Assessing Efficiency and Pragmatism in Public Resource Allocation: Digital Migration and the Future of Broadcasting in Uganda[1]

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ABSTRACT

No other industry in Uganda might be set for a more drastic impact of technological advancement this year or in the near foreseeable future like broadcasting. The move from analog to digital migration driven by International Telecommunication Union Directives will change the future of broadcasting in ways that many have not appreciated yet. What is remarkable is that this change will not only affect the broadcaster but also the end user and beneficiary of the broadcaster's content – ordinary Ugandan. It is a change that, while least understood by laymen because of the technical jargon involved, will have far-reaching legal, economic, governance and human rights implications. The controversy surrounding digital migration in Kenya offers many lessons for us to draw from and serves as a warning of two factors: the gravity of how big a mess we can make of resource allocation, and the need to be vigilant and ensure strict oversight measures are put in place with respect to digital migration and all issues that may arise in its relation.

This paper will analyze the advent of digital migration in Uganda and why this issue deserves as much attention. The paper will attempt to explain the technical aspects of digital migration, while analyzing the legal, economic, governance and human rights implications that we are to look out for as we transform the way that media content will be provided to Ugandans. The paper will then draw some conclusions. This paper will also offer some suggestions on how best Uganda can manage the migration process and oversee the regulation and allocation of spectrum frequencies in order to avoid a repeat of the upsetting situation that the Kenyan government now finds itself in.

[1] This paper was originally written for and with assistance of Parliamentary Watch Uganda. The views expressed herein are, however, solely mine and so is the responsibility for any mistakes.

Executive Summary:

The subject of digital migration is a fairly technical one. The subject is central to broadcasting and service delivery to the masses. In summary, the paper explains the following points:

- Digital migration is about so much more than broadcasting. A lot of attention is usually paid to the Content Service Provision (understood in its simplest sense as the work of a media house producing news and other content for the masses; and Applications Service Provision (understood in its commonest sense as using phone and web based applications to deliver services e.g. mobile money and *NTV Mobi).* These two aspects are popular because they are the two aspects that directly interface with the consumer.

- Application based service provision is the next frontier for dissemination of services to the masses and it is dependent in part on the efficient use of spectrum. It is also an area to which significant government resources will be deployed in the near future. This calls for oversight and stringent controls to protect the public interest and avoid manipulation.

- But this paper argues that the most significant aspect in digital migration and one that should receive the most scrutiny is the terrestrial infrastructural management. This essentially deals with who is in charge of the superhighway called spectrum. Without access to this spectrum, a player is locked away from the customer base completely.

- This paper suggests that the equitable way to distribute spectrum is to have three players manage the entire resource: a player that is really a combination of the free to air providers, another that is a combination of the pay TV players and the third that is responsible for government utilized infrastructure. But the third player should have the least of the spectrum.

- Government has taken a different approach and will initially let its subsidiary SIGNET control the spectrum and after five years, split the spectrum along side the lines of BSDs and Content provision. The procurement process around this liberalization must be watched carefully to avoid a repeat of the mistakes that were made in Kenya.[2]

- Transparency and accountability in resource allocation is key. The Kenyan government, for instance, made commitments to private sector players (media houses) but it was not held accountable to keep them. This resulted into a very embarrassing situation for the government that reached its peak when the Supreme Court of Kenya misinterpreted principles of law. It is very important that specific

[2] In the process of preparing to meet the deadline, the Kenyan government had quite a trying time with Free to Air broadcasters. These events and the legal challenges that surrounded them are discussed at length later in this paper.

rules be put in place to ensure that the public and all business interests know how spectrum is to be dealt with.

- Spectrum or the majority of frequency cannot, under any circumstances, be allocated to a foreign company or player. It is as unwise as it is insecure to do so. It is also not in the interests of the local industry to have foreigners control the larger space of the spectrum.

- Above all else, interests of a majority of poor viewers have been overlooked in favor of a small pay TV elite. The public interest should be the overriding factor in determining how to allocate, utilize and manage frequency in Uganda. Failing in this, it is hoped that there will be sufficient accountability mechanisms in place, including the use of litigation – if necessary, to ensure that the Ugandan regulator does not commit the same mistakes made by the Kenyan regulator.

- The majority of TV viewers rely on free to air channels to access content from which they derive ideas and information, thus enjoy their constitutional rights. How we deal with spectrum affects these people, just as much as it affects the media houses that generate and broadcast this content.

- The regulator needs to protect the public interest in this space. These include the right of the public to have access to information and the freedoms of speech and expression, which are an integral part of the media's business.

- It is important that the public secures the regulator's commitment to ensuring that these channels remain outside any pay tv service provider's exclusive domain.

- It is surprising that the media houses that generate this content are not themselves visibly seeking any measures to ensure that they have a spectrum space curved out for them as was the case in Kenya.

- Digital migration will inevitably lead to the deployment of more services through the use of spectrum. This will include delivery of key services such as health through digital means and resources. Aside from the fact that these services are ultimately intended for the benefit of the masses, it is obvious that a great deal of public resources will go into these sorts of initiatives.

- One possible consequence of the migration process will be the inevitable clash between co-existence with the telecom sector or the telecom sector's extinction of the media industry as we have known it in the past. The same way that telecommunications companies changed the broadcasting of music through marketing caller tunes is the same way they will affect the business of media houses by the use of cell phone based applications.

- Banks, for example, will need the telecommunications customer base to widen their service delivery, while telecommunications companies,

which have been allocated the spectrum that makes money remittance on mobile phones possible, will be complaining about the erosion of their business.

Parliament needs to play a dual role on digital migration. This paper suggests that parliament should ensure that there is an efficient legislative framework and that there are sufficient oversight and accountability measures in place.

From the legislative and regulatory side, it is suggested that parliament pushes for legislation that would:

- Ensure the best and most effective and efficient utilization of spectrum rather than simply re-licensing the existing players as SIGNET is set to do;

- Guarantee the protection of the human rights and other public interests of the masses discussed in this paper from violation and abuse by Broadcast Signal Distributor, pay tv and other players in the industry;

- Ensures that the content of "free to air" providers is not being billed as part of pay tv packages. This is because free to air content is intended for the poor masses while pay tv content is intended for the sophisticated and sometimes wealthy elite;

- Ensure that there are enough safeguards in the legal regime against manipulation of signal and content distribution along poltical leanings – this should be especially important as it could affect the broadcasting and publication of campaign strategies and election results both in the parliamentary and presidential elections;

- Guarantee the fact that under no circumstances will the control of spectrum frequencies or signal distribution be in the hands of non Ugandan players. This resource is simply too important and strategic to be trusted in the hands of non Ugandan players whose motivation may exceed profit but not be in the national interest;

- Ensure that even spectrum allocated to and used by government departments and institutions is also under the supervision of parliament;

- Provide for swifter dispute resolution mechanisms than the courts for example the establishment of a tribunal that would deal with issues surrounding the use of spectrum;

On the oversight and accountability side, parliament should:

- Oversee the procurement processes surrounding the structures and running of SIGNET and the eventual liberalization of the business of signal distribution;

- Regularly watch and demand accountability for the performance of SIGNET and the management of all resources allocated to it;

- Demand the publication of SIGNET and UCC's financial statements and accountability of how all the license fees are applied and utilized

- Ensure that SIGNET is run transparently and that licenses are issued transparently and fairly.

Introduction

The *Digital Migration Policy for Terrestrial Broadcasting in Uganda (2011)* (the Digital Migration Policy) offers some insight into what digital migration is all about.[3] The Policy explains that Broadcasting technologies currently are either Analogue or Digital. Digital broadcasting technology is superior to the Analogue broadcasting technology with the latter slowly being phased out worldwide. The move towards digital technologies is facilitating increased convergence between the traditionally separate businesses of broadcasting, telecommunications and the Internet. In contrast to analogue, digitalization has made it possible for different types of content (audio, video, text) to be stored in the same format and delivered through a wide variety of technologies (computers, mobile phones, televisions, etc.).

