



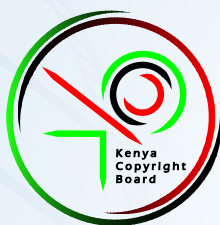
***Copyright** And The **Audiovisual** **Industry** In Kenya*

A PRACTICAL GUIDE ON COPYRIGHT FOR FILM MAKERS





REPUBLIC OF KENYA

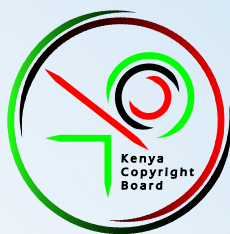


KENYA COPYRIGHT BOARD

COPYRIGHT AND THE AUDIOVISUAL INDUSTRY IN KENYA

A Practical Guide on Copyright for Film makers





Our Vision

A model administrator and Enforcer of Copyright.

Our Mission

To sustainably advance the growth of the creative and cultural industries through effective administration and enforcement of copyright and related rights for socio-economic development in Kenya.

This booklet was initially printed as part of the World Intellectual Property Organization (WIPO) Project on “Strengthening the Audio-visual Industry in Africa”. The views expressed do not purport to reflect the views of WIPO or its members.



Contents

- 1.0. INTRODUCTION**..... **5**
- 2.0. COPYRIGHT IN THE AUDIOVISUAL INDUSTRY**..... **7**
 - 2.1. HOW CAN I PROTECT MY AUDIOVISUAL WORK?.....7
 - 2.2. DO I NEED TO REGISTER MY AUDIOVISUAL WORK TO BE PROTECTED BY COPYRIGHT?.....7
 - 2.3. WHAT RIGHTS ARE GRANTED?.....8
 - 2.4. WHAT ARE THE LIMITS TO COPYRIGHT PROTECTION IN THE AUDIOVISUAL SECTOR?.....10
 - 2.5. WHO CAN OWN THE AUDIOVISUAL WORK AND FOR HOW LONG?.....10
 - 2.6. CAN THE RIGHTS BE TRANSFERRED TO OTHER PARTIES?.....11
 - 2.7. INFRINGEMENT.....11
 - 2.8. HOW DO I ENFORCE MY RIGHTS?.....12
 - 2.9. WHAT ARE THE RELEVANT GOVERNMENT AGENCIES?.....14
- 3.0. HOW DO I MANAGE AND NEGOTIATE MY RIGHTS WITHIN THE AUDIOVISUAL INDUSTRY?**..... **16**
 - 3.1. WHO DO I NEGOTIATE WITH?.....16
 - 3.2. TRANSFER OF RIGHTS.....17
 - 3.3. MARKETING AND DISTRIBUTION.....19
 - 3.4. CHAIN OF TITLE.....20
- 4.0. GLOSSARY OF INDUSTRY TERMS**..... **23**
- REFERENCES**..... **27**

1.0 Introduction

The audiovisual industry is important at the social, political and economic levels for various reasons. First, it plays an important role in communicating ideas, information and ideology; second, it provides a forum for debate, discussion, and exchange of information, an element essential for citizen's participation in community life; and third, it contributes to economic development through job and intellectual capital creation. Direct job creation happens in production and post-production companies, through casting and crewing agencies, in equipment-hiring companies, through set design and manufacturing companies, prop suppliers and in distribution businesses such as cinemas, TV broadcasters and mobile entertainment providers. Indirect job creation happens in supporting industries such as the hospitality industry, in catering firms and hotels, and the transport industry.

In the last few years, the audiovisual industry in Kenya has grown substantially. As per the study carried out in 2012, the addition to the GDP by the audiovisual industry was valued at KES 74 billion, which amounted to be about 2.25% of the GDP¹. Like other copyright industries, the audiovisual industry experiences various intellectual property issues, especially in the area of copyright and related rights. This booklet is designed to address these issues, in a manner that various players within the industry can understand and utilize. In other words, it seeks to demystify copyright in the context of the audiovisual industry.

Copyright in Kenya is protected both as a constitutional right and under the Copyright Act Chapter 130 of the Laws of Kenya (CAP 130). Copyright law protects literary, dramatic, musical and artistic works, as well as films, sound recordings, book layouts, and broadcasts. This law grants right holders in the audiovisual industry exclusive rights to reproduce, distribute, sell, hire, import, broadcast or communicate to the public, or translate or adapt their audiovisual materials, subject to certain exceptions and limitations.

