

The Kenya Communications (Amendment) Act



REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

ACTS, 2009

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CONTENT

The Kenya Communications (Amendment) Act

THE KENYA COMMUNICATIONS (AMENDMENT) ACT

No. 1 of 2009

Date of Assent: 30th December, 2008
Date of Commencement: 2nd January, 2009

AN ACT of Parliament to amend the Kenya Communications Act, 1998, to make minor amendments to other statute law, and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

Short title. **1.** This Act may be cited as the Kenya Communications (Amendment) Act, 2008.

Amendment of long title to No. 2 of 1998. **2.** The long title to the Kenya Communications Act, 1998, in this Act referred to as “the principal Act”, is amended by inserting the following words immediately after the words “Communications Commission of Kenya” -

“to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce”.

Amendment of section 1 of No. 2 of 1998. **3.** The principal Act is amended in section 1 by inserting the words “Information and” immediately after the word “Kenya”.

Amendment of section 2 of No.2 of 1998. **4.** Section 2 of the principal Act is amended in subsection (1)–
(a) by inserting the following new definitions in their proper alphabetical sequence–

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"access" in relation to any computer system", means instruct, communicate with, store data in, retrieve data from, or otherwise make use of any of the resources of the computer system;

“advanced electronic signature” means an electronic signature which meets all the following requirements:

- (a) is uniquely linked to the signatory;
- (b) is capable of identifying the signatory;
- (c) it is created using means that the signatory can maintain under his sole control; and
- (d) it is linked to the data to which it relates in such a manner that any subsequent change to the data is detectable;

“agreement” includes decisions or practices;

"broadcaster" means any legal or natural person who composes or packages or distributes television or radio programme services for reception by the public or sections of the public or subscribers to such a service, irrespective of technology used;

“broadcasting” means unidirectional conveyance of sounds or television programmes, whether encrypted or not by radio or other means of telecommunications, for reception by the public;

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“broadcasting service” means any service which consists of the broadcasting of television or sound broadcasting programs to the public, sections of the public or subscribers to such a service;

"broadcasting signal distribution" means the process whereby the output signal of a broadcasting service is taken from the point of origin, being the point where such signal is made available in its final content format, from where it is conveyed to any broadcast target area by means of a telecommunication process and includes multi-channel distribution;

“certificate” means a record which is issued by a certification service provider for the purpose of supporting a digital signature which purports to confirm the identity or other significant characteristics of the person who holds a particular key pair; identifies the certification service provider issuing it; names or identifies the person to whom it is issued; contains the public key of the person to whom it is issued; and is signed by a responsible officer of the certification service provider issuing it;

“certification service provider” means a person who has been granted a licence to issue a digital signature certificate;

"community" includes a geographically founded community or any group of persons or sector of the public having a specific, ascertainable common interest;

"community broadcasting service"

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means a broadcasting service which meets all the following requirements–

- (a) is fully controlled by a non-profit entity and carried on for non-profitable purposes;
- (b) serves a particular community;
- (c) encourages members of the community served by it or persons associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and
- (d) may be funded by donations, grants, sponsorships or membership fees, or by any combination of the aforementioned;

“computer” means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, software and communication facilities which are connected or related as a system or network;

"computer service" includes data processing and the storage or retrieval of data;

“computer system” means a device or collection of devices including input and

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output devices but excluding calculators which are not programmable and capable of being used in conjunction with external files which contain computer programmes, electronic instructions and data that perform logic, arithmetic, data storage, data retrieval, communication control and other functions;

“country code top-level domain” means top-level domain .ke used and reserved for Kenya;

"data" means information recorded in a format in which it can be processed by equipment operating automatically in response to instructions given for that purpose, and includes representations of facts, information and concepts held in any removable storage medium;

“document of title” means a formal document that is considered sufficient proof that the person who possesses it is entitled to receive, hold, and dispose of the instrument and the goods that it covers;

“dominant telecommunications service provider” means a licensee who has been declared by the Commission to be a dominant telecommunications service provider pursuant to section 84W(4) of this Act;

“e-Government services” means public services provided electronically by a Ministry or Government department, local authority, or any body established by or under any law or controlled or funded by the

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Government;

"electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities;

“electronic form” with reference to information, means any information generated, sent, received or stored in magnetic, optical, computer memory, microfilm or similar device;

“electronic Gazette” means the Kenya Gazette published in electronic form;

“electronic record” means a record generated in digital form by an information system, which can be transmitted within an information system or from one information system to another and stored in an information system or other medium;

“electronic signature” means data in electronic form affixed to or logically associated with other electronic data which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message;

“encryption” means a method transforming signals in a systematic way so that the signal would be unintelligible without a suitable receiving apparatus;

“equipment” includes any appliance, apparatus or accessory used or intended to be used for communication services;

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“free-to-air service” means a service which is broadcast without encryption and capable of being received by conventional broadcasting receiving apparatus;

"function" includes logic, control, arithmetic, deletion, storage and retrieval and communication or telecommunication to, from or within a computer system;

“Fund” means the Universal Service Fund established by section 84J of this Act;

"information and communication technologies" means technologies employed in collecting, storing, using or sending out information and include' those involving the use of computers or any telecommunication system;

"intercept" in relation to a function of a computer, includes listening to, or recording a function of a computer, or acquiring the substance, its meaning or purport of such function;

“Kenyan programme” means sounds or vision or a combination of both whose content comply with the classification of local content as may be required by the Commission from time to time;

“licence” means any licence issued under this Act;

"modification" means a modification of the contents of any computer system by the operation of any function of that computer

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system or any other computer system as a result of which -

- (a) any program or data held in the computer system is altered or erased;
- (b) any program or data is added to its contents; or
- (c) any act occurs which impairs the normal operation of the computer system;

"password" means any data by which a computer service or a computer system is capable of being obtained or used;

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"possession", "be in possession of" and "have in possession" have the meanings assigned to such expressions in section 4 of the Penal Code;

"private broadcaster" means a person licensed by the Commission under this Act to provide commercial broadcast services;

"programme" means sound, vision or a combination of both, intended to inform, educate or entertain, but does not include text or data;

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"public broadcaster" means the Kenya Broadcasting Corporation established by the Kenya Broadcasting Corporation Act;

"public broadcasting services" means broadcasting services of the public broadcaster;

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“repository” means a system for storing and retrieving certificates or other information relevant to certificates.

“signatory” means a person who holds a signature-creation device and acts either on his own behalf or on behalf of the natural or legal person or entity he represents;

“signature-creation data” means unique data, such as codes or private cryptographic keys, which are used by the signatory to create an electronic signature;

“signature-creation device” means configured software or hardware used to implement the signature-creation data;

“subscription management service” means a service which consists of the provision of support services to a subscription broadcasting service which support services may include, but not limited to, subscriber management support, subscription fee collection, call centres, sales and marketing, and technical and installation support.

(b) in subsection (3), by inserting the following new paragraphs immediately after paragraph (b)–

(d) save as otherwise agreed to between the originator and the addressee –

(i) the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator;

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- (ii) if the addressee has a designated computer resource for the purpose of receiving an electronic record, receipt occurs at the time when the electronic record enters the designated computer resource; or
- (iii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee; or
- (iv) if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee;
- (v) an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business; and
- (vi) the provisions of subparagraph (v) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under subparagraphs (ii) or (iii).

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Amendment of section 5 of No. 2 of 1998.

5. Section 5 of the principal Act is amended-

(a) by deleting subsection 1 and substituting therefor the following new subsection-

(1) The object and purpose for which the Commission is established shall be to licence and regulate postal, information and communication services in accordance with the provisions of this Act.

(b) by deleting subsection (5).

Insertion of new sections in No. 2 of 1998.

