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SCOPING STUDY ON STRENGTHENING AND DEVELOPMENT OF THE AUDIOVISUAL SECTOR IN BURKINA FASO AND CERTAIN AFRICAN COUNTRIES¹

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1. The Annex to this document contains a Scoping Study on Strengthening and Development of the Audiovisual Sector in Burkina Faso and Certain African Countries, undertaken in the context of the Project CDIP/9/13 approved by the Committee on Development and Intellectual Property (CDIP) in its Ninth Session, held in May 2012.

2. The study has been prepared by Messrs Bertrand Moullier, Owner of Narval Media, The United Kingdom, and Benoit Muller, Lawyer, Geneva bar, Switzerland, and evaluates the current role played by IP in the financing, production and distribution of audiovisual material in the three recipient countries, namely, Burkina Faso, Kenya and Senegal.

3. *The CDIP is invited to take note of the information contained in the Annex to this document.*

[Annex follows]

¹ The views expressed in this Study are those of the authors and do not necessarily reflect those of the WIPO Secretariat or any of the Organization's Member States.

OUTLINE

The study is part of the CDIP Project CDIP/9/13 and constitutes the first output of the Project. It constitutes an evaluation of the current role played by IP in the financing, production and distribution of audiovisual works in the three Project recipient countries and provides an assessment of IPR based transactions related to the film-making process; it assesses challenges and proposes solutions for the further effective use of intellectual property in this field.

Part One describes what can be referred to as the “international standard” in copyright-based transactions in the audiovisual sector. The purpose of describing such a standard in the context of the present study is to facilitate an objective assessment of what should be the priority areas on which the project could most helpfully be focused in order to support the development of a vibrant audiovisual sector in the countries concerned.

Part Two provides a snapshot assessment of the structural and copyright issues in the audiovisual sectors of the countries participating in the project (Burkina Faso, Kenya, Senegal). Comparing these assessments with the international standard described in Part I will help identify areas where international experience can help shape local strategies and practices adopted to the local context for maximizing the use of IP-based transactions and the underlying legal infrastructure to develop and strengthen the audiovisual sector.

Part Three then proposes conclusions and recommendations aimed at assisting the WIPO Secretariat and Member States in the scoping of project actions and deliverables leveraging international experience to the practical benefit of local needs.

PART ONE

How film industries utilize the IP rights infrastructure to develop, finance and distribute audiovisual works

1.1. INTRODUCTION

This first part provides an overview of the range of methods used by film and audiovisual production and distribution companies to make use of the legal infrastructure of intellectual property rights in order to develop, finance and distribute audiovisual works in all media.

Practices may vary between countries in the detail, especially where infrastructure such as national collective bargaining is in place to formalize and systematize (to a degree) some of the transactions based on copyright and other IP legislation relevant to the development, production and exploitation of films. However, over the past fifty years, as the film business has become progressively more globally inter-dependent, we have witnessed the emergence of what could reliably be described as an ‘international standard’ in the legal practice governing film transactions based on copyright and related rights. The standard has been developed empirically over time by private sector companies operating in the business of production and distribution of professionally-made filmed entertainment all over the world. It exists because it seems to constitute the most expedient and productive set of legal practices available to maximize the efficiency of transactions based on IP rights and protect the value of film as an economic asset.

1.2. The economic characteristics of the audiovisual work

Every film and other audiovisual work (hereafter “film”) made to the international standard is generally a compound of IP rights for which the producer (or his/her successor in the chain of title) needs to secure necessary consents and clearances before finalizing any transaction with distributors and/or aggregators of filmed content. Whilst the majority of those rights are related to copyright (e.g. fixation rights, reproduction rights, music synchronization rights, etc.), films also frequently require the clearance of other types of IP rights, such as trademarks appearing integrally in a film.

At the point of completion, a film’s economic value in the international marketplace is real only to the extent that the range of IP rights which enter into it have been cleared acquired and consolidated in the producer and/or his/her appointed commercial representative. The contractual paper trail evidencing this consolidation is referred to as “chain of title” and it is essential for anyone laying claim to control over the film to be able to produce such legal evidence. Without it, the film disintegrates as a creative asset and commercial exploitation may not take place under normal circumstances.

The protection of a completed film’s value as economic asset through chain of title documentation is all the more vital that a film is a creative product with an especially high profile of economic risk. In particular:

(a) Each film is a prototype product - unlike a car, a baby pram or a sewing machine, whose design and technology, once proven to attract the consumer, may be replicated in each new unit, no film ever completely resembles another. This factor means that the economic risk is always integral to each new film product. Large scale film companies such as Bollywood or

Hollywood major studios may have success mitigating this risk by developing “franchises”. These (e.g. Bollywood’s Dhoom I and Dhoom II, Hollywood’s Spiderman, X-men or Transformers) are well known to the consumer and provide a degree of standardization but these strategies are well beyond the reach of most film companies in smaller national film industries;

(b) Film is an “experience good”, i.e. one which the consumer can only assess after purchase. This characteristic is related to the nature of film as prototype;

(c) Film has very high fixed and “sunk” costs: the cost of producing a film does not vary according to the number of people who will eventually see it; these costs are fixed because they are dependent on what the script requires in order to bring the story to the screen. Sunk costs are those costs that may not be amortized if the film is abandoned during its production process. The labor cost of the writer and/or the director attached to the project in developing a screenplay, for instance, will not be recovered. Equally, if sets have been designed then abandoned, there is little potential for those to be re-used on another film because most production designs are bespoke to a specific story and style;

(d) Film has very high production costs: the average Bollywood film today is between \$800,000 and \$1.6 m, with some of the larger star-led productions reaching well over \$10 m. A Latin American production will typically be in the \$1 to \$3m bracket, whilst the average film made in the European Union will be around \$4.5 m, with prestige productions well over \$30 m. The much commented on ‘low-cost’ video-produced Nollywood film is comparatively cheaper at around \$20-25,000 average; however, considering the challenging conditions in the Nigerian and the pan-African market, this represents a level of investment risk comparable to that of independent film in other economic sub-regions of the world;

(e) Each film requires a high marketing spend to differentiate it effectively from other films in the marketplace and create audience awareness and ‘buzz’ ahead of it becoming available to the public. Whilst the enormous average costs of releasing a Hollywood blockbuster in the North American market are well documented - over \$100 m for the most expensive ‘tentpole’ movies - the lower figures for independent films in the rest of the world are still extremely high as regard to the far narrower potential market for most of these films;

(f) Film has low levels of price differentiation - a Bollywood blockbuster made at a cost of \$10 m or over will be retailed in the cinemas at the same ticket price as a small independent film made for a tenth of this budget, or less. An element of premium pricing does exist today for films distributed in 3D, and television license fees are markedly higher for hit films than for other films, but such differentiation is not the rule in the rest of the film value chain (e.g. DVD, Video-on-demand, etc.).

These characteristics support the conclusion that film is a high-value cultural artifact which is also a very high-risk economic product. In particular, the fact that films are expensive to make almost everywhere in the world, relative to local economic size, and that each film requires a new, original marketing campaign, with no guarantee of attracting audiences, compounds the risk factors and invites strategies which can share out the risk between a variety of investors.

