internet Treaties;
- Revise the IP Bill to ensure consistency with international obligations and best practices and to address shortcomings in Kenya's copyright and enforcement framework, including by:
 - deleting the provisions requiring copyright registration and compulsory recordation of assignments, and removing the requirement in the Copyright Act that authentication devices be affixed to sound recordings, all of which are incompatible with Kenya's international obligations, including under the Berne Convention, the TRIPS Agreement, and the WPPT;
 - ensuring that the exclusive rights of communication to the public and making available are clearly defined and meet the requirements of the WPPT;
 - ensuring that exclusive rights apply to all sound recordings, including "born digital" recordings;
 - retaining the rights of communication to the public and broadcasting as exclusive rights;
 - providing adequate and effective protections for technological protection measures (TPMs) and rights management information (RMI), in line with international standards;

¹For more details on Kenya's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Kenya's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.

²See Anyango Otieno, "AG: Kenya to ratify copyright protection, information laws", June 11, 2019, [The Standard](https://www.standardmedia.co.ke/article/2001329381/how-copyright-creative-works-can-boost-gdp), <https://www.standardmedia.co.ke/article/2001329381/how-copyright-creative-works-can-boost-gdp>.



- providing a term of protection consistent with international standards (life of the author plus 70 years, or at least 70 years from fixation or publication for sound recordings or works not measured by the life of a natural person);
- expressly incorporating the three-step test into the law to properly confine the scope of exceptions and limitations to copyright protection;
- adding secondary liability principles to ensure adequate legal incentives for cooperation between Internet Service Providers (ISPs) and rights holders;
- clarifying the correct scope of ISP safe harbors from liability as applying to only passive and neutral intermediaries that do not contribute to infringing activities;
- revising notice and takedown procedures to ensure expeditious takedown of infringing materials and other measures demonstrated effective in preventing or restraining infringement, and by removing onerous notice requirements;
- introducing an obligation for ISPs to adopt and implement a repeat infringer policy;
- ensuring effective, transparent and accountable collective management of rights consistent with international standards and best practices to ensure rights holders are able to control the use of their rights;
- introducing a rate-setting standard applicable to the licensing of collectively managed rights requiring that rates reflect the economic value of the use of the rights in trade (i.e., willing buyer/willing seller standard);
- providing deterrent civil and criminal penalties to combat piracy; and
- clarifying the role of the proposed IP Tribunal.
- Improve cooperation with rights holders on copyright enforcement efforts.

THE COPYRIGHT MARKETPLACE AND ENFORCEMENT IN KENYA

Internet use in Kenya has grown significantly in the 21st Century. According to Internet World Stats, in September 2020 there were 46.9 million Internet users in Kenya, up 23,335% since 2000.³ This impressive technological growth, unfortunately, is accompanied by illegitimate activities that will continue to hamper legitimate economic growth if left unchecked. To ensure, effectively, a safe, healthy, and sustainable digital marketplace, the Government of Kenya should assess whether its legal regime is capable of responding to today's challenges, including rampant online piracy.

Digital piracy in Kenya is a growing problem and, recently, the dominant form of piracy in Kenya shifted dramatically from web downloads to streaming. For example, a 2019 Muso and GumGum Sports study found that Kenya was among the top five countries in the world illegally streaming English Premier League (EPL) soccer games.⁴ Kenya's local artists and producers are stymied by the negative impact of widespread piracy in the country, which has stunted its marketplace for creative content.⁵

Kenya has a nexus to locally popular piracy music services, which provide links to infringing content and generate revenues from advertising. Examples include *djcelebu.co.ke* and *sunsetkenya.co.ke*. A particular problem is stream-ripping, which has exploded in the past year to become the most dominant method of music piracy. The music industry reports that stream-ripping accounted for 44.4% of piracy traffic in 2019-2020, up from 14.2% in 2018-2019. The most popular stream-ripping sites in Kenya include *savefrom.net* (782,298 visits), *y2mate.com* (759,542 visits),

³See Internet World Stats at <https://www.internetworldstats.com/stats1.htm>.

⁴See Kariuki, James "Kenya's Lead in Illegal Streaming of EPL Matches," July 11, 2019, *Daily Nation*, <https://allafrica.com/stories/201907120142.html>.

⁵See, e.g., "DStv 'Sambaza' lowers pay for MultiChoice creatives," October 30, 2019, available at <https://www.businessdailyafrica.com/corporate/companies/DStv-piracy-lowers-pay-for-MultiChoice/4003102-5330054-14kuv4bz/index.html> (MultiChoice Kenya, a television producer, states that infringement "has made it hard for us to pay our talents adequately at the prevailing market rate" and is "stifling the company's ability to pump more investments into the Kenyan economy."); Agade, Halligan "Film industry: How to get fans back into the cinema," January 27, 2020, available at <https://africa.cgtn.com/2020/01/27/film-industry-how-to-get-fans-back-into-the-cinema/> ("Film producer Michael Mwangi says the big issue is piracy and unless authorities come up with radical measures then the already low numbers in the cinema halls will continue to nosedive.")

and *mp3juices.cc* (684,871 visits). Peer-to-Peer (P2P) piracy is also a problem in Kenya. The P2P site *1337x.to* is very popular (1,269,791 visits).⁶

Cooperation between rights holders and government officials on copyright enforcement is relatively new. A coalition of rights holders, including representatives of the music industry, has engaged with the Kenya Copyright Board (KECOBO) and other stakeholders with a view toward future cooperation regarding the prevention of copyright infringement. IIPA hopes that this effort will result in enhanced cooperation.

