



**REVIEW OF THE COPYRIGHT AND NEIGHBOURING RIGHTS  
ACT, 2006**

**ISSUES PAPER**

**October, 2022**

## **PART I**

## **INTRODUCTION AND BACKGROUND**

### **1.0. Introduction**

The Uganda Law Reform Commission (the Commission) is undertaking review of the Copyright and Neighboring Rights Act, 2006. The review is intended to: address challenges faced in implementation of the law in practice, issues posed by technological advancement, domesticate international instruments that create obligations on Uganda as a country in copyright protection; and make proposals to entrench and strengthen copyright protection in Uganda.

### **1.1 Background**

Copyright exists to incentivise authorship, with the prospect of economic reward to rights holders. Copyright and neighbouring rights protection in Uganda is regulated by the Copyright and Neighbouring Rights Act, No. 6 of 2006. The Act provides for protection of literary, scientific and artistic intellectual works, computer programmes, electronic data banks and their neighbouring rights. Copyright and neighbouring rights protection stems from the constitutional right to property. Copyright is therefore a tool by which a government seeks to promote scientific, cultural and economic progress.<sup>1</sup> The goal of copyright and neighbouring rights protection is to encourage creativity to not only reward innovation but also to serve a public good.

Since enactment of the Act in 2006, there have been several developments that require attention. Uganda has ratified several international instruments that create obligations with which Uganda must comply. Technological innovations have changed world economies by reducing the cost of content creation, distribution and discovery. Some of the technological developments were not anticipated by the current Act.

The Government of Uganda has committed itself under the Third National Development Plan (NDPIII) to ensuring that the legal and regulatory framework within which businesses operate are updated to support economic development.

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<sup>1</sup> <https://www.ccianet.org/wp-content/uploads/2015/08/Copyright-Reform-for-a-Digital-Economy.pdf>, accessed on October 11, 2022.

It is against this background that the Commission is undertaking review of the Copyright and Neighbouring Rights Act, 2006.

## **1.2 Justification for the review**

Under Program VI of NDP III, the Government has committed itself to strengthening the private sector by sustainably lowering the cost of doing business while protecting and rewarding innovativeness. Review of the Copyright and Neighbouring Rights Act is intended to operationalise this commitment by ensuring that innovation is promoted by securing rights of creativity.

Review of the Act seeks to accommodate new technological innovations to maintain flexibilities so that copyright and neighbouring rights protection does not impede other economically valuable transactions, as well as provide certainty in the legal framework.

Uganda has ratified international instruments that impose obligations of compliance to ensure fair regulation of copyright and neighbouring rights. For example, the Beijing Treaty on Audio-visual Performances 2012, the Marrakesh Treaty (2013), the Kampala Protocol on Voluntary Registration of Copyright and related Rights (2021); the World Intellectual Property Organisation (WIPO) Copyright Treaty (1995); the WIPO Performances and Phonograms Treaty (1995); and the Berne Convention on Protection of Artistic and Literary Works (1886). This review is intended to address and domesticate some of the commitments that Uganda has signed up to under these international instruments.

Since enactment of the Copyright and Neighbouring Rights Act, new and emerging issues have cropped up in the regulation of copyright and neighbouring rights. For example, actors in the sector continue to advocate for private copy levy to plug revenue leakage arising out of activities that should be the exclusive right of authors or creators of works.

## **1.3 Statement of the problem**

Advancement in technology and innovation has changed the mode of content creation, distribution and discovery. These changes pose threats to copyright and neighbouring rights protection and public fair use. The Copyright and Neighboring Rights Act in its current state does not address issues of technological

circumvention that seek to control infringement of copyrights online or on digital platforms. It is therefore vital that this review is undertaken to address advancement in technology.

Despite the reforms introduced by the Act in 2006, Copyright and neighbouring rights infringement continues to rise and enforcement remains a challenge. Copyright piracy is prevalent and this can be attributed to weak sanctions in the Act, lack of certainty in enforcement and selective enforcement of the provisions of the Act. There is therefore need to review the Act to provide strong and punitive sanctions to ensure compliance with the law.

The Act lacks certainty as to the rights of producers and performers. Producers and performers play a crucial role in creation of copyrightable works. The Act is not clear as to the remuneration of a performer and economic rights to a producer.

The Act in its current form does not envisage copyright as a taxable area where the government can generate revenue. This has disincentivised the government in developing the sub sector and the sub sector has not been sufficiently exploited to contribute revenue to the national treasury. The Act does not provide for private copy levy (PLC) yet the current movement towards amendment fronts this as one of the major changes required in the law to enhance benefit to authors and holders of neighbouring rights from their creative works.

The current copyright regime is also hampered by institutional challenges. The registry of copyrights is together with the registry of companies, marriages, and documents under the umbrella of the Uganda Registration Services Bureau (URSB); the Registrar General also doubles as the Registrar of Copyrights. This arrangement is not only problematic in practical terms but also contravenes the intention of the legislature in sections 41, 42 and 43 of the Act.

## **1.4 Objectives**

The overall objective of the study is to review the Act and make recommendations for its reform. The specific objectives of the study are to: -

- (a) explore the legislative gaps in the existing law;
- (b) explore the challenges to implementation of the Act in its current form;
- (c) identify emerging issues and technologies that affect the law;

- (d) undertake comparative study of regional and international instruments and legislation of relevant jurisdictions to borrow best practices; and
- (e) and make proposals for reform of the law.

## **1.5 Scope of the Review**

This review will focus on the provisions of Copyright and Neighbouring Rights Act, 2006. A comparative study will be carried out to ensure that the review takes into account best practices in regulation and protection of copyright and neighbouring rights from selected, relevant jurisdictions. International conventions and treaties on copyrights will be reviewed to ascertain the extent to which they can be domesticated.

## **1.6 Methodology**

The following methodology will be adopted for the review.

### **1.6.1 Preparation of Issues Paper**

The Uganda Law Reform Commission, working together with Uganda Registration Services Bureau and First Parliamentary Counsel, have prepared an Issues Paper. The issues paper provides an overview of the gaps and other issues affecting implementation of the Copyright and Neighbouring Rights Act and puts forward provisional proposals for reform of the Act. The paper considers different legal frameworks for regulation of copyrights both at the national and international level.

### **1.6.2 Technical Working Group (TWG)**

The Commission will constitute a technical working group (TWG) of experts drawn from Uganda Registration Services Bureau, Ministry Justice and Constitutional Affairs, Uganda Law Reform Commission, Ministry of Foreign Affairs, Ministry of Local Government, Uganda Law Society, Uganda Communications Commission, Uganda Revenue Authority, Collective Management Organisations, National Cultural Forum, Academia and Private Sector actors.

The TWG is intended to provide professional guidance and expertise in considering the issues for reform.

### **1.6.3 Stakeholder consultations**

The Commission will carry out stakeholder consultations on the legislative proposals arising from the study. The consultations will target key stakeholders in the copyright sector. The consultations are intended to build consensus and validate the proposals.

### **1.6.4 Report writing**

The Commission will prepare a study report containing recommendations of the study. The report will inform the preparation of a Regulatory Impact Assessment (RIA) and legislative proposals for reform.

## **PART II - POLICY AND LEGAL FRAMEWORK ON COPYRIGHT AND NEIGHBOURING RIGHTS**

### **2.0. Introduction**

This part presents the policy context of copyright and neighbouring rights protection, the current legal framework, the need for reform and principles that will guide the review process.

### **2.1. Context of copyright and neighbouring rights protection**

Copyright and neighbouring rights law protects creators of original works by granting them the sole right to produce or reproduce any substantial part of the work in any form, to perform the work in public or, if the work is unpublished, to publish the work or any substantial part of it. Copyright protects only the form of expression of ideas, not the ideas themselves. Ideas, concepts, procedures, methods or other things of a similar nature are not be protected by copyright and neighbouring rights law.<sup>2</sup> The works protected by copyright are creative with regard to the choice and arrangement of the medium of expression such as words, videos, musical notes, colours and shapes.<sup>3</sup> By protecting the original expression of the idea, copyright encourages the dissemination of ideas in different forms by protecting the expression through statutory grant of proprietary interest.<sup>4</sup>

Copyright gives the owner of works both economic and moral rights. Economic rights allow right owners to derive financial reward from the use of their works by others. Moral rights allow authors and creators to take certain actions to preserve and protect their link with their work. However, these rights are subject to certain exemptions and limitations. These limitations include fair use, public benefit works, compulsory licence and access by persons who are blind, visually impaired, or otherwise print disabled.<sup>5</sup>

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<sup>2</sup> Section 6 of the Act.

