Mobile Network Operators (MNOs) and Content in Africa: The Coming Storm?

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I. Overview.
The mobile phone (and the smart phone, in particular) is increasingly displacing other mediums as a way to channel content. Given the growth and importance of the telecommunications industry in Africa, and the relentless penetration of smart phone technology, it is therefore unsurprising that Africans are consuming, and creating, an increasing volume of content, of both African and international provenance, on their enabled phones. Smartphone spending in sub-Saharan Africa is expected to increase by 5.9% in 2014, while feature phones will decrease by 10.9% (International Data Corporation (IDC)).

African mobile network operators (MNOs), eager to draw value from the content flowing through their plumbing, are working both in-house and with strategic partners to develop, administer and tailor content and value-added services designed for African consumers. This position is only heighten by the awareness that MNOs are no longer competing for a share of a subscriber’s communications spend, but instead for a piece of that subscriber’s entire disposable income.

The strategic leadership of MNOs are thus placing increasing importance on the projected growth of non-voice content and value-added services (VAS) components to top and bottom line growth. By way of example, in Airtel Africa’s 17 African operations, in the calendar year from December 2012 to December 2013, the data revenue grew 88%, and the contribution of data revenue to gross revenue grew from 3.88% in December 2012, to 7% in December 2013, which constitutes an 80% growth in importance to the gross revenue.

This shift in the MNO business model, from being network-oriented to being content/service-oriented, creates a corresponding change in the legal risks to be managed. In particular, the MNO is increasingly required to navigate the line between being a passive flow-through entity selling metered access to its network (and largely, as a result, risk-neutral) and having, directly or indirectly, a value-added position.

II. MNOs in Africa – Special Considerations.
This is particularly true in emerging and developing markets, where MNOs are generally more innovative and proactive in developing and deploying mobile VAS than their counterparts in the developed world, especially in the areas of mobile payments, P2P funds transfer and information services. Below is an overview which sets forth key examples of how the African market demands constant and bold innovation from MNOs operating in it, which in turn transforms the legal and regulatory risks to which African MNOs are subjected, as a cost of doing business.
How is the African MNO ecosystem different from more developed economies?

- Need to acquire rural/remote subscribers leads to VAS being an important differentiator: The vast majority of African subscribers live in rural areas, which creates an important opportunity for an MNO to bridge the services gap by serving as a platform for such VAS as mobile banking, insurance products, or agricultural information – by leapfrogging the solutions developed in more developed markets and by respecting that local problems may often be more effectively resolved by local solutions.

- Need to target ‘Bottom-of-the-Pyramid’ subscribers leads to an emphasis on both in-house, and outsourced, innovations: Similarly, most VAS need to be tailored to African subscribers inasmuch as the price-point should reflect what the market is willing to bear. The relatively low margins are offset, however, by the potentially enormous volumes which MNOs can reach. These market dynamics set the stage for an aggressive MNO strategy designed to penetrate the market with low-cost, high-volume VAS – all of which gets factored into the legal risk equation.

- Explicit government requirements for telecoms for create and sustain inclusive growth: Lastly, most African regulators and lawmakers have created explicit service inclusion requirements for MNOs, which entities the government use to reach their citizens with health, insurance, banking and similar soft infrastructures. Indeed, African governments’ information and technology departments explicitly stress the increasing importance of mobile applications as an alternative service delivery channel for their respective citizens. From a risk management perspective, this requires the active consideration of how regulatory mandates, and even public perception, may play into the MNOs strategies, stakeholder experiences, and on-the-ground realities.

In this light, this article examines the various Africa-specific legal issues arising from the subtle but sure shift in the MNO business model, with specific emphasis on the ways in which MNOs try to move up the value chain. The role of the in-house MNO lawyer in this context is thus a delicate one – poised between pre-emptive risk manager on the one hand, and enabler of novel structures and alliances on the other.