COPYRIGHT LAW AND RELATED ISSUES

Kenya has yet to ratify and fully implement the WIPO Internet Treaties, which set global minimum standards for providing copyright holders with the full panoply of exclusive rights in the digital networked environment. While the Government of Kenya has announced its intention to ratify the Treaties, there has been no stated timeframe for ratification.⁷ In 2019, Kenya enacted an amendment to its Copyright Act intended to address some of the challenges of the digital age. While the new law provides rights holders with some important protections, there are concerns regarding the scope of those protections, including whether they are consistent with international standards and best practices. The 2019 amendments were followed by the introduction of the IP Bill, which would further revise the law.

While the 2019 Copyright Act amendments and the IP Bill appear to provide many of the exclusive rights required by the Treaties, unfortunately there is uncertainty regarding the nature and scope of these protections. For example, the law is inconsistent with the requirements of the WPPT in that it does not expressly include public performance as part of the right of communication to the public and it does not expressly define the making available right. The Government of Kenya should revise the law to ensure that the exclusive rights of public performance and making available are fully and explicitly protected, consistent with the WPPT. Also in accordance with the WPPT, the definition of “publication” in Kenya’s law should be revised to clarify that protections for exclusive rights apply to all sound recordings, including “born digital” recordings that are not released in physical formats, reflecting the realities of today’s digital marketplace.

Kenya lacks proper protections for TPMs, which are critical for enabling business models that foster many of the innovative products and services available online. A major reason why so much legitimate creative content is now available to consumers, and in so many formats and on so many platforms, is because of the widespread use of TPMs by content producers and (licensed) services. These TPMs ensure that only authorized users and consumers have access to copyrighted content. The definition of TPMs in the Copyright Act should be amended to refer to technologies that are designed to have the effect of preventing or restricting infringement, and the prohibitions against the circumvention of TPMs should be updated to bring the protection of TPMs in line with the requirements of the WIPO Internet Treaties.

Protection for RMI is also critical for enabling legitimate trade of copyrighted content in the digital marketplace. The Copyright Act defines “electronic rights management information” as any information that identifies the work or recording. This definition is too narrow and should be amended to include information about the terms and conditions of use of the work or recording and any numbers or codes that represent such information.

Kenya provides an outdated term of protection of life plus 50 or 50 years from creation or publication for works, and 50 years after creation for sound recordings (which is retained in Section 219 of the IP Bill). Kenya should extend its term of protection to the global consensus, which is consistent with current U.S. law. For works, this is a term of life of the author plus 70 years, or at least 70 years from date of publication for works not measured by the life of a natural person. For sound recordings, the term of protection under U.S. law is 95 years from fixation. By adopting a term of

⁶All traffic data highlighted in this paragraph is for the third quarter of 2020, according to SimilarWeb.

⁷Kenya’s Attorney General recently affirmed that the government “is considering ratification of the WIPO Internet Treaties.” See Anyango Otieno, “AG: Kenya to ratify copyright protection, information laws”, June 11, 2019, *The Standard*, <https://www.standardmedia.co.ke/article/2001329381/how-copyright-creative-works-can-boost-gdp>.

protection in line with evolving global norms, Kenya would provide greater incentives for the production of copyrighted works and sound recordings. This change would also provide Kenyan recording artists with the security of knowing that their recordings have the potential to generate income during their lifetimes. In addition, it would provide producers with a stronger incentive to invest in the local creative industries, which would spur economic growth and tax revenues, and enable producers to continue offering works and recordings to local consumers in the latest formats.

Kenya should expressly incorporate the longstanding “three-step test” into its law to properly confine the scope of exceptions and limitations to copyright protection.⁸ Incorporating this well-established global norm into the law is critical to ensure that exceptions and limitations do not devalue the underlying exclusive rights that should be protected.

