Kenya Communications Amendment Act (2009)

Progressive or retrogressive?[1]

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[1]This report was written as a part of APC's Communication for influence in Central, East and West Africa (CICEWA) project, which is meant to promote advocacy for the affordable access to ICTs for all. CICEWA seeks to identify the political obstacles to extending affordable access to ICT infrastructure in Africa and to advocate for their removal in order to create a sound platform for sub-regional connectivity in East, West and Central Africa. This was possible thanks to Canada's International Development Research Centre (IDRC).

Contents

Preface

The landing of undersea telecommunications cables on the east coast of Africa in 2009 – starting with Seacom and The East African Marine System (TEAMS) and to be followed in 2010 by the Eastern Africa Submarine Cable System (EASSy) – creates an important opportunity for the countries of East Africa to develop affordable broadband access to the internet for all.[2] A 2009 World Bank report has analysed the impact of broadband on growth in 120 countries from 1980 to 2006, showing that each 10 percentage points of broadband penetration results in a 1.21% increase in per capita GDP growth in developed countries, and a 1.38% increase in developing countries. Investing in broadband is an investment in economic growth and development.[3]

However, this opportunity takes place against a backdrop of the implementation of telecommunications reform policy over the last fifteen years that has shaped the environment into which the new bandwidth will arrive. It is important to understand this history and some of the problems that occurred in the implementation of telecom reform policy so as not to repeat them in the era of broadband internet access. This is the approach of the CICEWA project, with its emphasis on "communications for influence", linking advocacy, dissemination and research by building information and communications technology for development (ICTD) networks in Central, East and West Africa.

The project's overall objectives are:

- To conduct research that will identify obstacles to universal affordable access to broadband ICT infrastructure in a number of countries and sub-regions in East, Central and West Africa.
- To develop two sub-regional ICT policy advocacy networks that will disseminate research and undertake advocacy on ICTD and access to infrastructure at the sub-regional level.

CICEWA coordinated research in Kenya, Rwanda and Uganda. In each case the research sought to investigate the history of communications policy and pointed to a number of problems arising in the way in which policy had developed, been implemented and was currently impacting on the goal of universal affordable broadband at the level of content and infrastructure. The researchers emphasised different dimensions of the policy outcomes, and took different approaches to their research task, given their fields of expertise and interest. As a result, the reports are different in structure and methodology – however, they all provoke the question central to the CICEWA project: What learning lessons does the policy narrative of a country hold for today?

With the arrival of high-speed cables, East Africa is moving towards a single market in communications. This will require greater policy and regulatory harmonisation at the national and regional level and a willingness to create forums to debate the best way of doing this. We hope that the research will contribute to this process by highlighting some of the problems that have arisen that will impact on the new converged broadband environment in a single East African community.

[2] www.seacom.mu/intro.html, en.wikipedia.org/wiki/TEAMS_(cable_system), www.eassy.org

[3] The World Bank Information and Communications for Development 2009: Extending Reach and Increasing Impact (Washington D.C.: The World Bank, 2009) go.worldbank.org/NATLOH7HV0

1. Introduction

On 12 December 2008, while Kenya celebrated the 44th anniversary of its independence, journalists and civil society activists took to the streets. They were protesting the publication of the Kenya Communications Amendment Bill (2007), which was later signed into law. While the media had various objections to the Bill, the amended Act was embraced by the communications sector as a whole. This was largely because it introduced a raft of new laws recognising cyber crime, introducing digital signatures and creating the much-needed Universal Services Fund (USF).

This report unpacks this mixed reception to the Act, outlining the media's objections as well as the government's response, and contextualising the tension between the two historically. At the same time, it asks whether the sector's positive response to the Act was misplaced, given some worrying inconsistencies and omissions.

The report poses four key questions which are loosely dealt with:

1. Should the Kenya media be regulated?
2. Should local content be regulated?
3. How will the Act deal effectively with internet content?
4. Who should manage a Universal Services Fund?

It then goes on to offer several recommendations in this regard.

In addressing these issues, the report relies on discussions on the Kenya ICT Action Network (KICTANet) mailing list, interviews with government officials and civil society organisations, as well as papers and memoranda presented before and after the law was assented.

