

Combating Digital Piracy in Kenya's Film Industry

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Introduction

The film industry in Kenya plays a strategic role in the social, economic, and political development of the country. The industry provides a forum for exchanging ideas and engaging in discussions, an important element in public participation. Moreover, it is vital in employment and wealth generation, especially among the youth. The industry is constantly undergoing changes that promise to promote its development and improve its financial gains. For instance, digital advancement in the country has created an environment for the film industry to thrive by improving distribution and access to internet-based audio-visual products.

Status of Digital Piracy in the Film Industry

Digital piracy refers to the illegal copying and distribution of videos, including film videos through the Internet without consent from the owners. Digital piracy, which increases with the development of internet and software technology, poses a threat to film producers and actors. Not only does online piracy pose a threat to potential investors in the industry, but also reduces revenue for film producers.

With digital developments, consumers can easily access foreign films cheaply in comparison to locally produced films. Moreover, digital technology has made it easier to access and download local films before they are distributed into the market, thus denying film creators from earning royalties and awards for their films. Literature reveals that the government has legal frameworks to protect content creators from online piracy. Despite this, digital piracy remains a challenge to filmmakers, costing them revenues and government taxes.

Online piracy of films is rampant in Kenya. For instance, one can gain access to films from movie shops and from traders on the streets, who illegally sell films without legal authorization. Pirated foreign films into the Kenyan market cause financial losses for local film producers. It also leads to unfair competition between easily available and affordable foreign films and those produced locally. It demoralizes the film-makers and stifles their talents, thus making them not to earn a living from their creativity. Digital piracy also hampers filmmakers from sustaining future operations. Equally, a pirated film in the market makes film producers miss out on royalties that would have been otherwise earned through legal film distribution.

Moreover, excessive piracy scares investors, who would have otherwise invested in Kenya's film industry.

Partners Against Piracy (PAP), a multi-sectoral association formed to fight against digital piracy estimates that online piracy costs Kenya's creative economy approximately Ksh 92 billion annually in gross losses. Artists on Safaricom Baze Music, Boomplay, and Mdundo platforms lost Ksh 15 billion due to pirated music, and Ksh 32 billion due to pirated video material in the year 2022. Content creators on YouTube, and MyMovies Africa, Netflix, ViuSasa, and Safaricom Baze are also impacted by piracy. Similar losses include Ksh 5 billion from cinema, Ksh 8 billion from television, Ksh 3 billion from video games and Ksh 29 billion from illegally obtained books, newspapers, and magazines. Piracy costs the Government approximately Ksh 12.69 billion annually in Value Added Tax, Ksh 2.49 billion in Corporation Tax, Ksh 1.07 billion in income tax for residents, and Ksh 1.13 billion for non-residents.

Government Interventions and Existing Gaps

To curb the menace, the Government through the Kenya Copyright Board (KECOBO) and the Kenya Film Classification Board (KFCB) banned the importation of foreign films by labeling all the films, though implementation remains a challenge. KECOBO introduced the Anti-Piracy Security Device (APSD), a unique barcode applied to legitimate video and audiovisual works to monitor the online distribution of films. Currently, KECOBO has the right to seize films that lack APSD. To further support the film industry against piracy, the Kenya Industrial Property Institute (KIPI) runs programmes that support creators and innovators in the country by extending intellectual property awareness to remote and rural areas.

To boost the distribution and exhibition of local films, the government through the Communications Authority of Kenya (CAK) set a local quota limit of 40% for registered local broadcasters of local broadcasting airtime. This has seen local filmmakers and content producers reap big fortunes from this government directive. In March 2016, the CAK created the Kenya Programming Code for Free-to-Air Radio and Television as a first step to developing Kenya's film sector. All broadcasting stations are required by this Code to preserve Intellectual Property Rights (IPR) and refrain from misappropriating programmes. The code mandates all radio and television broadcasters to observe the Authority's guidelines for local content.

Beyond the borders, Kenya is a member of the World Intellectual Property Organization (WIPO), an organization designed to promote intellectual property, trademarks, designs, and copyrighted material in literacy, music, cinematography, photographic, and other artistic works against unauthorized users. Extensive discussions on online piracy were developed and published by the Organization. Member countries were encouraged to adopt and domesticate laws against online piracy, thus further reinforcing the country's efforts to combat piracy.

While Kenya has made progress in fighting digital piracy, through the development of legislation, policies, and establishment of institutions, there seems to be overlapping roles within the institutions established. This has led to weak coordination and implementation of piracy laws and legislation, among the enforcing agencies. Whereas there are laws that protect against piracy, under special circumstances, the authority may be exercised by the third party without the exclusive rights of film producers, for instance when a film is used for academic purposes. With advancements in technology, piracy has taken a new dimension, thus leaving the film industry more vulnerable.

There are no clear guidelines that protect film producers against digital piracy. Sections 35B and 35C of the Copyright Amendment Act (2019) have put in place a legal basis for Internet Service Providers (ISPs) to help in regulating online piracy of films. However, three years down the line since its enactment, the Act is yet to be implemented and enforced. WIPO limitations on copyright laws vary from

country to country due to social, economic, and cultural underpinnings. It therefore provides a general application for the limitation and exceptions. Thus, individual country legislators are left to decide on the exact scope.

Recommendations

- (i) There is a need to establish regulation and enhance enforcement capacity of State agencies in film industry to prevent exploitation of local film makers by foreign companies. This will regulate the earnings of film producers, actors, and the film crew and shield local actors from exploitation by foreign film companies.
- (ii) Strengthen the institutional capacity of the Kenya Film Classification Board (KFCB) to be able to harmonize licensing of films at the national and county levels. This will limit the hurdles film producers experience at every licensing stage.
- (iii) Enhance public awareness and knowledge of IPRs in the country. As previously stated, it is easier to access films online without consent within the country. It is therefore important to increase public awareness of both the consumers and producers of films thus protecting this salient sector.
- (iv) Further, enhance coordination among the institutions and harmonize their mandate towards protecting intellectual property rights.

About KIPPRA Policy Briefs

KIPPRA Policy Briefs are aimed at a wide dissemination of the Institute's policy research findings. The findings are expected to stimulate discussion and also build capacity in the public policy making process in Kenya.

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