



# Music Copyright Society of Kenya Limited

NON-PROFITMAKING-NO SHARE CAPITAL-LIMITED BY GUARANTEE-AFFILIATED TO THE INTERNATIONAL CONFEDERATION COPYRIGHT SOCIETY - CISAC

Reg. C5/83

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## PRESS RELEASE

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### **MUSIC COPYRIGHT SOCIETY OF KENYA'S STATEMENT ON KENYA COPYRIGHT BOARD'S LONG STANDING UNFAIR AND ILL INTENDED REGULATION OF COLLECTIVE MANAGEMENT ORGANIZATIONS.**

Music Copyright Society of Kenya (MCSK) wishes to shed light into the poor and biased regulatory environment it has been subjected to by Kenya Copyright Board (KECOBO).

MCSK would like to call upon the public and most importantly its members to carefully go through the facts highlighted here. Some date as far as 2016 but have a compounding effect on some of the issues we are currently facing. MCSK would also like to assure its members, users of copyrighted works and the general public that we execute our mandate of collecting and distributing royalties as per the established laws, regulations and policies.

It is also important to note that MCSK represents not less than 20,000 Right Holders Citizens of Kenya and Millions of resident and non-resident Right Holders of Intellectual Property (Copyright and Related Rights) in the Republic of Kenya. MCSK further draws its power from the Constitution of Kenya which provides for protection of right to property to every person either individually or in association with others, to acquire and own property of any description and in any part of Kenya. It further provides that the State shall support, promote, and protect the Intellectual Property rights of the people of Kenya.

#### **A. UNLAWFUL, UNPROCEDURAL AND UNREASONABLE ACTS**

1. On 7<sup>th</sup> November 2016, KECOBO directly canvassed for the use of Digital Rights Management Limited otherwise known as DRM, in generating royalty statements when distributing Skiza platform royalties. DRM ended up being paid millions of shillings and failed to deliver any royalty statements to members of MCSK.
2. In the year 2017, KECOBO without regard to laid down procedures in the Constitution, Copyright Act, Fair Administrative Action Act and Public Service (Values and Principles) Act, Laws of Kenya, refused to issue MCSK with a CMO license to administer and enforce exploitation of economic rights in copyrighted musical works in its Kenyan and International catalogue/repertoire. KECOBO instead licensed Music Publishers Association of Kenya (MPAKE), to exercise MCSK rights without MCSK's authority and without meeting the basic minimum requirements stipulated in Section 46 of the Copyright Act and Regulations 15 and 16 of the Copyright Regulations.
3. In July 2018, a 3-judge bench sitting in the High Court of Kenya at Kakamega in Consolidated Petition No. 3B of 2017 ruled that the decision of KECOBO to issue MPAKE with a 2017 CMO license to be null and void. Even after the judgment KECOBO continued to go the extra step to support MPAKE in its illegal royalty collection activities by placing adverts in the newspapers and writing to the



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Inspector General of National Police to provide officer to MPAKE during their illegal activities and KECOBO has never publicly demanded for any accountability from MPAKE for royalties collected between 2017-18 that should have been distributed to MCSK.

- In January 2018 KAMP and PRISK communicated severally their reservations of working jointly with MPAKE but on 30th January 2018, KECOBO responded by coercing KAMP and PRISK to issue joint licenses with MPAKE using SUAVE joint licensing platform, [www.jointlicense.com](http://www.jointlicense.com) and USSD code \*611\* (Suave Group Limited). KAMP and PRISK were being charged a commission of either 10% (renewals) or 15% (new) from the royalties collected. It was explicitly stated that the renewal of KAMP and PRISK 2018 CMO license was pegged on using Suave Group Limited licensing system.
- On 11th February 2018, KAMP through its then CEO expressed its reservations and concerns to KECOBO on working with a system that was procured un-procedurally from SUAVE Group Limited. KECOBO responded by setting out unreasonable conditions to be met by KAMP to operate as a CMO and subsequently ended up sending further correspondences issuing ultimatums with threats of dire consequences.