There are three main reasons why it is important that those practicing in the audiovisual industry remain familiar with the basic principles of copyright law:

- a. To protect the work and enforce rights; to be able to authorize or prohibit the use of the work
- b. To exploit/use the work for commercial purposes within the legal framework, including works that belong to others or those from other copyright sectors. This will guide the terms and conditions of the contractual agreements between the parties.
- c. To understand the relationships within the industry, for instance between the producers and the scriptwriters and performers and between producers and distributors.

There are various government agencies that deal with different aspects of the audiovisual

1. Kenya Film Commission (2012) Economic contribution of the Film Industry in Kenya <http://www.kenyafilmcommission.com/images/EconomicContributionofFilmIndustryinKenya.pdf>



industry in Kenya. The Kenya Copyright Board is a government agency that deals with the overall administration, and enforcement, of copyright and related rights in Kenya. This board works with various government agencies, such as, the Kenya Film Commission, to ensure the growth and development of the film industry, and provides the government with advice on matters pertaining to development, co-ordination, regulation and promotion of the film industry in Kenya. Other government agencies include the Kenya Film Classification Board, the Department of Film Services and the Ministry of Information Communication Technologies.

Increased Internet availability, and access to up-to-date technology for production, access and dissemination of copyright protected works such as film, have created opportunities and challenges in equal measures, and the role of copyright and related rights cannot be underestimated by stakeholders in the industry.

The booklet generally looks at the role of copyright in the growth and development of the audiovisual industry, the interplay between rights holders and users, as well as the commercialization of copyright and other related rights.

2.0 Copyright in the Audiovisual Industry

Copyright law protects original works of authorship, such as audio-visual works, (films, documentaries, television programmes and other audiovisual content) among others. In the audiovisual industry, there are several copyrighted works encompassed in a work, for example scripts, sound recordings, performances, musical works and artistic works.

The party with the right to derive revenue from the exploitation of audiovisual productions is the one that is going to make the money out of the product, irrespective of where the audiovisual work is produced, the content of the production and the nationality of the cast or crew working on the production. The contracts and secondary rights agreements then determine to whom these revenues are paid including distributors in the form of distribution fees and reimbursement of distribution costs, lenders for the repayment of loans, investors in the form of recoupment and profit participation and possibly profits shared with producers, performers, the director and writers. Certain members of the creative team might even be able to apply for monies from secondary rights collection sources.

2.1. How can I Protect my Audiovisual Work?

Copyright does not protect ideas, concepts, systems, or methods of doing something. It protects the expression of the idea once it has been reduced to tangible format. Unlike other intellectual property like trademarks and patents, registration is not a prerequisite to the granting of rights. Registration of copyright in Kenya is optional. It is mainly used to create and maintain a database of copyright and related rights in Kenya, and to enhance the protection of works through the use of the anti-piracy security device.

An audiovisual work typically contains different rights, which are acquired by the producer. The title on its own cannot be protected by copyright. Likewise, once a film is fixed in any tangible format, it is protected.

2.2. Do I Need to Register my Audiovisual Work to be Protected by Copyright?

Registration is not a pre-requisite for copyright protection. Several countries like Kenya have a voluntary copyright registration system, which in essence, is a notification system. It is mainly used for purposes of creating a database to help in the enforcement of rights.

At the international level, there is the International Standard Audiovisual Number (ISAN) which is a voluntary numbering system used to identify audiovisual works. This reference number is unique and permanent. It helps in distinguishing one audiovisual work from another. It is useful especially in cases where works have similar titles, or titles change, according to territories.

The ISAN may be used in digital databases, exchange of information including cataloging, collective management of rights and enforcement of rights. One can register through a regional ISAN registration Agency.²

“The ISAN code does not include any signifying elements. Its purpose is to uniquely identify the work, and always relates and provides descriptive information about the audiovisual content. It identifies works and not the rights holders. The ISAN code remains the same regardless of the format”¹

A good example of the use of ISAN would be in the case the ‘Harry Potter and the Philosopher’s Stone’ which had to be changed to Harry Potter and the Sorcerer’s Stone for the US market. The ISAN number would remain the same and would help in identifying the work even when the title changes. Another example is the American television series ‘Scandal’ where the name had to be changed to ‘The Fixer’ in South Africa as there was already a South African television series with the same name. The ISAN number would be useful to identify the works.

2.3. What Rights are Granted?

2.3.1 To the Producer of the audiovisual work

Copyright grants the rights to:

- a. **Reproduce** the audiovisual work in any manner or form including in the digital networks;
- b. **Sell the audiovisual work;**
- c. **Distribute, hire, rent** copies of the audiovisual to the public, including exhibition in film theatres, television channels and over the internet;
- d. **Communicate the audiovisual to the public**, including making available over digital networks by streaming, uploading onto various websites etc;
- e. **Translate or authorise a derivative work** from the audiovisual.