The global trend of migrating from analogue broadcasting technologies to digital broadcasting technologies will mean that both broadcasting and telecommunications infrastructures will be used to achieve countrywide coverage for broadcasting services. The main purpose of the migration process is to ensure that all broadcasting services that are delivered through analogue network/technologies are fully replicated on the digital broadcasting network/technologies with the aim of switching off the analogue broadcasting services at a specific point in time.

Wachira Maina offers a simpler but vivid explanation: He explains that the basic idea is simple: Whether one uses an analogue or a digital platform the thing is that in both, information – sound or pictures – is transmitted as an electric signal.[4] In analogue, however, information is translated into electric pulses that are continuous whilst in digital transmission; information is translated into discrete ones and zeros. Ignoring the physics, the digital advantage lies in the fact that images and data can be compressed. This allows a station to broadcast more channels on the same bandwidth: for one frequency in analogue the consumer gets one TV service, for the same frequency in digital, the consumer gets 15 standard definition TV services.

To use a physical image, Wacharia Maina suggests thus: Think of a general trying to march his soldiers through the narrow gates of ancient Baghdad. In analogue, he can only move one soldier at a time through the narrow doorway. In digital, he has discovered a revolutionary new trick that allows him to compress his soldiers which then allows him to move 15 soldiers at a time through the same narrow doorway. Where he once moved one soldier a minute, he now moves 15 a minute. Consider how many soldiers he will get into Baghdad in an hour. Applied to broadcasting, the benefits are obvious: multiple TV stations transmitted in the same geographical area can operate on the same frequency without interference. This means that moving from

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[3] Ministry of Information and Communication Technologies (2011): *Digital Migration Policy for Terrestrial Broadcasting in Uganda* at p. 1 accessed at http://www.ucc.co.ug/files/downloads/Digital_Migration_policy.pdf on March 8, 15

[4] Wachira Main (2015): *Digital Migration, the What and Why* Daily Nation Saturday January 24 2015 accessed at: http://www.nation.co.ke/oped/Opinion/Digital-migration-The-what-and-why/-/440808/2601350/-/4p2ipdz/-/index.html on March 8, 15

analogue frees up valuable spectrum for re-allocation to more consumers. There are many users of the radio spectrum: the military, the police, telephone companies, radio and TV, emergency services, sports (such as Safari Rally) and so forth.[5]

From a technical standpoint, the concept describes a platform for three broad aspects: content service provision, applications service provision and digital terrestrial infrastructural management. Content service provision largely deals with the dissemination of various kinds of media messages. This is perhaps the commonest aspect as it entails the broadcasting of pay TV and Free-to-air content. Applications service provision deals with digital delivery of services (such as the broadcasting of news via cellular phones – in Uganda an example being the *NTV Mobi* Application by which the public can access NTV news via their cellular phones. The infrastructural side of the question deals with the control, management and distribution of the platform or gateway – spectrum radio frequency – through which content and applications service provision is made possible.

While digital migration has been largely viewed as a broadcasting issue, it is much broader. From the foregoing, it is clear that there is an infusion of more than broadcasting elements here. More subtle reasons as to why everybody should pay attention to this issue can be seen from the Digital Migration policy. In addition to offering the advantages of digital migration and its policy objectives, the foreword to this policy reminds us that:

> "It has long been established that [the] Radio Frequency Spectrum is a scarce resource. Digital migration will free up the radio frequency spectrum… Consequently, in this era of heightened demand for communications solutions, digital migration will avail the country with the opportunity to offer more services and applications to our people such as mobile telephony, wireless broadband and *e-services*."[6] (Emphasis added)

One of the areas of e-services that the policy particularly singles out is the use of the spectrum freed up as a result of digital migration (digital dividend) for the provision of government information and "services" to the people.[7] Aside from the fact that these services are ultimately intended for the benefit of the masses, it is obvious that a great deal of public resources will go into these sorts of initiatives. As such, the many and sometimes intractable issues surrounding digital migration must not only be viewed from the broadcasting perspective for this is only one facet. They must be viewed from the broader aspects of access to and use of public resources (including spectrum, public infrastructure and funds), governance and accountability, as well as basic equity and equality in sharing the benefits of this process.

According to the Ugandan Policy, Digital migration arises out of the Regional Radio communication Conference of 2006 (RRC06) and the subsequent Geneva 2006 Agreement (GE06) of the International Telecommunication Union (ITU) 'Recommendations' which resolved that all countries signatory to the agreement must migrate from analogue to digital broadcasting

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[5] ibid
[6] op. cit note 1 see foreword
[7] id, p.2 and p.7

services by June 17, 2015.[8] At the time of writing, this deadline is fast approaching.

The Nature of Broadcasting in Uganda today

Until the mid 1990s, Uganda only had a public telecommunications company, which offered only fixed line telephone services. This public corporation would later mutate into a private telecommunications player offering cellular services, and continues to do so.[9] In 1998, the telecommunications space was eventually opened up to allow other players.

The licensing and activities of telecommunications companies are mentioned here for two reasons: these companies changed the broadcasting of music with the marketing of caller tunes. This was previously only a preserve of the traditional media houses. It is also believed that these telecom companies will continue to play a crucial role in the nature and evolution of broadcasting in Uganda today. But secondly, the telecom companies will come centre stage in the digital broadcasting era because of their mass markets and the role of the cell phone in broadcasting. It is believed that Uganda has 19 million subscribers at the time of writing. Many of these have smart phones. Already, NTV Uganda Limited has taken to reaching its audience via the cell phone by launching the *NTV Mobi* Application. Other media houses will follow suit. It is only unwise not to. To a large extent therefore, the future of broadcasting is intertwined with the future of mobile telephony. The parallels are beyond the use of spectrum. They come down to the question of co-existence or extinction of the media industry with other industries and sectors.

The interrelation between the media and other sectors depends entirely on the licensing and use of spectrum, which is the exclusive preserve of the Uganda Communications Commission (UCC).[10] Presently, the licensing of these business segments has been independent of each other. This is especially the case because in the past, the regulation of broadcasting was the work of the Broadcasting Council while mobile telephony was the role of UCC. Now, event the regulatory functions have since been fused. It is imperative that both the broadcasters and the telecommunications players pay attention to the centrality of spectrum and its management to their businesses.

Broadcasting in Uganda has had a long and evolutionary history. Shortly after independence, the only form of broadcasting was through the state owned Radio Uganda. The national television broadcaster (previously known as Uganda Television and now) Uganda Broadcasting Corporation coming on air would soon follow this. Over the years, the number of television stations

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[8] op.cit note 1 at p.2

[9] Section 34 of the Uganda Posts and Telecommunications Act (Cap 104) created a monopoly when it created the Uganda Posts and Telecommunications Corporation and granted it the exclusive right to provide telephone services. This Act was repealed under section 96 of the Uganda Communications Act of 2000, which was also subsequently repealed under section 96 of the Uganda Communications Commission (UCC) Act, 2013

[10] see sections 24 and 25 of the UCC Act, 2013.

increased, as did the number of radio stations.[11] Uganda Communications Commission now divides the country into 14 regions for purposes of licensing radio and television broadcasting service providers.[12] Of the Television broadcasting stations in Uganda, there are now three kinds: the analog stations, digital broadcasters and satellite based broadcasters. After the digital migration process, it is expected that there will no longer be analog broadcasting.