<sup>3</sup> Understanding Copyright and Related rights WIPO – [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_909\\_2016.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf) Accessed on September 17<sup>th</sup>, 2022.

<sup>4</sup> Commonwealth of Australia Copyright Law Review Committee “An Economic analysis of Copyright Reform” ISBN 0642233594 1995.

<sup>5</sup>The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh Treaty), was adopted by WIPO Member States in June 2013. The Marrakesh Treaty requires its members to adopt limitations and exceptions for the creation and

Copyright protection is limited in duration and as such, the protection is not indefinite. Under section 13, copyright protection is during the life of the author and fifty years after the death of the author. Copyright protection continues, in general, until a certain time after the death of an author. The purpose of this provision in the law is to enable the author's successors to benefit economically from exploitation of the work even after the author's death<sup>6</sup>, while exemplifying the rule against perpetuities.

Copyright gives an owner of copyright protected material power to transfer rights by way of assignment or license to other individual or company for use.

Copyright protection is premised on the general principle of the rights of authors and makers of copyrighted material to determine how their works are exploited while at the same time acknowledging the rights of consumers to engage with content in a manner which does not adversely impact the rights of creators. The role of copyright in disseminating information and promoting welfare can only be effectively realised when copyright law reflects a balance between the competing interests of protection and access.<sup>7</sup>

The Copyright and Neighbouring Rights Act provides a basic framework for safeguarding rights of creators and ensuring investments in the creative sector are made profitable. However, there is a challenge in harmonising the provisions of the law to the positive advantage of creators and investors in the creative industry. This has made it difficult for the Ugandan creative industry to optimise its potential and deliver economic returns on levels comparable to its global counterparts. This is attributed to many factors, including: non-prioritisation of the creative industry by government; inadequate funding of regulatory and enforcement agencies; high prevalence of piracy which is facilitated by advancement in digital and communication technologies; low levels of public awareness of the importance of protecting copyright and neighbouring rights; poverty (leading to patronage of cheap pirated products); high cost of production; and poor organisation in the creative arts sector.

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cross-border transfer of certain published works in formats accessible to persons who are blind, visually impaired, or otherwise print disabled.

<sup>6</sup> Understanding Copyright and Related rights WIPO –

[https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_909\\_2016.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf) Accessed on September 17, 2022.

<sup>7</sup> Ruth L Okediji and William L Prosser the International Copyright system: Limitations, Exemptions and Public Interest Considerations for Developing Countries. Issues Paper No. 15. March 20065 UNCTAD.



## **2.2. Policy and legal framework**

This section examines international and national legal frameworks for copyright regulation and protection in Uganda. Uganda is a party to many international copyright treaties and protocols, which inform or ought to inform the formulation of domestic copyright law and policy.

### **2.2.1. The Berne Convention on the Protection of the Literary and Artistic Works 1886 (The Berne Convention)<sup>8</sup>**

The Berne Convention on the Protection of Literary and Artistic Works, 1886 deals with the protection of works and the rights of their authors. It provides creators such as authors, musicians, poets, painters etc., with the means to control the use of their works, by whom, and on what terms. The adoption of the Convention was prompted by the need to bring uniformity to the disparate bilateral treaties that existed at the time.

The Convention seeks to ensure that works in the literary, scientific and artistic domain such as books, pamphlets, lectures, addresses, sermons, drama, choreography, music, films, videos, drawings, paintings, architecture, sculpture, engraving, lithography, photography, art, illustrations, maps, plans, sketches, three-dimensional works relative to geography, topography, architecture or science enjoy copyright protection outside their country of origin as regards their economic exploitation and artistic integrity.

The Berne Convention is based on three basic principles:<sup>9</sup>

- (a) Works originating in one of the Contracting States must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals (principle of "national treatment");
- (b) Protection must not be conditional upon compliance with any formality (principle of "automatic protection"); and

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<sup>8</sup> [https://www.wipo.int/edocs/lexdocs/treaties/en/berne/trt\\_berne\\_001en.pdf](https://www.wipo.int/edocs/lexdocs/treaties/en/berne/trt_berne_001en.pdf) Accessed on September 12<sup>th</sup>, 2022.

<sup>9</sup> [https://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](https://www.wipo.int/treaties/en/ip/berne/summary_berne.html) Accessed on September 12<sup>th</sup>, 2022.

- (c) Protection is independent of the existence of protection in the country of origin of the work.

The Berne Convention is considered the primary document in the field of copyright that spells out rights of authors. Since its inception, all treaties have been developed consistent with it. For any country to adopt a World Intellectual Property Organisation (WIPO) led Copyright regime, the Berne Convention is considered the first treaty to adopt.

### **2.2.2. The Beijing Treaty on Audio-visual Performances 2012 (The Beijing Treaty)<sup>10</sup>**

The Beijing Treaty on Audio-visual Performances, 2012 was adopted on 24<sup>th</sup> June 2012 during a Diplomatic Conference on the Protection of Audio-visual Performances in Beijing. The Treaty deals with the intellectual property rights of performers in audio-visual performances. The objective of the Treaty is to provide protection for actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expression of folklore in audio-visual performances such as motion pictures and television shows.

The Treaty grants performers economic rights for their performances in fixed and unfixed works<sup>11</sup>. These are:

- (i) the Right to reproduction of the fixation;
- (ii) the right of distribution of the fixed works;
- (iii) the right of rental;
- (iv) the right of making available to the public;
- (v) the right of broadcasting;
- (vi) the right of communication to the public; and
- (vii) the right of fixation.

The Treaty also has the advantage of protecting locally manufactured audio-visual goods in international markets through the reciprocity principle. The Treaty obliges each Contracting Party to adopt, in accordance with its legal system, the measures

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<sup>10</sup> <https://www.wipo.int/treaties/en/ip/beijing/> Accessed on September 12<sup>th</sup>, 2022.

<sup>11</sup> [https://www.wipo.int/treaties/en/ip/beijing/summary\\_beijing.html](https://www.wipo.int/treaties/en/ip/beijing/summary_beijing.html) Accessed on September 12<sup>th</sup>, 2022.

necessary to ensure the application of the Treaty. In particular, each Contracting Party must ensure that enforcement procedures are available under its law so as to permit effective action against any act of infringement of rights covered by the Treaty. Such action must include expeditious remedies to prevent infringement as well as remedies that constitute a deterrent to further infringement.

Uganda ratified the Beijing Treaty on 28<sup>th</sup> January 2022 and as such became a party. Domestication of the treaty is intended to make international content exploited on the local market competitive by imposing the same standards and compliance requirements.<sup>12</sup> There are also ripple effects that will see the growth of other sectors such as cinema and theatre.

### **2.2.3. The WIPO Copyright Treaty (WCT)<sup>13</sup>**

The WIPO Copyright Treaty (WCT) was adopted in Geneva on December 20, 1996 as a special agreement under the Berne Convention that deals with the protection of works and the rights of their authors in the digital environment. The Treaty is devoted to protecting works and rights of authors of copyright in the digital environment by creating new minimum standards which clarify the application of copyright and related rights in the digital environment. The regulated rights include: the right of authors to authorise distribution; rental and communication to the public through the internet. In addition, the Treaty provides for protection of computer programs, and compilations of data. The Treaty entered into force in 2002 and has 96 Member States. The Treaty protects and enables remuneration for creative works consumed in the digital space by protecting against online exploitation and circumventing digital restrictions. It also avails the digital space as a market place for legitimate content traffic.

The Treaty is complimentary<sup>14</sup> and mainly necessary to members that have already ratified major treaties such as the Berne Convention<sup>15</sup>. Domestication will enable reciprocity where creators of protected content in Uganda will equally be protected in Member States.

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<sup>12</sup> [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_beijing\\_flyer.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_beijing_flyer.pdf) pages 5-6, accessed on September 12<sup>th</sup>, 2022.

<sup>13</sup> <https://wipolex.wipo.int/en/text/295157> Accessed on September 12<sup>th</sup>, 2022.