² See <http://www.isan.org>

These are known as economic rights.

Economic Rights

In the recent past, we have seen more Kenyan produced films like *“Kati Kati,” “From a Whisper,” “Fundi-Mentals* to name a few. For the producers enjoy the economic rights to authorize or prohibit others from selling, distributing in any manner or form (including online) communication to the public and reproducing their films.

In addition to the economic rights, there are rights known as moral rights. These rights include:

- a. The right to claim authorship of the audio visual works and be acknowledged as such; (Right of attribution)
- b. The right to object to any distortion, mutilation, modification or any other derogatory action in relation to the audiovisual works that may be prejudicial to his/her honor and reputation. (Right to integrity)

This means that even after the expiration of the copyright, no one can distort or change the audiovisual work in a manner that would be prejudicial to the author, and that authorship cannot be changed. It is notable that where the economic rights in the underlying works have been transferred, or acquired by the producer, the moral rights still remain with the author.

2.3.2 To the performer for the audiovisual performance

Performers in the audiovisual sector are also granted a comprehensive set of related rights (neighboring rights), which include:

- a. The right of recording (fixation) of their performance in the audiovisual work
- b. The right of reproduction of their previously recorded performance which had been recorded without their authority
- c. The right to rent for commercial purposes to the public original recordings and copies of their fixed performances
- d. Distribution of a fixation of their performances
- e. Making available of their fixed performances in the audiovisual work through different media including digital networks.

The performer also has the right to equitable remuneration where a recording of a performance is used for broadcasting or other communication to the public or is publicly performed.

This is collected through the performers' rights collective management organisation such as the Performers' Rights Society of Kenya (PRiSK).

Right to Equitable Remuneration

Even where the performer has transferred his/her exclusive rights to the producer, he/she is still entitled to what is known as equitable remuneration from the use the work such as online downloads, streaming, broadcasting and any other public performance of the work. So for instance, in the case of the hit television series "*Vioja Mahakamani*," the performers are entitled to an equitable remuneration, which shall be paid by the broadcasting organisation through the Performers' Rights Society of Kenya.

In addition to the above, the performer has the right to be identified as the performer in his/her performance and are entitled to seek relief connection with any distortion, mutilation or other modification of, and any other derogatory action in relation to his/her work, where such work would be or is prejudicial to his/her honor or reputation.

2.4. What are the Limits to Copyright Protection in the Audiovisual Sector?

There are certain circumstances recognized under the Second Schedule of Cap 130, whereby third parties may exercise these exclusive rights without the authority of the producer. For instance, where a film is used by a professor in an educational institution to teach a class on film making and the producer is acknowledged as the owner.

2.5. Who Can Own the Audiovisual Work and for How Long?

The Copyright Act recognises the producer of the film/audiovisual work as the author and the first owner of the work; he/she is the person under whom the arrangements for making the film were made. This is however subject to the contracts in the underlying works. For instance, the scriptwriter, score writer and performers sign contracts with the producer, which govern the transfer of rights to the producer. In case there are no contracts, the law presumes that they are commissioned, or works made for hire, and thus ownership automatically vests in the producer.

Copyright protection will last for fifty (50) years from the end of the year in which the audiovisual work was first made public or published. If a film was first published in 2015, copyright protection will last until 2065 after which the work will fall into public domain.

Term of Protection

The film 'The First Grader' was released in 2011, which means that copyright of this audiovisual work will be calculated for 50 years from the end of 2011, expiring on December 31, 2061. During this time, the producer, unless he/she has sold his/her rights to another party, has the exclusive right to allow or prohibit others from using his/her works, save under the exceptions and limitations provided for under the law.

2.6. Can the Rights be Transferred to Other Parties?

Since copyright is protected like any other property, it can be transferred from one party to another through sale, licences or inheritance. Economic rights can only be transferred by written contracts. The rights can be transferred as a bundle of rights, or specific rights, for instance, the owner can transfer the rights of distribution and retain the right of reproduction. The producer cannot transfer his/her moral rights.

Licences have to be in writing and they must have specific terms and conditions. For instance, the producer can licence the exhibition of the film in film theatres for a specific period of time and for determined consideration. They may also licence a third party to reproduce and make the film available to the public on a specific platform including streaming the content online. Most licensing agreements have provisions for payment of royalties for the use of the work.

Once the producer sells the audiovisual work, he/she cannot subsequently claim it and cannot control how the third party chooses to exploit it, as it is no longer his/her property. He/she retains the moral rights, as these are not transferrable. The assignment can be limited to certain rights but the terms have to be clearly stated in a written contract.