In explaining digital migration, UCC confirms on its website that after the completion of the migration process, the consumer will be able to access two kinds of service packages: the free to air channels and pay tv. The list of free to air channels provided are UBC, WBS, NTV, NBS, Lighthouse TV, Record TV, Capital, Bukedde TV, BTN TV, Bunyoro TV, EATV, Family TV, Top TV, Kakira Sugar TV, Channel 44, Top TV, Urban TV, Northern TV, and TV WA.[13]

It is important to observe at this point, that a dominant player in Uganda is DSTV, which runs a satellite-based business. This player is not mentioned anywhere on the UCC Communication on Digital Migration, although its subsidiary, Go TV is. The reason this is significant is that today, on a number of packages offered by DSTV, a customer will be denied access to these free to air channels once their subscription elapses. It is important that the public secures the regulator's commitment to ensuring that these channels remain outside any pay tv service provider's exclusive domain. While it may be argued that this is the business of the broadcasting houses, there are broader considerations that enjoin the regulator to protect the public interest in this space. These include the right of the public to have access to information and the freedoms of speech and expression, which are an integral part of the media's business.

The legal and regulatory framework essentially comprises of the Electronic Media Act and the Uganda Communications Commission Act. None of these statutes seem to draw the distinction or offer a bold affirmative position intended for the protection of the public's access to free to air media content. It is surprising that the media houses that generate this content are not themselves visibly seeking any measures to ensure that they have a spectrum space curved out for them as was the case in Kenya. But for the purposes of this paper, it suffices to say that what is important is to remember that the concerns around free to air content are not only business concerns (from the viewpoint of the media houses) but also public policy concerns. This is why the law falls short when it does not guarantee a means for exclusion of free to air content from the capitalist and monopolistic tendencies of the pay tv model.

Why Digital Migration is Broader than Broadcasting

Two stories are worth mentioning that show why this is a subject of tremendous importance to everyone today. First is a story that ran in the

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[11] A complete list is available on the UCC website.

[12] http://www.ucc.co.ug/files/downloads/Radio%20&%20TV%20Stations%20in%20Uganda%20as%20of%201%20December%202011.pdf accessed on March 13, 15. It does not help that UCC does not regularly update the statistics and licensing information available on their website.

[13] http://www.ucc.co.ug/data/smenu/22/Digital-Migration.html

daily newspapers recently. Multichoice Uganda, which supplies DSTV services in Uganda has for a long time offered its products at almost US Dollars 100. On June 1 2015, Multichoice Uganda slashed its prices to about USD 30. The reason for this price change was offered as preparation for digital migration.[14] The second is a story that ran in WIRED, a leading technology journal, that explained a fight between a manufacturer of lawn mowers and astronomers, at the centre of which is the debate on the use of spectrum and the role of the Federal Communications Commission of the United States. It turns out, the technology that would make electronic lawn mowers more efficient would result in creating *ad hoc* communications *networks*, which in turn would affect the operations of astronomers. And this entire situation is about the use and control of spectrum.[15] It is this spectrum that is at the centre of the digital migration discussion. Controlling and allocating spectrum today will have significant ramifications on the future. It is very important that this country gets it right at this stage.

It is important to understand the technical layout of the digital broadcasting space. Players in this space would ideally fall in three broad categories. A player is either a Content Service Provider (CSP), or an Applications Service Provider (ASP) or a player is in charge of Infrastructure (Signal Distributor). For broadcasting purposes, the Ugandan public is most familiar with Content Service Providers. These are the typical media houses that distribute and broadcast news and other viewer targeted content.[16] Some of these are locally owned and others are foreign owned.

CSPs are understood in Uganda in the traditional sense of a media house. Most of the content the Ugandan audience is used to is broadcast by CSPs on a Free to Air basis. But ideally, a CSP is much more than that and can actually run a Pay TV model. There are CSPs that are not local and are broadcasting content that is not locally generated. These primarily include DSTV, Star Times and Azaam TV. These CSPs rely on satellite links to broadcast their signals and as such should not ordinarily be in the race for spectrum. They are also mostly in the Pay TV category so any content they disseminate will only reach a consumer at the consumer's cost. However, Star Times offers a package of channels that inevitably necessitates that they use or be allocated spectrum. Moreover, if the Kenyan situation is anything to go by, it is to be expected that Star Times will be a major contender in the fray for the control of Ugandan spectrum.

Further, these satellite-based operators now offer certain content as part of their Pay TV packages, which would ordinarily be free to air. This content does not belong to them but to the media houses. In the event that the media houses have entered binding contractual relationships with the Pay TV channels to allow the Pay TV CSPs carry their content, then there might not be copyright issues. If on the other hand, the local channels are being carried and billed for without the consent of the media houses, this is going

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[14] See http://www.monitor.co.ug/Business/Technology/Pay-TV-firm-slashes-prices-ahead-of-digital-migration-deadline/-/688612/2736172/-/em0pmgz/-/index.html

[15] Dewey Alba: The Roomba for Lawns is Really Pissing off Astronomers, WIRED April 16, 2015 at 7:00am available at http://www.wired.com/2015/04/irobot-lawnbot/

[16] In Uganda these include: UBC, WBS, NTV, NBS, Lighthouse TV, Record TV, Capital, Bukedde TV, BTN TV, Bunyoro TV, EATV, Family TV, Top TV, Kakira Sugar TV, Channel 44, Top TV, Urban TV, Northern TV, and perhaps a few less known channels.

to be problematic.

On the other hand, some of the local CSPs are broadcasting non-local content. Urban TV for instance, frequently broadcasts BBC owned programs. This leads to the inevitable conclusion that the CSPs that fall in this category will need to have access to, if not be in direct control of, spectrum. This may raise the issues as to how the spectrum will be managed and distributed.

Application Service Providers on the other hand, are mainly in the business of rendering services that are based primarily on service delivery though the use of applications on digital media, but not necessarily content distribution. For these players, the cellphone, rather than the television, has become an ever more relevant tool of service delivery. The services here may range from the broadcasting of news on cellphones (such as in the case of *NTV Mobi*) to the dissemination of financial (such as mobile money transfers), medical or any other services through an Application based system.

From a regulatory and competition perspective, this is perhaps the one area of the digital space where regulatory mandates and business practices and competition are going to see the greatest clashes and confusion. Banks, for example, will need the telecommunications customer base to widen their service delivery, while telecommunications companies, which have been allocated the spectrum that makes money remittance on mobile phones possible, will be complaining about the erosion of their business. In Kenya, this is already happening with regulatory approval and did spark quite a row.[17] Another concern that has arisen in the contest between banks and telecoms on who should control mobile money services is the question of data integrity; there are concerns that proprietary and private banking data could fall in the hands of the wrong person.[18] Ugandan regulators do not seem to have successfully addressed the challenges and confusion that comes with fast paced technology related innovation.

From the foregoing, it is clear that a lot of attention is usually paid to the CSP and ASP aspects of digital migration, as these are the two aspects, which directly interface with the consumer. But it is argued here, that the most significant aspect in digital migration and one that should receive the most scrutiny is the infrastructural management. This essentially deals with who is in charge of the superhighway called spectrum. Without access to

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[17] This is already happening in Kenya between Safaricom and Equity Bank. See for instance, http://www.theguardian.com/global-development-professionals-network/2014/oct/02/mpesa-safaricom-equity-bank-financial-inclusion-kenya, see also http://www.balancingact-africa.com/news/en/issue-no-421/web-and-mobile-data/equity-launches-cell/en and Microcapital Brief: Kenyan Regulators Approve Equity Bank Mobile Services Despite Security Objections from Safaricom, Tuesday October 24, 2014 accessed at http://www.microcapital.org/microcapital-brief-kenyan-regulators-approve-equity-bank-mobile-money-services-despite-security-objections-from-safaricom/ and Standard Digital: Safaricom Loses Battle to Block Equity Bank Thin Sim Card, September 23, 2014 accessed at: http://www.standardmedia.co.ke/business/article/2000135850/safaricom-loses-battle-to-block-equity-bank-s-thin-sim-card

[18] http://www.microcapital.org/microcapital-brief-kenyan-regulators-approve-equity-bank-mobile-money-services-despite-security-objections-from-safaricom/ see also: Mbatau Wangai: Safaricom, Equity Bank Thin Sim war a Distraction that should not Drag On, Standard Digital, September 20th 2014 accessed at http://www.standardmedia.co.ke/business/article/2000135516/safaricom-equity-bank-thin-sim-wars-a-distraction-that-should-not-drag-on

this spectrum, a player is locked away from the customer base completely. A media house for instance, would have all the content and all the equipment but no means to reach its customers – more like having a car with a tank full of gasoline but no access to the road that leads you to an important meeting or event. You are no better than a person staying at home as you both will not have access to the event.