1.3. The constellation of financing sources for audiovisual works

Film and audiovisual products in mature content industries is rarely ever financed through a single source of funds. Although some low budget “cultural” films in subsidy-rich states such as Europe’s Nordic countries may sometimes cover their costs entirely out of state aid, they are the exception rather than the norm. Another film industry with an unusual business model is Hollywood, where it is still frequent to see films’ individual budgets financed 100% by a single

studio, most often against ownership and control of copyright and all exploitation rights in all media worldwide. In this unusual model, the 'studio' takes 100% of the financial risk against 100% control over the financial upside, in order to minimize the risk and maximize opportunities to earn back its hefty investment. However, in this most commercially-driven of film industries, the considerable risk involved, mean studios will also be on the lookout for opportunities to take part of the financial risk off the balance sheet; they may do so by co-funding the most expensive effects-ridden and/or star-studded 'tentpole' films with another studio, generally against a proportional share out of control over worldwide copyright and exploitation rights;. However, in this most commercially-driven of the film industries, studios tend to co-fund the most expensive effects-ridden and/or star-studded 'tentpole' films with other studios in order to minimize financial risks, obtaining thereby a proportional share of the worldwide copyrights and exploitation rights. They may also look for outside equity partners or may offset some of the exploitation rights at an early stage to national distributors, in exchange for contractual commitments from these distributors to buy the finished film's rights for their territory.

Outside the studio system, the majority of film industries rely on a patchwork model for the financing of audiovisual content. The patchwork may have many components which can be fitted in distinct categories. Here are those most commonly found:

Private equity

Private equity may arise in the film industry through a variety of sources. Infrequently, the production company may hold sufficient assets to be able to put its own original contribution towards the cost of production, as recoupable investment. Firms specialized in channeling private equity in commercial and industrial ventures may also be a source. In some countries, public sector funding agencies add their contribution to a film's budget not as 'soft' money (i.e. recoupable only after the film's private sector contributions have been fully recouped), but on terms similar to that of private sector investors. In some film industries, the role directly played by private firms or high-net-worth individuals (in unrelated industries) can be substantial: some of the regional film industries in India (e.g. Tamil and Telegu language films) have attracted important investments from local industries at large, in spite of the high-risk profile of such investments.

In some regions of the world (Europe especially), national broadcasters have not only played a large part in financing local films through the pre-acquisition of broadcast rights, but have also contributed with additional funds as equity recoupable from other forms of exploitation of the finished film. Entities such as BBC Films in the UK or France 3 Cinéma in France continue to operate on this model.

Private equity is very often linked to national State aid policies. Where tax shelter measures exist to encourage investment in film, private firms in unrelated industries have a stronger incentive to invest in film production owing to the immediate fiscal write-off advantage.

Some film projects may have access to equity firms specializing in the film industry and sometimes acting as one-stop-shops. In a specific market, these firms may provide, for instance, hard equity as well as debt-financing; they may also offer to cash-flow any Government's tax credit available to the production. In times of strong economic growth, some of these firms may also offer "gap financing". This form of finance constitutes an advance (at risk) on part of the estimated value of the rights to the film in countries where those rights have yet to be sold. Gap financing, as the terminology indicates, covers the gap between the financing already in place (including executed pre-sales) and the budget necessary to make the film; it tends to be very expensive owing to the high risk involved. This practice has been significant, noticeably so for middlebrow Anglo-US independent films with expensive cast, but

the terms are generally expensive for the production and the current recessionary climate has meant a marked decline in this form of financing.

Debt

Debt-financing arises from traditional lending institutions such as private sector banks and occasionally from specialized lenders who also offer other types of financing to film producers (e.g. Equity, “gap”, etc.). There are very few banks throughout the world with specialized filmed entertainment divisions and the strong collateral requirements often makes it difficult for film makers to gain access to these facilities. The majority of banks only offer relatively short term cash-flow loans to bridge the temporal gap between a film starting production and the various funding partners cash-flowing their contributions, which may sometimes be after production has been completed. Cash-flow loans are generally reimbursable prior to the end of production and may indeed only be obtainable for the ‘pre-production’ stage.

Where production loans are concerned, in many cases, banks will lend against a charge on the copyright in the film, a transaction which entails the temporary transfer of ownership of the negative to the bank.

Bank loans are generally recoverable in “first position” from the first dollar of income from the exploitation of the film, before equity participants and other investors.

Participation/deferred payments

This form of film financing is part of the tool kit of independent film financing the world over. Very often, a project budgeted at a certain level may struggle to “close” its financing. In negotiations with funding sources, the producer(s) and director may find themselves under pressure to take a part - or the whole - of their fees out of the budget and into the back-end. This practice reduces the budget to be covered out of upfront investment but often puts these participants in a significant risk position - i.e. the film may not make enough money for them ever to recover their deferrals. To accommodate this factor, they may be in a position to negotiate an improved position in the film’s “revenue waterfall”. They may, for instance, obtain that they could recover up to a certain level of fees alongside the equity investors in the film. Whether such accommodations are obtainable or not depends largely on the bargaining power of the individuals or the production company itself.

Participation deals are also frequent where main cast is concerned. Independent films the world over often struggle to sign up significant stars owing to the size of their fees. Some commercially and artistically ambitious films thus struggle with a quandary: on the one hand, the film makers have certain creative ambitions which may not be compatible with attracting a mass audience - the presence of stars may mitigate this factor and make the project more “commercial”; on the other hand, having stars tends to push the budget beyond the point where investors would be confident to cover their risk, owing to the nature of the project. Offering the star the option of taking less upfront as salary, and more from the revenues generated latterly, by the finished film, offers one way out of this dilemma. However, in doing so, the stars effectively become co-owners of the IP in the film and their bargaining power means they are in a position to take a significant part of the film’s revenues (not just the deferred element of their salary but also additional reward for their risk).

State aid 1 - Direct funding

For the reasons outlined in Para 1 (above), film is a public good very often affected by market failure, meaning that the cost for the producer generally exceeds what revenues may

reasonably be generated. In many countries around the world, the idea of having a local industry with the capacity to turn in a critical mass of local films reflecting the local culture to local citizens is considered a worthwhile public interest objective. Accordingly, many countries have deployed policies designed to palliate partly to the market failure issue through redistributive mechanisms which ensure that film makers may find part of the funding necessary for production.

Broadly-speaking, State aid comes in two categories: selective and automatic. In selective funds, projects compete for funds on subjective merits assessed either by industry peers, or by civil servants or a mix of the both. This approach means effectively that the public fund makes a judgment call on the suitability of the project to a set of criteria. The criteria may be strictly cultural (i.e. the French "Avance Sur Recettes"), resulting in choices being guided by a sense that the project would contribute to the cultural life and may not otherwise be made through an appeal to the marketplace alone. Alternatively, the criteria may be commercially-driven, in which case the decision-makers will attempt to assess the project's ability to recover its costs and reach a substantial audience. In many cases, public funds work with a set of mixed criteria in which selected films are required to meet both cultural and commercial expectations, a brief which sometimes make the selection process somewhat political.

Automatic subsidy schemes generally reward film companies in *pro-rata* of the money generated by individual films at the cinema box office. This approach exists in France and Spain and there is a pan-European scheme (MEDIA Program) which rewards film distributors along similar lines.

State aid 2 - hypothecated tax, tax credits, rebates, etc.