By way of example, below are three sorts of relatively novel arrangements which African MNOs are actively deploying, in country and demographic-specific flavours across the continent:

- Mobile Money Services: Only commercially launched in East Africa in 2007, mobile money services have grown to tens of millions of users and peer-to-peer money transfers of billions of dollars. It is also increasingly recognized as a subscriber acquisition and a retention tool, particularly given the sparsely populated and vast geographies of Africa in general. Mobile banking is most often performed via SMS or the Mobile Internet, but can also use apps downloaded to a mobile device. A standard mobile banking menu generally covers mini-statements and checking of account history; alerts on account activity or crossing of set thresholds; monitoring of term deposits; micro-payment handling; mobile recharging; commercial payment processing; bill payment processing; peer to peer payments; and deposit at banking agent.
• **Subscriber Data Mining**: As well as driving revenues directly, VAS can enhance performance in other ways. Critically, in a competitive market with the high churn exhibited in Africa, they help to build stronger relationships with customers, as customer data can be mined to create customized services that increase loyalty and enhance stickiness. Sticky services help to lock in subscribers by allowing MNOs to play an intimate and daily role in the subscriber’s life, by offering a range of personalized content and social networking tools. MNOs can also use customer data to generate insight about the types of service bundles that would suit specific customer segments, and use these to help drive retention. Increasingly, MNOs are asking managed services providers to produce solutions for this problem: how to utilize the power of this valuable information in compliance with the law to offer more value to their subscribers and generate new revenue streams through mobile advertising services.

• **Audio and Video Content via Mobile Device**: At the heart of the data revolution which MNOs are living, is the relatively recent ability to transmit, and the increasingly robust demand for, audio and video content via smartphones. The content is both local and international in provenance, and is being consumed in ever greater volumes, and novel formats, all over the African continent.

Although each of the examples above creates its own sets of opportunities and challenges, in the interest of focus, this article delves into the third one. Specifically, and in the interest of providing depth of analysis, this article sets forth the legal risks and opportunities associated with the delivery of international and local content in the African MNO ecosystem.

### III. Audio and Video Content via Mobile Device.

In the field of the creation and delivery of content for mobile devices, the current ecosystem is a delicate balance between dedicated content providers, content aggregators (also known as platform-providers), application developers and MNOs. Each of these is constantly trying out new models and flavours of content delivery, by mixing and matching variables such as technology, revenue share and brand visibility. In such a dynamic mix, MNOs can play an important role by providing leadership on issues such as pricing and payment transparency, security of copyright and content management. Indeed, for the legal department, such (strictly-speaking) non-commercial issues must be factored into the commercial equation, all the while without slowing the pace of the business.

As a general matter, content consumed via mobile device may be distributed in ring back tones, caller ring back tones, music on demand, streaming, or a variety of similar mechanisms (collectively, and strictly speaking inaccurately, ‘RBTs’). For the purposes of this article, the legal risk analysis is analysed as being equivalent for each of these, and falling chiefly under the rubric of rights acquisition or copyright compliance.

As a further jurisdictional aside, it bears mentioning here that African countries are, in the main, either Anglophone or Francophone (and consequently, either common law or civil law jurisdictions). Again, for the purposes of straightforward analysis, and with the caveat that nothing in this article is intended to constitute legal advice (which by its very nature is fact-specific), this article adheres to the spirit of copyright law in a way which is agnostic to its actual national codifications, or indeed any particular fact-specific analysis.
With this logistical side-stepping of country-specific analysis, and by way of methodological backdrop, this article generally considers the copyrights issues in the following broad MNO-specific context:

i. the right to perform the work in public;
ii. the right to communicate the work by broadcast;
iii. the right to communicate the broadcast of the work to the public by a loud speaker;
iv. the right to communicate the broadcast of the work to the public by any instrument;
v. the right to make any record in respect of the work.

The first four rights above are generally referred to as ‘Performing Rights’, while the last right is commonly referred to as a ‘Mechanical Right’, and each of these is, as a general matter in the African context, administered on behalf of the artists and composers by the nationally mandated copyright management administrative body. In terms of revenue flow, MNOs generally charge their subscribers a fee for every track that is down-loaded, the proceeds of which are then shared between content providers, the telecommunication providers and, eventually and ostensibly, the artists themselves.

There has been some noisy public debate as to whether RBTs fall under the category of Performing Rights (see in particular the copyright infringement action by BMI against U.S. MNO T-Mobile, or, to take an African example, that of the Music Copyright Society of Kenya (MCSK) against VAS-provider Cellulant Kenya, a detailed discussion of which is beyond the scope of this article), but again, from a practical risk-management perspective in an African context, it is prudent to assume that all RBTs do, in fact, constitute public performance and ensure that the license rights are suitably acquired.

In a contractual sense, it is also advisable therefore, to further inoculate the MNO from contractual claims, to specifically call out the contemplated use of the content in question, by spelling out, for instance, that RBTs will be deployed, and that it is the content provider’s sole responsibility to obtain all underlying licenses for all contemplated uses. This is true for MNOs the world over.