The management of this infrastructure is crucial for three main reasons: firstly, it deals with providing information to the masses. This by its nature is not only a business issue but also a human rights and good governance issue. An informed citizenry is a crucial part of building a strong democracy anywhere in the world. This in fact, is the premise on which the media is pitted as the fourth estate.

Secondly, this resource is finite and whoever controls it holds real power over the masses. As such, very many factors, political, economic, and social may be affected if a party susceptible to particular persuasions or leanings controls the resource. If for instance, the resource were to be tampered with to affect the relaying of information relating to presidential and parliamentary elections, this could have catastrophic results. It will be remembered that in the last Kenyan election, the IEBC blamed tallying problems on system malfunctions. In the last preceding Ugandan election, the tallying and declaration of results was largely dependent on technology. Most of the technologies used in these sorts of situations are dependent on spectrum and to have the party controlling this spectrum leaning in particular directions can have its own repercussions. Or at least, it is a threat we all must be aware of.

Presently, the spectrum is wholly controlled by a government subsidiary. The Executive Director of the Uganda Communications Commission has made statements in the press that indicate that this company will not have the capacity to control the entire network and infrastructure, meaning that there will soon be processes to open up the control of this resource to other private players. This is one procurement process that must be watched carefully. It was the procurement process in Kenya that led to a major scandal in the heat of which four media houses were turned off. As is discussed further, one of the resultant questions that emerged in the Kenyan situation was why put such a significant national resource in the hands of a foreign company?

Thirdly, the public is largely concerned with the fact that each person will be able to access any content they desire as long as they have a set top box (usually referred to as a decoder) that gives them the content they wish to access. But this is the lesser point. The focus should, in fact, be on who and how the resource is controlled. This is because regardless of the set top box that one has, if the broadcaster does not have access to the superhighway, the content will not come through to the end user. This was most vividly demonstrated by the Kenyan situation when four stations were turned off air. This therefore leads to the question of how the resource will be allocated. The issues here are: firstly, whether each media house should be allocated spectrum – the answer to this question is definitely in the negative because this would lead to a waste of the already scarce resource that digital migration is meant to save and maximize.

Secondly, what is the most equitable way of licensing and availing spectrum? For instance, should free to air channels be granted their own frequency and access to spectrum while the pay TV players are availed different spectrum? This question leads to more challenging practical considerations. It must not be forgotten that in every sense, each of these players is a competitor. Subjecting others to the control of one of the players would create its own set of problems. One model that was attempted in Kenya and failed was to compel the free to air channels to make their content available to Pan African Network Group (PANG) – a subsidiary of Star Times, Chinese entity. This failed, and rightly so. It raises copyright and compensation issues. This is because in essence, the regulator was asking the free to air channels to avail their proprietary material to their competitor without charging royalties or any form of compensation.

The other model attempted was to bring together the free to air players and grant them 30% ownership of the entity that was granted control over the infrastructure in exchange for them not being in control of any spectrum. The problem was that when the procurement process was complete, these companies had neither spectrum nor the 30% shareholding. This points to the shady way in which the procurement process was conducted, and sounds warning bells for the Ugandan procurement process. It seems, sadly, that the government of Uganda will simply have SIGNET recall all the licenses issued before the migration deadline, and hand them back to the same players at the expiry of the deadline. This is not the most efficient way to manage this resource.

It does seem though, that one logical way to go about the equitable distribution is to have three players manage the entire resource: a player that is really a combination of the free to air providers, another that is a combination of the pay TV players and the third that is responsible for government utilized infrastructure. But the third player should have the least of the spectrum. It is important that critical government departments that depend on spectrum do not be inhibited from performing simply because they are now at the behest of a private player. These players usually include security agencies such as the military and the police, national water and other utilities entities.

It is also important that they have their own access to spectrum so that Ugandans are not overcharged for a resource that they should own in the first place. But it is also important that spectrum allocated to government is not misapplied for the wrong reasons. It should not for instance, be used to license radio stations for the ruling party or license government television stations such as Urban TV. These should pay licensing fees and be subject to the same rules that apply to mainstream media and other political parties. Their regulation should fall within their peer entities such that they are not the avenues through which propaganda or media content is censored to the exclusive aid of the ruling party.

Meanwhile, it is important that the pay TV players do not be placed in charge of free to air players because these are players in direct competition with each other. Each payer should generate and price their own content the way they deem fit. And the public should not be subjected to charges they need not pay simply because they wish to access free to air content.

Key Concerns for the Digital Migration process

From the discussion above, it is clear that there are a number of reasons why digital migration is broader than just broadcasting. This paper highlights three key concerns: these include procurement, human rights and good governance.

Procurement Concerns:

Under the Public Procurement and Disposal of Assets Act (as amended), the management of terrestrial infrastructure should be advertised and bids invited. Unfortunately, there is hardly a large-scale public procurement process in Uganda's recent past that has not been fraught with gross irregularities. It is very important that the liberalization of this resource be watched carefully because as demonstrated above, it involves large-scale business and will be vital to the delivery of sensitive services. Uganda must learn from the Kenyan situation and avoid the kinds of unexplainable embarrassments that can arise from poor licensing of this resource.

The earliest warning sign is from the recent media reports that SIGNET, the government subsidiary that is presently in charge of the spectrum and is managing the migration process, is doing so without a license.[19] One wonders how a government subsidiary would fail to get a license from the government, and how such an entity would be entrusted with such a sensitive resource in the first place. Further, should the government elect to diversify the management and administration of signal distribution, SIGNET must be required to compete with all the other players. In Kenya, the KBC subsidiary also named SIGNET was awarded spectrum as a matter of course. This should not be the case in Uganda.

Another question that quickly arises is who, if at all, this entity accounts to. One would have assumed that if this entity accounted to UCC, they would have taken the trouble to ensure that the entity was properly licensed. It is very important that the questions of regulatory capacity be addressed. Ahead of or prior to the completion of digital migration, it is crucial that we ascertain that UCC has the human and logistical resources to effectively manage digital migration and the telecommunications sector. It is argued here that digital migration will complicate UCC's already difficult job even further and there is need to develop much stronger oversight mechanisms within the legal framework that can be utilized to hold UCC accountable where it fails to hold the players accountable.

The question of technical capacity must be examined further in light of terrestrial infrastructural management. As mentioned earlier in this paper, the Executive Director of UCC has made press statements in the past to the effect that SIGNET does not have the capacity to manage the resource on its own. It is thus important to ascertain the criteria that will be utilized to evaluate the capacity of whoever will be entrusted with the management of this resource in the end. This can only be done through the thorough scrutiny that public procurement should offer. As such, it is argued that it is important that the procurement process be as transparent as possible in

[19] Solomon Arinaitwe, *Digital Migration Operating Illegally – Parliament*, Daily Monitor February 19, 2015

order to allow for the attendant scrutiny.