2. Background to ICT policy making in Kenya

In Africa, the information and communications technologies (ICT) sector has not grown as fast as it should have, due to the lack of conducive regulatory and legal environments. By 2007, 34 African countries had ICT policies, twelve were in the process of drafting one and seven had not launched the policy development process at all.[4]

In Kenya, the ICT policy development process started in 1993 and by 1998 the Kenya Communications Act became operational.

The 1998 Act was preceded by the telecommunications policy of 1997 that set out the government vision on telecommunications development to the year 2015. The policy mainly addressed the issue of transformation from a market monopoly to a liberalised telecommunication market. The policy and the Act clarified the roles and regulatory and operational responsibilities of various institutions, as well as government arms, specifically the Ministry of Transport and Communications, which retained the role of policy guidance.

By 1998, the Kenya Posts and Telecommunications Corporation was split into three entities: Telkom Kenya Limited, the Postal Corporation of Kenya and the Communications Commission of Kenya (CCK). The National Communications Secretariat was also formed under the Act to serve as the policy advisory arm of the government on all matters pertaining to the ICT sector.

The consequent change in the telecoms landscape was reflected in the rapid growth in the telecoms and internet sectors, from one internet service provider (ISP) in 1995 to 900 in 2005,[5] and one mobile operator in 1997 to four in 2009.

Between 1996 and 1998, the liberalisation of airwaves took place, ending the monopoly of the Kenya Broadcasting Corporation (KBC). The Corporation was facing accusations of being a government mouthpiece and opposition politicians of wanting to get their "own" radio stations or "community" stations that pursued their agenda.

By the time the Communications Act of 1998 was enacted there were many FM stations emerging and the CCK was given the regulatory mandate to oversee frequency allocation and to ensure the regulatory compliance of electronic media. The lack of a structure in frequency allocation led to politicians owning radio stations – in some cases more than one. This is part of the challenge faced by CCK today when it deals with issues of cross-ownership.

Because the Communications Act of 1998 largely addressed broadcasting issues, it was seen as responding to the needs of traditional broadcast media rather than those presented by the new ICTs that had emerged after 1998. However, even at the level of broadcasting legislation it fell short. For instance, the Act did not address the different roles the national broadcaster was expected to play. It also did not distinguish FM stations from the national broadcaster.

The 1998 Act was deemed a work in progress and the process of amending the Act was commenced immediately after it came into force, with the aim of addressing wider issues emerging in the ICT sector.

[4] www.UNECA.org

[5] www.cck.go.ke

Following several sessions between government, the private sector, civil society and academia in 2006, on 18 July 2008, the minister for information and communications published the Kenya Communications Amendment Bill (2007). It was assented on 2 January 2009.

The Kenya Communications Amendment Act (2009) has the following key focus areas:

- Broadcasting and media
- Information technology
- Telecommunications and radio
- Postal services
- Academia and socio-cultural issues (implied in the text)

As mentioned, the amendments were introduced to help streamline and introduce regulatory provisions in electronic transactions and broadcasting which were considered weak. This was done by transforming and empowering the CCK into a fully fledged ICT sector regulator.

In strengthening the role of CCK within the ICT sector, the Act, amongst other things, also set out to:

- Create regulatory, advisory and dispute resolution bodies to support the implementation of the national ICT policy
- Provide a new regulatory framework for broadcasting stations and services
- Provide for the licensing of country code top-level domain administrators.
- Provide for electronic transactions-related offences, including cyber crime and reprogramming mobile phones

3. To regulate or not to regulate the media in Kenya?

3.1. A failure of media responsibility?

The media are considered a fundamental pillar of any democracy. Democracy is measured partly by how free the media are as well as how well the government protects freedom of expression as envisaged in constitutional law. The media also have the power to shape or destroy a country. This is evident in the case of Rwanda, where the media engaged in biased reporting and helped instigate the genocide. As a result, some 800,000 people were killed during the hundred days of "ethnic cleansing". Later, three journalists – Ferdinand Nahimana, Hassan Ngeze and Jean-Bosco Barayagwiza – were charged on counts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity. The accused were also charged with individual criminal responsibility under Article 6(1) of the Geneva Conventions and the Additional Protocol II.

The media in Kenya are largely divided into electronic and print media with the KBC as the only public broadcaster funded by the government. The Nation Media Group is the largest media house, with two daily newspapers, a regional newspaper, a TV station and two FM radio stations. The Standard Group has a daily newspaper, a TV station and an FM station. Royal Media is probably the largest electronic media company with a TV station and about 20 FM stations in various vernacular languages.