Many national jurisdictions have adjusted their tax codes to make it possible for private sector companies and individuals to shelter taxable income through investment in film production. Amongst those are Canada, Brazil, France, the UK, Belgium and 42 of the states and territories of the United States to name a few. Brazil is an interesting paradigm for this model: local films qualifying under the tax breaks may cover a considerable proportion of their budgets through equity arising from big scale corporate sectors with large amounts of taxable revenue (e.g. Petrobras, Embraer).

Tax credits available directly to film productions do not involve third party investors. They are often a preferred choice of governments because they are seen as less open to distortion and abuse as tax shelter schemes. Under the tax credit systems, producers may receive a direct cash benefit corresponding to tax foregone by the fiscal agency over certain types of qualifying expenditures, mostly those relating to the direct costs of physical production.

State aid and official coproduction

There is an international dimension to State aid: many countries have established official bilateral co-production agreements/treaties. These formal agreements create a legally-binding template between sovereign states which effectively grant qualifying co-productions nationality status in both countries. The advantages of dual nationality is that the production is then qualified to received State aid from both countries, thereby increasing the pool of public sector equity (or tax credit/underwriting) available to fund the film's budget. The inconvenient is that transaction costs for co-productions (e.g. legal fees, administrative compliance, etc.) tend to be higher than for most purely national productions. They may also somewhat constrain the options available to the producers (locations, crew, post-production) as the agreements/treaties expect projects to strike a balance of spend in each country, more or less proportionally to their respective financial contributions. Official co-productions are nevertheless a proven positive

factor in the development of national film industries: they bring cash-strapped national films, additional opportunities for finance, secure distribution outside national borders and stimulated international cooperation.

Sponsorship and product placement

All over the world, high-value brands seek association with film and audiovisual works, which they see as an opportunity to associate their product with specific lifestyles and demographics. Big budget international productions (e.g. the James Bond franchise) often resort to this form of production funding and in recent years, some large corporations have even opened filmed entertainment divisions in order to gain control of the creative film projects they wished to link their product (e.g. Adidas with the football drama franchise *Goal!* 1 and 2). Sponsorship and product placement are also strongly developing film financing strands in the many developing countries with emergent mass consumer markets.

Pre-sales of rights

The pre-sale of rights is a mechanism whereby the film makers (or their designated sales agent) secure the commitment of a distributor (or a broadcaster, VoD platform, etc.) to acquire certain distribution rights in the film prior to the film being completed and delivered. The pre-sale contract, providing it comes from a *bona fide* distributor, may then be used by the film makers to secure bank financing (production loan) in order to complete the financing of the film's budget. Thus, the pre-sale illustrates the strategic role of IP in getting films actually made, as well as distributed. The ability to get distributors and/or distribution platforms involved in the project through the pre-sale of rights drives all other forms of finance into the project - though it is last on our list, the pre-sale is in fact the apex of the film financing system. Few film industries can claim to have reached maturity if they lack the market structures and copyright transaction practices which enable some of the rights in a film project to be offset prior to the end of production, against production financing.

The next section goes into more detail about the pre-sale and the important role it plays in the financing of many independent films.

1.4. Utilizing the IP infrastructure to develop, finance and distribute audio-visual works

1.4.1. Use of IP in the creative development of audiovisual works

One of the salient characteristics of the professionally-produced audiovisual work is the time and financial resources it takes to bring a project from initial idea to first day of filming. In the industry, this stage in the economic and creative cycle of a film's production is called "development". Development comprises all the tasks that go into turning an idea and/or source material (e.g. a literary or factual book, a theatrical play, a musical, a pre-existing film (remake rights) a magazine article, an original treatment or script, someone's life story, etc.) into the mobilization of creative, financial, technical and physical assets necessary to make a film/audiovisual work. Channeling resources into development is one of the key tenets of competitive conduct in the film industry, where there is an empirical connection between the care given to this part of the process and the capacity of the end product to attract an audience.

Central to development for a film/audiovisual production company is the ability to secure creative assets on an exclusive basis. At every step of the way, it is essential for the project to have clearly WRITTEN assignment/transfer or licensing agreements obtained for every of such

creative assets. One of the well-diagnosed issues of film production in Africa is the relative lack of a clear and harmonized set of legal practices which would permit the producer to establish unambiguously that he/she has indeed cleared the necessary rights to the creative components to enter into the finished film.

The most pivotal of those creative assets will be the underlying source material (i.e. a pre-existing work, very often a book or an existing screenplay). In order to secure such assets, the production is required to enter into contractual agreements with the owners of the pre-existing works so that intellectual property in the resulting project may be under their direct control.

In the case of underlying - or pre-existing - works, it is an established practice in the international standard that producers will take an "option" on the work rather than buying the rights from the very outset of the development process. In an option deal, the owners of the IP in the pre-existing work grant the film makers an exclusive right to be the only ones entitled to adapt and develop the work into a work of filmed entertainment. The advantage of the option is that it is a kind of half-way house in the development process and, as such, less expensive than purchasing the rights upfront. An option agreement will typically run for an initial period of eighteen months, renewable thereafter for shorter terms (e.g. a year, six months, etc.). The option agreement represents a creative adaptation of the legal infrastructure to the inevitable vagaries and uncertainties of the development process in the film industry: the majority of projects do not lead to the creation of the film and many projects are written-off fairly early in their development, because the film makers either realize that the material has poor potential as a feature film or cannot reconcile its ambitions with what the marketplace can offer in production funding. The ratio of projects going in development to projects being made into films varies from country to country. In Hollywood, the reported ratio is around one in ten for the studio system. Europe, with its well-developed State subsidy systems, may allow for a greater variety of projects to see the light of day, but the ratio remains at about one in five:]. Once the film company has acquired the certainty (or at least a reasonable belief) that the project is creatively and financially viable, they will have to acquire full rights to the project from the owners of the rights in the pre-existing work. From that point, and subject to specific accommodations in the assignment/transfer contract, the production may go ahead with turning development assets (e.g. a script, draft production sets' drawings based on authored designs, etc.) into a finished film.

The development process also entails the production of a script, or screenplay, which is itself a separate copyright work, whether it is an original work directly conceived for film, or is based on an underlying work. It is essential for a film company to develop the editorial and legal skillset necessary to spearhead this process, bearing in mind a strong script is one of the most potent creative assets a producer can muster at the point when he/she will be looking to get the project financed.

There are different legal doctrines and sets of practices around the development of a film's script. In the 'work for hire' doctrine (e.g. USA), the producer is the owner of the copyright in the script and commissions the script writer, whose work is remunerated as a technical service, not against the purchase of authorial rights.

Other jurisdictions may have a different approach. In 'droit d'auteur' countries, the authors' rights are generally vested in the script writer as a matter of legal presumption. Consequently, even if it is taking the financial risk on paying for the writer's time and expertise, the production company will take care not only to remunerate the service but to obtain the necessary transfer of rights in the screenplay from the writer. This may require two separate contracts: one for the work on the screenplay itself, and another one to take assignment/transfer or license of rights from the script writer as the author of his script, with attendant additional financial compensation.

In some countries, where collective bargaining structures are in place, the writer(s) as authors of the script used to make the film may also be entitled to a proportionate share of the revenues from the commercial exploitation of the finished film (often expressed as a percentage on net revenues, after deduction of sales costs, distributors' fees, etc.).