6. The principal Act is amended by inserting the following new sections immediately after section 5-

Minister to issue policy guidelines.

5A. (1) The Minister may issue to the Commission policy guidelines of a general nature relating to the provisions of this Act as may be appropriate.

(2) The guidelines referred to under subsection (1) shall be in writing and shall be published in the Gazette.

Independence of the Commission.

5B. Except as provided for under this Act or any other law, the Commission shall exercise its functions independent of any person or body.

Amendment of section 6 of No. 2 of 1998.

7. Section 6 of the principal Act is amended-

(a) in paragraph (c) by inserting the words “information and” immediately before the word “communications”;

(b) by deleting paragraph (f) and substituting therefor

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the following new paragraph-

(f) at least seven other persons, not being public officers, appointed by the Minister and of whom—

- (i) at least one shall have knowledge or experience in matters relating to law;
- (ii) at least one shall have knowledge or experience in postal services;
- (iii) at least one shall have knowledge or experience in matters relating to broadcasting;
- (iv) at least one shall have knowledge or experience in matters relating to radio communications;
- (v) at least one shall have knowledge or experience in matters relating to information technology or computer science;
- (vi) at least one shall have knowledge or experience in matters relating to telecommunications; and
- (vii) at least one shall have knowledge or experience in consumer protection matters.

(c) by deleting paragraph (g);

(d) by renumbering the existing provision as subsection (1) and inserting the following new subsection—

(2) The Minister shall have due regard to registered societies

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representing such matters in exercising his powers under this section.

Amendment of section 24 of No. 2 of 1998.

8. Section 24 of the principal Act is amended in subsection (2)–

- (a) by deleting the words “three hundred thousand shillings” and substituting therefor the words “one million shillings”;
- (b) by deleting the words “three years” and substituting therefor the words “five years”.

Deletion of section 26 of No.2 of 1998.

9. The principal Act is amended by deleting section 26.

Amendment of section 28 of No. 2 of 1998.

10. Section 28 of the principal Act is amended–

- (a) by deleting the words “one hundred thousand shillings” and substituting therefor the words “one million shillings”;
- (b) by deleting the words “one year” and substituting therefor the words “five years”.

Amendment of section 33 of No. 2 of 1998.

11. Section 33 of the principal Act is amended by deleting the words “one hundred thousand shillings” and substituting therefor the words “three hundred thousand shillings”.

Amendment of section 34 of No.2 of 1998.

12. Section 34 of the principal Act is amended in subsection (3) by-

- (a) deleting the words “three hundred thousand shillings” and substituting therefor the words “one million shillings” ;
- (b) by deleting the words “three years” and substituting therefor the words “five years”.

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Amendment
of section 38
of No.2 of
1998.

13. Section 38 of the principal Act is amended –

- (a) in subsection (1) by deleting the words “(other than radio communication restricted to the receiving of public broadcasting)” ;
- (b) in subsection (2) by deleting the words “three hundred thousand shillings” and substituting therefor the words “one million shillings;
- (c) in subsection (2) by deleting the words “three years” and substituting therefor the words “five years”.

Amendment
of section 44
of No. 2 of
1998.

14. Section 44 of the principal Act is amended -

- (a) by deleting the words “five hundred thousand shillings” and substituting therefor the words “one million shillings”.
- (b) by deleting the words “three years” and substituting therefor the words “five years”.

Amendment
of section 45
of No. 2 of
1998.

15. Section 45 of the principal Act is amended -

- (a) by deleting the words “three hundred thousand shillings” and substituting therefor the words “one million shillings”;
- (b) by deleting the words “one year” and substituting therefor the words “five years”.

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Insertion of
new Part in
No. 2 of
1998.

16. The principal Act is amended by inserting the following new Parts immediately after Part IV–

PART IV A – BROADCASTING SERVICES

Functions of the
Commission in relation to
broadcasting services.

46A. The functions of the Commission in relation to broadcasting services shall be to:

- (a) promote and facilitate the development, in keeping with the public interest, of a diverse range of broadcasting services in Kenya;
- (b) facilitate and encourage the development of Kenyan programmes;
- (c) promote the observance at all times, of public interest obligations in all broadcasting categories;
- (d) promote diversity and plurality of views for a competitive marketplace of ideas;
- (e) ensure the provision by broadcasters of appropriate internal mechanisms for disposing of complaints in relation to broadcasting services;
- (f) protect the right to privacy of all persons; and
- (g) carry out such other functions as are necessary or expedient for the

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discharge of all or any of the functions conferred upon it under this Act.

Classification of broadcasting services.

46B.(1) Broadcasting services shall be classified for specified areas according to the following service categories-

- (a) public broadcasting;
- (b) private broadcasting;
- (c) community broadcasting.

(2) Subject to the provisions of this Act, broadcasting service licences shall be categorized into the following classes-

- (a) free-to-air radio;
- (b) free-to-air television;
- (c) subscription radio;
- (d) subscription television;
- (e) subscription management;
- (f) any other class of licence as may be determined in accordance with the Regulations.

Requirement of a broadcasting licence.

46C. (1) Subject to this Act, no person shall provide broadcasting services except in accordance with a licence issued under this Part.

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(2) Any person who contravenes this section commits an offence and shall, on conviction, be liable to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding three years, or to both.

(3) A licence granted under this section may include conditions requiring the licensee to –

- (a) broadcast in such areas and within such geographical limits as the Commission may prescribe;
- (b) commit a minimum amount of time as may be prescribed, in its programme schedule to locally produced programmes, or, in the alternative, pay such amount of money as may be prescribed, into a Fund to assist the development of the Kenyan production industry;
- (c) pay such fees as the Commission may prescribe; and
- (d) fulfil such other conditions as the Commission may require.

Eligibility for
licensing and
considerations
for grant of licence.

46D. (1) A person shall not be eligible for the grant of a broadcasting licence if such person-

- (a) is a political party;

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- (b) is adjudged bankrupt or has entered into a composition or scheme of arrangement with his creditors;
- (c) is of unsound mind;
- (d) does not fulfill such other conditions as may be prescribed.

(2) In considering applications for the grant of a broadcasting licence, the Commission shall have regard to-

- (a) observance at all times of public interest obligations in all broadcasting categories
- (b) diversity and plurality of views for a competitive marketplace of ideas;
- (c) availability of radio frequency spectrum including the availability of such spectrum for future use;
- (d) efficiency and economy in the provision of broadcasting services;
- (e) demand for the proposed broadcasting service within the proposed broadcast area;
- (f) expected technical quality of the proposed service, having regard to developments in broadcasting technology;
- (g) suitability, capability, experience

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and expertise of the applicant in as far as carrying out such broadcast service is concerned;

- (h) financial means and business record, if any, of the applicant; and
- (i) any other relevant matter that the Commission may consider necessary.

Public broadcasting services.
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46E. The Kenya Broadcasting Corporation established under section 3 of the Kenya Broadcasting Corporation Act is hereby designated as the public broadcaster and shall provide public broadcasting services.

Community broadcasting services.

46F. (1) The Commission may, upon application in the prescribed manner and subject to such conditions as the Commission may deem necessary, grant a licence authorizing the provision of community broadcasting services.

(2) The Commission in considering applications for grant of a licence under this section shall have regard –

- (a) to the community of interests of the persons applying for or on whose behalf the application is made;
- (b) as to whether the persons, or a significant proportion thereof constituting the community have consented to the application;

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- (c) to the source of funding for the broadcasting service;
- (d) as to whether the broadcasting service to be established is not-for-profit; and
- (e) to the manner in which members of the community will participate in the selection and provision of programmes to be broadcast.