The performers or other performers in audiovisual performances can transfer their rights to the producer through written contracts.

Any assignment or transfer of rights from outside the country has to be verified through the Kenya Copyright Board. This ensures that the licences or assignments are genuine.

2.7. Infringement

Where someone, without the authority of the producer, his/her licensee or assignee makes copies of the film, distributes by way of sale, hire or public display through theatres, or communicates the works to the public on both digital and non-digital platforms, he/she is infringing on copyright and the owner can take legal action against her/him.

‘Piracy’ of Audiovisual Works

There are numerous examples in Kenya of infringement of audiovisual works. It is common to walk in the streets and find various traders, in shops and on the streets, selling films for which they do not have authority from the rights holders. A good example is the case of the film *“Nairobi Half life”*; thousands of infringing copies were available for purchase before the producers released it for sale or other forms of distribution.

2.8. How do I Enforce my Rights?

As the owner of the audiovisual work, one has several remedies under the law where infringement occurs.

2.8.1. Can I Sue for Infringement?

The right holder has the right to take legal action against the alleged infringer. Where a suit is filed, the rights holder can seek legal remedies such as injunctions to stop further infringement or may seek compensation including claiming damages, and accounts for profits, to compensate for any losses that might have occurred due to the infringement.

2.8.2. Can the Matter be Prosecuted in Court?

The law provides for criminal prosecution, and if the matter is successfully prosecuted, the infringer is liable to a fine not exceeding KES 800 000 or a jail term of up to 10 years or both. The infringer may report the matter to the police station or to the Kenya Copyright Board who will investigate and in the case of KECOBO, prosecute the matter in court.

2.8.3. Administrative Actions

For purposes of enforcement, the KECOBO has implemented the anti-piracy security device, which is a tamper proof sticker that is placed on legitimate film carriers.

It does not apply to digital copies, although the KECOBO is in the process of creating an online authentication system. Apart from enabling the categorization of genuine copies and pirated copies, the anti-piracy security devices aid law enforcement officers to conduct raids and seizures of suspected pirated works more effectively. The KECOBO is also able to prosecute those who sell films and other audio-visual works on their own motion.

2.8.4. Other Enforcement Actions

Training and awareness creation are an important tool in the enforcement of copyright in the audiovisual industry. There are several programs that are carried out by the Kenya Copyright Board and the Kenya Film Commission, in collaboration with the World Intellectual Property Organization (WIPO) to train both the rights holders, and users, on copyright and related rights. The industry organizations also play an important role.

The producers have also used technological protection measures to stop unauthorized reproduction and distribution of their audiovisual works, both online and in 'analogue' format. They are able to authorize access to the legitimate users through the provision of passwords, authorized decryption and other technologies.

Enforcing Rights

In a bid to fight piracy, an online producer has initiated training on the importance of safeguarding his audiovisual work from reaching pirates. He has also invested in the use of DVDs that cannot be copied, hence limiting piracy. The online platform has an encryption key, which prevents downloads ensuring that downloaded videos cannot be watched.

2.8.5. Alternative Dispute Resolution

Alternative dispute resolution is gaining traction in Kenya and is expeditious, and to a certain extent, more cost effective. The parties may have a mediation or arbitration clause in their contract and agree on alternative dispute resolution. Mediation provides the parties with an opportunity to discuss their issues before a third party, such as the Kenya Copyright Board, and come up with an agreement, as to settlement. If either party is not satisfied, they can take the matter to court. In the case of arbitration, the parties have to agree on the arbitrator and the decision of the arbitrator is final and binding.

The World Intellectual Property Organization (WIPO) Arbitration and Mediation Center was established to handle disputes, including those that arise from the audiovisual industry. In 2009, the Center launched the WIPO Film and Media Rules, specifically tailored to resolve disputes within the audiovisual and media sectors. The rules are available at www.wipo.int/amc/en/film/rules/. To deal with these disputes, the WIPO Film and Media Panel was established. Below are sample mediation and arbitration clauses that could be included in contracts where parties opt for mediation through the WIPO Mediation and Arbitration Center.

Sample Mediation Clause

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules for Film and Media. The place of mediation shall beThe language to be used in the mediation shall be English.”

Sample Arbitration Clause

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules for Film and Media. The arbitral tribunal shall consist of a sole arbitrator. The place of arbitration shall be The language to be used in the arbitral proceedings shall be English. The dispute, controversy or claim shall be decided in accordance with the law of”

2.9 What Are the Relevant Government Agencies?

The Kenya Copyright Board (KECOBO) is a state corporation established under Section 3 of the Copyright Act Cap 130 of the Laws of Kenya. It is mandated to administer and enforce copyright and related rights, including rights in audiovisual sector. The KECOBO registers copyright works, enforces the rights in the audiovisual industry through the administration of the anti-piracy security device, investigates and handles complaints on infringement, and prosecutes infringement cases. In addition KECOBO carries out awareness among rights holders and the public, licenses collective management organizations and offers free legal advice to the public on copyright law.