<sup>14</sup> [http://documentostics.com/documentos/advantages\\_wct\\_wppt.pdf](http://documentostics.com/documentos/advantages_wct_wppt.pdf) Accessed on September 12<sup>th</sup>, 2022.

<sup>15</sup> <https://wipolex.wipo.int/en/text/283693> Accessed on September 12<sup>th</sup>, 2022.

The Treaty will provide protection for Ugandan content in foreign markets through reciprocity. This will also make foreign works consumed here competitive as a result of application of the same standards. The Treaty seeks to create equity in the treatment of foreign works if they adhere to the standard terms and conditions set for local works<sup>16</sup>.

#### **2.2.4. The WIPO Performances and Phonograms Treaty (WPPT)<sup>17</sup>**

The WIPO Performances and Phonograms Treaty (WPPT) was adopted in Geneva on December 20, 1996 as a special agreement under the Berne Convention that deals with protection of works and the rights of producers (persons or legal entities that take the initiative and have the responsibility for the fixation of sound) and performers (actors, singer, musicians, dancers etc.) in the digital environment. The Treaty entered into force in 2002 and has 96-member States.

The Treaty grants performers both economic and moral rights in their performances fixed in phonograms (not in audio-visual fixations, such as motion pictures) the right of reproduction; distribution; rental; and making available. The treaty also grants performers moral rights, that is, the right to claim to be identified as the performer and the right to object to any distortion, mutilation or other modification that would be prejudicial to the performers' reputation. The treaty further provides that performers and producers of phonograms have the right to a single equitable remuneration for the direct or indirect use of phonograms, published for commercial purposes, broadcasting or communication to the public. However, any contracting party may restrict or, provided it makes a reservation to the treaty, deny this right.<sup>18</sup>

The treaty obliges contracting parties to provide for legal remedies against the circumvention of technological measures. For example, encryption used by performers or phonogram producers in connection with the exercise of their rights and against the removal or altering of information such as the indication of certain data that identify the performer, performance, producer of the phonogram and the

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<sup>16</sup> [http://documentostics.com/documentos/advantages\\_wct\\_wppt.pdf](http://documentostics.com/documentos/advantages_wct_wppt.pdf) Page 5, accessed on September 13<sup>th</sup>, 2022.

<sup>17</sup> <https://wipolex.wipo.int/en/text/295477> Accessed on September 13<sup>th</sup>, 2022.

<sup>18</sup> [https://www.wipo.int/treaties/en/ip/wppt/summary\\_wppt.html](https://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html) Accessed on September 13<sup>th</sup>, 2022.

phonogram itself, necessary for the management, licensing, collecting and distribution of royalties of the said rights.<sup>19</sup>

The Performances and Phonograms Treaty (PPT) represents a major advance in the protection of artists and producers of phonograms. They now enjoy exclusive rights in the areas of copying, distribution, commercial rental and making their performances and phonograms available to the public via networks. Artists, performers and producers of phonograms also have a right of remuneration for broadcasting and any other means of communication to the public of phonograms published for commercial purposes.<sup>20</sup>

According to the European Commission, the WIPO Performances and Phonograms Treaty clearly presents an opportunity for countries to: develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible; provide adequate solutions to the questions raised by economic, social, cultural and technological developments; recognise the impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms; and balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information.<sup>21</sup>

Uganda acceded to the Performances and Phonograms Treaty in January 2022 and as a contracting party, Uganda is under obligation to ensure compliance with the provisions of the Treaty by domesticating its provisions to give them local efficacy. The accession is a significant step for Uganda to promote utilisation of the intellectual property system, as prescribed in the National Intellectual Property Policy, 2019<sup>22</sup> and provide protection for her authors, writers, performers, artists, programmers and other copyright holders. This is in line with the Third National Development Plan (NDP III) Program VI (private sector development) and the respective Subprogram (creation of an enabling environment for private sector development).

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<sup>19</sup> [https://www.wipo.int/treaties/en/ip/wppt/summary\\_wppt.html](https://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html) Accessed on September 13<sup>th</sup>, 2022.

<sup>20</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51998PC0249&rid=3> Accessed on September 13<sup>th</sup>, 2022.

<sup>21</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51998PC0249&rid=3> Accessed on September 13<sup>th</sup>, 2022.

<sup>22</sup> The Republic of Uganda, National Intellectual Property Policy, May, 2019.

### **2.2.5. The Kampala Protocol on Voluntary Registration of Copyright and Related Rights (Kampala Protocol)<sup>23</sup>**

The Kampala Protocol on Voluntary registration of copyright and related rights was adopted in Kampala on 27<sup>th</sup> August 2021. This is a regional Protocol for the African Regional Intellectual Property Organisation (ARIPO) Member States to purposely establish, manage, facilitate and coordinate a system for voluntary registration and notification of copyright and related rights. The Protocol is also intended to provide a framework to create an integrated regional database for copyright material for easy access and use within and without the ARIPO Regional block. In order to leverage the advantages presented by the Protocol, it requires Members to ratify it. Uganda will be disadvantaged if her works cannot be integrated and protected regionally.

The voluntary registration of copyright and related rights will also enable an author to have a registration certificate that can be prima facie evidence of ownership of that property (copyright and related rights works, recordings and productions). The author or holder of a neighbouring right may use it to approach a financial institution for a loan, or use it as collateral; engage in foreign direct investment; enter into partnership; or use different means to commercialise the property such as licensing, merchandising, selling, etc. In case of any dispute regarding the property, the certificate may be used as prima facie evidence of ownership.<sup>24</sup>

### **2.2.6. The Marrakesh Treaty to Facilitate Access to Published Works for Persons, who are Blind, Visually Impaired or Otherwise Print Disabled (VIPS), 2013**

The Marrakesh Treaty aims to improve the availability and cross-border exchange of certain copyrighted works and other protected subject matter in accessible formats for persons who are blind, visually impaired or otherwise print-disabled. To do this, the Treaty harmonises copyright exceptions (by providing for acts that do not need the permission of a copyright owner where the act is intended for the benefit of the blind, visually impaired or otherwise print-disabled people) so that

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<sup>23</sup> <https://www.aripo.org/wp-content/uploads/2021/09/Kampala-Protocol-on-Voluntary-Registration-of-Copyright-and-Related-Rights-2.pdf> Accessed on September 13<sup>th</sup>, 2022.

<sup>24</sup> <https://www.aripo.org/adoption-of-a-protocol-on-voluntary-registration-of-copyright-and-related-rights> Accessed on September 13<sup>th</sup>, 2022.

accessible versions of copyright works (for example, Braille versions of books) can be legally produced under certain conditions without necessarily infringing copyright.

The Treaty provides that all Contracting Parties shall make an exception to copyright in their domestic law to ensure that, under certain circumstances, accessible versions of copyright protected works can be made available for visually impaired or otherwise print-disabled people without the need for permission from the copyright owner.<sup>25</sup> The Treaty also allows organisations working on behalf of visually impaired people to export accessible versions of works, made under their national exceptions, to similar organisations or individuals in another country without first seeking or obtaining permission of the author or rights holder.<sup>26</sup> A further provision ensures that all Contracting Parties allow the import of qualifying accessible copies of copyright protected works, where the domestic law of the exporting country permits the making of such accessible copies, for export, without first seeking or obtaining permission of the author or rights holder.<sup>27</sup>

The Treaty also recognises the role of authorised entities which may, on a non-profit basis, make accessible format copies of published works, for non-commercial lending or electronic distribution, as long as access to the work is lawful, making only those changes needed to make the work accessible, and supplying the copies only for use by beneficiary persons.<sup>28</sup>

The Marrakesh Treaty represents a significant development in international copyright law because it is the first treaty devoted exclusively to creating international minimum standards for the benefit of visually impaired users of print copyrighted materials. It has the potential to increase the availability of materials in accessible formats globally.

Uganda is committed to improving access to copyright protected works for visually impaired people, and the Government's decision to sign the Treaty reaffirms this commitment. Ratification of the Treaty further highlights Uganda's commitment to its aims. Visually impaired people around the world will have greater access to books. It is in the interest of Uganda to adopt provisions of Treaty through

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<sup>25</sup> See Article 4 of the Treaty.

<sup>26</sup> See Article 5 of the Treaty.

<sup>27</sup> See Article 6 of the Treaty.