(3) A licence granted under this section may contain conditions requiring the licensee to —

- (a) ensure that a cross section of the community is represented in the management of the broadcasting service;
- (b) ensure that each member of the community has a reasonable chance to serve in the management of the broadcasting service;
- (c) ensure that members of the community have a way of making their preferences known in the selection and provision of programmes;
- (d) conform to any conditions or guidelines as the Commission may require or issue with regard to such broadcasting service.

Private broadcasting services.

46G.(1) Subject to this Act, the

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Commission may grant a licence to any person to provide private broadcasting services.

(2) A licence granted under this section may include conditions requiring the private broadcaster to —

- (a) provide coverage in such areas as may be specified by the Commission;
- (b) in the case of television, include drama, documentaries and children's programmes that reflect Kenyan themes.

Commission to prescribe programme code.

46H.(1) The Commission shall have the power to set standards for the time and manner of programmes to be broadcast by licensees under this Act.

(2) Without prejudice to the generality of sub-section (1), the Commission shall —

- (a) prescribe a programming code;
- (b) review the programming code at least once every two years;
- (c) prescribe a watershed period programming when large numbers of children are likely to be watching programmes; and
- (d) ensure compliance with the programming code prescribed under this section;

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Provided that the programming code referred to herein shall not apply where a licensee is a member of a body which has proved to the satisfaction of the Commission that its members subscribe and adhere to a programming code enforced by that body by means of its own mechanisms and provided further that such programming code and mechanisms have been filed with and accepted by the Commission.

Responsibilities of
broadcasters.

46I. (1) All licensed broadcasters shall-

- (a) provide responsible and responsive programming that caters for the varied needs and susceptibilities of different sections of the Kenyan community;
- (b) ensure that Kenyan identity is developed and maintained in programmes;
- (c) observe standards of good taste and decency;
- (d) gather and present news and information accurately and impartially;
- (e) when controversial or contentious issues of public interest are discussed, make reasonable efforts to present alternative points of view, either in the same programme or in other programmes within the period of current interest;

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- (f) respect the right to privacy of individuals;
- (g) respect copyright and neighbouring rights in respect of any work or material;
- (h) keep a program log or machine readable record of its programming for a period of one year after the date of broadcasting;
- (i) ensure that advertisements, either in terms of content, tone or treatment, are not deceptive or are not repugnant to good taste;
- (j) ensure that derogatory remarks based on ethnicity, race, creed, colour and sex are not broadcast.

(2) Where –

- (a) any cinematograph film has been submitted under any law for classification or censorship and approved for exhibition; and
- (b) where approval of the film for exhibition has been denied or has been given subject to excisions, no broadcaster shall –
 - (i) in the case of any film in respect of which such approval has been denied,

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broadcast the film or any part thereof; or

- (ii) in the case of any film that has been approved for exhibition subject to excisions therefrom, broadcast that film or any part thereof if the film or, as the case may be, that part thereof includes any part of the film required to be excised;

except with the consent of and subject to any conditions given by the Kenya Film Censorship Board established under the Films and Stage Plays Act .

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Revocation of licences.

46J. The Commission may in accordance with this Act revoke a licence to broadcast where the licensee-

- (a) is in breach of the provisions of the Act or regulations made thereunder;
- (b) is in breach of the conditions of a broadcasting licence; or
- (c) fails to use the assigned broadcasting frequencies within one year after assignment by the Commission.

Regulations on broadcasting.

46K. The Minister may, in consultation with the Commission, make regulations generally with respect to all broadcasting services and without prejudice to the generality

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of the foregoing, with respect to-

- (a) the facilitation, promotion and maintenance of diversity and plurality of views for a competitive marketplace of ideas;
- (b) financing and broadcast of local content;
- (c) mandating the carriage of content, in keeping with public interest obligations, across licensed broadcasting services;
- (d) prescribing anything that may be prescribed under this Part.

Requirement for complaints procedure

46L.(1) All broadcasters shall establish and maintain a procedure, by which persons aggrieved by any broadcast or who allege that a broadcaster is not complying with this Act, may file complaints.

(2) The procedure referred to in subsection (1) shall be submitted to the Commission for approval,

(3) Where any person alleges that he has exhausted the procedure mentioned in subsection (1) but is not satisfied with the remedy offered or action taken, he may appeal to the Commission.

(4) Complaints made under this section shall be made in writing within thirty days of

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the breach under subsection (1) and shall set out the grounds upon which they are based, the nature of damage or injury suffered as result of the broadcast or the violation complained of and the remedy sought.

(5) Any person who is aggrieved by a decision of the Commission made under this section may appeal to the Tribunal within thirty days after the decision.

Access to programmes.

46M. The Commission or the Tribunal may with a view to solving any dispute brought under section 46L require a licensee to –

- (a) provide the Commission, the Tribunal or the complainant with a transcript of the broadcast complained of;
- (b) furnish the Commission, the Tribunal or the complainant with copies of any document that may assist in resolving the dispute; or
- (c) furnish the Commission or the Tribunal with any written or oral evidence to assist in resolving the dispute or in answer to the complaint.

Requirement for a licence for signal distribution

46N.(1) Subject to this Act, no person shall provide signal distribution services within Kenya or from Kenya to other countries except in accordance with a licence issued under this Part.

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(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or both.

Signal distribution services

460. (1) The Commission may upon an application in the prescribed manner and subject to such conditions as it may deem necessary, grant a licence authorizing any person or persons to provide signal distribution services.

(2) A signal distribution licence granted under this section may require the signal distribution licensee to-

- (a) provide signal distribution services as a common carrier to broadcasting licensees;
- (b) provide services promptly upon request, in an equitable, reasonable, non-preferential and non-discriminatory manner;
- (c) provide capability for a diversity of broadcast services and content;
- (d) provide an open network that is interoperable with other signal distribution networks; and
- (e) comply with any other conditions that the Commission may determine.

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(3) A signal distribution licensee utilizing the radio frequency resource may be required by the Commission to comply with conditions as to the nature and location of transmitters and their transmission characteristics.

(4) A licensee who changes the nature, location or transmission characteristics approved in terms of sub-section (1) without the approval of the Commission commits an offence and shall on conviction be liable to a fine not exceeding one million shillings or imprisonment for a term not exceeding three years or, to both.

Revocation of signal
distribution licence

46P. The Commission may revoke a licence under this Part where the licensee or a person under the control of the licensee-

- (a) is in breach of this Act or regulations made thereunder;
- (b) is in breach of the conditions of a licence;
- (c) fails to commence operations within the period prescribed by the Commission.

Offences relating to
broadcasting services.

46Q. (1) Any person who provides a broadcasting service without a broadcasting licence commits an offence.

(2) Any person who provides a broadcasting service pursuant to a licence granted under this Act commits an offence if-

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- (a) that person provides a broadcasting service which is not of a description specified in the licence;
- (b) that person provides broadcasting services in an area for which he is not licensed to broadcast; or
- (c) that person broadcasts in contravention of the Act or the licence conditions.

(3) A person convicted of an offence under this section shall, on conviction, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or both.

Transitional provisions.

46R. The transitional provisions set out in the Fifth Schedule to this Act shall have effect with respect to broadcasting permits issued prior to the commencement of this Act.

Amendment of section 49 of No. 2 of 1998.

17. (1) Section 49 of the principal Act is amended in subsection (2)-

- (a) by deleting the words “fifty thousand shillings” and substituting therefor the words “three hundred thousand shillings”;
- (b) by deleting the words “six months” and substituting therefor the words “one year”.

Amendment of section 67 of No. 2 of 1998.

18. Section 67 of the principal Act is amended-

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(a) by deleting the words “fifty thousand shillings” and substituting therefor the words “two hundred thousand shillings”.