In African jurisdictions, however, two further complications are introduced. First, the national copyright organizations suffer from weak funding and mandates, and are as such unable or unwilling to play a ‘traffic cop’ role. Specifically, such national organizations provide only a wobbly landing spot for any international content, of which Africans are increasingly important consumers. Inasmuch as an African national copyright organization serves as a Collective Management Organization (CMO), collecting and distributing royalties earned in that country to international artists, there are, generally, a lot of moving parts required for the process to work efficiently. Second, in African markets, record labels and recording studios are generally not a common business model, which deepens the atomization of the underlying rights required for RBT deployment.

These issues are only going to grow, with audio traffic expected to increase at an annual rate of around 40%. (Ericsson Mobility Report, November 2013). Of particular note in Africa is the fact that locally produced digital media is expected to accelerate, driven by strong demand for content made for Africans, by Africans.

For an MNO operating in an African market, therefore, content may be procured through one of three main routes: (i) directly from the artist, (ii) from a content provider, which in turn liaises (contractually and operationally speaking) with the artists, and (iii) directly from the content aggregator which liaises with both artist and content provider, given its resources, experience in the market, and appetite for risk. This third model is growing in
importance, and conveys upon the content aggregator the role of a quasi ‘digital music label’, and correspondingly, exposes an MNO-client to greater compliance-dependency on such digital music label.

Contractual Risks. Compounding the complicated and dynamic market situation highlighted above, the license agreements in the African market are rife with errors and omissions which undermine the predictability of the rights purportedly granted. Below is a list of the examples of contractual risks faced by MNOs in their roles in the content value-chain:

- The license agreements may not list out the catalogue of music to be licensed – sometimes there isn’t even a date window of the content which is purportedly covered by the agreement in question;
- Even if there is a catalogue, it may on an album basis, which is less accurate (and therefore less predictable) than on a per-track basis;
- The license may be granted on an ostensibly exclusive basis for an initial time-frame, requiring the proper level of tagging and track management by the content aggregators and platforms, especially if such platforms allow more than one iteration of a particular track on the platform;
- In certain cases, artists grant more than one purportedly exclusive license for the same underlying content;
- The license may purport to grant from the artist to the licensee yet-to-be-produced material, which requires a fact and statutory-specific analysis as to its validity;

Risks beyond the contract itself. Beyond the realm of mere contractual risks, the African market place also throws up significant ‘eco-system’ challenges to smooth content management:

- Artists don’t get paid – Despite the contractual cascading of obligations (wherein, generally, the MNO pays the content provider/content aggregator, which in turn pays the artist), in the event there is a revenue share dispute or that invoices don’t get approved or processed timely, it is invariably the artist who ends up out of pocket. This creates reputational and brand harm because the artists generally enjoy public platforms (e.g. radio shows, blogs etc.) from which to broadcast their message of discontent, which will invariably skew towards casting the MNO as the villain of the piece.
- The validity of the contract may be undermined on a statutory basis. In some instances, individual third parties may be statutorily forbidden from entering into copyright license agreements – that privilege being reserved for the national copyright management organization.
- International content presents its own risks, in so far as some national copyright agencies are only mandated to handle local content. By way of example, the MCSK only addresses local artists, requiring content providers to get licences or authority from international record labels for all international content.

Being the market-facing, deep-pocketed brand in the content ecosystem, and in light of the uncertainty inherent in the African content-acquisition and management space, the MNO thus faces risks of both a legal and reputational nature. In-house counsel spend a great deal of time with the marketing teams, devising tipping point analyses beyond which some sort of intervention will be approved, even if not required in a narrowly contractual sense. By way of example, most of the artists have radio shows, blogs or
other public aspects of their creative identities. If, due to a dispute between an MNO and a content aggregator (or, worse for the MNO, between a content aggregator and a downstream content provider) an artist does not get paid, such claims generally first bubble up in the blogosphere or on the radio waves. In certain cases, a well-connected local artist may even stir of the national ministry of culture, which could lead to political involvement with the regulator. It will do little good in such instances for the in-house legal team to point to the contract, and claim that within its confines the MNO is not obliged to pay the artist directly. Nor will the hard-won representations, warranties and indemnities granted by the content aggregators in their agreement with the MNO provide any immediate consolation to the general counsel explaining the facts of the dispute to the management.

Instead, the savvy in-house counsel will understand the on-the-ground realities, and use both the shield of contractual protections, with the sword of working with marketing colleagues, artists and VAS partners alike, to get ahead of the issue well before the CEO gets an angry call from the minister of culture.

