

IP Legal Alert

# Multichoice Kenya Limited V. Safaricom PLC & Jamii Telecom Limited

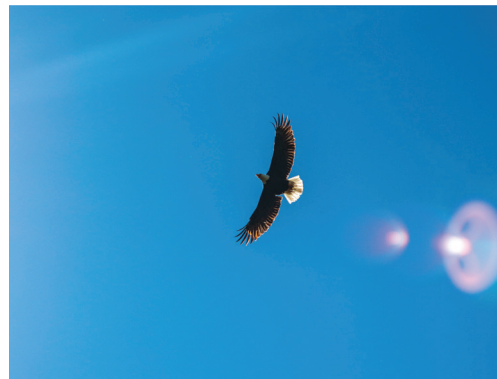
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By Judith Kagere

In November, the High Court of Kenya at Nairobi passed a ruling to issue a temporary order as per section 35D (2) of the Copyright (Amendment) Act 2019, to Safaricom PLC and Jamii Telecom Limited to prevent or impede the use of its service to access a service, website place, domains or facilities situated in or outside Kenya, that is used to infringe Multichoice Kenya's copyright in the takedown notice.

One year after passing the of the copyright Amendment Act of Kenya, such a ruling demonstrates that Kenya is making positive steps towards copyright and ultimately, IP protection.

Under 35D of the Copyright Act No. 12 of 2001, 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. The High Court may thereafter upon application 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.



The application was premised on the grounds that despite being duly served with a takedown notice, the respondent disregarded the notice and failed to acknowledge or act on it, nor give their reasons for non-compliance. In addition, Safaricom PLC and Jamii Telecom Limited continued to host or allow content to be hosted on their networks well knowing the same infringed on the IP rights of Multichoice Kenya Limited.

The issue of this injunction to comply with a take down notice requires the respondents to block access to the platforms that play or display this infringing material. A take down notice is a common law IP enforcement measure that is intended by law to provide some relief to the IP owner by halting the continued publication (copy, publication, performance, creation of derivative works...) of the infringing material.

What is important here is to identify if there will be any re occurrence of the content on the platform and block access to it, while monitoring content for re-occurrence. Platform owners such as telecoms and broadcasters' owners need to assist to stop the publication of illegal content. The publisher, may through no fault on their own, still have the material displayed via their channel. They may not have control of what the infringer decides to play or the substance of their material but they have control at the point of broadcast and so are involved in the infringement. The platform provider is not under liability for creating the infringing material but nonetheless, will still come under the obligation to block access to it and provide the IP owner some relief.

The determination of who bears the costs of compliance with such an order will firstly follow the court's orders as to costs, which are as a general rule, at the discretion of court. What may be considered are that some of these platform service providers are offered some limitations on their liabilities for third party infringing material to which they merely provide access, and so one may argue the costs they incur to comply with a court order are simply a small price for this privilege they are allowed to enjoy.

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### ***'Part V Electronic Transactions Act, 2011.***

processes or stores computer data on behalf of such communication service or users of such service". It is true that the times have changed the dynamics and how we approach piracy, but it has also buttressed the common law remedies or reliefs offered to IP owners who have had their IP infringed upon.

A take down notice presents a justifiable remedy to stop an infringing act. It is a court annexed interlocutory relief that may be sought by an injured party to assist with the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter.

In sum, this is a landmark ruling as it has re-affirmed that an IP owner can obtain relief from court through a take down action. Take down action have been employed world wide especially on ISPs and an order against a telecommunication service provider will go a long way in recognising IP enforcement procedures.

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