(b) by deleting the words “six months” and substituting therefor the words “one year”.

Amendment
of section 69
of No. 2 of
1998.

19. Section 69 of the principal Act is amended

(a) by deleting the words “fifty thousand shillings” and substituting therefor the words “three hundred thousand shillings”.

(b) by deleting the words “one year” and substituting therefor the words “two years”.

Amendment
of section 71
of No. 2 of
1998.

20. Section 71 of the principal Act is amended

(a) by deleting the words “one hundred thousand shillings” and substituting therefor the words “three hundred thousand shillings”.

(b) by deleting the words “two years” and substituting therefor the words “three years”.

Amendment
of section 72
of No. 2 of
1998.

21. Section 72 of the principal Act is amended-

(a) by deleting the words “one hundred thousand shillings” and substituting therefor the words “three hundred thousand shillings”.

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(b) by deleting the words “two years” and substituting therefor the words “three years”.

Amendment of section 73 of No. 2 of 1998.

22. Section 73 of the principal Act is amended by deleting the words “two hundred thousand shillings” and substituting therefor the words “five hundred thousand shillings”.

Amendment of section 74 of No. 2 of 1998.

23. Section 74 of the principal Act is amended by deleting the words “five thousand shillings” and substituting therefor the words “ten thousand shillings”.

Amendment of section 75 of No. 2 of 1998.

24. Section 75 of the principal Act is amended

(a) by deleting the words “one hundred thousand shillings” and substituting therefor the words “three hundred thousand shillings”.

(b) by deleting the words “one year” and substituting therefor the words “three years”.

Amendment of section 76 of No. 2 of 1998.

25. Section 76 of the principal Act is amended by deleting the words “one hundred thousand shillings” and substituting therefor the words “five hundred thousand shillings”.

Amendment to heading of Part VI of No.2 of 1998.

26. The principal Act is amended in the heading of Part VI by deleting the words “LICENSING PROCEDURE” and substituting therefor the words “LICENSING AND ENFORCEMENT”.

Amendment of section 78 of No.2 of 1998

27. Section 78 of the principal Act is amended in subsection (1) -

(a) by deleting the words “sixty days” whenever they occur and substituting therefor the words “thirty days.”

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(b) by inserting the following proviso immediately after paragraph (c)-

Provided that nothing in this subsection shall apply in respect of licences for-

- (i) telecommunications vendors
- (ii) radio-communications; or
- (iii) value-added or resale services

Amendment
of section 79
of No.2 of
1998

28. Section 79 of the principal Act is amended by deleting the words “sixty days” and substituting therefor the words “thirty days”.

Amendment
of section 82
of No.2 of
1998

29. Section 82 of the principal Act is amended in subsection (2) –

(a) by deleting the words “sixty days” and substituting therefor the words “thirty days”.

(b) by inserting the following proviso immediately after paragraph (c)-

Provided that nothing in this subsection shall apply in respect of licences for –

- (i) telecommunication vendors;
- (ii) radio-communications; or
- (iii) value-added or resale services.

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Insertion of
section 83A
in No.2 of
1998.

30. The principal Act is amended by inserting the following new section immediately after section 83 -

Enforcement
of licence
conditions

83A.(1) Where, on its own motion or consequent upon a complaint made by any person, the Commission

- (a) is satisfied that a licensee is contravening or has contravened the Act, or any other written law or any of the conditions of that licence;
- (b) notifies the licensee in writing, specifying the acts or omissions which, in its opinion, constitute or would constitute contravention of the Act or the licence;
- (c) requires the licensee to remedy the contravention within such period as the Commission may specify in the notice,

then if the licensee fails to remedy the contravention within the prescribed period without reasonable cause, such a licensee shall be liable to a penalty of five hundred thousand shillings and such penalty shall be a debt owed to the Commission and recoverable summarily.

(2) Notwithstanding the provisions of subsection (1), any licensee aggrieved by a decision of the Commission under this section may appeal to the tribunal within fifteen days of receipt of the notification thereof by the Commission.

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Insertion of
new parts in
No. 2 of
1998.

31. The principal Act is amended by inserting the following new Parts immediately after Part VI -

PART VIA – ELECTRONIC TRANSACTIONS

Application.

83B.(1) This Part shall not apply to any rule or law requiring writing or signatures in any of the following matters:

- (a) the creation or execution of a will;
- (b) negotiable instruments;
- (c) documents of title.

(2) The Minister may by order modify the provisions of sub-section (1) by adding or removing any class of transactions or matters.

Functions of the
Commission in
relation to
electronic
transactions.

83C. The functions of the Commission in relation to electronic transactions shall be to:

- (a) facilitate electronic transactions by ensuring the use of reliable electronic records;
- (b) facilitate electronic commerce and eliminate barriers to electronic commerce such as those resulting from uncertainties over writing and signature requirements;
- (c) promote public confidence in the integrity and reliability of electronic records and electronic

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transactions;

- (d) foster the development of electronic commerce through the use of electronic signatures to lend authenticity and integrity to correspondence in any electronic medium;
- (e) promote and facilitate efficient delivery of public sector services by means of reliable electronic records; and
- (f) develop sound frameworks to minimize the incidence of forged electronic records and fraud in electronic commerce and other electronic transactions.

Requirement for
a licence.

83D.(1) No person shall –

- (a) operate an electronic certification system;
or
- (b) update a repository or administer a sub-domain in the Kenya country top level domain (.ke ccTLD);

except in accordance with a licence granted under this Act.

(2) A person who contravenes this section commits an offence and shall be liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or both.

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Licence for electronic certification services.

83E.(1) The Commission may, upon application in a prescribed manner and subject to such conditions as it may deem necessary, grant licences under this section authorizing a person to provide electronic certification services.

(2) A licence granted under sub-section (1) may require a licensee to:

- (a) make use of hardware, software and procedures that are secure from intrusion and misuse;
- (b) provide a reasonable level of reliability in its services which are reasonably suited to the performance of intended functions;
- (c) adhere to procedures that ensure that the secrecy and privacy of the electronic signatures are assured; and
- (d) observe such other standards as may be specified by regulations.

Licence for country code top-level domain

83F. The Commission may, upon application in the prescribed manner and subject to such conditions as it may deem necessary, grant licences under this section authorizing a person to administer a sub-domain in the country code top-level domain.

Legal recognition of electronic records.

83G. Where any law provides that information or other matter shall be in writing then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is:-

- (a) rendered or made available in an electronic

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form; and

- (b) accessible so as to be usable for a subsequent reference

Retention of electronic records.

83H. Where any law provides that documents, records or information shall be retained for any specific period, then that requirement shall be deemed to have been satisfied where such documents, records or information are retained in electronic form if:

- (a) the information contained therein remains accessible so as to be usable for subsequent reference;
- (b) the electronic record is retained in the format in which it was originally generated, sent or received or in a format which can be demonstrated to represent accurately the information originally generated, sent or received; and
- (c) the details which will facilitate the identification of the original destination, date and time of dispatch or receipt of such electronic record are available in the electronic record;

Provided that this clause shall not apply to any information which is automatically generated solely for the purpose of enabling an electronic record to be dispatched or received.

Retention of information in original form.

83I.(1) Where any law requires information to be presented or retained in its original form, that requirement is met by an electronic record if:

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- (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form as an electronic message or otherwise; and
- (b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.

(2) Sub-section(1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being presented or retained in its original form.

(3) For the purposes of sub-section (1)(a):

- (a) the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and
- (b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in light of all the relevant circumstances.

Formation and
validity of
contracts.

83J.(1) In the context of contract formation, unless otherwise agreed by the parties, an offer and acceptance of an offer may be expressed by means of electronic messages thus where an electronic message is used in the formation of a contract, the contract shall not be denied validity or enforceability solely on the ground that an electronic message was used for the purpose.