Responsible journalism promotes development, while racial and ethnic divisions promoted by the media can ruin a country. During the 2007 post-election violence in Kenya, the media were accused of actively fanning the flames of tribal hatred and taking political sides, a factor that played a role in escalating the violence to near civil war. The behaviour of the media – both electronic and print – was thought to be a result of weak legislation and a lack of mechanisms for self-regulation.

In pursuing their editorial policies – whether right or wrong – the media have always pointed to the freedom of expression which is guaranteed under the constitution.

The government has justified the new regulatory mechanisms under the Act in part by pointing to media behaviour during the post-election violence in Kenya. For instance, KASS FM was alleged to have aired inflammatory broadcasts during the post-election violence, yet nothing was done about it. Other media houses like Royal Media Services, which owns Citizen TV and several vernacular stations, openly supported the Party of National Unity (PNU) while KASS was pro-Orange Democratic Movement (ODM).

The government has also pointed to a lack of self-regulation generally regarding content. For example, many people across all sectors praised the Act's attempt to address content issues as far as programming was concerned. Because there were no guidelines on what should be aired and when, different media houses took different stands on broadcasting adult content during "family hours". The government had received complaints that families were unable or embarrassed to watch news together because of the "lurid" content aired. The Act therefore sought to raise debate over media content and the boundaries of editorial discretion versus the need to uphold morality.

However, in a memorandum forwarded to the Attorney General, the media argued that the decision to lump content issues together with technical and infrastructure issues was wrong. It said the regulation of editorial content should be left to the mechanisms of the existing Media Council to encourage both media diversity and pluralism.

A statement from the Editors' Guild put it this way:

> [T]he amendments to the Act not only confirm but, in fact, reinforce the powers of the Minister for Information to control and regulate every aspect of communications, including usurping editorial management by prescribing what content should be aired when through a draconian coding system.

The following sub-sections outline some of the media's main concerns.

3.2. Key media concerns

3.2.1. Section 88: Inheriting the problem

The problems of the Media Act (see below) seem to have spilled over to the amended Communications Act, with the government and proponents of the law arguing that the media have not tightened their grip on errant journalists and media houses. On the other hand, media houses argue that the Media Council is dealing with the issues as raised, pointing to the cases filed.

Apart from the Media Council's lack of powers, the media and the government have approached each other with suspicion since the early 1990s when there was a clamour for multiparty democracy during the reign of retired president Daniel Arap Moi. The media were among the crusaders of democracy, which irritated officials of the Moi regime.

Moi's Legacy

Freedom of expression was kept in check during the Moi regime, when newspapers perceived to have crossed the lines of acceptable journalism were banned, and journalists arrested and detained without trial. For instance, in June 1992, the office of Society magazine in Tumaini House, Nairobi, was petrol-bombed by "unknown people". In February 1993, police raided the offices of Finance magazine, smashed the computers and stabbed IT manager David Njau. In May 1993, police raided the offices of Jitegemea, a monthly publication of the Presbyterian Church of East Africa, and seized 6,000 copies of the magazine. On 1 February 1995, two armed men burst into the offices of Finance magazine, doused it in petrol and set it on fire. Ruth Gathiga, secretary to the publisher, Njehu Gatabaki, was assaulted with a gun butt by one of the attackers, believed to be policemen.

Not content with harassing media practitioners, the Moi regime raised the fight a notch higher when on 30 April 1993 state agents carried out a raid on the premises of a printing firm, Fotoform Limited – the printer of a number of the magazines the government did not approve of. They dismantled the printing press, causing the owners large financial losses. Fotoform subsequently sought legal redress for its huge losses but the high court refused to grant compensation.

More recently, on 2 March 2006, hooded police officers raided The Standard newspaper offices, destroyed property and burnt newspapers in a swoop that was carried out as a "state security measure" and, the state said, to prevent a crime that the newspaper was involved in committing. In remembering the event on 2 March 2009, Paul Melly, Standard Group CEO, wondered whether there was a big story that the newspaper had missed, one that the government had anticipated.

Paul Muite, a former member of parliament and a human rights activist, said that the then internal security minister, John Michuki, confirmed that the attack and destruction of property was a "government operation".

A statement from the Media Owners' Association captured the media's anxiety in light of its experience with government excesses:

> Given this government's track record of relations with the media over the past six years, we are apprehensive that the amendments as proposed will curtail media freedoms. The ban on live coverage early this year in the wake of the disputed Presidential results, is testimony to what executive control of the media can mean.