Registration enables the creation of a database of authors and further facilitates the implementation of the anti-piracy security devices, which can be used to identify infringing copies of works.

Kenya Film Commission is a state corporation under Ministry of Information and Communications and Technology. It was established in 2005 through the Legal notice No. 10 of 2005. The Commission is mandated to perform the following functions:

1. To advise the government and other relevant stakeholders on matters pertaining to development, co-ordination, regulation and promotion of the film industry in Kenya;
2. To facilitate the provision of content development, funding and investment for film projects;
3. To market Kenya as a centre for excellence in film production;
4. To facilitate proper keeping of film archives in Kenya;
5. To facilitate investment in the development of film industry infrastructure;

There are other government agencies that are involved in the development and regulation of the audiovisual industry, such as the Department of Film Service, the Kenya Film Classification Board, the Communications Authority and the ICT Authority.

3.0 How do I Manage and Negotiate my Rights Within the Audiovisual Industry?

3.1 Who do I Negotiate With?

The producer is generally the owner of copyright in a film. However, as stated earlier, there are several other rights incorporated in the film that are presumed transferred to the producers, unless there is a contract stating otherwise. In an instance whereby the scriptwriter writes the script under a contract for hire/ as an employee, the script belongs to the producer, and copyright would entirely be vested in him/her. Where there is an agreement to the effect that the scriptwriter does so independently, this would be a case of joint authorship of the copyright in the film.

3.1.1. Performers

Performers are usually hired on specific terms, and are paid accordingly. However, there are performers who get royalty payments based on the gross takings of the film. The rights of performers are protected under performer rights, represented by the Performing Rights Society of Kenya. The collecting society collects royalties for the public performance and broadcasting of their fixed performances. Payment of royalties is subject to agreements made between the performers and the production company in respect of a particular film.

Negotiations between Performers and Producers

The performers in an audiovisual work can negotiate with the producers as to the licensing or assignment of part or all their rights in the performance. Where they have assigned the right to broadcast, it is limited to the broadcasting organisation(s) as stated in the agreement. The authorisation to broadcast does not imply that the producer may make a fixation of the work. It is important for the performers to understand their rights under the law so that they can make informed decisions in relation to their performances.

3.1.2. Use of Music/Soundtracks in a Film

Producers of films have to obtain synchronisations rights for any music contained in the film. This may be done directly between the rights holder or through the collective management organization. In the case of an original score commissioned by the producer, the producer is presumed to be the owner of the music unless there was a contract indicating otherwise.

It is necessary to have a contract, with the use of the rights clearly stated, between the producer

and the composer/author of the music who has the ownership rights. It is important to indicate the author of the music/music score. Use of music without the authority of the owner amounts to copyright infringement and the producer is legally liable.

3.1.3. Derivative Works

Derivative works are new works that are created from pre-existing copyright works and include translations and adaptations. These include sequels, movies based on existing novels or plays among others. Since there is an underlying copyright work, it is important for the producer to get clearance to use the rights from the owners. However, the producer need not seek permission if the use falls within the exceptions and limitations such as fair dealing, for educational purposes etc.

3.1.4. Use of Works in Public Domain

If the work is in public domain, that is, the copyright has expired, or it is not protected in the country, or the owner has put it into public domain, the producer may use it without seeking authority. However, just as in the case of exceptions and limitations, the author of the work has to be acknowledged. There are instances where the copyright owner will renounce their copyright, in effect, placing the works in public domain.

Use of works in Public Domain

A film, documentary or television series that was first published in Kenya in 1963 fell into public domain in December 2013. That means a third party may use it without reference to the copyright owner but has to acknowledge the author. The local Kenyan film “*Malooned*” which was first published in 2007 will fall into public domain on December 31, 2057, meaning that the works may be used after that date without seeking permission from the producer or his/her heirs in title. It is only the economic rights that fall into public domain.

3.2. Transfer of Rights

3.2.1 Acquisition of Rights by Producer

As stated earlier, the producer needs to acquire the underlying rights for a film. It is important to note that while initially the producer could get blanket rights over the use of a work, with the ever-changing technology and new forms of dissemination and access to copyright protected works, it is important to have an exhaustive list to avoid any legal challenges once the film has been produced. This is often accomplished through the use of a phrase saying that the rights

are granted for “all forms of distribution now known or created in the future, in perpetuity, throughout the universe”.