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(2) Nothing in this section shall apply to any law that expressly provides a different method for the formation of a valid contract.

Recognition of parties of electronic messages.

83K. As between the originator and the addressee of an electronic message, a declaration of intent or other statement shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic message.

Attribution of electronic records.

83L.(1) An electronic message shall be attributed to the originator if it was sent by the originator himself, or by a person who had the authority to act on behalf of the originator in respect of the electronic record or by an information system programmed by or on behalf of the originator to operate automatically.

(2) As between an originator and an addressee, an addressee is entitled to regard an electronic message as being that of the originator, and act on that assumption, if:

- (a) in order to ascertain whether the electronic message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for the purpose; or
- (b) the electronic message as received by addressee resulted from actions of a person who had the authority to act on behalf of the originator in respect of the electronic record.

Acknowledgement of receipt.

83M.(1) Where the originator has not agreed with the addressee that the acknowledgement of receipt of electronic records be given in a particular form or by a particular method, an acknowledgement may be given by:-

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- (a) any communication by the addressee, automated or otherwise;
- (b) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

(2) Where the originator has stipulated that an electronic record shall be binding only on receipt of an acknowledgement of such electronic record, then, unless acknowledgement has been received, the electronic record shall be deemed to have never been sent by the originator.

(3) Where the originator has not stipulated that the electronic record shall be binding on receipt of such acknowledgement, and acknowledgement has not been received by the originator within a reasonable time, then, the originator may give notice to the addressee stating that no acknowledgement has been received by him and specifying a reasonable time by which the acknowledgement must be received by him and if no acknowledgement is received within that time limit, he may, after giving notice to the addressee, treat the electronic record as though it was never sent.

Secure
electronic
record.

83N.Where any security procedure has been applied to an electronic record at a specific point of time, then such record shall be deemed to be a secure electronic record from that point of time to verification.

Compliance with
requirement for
a signature.

83O.(1) Where any law requires a signature of a person, that requirement is met in relation to an electronic message if an advanced electronic signature is used that is as reliable as was appropriate for the purpose for which the electronic message was generated or communicated,

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in light of all the circumstances, including any relevant agreement.

(2) Sub-section (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) An advanced electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in sub-section (1) if:

- (a) it is generated through a signature-creation device;
- (b) the signature creation data are, within the context in which they are used, linked to the signatory and to no other person;
- (c) the signature creation data were, at the time of signing, under the control of the signatory and of no other person;
- (d) any alteration to the electronic signature made after the time of signing is detectable; and
- (e) where the purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing, is detectable.

Legal
recognition of
electronic
signatures.

83P. Where any law provides that information or any other matter shall be authenticated by affixing a signature or that any document shall be signed or bear the

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signature of any person, then, notwithstanding anything contained in that law, such requirement shall be deemed to have been satisfied if such information is authenticated by means of an advanced electronic signature affixed in such manner as may be prescribed by the Minister.

Protected systems.

83Q.(1) The Minister may, by notification in the Gazette, declare that any computer system or computer network is a protected system.

(2) The Minister may, by order in writing, authorize any person to access protected systems notified under sub-section (1).

Regulations for electronic signatures.

83R. The Minister may, in consultation with the Commission, for the purposes of this Act, prescribe regulations on:

- (a) the type of electronic signature;
- (b) the manner and format in which the electronic signature shall be affixed;
- (c) the manner and procedure which facilitates identification of the person affixing the electronic signature;
- (d) control of the processes and procedures to ensure adequate integrity, security and confidentiality of electronic records or payments; and
- (e) any other matter which is necessary to give legal effect to electronic signatures.

Use of electronic records and electronic

83S.(1) Where any law provides for-

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signatures in
Government and
its agencies.

- (a) the effective delivery of public goods and services, improving quality of life for disadvantaged communities, strengthening good governance and public participation, creation of a better business environment, improving productivity and efficiency of government departments;
- (b) the filing of any form, application or any other document with any office, authority, body or agency owned or controlled by the Government in a particular manner;
- (c) the issue or grant of any licence, permit, sanction or approval by whatever name called in a particular manner; or
- (d) the receipt or payment of money in a particular manner;

then notwithstanding anything contained in such law for the time being in force, such requirement shall be deemed to have been satisfied if such filing, issue, grant, receipt or payment, as the case may be, is effected by means of such electronic forms as may be prescribed by the Minister in consultation with the Commission.

(2) The Minister may, for the purposes of sub-section (1), by regulations prescribe:-

- (a) the manner and format in which such electronic records shall be filed, created or used;
- (b) the manner or method of payment of any fee or charges for filing, creation or issue of any electronic record under sub-paragraph (a).

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Electronic
Gazette

83T. Where any law provides that any rule, regulation, order, notification, or any other matter shall be published in the Gazette, then such requirement shall be deemed to have been satisfied if such rule, regulation, order, notification or any other matter is published in the electronic Gazette;

Provided that where any rule, regulation, order, by-law, notification or any other matter is published both in the printed and electronic Gazettes, the date of publication shall be deemed to be the date of the Gazette which was first published in any form.

Unauthorized
access to
computer data

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.

(2) A person shall not be liable under subsection (1) where he: –

- (a) is a person with a right to control the operation or use of the computer system and exercises such right in good faith;
- (b) has the express or implied consent of the person empowered to authorize him to have such an access;
- (c) has reasonable grounds to believe that he had such consent as specified under paragraph (b) above; or
- (d) is acting in reliance of any statutory power for the purpose of obtaining information, or

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taking possession of any document or other property.

Access with
intent to commit
offences

83V.(1) Any person who causes a computer system to perform any function for the purpose of securing access to any program or data held in any computer system, with intent to commit an offence under any law, shall commit an offence and shall, on conviction be liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding two years or both

(2) For the purposes of this section, it is immaterial that—

- (a) the access referred to in subsection (1) is authorized or unauthorized;
- (b) the further offence to which this section applies is committed at the same time when the access is secured or at any other time.

Unauthorized
access to and
interception of
computer service

83W.(1) Subject to subsection (3), any person who by any means knowingly: –

- (a) secures access to any computer system for the purpose of obtaining, directly or indirectly, any computer service;
- (b) intercepts or causes to be intercepted, directly or indirectly, any function of, or any data within a computer system, shall commit an offence.

(2) A person convicted for an offence under subsection (1) shall be liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a

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term not exceeding three years or both.

(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.

(4) For the purpose of this section, it is immaterial that the unauthorized access or interception is not directed at-

(a) any particular program or data;

(b) a program or data of any kind; or

(c) a program or data held in any particular computer system.

(5) A person shall not be liable under subsection (1) where he –

(a) has the express or implied consent of both the person who sent the data and the intended recipient of such data;

(b) is acting in reliance of any statutory power.

Unauthorized
modification of
computer
material.

83X.(1) Subject to subsections (3) and (4), any person who, knowingly does an act which causes an unauthorized modification of data held in any computer system shall, on conviction be liable to a fine not exceeding five hundred thousand shillings or to

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imprisonment for a term not exceeding three years or both.

(2) Where as a result of the commission of an offence under this section: –

- (a) the operation of the computer system;
- (b) access to any program or data held in any computer; or
- (c) the operation of any program or the reliability of any data, is suppressed, modified or otherwise impaired

a person convicted for the offence shall be liable on conviction to a fine not exceeding two hundred thousand shillings and or imprisonment for a term not exceeding two years or both.

(3) A person shall not be liable under this section where he is acting in reliance of any statutory power.

(4) A modification is unauthorized if: –

- (a) the person whose act causes it is not himself entitled to determine whether the modification should be made; and
- (b) he does not have consent to the modification from any person who is so entitled.