The media protested against several provisions in the amended Act. The most controversial was Section 88 of the Act which gives the minister of communications powers to unilaterally, without recourse to parliament or the courts, enter and search broadcasting stations, and seize, dismantle and dispose of equipment. The minister is also given powers to intercept and disclose communications between persons, and to intercept, disclose and dispose of postal articles.

The section provides:

> (a) Any officer duly authorized… to take temporary possession of any telecommunication apparatus or any radio communication station or apparatus within Kenya, and
>
> (b) In the case of a radio communication, that any communication or class of communication shall or shall not be emitted from any radio communication station or apparatus taken under this section; or
>
> (c) In the case of telecommunication, that any communication within Kenya from any person or class of persons relating to any particular object shall be intercepted and disclosed to such person as may be specified in the order; or
>
> (e) In the case of broadcasting and any broadcasting apparatus or any radio, television, cable or satellite broadcasting or signal distribution or apparatus within Kenya –
>
> (i) That no broadcasting shall be broadcast from any radio communication station or apparatus taken under this section; or
>
> (ii) That any signal within Kenya from any person or class of persons relating to any specified subject shall be intercepted and disclosed to such person as may be specified in the order.

In defending the provision, Minister of Information and Communications Samuel Poghisio referred to other democracies like the United States (US) and the United Kingdom (UK), as well as African countries like Tanzania, that have put in place mechanisms to regulate the electronic media. The minister also pointed to the reckless behaviour demonstrated by media houses, which openly supported various candidates across the political divide during the 2007 general elections. He argued that it was important to adhere to codes of programming given that there were complaints raised by the public over the content aired in the media.

Section 88 also empowers the minister for internal security to suspend electronic media services in case of public emergency:

> (2) A certificate signed by the Minister for the time being responsible for internal security shall be conclusive proof of the existence of a public emergency, or that any act done under sub section (1) was done in the interest of public safety and tranquillity.
>
> (3) Any information and communication apparatus constructed, or maintained or operated by any person within Kenya or any postal article which is seized by any officer duly authorized under Section (1)(a) shall be returned to the operator at the end of the emergency or where such apparatus or article is not returned, full compensation in respect thereof, to be determined by the Minister, shall be paid to the owner.
>
> (4) A person aggrieved by a decision of the Minister under Subsection (3) as to the compensation payable in respect of anything seized under this Section may appeal to the High Court within fourteen days of such decision.

The media considered Section 88 as giving unrestricted powers to the two ministers (of internal security and information and communications) and their regulatory appointees (i.e., the CCK).

They contended that these powers are likely to be abused, particularly because of the heavy government composition of the regulatory authority which would likely serve their appointing authority rather than the common good (the public). The argument criticises the composition and independence of the CCK, given that the Act clearly states that the CCK should be independent in decision making.

The political interference in the allocation of frequencies in the past had led to a strained relationship between the media and the government – political differences were extended to media ownership and the stations gave more or less air time and newspaper coverage depending on which party official was speaking.

3.2.2. Enforcement mechanisms

The media raised several concerns with the envisaged enforcement regime. Under Section 46L, each broadcaster is required to establish a mechanism whereby complaints may be filed to the CCK. The government maintained that the broadcasters had been given a chance to self-regulate by establishing internal mechanisms.

Some analysts agreed. "The media have been given an opportunity to self-regulate through the Media Council, but they have shown they are incapable or not willing to do it," said John Walubengo, academic and ICT expert. "A good example is during the campaign period in 2007 when the political parties came up with 'ugly' advertisements in which they tore into each other in an undignified manner. The Media Council did nothing and credit goes to one media house (Nation Media Group) that chose not to air such content. This Act, and section 46H in particular, ensures that in future all media houses will behave and self-regulate by conforming to an accepted standard in society."

However, the media argued that the practice in other countries is that a centralised complaints mechanism is set up, to which members of the public can direct their complaints. They said the Media Council was set up for this purpose, but admitted that the Council needs to be empowered.

The Council is comprised of government and media representatives and is expected to receive public complaints and conduct hearings. It is supposed to play the role of arbiter as envisaged under the Media Act (2007), but has structural weaknesses, mainly the ability to enforce penalties and to make its decisions binding.