Human rights and Good Governance Concerns:

The Constitution of Uganda guarantees the rights of access to information, freedom of expression and a free press.[20] These rights are receiving notoriety, as the Constitution grows older. Access to information is an integral part of ensuring that the citizens hold their leaders accountable. As such, access to information is very central to good governance in itself. The basic essence of access to information was well summarized by Richard Nixon, former President of the United States when he said:

> "When information, which properly belongs to the public, is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and eventually incapable of determining their destinies."[21]

It is not in doubt that the media, and more recently telecommunications companies, play a central role in the dissemination of information to the public. Having a situation where all media houses are now subject to the control of one particular player that is in charge of the terrestrial infrastructure must thus concern every player in this industry and consumer of media content. As Kakungulu – Mayambala has documented, the Ugandan government is no stranger to censorship and there are no guarantees whatsoever in the law that this censorship will not happen again.[22] It is important to note that while the most vivid and perhaps sensational cause of censorship is viewed to be politics, there are also non political causes of censorship – such as moral reasons. In recent past, some content has been censored on moral grounds in Uganda.[23]

It is further argued here that the fact that the terrestrial infrastructure will be in private hands presents the new potential risk of business related censorship or elsewhere known as corporate espionage. It would be tragic to have a situation where private profit motivated interests were the basis for a company frustrating the fundamental human right of access to information.

Another human rights concern that arises from the migration question is the right to privacy. UCC requires that all set top boxes be approved in their specifications before they are distributed to the public. But one of the advantages of digital broadcasting is that it avails a means within which the end user can interact with the broadcaster. This means that with a simple

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[20] For the provisions on the rights to freedom of expression and access to information, see articles 29 and 41 of the Constitution of the Republic of Uganda 1995. The right of media — now secured by Article 34 of the Constitution — rests on the idea that the public debate depends on a free and plural media. It is noteworthy that Kenya has the most elaborate constitutional provision on media rights in the East African Region.

[21] Adapted from Kakungulu – Mayambala (2010): *Examining the Nexus between ICTS and Human Rights in Uganda: A Survey of the Key Issues,* EAJPHR vol. 16 no. 2 p.1 at p.14. For a more general discussion on how broad governance issues relating to ICTs and human rights can go, see also my discussion in the same journal on internet governance, privacy and hate speech: *Internet Governance, Hate Speech and Human Rights: Thoughts and Perspectives for African Countries* EAJPHR vol. 16 no. 2 pp. 71 to 98.

[22] ibid. Mayambala discusses access to information in some detail and offers a detailed record of Ugandan government censorship crimes in his paper. See pages 11 to 21.

[23] ibid

manipulation of the set top box that a consumer has in their house, the broadcaster can transmit back to their station whatever is going on in the consumer's immediate surroundings. There is a danger therefore, that the set top box could become a tool of surveillance that no consumer has considered or would be able to avoid.

In addition to the foregoing, both the broadcaster (and vendor of the set top box and the person controlling the terrestrial infrastructure will have the means to generate and gather a lot of information about the consumers of digital content. There may be ways in which the suppliers of digital content could track information regarding tastes and preferences, and these would be useful data for them in their commercial endeavors. But there are no ways or safeguards to ensure that this is all the data that they collect. It is important to ensure that data that would be considered intrusive not be collected from the citizens of this country, as this would in fact violate their right to privacy.[24]

The Role of Parliament

The discussion so far demonstrates that there are a lot of oversight and accountability issues that arise in relation to the use of public resources, as well as the need for streamlining the regulatory powers and processes that relate to digital migration and the management of spectrum as a public resource.

Parliament as the legislative arm of government is constitutionally mandated to address all the legislative and regulatory issues, and through its committee on Information and Communications Technologies, is well placed to play the oversight role holding UCC and SIGNET accountable.

From the legislative and regulatory side, it is suggested that parliament pushes for legislation that would:

- Ensure the best and most effective and efficient utilization of spectrum rather than simply re-licensing the existing players as SIGNET is set to do;

- Guarantee the protection of the human rights and other public interests of the masses discussed in this paper from violation and abuse by Broadcast Signal Distributor, pay tv and other players in the industry;

- Ensures that the content of "free to air" providers is not being billed as part of pay tv packages. This is because free to air content is intended for the poor masses while pay tv content is intended for the sophisticated and sometimes wealthy elite;

- Ensure that there are enough safeguards in the legal regime against manipulation of signal and content distribution along poltical leanings – this should be especially important as it could affect the broadcasting and publication of campaign strategies and election results both in the parliamentary and presidential elections;

[24] For a more general discussion on how broad governance issues relating to Privacy, ICTs and human rights can go, see my discussion in: *Internet Governance, Hate Speech and Human Rights: Thoughts and Perspectives for African Countries* EAJPHR vol. 16 no. 2 pp. 71 to 98.

- Guarantee the fact that under no circumstances will the control of spectrum frequencies or signal distribution be in the hands of non Ugandan players. This resource is simply too important and strategic to be trusted in the hands of non Ugandan players whose motivation may exceed profit but not be in the national interest;

- Ensure that even spectrum allocated to and used by government departments and institutions is also under the supervision of parliament;

- Provide for swifter dispute resolution mechanisms than the courts for example the establishment of a tribunal that would deal with issues surrounding the use of spectrum;

On the oversight and accountability side, parliament should:

- Oversee the procurement processes surrounding the structures and running of SIGNET and the eventual liberalization of the business of signal distribution;

- Regularly watch and demand accountability for the performance of SIGNET and the management of all resources allocated to it;

- Demand the publication of SIGNET and UCC's financial statements and accountability of how all the license fees are applied and utilized

- Ensure that SIGNET is run transparently and that licenses are issued transparently and fairly.

Lessons from Kenya

The Facts:

Kenya, like Uganda, is in the process of formalizing its digital migration by the June 2015 deadline. The process has been as dramatic as it has been complex. But in a series of four articles, Wachira Maina offers a broad overview of the legal and political issues involved.[25] Maina has blamed Kenyan digital migration woes on two factors: a series of bad decisions by the Communications Authority of Kenya (CAK) together with its predecessor, the Communications Commission of Kenya (CCK), and an even worse judgment by the Supreme Court of Kenya.

Many things went wrong in the digital migration process in Kenya. Maina has offered a precise summary thus: The first is that the Communication Authority of Kenya (CAK) has been extremely cack-handed and anti- Kenyan

[25] Wachira Main (2015): *Digital Migration, the What and Why* Daily Nation Saturday January 24 2015 accessed at: http://www.nation.co.ke/oped/Opinion/Digital-migration-The-what-and-why/-/440808/2601350/-/4p2ipdz/-/index.html on March 8, 15, *Supreme confusion: How authority, court muddled the copyright law* Daily Nation January 23, 2015, *Why Supreme Court was wrong on signal licence dispute: It is commonplace to deplore litigation; even the law itself does so.* Daily Nation January 26th 2015; *Court failed to hold State to its pledge onlicence: Interests of a majority of poor viewers have been overlooked in favour of a small pay TV elite.* Daily Nation January 27 2015,

in managing the process.[26]

Secondly, and contrary to all best practices the world over, the authority has favoured and continues to favour pay TV (the option for the elite) against Free-to-Air TV (the option for ordinary folks).

Thirdly, the government had made promises to the three media houses and to the Kenya Broadcasting Corporation (KBC). It has honoured the one to KBC but not the one to the three private media houses.

Fourthly, the government had decided - as a matter of policy - that Kenyans must hold 30 per cent of equity in BSD licenses. The Communications Commission of Kenya licensed a 100 per cent Chinese-owned outfit, PANG.

The Communications Authority of Kenya ignored wise best practices that could have protected the public interest when it licensed most of the frequency to PANG. It is partly from this insight that in the US, the Communications Act of 1934 prohibits foreign ownership or voting interests exceeding 25 per cent in US entities that control broadcasting.

In a clarification on this point issued in 2013, the Federal Communications Commission (FCC), allowed that this limit could be passed. Even so, the FCC insists that those wanting to pass this limit must draft a petition to the regulator for a declaratory ruling. In short, Kenya did the exact opposite of what the FCC has done, to no obvious advantage to the country or to the public interest.