## B. USURPING GOVERNANCE AND MANAGEMENT OF CMOs AND NOT REGULATING

- Through a letter dated 26<sup>th</sup> August 2019, Ref: XML/26/08, KECOBO wrote that it had engaged Expedia Management Limited to pilot Expedia Royalty Management System. Expedia Management Limited is a Content Service Provider (CSP) on Skiza Platform (Safaricom Limited) that right holders have raised complaints about their royalties from Safaricom in futility.
- KECOBO acted beyond its legal mandate in engaging the service of Expedia Management Limited to pilot Expedia Royalty Management System on behalf of MCSK. Raising the pertinent question of the underlying interest of KECOBO in directly sourcing for the services of Expedia Management Limited.
- In February 2020, the tripartite Board of Directors of MCSK, KAMP and PRISK resolved that they shall not engage the services of Liberty Afrika Technologies Limited; a Content Service Provider (CSP) that provides content on Skiza Platform (Safaricom Limited) with outcries from all musicians on how they are mismanaging and misrepresenting their royalties from Safaricom Ltd.
- In March 2020, KECOBO coerced the CEOs of MCSK, KAMP and PRISK to sign an agreement awarding Licensing system tender to Liberty Afrika Technologies Limited but on 25th March 2020 the CEOs informed KECOBO of their reservations in the manner of signing the agreement and formally withdrew their signatures to the agreement.
- In April 2020 KECOBO coerced the CMOs Chairmen and CEOs to execute an Agreement with Liberty Afrika Technologies Limited.



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6. MCSK's reservation to signing the agreement with Liberty Afrika Technologies Limited was clearly expressed in the correspondence by MCSK chairman to KECOBO dated 24th April 2020.
7. KECOBO retained the original signed Agreements till when it was compelled to produce them in January 2021 by MCSK's advocate.
8. Liberty Afrika Technologies Limited are being paid a monthly commission of 2% (1% to offset the balance of the cost of the system {Kenya Shillings Eighty-Five Million KShs. 85,000,000} and 1% maintenance payments) of all royalties collected through the "self-licensing system".
9. The CMOs being compelled to pay for the Licensing system is contrary to assurances given in a meeting on 20th December 2020 to the CMOs Chairmen and CEOs by Hon. Joseph Mucheru, Cabinet Secretary of ICT, Youth and Innovation, that the Government had sourced for a sponsor to procure the system for the CMOs so that they do not have to dig into royalties collected.
10. The said system currently is still under construction and cannot monitor music usage, distribution of royalties and it's not self-licensing as was alleged. KECOBO is adamant that distribution of CMOs royalties has to be done through this Liberty Afrika Technologies Ltd System that is not yet ready to distribute, raising red flags as to the reasons of the insistence.
11. CMOs have had to bring in licensing agents who had to assist users of the system to pay in order to obtain a license to exploit copyrighted works. The said agents are commission-based meaning that, once they assist the users to pay for a license through the system, the royalties collected will still be subjected to a deduction one to the agent and secondly to the system developer. This further reduces the amount of money that should be distributed to the rights holders.
12. It is worthy to note that World Intellectual Property Organization (WIPO) had volunteered to give MCSK a system known as WIPO-CONNECT at no cost, however, KECOBO was in opposition of the system and insisted on having the ICT system by Liberty Afrika Technologies Ltd.
13. Liberty Afrika through a letter dated 25th June, 2021 have since written a demand letter to the CMOs demanding for KShs. 79,896, 208.56 for the use of their system. The amount being demanded from the CMOs is an amount that they otherwise shouldn't have incurred had they maintained their initial system which was still functional and/or accepted the systems being offered for free by international partners. This therefore means that the CMOs will be forced to use monies collected from royalties to settle this debt as opposed to using the royalties for distribution to the members.

## C. UNREASONABLE TERMS AND CONDITIONS FOR ISSUANCE OF THE ANNUAL CMO LICENSES

1. On 10<sup>th</sup> December 2020 KECOBO informed MCSK that its 2020 CMO license had been revoked (2 weeks before it expired). This was done without any justifiable reasons, without giving MCSK an opportunity to be heard on any allegations that would warrant such an action and failing to abide by



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any of the laid down procedures within the provisions of The Constitution of Kenya, The Copyright Act and Fair Administrative Actions Act, Laws of Kenya.