<sup>28</sup> See Ibid.

domestication to build synergy that will enable access to otherwise protected material.

### **2.2.7. The Copyright and Neighbouring Rights Act, No. 16 of 2006**

This is the principal legislation governing copyright protection in Uganda. The Act was enacted to repeal and replace the Copyright Act, Cap. 215; provide for the protection of literary, scientific and artistic intellectual works and their neighbouring rights; and provide for other related matters. The Act was the first step towards reforming the law relating to copyright and neighbouring rights protection in Uganda.

The Copyright and Neighbouring Rights Act, 2006 applies to any work, including work created or published, which has not yet fallen into the public domain. The Act protects only works that are original and no formalities are required or necessary for protection.<sup>29</sup> Copyright protection is extended to literary, scientific and artistic works. These include articles, books, pamphlets, lectures, addresses, sermons and other works of a similar nature; dramatic, dramatic-musical and musical works; audio-visual works and sound recording, including cinematographic works and other work of a similar nature; choreographic works and pantomimes; computer programmes and electronic data banks and other accompanying materials<sup>30</sup>

The Act grants both economic and moral rights to authors. Economic rights include exclusive right to do or authorise other persons to: publish, produce or reproduce the work; distribute or make available to the public the original or copies of the work through sale or other means of transfer of ownership; perform the work in public; broadcast the work; commercially rent or sell the original or copies of the work; and reproduce transcription into braille which is accessible to visually impaired persons.

Moral rights include rights to: claim authorship of a work, except where the work is included incidentally or accidentally in reporting current events by means of media or other means; have the author's name or pseudonym mentioned or acknowledged each time the work is used; and seek relief in connection with any distortion, mutilation, alteration or modification of the work.

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<sup>29</sup> Section 4.

<sup>30</sup> Section 5.



## **2.3. The need for reform of the Copyright and Neighbouring Rights Act, 2006**

### **2.3.1. Exploiting digital economy**

Copyright law requires reform in order to facilitate the commercial and cultural opportunities of the digital economy. As Uganda strives to attain middle-income status, Information and Communication Technology (ICT) presents an opportunity that must be exploited. It is imperative that Uganda puts in place an intellectual property framework that supports rather than hinders investment in the ICT economy and is flexible to promote research and development that is essential to innovation, growth and enhanced commercial benefit from the copyright subsector.

### **2.3.2. Encourage innovation and reward creativeness**

Copyright law is fundamentally concerned with motivating the creation and distribution of new copyrighted material, by giving rights holders a limited monopoly over the use of their material. It is generally accepted that without this monopoly, there would be fewer new works and less innovation.<sup>31</sup> However, innovation generally thrives where there is competition. Therefore, by limiting copyright monopoly, exceptions can increase competition and stimulate innovation. Reforming copyright exceptions may therefore be seen as an attempt to find the optimum point at which creation and innovation are maximised.<sup>32</sup>

Proposed reforms to the copyright and neighbouring rights law is intended to facilitate a copyright framework in which innovation and productivity are enhanced as Ugandans participate in the digital economy and diversify areas of economic development for the future.

### **2.3.3. The need for a copyright regime that is more flexible and adaptable**

Exceptions and limitations to copyright are implicitly or explicitly aimed at striking a balance between the creation and dissemination of works, for example, by tailoring copyright to different types of works and by increasing dissemination for certain subgroups of consumers and professional users, without eroding the

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<sup>31</sup> <https://www.alrc.gov.au/wp-content/uploads/2019/08/03.copyrightreformincontext.pdf> Accessed on September 13<sup>th</sup>, 2022.

<sup>32</sup> Ibid.

business model of the producer.<sup>33</sup> In the current digital and turbulent but highly evolving business landscape, copyright law is sometimes said to lack flexibility for enhancing innovation, creative re-use and commercial exploitation and development of new business models.<sup>34</sup> Proposed reform is therefore necessary to explore the extent to which the law can be open and flexible to accommodate future technological developments.

## **2.4. Principles to guide reform of the law**

- (a) Competitiveness of Uganda's creative industry in a digital and knowledge-based global economy;
- (b) Effective protection of authors to ensure just rewards and recognition for intellectual efforts while also providing appropriate limitations and exceptions to guarantee access to creative works, encourage cultural interchange, and advance public welfare;
- (c) A law that is more flexible and adaptable to new technologies;
- (d) Compliance with obligations arising from relevant international copyright treaties;
- (e) A commercially viable and revenue generating creative industry; and
- (f) Effective administration and enforcement of the provisions of the Act.

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<sup>33</sup> Flexible Copyright: The Law and Economics of Introducing an Open norm in the Netherlands [https://www.ivir.nl/publicaties/download/Flexible\\_Copyright.pdf](https://www.ivir.nl/publicaties/download/Flexible_Copyright.pdf) Accessed on September 14<sup>th</sup>, 2022.

<sup>34</sup> Flexible Copyright: The Law and Economics of Introducing an Open norm in the Netherlands [https://www.ivir.nl/publicaties/download/Flexible\\_Copyright.pdf](https://www.ivir.nl/publicaties/download/Flexible_Copyright.pdf) Accessed on September 14<sup>th</sup>, 2022.

## **PART III- ISSUES FOR CONSULTATION**

### **3.0. Introduction**

This part presents the thematic areas that have been identified for reform, it analyses the legal context of the issues, presents the literature reviewed and compares copyright protection regimes in other jurisdictions. The section then poses questions to guide the consultative process.

### **3.1. Domestication of international treaties and conventions**

On 28<sup>th</sup> January 2022, Uganda acceded to four Copyright Treaties; the Berne Convention for the Protection of Literary and Artistic Works (1886), The WIPO Copyright Treaty (WCT) (1996), The WIPO Performances and Phonograms Treaty (WPPT) (1996), and the Beijing Treaty on Audiovisual Performances (2012). Accession to these four Treaties followed ratification of The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, which took place on 23<sup>rd</sup> April 2018.

The WCT, WPPT and Beijing treaties seek to update and supplement other copyright and related rights treaties primarily to respond to developments in technology and the marketplace. They seek to address the challenges posed by digital technologies, and in particular access and dissemination of protected material on digital networks such as the internet.<sup>35</sup>

The treaties impose obligations on Contracting States. For example, Contracting States are required to provide for minimum rights, allowing creators to control and or be compensated for use of their creations by third parties. These treaties ensure that the owners of rights are adequately protected when their works are disseminated through new technologies especially through the Internet.<sup>36</sup> Therefore Uganda is under a duty to domesticate these treaties so as to ensure that it complies with its international obligations.

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<sup>35</sup> <https://www.aripo.org/wp-content/uploads/2019/11/ARIPO-Guidelines-for-Ratification-or-Accession-and-Domestication-of-International-Instruments-on-Copyright-and-Related-Rights.pdf>, accessed on September 14<sup>th</sup>, 2022.

<sup>36</sup> Ibid.

Domestication of treaties offers opportunities and benefits to Uganda's economy and to the authors of material that qualifies for protection. For example, domestication of the copyright treaties will encourage foreign investment and provide the necessary legal framework for the creation, dissemination and access to works. Creators will also be able to exploit their works over the Internet within a structured legal environment without the need to resort to use of physical copies when the works are stored in digital form.<sup>37</sup>

Copyright, like other intellectual property rights is territorial and there is need to have laws to ensure protection beyond borders. This is even more important in the digital environment where works can be accessed and disseminated from any country.<sup>38</sup>

Domestication of treaties will allow protection of foreign copyright in Uganda. Protection of foreign copyright protected works allows the domestic authors to compete on a fair level with the foreign rights holders.<sup>39</sup> If foreign works are not protected, they are likely to disadvantage local rights holders as their works can be used without licences and create an unfair playing field.<sup>40</sup>

Treaties address some of the issues raised by copyright in the digital environment even though the basic principles of copyright and related rights still apply.<sup>41</sup> National legislative measures alone may not be enough to offer the protection that is required due to the trans-national nature of e-commerce in relation to copyright and related rights.<sup>42</sup> Treaties also address issues of copyright exploitation across borders, which provides good opportunity for Ugandan authors. The measures provided for under international treaties can help in enforcement of rights in the digital environment.