The Communications Authority of Kenya and the Supreme Court there made a major mess of applying copyright law principles and the broadcasting principle of free to air. Sadly, the Supreme Court being the highest court, this jurisprudence will take a while to correct.

Finally, constitutional principles mandate public participation, transparency and equity when public bodies make crucial decisions like those in communications. This BSD process could hardly pass muster on that criteria, a point the Supreme Court itself made. And then there is Article 34, with the freedom of media and the right of establishment. The right of establishment surely includes the right not to be dis-established. But in all the decisions the Supreme Court of Kenya made on these matters, it did not correct any of the above wrongs and this is what makes the case a curiously interesting one for Uganda to learn from. One hopes our judges would be soberer. But for the better grasping of the issues, a closer look at how these mistakes were made is necessary.

The What and the why:

Maina argues that given the significant efficiency gains arising from moving to a digital platform, allocating individual frequencies to broadcasters was not considered reasonable: frequencies are scarce national resources, they should not be squandered through inefficient allocation. To ensure efficiency, the government proposed to split broadcasting into two: Content Developers and Signal Distributors. The content developer would now be the

[26] This summary is at the end of his article titled: *Why the Supreme Court Was Wrong on Signal License Dispute* Daily Nation, January 26, 2015

broadcaster and would therefore develop or assemble content.

That content would then be carried by a licensed Broadcast Signal Distributor to the end consumer. It is the BSD firm to which frequencies would be allotted. Under the new arrangement the government said that broadcasters – that is content developers – would be separated from signal distributors, termed BSD licensees. On the consumer end, anyone who still had an analogue TV would then have to buy a set- top box which would ensure that digital signal can be received on analogue sets.

But government also recognized that other important interests were at stake. Both the Government Policy and the Task Force Report recognized the public interest in fair frequency distribution and the sunk costs already borne by the existing broadcasters who had historically invested in the analogue infrastructure.

For this reason, government policy was to develop "broadcasting services that reflect a sense of Kenyan identity, character, cultural diversity and expression through the development of appropriate local content." It also undertook to encourage "a broadcasting industry that is efficient, competitive and responsive to audience needs" and, to allocate "frequencies through an equitable process." Within that framework, efforts would be made to reduce the cost of migration by using "the existing designated transmitting analogue sites and infrastructure for digital transmission."

Crucially, the Task Force also proposed that the "existing infrastructure owners" be permitted to "enter into agreements with signal distributors and future infrastructure investors regarding integration of their facilities into the signal distribution network." Most important for the digital migration case, the Task Force asked that "incumbent broadcasters be allowed to form an independent company licensed to run the signal distribution services."

In order to ensure national interest any firms licensed to be Broadcast Signal Distributors were to have at least 30% equity participation by locals. The public broadcaster, the Kenya Broadcasting Corporation (KBC) was to be granted a BSD license as a matter of course. The result was that Chinese owned company, the Pan Africa Network Group (Kenya) Co Ltd, was licensed as a BSD carrier in October 2011. Also licensed along with PANG but without going through procurement was the KBC owned BSD carrier, SIGNET. The losing local consortium then appealed to the Public Procurement Administrative Review Board (PPARB) and lost, again.

As for the policy decision to promote local content, the CCK decision was bizarre. It wrote a letter requiring pay TV stations including StarTimes and Go-TV (owned by Multichoice) to carry the content of local Free to Air Television stations under the guise of what broadcasters call a "must carry" rule.

From data downloaded from the CCK website but subsequently removed – perhaps because of the Supreme Court case – the Communications Authority of Kenya has allotted the lion's share of frequencies, 120 in total, to the wholly owned Chinese company, PANG. KBC, the public broadcaster, was allotted only 54.

Maina poses some questions that should serve as warning signs for the Ugandan situation. Why did the government allow a company associated with PANG, StarTimes TV, to be a broadcaster, having made a commitment to split content development from carrier services? Why did the Kenya Government depart from its explicit commitment that at least locals must hold 30% equity in a BSD licensee?

Maina also argues that the regulator harmed the public interest, first by ignoring mandatory constitutional principles, then by taking a scarce national resource – radio frequencies – and handing the bulk of these frequencies to foreigners, contrary to government policy and to best practice the world over, and then, by taking decisions in a manner that is not transparent, principled or accountable.

When these decisions were challenged in court, the Supreme Court compounded the original sin with a patchwork judgment that restrictively and narrowly read key articles in the Constitution on media freedom, misstated crucial elements of the law on copyright, broadcasting and the nature and scope of constitutional remedies.[27]

Four key lessons must be learned from the Kenyan situation thus far: firstly, the approach taken to split the spectrum along side the lines of BSDs and Content provision is significantly different from the three pronged split suggested earlier in this paper. Although the Ugandan Digital Migration Policy advocates for a split along the same lines as the Kenyan one,[28] this paper proposes that Uganda splits it along the lines of content provision and distribution, but the spectrum is held on the basis of interests in holding companies. In other words, the Content providers form their own consortium and any one interested in distributing signal without having to generate and provide content also be pulled together into their own consortium. A category that could fall in the latter would be the telecommunication companies or companies interested in selling Applications. The alternative is that this spectrum be held in trust by a government entity.

The second important lesson to learn from this process in Kenya is that transparency and accountability in resource allocation is key. Government made commitments it was not held accountable to keep. It is very important that specific rules be put in place to ensure that the public and all business interests know how spectrum is to be dealt with. Uganda seems to have already failed the transparency process as the Digital Migration Task Force that was envisioned in the Digital Migration Policy has been largely unknown by the masses. Apart from the publicization of the need to get set top boxes in order to be able to access digital content beyond the deadline, there is not much literature explaining the details on digital migration that are covered in this paper anywhere in the public domain. The masses have thus largely been denied the opportunity to scrutinize how their resource is being dealt with.

The third lesson, one that has come back to haunt the Communications Commission of Kenya, and one that Ugandan authorities should take very

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[27] Wachira Maina (2015): *Digital migration: The what and why The pressing questions that Kenya's communications regulator must answer*. Daily Nation January 24, 2015

[28] See Uganda Digital Migration Policy, 2011 at pp. 16-22

seriously, is that spectrum or the majority of frequency cannot, under any circumstances, be allocated to a foreign company or player. It is as unwise as it is insecure to do so. It is also not in the interests of the local industry to have foreigners control the larger space of the spectrum. The argument often raised in other sectors is that foreign investors have the capital required to develop these industries. But this argument falls short because it sacrifices the opportunity to build local capacity in the first place. Also, local content is an industry that must be encouraged, but it is not necessarily one that is in the interests of foreign players.

Fourth and paramount is the fact that above all else, the public interest should be the overriding factor in determining how to allocate, utilize and manage frequency in Uganda. Failing in this, it is hoped that there will be sufficient accountability mechanisms in place, including the use of litigation – if necessary, to ensure that the Ugandan regulator does not commit the same mistakes made by the Kenyan regulator.

The Public Interest:

"Interests of a majority of poor viewers have been overlooked in favor of a small pay TV elite."[29]

Will anyone in Uganda protect the public interest? If so, what do we need to keep in mind? The majority of TV viewers rely on free to air channels to access content from which they derive ideas and information, thus enjoy their constitutional rights. How we deal with spectrum affects these people, just as much as it affects the media houses that generate and broadcast this content. In Kenya, Maina offers two reasons why the media houses should be protected in their quest for frequency: first, competition gives the public access to better and more information, and second, the constitutional rights that surround the media. These are rights we have committed to regardless of our sentiments of any single media house.[30] It will be noted that both of these reasons in the end benefit the public the most, or at least as much as they benefit the big media houses.