One reason for its institutional weakness is a lack of funding. The media did not want the government to fund it completely, alleging control and interference. The government opposed foreign funding, and the media have yet to commit funds to run it.

Under Section 46J of the Act, the CCK may revoke a licence in one of three cases:

- If the broadcaster is in breach of the provisions of the Act or regulations made under the Act
- If the broadcaster is in breach of the conditions of a broadcasting licence
- If the broadcaster fails to use the assigned broadcasting frequencies within one year after their assignment by the CCK.

However, the media argued that as a matter of principle, a licence should be revoked only after extremely serious breaches of the law, such as repeated incitement to hatred, and only after previous penalties have failed to remedy this breach. The media also contended that licences should never be revoked for breaches relating to privacy or other relatively "minor" contraventions of the law. They said financial penalties should be imposed instead.

The media further contended that, compared to other laws in Kenya, the fines prescribed by the Act are generally too high. They asked whether they are not in effect discriminatory, and therefore in violation of the constitutional guarantee against discrimination.

Both the director of information and the media have agreed that the amended Communications Act seems to duplicate aspects of media regulation already covered in the Media Act (2007), adding that more input is needed to strengthen both the Media Act and the Communications Act.

While the regulation of ethics is a function of the Media Council as envisaged under the Media Act, the Media Act establishes a public complaints system for both broadcast and print journalism, and as such there may be disharmony with a parallel public complaints system for broadcasting media set to be established by the Communications Act.

3.2.3. Section 46 (c, h): Local content and programming

This section mandates the CCK to regulate the programming code for content that suits various ages. Media houses are expected to file the code with the CCK, but the media are discontent with the section. While the minister pointed to complaints of adult content being aired as early as 7:00 pm, the media thought the section would result in undue interference in editorial independence. The media want the decision on what to air when to be left to market forces and editorial policies.

However, Bitange Ndemo, the permanent secretary in the Ministry of Information and Communications, is not convinced: "Can the radio presenters repeat what they say on air in front of their mother, father, younger sisters and brothers or their own children?" he said. "This law protects consumers hitherto frustrated with the un-African [taboo, especially sexual] type of content spewing from TV and radios stations by 'comedians' claiming to be 'journalists' and hiding behind 'Press Freedom'."

Across the European Union (EU), broadcasters are subject to a variety of more or less demanding regimes. Statutory regulatory bodies find it increasingly difficult to cope with the sheer volume of material that they are responsible for regulating. Where regulators have a responsibility for detailed monitoring and reporting on media content, the trend has been towards a "lighter touch regulation". In this way, more of the regulatory responsibilities are taken on by the producers and users of content rather than legal or regulatory bodies.

In Germany, the Freiwillige Selbstkontrolle Fernsehen e.V. (Voluntary Television Review Body), or FSF, is an organisation whose main concern is the protection of minors in relation to the representation of violence and sex on television. The FSF was founded in 1993 by the largest German commercial broadcasters, as a response to a public outcry about the depiction of violence and sex on television.

In Italy, public and commercial broadcasters agreed to a "[s]elf-regulatory [c]ode of conduct on television and [regarding] minors" to protect minors from harmful content. In January 2003 a Supervisory Committee was set up. This system works within the statutory control in place, and to ensure compliance, the Supervisory Committee can refer non-compliance cases to AGCOM, the statutory regulator.

In Sweden, the Våldsskildrings rådet (Council on Media Violence) supports and stimulates the industry's efforts regarding self-regulation. The Swedish Ministry of Culture is responsible for the technical aspects of broadcasting and the Radio and Television Authority is in charge of awarding licences.

In Kenya, the media expect responsibility to be taken by the producers and users of content rather than the CCK. The problem is that proper mechanisms do not exist to make this a reality. Moreover, the self-regulation versus government regulation debate has been crowded by deep-seated issues of journalistic ethics and corruption. Regarding journalistic ethics, the Media Council launched a code of conduct in 2005 for print, television and radio journalists. Again, it lacks enforcement mechanisms.

In supporting regulation, the government contends that alleged cases of breaches of professional standards in the print or the broadcast media have gone unpunished, though the Media Council of Kenya says it has cases pending.

3.2.4. Section 46 (i): Responsibility and "good taste"

In support of this section, the government pointed to "immoral or vulgar" content that it said was aired on the FM stations in the morning shows. The media, on the other hand, said that such content is an editorial prerogative and any issue in this regard concerns the media code of ethics.