Domestication of the various treaties will enable Uganda to enjoy uniformity in copyright protection across the world. Being a signatory of the international copyright treaties or conventions illustrates commitment on the part of signatories

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<sup>37</sup> <https://www.aripo.org/wp-content/uploads/2019/11/ARIPO-Guidelines-for-Ratification-or-Accession-and-Domestication-of-International-Instruments-on-Copyright-and-Related-Rights.pdf> Accessed on September 14<sup>th</sup>, 2022.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

who are accordingly expected to set systems within their jurisdictions to observe the international commitments embedded in the treaties.<sup>43</sup>

Uganda should domesticate the Berne Convention for the Protection of Literary and Artistic Works (1886), The WIPO Copyright Treaty (WCT) (1996), The WIPO Performances and Phonograms Treaty (WPPT) (1996), and the Beijing Treaty on Audiovisual Performances (2012).

### **Issue for consultation**

- 1. Whether Uganda should domesticate the different treaties that have been ratified or acceded to?**
- 2. What impact will domestication of some or all of the copyright treaties have on Uganda as a country?**
- 3. Whether the Copyright and Neighbouring Rights Act sufficiently provides for matters covered under the different copyright treaties that Uganda has ratified?**

### **3.2. Digital and technological advancements**

The recent digital revolution and emergence of the Internet in particular have had a strong impact on virtually all industries, including the copyright sector.<sup>44</sup> The Internet has become a vital platform for delivering digital content such as movies, music, books, news, and software. Most importantly, the global reach of the Internet enables digital content to be nearly instantaneously delivered to any part of the world.<sup>45</sup>

Uganda has seen a rapid rise in use of the internet over the years. As of January 2022, there were 13.92 Million internet users in Uganda, which represented 21.9 % of the Ugandan population.<sup>46</sup> The figures for internet use continue to increase. For example, there was an increase of 1.8% from year 2021.<sup>47</sup>

As technology continues to evolve, improve and expand, a growing number of services within the copyright sector rely on new and innovative business models

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<sup>43</sup> Ibid.

<sup>44</sup> Copyright in the Digital Era: Country Studies ENQUIRIES INTO INTELLECTUAL PROPERTY'S ECONOMIC IMPACT © OECD 2015 <https://www.oecd.org/sti/ieconomy/Chapter5-KBC2-IP.pdf> Accessed on September 14<sup>th</sup>, 2022.

<sup>45</sup> Copyright in the Digital Era: Country Studies ENQUIRIES INTO INTELLECTUAL PROPERTY'S ECONOMIC IMPACT © OECD 2015 <https://www.oecd.org/sti/ieconomy/Chapter5-KBC2-IP.pdf>

<sup>46</sup> <https://datareportal.com/reports/digital-2022-uganda> Accessed on September 14<sup>th</sup>, 2022.

<sup>47</sup> Ibid.

that use the internet as a new way to deliver content and take advantage of improved portability of content.<sup>48</sup>

In response to the evolving digital and technological developments, countries have amended or are in the process of amending their copyright laws in order to bring them up to date with contemporary uses of technology. The effect of digital evolution has been recognised by the international community. Member States under the umbrella World Intellectual Property Organisation (WIPO) have responded to this digital development by agreeing to the WIPO Performances and Phonograms Treaty (WPPT), which was adopted in Geneva on December 20, 1996 as a special agreement under the Berne Convention that deals with protection of works and the rights of producers ( persons or legal entities that take the initiative and have the responsibility for the fixation of sound) and performers (actors, singer, musicians, dancers and others) in the digital environment.

The issues sought to be addressed in the digital environment relate to scope of copyrights, orphan works, copyright limitations and exceptions, copyright registration and enforcement. In the context of technological progress, it is important to notice issues related to the scope of copyright, particularly with respect to coverage of data and datasets. Rapid technological progress is likely to permit economic use (and hence monetisation) of data, just as creative content can be monetised today.<sup>49</sup> The emergence of the Internet and the resulting drastic reduction of cost of transforming creative content have led to the increase in orphan works where the owner is not known or cannot be found.

Digital technology greatly reduces the cost of copying, distributing and transforming content, which has led to the availability of more copyright protected content and much wider usage of it than ever before and the corollary availability of pirated content.<sup>50</sup> As a result, issues of extending limitations and exceptions in copyright protection do arise to ensure that the legitimate interests of rights holders are respected, by restricting the use of such content.

Technological progress facilitates digital piracy, enables users to employ various web-based workarounds and applications to distribute and exchange large amounts of pirated digital products instantaneously around the world.<sup>51</sup> Piracy over the internet is a significant problem that seems to be growing in many countries. According to the recent 301 Report by the US Trade Representative, on-line

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<sup>48</sup> Ibid.

<sup>49</sup> Copyright in the Digital Era: Country Studies ENQUIRIES INTO INTELLECTUAL PROPERTY'S ECONOMIC IMPACT © OECD 2015 at page 213. Available at <https://www.oecd.org/sti/ieconomy/Chapter5-KBC2-IP.pdf> Accessed on September 14<sup>th</sup>, 2022.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

copyright infringement is a growing concern for virtually all copyright-intensive industries, in all formats including mobile telephones, tablets, flash drives, and other mobile technologies.<sup>52</sup>

Clearly, advancement in technology calls for re-examination of the copyright legislative framework to ensure that it addresses the issues posed, especially online piracy, and that exceptions and limitations in the digital environment are introduced.

The reforms will provide a framework that is forward-looking and flexible and supports new business models in the digital age. The reforms will also aim at providing rights holders with new rights and tools for the digital environment, while giving individuals greater flexibility in using legitimately acquired materials and creating user-generated content.

The World Intellectual Property Organisation (WIPO) has adopted two treaties which Uganda has ratified, that seek to address need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments. These are the WIPO Copyright Treaty (WCT) (1996) and the WIPO Performances and Phonograms Treaty, deals with neighbouring rights.

The Treaties have provisions that cover exploitation of works both by traditional means and by means of new technologies. The treaties are cognisant of the impact of the development and convergence; of information and communication technologies on the creation and use a of literary and artistic works.

The European Commission has observed that the treaties' provisions cover the exploitation of works both by traditional means and by means of new technologies. They are of particular importance in addressing new technologies, this being the first time that international treaties have dealt with the opportunities and risks thrown up by new technologies and put forward appropriate solutions before such risks arise.<sup>53</sup>

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<sup>52</sup> Ibid.

<sup>53</sup> Proposal for a Council decision on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Brussels, 24.04.1998 (COMQ998) at page 249.

## Issues for consultation

1. **How have digital and technological advancements affected copyright protection environment in Uganda?**
2. **Whether the Copyright and Neighbouring Rights Act comprehensively addresses issues posed by digital and technological advancement?**
3. **How best can copyright law address copyright issues posed by digital and technological advancement?**

### 3.3. Exceptions and limitations to copyright

The Copyright and Neighbouring Rights Act provides a list of specific exemptions and limitations of fair use under certain circumstances without the prior consent of authorisation of the owner.<sup>54</sup> These exemptions and limitations form an integral part of the copyright system through which balance is achieved between rights holders and users.

Section 15 of the Act provides that works used in the following circumstances are treated as fair use:

- (i) where works are used for private personal use only;
- (ii) where a quotation from a published work is used in another work;
- (iii) where a published work is used for teaching purposes;
- (iv) where the work is communicated to the public for teaching purposes for schools, colleges, universities or other educational institution or for professional training;
- (v) where the work is reproduced, broadcast or communicated to the public with acknowledgement of the work, in any article printed in a newspaper, periodical or work broadcast on current economic, social, political or religious topic;
- (vi) works used to report on current events;
- (vii) where the work is reproduced for the purpose of a judicial proceeding; and
- (viii) where any work is transcribed into braille or sign language for educational purpose of persons with disabilities.

The Act lists the different circumstances for fair use, but limits the scope of what is allowed and what is not. A system of statutory limitations that does not contain an

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<sup>54</sup> Section 15 Copyright and Neighbouring Rights Act, 2006.



open norm to allow a judge to decide whether in circumstances not covered by any of the express limitations recourse could be had to non-written exceptions, is disadvantageous to consumers.<sup>55</sup>

A close scrutiny of section 15 that makes provision for limitations and exemptions based on fair use shows that the section falls short of addressing fair use that might be necessary in the digital environment. The section only addresses fair use in published works, broadcast, sound and visual recordings and audio-visual works. The section does not cover fair use in the digital environment such as reproduction and adaptation of computer programs, duplication, de-compilation and disassembly of computer programs, and use of databases among others, which should be viewed as fair use. Copying or adapting a computer program as an "essential step" in the utilisation of the program in conjunction with a machine is also not provided for as fair use.<sup>56</sup> These exceptions should be subject to use of the computer programs in a manner that supports reverse engineering.<sup>57</sup> The exceptions that relate to computer programs are vital to encourage innovation through reverse engineering.