Films are often based on real lives, whether past or current. Clearing rights in such situations may involve a complex web of legal tasks: the rights related to a living person are not copyright-related but it is nonetheless important to ensure that the film may not be laid open to injunction based on a person's privacy rights, right to one's image, libel law, etc. The source material for a person's biographical information may be an existing copyright work e.g. press article, published biography, radio program, current affairs or documentary film which will require clearance and - where relevant - a purchase of rights.

The short scope of this study does not allow us to go into further detail about the legal intricacies of the development cycle in film making (e.g. pre-recorded music, production designs based on existing works, use of trademark objects in the frame, etc.). The overriding principle with all stages in the development process is that - in order to end up with a trade-able creative asset and begin the next stage of attracting production financing, the production company needs to observe stringent legal discipline: it needs to ensure all sets of IP rights entering into the project are either cleared - or at least clear-able at a later stage.

1.4.2. Uses of IP in the production financing of audiovisual works

In section 1 we provided an overview of the main sources of financing available in mature film industries. Outside of the world's two major studio systems (e.g. US, India), it is very rare that an average commercial film's budget made to a professional standard will be funded through a single source. Most films' budgets are raised through a patchwork of sources, which requires great entrepreneurial resourcefulness from the production company.

Once relevant underlying rights, performance rights, music, design and other relevant rights have been cleared, the production company - or its designated agent - is in a position to bring the project to national distributors, broadcasters and/or other platforms. At this point, the producer generally has a "package" consisting in a script (which may or may not be a last draft); he/she may also have some key cast attached to the project (subject to certain conditions e.g. start date, back-end revenue deal, etc.) and, in some cases, a director. The company may also have secured some non-rights based financing such as private equity or State aid, or an offer of discounted cash-flow on post-production, etc.

In the film financing ecology, the power of the project to attract pre-sale/distribution commitments ahead of production is not only key to obtain the financing; it is also indispensable in order to secure final commitment from most other sources. Equity investors, for instance, are usually not interested in a project unless they have sufficient guarantee that the film will achieve distribution. Moreover, it is by no means a safe bet to assume that distribution rights will be picked up once the film has been completed: many national film industries (e.g. Tamil or Telegu film production in India) are littered with films that - having somehow managed to be made without any pre-sale of distribution rights - end up gathering dust on a shelf because no distributors has picked up the finished product. The budget for the worldwide British hit film *The King's Speech* was a little over \$12 m. The film had an unusually high level of equity financing (over 60%, though some of it was straight debt financing) from London-based film financing firm Prescience Film Finance. A large part of the equity component in the film would not however have been secured had not the producers been able to secure pre-sales of distribution rights from two very senior companies in two key distribution territories: Momentum Pictures for the UK and The Weinstein Company for North America.

1.5. The key role of rights' transactions in the financing of film - case studies

The case study below, the 2012 Argentina/Spain/France production *Elefante Blanco* (White Elephant) combines three key sources of financing: public sector equity (state aid), deferred fees (producers taking part/whole of their fees out of the budget to be earned back from exploitation of the finished film) and pre-sales of relevant rights.

The film narrates, in a gritty social-realist style, the daily struggles of a committed urban priest in Buenos Aires and his complex relationship with a young social worker who does not share his religious convictions. Starring Ricardo Darin, a prominent Latin American film star became more global after the international success of the Oscar-winning *El Secreto de sus Ojos* (The Secret in their Eyes), *Elefante Blanco* is directed by the acclaimed Argentine director Pablo Trapero.

Case study 1: Financing plan - *Elefante Blanco*

Funding source	Type	Amount (€)	%
Public broadcaster Spain TVE	Pre-sale of broadcasting rights for Spain	600,000	18.75
ICAA, Spain	Public sector equity (national film institute)	753,000	23.53
INCAA, Argentina	Public sector agency equity	538,667	16.83
Patagonik Films, Argentina	Minimum guarantee payment against rights for Latin America	700,000	21.87
Full House Film, France	Third party French co-producer. Financial contribution only (subsidy)	250,000	7.81
Wild Bunch, France	Minimum guarantee payment from an international film sales company - against all rights to rest of the world outside Latin America	250,000	7.81
Deferred fees	Morena Films and Matanza/Patagonik producers' fees as the co-producers of the film	108,000	3.37
	Budget	3,200,000	

The State aid element has been amplified considerably in this case by the use of official co-production treaties which automatically granted the film Spanish, Argentine and French nationality, enabling the producers to receive subsidy in all three countries. The co-production strategy also allowed the producer to secure distribution rights on a pre-sale basis in the two majority co-producing partner countries (Argentina and Spain). In all, the choice of co-production delivered the producers a considerably higher budget than they would normally have been able to attract on this story, which is set entirely in an inner city area of Argentina's capital. Had it been confined to only raising its financing from Argentina, it is likely the budget of *Elefante Blanco* may have been 50% lower or more, owing to the limitations of the national market making it challenging for higher budget films to be economically sustainable.

With a co-production budget of €3.2 m, the film makers knew they could afford to deliver high production values, thereby increasing the likelihood of the film achieving widespread distribution internationally, outside the two co-producing countries

Elefante Blanco illustrates very vividly the strategic role of copyright-based transactions in enabling films to be financed and produced. The pre-sale element almost matches State aid from the co-producing countries' film agencies and covers nearly half of the budget (48.3%). Many funding agencies make their contribution conditional to the film companies securing such

pre-sales, in order to ensure that their investment benefits the public interest through the finished film reaching consumers. In this example, the pre-sales - or minimum guarantee payments set against certain rights - have ensured that the film would secure strong distribution in the co-production territories and elsewhere.

Our second case study, *Caramel* (Sukkar Banat), made full use of the cultural and commercial ties between Lebanon and France, utilizing seed money from the public sector to launch the project and attracting significant pre-sales of rights to finance the \$1.3 m budget.

Directed by first-time director Nadine Labaki, who also stars and wrote the script thanks to a development grant from the Cannes Film Festival organization, *Caramel* celebrates the resilience and life-affirming humor of a small group of Lebanese women whose world centers around a hair salon in Beirut. The vitality of the women is set against the on-going strife that has marred the country for decades, and presents a sunnier side of the Lebanese experience.

Case study 2: Financing plan - *Caramel*

Source	Type	Amount (€)	%
Fond Sud, France	State aid. French agency for films co-produced with developing countries	100,000	7.69
Agence Francophonie	State aid. International agency to promote French language & culture	25,000	1.92
Sabban Media	Pre-sale of cinema and video rights for the Arab world to leading film distributor	102,200	7.84
ART	Pre-sale of pan-Arab broadcasting rights to Middle-East satellite broadcaster	393,000	30.23
Roissy Films	Against sales mandate all rights to all territories outside France and middle-East	300,000	23.07
Bac Films	Pre-sale of cinema and video rights for France to leading French film distributor	200,000	15.38
ARTE	Pre-sale (license) of German and French satellite broadcast rights to the Franco-German public cultural channel	150,00	11.53
	Budget	1,300,000	

In the case of *Caramel*, 88% of the funds to cover the €1.3 m budget came from rights-based transactions, e.g. minimum guarantee payments against certain sets of rights, with only 9.6% from State aid sources. *Caramel* typifies the way in which film makers will make strategic use of the value of intellectual property to leverage finance and thus turn their creative visions into a marketable cultural product. By the time the financing was completed, the project's pre-sales ensured that the finished film would have distribution throughout the Arab world in all media (including pan-Arab broadcasting), France (cinemas, DVD and television), with an additional financial commitment from an international sales agent to negotiate distribution rights in other countries.

