

Role and Responsibility of Internet Intermediaries in the Field of Copyright in Kenya

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Introduction

- Use of the internet in Kenya is estimated at 8.6 million as at May 2011 which translates to about 22% of the population.
- This is expected to increase with the introduction of broadband and the proliferation of mobile telephony in the country
- Reduction in the cost of connectivity especially for mobile phone services

Internet Intermediaries

- Facilitate transactions between third parties on the internet
- Provide access and transmit content originated by third parties over the internet and digital networks
- Provision of internet based services including e commerce to third parties

Internet Intermediaries

- In some cases, they may generate and provide their own content and transmit the same to third parties.
- They are licensed entities for instance in Kenya they have to be licensed by the Communications Commission of Kenya

Internet Service Providers

- Internet Service Providers such as the telecommunications companies include Safaricom, Orange Kenya, Airtel, and Yu
- Provide platforms for the use of content
- A good example are the premium service providers who offer content such as music on these platforms
- Provide for money transfer services

Data Processing And Web-casting Providers

- These include Access Kenya, UUNET, Wananchi Online, Zuku, among others
- They currently offer high speed broadband through the fibre optic cable
- They enable efficient downloads of content from the internet.

Internet Search Engines

- Include search engines such as Google among others
- Google has been keen on obtaining licences from the rights holders in Kenya to upload content in the music industry

Other Internet Intermediaries

- E commerce Intermediaries such as e bay and amazon
- Internet payment systems such as paypal and mobile telephone money transfer
- Social networking sites with user generated content such as facebook, Mixit (mobile phone), Ytube, twitter among others

General Principles That Guide The Intermediaries In Relation To Copyright

- (a) No obligation to monitor data traffic unless they are aware of an illegal/unauthorised activity
- (b) limitation of liability for in the case of transmission, caching and hosting (normally require third parties to indemnify them)

General Principles

- Exempt from Liability if they conform to the existing laws and regulations
- Adhere to the take down principles once they have been informed of the infringing material

Copyright Act

- Section 26 of the Act grants exclusive rights to the rights holders including communication to the public, sale, distribution
- Section 35 makes it an infringement to do any of the acts under section 26, without the authority of the rights holders

Kenya Information Communication Act (2009)

- Act places liability on the ISPs
- Fine of up to KES 200 000 (US\$ 2 000) or 2 years or both
- Notice to take down based on international practice and saves litigation

Liability of Internet Intermediaries

- Example of ISPs that provides platforms for Premium service providers to upload and disseminate copyright works over mobile phones
- Rights holders threatened to take the ISP (mobile phone service providers) to court for infringement. Matter settled out of court

Liability of Internet Intermediaries

- The Music Copyright Society of Kenya has taken a PRSP and a mobile phone company to court over the issue of ring tones and real tones
- Google is engaged with the rights holders to get authorisation to upload content
- There is hardly any litigation in relation to infringement by the internet intermediaries

Other legal Instruments

- Kenya Communications (Electronic Transactions) Regulations 2009 do not give specific provisions in relation to the liability of the internet intermediaries in Kenya
- No other legal instruments that have a direct bearing on the liability of the Internet Intermediaries in relation to copyright
- Communications Act provides for liability in relation to fraud, offensive material etc

Safe Harbours

- Currently no specific provision for safe harbours entrenched in the law
- Under the Copyright Act, there is a provision in relation to criminal infringement of copyright which provides that where the third party was not aware that the works uploaded to be infringing
- If notified and the take down applied, the internet Intermediary will not be liable

Comparison with other Countries

- Nigeria relies on the provisions of the copyright Act as is the case with Egypt
- South Africa, in addition to the Copyright Act have the South Africa Electronic Communications Act 2002
- It has more detailed provisions in relation to infringement

South Africa

- The provisions are based on the United States DMCA,
- Introduces four safe harbors defenses for Internet intermediaries, defined as “service providers” providing “information system services

Conclusion

- Laws in Kenya like in other African Countries is re active especially in relation to digital technology
- There is quite a bit of work to be done to ensure that the laws make clear provisions in relation to the internet service providers

Conclusions

- Internet Intermediaries have a responsibility to ensure that they only have authorised copyright works
- The laws need to not only facilitate them but also ensure that copyright and related rights are not infringed.

Thank you
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