(5) For the purposes of this section, it is immaterial whether an unauthorized modification or any intended effect of it, be permanent or merely temporary.

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Damaging or denying access to computer system

83Y. Any person who without lawful authority or lawful excuse does an act which causes directly or indirectly: –

- (a) a degradation, failure, interruption or obstruction of the operation of a computer system; or
- (b) a denial of access to, or impairment of any program or data stored in, the computer system;

shall commit an offence and shall, on conviction be liable to a fine not exceeding two hundred thousand shillings and or imprisonment for a term not exceeding two years or both.

Unauthorized disclosure of password

83Z. Any person who knowingly discloses any password, access code, or any other means of gaining access to any program or data held in any computer system –

- (a) for any wrongful gain;
- (b) for any unlawful purpose; or
- (c) knowing that the disclosure is likely to cause prejudice to any person,

shall commit an offence and shall, on conviction, be liable on conviction to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years or both.

Unlawful possession of devices and data.

84A Any person who knowingly manufactures, sells, procures for use, imports, distributes or otherwise makes

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available a computer system or any other device designed or adapted primarily for the purpose of committing any offence under sections 83U to 83Z, shall commit an offence.

(2) Any person who knowingly receives, or is in possession, without sufficient excuse or justification, of one or more of the devices under subsection (1) shall commit an offence.

(3) Any person who is found in possession of any data or program with the intention that the data or program be used, by the person himself or another person, to commit or facilitate the commission of an offence under this Act, shall commit an offence.

(4) For the purposes of subsection (3), possession of any data or program includes –

- (a) having possession of a computer system or data storage device that holds or contains the data or program;
- (b) having possession of a document in which the data or program is recorded; or
- (c) having control of data or program that is in the possession of another person.

(5) Where a person is convicted under this section, he 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.

Electronic fraud.

84B Any person who fraudulently causes loss of property to another person by:-

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- (a) any input, alteration, deletion or suppression of data; or
- (b) any interference with the functioning of a computer system,

with intent to procure for himself or another person, an advantage, shall commit an offence and shall, on conviction be liable to a fine not exceeding two hundred thousand shillings and or imprisonment for a term not exceeding three years or both.

Tampering with computer source documents.

84C Any person who knowingly or intentionally conceals, destroys or alters, or intentionally or knowingly causes another person to conceal, destroy or alter any computer source code, computer programme, computer system or computer network, where the computer source code is required to be kept or maintained by law for the time being in force, shall on conviction be liable to a fine not exceeding three hundred thousand shillings or imprisonment for a term not exceeding three years, or both.

Publishing of obscene information in electronic form.

84D Any person who publishes or transmits or causes to be published in electronic form, any material which is lascivious or appeals to the prurient interest and its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied therein, 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.

Publication for fraudulent purpose.

84E Any person who knowingly creates, publishes or otherwise makes available an electronic signature certificate for any fraudulent or unlawful purpose commits an offence and shall on conviction be liable to a fine not

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exceeding one million shillings or imprisonment for a term not exceeding five years, or both.

Unauthorized access to protected systems.

84F Any person who secures access or attempts to secure access to a protected system in contravention of the provisions of this Part shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one million shillings or imprisonment for a term not exceeding five years, or both.

Re-programming of mobile telephone.

84G.(1) Any person who knowingly or intentionally, not being a manufacturer of mobile telephone devices or authorized agent of such manufacturer, changes mobile telephone equipment identity, or interferes with the operation of the mobile telephone equipment identity, commits an offence.

(2) A person guilty of an offence under this section shall on conviction be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years or both.

Possession or supply of anything for re-programming mobile telephone.

84H(1) A person commits an offence if he:-

- (a) has in his custody or under his control anything which may be used for the purpose of changing or interfering with the operation of a mobile telephone equipment identifier, and
- (b) intends to use the thing unlawfully for that purpose or to allow it to be used unlawfully for that purpose; or
- (c) supplies anything which may be used for the purpose of changing or interfering with the operation of a mobile telephone equipment, and

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- (d) knows or believes that the person to whom the thing is supplied intends to use it unlawfully for that purpose or to allow it to be used unlawfully for that purpose; or
- (e) offers to supply anything which may be used for the purpose of changing or interfering with the operation of a mobile telephone equipment identifier, and
- (f) knows or believes that the person to whom the thing is offered intends if it is supplied to him to use it unlawfully for that purpose or to allow it to be used unlawfully for that purpose.

(2) A person guilty of an offence under this section is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years or to both.

Bonafide re-
programming or
possession **84I.** It shall not be an offence under sections 84G and 84H if-

- (a) the re-programming of mobile telephone equipment identity is done; or
- (b) the possession of anything that can change the mobile telephone equipment identity is had;

bonafides for personal technological pursuits or other technological review endeavours.

PART VIB – UNIVERSAL SERVICE FUND

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Establishment of
the Fund.

84J. (1) There is hereby established a fund to be known as the Universal Service Fund which shall be managed and administered by the Commission.

(2) The object and the purpose of the Fund shall be to support widespread access to, support capacity building and promote innovation in information and communications technology services.

(3) There shall be a universal service levy (in this Part referred to as the “levy”) that shall be charged by the Commission on the licensees under this Act for purposes of the Universal Service Fund.

Revenue and
expenditure of
the Fund.

84K.(1) There shall be credited to the Fund -

- (a) levies from licensees;
- (b) such monies as may be provided by Parliament for that purpose;
- (c) repayment of the principal sum and interest on any loan granted by the Commission;
- (d) income from any investment made by the Commission; and
- (e) any gifts, donations, grants and endowments made to the Fund.

(2) There shall be paid out of the Fund any expenditure approved by the Board for the purposes of and the administration of the Fund.

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Application for
grant of fund
loan.

84L Any person may make an application to the Board for consideration for the grant of a loan from the Fund in the prescribed form.

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Conditions for
grant of loan.

84M(1) The Board may—

- (a) accept or reject any application for a loan;
- (b) grant a loan to an applicant and in so granting may impose conditions, demand security and require repayment in instalments at such times and within such periods as the Board deems fit;

Provided that, and subject to the provisions of this section, the Board may upon the request by an applicant to whom a loan has been granted at any time vary—

- (i) the conditions upon which the loan was made;
- (i) any security given in relation to the loan; or
- (ii) any of the terms of repayment of the loan.

(2) Where the Board has resolved to grant a loan, the Board shall notify the applicant in writing and require him within a specified period not exceeding six months to comply with any conditions and provide any security which the Board may have imposed or demanded.

(3) Where an applicant fails to comply with a requirement of the Board notified to him under subsection (2) within the prescribed period, the application shall be deemed to have lapsed.

Penalties for
delayed

84N Where an applicant fails to make the repayments

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remittances. of instalments on the loan within the prescribed period, the Board may impose penalties for each month or part of the month that the repayments remain unpaid.

Fund's annual returns and audit. No.12 of 2003 **84O** The Board shall comply with the Public Audit Act as regards the operations of the Fund.

Regulations with respect to the Fund. **84P** The Minister may, in consultation with the Commission, make regulations generally with respect to the administration of the Fund and without prejudice to the generality of the foregoing, with respect to-

- (a) amount of levy;
- (b) levels of subsidies to licensees;
- (c) conditions for the grant of a loan;
- (d) mechanisms for collection of the levy;
- or
- (e) prescribing anything that may prescribed under this Part.

PART VIC – FAIR COMPETITION AND EQUAL TREATMENT

General prohibition on anti-competitive conduct **84Q** A licensee under this Act shall not engage in activities, which have or are intended to or likely to have the effect of unfairly preventing, restricting or distorting competition where such act or omission is done in the course of, as a result of or in connection with any business activity relating to licensed services.