As with *Elefante Blanco*, the financing structure of *Caramel* itself built in an ambitious international distribution strategy. This effect, combined with the very positive critical reception, conspired to make the film a worldwide success: *Caramel* achieved a record-breaking 130,000 admissions in cinemas in Lebanon, garnered over \$700,000 at the US box office (a notoriously difficult market for foreign language films), and did extremely good business in Europe also.

Our third case study, the South African film *Otelo Burning*, combines some direct State aid with a government tax credit, private equity and a single large pre-sale. This film by writer/director Sara Blecher tells the tale of young Otelo, a young boy from a Durban township. He and his friends discover the exhilaration of surfing - a sport strictly forbidden to blacks during the dark days of Apartheid. Their joyous transgression through sport becomes a vibrant metaphor for the momentous change which overtook South African society and polity at the time of Nelson Mandela's liberation - the film's tense climax takes place on that historic day.

Case study 3: Financing plan - *Otelo Burning*

Source	Type	Amount (\$)	%
NFVF	State aid (equity). South African National Film & Video Foundation	234,000	18
Tax rebate	State aid. Cash-flowed rebate applies to local production spend (35% up to \$1m)	325,000	25
ETV or: [Undisclosed Broadcaster]	Pre-sale. Against all pan-African broadcast rights in perpetuity (+ some equity)	520,000	40
Private equity	Undisclosed	221,000	17
	Budget	1,300,000	

South Africa boasts a sophisticated set of public sector mechanisms to support local film production. For this, a film with a high budget by average African standards, 43% of the financing was secured through a direct equity investment by the State agency (NFVF), and additional cash-flow from the tax rebate facility. A further 17% came from a private equity source. Here, as in previous examples however, the film could not have been made, had it not been for the ability of the film makers to pre-sell rights in the film, through a single deal with a local private sector broadcasting organization, against a contribution worth 40% of the budget.

The financing of *Otelo Burning* thus illustrates the increasingly important role played by broadcasting rights in the financing of a growing number of films made in Africa. The relatively small cinema infrastructure and widespread piracy in the video market means opportunities for film producers to secure pre-sales for those sets of rights are scant. By contrast, commercial broadcasters, including national and pan-African satellite broadcasters, often boast good infrastructures, strong cash-flow and good professional standards in the acquisition of rights to content offered by third parties. This is also a very concentrated market with local monopolies at national level and a relatively small number of larger pan-African broadcasters - as a result, bargaining power tends to favor those entities who often pre-purchase African rights in perpetuity even when they are funding a relatively small proportion of the budget for the film.

1.6. Sound practices – the importance of copyright documentation [Chain of title]

The preceding section demonstrates the pivotal role played by rights related to copyright, not merely for the distribution and commercial exploitation of a finished film, but as a legal tool to actually raise financing from the distribution sector before a film is even put in production and completed. The ability to add the pre-sale of rights in a project to the arsenal of financing options is a salient component of the international standard. And for any pre-sale to occur, whether domestic or foreign, a film will depend on sound copyright documentation in order to

sustain its value as a creative package which can be turned into a valuable active economic asset and monetized accordingly. The international standard, which this chapter describes only cursorily, posits that sound legal practice in this area is the pre-condition for achieving economic success: whilst good copyright documentation does not guarantee that a film will attract audiences, its absence will most often make it unlikely that the film will be financed and produced; at the very least, it is unlikely that it would become commercially exploited without impediments which may include unwanted injunctions by aggrieved owners of rights in elements entering into the film (e.g. soundtrack, live performances, trademarks, underlying work, etc.). For film to yield economic value of any kind, rights must be demonstrably cleared.

Our short survey of the countries participating in WIPO's Development Agenda Project C4AC - Burkina Faso, Kenya and Senegal - in Part II of this report, highlights a common challenge, which many other WIPO Member States in the developing world share in various degrees. In all three countries, consistency and reliability in copyright chain of title practices on domestically-produced audiovisual works are often lacking. Whilst it would be inaccurate to suggest that the widespread adoption of best practice in chain of title would be sufficient to address the economic challenges of those countries' developing audiovisual sectors, there is no doubt that a high standard in this area is both a prerequisite for higher growth (especially in these as yet largely unexploited export and co-production opportunities) and an essential accompaniment to it.

A thorough and complete chain of title evidenced by written contracts and agreements protects the potential economic value of the audiovisual asset: an international distributor working to the international standard would not consider picking up rights to a film project or a finished film - even a very good film - with a patchy chain of title. Without evidence that the rights have been cleared (to the best knowledge of the producer selling the work), the distributor would not be able to ensure his purchase against the risk of a possible later claim by a rights holder, which may lead to the film not being legally exploitable in the territory for which the distributor would have acquired the film's rights. Conversely, best practice in this area helps make good audiovisual works more competitive, as compared to those over which legal certainty is not present.

In turn, best practice in chain of title documentation can mean more opportunities to exploit the audiovisual work across all the segments of the value chain, from the film theatre and/or the DVD market, through to free television and online VoD platforms. For some films, this could mean more revenues, which in turn, helps the production company underwrite the cost of acquiring the rights necessary for the creative development of new projects, commission original screenplays, buy film adaptation rights to a best-selling novel, etc. A professional standard in copyright documentation is also essential for production companies to attract bank financing, where the template for risk assessment is very rigorous.

In taking on the exciting challenge of developing their audiovisual sectors, the participating countries in WIPO's CDIP 9/13 Project may look forward to generating new virtuous effects by building professional skills in the use of copyright and related rights. Whilst the challenges involved in allowing their audiovisual sectors to fulfill their economic and cultural potential are numerous, and whilst many lie outside the intellectual property field, sustainable growth is realistic in the long run only if their film entrepreneurs are given the opportunity to be brought up to speed with the legal standards and practice which prevail in the global filmed entertainment sphere. Far from fostering cultural and creative uniformity, this international legal standard frees up film makers and gives them a wider range of options to turn their creative visions into valuable copyright assets.

PART TWO

ASSESSMENT OF THE ROLE OF INTELLECTUAL PROPERTY IN THE FINANCING, PRODUCTION AND DISTRIBUTION OF AUDIOVISUAL WORKS IN BURKINA FASO, KENYA AND SENEGAL

2.1. Methodology and disclaimer

We conducted desk research on copyright in the audiovisual sectors of Burkina Faso, Kenya and Senegal and addressed a questionnaire to and interviewed a number of key stakeholders, both government officials and audiovisual entrepreneurs.

Considering the short time available and the scarce availability of pertinent data, our findings are essentially empirical and do not pretend to be exhaustive or definitive; as such, this report stands to be supplemented or corrected as required.

We focused our research on the practical realities in the three targeted countries and our analysis on the challenges for using and managing copyright (to be understood as copyright and related rights) to the benefit of strengthening and developing these audiovisual sectors.

2.2. Key findings

a) Copyright only plays a marginal role in the financing and exploitation of audiovisual works produced in Burkina Faso, Kenya and Senegal.

b) Co-production and exploitation contracts with foreign producers and distributors are copyright-based but not always well understood.

c) Audiovisual stakeholders in the surveyed countries have limited awareness of copyright and lack access to specialized legal training, resources and counsel.

d) A more efficient use of copyright presents real opportunities but is underpinned by corresponding structural sector changes and new market opportunities.

e) In the presence of a talented and motivated new film maker generation, in the wake of new distribution opportunities on the Internet and political will to strengthen the production and availability of African audiovisual content, there is momentum for reviewing practices and considering a strategic utilization of copyright in the audiovisual sector.