The producer has an option to acquire a limited set of rights, or the owner may decide to licence different companies’ different sets of rights, with regard to his/her copyright protected work being incorporated into the film.

In the case of audiovisual performers, the economic rights may be transferred to the producer through contracts, which have to be in writing.

3.2.2. Assignment or Licence

An assignment results in the permanent and total transfer of the rights or set of rights. The producer who acquires the rights, through an assignment, owns the works and may deal with them as they please as long as they do not infringe, on the moral rights of the author. When acquiring rights, producers/production companies prefer assignments, as it gives them total control of the work, and they do not have to make any further reference to the author, as they fully own the work.

Licences on the other hand are for a specific period of time, subject to the terms and conditions set out in the licence agreement. The author still has control of the works and will usually be paid royalties for the use of the works and for the duration of the licence.

3.2.3. Reservation of Rights

As stated earlier, the producers cannot acquire moral rights as they are not transferrable in Kenya. In the case of books that are adapted into a motion picture, the author/owner of the rights may decide to reserve some rights such as the publishing rights. Both parties can reserve rights for instance with the agreement requiring the author not to exploit some specific rights for the duration of the licence, to enable the producer to maximize on the licence.

3.2.4. Acquisition of Rights – Distributer

Once the film is beyond the development stage, the producer may engage a distributor to distribute the works by assignment of licence. In some cases, the producers will have their own distribution section within the company and will not need to engage an outside distributor. It is important to note that there are different distribution channels, such as theatre, television, DVD, online distribution etc., and the producers may need to engage different distributors for the different segments. The distributor for purely economic reasons could try and get all the rights possible assigned to him or her, to maximise on profits. However, the producers should only licence what they think is necessary and retain the others. The main rights in the distribution of films are as hereunder;

- a. Theatrical: this is the right to exhibit or exploit the rights in commercial theatres/cinemas.

On the main screens is where blockbusters make their money. This dictates how the film will fare in other distribution channels;

- b. Online distribution, which includes streaming by broadcasting stations and online content providers;
- c. Video rights: these include the release on CDs and DVDs;
- d. Pay Television rights. It also includes video on demand which are services offered by pay television stations;
- e. Satellite television;
- f. Free-to air television ;
- g. Rental rights which include both physical copies and video on demand.

The licences are normally territorial as the market is segmented. The producer may thus licence different distributors for specific territories. The contract has to have very clear terms as to the rights and the territories to which the rights have been licensed or assigned.

3.2.5. Collective Licensing

There are instances where it is not possible to manage rights individually and the producer has to obtain the collective licence, as opposed to individual licences. This usually applies to the use of works in broadcasting by television stations, especially in the case of music that has been used. In the case of the audio-visual industry, the main rights collectively managed include cable retransmission rights and private copyright levies. In Kenya, the right to cable retransmission and video rentals and copying, may be exercised through collective management. Where the authors and performers have assigned these rights to the producer, the producer will collect the rights from the collective management organization. However, the authors and performers usually assign these rights to the collective management organisation.

Producers of audiovisual works in Kenya do not have a collective management organization. The authors and publishers can collect licenses through the relevant collecting society, but only in relation to the musical works within the audiovisual work.

3.3. Marketing and Distribution

There are different marketing strategies and distribution channels that the producer can use including, through third parties and agents. These include film and televisions festivals, engagement of sales agents, through television and cable networks, as well as online, using current digital technologies.

3.3.1. Sales Agents

Sales agents will work the film through the market, including festivals. Film festivals, including what is known as the Kenya International Film Festival, offer an opportunity to market the film. They also offer an opportunity to showcase the works at national, regional and international levels. The sales agents do not acquire the rights.

3.3.2. Exhibitors/Theatres

In the United States and other countries, how the film performs at the box office, as the first mode of distribution, determines the profits or otherwise. For successful films, the costs are more or less recovered by the box office sales. In Kenya, as there are few theatres and local productions that have been able to pull numbers at the box office as foreign films do, the film exhibitors/theatres play a nominal role in the distribution of films. The exhibitors/theatres have to obtain the relevant licenses from the producer. In most cases, the licences are limited to the theatrical release only.

3.3.3. Television Distribution

Television plays a significant role in distribution of audiovisual works. As they have to rely on sponsorships, and the cost of airing a production on television can be deemed to be quite prohibitive for local producers, the revenues from the television distribution are not significant. Cable distributors offer slightly more than other television companies. They, in some instances, commission producers to create content for them, and issues, as to who owns the copyright, often arise as they relate to exploitation of the work and territory.