**How to protect yourself contractually.** In the confines of the agreement with the content aggregator and/or the content providers (it is, generally, injudicious for an MNO to sign directly with artists), it is advisable to have the usual contractual protections of representations and warranties as to the content, and its procurement by the contractual partner, and indemnities in the event of any breach of the contractual partner’s obligations. In addition, and in light of the experiences in the African content ecosystem, an MNO should consider the following contractual devices:

- Request indemnities from claims arising from or relating to copyright agencies;
- Request the ability to undertake mitigatory steps which could be triggered prior to the crystallization of the indemnification provisions, for which mitigatory steps the counter-party shall be responsible;
- Explicitly requiring payment to artists and/or content providers in a timely fashion, and demand quarterly written certifications from the counter-party's management evidencing that it has done so (including the dollar value associated with this);
- List out the catalogue of content by track (not album, or year, or recording house, or any other metric). Bear in mind that in some jurisdictions, it is not permissible to grant a license or otherwise convey yet-to-exist content;
- Review the exclusivity provision carefully as it may apply only to an initial period, and then be silent as to the treatment of such content after the expiration of such exclusivity period;
- Consider what would be the decision tree in the event it transpired that an artist had signed more than one purportedly exclusive agreement with more than one content provider and/or content aggregator.

**How to protect yourself beyond the contract.** As described above, contractual protections will only go so far in inoculating a market-facing MNO from the ups and downs of (often inaccurate) public perception, artists’ expectations, and social media in general. As a result, it is important for the MNO to undertake the following proactive market-presence measures which gather and feed intelligence into the marketing and legal functions:

- It is effective to have personnel out and about in the market place, dealing with the artists and the rest of the content ecosystem in person because it allows for a more robust feedback process, and to pre-empt issues before they snowball into full-blown disputes or public relations situations;
Similarly, it is important to take a leading role in managing the expectations of artists, and in educating them as to their rights in regards to their creations. Many African artists seem to have unrealistic expectations as to the revenue stream they will be due from the licensed content. This kind of initiative may take the form of on-the-ground ‘Copyright Clinics’ or other similar corporate social responsibility undertakings;

- Insert contractual buffer layers between the MNO and the content providers and the artists:
- Audit the content aggregators and content providers to ensure that the content acquisition is being conducted in a professional way, that the revenue data is being managed appropriately, and that all downstream payments are being made on time
- Provide the content management guidelines and the form of content acquisition agreement governing the content aggregators, and/or review the existing documents intended to serve this function.

IV. Key learning for In-house Counsel.

As can be seen above, and as the market-facing brand, subject to the vicissitudes of social media and public opinion, the MNO faces both reputational and legal risks. While the latter can be managed contractually through the usual tools of representations, warranties, indemnities and limits on liability, the former need proactive and preventive intervention to ensure that the brand is not tarnished. In-house counsel’s job is thus chiefly to devise a framework within which the process will function, and the dialogue which will be required if and when a fact-specific scenario strains that framework.

The key learning for the proactive and effective in-house counsel can then be summarized as follows:

- **Stick to what you know**: An MNO will not have the bandwidth or skills to actively procure or manage content. Rather, an MNO should stick to what it is licensed and capitalized to do – namely, serve the market as an MNO, as that role evolves in the light of the demand and supply forces described in this article.
- **Have your partner stick to what they know**: Understand the difference between a content aggregator, a content provider, and an artist, and the respective economic initiatives in each one of those scenarios.
- **Develop and execute technology-agnostic decision-making**: It is too often easy for in-house lawyers (especially those working for MNOs) to become dazzled by and enamoured of purely technological solutions. Instead, develop work-flows and checklists that are agnostic as to particular forms of technological solutions, and are oriented by the obligations of each of the parties in the various arrangements.
- **Prioritize by commercial importance**: When the artist and content disputes arise, they often come fast and thick, because one occurrence is usually just emblematic of a failure of the process. In such events, orient the efforts and resources of the legal department by commercial priorities – which is to say, find the 20% of content which contributes the 80% of the revenues, and resolve these first. This will be a big first step in reducing the scope of the dispute to a more manageable level, and will have the added benefit of generating good news to report back to the management.
- **Create dialogue**: Whether with the marketing and revenue assurance team, or outside the building with the copyright association or the artists themselves, it is very important that the in-house legal team create dialogue
with the various stakeholders in the content ecosystem. Ultimately, having a good relationship with a party is the best prevention against unpleasant, expensive and brand-damaging content disputes.

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