The challenge is how to legislate good taste as a standard upon which a broadcaster can be held criminally liable. It was argued that a culturally diverse society like Kenya does not have a universal value of what is good or abhorrent, and the discretion of the editor, guided by professional ethics and the existing laws on public nuisance and morality, would be adequate.

3.2.5. Section 46 (r): Cross-ownership

Part VI A of this section restricts cross-ownership of media to minority shareholding. But it is unclear on what happens to those who have legally acquired ownership of broadcast media to expand their reach and ensure viability of their enterprises. Should they be forced to drop their stake, and through what process?

The media owners felt that this will cause unnecessary disruption of the sector and that people would lose jobs. Moreover, they felt that the six months allowed for transition to the new shareholding structure is too short.

On the other hand, this section was discussed and found acceptable by ICT stakeholders who felt that the media had been polarised along political lines with media houses owning more than 20 radio outlets. This shaped the news agenda negatively. Given the political influence in media

ownership, it was perceived that if ownership was diluted, then different voices and opinions would emerge and debates would be more balanced.

3.2.6. Section 5B: Independence of the CCK

Though the director of public information maintained that the CCK is independent, the media contested that the independence of the Commission is a mere declaration under Section 5B of the Act. There were expectations that the CCK board would be approved by parliament. However, it is executive-appointed without the participation of stakeholders, parliament or any other interest groups. The chair of CCK is appointed by the president, four of its members are permanent secretaries (again presidential appointees), and the remaining seven are ministerial appointees. The Act also gives the government power to "issue policy guidelines" to the Commission.

As mentioned, given the role of the Media Council as prescribed under the Media Act, the media also felt that the CCK was taking over some of the Media Council powers prescribed under the Act, which would lead to conflict in dispensing duties. However, some people in the ICT industry see the CCK's role as merely offering oversight and say there is no likelihood of conflict between its responsibilities and those of the Media Council.

3.2.7. Section 46 and 83A: High penalties

Compared to other laws in Kenya, the fines prescribed by the Act are considered generally too high and suggest a discriminatory and vindictive attitude towards the media. Under Section 83A, if the CCK finds that a licensee has contravened the Act, the programme code or a license condition, it will write to the broadcaster concerned. If the broadcaster fails to take action to remedy the breach, a penalty of KES 500,000 is imposed. Broadcasters may appeal to a specially established tribunal. Considering that this law is essentially about the fundamental freedom of expression and opinion, many feel the extreme measures are unwarranted and unjust.

4. How will the Act deal effectively with internet content?

The convergence produced by digital technologies has made broadcasting, telecommunications and the internet come closer because it has become possible for any given medium to deliver any type of content. Consequently, and although full convergence has yet to take effect in Kenya, there is a tendency to combine the diverse functions of several regulators in one as envisaged in the Act. Though the Act does not mention internet protocol television (IPTV) and online radio streaming, they are expected to be regulated by the CCK under the Act, presumably because they will fall under broadcast services.

However, the Act seems as if it has been written for legacy systems of broadcast without regard for the present convergence of the industry and media. For instance, what will happen with the entry of optical fibre? Fibre optic cable will allow Kenyans to access cheap bandwidth that will redefine media coverage. People who feel that the media is not giving them adequate coverage can stream online, whether radio or TV. The internet will become the new frontier.

The internet played a major role in the post-election violence in Kenya. It was used by Kenyans in the diaspora to send text messages and emails that were potentially more harmful to state security than the electronic media as understood in the traditional sense. In such cases, the government is required to develop a content policy in conjunction with ISPs, who in most cases host the online content. For instance, the Tanzania Telecommunications Regulatory Authority has a content policy that outlines the obligations of all telecoms providers.

In many countries, ISPs are not required to review, monitor or classify the content that they host, and are therefore not held liable for the transmission of prohibited content unless they have specific knowledge of the illegal content or fail to report it and take corrective action.

This policy results from the rationale that, like traditional telecommunications carriers, ISPs are merely conduits that passively transmit data and therefore are not responsible for the nature or character of that data. In this argument, it would be unjust, unreasonable and impractical to expect an ISP to monitor content in order to safeguard against illegal use or criminal activity.

5. Should local content be regulated?

5.1. No clear direction

Kenya has no specific regulation on local content, although the minister for information and communications had suggested that the government would impose a regulation that 30% of TV content be locally produced. For their part, the Kenyan media say market forces should determine content. This position contradicts international and regional precedents, including those set in Tanzania and South Africa.