- Intellectual Property Owners Association of Kenya (IPOAK) has filed cases in the High Court of Kenya in 2017, 2018, 2019 and 2020 to challenge the issuance of a CMO license to MCSK by KECOBO. These cases have been ruses by KECOBO and IPOAK to frustrate the issuance of a CMO license to MCSK.
- Bernsoft Group Limited is a licensed Content Service Provider on Skiza platform (Safaricom Limited) and they have numerous pending complaints on royalties they have received from Safaricom Ltd on behalf of Right holders, KAMP, PRISK and MCSK included.
- Further, on or about July 2021, representatives of Creative Society of Kenya and KECOBO, made misrepresentations to the Senate Standing Committee on Labour and Social Welfare on MCSK, KAMP and PRISK. The objective being to malign the image of MCSK, KAMP and PRISK before considering issuance of 2021 CMO licenses.
- The Copyright Act provides that CMO licenses should be an annual (12 months) license valid only till 31st December every year, but to date MCSK, KAMP and PRISK have not yet been issued with any, this being the 7th month into the year. Reasons being that KECOBO will issue provisional six (6) months licenses whose terms and conditions are not negotiable although they are not practical, tenable and contrary to Memorandum and Articles of Association of MCSK, KAMP and PRISK.
- This delays and uncertainties in issuance of a CMO license greatly affects collection of royalties (increases resistance to comply by users), implementation of strategies and general governance. Specifically, MCSK's relations and representation with its international partners (International Confederation of Societies of Authors and Composers (CISAC), International Bureau of the Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM) and World Intellectual Property Organization (WIPO)) and sister societies is greatly affected negatively due to the uncertainty of the future status of its operations. MCSK's international partners are not ready to invest in and provide much needed support in improvement of documentation, distribution, monitoring and licensing systems. These require long term planning but currently MCSK future is not guaranteed with the way KECOBO is exercising its regulatory authority.
- Skiza (Safaricom Ltd) music platform is supposed to be one of the major sources of royalties for Right Holders, through acquiring a copyright license from MCSK for exploiting Communication to the Public Rights and Mechanical Reproduction Rights in copyrighted musical works, but that is not the case because it is under the control of unscrupulous content service providers (CSP) such as Liberty Afrika Technologies Ltd, Expedia Management Ltd, Bernsoft Group Limited, Cellulant (K) Limited, M-Tech, Fanaka Mobile Ltd etc. All right holders whose content is on Skiza platform complain that the CSPs distribute the royalties very opaquely and on very unreasonable terms and conditions.



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8. KECOBO, the copyright regulator, is aware of the legal requirements that Safaricom Ltd should have a copyright license from MCSK in order to legally exploit economic rights it administers. However, KECOBO has never acted in any way to ensure that Safaricom Ltd and other Telcos comply with the Copyright Act.

## D. LACK OF ENFORCEMENT

1. Through a letter dated 28th August 2019 the Inspector General of National Police Service instructed Police officers to stop supporting the CMOs in enforcing compliance to the Copyright Act. This directive by the IG was based on a misrepresentation of how the CMOs work and KECOBO, the Regulator, did not taken any initiative to address the problem despite numerous pleas from CMOs, knowing very well the implications of such a directive on the collection of royalties by CMOs. Unfortunately, the situation in Kenya is that CMOs require the help of National Police for the Public to comply with their obligations as provided for in the Copyright Act.
2. The Constitution of Kenya and The Copyright Act, 2001, Laws of Kenya are very clear on the role the police must play in supporting and enforcing the compliance of all the Laws of Kenya. This consequently affected the collection of royalties as the collections significantly dipped.
3. The CMOs have continuously engaged KECOBO for purposes of being assisted to obtain the services of the police during enforcement to increase the royalties being collected and consequently the royalties that go towards distribution. However, it came to our attention much later that it was the same KECOBO sabotaging CMOs as they wrote to have the police withdrawn from working with CMOs.

## E. TARIFFS

1. Section 46A of the Copyright Act, 2001, provides that the tariffs to be used by the CMOs shall be published in the Kenya Gazette by the Cabinet Secretary. The process of public participation and eventual publishing of the tariffs to be applicable annually is cumbersome and limiting for the effective administration/collection of royalties from users of copyrighted works.
2. That during this public participation, especially the most recently held, KECOBO seemed to incline more towards the users of copyrighted works than the rights holders. This resulted in having tariffs that are significantly low.
3. Broadcasters are the biggest users of copyrighted works, yet they are now subjected to an all-time very low flat rate tariff, which is not in any way commensurate with the revenue they earn from copyrighted works they exploit. Further, most broadcasters, including the government broadcaster KBC, still owe royalties to the CMOs dating back to 2017. Communication Authority of Kenya, being a regulator of broadcasters still issues non-compliant broadcasters with their annual licenses. This



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only goes to show how challenging it is for the CMOs to execute their mandate of collecting and distributing royalties without support from the government as is explicitly captured in the Constitution of Kenya.

## F. EFFECTS OF COVID-19

1. That following the current economic crisis in Kenya that has been occasioned by the prevailing global pandemic of Covid-19 (Coronavirus) crisis. The government of Kenya resulted in declaring a national health emergency, culminating in the imposition of several curfews and scaling down of all business operations in Kenya. At some point, the Government even ordered the closure of institutions such as pubs and restaurant which are keys areas where we collect our revenue from. This has greatly affected the royalties collected and consequently, the royalties available for distribution.

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