In the Kenyan case, the expectation that the public interest would override all other considerations was perhaps premised on the commitment In the Report of the Task Force on The Migration of Terrestrial Television from Analogue to Digital Broadcasting, 2007, which was meant to provide the modalities of implementing the 2006 National Information and Communications Technology Policy. The government was explicit. It committed itself to develop "broadcasting services that reflect a sense of Kenyan identity, character, cultural diversity and expression through the development of appropriate local content."[31] It is hoped that Uganda would pursue similar ambitions and objectives.

In the broader sense, the above recommendation led to the promise to allow the consortium of three large media houses to set up a special purpose vehicle through which they would be licensed to distribute spectrum. This promise, as has been pointed out above, did not materialize. In a court battle

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[29] This was Wachira Maina's conclusion of the situation in Kenya. See Wachira Maina (2015): *"Court failed to hold State to its pledge on licence"* Daily Nation, January 27, 2015

[30] ibid

[31] ibid

that ended in the Supreme Court, the court found that the companies did not have a legitimate expectation from the commitments of a ministerial official. Maina has criticized this decision as having been reached from a misapplication of English precedent. [32] What Ugandan lawyers and broadcasters need to note here is that in seeking to protect the public interest, it is wiser to secure firm commitments that protect this interest within the legal framework rather than relying on the undertakings of politicians and technocrats. The Digital Migration Policy did mention that there would be need for the creation of an enabling framework. It is hoped that in framing that framework, the public interest considered here will be provided for.

As discussed earlier, SIGNET in Kenya was allocated a BSD license as a matter of course. It has been argued that this should not be the case in Uganda. The reasoning derives from the assessment of SIGNET's commercial interest. Although SIGNET (and in this case the name is used in reference both to Kenya and Uganda) is publicly owned, there are real questions as to who benefits the most from its activities. SIGNET in Uganda, like in Kenya, is a commercial entity that will compete for commercial customers. So, in principle, there is no real public interest for these government subsidiaries owning BSD licenses.[33]

Further, it is not to be expected that the regulator would set regulatory positions that conflict with another government entity. This means that the dangers warned of earlier in this paper with regard to manipulation of signal control would be ever closer if SIGNET were either to remain in ultimate control or to be granted a license as of right. In the result, the larger national interest is harmed. Also, in the history of UCC's existence, it has never accounted for any of the proceeds of regulatory funds that it controls. Neither has UBC (the parent entity to SIGNET) ever accounted for its profits. This leaves the question of who truly stands to gain from the profit motivations of licensing SIGNET Uganda as a BSD license holder. This question, it is hoped, will be answered by Parliament, and in the rarest of cases, the courts of law – should a curious citizen seek to hold these players to account.

The Sometimes Necessary Challenge of Litigation

On losing out in the procurement process, the media houses took to appealing the decisions before the Procurement Administration Review Board.[34] A similar body is provided for in the PPDA Act as amended but has never been put in place.[35] It is likely that should the day ever come when any player in Uganda wants to challenge license allocation or signal distribution in Uganda, they will be tied in the sophisticated lottery that is Uganda's court system. As noted above, there are several constitutional issues on this subject. What this means is that one has to choose their

[32] ibid

[33] ibid

[34] This was the beginning of a long and fairly complex litigation process. Some of the decisions reached in the course of this litigation were *Royal Media Services Ltd & 2 others v Attorney General & 8 others [2013] eKLR* and *Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others [2015] eKLR*. It is noted that the latter matter was heard and (effectively) determined with two Supreme Court decisions.

[35] see sections 89 to 91T of the PPDA Act, 2003 as amended that provide for the Procurement Tribunal, which is to have the powers of the High Court.

forum carefully and it is likely that if this process is mismanaged, it could result in multi faceted litigation. This, it is argued in this paper ought to be avoided. Should there be infractions in the way the process is managed, however, it is hoped that the citizens, media houses and other interested parties will rise to the occasion to challenge any breach of law or abuse of public resources and interest, to stop the commercialization of human rights through the exclusive licensing of SIGNET and to demand accountability for profits generated from this commercialization.

The advantage that Ugandan law has over Kenyan law, however, is that our Constitution is express on what happens if a constitutional question is raised. In our case, all proceedings must be stayed and a reference made to the Constitutional Court. In the Kenyan situation, the waters were muddled when the Supreme Court held that the Public Procurement Administration Review Board had no jurisdiction to hear constitutional issues. But what is important to remember is that these issues are as wide and technical as they can be intractable. A careful understanding of the principles and the technical jargon is important for anyone interested in going down the road to litigation on these issues.

There is another major lesson to learn from the Kenyan litigation on digital migration: the Kenyan Supreme Court issued a decision on September 29th 2014 between the Communications Commission of Kenya and Five (5) Others v. Royal Media Services Limited and Four (4) Others. But the court did something that is entirely unprecedented. It exercised residual jurisdiction to monitor the scope of compliance. Thus in a later decision of February 13, 2015, the court seems to have revisited the same matter it had heard, determined and issued Orders "with finality for the purpose of disposing of the suit."[36] It would be interesting to attempt to pursue the exercise of similar jurisdiction by the Ugandan Supreme Court. It is arguable, on the other hand however, that it is a well-settled principle of our legal system that all matters must come to an end and be put to rest (the doctrine of *res judicata).* Once a court determines the matter with finality, then that court should aid the litigants in moving on by not facilitating their thirst to return for further Orders. Exercising residual jurisdiction of the Supreme Court bypasses this principle and should not be encouraged.

On Copyright Issues and the Legal Framework

The Ugandan Digital Migration Policy does provide that new mechanisms are required to compensate content creators and distributors in an environment where it is easy to replicate perfect copies. Publication of copyright protected material for instance may results in a right to additional copyright payments even though few or no additional viewers are involved. Developments in digital broadcasting may therefore be constrained by right holders, given the territorial nature of copyright. Legal issues on protection of electronic pay services often encrypted to ensure remuneration and/or to limit viewing to a specific territory need to be resolved.

In a bid to address copy right issues the Ugandan Digital Migraion Policy points out that following areas need to be clearly addressed:

a) Establishment of appropriate policies on the access, use

[36] *Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others [2015] eKLR*

and distribution of content in the diverse digital service environment;

b) Establishment of a body entrusted with the responsibility of promoting diverse content creation that supports among others, local content development industry, and;

c) Streamline the development and supervision of curriculum used in the media training institutions to utilization of digital systems.

Sadly, this is just about all the Policy says of copyright related matters. The section on the legal framework is just as shallow. The laws that this section of the Policy refers to have since been repealed by the Uganda Communications Act, Act 1 of 2013. This law says nothing of the copyright and free to air or must carry on issues that arise in broadcasting. And yet these are by no means easy issues to resolve.

In the event that media houses in Uganda are no longer granted frequency to broadcast after the June 17, 2015 deadline, they will have to contend with the issue of whether or perhaps more accurately, how to avail their content to pay TV distributors. This is what often raises the copyright issue and sometimes raises the debate on the rules of copyright law and its exception of fair dealing on the one hand, and the must carry on rule in broadcasting on the other.

The basis of the attendant arguments is quite simple: the media house invests in generation of content and makes its profit from advertisers who sponsor the broadcasting of this "free" content. Hence the term "free to air." Arguably the most widely consumed "free to air" content is the news. But this content at all times remains the intellectual property of the media house that generated it.

On the other hand, the pay TV players encrypt their content and only make it available to subscribers who pay a fee to access whatever content they choose. So, when the frequencies presently held by free to air media houses are withdrawn, either the media houses will work out transactional relationships with the pay TV distributors to ensure that they are compensated for their content (thereby receiving fair and adequate compensation for their proprietary rights as required by Article 26 of the Constitution of the Republic of Uganda), or they will be stuck with content they cannot distribute if they are not granted frequencies of their own somehow.