2.3. Burkina Faso

2.3.1. *State-of-play of copyright in the audiovisual sector*

According to the *Bureau Burkinabe du Droit d'Auteur* (BBDA), statistics about the audiovisual sector in Burkina Faso and its utilization of copyright are not readily available. A number of stakeholders called for the generation of such data in support of the strengthening of the sector and to allow the evaluation of policies over time. There are ongoing projects at the sub-regional

level to develop a methodology for generating such data. Meanwhile, the BBDA makes available some data, namely on collection of fees and distribution of remuneration for collectively managed rights, which can be obtained for free following a dedicated procedure.

Burkina Faso is home to some of Africa's best known and legendary film makers such as Gaston Kaboré, Idrissa Ouedraogo, Perre Yameogo and Dani Kouaté. The majority of the production qualifies as *cinéma d'auteur*, characterized by scenarios inspired by cultural traditions and contemporary social realities, esthetic photography and long production cycles relying on public funding. More recently, a young generation using digital technology to produce faster and more at lower cost has been emerging, who according to established producers is full of talent but still has a way to go to meet commercially acceptable quality standards.

Ouagadougou hosts not only one of Africa's best known film schools but also the biannual FESPACO film festival, the most important gathering of the pan-African audiovisual sector taking place since the late 1960s, the 23rd edition of which took place on 23 February to 2 March 2013. In the framework of the FESPACO festival, attempts have been made to organize an African film market to facilitate co-productions, distribution arrangements and other transactions for exploiting African audiovisual works. Ouagadougou during FESPACO festival is the unavoidable meeting point of African cinema. Producers, distributors, sponsors, other professionals and officials meet and at times conclude transactions, but a structured and dynamic African film market comparable to leading international film markets has not fully developed and the number of deals materializing is not yet sustaining a pan-African market. Initiatives to further develop and structure FESPACO's African film market are on-going.

For most audiovisual sector stakeholders, copyright is still perceived as too abstract, with unrealistic revenue expectations by the collective management organization *Bureau Burkinabe du Droit d'Auteur* (BBDA) which cannot be fulfilled. The sector's reliance on public funding from Government and foreign sources, and in some cases co-productions with Europeans has to a large extent prevented the development of entrepreneurial copyright management practices such as copyright pre-sales or exploitation through licensing various platform and territorial distribution rights. Aware of the situation, Government and stakeholders are in the process of structuring the audiovisual market, including the creation of the *Centre National de la Cinématographie*, to further assist stakeholders raising finance, produce and exploit audiovisual works.

In some cases, contracts with contributors to audiovisual works such as performers are in oral rather than the prescribed written form, which casts unwelcome uncertainty on a work's chain of title necessary for its exploitation. Many contracts vest most exploitation rights in a foreign producer or distributor and fail to generate copyright-based production funding or exploitation revenue. Most works are not distributed and exploited to their full potential.

As noted by Burkina Faso's Minister for Culture Baba Hama at the launching conference held at FESPACO film festival in Ouagadougou on 26 February 2013, the project's aim to facilitate a focused and practical review of the utilization of copyright in the audiovisual sector is timely and responds to a pan-African vision for a truly emerging and financially sustainable audiovisual sector.

2.3.2. Copyright protection for audiovisual works under domestic law

Burkina Faso was part of the first wave of African countries adhering to the Berne Convention (1963) as well as to the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) since 1999. Burkina Faso signed the Beijing Treaty on Audiovisual Performances.

Audiovisual works, performances and videograms are specifically protected under Burkina Faso's Copyright Act (BFCA) entitled *Loi No. 032-99/AN du 22 décembre 1999 portant protection de la propriété littéraire et artistique* (Articles 5, 71 and 77 BFCA). The law is of civil and *droit d'auteur* conception and tradition. Authors enjoy moral rights (Articles 9 to 15 BFCA) and transferable exclusive economic rights (Articles 16 to 20 BFCA) including a right of communication to the public also covering the making available on the Internet, subject to exceptions (Article 21 BFCA).

Copyright ownership in an audiovisual work depends on the relations between its creators, the presence or not of a producer and/or work-for-hire, ranging from co-authorship (Articles 27 and 33 BFCA) to the producer or the publisher in case of a collective work or a producer-led audiovisual creation (Articles 28 and 59 BFCA) or the employer (Article 30 BFCA).

The term of protection is 70 years after the death of the last surviving author (Article 34 BFCA), 70 years after publication if a collective work (Article 35 BFCA) and 70 years after fixation for performances and videograms (Article 85 BFCA).

The Copyright Act contains a number of provisions on contracts involving copyright transactions, including general principles such as written form (Article 42 BFCA) and fair terms (Article 45 BFCA), provisions on publishing contracts (Articles 47 to 56 BFCA), performance contracts (Articles 57 to 58 BFCA) and audiovisual production contracts (Articles 57 to 67 BFCA).

The *Bureau Burkinabe du Droit d'Auteur* (BBDA) entrusted with serving as the country's only collective copyright management organization administers statutory licenses for the broadcasting and communication to the public of commercially published videograms (Article 79 BFCA) and private copy of audiovisual works (Article 82 BFCA). Expressions of cultural heritage are protected under the Copyright Act and the creation of works derived from there are by non-nationals are subject to the authorization of and payment of a fee to the BBDA (Articles 92 and 93 BFCA). Rights owners may voluntarily assign other copyrights to the BBDA for administration (Articles 95 and 96 BFCA) under a transparent, structured but highly complex distribution scheme².

The Copyright Act further provides for civil procedures and sanctions (Articles 98 to 105 BFCA), criminal sanctions and procedures (Articles 106 to 111 BFCA), including the protection of technological measures (Article 108 BFCA) and border measures (Articles 112 to 116 BFCA).

2.3.3. *Copyright in the market context*

Most audiovisual rights by law and in effect are collectively licensed through the BBDA and generate only limited revenue, representing a low 3% of total revenue from collective copyright management in Burkina Faso. Opportunities for raising finance and commercial exploitation supported by copyright transactions are unknown to and unexploited by most stakeholders except foreign co-producers.

Ouagadougou is among the few African cities that still have a number of operating movie theatres, although as elsewhere on the continent their number has been declining, with only a handful in Ouagadougou and Bobo-Dioulasso remaining. Both stakeholders and Government are involved in initiatives to maintain and develop the theatric exhibition park. Indigenous and other African productions tend to generate more audience than European, American or Indian

² Arrêté du 20 mars 2000 portant règlement de répartition des droits

movies. A number of stakeholders however pointed out that distribution could be optimized and that for a vibrant theatric exhibition market to exist there needs to be more investment in movie production resulting in a greater number of releases. Theatric exhibition rights are collectively managed by the BBDA and generate little revenue. Producers and distributors thus turn to sponsors and publicity as alternative sources of funding.