Commission to ensure fair competition **84R.**(1)The Commission shall ensure that there is fair competition in the sector and in this regard may make a determination in the licensed system and services.

(2) Without prejudice to the generality of the

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foregoing the Commission shall in the performance of its functions under this Act, promote, develop and enforce fair competition and equality of treatment among licensees.

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(3) The Minister may, in consultation with the Commission, make regulations for the better carrying out of the provisions under this Part.

Anti-
competitive
conduct

84S. (1) The Commission may, on its own motion or upon complaint, investigate any licensee whom it has reason to believe or is alleged to have committed any act or omission, or to have engaged in a practice, in breach of fair competition or equal access.

(2) Without limiting the generality of subsection (1) an act or omission shall include —

(a) any abuse by an licensee, either independently or with others, of a dominant position which unfairly excludes or limits competition between such operator and any other party;

(b) entering any agreement or engaging in any concerted practice with any other party, which unfairly prevents, restricts or distorts competition or which;

(i) directly or indirectly fix purchase or selling prices or any other trading conditions;

(ii) limit or control production, markets, technical development or investment;

(iii) share markets or sources of supply;

(iv) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing

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them at a competitive
disadvantage;

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(v) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract.

(c) the effectuation of anti-competitive changes in the market structure and in particular, anti-competitive mergers and acquisitions in the communications sector.

Complaints and investigation by the Commission.

84T.(1) The Commission may, on its own motion, investigate any licensee who commits any act or omission in breach of fair competition.

(2) Any person having a complaint of a breach of fair competition against a licensee shall lodge a complaint to the Commission and the Commission shall, if it appears that a breach of fair competition has been or is being committed, investigate the act and omission and give written notice to the licensee stating-

(a) that the Commission is investigating a possible breach of fair competition;

(b) the reasons for the suspicion of a contravention or breach, including any matter of facts or law which are relevant to the investigation;

(c) further information required from the licensee in order to complete the investigations; and

(d) where appropriate, the steps to be taken in

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order to remedy breach.

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(3) The licensee issued with a notice under subsection (2) may, within thirty days from the date of the notice, make representations in response to the notice and give to the Commission all information required under the notice.

(4) Any person affected by the contravention or breach of fair competition may similarly make representation to the Commission in relation thereto.

(5) The Commission shall, after considering any representations of the licensee or any other person fix a date on which to make a decision on the matter.

(6) Where the Commission makes a decision that a licensee is competing unfairly, the Commission may —

- (a) order the licensee to stop the unfair competition;
- (b) require the licensee to pay a fine not exceeding the equivalent of ten percent of the annual turnover of the licensee for each financial year that the breach lasted upto a maximum of three years;
- (c) declare any anti-competitive agreement or contracts null and void.

(7) The provisions of subsection (6) shall not in any way affect the right of any person to make and sustain any claim under any law in force in Kenya for the act or omission which constitutes an offence under this Act or from being liable under that other written law to any punishment or penalty higher than that prescribed under

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this Act.

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(8) Any person aggrieved by the decision of the Commission under this section may appeal to the Tribunal.

(9) The provisions of this section, shall not limit or in any way affect the obligations of a licensee under any condition of a licence.

Denial of access.

84U No licensee under this Act shall deny access or service to a customer except for delinquency of payment of dues or for any other just cause.

Anti-competitive practices and conduct.

84V A licensee shall provide equal opportunity for access to the same type and quality of service to all customers in a given area at substantially the same tariff limiting variations to available or appropriate technologies required to serve specific customers.

Regulations on competition issues

84W.(1) The Minister may in consultation with the Commission make regulations with respect to competition issues.

(2) Without prejudice to the generality of the foregoing, the Minister in consultation with the Commission may make regulations with respect to-

- (a) access, including rules of interconnection, by licensees under this Act and their subscribers to each other's network;
- (b) the procedure of handling alleged breaches of fair competition;
- (c) investigation of a licensee under this Act

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alleged to have committed acts or
omissions in breach of fair competition;

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- (d) access to information from any licensee with regard to facilitating investigations on alleged breaches of fair competition;
- (e) steps to be taken in order to remedy the breach;
- (f) definition of market segments;
- (g) market segments in respect of which limited competition may be allowed

(3) A dominant telecommunications service provider shall file tariffs, rates, terms, and conditions of interconnection with the Commission.

(4) The Commission may, by notice in the Gazette, declare a person or institution to be a “dominant telecommunications service provider” for the purposes of this Act.

(5) In making a declaration under subsection (4), the Commission shall consider-

- (a) the market share of the telecommunications service provider being at least twenty five per cent of the total revenue of the entire telecommunications market;
- (b) the level of control over the communications infrastructure;
- (c) the level of technological advancement of the telecommunications service provider;

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- (d) the scale of operations of the telecommunications service provider.

Inserting section 85A in No.2 of 1998.

32.(1) The principal Act is amended by inserting the following new section immediately after section 85 -

Co-location. **85A.**(1) Co-location at sites and facilities may be done with prior agreement of licenses.

(2) When no agreement on co-location is reached, the licensees may refer the issue to the Commission for a decision.

Amendment of Act 102 of No. 2 of 1998.

33. Section 102 of the principal Act is amended in subsection (1)(b) deleting the word “two” and substituting therefore the word “four”.

Insertion of section 102A in No. 2 of 1998.

34. The principal Act is amended by inserting the following new section immediately after section 102-

Universal Service Advisory Council.

102A (1) There is established a Council to be known as the Universal Service Advisory Council.

(2) The Council shall consist of a maximum of seven members as follows-

(a) a chairman appointed by the Minister in consultation with the Board;

(b) at least four members appointed by the Minister in consultation with the Board.

(3) The Council may, upon approval by the Board, co-opt experts as it considers necessary.

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(4) In appointing members of the Council under sub-section (2), the Minister shall have regard to appoint persons who-

- (a) have knowledge or experience in broadcasting, telecommunication, postal systems, information technology or finance;
- (b) have satisfied the Minister that they are unlikely to have a conflict of interest under this Act and will not have any financial or other interest which will be likely prejudicially affect the carrying out of any functions under this Part;

Provided that an authorization shall not be issued under this sub-section unless either –

- (i) it is shown to the court that the Commission is satisfied that there are reasonable grounds for believing that the use of the station or apparatus in question is likely to cause undue interference with any radio-communication used for the purposes of any safety-of life-service or any purpose on which the safety of any person or of any vessel, aircraft or vehicle may depend; or

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Insertion of
new
Schedules in
No.
2 /1998

35. The principal Act is amended by inserting the following two new Schedules immediately after the Third Schedule-

FOURTH SCHEDULE (sec. 102A)

PROVISIONS AS TO THE UNIVERSAL SERVICE ADVISORY COUNCIL

Tenure
of office.

1. The Chairman and members of the Council shall, subject to the provisions of this Schedule, hold office for a period not exceeding three years on such terms and conditions as may be specified in their instrument of appointment, but shall be eligible for reappointment for one more term of a period not exceeding three years.

Appoint
ment of
members

2. The members of the Council shall be appointed at such times that their respective terms of office shall expire at different times.

Vacation
of office.

3. A member of the Council may:-

- (a) at any time by notice in writing addressed to the Minister, resign his office;
- (b) be removed from office by the Minister if the member-
 - (i) has been absent from three consecutive meetings of the Council without permission from the chairman;
 - (ii) is adjudged bankrupt or enters into a composition or scheme

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of arrangement with creditors;
or

- (iii) is convicted of an offence involving dishonesty or fraud;
- (iv) is convicted of a criminal offence and sentenced to imprisonment for a term exceeding six months or a fine exceeding ten thousand shillings; or
- (v) is incapacitated by prolonged physical or mental illness; or
- (vi) fails to comply with the provisions of the Act relating to disclosure.