A review of practices in other jurisdictions indicates that reverse engineering as fair use on copyright protection has been accepted and legislated upon. For example, the United States copyright law allows fair use for reverse engineering.<sup>58</sup> Similarly, the European Union has recognised fair use of a copyrighted computer program by allowing de-compilation or disassembly if it is done to study the ideas and principles which underlie any element of the program as reverse engineering.<sup>59</sup>

Studies have shown that traditional copyright exemptions and limitations do not cover fair use in the technology environment. For example, they do not cover uses

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<sup>55</sup> Flexible Copyright: The Law and Economics of Introducing an Open Norm in the Netherland [https://www.ivir.nl/publicaties/download/Flexible\\_Copyright.pdf](https://www.ivir.nl/publicaties/download/Flexible_Copyright.pdf) Accessed on September 14<sup>th</sup>, 2022.

<sup>56</sup> See section 107 and 117 United States Copyright Act 1976.

<sup>57</sup> In *Atari Games Corp. v. Nintendo of America* 975 F.2d 832 (Fed. Cir. 1992). and *Sega Enterprises, Ltd. v. Accolade, Inc.*, 1993 U.S. App. LEXIS 78 (9th Cir. 1993). Two federal courts of appeals for the first time held that § 107 of the Copyright Act permits an individual who is in rightful possession of a copy of a computer program to engage in reverse engineering." The courts held that such a party may undertake necessary efforts, including disassembly or recompilation of the program, to gain an understanding of the unprotected functional elements of the program, such as the ideas, processes or methods of operation contained in the program, at least where there is a legitimate reason for doing so and no other means of access to the unprotected elements exists.

<sup>58</sup> *Ibid.*

<sup>59</sup> Article 5 and 6 Council Directive 91/250 of 14 May 1991 on the Legal Protection of Computer Programs.

that are the activities of search engines, either for the display of thumbnails in search results or for the dissemination of news articles; the use of works in user-created content; cloud computing; data mining; distance learning; and other transformative uses, such as those of documentary filmmakers.<sup>60</sup>

One of the reasons why it is impossible to provide an exhaustive list for fair use in copyright law is that the exemptions and limitations for fair use are too complex to define conclusively. There are many types of use imaginable that should fall under this exception. Defining and limiting these exceptions is practically impossible. Defining exceptions and limitations becomes even more cumbersome when taking future technologies into account.<sup>61</sup>

The interpretation given by courts to existing exceptions and limitations like the quotation right, the exception for transient and incidental copying, the private copying exception, and the incidental use exception is usually too narrow to respond to new technological developments, or new behavioural patterns in the creation process or commercialisation models.<sup>62</sup> Because the system of the law is not flexible in itself, courts have increasingly come up with inventive ways to create space in law for uses that are not covered by the list of exceptions, but which they felt should not be prohibited by copyright.<sup>63</sup>

Whereas, the exemptions and limitations under the Copyright and Neighbouring Rights Act provide predictability and certainty of the law, in the world of technological advancement a list of specific exemptions and limitation may not be feasible since the future of technological development is not predictable. Technological developments are expected to bring about new, innovative services, or services that are still 'under construction' or have not even been invented yet. A rigid system with an exhaustive list of static exceptions will continue to create new controversies with respect to future use of copyright protected material, which may hamper innovation.<sup>64</sup> Providing for flexibilities and provisions that are adaptable to technological advancement will foster innovation and development of new online business models.<sup>65</sup>

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<sup>60</sup> Flexible Copyright: The Law and Economics of Introducing an Open Norm in the Netherland [https://www.ivir.nl/publicaties/download/Flexible\\_Copyright.pdf](https://www.ivir.nl/publicaties/download/Flexible_Copyright.pdf) Accessed on September 15<sup>th</sup>, 2022.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Flexible Copyright: The Law and Economics of Introducing an Open Norm in the Netherland [https://www.ivir.nl/publicaties/download/Flexible\\_Copyright.pdf](https://www.ivir.nl/publicaties/download/Flexible_Copyright.pdf) Accessed on September 14<sup>th</sup>, 2022.

<sup>65</sup> Ibid.

## Issues for consultation

- 1. Whether the exemptions and limitations to copyright protection with regard to fair use under section 15 adequately address issues of fair use in the technological environment?**
- 2. Whether the law should allow courts to extend and set up other circumstances of fair use?**
- 3. Whether the law should provide flexible and adaptable provisions on exemptions and limitations that can be exploited to address technological developments?**
- 4. Do the exceptions for fair use under section 15 apply to exploitation of computer programs?**

### **3.4. Private copying levy (PCL)**

The Berne Convention allows Member States to provide for exceptions and limitations to the right of reproduction, provided that the conditions of a three-step-test are met. Many jurisdictions limit the application of the reproduction right for activities that can be qualified as “private copying” because it is practically impossible to grant permission to large numbers of individuals or to monitor how such permission is subsequently used.<sup>66</sup> In general, the solution was found in an exception or limitation to the exclusive right on condition that fair compensation was paid to authors and other right holders for loss of revenues or harm caused where their work is copied.<sup>67</sup> This is what is referred to as Private Copying Levy (PCL).

A PCL is a surcharge on the price of media capable of making copies. It is supposed to be redistributed to rights holders in order to compensate for an alleged or presumed loss suffered by them as a result of copies made under the private copying exception. PCLs are intended to offset an assumed loss, which results from lawful copies made for private consumer use.<sup>68</sup> A private copy is usually defined as any copy for non-commercial purposes made by a natural person for

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<sup>66</sup>Hester Wijminga, Wouter Klomp, Marije van der Jagt and Joost Poort International Survey on Private Copying Law and Practice (WIPO 2016) [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1037\\_2017.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2017.pdf), accessed on September 15<sup>th</sup>, 2022.

<sup>67</sup> Professor Marcel Boyer, The Economics of Private Copying (2017) Available at [https://www.tse-fr.eu/sites/default/files/TSE/documents/ChaireJL/PolicyPapers/pp\\_the\\_economics\\_of\\_private\\_copying\\_marcel\\_boyer\\_31\\_august\\_2017.pdf](https://www.tse-fr.eu/sites/default/files/TSE/documents/ChaireJL/PolicyPapers/pp_the_economics_of_private_copying_marcel_boyer_31_august_2017.pdf) Accessed on September 15<sup>th</sup>, 2022.

<sup>68</sup> <https://www.edri.org/files/privatecopyinglevies.pdf> Accessed on September 15<sup>th</sup>, 2022.

his or her own personal use.<sup>69</sup> The levy is based on a presumption that private users may engage in activities such as replication, dubbing, downloads, storage, that are principally the reserve of content owners and any exception to this should be remunerated through fair compensation.

Confronted with an increasing use of their copyrighted works in a globalised and digital context, rights holders are struggling to protect their copyright or neighbouring rights, which should allow them to capture a fair (competitive) share of the value that their created works or assets generate. The main copyright challenge today is the adaptation of copyright law and practice to the digital age.<sup>70</sup> PCL systems tend to adapt to new technology and new devices in some countries.

The enforcement of PCLs presents a complex system to apply. As such, there are substantial differences between private copying systems across the world regarding, among others, tariff levels, scope of levy, liability of market players, methods of reporting, legal tools for monitoring and enforcement and methods of setting the tariff.<sup>71</sup> According to Professor Marcel Boyer<sup>72</sup> applying levies to the price of recording equipment or media sold to individuals for their private purpose appears to be the most feasible and efficient method for collecting compensation from individuals.

The application of PCLs raises questions of implementation such as:

- (a) At what point is the levy charged? Is it at the point of importation, sale, usage, or manufacture?
- (b) On what gadgets should the charge be imposed?
- (c) Who should be in charge?
- (d) How should the distribution be done?
- (e) Whether this is distributable money or not?