Distribution markets for DVDs and VCDs of domestic productions are suffering from piracy and hardly exist beyond a few video clubs in major cities, which generate only very little remuneration whether from sales revenue or rental rights collectively managed by the BBDA. Several attempts to commercialize a movie in DVD or VCD copies failed after pirated versions were available shortly after release of the genuine disks selling for less than one Euro, thus cannibalizing the market. The Government's steady resolve to address the piracy problem will hopefully bear results, but will require concerted efforts with neighboring countries to prevent the importation of pirate disks and the realization of other conditions essential for a legal market to develop.

The statutory license for broadcasting and other communications to the public of videograms (Article 79 BFCA) results in little market opportunities for exploiting audiovisual works on domestic television and the Internet. As is the case in other Francophone African countries, broadcasters pay a yearly fee to the BBDA against the authorization to broadcast any copyrighted content of their choice. Distribution of Burkina Faso audiovisual content on pan-African television channels is rare, but producers are increasingly looking for such opportunities and calling for an organized, concerted action to renegotiate broadcasters' licensing practices. Internet distribution sites for pan-African audiovisual content are emerging, both legal and illegal, but they are located in other countries and still mostly unavailable in Burkina Faso due to Internet connectivity not able to sustain downloading or streaming audiovisual content, a situation which can rapidly change. Many rights holders also have voluntarily assigned their online communication to the public rights to collective management by the BBDA but have not received any remuneration to date.

In face of the rapid penetration of digital video players and computers in Burkina Faso homes, the BBDA is among the continent's first collective management organization to perceive private copy remuneration, of which part is to compensate audiovisual rights holders. But the volume of the remuneration remains symbolic.

Untapped funding potentials, insufficient exploitation opportunities, piracy, and lack of copyright awareness in the production and financial sectors acting as a deterrent to audiovisual production and distribution, had already been identified at a colloquium at FESPACO film festival in 2011, and was again addressed and followed by political commitment to develop funding and distribution opportunities for African cinema at FESPACO 2013's colloquium on *African cinema and public policies*, see final declaration adopted under the stewardship of Ministers of Burkina Faso, Gabon and Mali, which the President of Burkina Faso, His Excellency Blaise Compaoré, committed to convey to African heads of State³.

³ <http://www.imagesfrancophones.org/ficheMurmure.php?no=11952>

2.4. Kenya

2.4.1. *State-of-play of copyright in the audiovisual sector*

According to the *Kenya Copyright Board* (KCB) reliable data about the domestic audiovisual sector is difficult to obtain considering the sector being partly in the informal economy. Unlike the situation in most Francophone African countries, Kenya's audiovisual sector including *Riverwood's* low budget productions distributed on DVD in short production/sales cycles, rather compares to Nigeria's *Nollywood*. A number of established producers realize works subject to more developed copyright transactions, such as the recent success movie *Nairobi Half Life*. Productions are mostly self-financed, without Kenyan Government funding, in some cases subsidized by European funds. A range of government agencies have responsibility for supporting the audiovisual sector, and a number of stakeholders have called for their rationalization.

While contracts between the producer and other rights owners are generally in written form, pre-sales of distribution rights and other copyright-based funding opportunities are only marginally exploited. Many audiovisual works and most transactions are not notified to the *Copyright Register*. Rights holders in general only become aware of the importance and meaning of copyright in case of disputes. Most stakeholders lack awareness about copyright and related commercial exploitation opportunities and practices.

Recent developments, such as increasing interest from television broadcasters for Kenyan audiovisual content, the growing Diaspora market, and the aspiration to rise production funding and quality, have led the sector to realize the strategic importance of copyright. In particular, producers became aware of the importance to secure the *chain of title* clearing all copyrights and other rights with the movie's contributors in order to be able to exploit the work with local and foreign distributors.

The Kenyan Government is committed to strengthening and developing its audiovisual sector with the pan-African objective to generate more screenings and distribution of African productions, and is thus favorably disposed to the project's objective of facilitating a more effective utilization of copyright in the audiovisual sector. Many observe that the Kenyan audiovisual sector is creatively vibrant and has great economic potential, calling for immediate action to establish the copyright foundations and practices necessary for materializing domestic and foreign exploitation opportunities.

According to the WIPO-commissioned study on the Economic Contribution of Copyright-based Industries in Kenya of 2009, the core copyright industries, of which motion pictures and video are part, contributed KSH 36.94 billion corresponding to 2.17% of Kenya's GDP and employed 22.799 people or 1.2% of the total national workforce⁴. However, as the WIPO study further reveals, the audiovisual sector's contribution is significantly lower than that of other core copyright industries such as book publishing, an indication of an untapped potential as the audiovisual sector to a large extent is still part of the informal economy.

According to the *Kenya Film Commission* (KFC), the local film industry regulator, if all facilitative aspects of the industry were in place, Kenya could be making over KSHs 40 billion annually. However, with little exploitation of the sector, Kenya raked in about KSHs 3.5 billion in the year 2007 alone from a few feature movies⁵. KFC was formed to facilitate the screening and filming

⁴ http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_ke.pdf

⁵ See WIPO study, page 86

of Kenyan film production. It exists to support local film producers by providing them with structures necessary for film production. It also organizes educational workshops on production, targeting local film producers to build their capacity in film production⁶.

The WIPO study, in 2009, concluded:

“Existing policies should be strengthened to streamline the operations of copyright-based industries in order to promote the growth and development of these industries. Adequate policies will enable the government to capture the contribution of these industries and ultimately lead to deepened recognition of their importance in the national economy. In addition, a proactive approach is necessary to promote the copyright-based industries given their significant contribution to the national economy, especially in terms of employment. Creative Industries are doing better than the overall national economy.”

2.4.2. Copyright protection for audiovisual works under domestic law

Kenya joined the Berne Convention in 1993 but has not yet acceded to the WIPO Internet Treaties, the WCT and the WPPT. Its Copyright Act nevertheless protects technological measures and rights management information (Article 35.3). Kenya signed the Beijing Treaty on Audiovisual Performances.

Kenya’s copyright framework consists of the *Copyright Act 2001* (KCA) and the *Copyright Regulations 2011 and 2004* (KCR). The KCA is of Anglo-Saxon *copyright* tradition and under the supervision of the *Copyright Board* includes a member nominated by registered filming associations (Article 6.1.d).

Audiovisual works and performances specifically enjoy copyright protection (Articles 2.1.f; 22.1.d; 30 KCA). Rights respectively belong to the author, the producer or the employer (Article 31.1 and 32.1 KCA) and the performer (Article 30.1 KCA).

The term of protection is 50 years after the end or publication of the work (Article 23.2 KCA) or after the performance took place (Article 30.4 KCA) and rights holders enjoy exclusive rights subject to statutory and *fair dealing* exceptions (Article 26 KCA), which can be assigned and licensed (Article 33 KCA).

The Copyright Act further contains sections on infringement, inspection, public domain and collective administration of copyright. The Copyright Regulations set out detailed provisions implementing the Act, including with respect to the use of folklore in a creative work subject to the permission of and payment of a fee to the KCB (Article 20 KCR) and procedures for registering works and copyright transactions in the *Copyright Register*.

2.4.3. Copyright in the market context

Copyright is not sufficiently valued and exploited as an asset in the audiovisual sector. Its linkage to financing is little understood and rarely utilized. Financial institutions lack any knowledge and experience financing audiovisual productions. Copyright is part of film teaching in two Kenyan universities. The Government also funds the organization of a yearly film festival, yet another opportunity to build awareness and foster a strategic utilization of copyright in the audiovisual sector.