Gazettement
of members.

4. The names of persons appointed to be members of an advisory council and the interests they represent and the names of persons ceasing to be members of the council shall be notified in the Gazette.

Meetings and
proceedings.

5. Subject to this Schedule, the Council shall regulate its own procedure.

Meetings.

6. Meetings of the Council shall be called by the Chairman whenever the Board so requests.

Absence of
chairman.

7. If the chairman is absent from a meeting of the Council, the members present shall elect one of their number to preside at that meeting.

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- Agenda of meetings. **8.** The agenda at a meeting of the Council shall consist of such matters as the Board may from time to time refer to the Council for consideration and such other matters as the Council, with the agreement of the Board, may receive.
- Quorum. **9.** A quorum at any meeting of the Council shall be one half of the members of the Council.
- Resolutions. **10.** A resolution at a meeting of the Council shall require the affirmative votes of one half of the members present except the chairman, who shall have a casting vote only.
- Staff of the council. **11.** The secretary and any other staff of the Council shall be members of the staff of the Commission appointed for the purpose by the Board.

FIFTH SCHEDULE (sec. 46R)

TRANSITIONAL PROVISIONS

- Interpretation. **1.** In this Schedule, unless the context requires otherwise, “broadcasting permits” means any authority given prior to the commencement of this Act by the Minister in charge of broadcasting authorizing any person to undertake broadcasting services.
- Broadcasting permits granted by the Minister. **2.** The Commission shall respect and uphold the vested rights and interests of parties holding broadcasting permits issued by the Minister prior to the commencement of this Act;

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Provided that—

- (a) such parties shall be granted a period not exceeding one year during which they may continue to operate in accordance with their existing permits; and
- (b) before the expiry of the one year period, such parties shall apply to the Commission to be licensed under this Act.

Domain administrators.

3. The Commission shall respect and uphold the vested rights and interests of parties that were actively involved in the management and administration of the .ke domain name space at the date of commencement of this Act provided that-

- (a) such parties shall be granted a period not exceeding six months during which they may continue to operate in respect of their existing delegated sub-domains; and
- (b) before the expiry of the six months period, such parties shall apply to the Commission to be licensed under this Act.

Amendments to statute law

36. The several written laws specified in the first column of the Sixth Schedule are amended, in the provisions thereof specified in the second column, in the manner respectively specified in the third column.

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SIXTH SCHEDULE

<i>Written Law</i>	<i>Provision</i>	<i>Amendment</i>
The Kenya Broadcasting Corporation Act, Cap. 221	Long title	Delete the words “to provide for the control of broadcast receiving sets, and for licensing of dealers, repairers and importers of broadcast receiving sets;”
	s.1 (2)	Delete
	s.9 (3)	Delete
	s.11 (3)	Delete paragraphs (a), (b), (c), (d) and (e)
	Part VI (secs.21-36)	Delete whole part
	s.49	Delete
The Penal Code, Cap.63	s.4	Insert the following new definition in its proper alphabetical sequence - “electronic record” means a record generated in digital form by an information system which can be transmitted within an information system or from one information system to another, and stored in an information system or other medium;
	s. 267	Insert new subsection (9) as follows- (9) Information is capable of being stolen.

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<i>Written Law</i>	<i>Provision</i>	<i>Amendment</i>
	s. 346	Add at the end thereof the words “or in electronic form.”
	s.347	Insert the following new paragraphs immediately after paragraph (d)- (e) fraudulently- (i) makes or transmits any electronic record or part of an electronic record; (ii) affixes any digital signature on any electronic record, or (iii) makes any mark denoting the authenticity of a digital signature, with the intention of causing it to be believed that such record, or part of document, electronic record or digital signature was made, signed, executed, transmitted or affixed by or by the authority of a person by whom or whose authority he knows that it was not made, signed, executed or affixed; (f) without lawful authority or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made,

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<i>Written Law</i>	<i>Provision</i>	<i>Amendment</i>
		<p>executed or affixed with a digital signature either by himself or by any other person, whether such person is living or dead at the time of such alteration; or</p> <p>(g) fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his digital signature on any electronic record knowing that such person by reason of deception practised upon him, does not know the contents of the document or electronic record or the nature of the alteration.</p>
	s.349	Insert the words “or electronic record” after the words “ any document”.
	s.354	Insert the words “ or electronic record” after the words “any document” wherever they occur;
	s.355	Insert the words “or electronic record” after the word “document” wherever it occurs;
	s.357	Insert the words “or electronic record” after the word “document” wherever it occurs.
The Evidence Act, Cap. 80	s.3	Insert the words “ whether kept in written form or printouts or electronic form” at the end of the definition of “banker’s book”

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<i>Written Law</i>	<i>Provision</i>	<i>Amendment</i>
	New	Insert the following new part in Chapter III immediately after Part VI -

PART VII – ELECTRONIC RECORDS

Section 106B to apply in proof of electronic records **106A.** The contents of electronic records may be proved in accordance with the provisions of section 106B..

Admissibility of electronic records. **106B.** (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following-

- (a) the computer output containing the information was produced by the computer during the period over which the computer was used to

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<i>Written Law</i>	<i>Provision</i>	<i>Amendment</i>
		store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
		(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
		(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
		(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
		(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub-section (2) was

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<i>Written Law</i>	<i>Provision</i>	<i>Amendment</i>
		regularly performed by computers, whether-
		(a) by a combination of computers operating in succession over that period; or
		(b) by different computers operating in succession over that period; or
		(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following-

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any

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		device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
		(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and
		(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),

shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly

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		supplied to that computer, shall be taken to be supplied to it in the course of those activities.
	Proof as to a electronic signature	106C. Except in the case of a secure signature, if the electronic signature of any subscriber is alleged to have been affixed to an electronic record, then the fact that such an electronic signature is the electronic signature of the subscriber must be proved.
	Proof as to the verification of electronic signature.	106D. In order to ascertain whether an electronic signature is that of the person by whom it purports to have been affixed, the court may direct:- (a) that person or the certification service provider to produce the electronic signature certificate; or (b) any other person to apply the procedure listed in the electronic signature certificate and verify the electronic signature purported to have been affixed by that person
	Presumption as to Gazette in electronic form.	106E. A court shall take recognizance of every electronic record purporting to be the official Gazette, or purporting to be electronic record directed by any law to be kept by any person, if such electronic record is kept substantially in the form required by law and is produced from its

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		proper custody.
	Presumption as to electronic agreements.	106F. A court shall presume that every electronic record purporting to be an agreement containing the electronic signatures of the parties was concluded by affixing the digital signature of the parties.
	Presumption as to electronic records and electronic signatures.	106G. (1) In any proceedings involving a secure electronic record, the court shall presume, unless the contrary is proved, that the secure electronic record has not been altered since the specific point of time the secure electronic signature was affixed. (2) In any proceedings involving secure electronic signature, the court shall presume, unless the contrary is proved, that the secure signature is affixed by the subscriber with the intention of signing or approving the electronic record; (3) except in the case of a secure electronic or a secure digital signature, nothing in this section shall create any presumption relating to authenticity and integrity of the electronic record or any digital signature.
	Presumption as to electronic signature certificates.	106H. A court shall presume, unless the contrary is proved, that the information listed in an electronic signature certificate is correct, except for information, which has not been verified, if the certificate was accepted by the subscriber.

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<i>Written Law</i>	<i>Provision</i>	<i>Amendment</i>
	Presumption as to electronic messages.	106I. A court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission, but the court shall not make any presumption as to the person by whom such a message was sent.