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<sup>69</sup> Hester Wijminga, Wouter Klomp, Marije van der Jagt and Joost Poort International Survey on Private Copying Law and Practice (WIPO 2016) [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1037\\_2017.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2017.pdf) Accessed on September 15<sup>th</sup>, 2022.

<sup>70</sup> Professor Marcel Boyer, The Economics of Private Copying (2017) Available at [https://www.tse-fr.eu/sites/default/files/TSE/documents/ChaireJL/PolicyPapers/pp\\_the\\_economics\\_of\\_private\\_copying\\_marcel\\_boyer\\_31\\_august\\_2017.pdf](https://www.tse-fr.eu/sites/default/files/TSE/documents/ChaireJL/PolicyPapers/pp_the_economics_of_private_copying_marcel_boyer_31_august_2017.pdf) Accessed on September 15<sup>th</sup>, 2022.

<sup>71</sup> Professor Marcel Boyer, The Economics of Private Copying (2017) Available at [https://www.tse-fr.eu/sites/default/files/TSE/documents/ChaireJL/PolicyPapers/pp\\_the\\_economics\\_of\\_private\\_copying\\_marcel\\_boyer\\_31\\_august\\_2017.pdf](https://www.tse-fr.eu/sites/default/files/TSE/documents/ChaireJL/PolicyPapers/pp_the_economics_of_private_copying_marcel_boyer_31_august_2017.pdf) Accessed on September 15<sup>th</sup>, 2022.

<sup>72</sup> Ibid.

These questions must be answered if the system is to be adopted to work for any economy.

The practice in jurisdictions that have adopted PCLs, especially in Europe, indicates that the collecting process of private copying remunerations is generally carried out by one collecting society appointed by the government or by rights holders, to which importers, manufacturers and other liable parties are required to report. Authors, performing artists, and producers are represented on the boards of such institutions.<sup>73</sup>

According to the EU Commission, whereas it is important that artists and creators get paid for their creativity, the use of PCL is controversial because it has created many obstacles to the achievement of a single market and serves to discredit copyright in the eyes of citizens.<sup>74</sup> In Europe, PCL has been viewed as an obstacle to innovation mainly because the system distorts the market by compensating economic loss that has not been clearly demonstrated or accurately quantified, and appears to have a negative impact on new business models. Accordingly, the issue of the real impact of this levy on new technology must be addressed.<sup>75</sup> It is therefore necessary to think about the implementation consequences of this levy before any country rushes to adopt it.

PCLs are also seen as having a negative impact on the cost of doing business and have the potential to increase the cost of products. For example, the Canadian Government, while issuing a regulation aimed at excluding micro SD cards and similar cards from the definition of “audio recording medium” for purposes of private copying levy, argued that a levy would “increase the costs to manufacturers and importers of these cards, resulting in these costs indirectly being passed on to retailers and consumers... thereby negatively impacting e-commerce businesses and Canada’s participation in the digital economy.”<sup>76</sup>

In Uganda, there have been calls for the introduction of PCL on gadgets used or that are likely to be used to exploit copyright protected material. Introducing a PCL system in Uganda can possibly help the creative industry thrive and support

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<sup>73</sup> Ibid

<sup>74</sup> European Digital Rights available at <https://www.edri.org/files/privatecopyinglevies.pdf> Accessed on September 15<sup>th</sup>, 2022.

<sup>75</sup> <https://www.edri.org/files/privatecopyinglevies.pdf> Accessed on September 15<sup>th</sup>, 2022.

<sup>76</sup> <sup>76</sup> Professor Marcel Boyer, The Economics of Private Copying (2017) Available at [https://www.tse-fr.eu/sites/default/files/TSE/documents/ChaireJL/PolicyPapers/pp\\_the\\_economics\\_of\\_private\\_copying\\_marcel\\_boyer\\_31\\_august\\_2017.pdf](https://www.tse-fr.eu/sites/default/files/TSE/documents/ChaireJL/PolicyPapers/pp_the_economics_of_private_copying_marcel_boyer_31_august_2017.pdf) Accessed on September, 2022.

artistes. However, the question is, does Uganda have in place facilities or systems that can enable the enforcement of PCL without having a negative effect on the cost of doing business and containing innovation especially in the information technology sector to which the country has set its development agenda?

Collective Management Organisations (CMOs) in Uganda are still in their infancy, undeveloped and not well organised. As such, issues of transparency, financial management and accountability remain a great challenge. Whereas, PCL presents benefits to rights holders by compensating them for their creativity, this must be weighed against the general public good. Uganda has no well-developed enabling infrastructure that can allow fair imposition and enforcement of PCL. Consequently, imposing it may have dire consequences on doing business, the business environment and inhibit innovation.

### **Issues for consultation**

- 1. Is Uganda's economy ready to adopt and impose Private Copying Levy (PCL)?**
- 2. What impact does the imposition of PCL have on the country's development agenda?**
- 3. If Uganda was to impose PCL how should it be enforced?**

### **3.5. Exceptions for the benefit of Persons with Disability (PWDs)**

The Copyright and Neighbouring Rights Act, provides another exception under fair use where any work is transcribed into braille or sign language for educational purpose of persons with disabilities.<sup>77</sup> The Act limits the exception to only works that are to be used for educational purposes of the person with disabilities. However, this exception does not benefit all groups of people with disabilities, for example, those with dyslexia who are unable to access works due to their disability, and does not apply to all works. For example, it does not apply to audio description of films.

Therefore, the current disability exception only applies to certain types of copyright protected works (i.e. literary, dramatic, musical or artistic works), and does not include films, broadcasts or sound recordings. This means that the exception does

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<sup>77</sup> Section 15 of the Act.

not permit the making of an audio description that enables a visually impaired person to access a film.

Uganda has ratified the Marrakesh Treaty to Facilitate Access to Published Works for Persons, who are Blind, Visually Impaired or Otherwise Print Disabled. The treaty obliges all Contracting Parties to make an exception to copyright in their domestic law to ensure that, under certain circumstances, accessible versions of copyright protected works can be made for visually impaired or otherwise print-disabled people without the need for permission from the copyright owner.<sup>78</sup> The treaty also allows organisations working on behalf of visually impaired people to export accessible versions of works, made under their national exceptions, to similar organisations or individuals in another country.<sup>79</sup> Another provision ensures that all Contracting Parties allow importation of qualifying accessible copies of copyright works, where the domestic law of the exporting country permits the making of such accessible copies, for export.<sup>80</sup>

According to a WIPO study,<sup>81</sup> the common concern is the expense and time needed to make accessible copies of books which are only available in paper format or in a digital format that is not easily convertible to Braille or other format. The European Commission has noted that the main issue is how to supply relevant organisations with non-protected digital copy for creating accessible formats in a way that addresses publishers concerns about security and the protection of their copyright works.<sup>82</sup>

### **Issues for consultation**

- 1. Should the law extend the exception to cover all disabilities?**
- 2. Should the law extend the exception to cover organisations of persons with disabilities?**
- 3. Should the law extend the exception to cover other use beyond educational use by persons with disabilities?**

### **3.6. Commercialising copyright**

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<sup>78</sup> See Article 4 of the Treaty.

<sup>79</sup> See Article 5 of the Treaty.

<sup>80</sup> See Article 6 of the Treaty.

<sup>81</sup> Study on Copyright Limitation and Exceptions for visually impaired, by J. Sullivan for the WIPO standing Committee on copyright and Related rights (2006).

<sup>82</sup> European Commission Green Paper: Copyright in the Knowledge Economy COM (2008) 466 Final.

The creative industry is composed of creation, production, marketing, and distribution of products and services generated from human creativity. Thus, knowledge-based economic activities rise from tangible products and intangible intellectual services with economic and cultural value, creative content and market objectives.<sup>83</sup> Among the sectors that are growing steadily and likely to be exploited for development of the Uganda is the intellectual property sector.