When this happened in Kenya, three media houses were turned off. The Supreme Court had occasion to consider the attendant rules. Maina argues that in this respect, there are three points to make from the Kenyan situation: First, both CA and the Supreme Court are wrong on the 'must-carry' rule. Second, the Supreme Court is wrong in treating the 'must-carry' rule (a broadcasting matter) and fair dealing (a copyright exception) as mutually inclusive. Third, the Supreme Court was wrong in using subsidiary legislation to limit property rights granted by the Constitution, including

intellectual property rights.[37]

He further asserts that the confusion wrought by the authority and fortified by the Supreme Court arises from a failure to distinguish the nature of the broadcasting market and the public interest issues at stake in its regulation. The world over, "free to air" broadcasting is the means through which poorer members of the community access information, hence the "must-carry" rule. In both the US and Europe, "free to air" broadcasters both have the largest infrastructure and reach the largest parts of linguistic minority communities. Indeed, In the US, as the case of Turner Broadcasting v. The Federal Communications Commission shows, 'must-carry' rules were meant to protect Free-to-Air broadcasters. In Europe, 'must- carry rules' are used to protect local language channels.[38]

Under 'must-carry' regimes, there are two options. The first is that the Free-to-Air broadcaster may itself require to be carried on cable or another platform. Where it is the Free-to-Air broadcaster asking to be carried, no copyright issues are at play. The second option is that the cable service may decide to re-transmit the Free-to-Air signal or they may be asked to do so by the regulator. If so, then for copyright reasons, the Free-to- Air broadcaster must be remunerated for that re-transmission.

Looking at Australia, the US and Europe, it is clear that "must-carry" provisions impose obligations to communicate copyrighted materials (broadcasts). But they do so at the behest of the copyright holder, not at the behest of the regulator and for the benefit of the broadcaster. Technically speaking, there is no market segment served by cable or pay TV that is also not covered by Free-to-Air TV. This means that there is no Free-to-Air market segment accessible to pay TV but unavailable to Free-to-Air TV. Why, then, does the authority require Free-to-Air broadcasts to be carried? Where is the public interest argument for the authority to mandate that pay TV carry Free-to-Air broadcasters?

The Free-to-Air broadcasters have not asked for it and the market structure that would demand it, namely greater penetration by pay TV over Free-to-Air TV, does not exist in Kenya. "Must-carry" rules raise no copyright issues because the copyright holder is either exercising the right to be carried or, if the regulator demands that he or she be carried, then the carrier pays for intellectual property rights, which is what copyright is.

Fair dealing on the other hand is an exception to copyright. Fair dealing is the rule that allows people to use copyrighted materials for purposes that are considered fair. It is an exception to copyright, which covers research or study; criticism or review; parody or satire or reporting news. There are two steps involved in deciding if some particular use of copyrighted material is fair dealing. First, one must use the material for specific purposes provided for in the law. Secondly, the use must be fair. Whether a particular use is fair will, of course, depend on the circumstances of the case. In short, this will be determined on a case-by-case basis by the court.

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[37] Wachira Maina (2015): *Supreme Confusion: How Authority, Court Muddled the Copyright Law* Daily Nation January 23, 2015
[38] ibid

In brief, the court failed to notice a basic difference: "Must carry" is an obligation that a broadcast regulator imposes on a cable or satellite station to carry the signal of a Free-to-Air broadcaster in order to enhance the reach of the Free-to-Air TV or local station. Fair dealing is the right to use another person's copyrighted material in certain narrowly defined circumstances. The court first misstates the "must-carry rule" and then justifies that misstatement by misapplying the fair-dealing rule from copyright law.

In this particular case, there are three reasons why the retransmission of Free-to-Air signals by pay TV cannot be fair dealing. First, it is not up to the CA to decide fair dealing as that is a copyright issue between the holder of copyright and the user who claims fair dealing. This means that the authority's 'must-carry' rule cannot be defended with fair-dealing arguments. Secondly, even on the face of it, the fact that pay TV are using local channels as a selling point for their product shows clearly that they are gaining a commercial benefit from this so called 'must-carry' rule. They are gaining a benefit for which they have not paid the copyright holder. Thirdly, pay TV has appropriated and re-branded the news broadcasts of Free-to-Air TV, in effect, making it seem as if they are the joint owners of those broadcasts.

Ugandan broadcasters should therefore be careful and insist that no pay TV provider is allowed to broadcast their content for commercial benefit without their consent and remuneration. This would mean that their property has been taken and utilized by another for commercial benefit to their detriment. It is important to note that in the Kenyan case, the Supreme Court went on to find and hold that the digital boxes sold by StarTimes were configured to air the free channels and that there was no factual basis for the complaint of the three media houses. But this decision is wrong because the rights in that content are not proprietary because they are acquired. In other words, StarTimes or DSTV does not have proprietary rights *because* it has access to the media content. StarTimes or DSTV has to have the consent of the media house to appropriate that content.[39]

As Uganda follows the doctrine of precedent, this is one point that broadcasters in Uganda should seek to distinguish and clarify. Otherwise should the Kenyan decision be applied in Uganda, it will not only lead to an infraction of Article 26 of the Constitution but also lead to a drastically commercially unfriendly position. This precedent would also have far reaching implications on human rights. The Supreme Court of Kenya found that indeed the right to property includes intellectual property rights – a point that should ideally need no particular justification in the first place – but the court went ahead to find limitations exist against these rights. This was wrong and Maina has a most eloquent explanation why:

> It is not in argument that the rights to property, fair trial, free expression, freedom of the media and freedom of information – to name only a few rights – are derogable. But to say that rights are derogable is to say very little that is meaningful. That rights are derogable does not mean that they are not fundamental. Rights are to be derogated from only when there are exceptional circumstances

[39] ibid, specifically where Maina explains Intellectual Property Rights not being fugitive resources.

> threatening the nation. The fundamental status of any right does not derive from the fact that it is not derogable. To begin analysis with exceptions to a right is the sort of dangerous theory that got Kenya into its past difficulties. The fact that a right is protected by the Constitution means that the court's inquiry should begin the other way. The person who claims an exception to the right must show that the exception is consistent with the right. The signals of Free-to-Air TV are not public resources; they are resources developed by private individuals.)[40]

It is sincerely hoped that when faced with the challenges of managing and administering spectrum, UCC will not make the same mistakes that the Communications Authority in Kenya made. It is even more pressing that the Ugandan courts do not fall prey to the same misinterpretations that the Kenyan Supreme Court fell to. Should these matters on licensing, copyright and must-carry on, it is hoped that the Ugandan courts will attempt to correct the jurisprudential shortfalls of their Kenyan counterparts. But more importantly, it suffices to note that most of these pitfalls can be avoided by simply enacting the proper legal framework that covers and clarifies the broad spectrum of issues discussed from the Kenyan situation. From the above discussion therefore, many lessons should from the Kenyan situation and these will save all parties much cost in time and resources, while at the same time protecting the public interest.

Conclusion:

This paper has attempted to demonstrate why digital migration should matter to every ordinary Ugandan as much as it should matter to the regulators, policy makers and legislators who are mandated to play oversight. It seems to be the case that Uganda has chosen the least efficient way to manage frequency spectrum and will end up wasting it so as to avoid dealing with the complexities of the proprietary and other human rights that this issue raises. It is also apparent that the creation of a new institution (SIGNET) with no resources allocated to it and will have to rely on UCC for its logistical sustenance presents challenges of efficiency and practicability in the performance of the necessary roles. There are many lessons to learn from Kenya, the United States and elsewhere in the world that would have guided UCC and all other stakeholders in navigating these murky waters. But alas, we seem to have learned nothing from the confusion that has ensued across our borders. It remains to be seen whether the litigation anticipated in this paper will actually be necessary, but it is the author's hope that should that be the case, the Ugandan courts will not muddle the matters as their Kenyan counterparts did.

[40] ibid