

KEPSA 6 ICT Sector

Reclassifying Internet access as a Utility

For a long time the providers of Internet and communications providers have acted in isolation on the issues such as way leave, building entry and vandalism/sabotage.



From the contributions from participants in various forums the direction has been towards coming up with new legislation to resolve the issues instead of strengthening of existing laws to overcome the hurdles.

Way Leaves

The ideal approach that would resolve the issue of way leave and building entry is to have the said services treated as a utility such as power, water and sewerage thereby making the laws that are applicable to communications.

The law on way leave states;

Cap 292 Way Leave 6

-  3. The Government may carry any sewer, drain or pipeline into, through, over or under any lands whatsoever. but may not in so doing interfere with any existing building.
-  8. Any person who, without the consent of the Permanent Secretary to the Ministry responsible for works (which consent shall not be unreasonably withheld), causes any building to be newly erected over any sewer, drain or pipeline the property of the Government shall be guilty of an offence and liable to a fine of one hundred and fifty shillings, and a further fine of sixty shillings for every day during which the offence is continued after written notice in that behalf from the Permanent Secretary; and the Permanent Secretary may cause any building erected in contravention of this section to be altered, demolished or otherwise dealt with as he may think fit, and may recover any expense incurred by the Government in so doing from the offender.

The Cap 411 - Kenya Posts and Telecommunications (repealed) was repealed instead of changed so as to allow for the new dispensation where the services are to be provided by private organisations. The repeal is the cause of all the problems being experienced by the ICT sector today.

It is unfortunate that these laws still pertain that the services are being provided by the government yet this has been privatised over time. The lobbying for changing some of these laws will resolve the issues we are experiencing.

Infrastructure Vandalism

On the issue of vandalism and sabotage of communications infrastructure can best be resolved by pulling in all affected parties namely the consumer. The cutting of fibre optic cable needs to be equated to that of puncturing a water pipe or decanting

lubricant from a transformer. Generally this is an economic crime and needs to be treated as such with the corresponding ramifications.

When a power line goes down it affects industries which are then forced to revert to more expensive generators that results in high costs of goods. When a fibre is cut it may affect a mobile repeater which therefore means that a doctor might not be contacted in time to save the patient. The issue needs to be put to the public as radically as possible; a scare tactic is the only way to get buy in.

Corporate entities such as banks can show how the need to provide multiple connectivity to an ATM results in a higher cost of operations which is past on to the consumer. In addition the inability for the providers to roll out nationally as they need to keep maintaining the existing links results in no services in the rural areas.

Cap 411A ó Kenya Information and Communications Act

83W (3) Where as a result of the commission of an offence under subsection (1), the operation of the computer system, is impaired, or data contained in the computer system is suppressed or modified, the person convicted of such offence shall be liable on conviction to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding two years or both.

The wide area network can be deemed to be part of an computer system which would then imply that the damaging of a fibre optic cable can be construed to affected the operation of the system. This same implication can be derived from the cutting of a copper cable as we can indicate that someone was working over a dialup or ADSL modem therefore the cutting of the cable affected the operations of the computer system.

Unlike the scrap metal act that has been used to deal with cable vandalism the communications act carries a fine of 250,000/- and 2 years in prison or both which is a greater deterrent.

Cyber Crime

Cap 411A ó Kenya Information and Communications Act

83U. (1) Subject to subsections (2), any person who causes a computer system to perform a function, knowing that the access he has secured is unauthorized, shall commit an offence and shall on conviction be liable to a fine not exceeding two hundred thousand shillings or Imprisonment for a term not exceeding two years or both.

We are complicating an otherwise simple issue by trying to have new laws enacted yet all that is required is to have culprits charged under the right act.

I am not a lawyer but yet I can extract the following from the existing laws, what is required is for us to educate lawyers in terminology such as what is a computer system or data or unauthorised access.

The emphasis now should be to have the rights of communications providers enshrined in the constitution as was the case with the Kenya Power and Kenya Posts acts that recognised the essential nature of the services.