In the EU there is the Framework Directive and the Television Without Frontiers Directive that has redefined broadcasting in the region. In particular, the directive separates regulation of content from the regulation of transmission.

In Australia, the Australian Content Standard requires all commercial free-to-air television licensees to broadcast an annual minimum transmission quota of 55% Australian programming between 6:00 am and midnight. There are also specific minimum annual sub-quotas for Australian adult drama, documentaries and children's programmes.

5.2. Can we promote local content without community broadcasting?

The 2001 Windhoek Declaration notes that African governments should provide the legal framework for broadcasting, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas. Governments should also create a three-tier system for broadcasting: public service, commercial and community.

In Kenya, the public broadcast services are provided by KBC. While a number of commercial broadcast stations exist, Mang'elete radio station exists as the only community radio in the country. However, other vernacular stations have purported to be community radio stations merely because they serve particular communities.

Section 46(f) of the amended Act provides that the CCK "may", upon application subject to such conditions it deems necessary, license community broadcasters. Community broadcasting is defined broadly as having one or several of the following characteristics:

- Commonality of interest of the persons applying for a licence or on whose behalf the application is made.
- Whether the persons or a significant proportion thereof constituting the community have consented to the application.
- Sources of funding.
- Whether the broadcasting service to be established is not-for-profit.
- The manner in which members of the community will participate in the selection and provision of programmes to be broadcast

The licence issued may require that:

- A cross-section of the community be represented in the management of the affairs of the broadcasting service.
- Each member of the community has equal opportunity to be elected to the board or committees managing the affairs of the broadcasting service.
- Members of the community have a way of making their preferences known in the selection and provision of programmes.
- The service conforms to any conditions or guidelines laid out by the CCK.

What could community broadcasting do to reduce poverty in Kenya? Mang'elete, a women's project, has shown how communities can improve their welfare by generating their own content and addressing their issues. The radio station is based in Makueni (about 100 kilometres from Nairobi).

With the assistance of community members in the different villages, the station produces programmes that have a direct bearing on the day-to-day lives of the community. This includes coverage of issues such as agriculture, health and human rights. By controlling their own radio

station, the community can prepare programming and activities according to the needs of the community. In this way the role of community radio becomes strategic in the context of generating local content and allowing communities to develop editorial guidelines on what makes news and what does not. It also has a direct effect of building capacity in a community.

While the government was commended for the explicit recognition of community broadcasting in the Act, it was felt that it makes community broadcasting optional. According to the Declaration on Principles of Freedom of Expression in Africa, the broadcast regulatory system is required to encourage private and community broadcasting in accordance with the following principles:

There shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community; an independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions; licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting; and community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves.

Proponents of community broadcasting felt that the CCK should be required to set aside spectrum for community broadcasters. Licensing community broadcasters should not be an optional consideration; rather, the government should be compelled to grant community broadcasting licences.

6. Who should manage a Universal Services Fund?

6.1. Universal service provisions

Section 118 (1) of the Act makes provision for the USF, to be managed by the CCK. The USF is a tax on telecommunications services which is used to fund and subsidise telecommunication infrastructure for remote and rural areas. The Act stipulates that money for the fund will be raised from levies on licensees, parliament, investments by the CCK and interest accruing from loans advanced by the CCK.

The USF is broadly geared towards:

- Promoting the availability of quality services at just, reasonable, and affordable rates
- Increasing access to advanced telecommunications services throughout Kenya
- Advancing the availability of these services to all consumers, including those in low-income, rural and isolated areas at rates that are reasonably comparable to those charged in urban areas.

The CCK recognises the important role played by access to ICTs and has developed a five-year strategic plan to guide the implementation of universal service activities in the country. The plan was developed after completion of a universal access study in 2004, which was jointly funded by the CCK and the International Development Research Centre (IDRC). According to the CCK, the plan's specific objectives are defined within the context of meeting infrastructure targets to be achieved by the year 2010.