According to UNCTAD, the potential for escalating socio-economic growth and employment through the creative industry in developing countries remains mostly untapped.<sup>84</sup> The benefits of creative industries to economic development include the promotion of new integration with the global economy through regional co-operation which fosters social inclusion; promotion of economic diversification, trade and innovation; and promotion of cultural sustainability.<sup>85</sup>

Uganda is endowed with rich and diverse cultural values and traditional skills. Among the programmes under the Third National Development Plan, (NDP III) is the Innovation, Technology Development and Transfer Programme. This programme aims at increasing the application of appropriate technology in production and service delivery processes through development of a well-coordinated STI eco-system.<sup>86</sup> Among the expected results of this programme is increase in the number of intellectual properties registered. Among the strategies identified to achieve this is strengthening the intellectual property value chain.<sup>87</sup> This shows that Uganda is at the stage of supporting commercialisation of intellectual property rights to ensure that innovation, technology development and transfer is achieved.

Commercialisation of intellectual property has been hindered by low awareness levels about the protection accorded to the intangible rights by the population. The creation of Intellectual Property to gain a competitive edge in Small Scale Enterprises (SME) is often lost as most companies are not even aware that they have an innovative idea worthy of protection. Intellectual Property education is

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<sup>83</sup> UNCTAD 'Strengthening the Creative Industries for Development in Mozambique' UNCTAD/DITC/TAB/2009/2 11 2009 accessed 29 October 2018.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> National Planning Authority, Third National Development Plan (NDP III). Available at [http://www.npa.go.ug/wp-content/uploads/2020/08/NDPIII-Finale\\_Compressed.pdf](http://www.npa.go.ug/wp-content/uploads/2020/08/NDPIII-Finale_Compressed.pdf) Accessed on September 15<sup>th</sup>, 2022.

<sup>87</sup> NDP III



important for SMEs for them to know from the outset that rights and protections are available. This will allow companies to innovate more rather than litigate.<sup>88</sup>

This review is therefore intended to maximise commercial benefits of copyright and neighbouring rights owners while at the same time enhancing the country's revenue generation from the creative industry.

### **Issues for consultation**

- 1. How can the copyright legal framework be used to promote commercialisation of copyright exploitation?**
- 2. What are the challenges faced in commercialisation of copyright exploitation?**
- 3. How can government leverage the commercially enhanced intellectual property industry for revenue generation?**

### **3.7. Remedies for infringement**

The Copyright and Neighbouring Rights Act provides civil remedies for infringement of copyright. Under sections 45, any person whose rights are in imminent danger of being infringed or are being infringed may institute civil proceedings in the Commercial Court for an injunction to prevent the infringement or to prohibit the continuation of the infringement. Section 56 provides that a rights owner who has reasonable grounds for suspecting that importation of pirated goods may take place, may lodge an application in writing with the Commercial Court for suspension of release into free circulation of such goods.

The Act provides certainty and predictability as to the remedies available to an owner of a copyright that has been infringed. However, the question that arises is whether the Commercial Court is a forum that is easily accessible to offer speedy and cost-effective justice service delivery to the public. Whereas the Commercial Court is seen as a specialised court to dispense commercial justice, the reality is that it is difficult to access since it is a division of the High Court which is stationed only in Kampala. Consequently, it is a hindrance to those who seek to protect their rights.

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<sup>88</sup> Ibid.

The provisions giving a right to civil remedies lack certainty and predictability as to who has a right to bring an action for infringement. Sections 45 and 56 provide for “*a person whose rights have or are in imminent danger or a rights owner.*” The provisions are silent about the right to bring an action by other copyright interest holders such as assignees and exclusive license holders. This makes the provisions uncertain and unpredictable.

### **Issues for consultation**

- 1. Whether the Commercial Court is a suitable forum to grant civil remedies for infringement of copyright?**
- 2. Whether it is necessary to establish specialised courts to address intellectual property issues?**
- 3. Whether the forum for addressing issues of copyright infringement and remedies should be open to other courts of judicature?**
- 4. Whether sections 45 and 56 lack certainty and predictability for the civil action to be commenced by assignees and exclusive license holders?**

### **3.8. Remedies for civil actions**

The Copyright and Neighbouring rights Act provides for civil remedies of injunction and payment of damages for threatened infringement or infringement of a copyright. Under sections 45 and 56, where a civil action is instituted for threatened danger of infringement of a copyright, the court may issue an injunction to prevent the infringement or prohibit continuation of the infringement. The court can also make an order for inspection of or removal from the infringing person’s premises of the copyright infringing materials.

Section 45 (4) provides that a person who sustains any damage because of the infringement of his or her rights may claim damages against the person responsible for the infringement, whether or not that person has been successfully prosecuted.

Whereas this section provides civil remedies for threatened or actual infringement, it is silent as to other vital remedies such as orders to account for profits, takedown, removal of infringing content, cessation of infringement acts among others.

Whereas, it can be assumed that courts have inherent powers to make orders, as they deem necessary, the fact that the Act is silent as to other vital remedies in an action for infringement makes the law uncertain and unpredictable for the litigants.

Certainty and predictability are crucial for any law to be clear to the users and implementers.

### **Issues for consultation**

- 1. Whether the Act provides exhaustive remedies for threatened or actual infringement?**
- 2. Whether there is need for remedies like account for profits, takedown, removal of infringing content, cessation of infringement acts?**
- 3. What other orders should be specified in the law for clarity, certainty and predictability for users and implementers?**

### **3.9. Infringement of neighbouring rights**

Neighbouring rights are rights attached to the auxiliary role played by performers, producers of sound recordings, music publishers, audio-visual and broadcasting companies.<sup>89</sup> The Act provides for economic and moral rights to owners of neighbouring rights.<sup>90</sup> Neighbouring rights are protected for a period of fifty years from the date of the performance.

The Act expressly forbids and criminalises infringement of copyright but does not provide the same protection to neighbouring rights. According to section 45, “infringement of copyright or neighbouring rights occurs where, without a valid transfer, licence, assignment or other authorisation under this Act, a person deals with any work or performance contrary to the permitted free use and in particular, where that person does or causes or permits another person to:-

- (a) reproduce, fix, duplicate, extract, imitate or import into Uganda otherwise than for his or her own private use;
- (b) distribute in Uganda by way of sale, hire, rental or like manner; or
- (c) exhibit to the public for commercial purposes by way of broadcast, public performance or otherwise.”

The acts provided for as constituting infringement do apply to infringement of a copyright. The section is silent and not clear as to the nature of acts that constitute infringement for neighbouring rights such as performance and production. Lack of

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<sup>89</sup> Section 21.

<sup>90</sup> Section 22 and 23.

clarity as to the acts that constitute infringement of neighbouring rights creates uncertainty.

Review of copyright legislation in other jurisdictions revealed that the law can provide clarity and certainty as to the nature of acts that would constitute infringement of neighbouring rights. For example, the Nigerian Copyright Act provides that a person infringes a neighbouring right where he or she: -

- (a) permits a place of public entertainment or business to be used for a performance in the public of a work, where the performance constitutes an infringement of copyright in the work, unless the person permitting the place to be so used was not aware, and had no reasonable ground for suspecting that the performance would be an infringement of the copyright; or
- (b) performs or causes to be performed, for purposes of trade or business or as a supporting facility to a trade or business, any work in which copyright subsists.

## **Issues for consultation**

**Whether the Copyright and Neighbouring Rights Act is clear as to what acts constitute infringement of neighbouring rights?**

### **3.10. Criminal Liability for copyright infringement**

The Copyright and Neighbouring Rights Act creates offences and penalties related to infringement of copyright. Under section 47, it is an offence for any person who, without the authorisation or license from the rights owner or his or her agent to: publish, distribute or reproduce the work; perform the work in public; broadcast the work; communicate the work to the public; or import any work and use it in a manner which, were it work made in Uganda, would constitute an infringement of copyright. Under section 48, it is an offence for any person to infringe a neighbouring right of another person.

Section 49 extends criminal liability to officers of a corporation or partners in a partnership.

The provisions provide for strict criminal liability for persons found to have infringed copyright. The Act however, does not make provisions for defences to any of the offences created under the Act.

Review of legislation from other jurisdictions revealed that there are some defenses to certain offences provided for under the law. For example, under the Nigerian Copyright Act, an accused person can raise a defence that he or she did not know and had no reason to believe that any such copy was an infringing copy of any such work.

### **Issues for consultation**

- 1. Whether the offences provided under the Act are exhaustive and sufficient to deter copyright infringement?**
- 2. Whether it is necessary to expand the offences under the Act to cover offences relating to producers of phonograms and performers?**
- 3. Should the law prescribe defenses to infringement of an existing copyright?**