3.3.4. Online Distribution

New media present great opportunities for the audiovisual sector although the revenue streams are still quite low. Availability and affordability of high speed Internet makes online distribution quite favourable. The online distribution contract should be clear as to the exploitation of the rights online. The use of technological protection measures is desirable to stop the unlawful access by third parties. Some of the online distribution channels include video on demand, streaming (advertisement supported) and subscriptions for download or streaming. The 'traditional' distribution channels are also using these new technologies to distribute content.

3.4. Chain of Title

It is important to ensure that there is a proper chain of title from production to distribution. Financial institutions, investors and distributors will require from the producers the following documents for the chain of title:

3.4.1. Pre-existing Works

Any copyright material previously published as a work that is incorporated into the audiovisual work should have the necessary clearances. Failure to get the clearance from the rights holders can cause financial loss if the copyright owner of the original work decides to sue for infringement of copyright. So, to adopt a book to a motion picture, it is important to have the authorization from the rights holder.

3.4.2. Music Licences and Clearances

For use of music, the producer has to obtain two licences: synchronisation rights which are the rights to use the music composition. These are usually obtained from the publisher through the collective management organization. The second right is the master use, right to use the recording of the music. These may be obtained from the relevant collective management organisations such as the Kenya Association of Music Producers (KAMP) and the Performers Rights Society of Kenya (PRISK) as well the collective management organization for authors, composers and publishers.³

This applies to any music that is used within the film, television program or documentary. For instance, music playing from the radio or other sound player in a particular scene requires a licence or clearance from the rights holder(s).

3.4.3. Still Photography and Clip Licences

A clip licence must be obtained when a previously recorded work is presented on television, in theatre, on a mobile device or in a film. This also applies to the use of a still photograph. However, this does not apply to use of still photographs or artwork that are incidental as this falls within the realm of exceptions to copyright.

3.4.4. Trademark Clearance

This is an area that requires attention, as it can be quite tricky. The use of products with their trademark clearly visible in the audiovisual work should be cleared with the trademark owner. They may object to the use of their trademark for various reasons such as dilution of the trademark, use in a manner that may be disparaging to the product or it may be seen as advertising and unfair competition. Use of a trademark in an incidental manner may also require a licence or clearance

3. These are the existing CMOs as at the time of publication

Incidental use of Trademarks

It is common these days to see the name, logo, or trademark of a particular product rendered not visible in audiovisual works to avoid having to get clearance for incidental use. For instance, the use of a particular beverage by participants in a talk show may be incidental but deemed provide an unfair advantage for the product. Another example is where an office scene has different office equipment such as computers and photocopiers. Most producers will ensure that the trademark is not visible.

3.4.5. Name, Story and Likeness

The use of copyright under fair dealing, such as reporting news may not apply in the case a person is defamed or his/her likeness or personal information is used, as it may infringe on the person's right to privacy or more recently, the right to publicity or image rights. It is advisable to avoid the use of the above.

3.4.6. Character Licences

Use of characters in an audiovisual work requires a licence from the author of the work. Due to the nature of the characters and the issue of determining ownership, most producers prefer creating and using their own characters.

3.4.6. When are Licences not Required?

Licences or clearance is not required when the work falls within what is defined as fair dealing under exceptions and limitations. Where works fall within the realm of public domain, a licence will not be required.

4.0 Glossary of Industry Terms

Above-the-Line Costs: Portion of the budget that covers major creative participants (writer, director, performers and producer) including script and story development costs.

Author: The person by whom the arrangements for the making of the film were made. Film is a collaborative process and it is common for two or more individuals to collaborate on the critical aspects of the film such as writing the screen-play, acquiring other intellectual property and retaining performers and crew. It is thus common to have joint authors in the film industry.

Below-The-Line Costs: The technical expenses and labour including set construction, crew, camera equipment, film stock, developing and printing.

Chain of Title: The documents and contracts that show how rights move from one party to another.

Completion Bond: A form of insurance, which guarantees financing to complete a film in the event that the producer exceeds the budget. Completion bonds are sometimes required by banks and investors to secure loans and investments in a production. Should a bond be invoked, the completion guarantor may assume control over the production and be in a recoupment position superior to all investors.

Co-Production: A production that combines inputs from more than one production company.

Cross Collateralization: Practice by which distributors off-set financial losses in one medium or market against revenue derived from others. For example, the rentals obtained from Kenya are combined with those from Uganda, and after the expenses for both are deducted, the remainder, if any, is net revenue.

Day to date: Simultaneous release of a film across multiple territories as well as multiple distribution platforms.