The ISP liability provisions in Kenya’s amended Copyright Act fall short of global best practices. As an initial matter, Kenya’s law does not include secondary liability principles to hold service providers responsible for infringements carried out by third parties using their services. In U.S. law, secondary liability doctrines (under vicarious, contributory, and inducement theories of law) provide legal incentives for cooperation, and are a deterrent to the unauthorized storage and transmission of copyrighted materials. Second, the scope of the safe harbors from liability in Kenya’s law (also included in Section 238 of the IP Bill) is too broad, and not limited to only passive and neutral intermediaries that do not contribute to infringing activities. In addition, the law also does not require expeditious takedown of notified content (and this deficiency, unfortunately, remains in the IP Bill). Instead, the law allows an ISP to take 48 business hours between receiving a notice and taking down or disabling access to the infringing content. This is inconsistent with baseline international practices and undermines any effectiveness of the system because enormous harm can be caused in 48 hours before the infringing content is taken down. ISPs should be required to expeditiously remove or disable access to infringing content upon receiving notice, as is the global standard, and to take other measures demonstrated effective in preventing or restraining infringement. Furthermore, the requirements for a takedown notice are onerous because they include submission of an affidavit or declaration regarding ownership and validity of rights and additional extraneous information. Consistent with best international practice, the requirements for the notice should instead include simply a statement that the person sending the notice is authorized to act on behalf of the copyright owner and is acting in good faith, and information reasonably sufficient to permit the ISP to locate the content. Finally, the law does not include any requirement for an ISP to adopt and effectively implement a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers (i.e., a repeat infringer policy).

Kenya’s copyright law should clarify that exclusive rights should not be subject to management by collective management organizations (CMOs) unless rights holders expressly authorize a CMO to manage their rights on a voluntary basis and, in that case, only in accordance with the terms of that authorization. In addition, Kenya’s legal framework for CMOs, including proposed regulations, falls well short of international standards and best practices for transparency, accountability, and governance. Moreover, government intervention has undermined rights holders’ freedom to contract and control over their works and sound recordings. The rate-setting process for royalties is non-transparent, arbitrary, and unaccountable to rights holders. As a result, royalty rates are not set according to the commercial value of the use of the rights (i.e., the rate that would be agreed between a willing buyer and willing seller). Furthermore, there are serious concerns about the Government of Kenya’s attempts to remove the ability of CMOs to collect revenues from users of collectively managed rights and its appointment of a third party, not controlled by rights holders, to carry out collection activities instead.

Kenya’s Copyright Act provides for a legal basis for injunctions against intermediaries to disable access to infringing content and penalties for infringement. These are important enforcement tools to combat online piracy, but Kenya’s enforcement framework remains deficient. To ensure adequate and effective enforcement, Kenya should upgrade its criminal, civil, and border enforcement frameworks, including by providing increased, deterrent-level criminal and civil penalties for copyright infringement.

⁸See, e.g., TRIPS Agreement Article 13.

Section 36 of the Copyright Act requires authentication devices to be affixed to sound recordings and audiovisual recordings. Authentication devices were once thought to be an effective means to combat piracy. Unfortunately, authentication devices did not fulfil this promise due to problems such as the use and illicit sale of unauthorized authentication devices. This outdated provision also may be regarded as a formality contravening the international prohibition on formalities in the Berne Convention (and the WIPO Internet Treaties) to the extent that it has the effect of precluding the exercise of rights in cases where authentication devices are not used. This provision should be removed.

In addition to failing to address the deficiencies in the law discussed above, the IP Bill also includes registration and recordation requirements that appear to be inconsistent with Kenya's international obligations. Section 218 of the IP Bill runs afoul of the prohibition on formalities in Article 5(2) of the Berne Convention (as well as the requirements of WIPO Internet Treaties, which, noted above, Kenya should ratify and implement) because copyright owners would be required to register their works in order to enjoy the presumption of ownership that enables rights holders to exercise their rights more efficiently. Section 234(4) of the IP Bill also proposes to invalidate assignments that are not lodged at the Copyright Office, which clearly would constitute a formality on the exercise of rights that is incompatible with the Berne Convention (and the WIPO Internet Treaties), and place an onerous burden on rights holders, creating a substantial obstacle to a thriving creative economy.

Finally, the IP Bill proposes to establish an IP Tribunal. The Government of Kenya should clarify whether the IP Tribunal is intended to be a specialized IP Court or whether the IP Tribunal is intended to adjudicate only disputes concerning the collective management of rights. It is normal practice for the jurisdiction of such a tribunal to be limited to disputes over the collective management of rights. In any event, the law should clarify that rights holders may elect to bring claims under the IP Bill to the IP Tribunal or to the courts.

While IIPA applauds the Government of Kenya's efforts to upgrade its copyright legal framework in the IP Bill, as noted, the draft legislation fails to address many of the concerns outlined above. Moreover, certain provisions—including regarding scope of protections, term of protection, TPMs, exceptions and limitations, intermediary safe harbors, collective management, and formalities on the exercise of rights—fall short of the requirements of the TRIPS Agreement, Berne Convention, the WIPO Internet Treaties, and/or international best practices.

IIPA hopes the Government of Kenya will address these concerns to ensure Kenya meets its international commitments and complies with international norms.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

As noted above, Kenya's existing copyright regime falls short of the requirements of the WIPO Internet Treaties, and the IP Bill raises questions regarding compliance with the TRIPS Agreement, Berne Convention, and the WIPO Internet Treaties.