The strategic objectives of the plan are to:

- Create a conducive regulatory and licensing framework for universal access
- Achieve effective coverage in rural areas, and ensure that this coverage is sustainable
- Support the development of human capacity required for rural development (i.e., ICT training institutions and education)
- Realise effective public access to services for all within a reasonable distance (i.e., telephone services, internet services and telecentres)
- Make communication services affordable to Kenyans, especially low-income groups
- Facilitate the development of and access to a wide range of local and relevant content (includes internet, data services, radio and TV)
- Ensure efficiency in frequency applications, processing and equipment type approval, and give priority to those with reach to rural areas
- Promote access to effective communication services in emergency situations
- Establish sustainable funding for universal access.

6.2. Problems with USF legislation as it stands

In addition to establishing the USF, the regulator must put in place the necessary procedures to manage and administer the fund – and it is here where many feel that the CCK faces a challenge. In managing the USF, the CCK will set up a department that will deal with the fund administration, including assessing the validity of projects submitted for funding. However, the question has been asked: Why has the Act left this to the CCK board instead of a public-private sector partnership (the money will, after all, be raised from the private sector)?

In Taiwan, for example, the Directorate General of Telecommunications (DGT), a division of the Ministry of Transportation and Communications (MOTC), administers and manages its USF. However, the DGT oversees the affairs of the fund through a Universal Service Fund Administrative Committee composed of seven to eleven members from agencies, academia, and sector experts. In Chile, the Telecommunications Development Fund (FDT) is managed by the Telecommunications Development Council, a group composed of three ministers (including the minister of transportation and telecommunications, who acts as chairman of the council) and three telecommunications experts, representing different regions of the country.

While the idea of the management of the USF is of great concern, Section 84(m) of the Act raises other issues. For instance, the section stipulates that the CCK board may accept or reject any application for a loan, or may grant the loan and impose conditions for security as it may deem necessary. The CCK board is also mandated to demand security and require repayments by instalments within the period that the board may deem fit. Just like in the financial sector, the board is also empowered to vary the conditions under which the loan was given as well as the terms of repayment.

The loan idea may have been a good idea, but does the CCK want to turn into a bank? Will the CCK have a new department charged with advancing loans, vetting applicants and attaching property for those who have defaulted in repayment? In response, the CCK said that it will determine whether or not to partner with a financial institution to disburse the money.

Moreover, the independence of the CCK has been questioned in the past and questions still linger whether the board is still susceptible to political manipulation. While the Act empowers the minister to make regulations regarding the conditions for granting the loan, it has not stipulated that any loan granted must be in advancement of ICT-related activities and not, for instance, political activities. It can, as a result, allow for manipulation by politicians, especially if the interest rate is below the market rate.

Other issues regarding the fund are not clear in the Act. For instance, will all licensees be required to contribute to the fund, or only a particular category? What will be the criteria for determining who pays and who does not? Profit or turnover? Section 84(p) empowers the minister of information and communications to make general regulations regarding the amount of the levy, meaning that the minister can decide that different players pay different amounts, even though they are in the same licence category.

There is no doubt that there will be subsidiary legislation to support the Act, but if the Act does not make some of these considerations very explicit, the subsidiary legislation may prove powerless.

7. Recommendations

The following recommendations can be made to improve the legislative and regulatory communications environment in Kenya:

Develop specific legislation, regulations and guidelines appropriate to convergence: Content guidelines should take into account the impact of new technologies and communication channels on the media as broadly conceptualised. This includes online content.

Encourage self-regulation: Technological progress in Kenya has brought increased levels of complexity to a relatively stable licensing scheme, and policy changes have been in part responding to this challenge. Complexity, in terms of more services brought about by the TEAMS, Seacom and EASSy fibre optic submarine cables, satellite, and then digital technologies, will force changes in the regulatory environment. The environment makes supervision more difficult for statutory regulators as it will become increasingly onerous to supervise all these new communication channels and services. To cope with these challenges, authorities will have to encourage self-regulation.

Empower the Media Council: While the trend should be towards continued delegation, the media should put in place self-regulatory mechanisms, such as empowering the Media Council by giving it power to sanction through fines, apologies, and even the suspension of licences. The regulatory environment would in this way permit the task of supervising content to be discharged by increasingly autonomous mechanisms, and the CCK will retain supervision at a higher level (broad guidelines, judicial review, etc.).

Develop community broadcasting and ICT take-up as a priority: Commercial broadcasters are obviously driven by profit, and in Kenya they tend to imitate Western styles of consumption and content creation. Community broadcasting is considered more accommodative to the needs of communities, including language, and is an imperative for building a knowledge society at the grassroots level.

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