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The Copyright (Amendment) Bill, 2017: Clauses that Fell Between the Cracks

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The Copyright (Amendment) Bill, 2017: Clauses that Fell Between the Cracks

The Copyright (Amendment) Bill, 2017 is intended to overhaul an outdated Copyright Act. The Bill addresses contentious areas within copyright law like the fair dealing exception of computer programs, the possibility of circumvention of technological protection measures in limited circumstances, and the reproduction of materials for the visually impaired by authorized entities without liability for copyright infringement. Other favourable aspects of the Bill include the provisions on the liability of Internet Service Providers (ISPs) for copyright infringement and a process for taking down infringing online content.

Some recommendations fell through the cracks resulting to a missed opportunity for a robust Copyright Act.

The Fair Dealing Exceptions

Copyright gives an owner the exclusive right to control how their work is used and distributed and requires their express permission before use. Contravention amounts to copyright infringement, unless the work falls under some limited copyright exceptions, so that permissions are not necessary.

Scientific Research and Current News

The inaugural post-independence Copyright Act in Kenya enacted in 1966 was largely a mirror of the British Copyright, Designs and Patent Act.

The British legislation stipulated that fair dealing would apply to research and private study (under section 29), criticism or review (under section 30) and to the reporting of current events. After review, the UK law acknowledges that fair dealing applies to private use and private study, research, text and data analysis for non-commercial research, criticism, review (quotation), news reporting, caricature, parody and pastiche (under sections 28B to 30A). In Kenya, the general exceptions and limitations to copyright are set out under section 26 of the Copyright Amendment Bill, 2017 and includes works used for 'scientific research, private use, criticism or review, the reporting of current events, parody, pastiche, caricature and quoting'. A retrospective review reveals the absence of 'scientific research' in the British copyright law making it an inexplicable obtruder.

On 'current reporting of events', some copyright materials might be used to report stories that have nothing to do with current events, but nonetheless still warrant reporting and thus risks exclusion by the restrictive criteria in the Amendment Bill.

In a memoranda submitted to the National Assembly in May 2018, recommendations were made for the amendment of these two restrictive criteria; by amending to 'news' and 'research' to ensure that all research would come under fair dealing, not just scientific research.

Teaching and Education

There was a recommendation for a new category of a teaching and education exception. Educational institutions would benefit greatly from using certain limited portions of works freely and only to the extent justified for the purpose of teaching. This should include any acts necessary to display the work, e.g. images and videos for teaching, and would address the digital copyright issues in distance learning. The second schedule of the Bill limits educational institutions to one page of literary or musical works. Without these exceptions and limitations, educators become infringers whilst imparting much needed knowledge to learners.

Libraries, Museums and Archives

There was an opportunity for a holistic clause to ensure better protection not only for libraries and archives but also for museums and galleries which are not mentioned. This would permit reproduction of materials for preservation in circumstances like; the maintenance and management of permanent collections, one copy of an original rare or out of print work which is deteriorating, damaged, lost or at risk of such if the original cannot be viewed due to its condition or atmosphere of storage; if the original is in an obsolete format due to technological advances (e.g. VHS) or to restore the original as long as no other appropriate copy is commercially available in an appropriate medium of quality.

Internet Service Providers

In as much as ISP's may remove infringing content within a set time, a mechanism for the rejection of improper notifications of takedown as well as the provision of claim forms on their websites with all the necessary information to make a valid claim is worth consideration. The ISP should upon request give the identity of the person filing a takedown request for the avoidance of malice and the recipient should be able to file an opposition against the ISP's decision to take down the data electronically shortly after the ISP notice. The ISP can then after the opposition letter either reject it and continue blockage or accept the opposition and restore the content.

Orphan Works

There is no indication or direction on what to do when one comes across an orphan work. A recommendation for mechanical licences was made. This area is in urgent need of further review. Government owns the copyright to its works. The public could benefit from reproduction and distribution of some works and the government would be welcome to adopt open government licenses.

In essence, further discussions are necessary to ensure that these issues are captured in the Copyright Act.

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