Distributor: A legal entity that distributes a motion picture, placing it in theatres and any media, and advertising and promoting it. He has the right to generate revenue from the copyright by releasing the film to the public or licensing the rights to others. The major studios nowadays are mostly in the business of financing and distributing films, leaving production to smaller independent companies.

Distribution Expenses: May include taxes, residuals, trade association dues, conversion/transmission costs, collection costs, checking costs, advertising and publicity costs, re-editing costs, print duplication, foreign version costs, transportation and shipping costs, and insurance.

Distribution: Distribution (of films) is the process of making a movie available for viewing by an audience. A film distributor determines the marketing strategy for the film, the media by which

the film is to be exhibited or made available for viewing, and who may set the release date and other matters. The film may be exhibited directly to the public either through a movie theatre or [television](#), or directly to mediums such as DVDs that allow for home viewing.

Droit d'auteur: Rights granted to authors which cover economic and moral rights such as the right to assert paternity and moral rights over the works he/she creates. Authors rights of civil law countries such as France, Spain, Senegal or Burkina Faso, is generally referred to in relation to “copyright” of the common law countries where it has a narrower meaning covering economic rights.

Executive Producer: Usually the producer whose principal task is the financing of the film.

Exclusive License: This means a license in writing signed by or on behalf of an owner or prospective owner of copyright or related rights, authorizing the licensee to the exclusion of all other persons, the right to use or exploit his work.

Final Cut: The right of the director, producer or financier or a combination of all three to approve the final shape and form of the film.

Feature Film: Full length, fictional films (not documentaries or shorts), generally for theatrical release.

Gap Financing: Finance usually debt against unsold territories.

Licence: A time limited grant of rights.

Line Producer: Non-creative work-for-hire producers responsible for managing the day-to-day production.

Overage: Any sums paid to any recipient of a film's revenues after recouping production costs and any sums payable to the financiers.

Pre-Production: The preparation and organisation of the film prior to the principle photography.

Producer: The person or company responsible for making the film and is usually the rights holder.

Production Company: The production company owns or licenses all of the intellectual property associated with the film. This includes the rights to use the script, the rights to the actor's performances, and licenses for all music.

Production Director: The production director could be an employee of a publication company or could be hired by an independent producer. He/she supervises the performers and directs the action in the production of a film or advertisement or other audiovisual work.

Stills: Photographs taken during production for use later in advertising and/or publicity. Stills should be in a horizontal format, and should list such information as film title, producer/director and cast below the photo.

Syndication: Distribution of motion pictures to independent commercial television stations on a regional basis.

Talent: The word used to describe those involved in the artistic aspects of filmmaking (i.e., writers, performers, directors) as opposed to the business people.

Synchronization Rights: This is the right to authorize the inclusion of musical works in audiovisual works such as feature films, documentaries, television programs, advertisements etc. These rights may be administered individually or publicly.



FILM PIRACY KILLS TALENT



Get us on:

Email: info@copyright.go.ke



: @KenyaCopyright



: KenyaCopyrightBoard

KECOBO HOTLINE: **0703885033**

J. Nyagah '17

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3. Koskinen-Olsson Tarja, *Study on Collective Negotiation of Rights and Collective Management of Rights in the Audiovisual Sector*,
4. http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_14/cdip_14_inf_2.pdf
5. Moullier Bertrand, Holmes Richard, *Rights Camera Action: IP Rights and the Film Making Process* WIPO Creative Industries Booklet 2
6. <http://www.wipo.int/publications/en/details.jsp?id=256&plang=EN>
7. Sihanya Ben, “Rights in Performance in Kenya” South African Intellectual Property Law Journal Volume 1 2013
8. http://www.iplaw.uct.ac.za/ipu/publications/sa_iplj
9. <https://www.aripo.org/>

Online Resources

1. International Standard Audiovisual Number <http://www.isan.org>
2. Kenya Copyright Board, <http://www.copyright.go.ke>
3. Kenya Film Commission: <http://www.kenyafilmcommission.com/>
4. Performers’ Rights Society of Kenya <http://www.prisk.or.ke/>
5. World Intellectual Property Organisation: <http://www.wipo.int/portal/en/index.html>
6. The African Regional Intellectual Property Organization (ARIPO): <https://www.aripo.org/>

Legal Instruments

1. Copyright Act Chapter 130 of the Laws of Kenya (as amended in 2014).
2. Copyright Regulations 2020.
3. Copyright (Collective Management Regulations) 2020.
4. Constitution of Kenya.

(Footnotes)

- 1 <http://www.isan.org/>

FOR FURTHER INFORMATION CONTACT:

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