⁶ Idem, page 91

With a partly Anglophone production and a vast Diaspora, the Kenyan audiovisual sector has started to realize the potential of global markets, but is yet looking for the best opportunities to exploit the potential of DVD/VCD, television and Internet distribution. However, monetization of copyright transactions needs to be matched with the development of corresponding market opportunities, in particular more and better valued broadcasting of African content and the expansion of theatric exhibition opportunities on the continent. High penetration of mobile devices constitutes additional audiovisual content consumption opportunities, both legal and illegal.

The theatric exhibition market exists but is on the decline. Without sufficient revenue to operate on a profitable basis, many movie theatres are converted into places of worship. The vast majority of domestic productions lack the financial resources required to market the movie, thus resulting in poor audiences and too short screening periods to make a profit. Several stakeholders called for a concerted effort to boost demand and theatric exhibition revenue opportunities across the country.

Piracy is undermining the DVD/VCD market as well as theatric exhibition opportunities. As is the case in other countries, Government and stakeholders face a chicken-and-the-egg dilemma: piracy cannot be eradicated unless there is a legal market; a legal market cannot develop when pirated copies are widespread, very cheap and easy to buy. The *Film Classification Board* imposed holograms on disks for sale are reportedly easy to obtain without any license to distribute the work, and some have suggested improving the system restricting distribution of the holograms to the producer and undertaking a concerted effort to better organize the legal distribution market towards greater sales volumes at lower prices.

As national broadcasters have tended to prefer popular foreign content, Kenyan works have had little television licensing opportunities. The recent surge for popular Kenyan drama in some cases co-produced and pre-financed by a pan-African broadcaster and the imminent migration to digital TV are changing the landscape and may provide new opportunities for channels and African content alike.

Online consumption of movies is progressively penetrating the Kenyan market as broadband connection becomes available. Foreign pay-per-view websites are increasingly interested in Kenyan content. But illegal online access to Kenyan works is equally fast developing and threatening these works' exploitation potential. The sector is very aware of the importance to develop clear business models to reap the online potential. The development of digital rights exploitation strategies in the audiovisual sector is somewhat constraint by uncertain communication to the public/making available rights under Kenyan law and Kenya not having acceded to the WIPO Internet Treaties. In the absence of a predictable domestic online market and national treatment protection abroad, the audiovisual sector risks remaining at a competitive disadvantage in the global marketplace and exposed to free-riding translating in missed business opportunities, at home and abroad.

2.5. Senegal

2.5.1. *State-of-play of copyright in the audiovisual sector*

According to the *Direction de la Cinématographie*, statistical data on the Senegalese audiovisual sector and its utilization of copyright is not available. The Senegalese audiovisual sector is among Africa's most talented, as evidenced by Alain Gomis' *Tey* and Moussa Touré's *La Pirogue* winning two of the three top FESPACO 2013 awards and Saul Willians winning the best actor award for his performance in *Tey*. It is characterized by a rich, diverse and creative

talent base and the focus of an important will to reform and restructure towards sustainability and growth. But the sector is constrained by a lack of domestic market opportunities for the commercial exploitation of audiovisual works, thus limiting the potential and number of producers and other audiovisual professionals.

Despite the obligation to register copyright transactions in the *Registre public de la cinématographie et de l'audiovisuel*, little information on such transactions exists. Most audiovisual copyright owners reportedly do not receive any remuneration from the collective management organization *Bureau Sénégalais du Droit d'Auteur* (BSDA). Piracy, unlicensed broadcasting and lack of professionalism in the audiovisual sector are major challenges for an effective utilization of copyright.

Copyright only plays a marginal role in the stages of development and exploitation of Senegalese movies, documentaries and TV content. For most works the director acting as an executive producer typically concludes “upstream” copyright transactions with the author of the work (in case of an adaptation from an existing literary work), the author of the screenplay, (unless the producer is himself the author), actors and technicians. In most cases, these contracts are in the form of a work-for-hire or all rights transfer against a lump sum, with some authors and directors on a royalty basis. These contracts are generally simple, since the exploitation of most performers’ as well as authors’ rights is subject to collective management by the BSDA.

The producer only rarely exploits copyright “downstream” to pre-sell distribution rights or otherwise raise finance, unless it is a foreign co-producer typically attracting co-production or support from a foreign broadcaster or sponsor, or in case of co-productions with a local broadcaster. Rights owners generally do not receive revenues from the exploitation of their copyrights and lack the resources and solutions to combat the illegal distribution and exploitation of their works.

As a result, audiovisual productions are essentially financed by private equity, local and European grants, which take years to secure, in most cases not generating large enough budgets to produce state-of-the-art works capable of competing on the global market and revenues insufficient to remunerate a self-sustainable industry. Therefore, most successful Senegalese rights owners work with a foreign co-producer and/or register their works with a foreign collective management organization.

The Senegalese Government is committed to supporting the development, professionalization and funding of the audiovisual sector, including through a review of copyright practices, in particular in the fields of collective management and in the digital environment.

2.5.2. Copyright protection for audiovisual works under domestic law

Senegal is a long-time member of the Berne Convention (since 1962) and one of the early African countries to adhere to the WIPO Internet Treaties, the Copyright Treaty (WCT) as well as the WIPO Performances and Phonograms Treaty (WPPT) (since 2002). Senegal signed the Beijing Treaty on Audiovisual Performances.

The Senegalese Copyright Act (SCA), *Loi No. 2008-09 du 25 janvier 2008 sur le droit d'auteur et les droits voisins*, aims to implement the WIPO Internet Treaties as well as WTO Trade-Related Aspects in Intellectual Property Agreement (TRIPS) obligations. Inspired by the French Copyright Act, Senegalese law is of civil law, *droit d'auteur* conception and tradition.

Senegalese law specifically protects audiovisual works (Articles 6.5 and 26 SCA) and performances (Article 92 SCA), in both the traditional and online environment (Articles 27 to 37

SCA and Article 93 to 94), for a term of 70 years after death of the last surviving author (Article 52 SCA) and 50 year post fixation (Article 90) respectively, subject to exceptions (Articles 38 to 46 and 89), as well as technological protection measures (Article 125 SCA) and rights management information (Article 126 SCA). The law further contains procedural, enforcement and sanctions provisions aimed to fulfill TRIPS obligations (Articles 127 to 152).

The Copyright Act also includes rules governing certain contracts including publishing contracts (Articles 66 to 74 SCA), representation contracts (Articles 75 to 80 SCA) and audiovisual production contracts (Articles 81 to 85 SCA). The law provides for a rebuttable presumption of the transfer of rights to the producer (Article 82 SCA).

Senegalese law contains a statutory license for the communication to the public on any platform except the Internet of videograms published for commercial purposes against payment of an equitable remuneration to the collective management organization *Bureau Sénégalais du Droit d'Auteur* (BSDA) as determined by the *Commission Rémunération Equitable* (Article 100 SCA), which benefits broadcasting organizations which themselves enjoy exclusive rights on their programs (Article 101 SCA). Audiovisual copyright holders in principle are also entitled to remuneration from the private copy statutory license (Articles 103 and 104 SCA) and have the option to commission the collective management organization with the management of their other copyrights (Article 112 SCA). The exploitation in Senegal of works inspired by folklore or in the public domain after the expiration of the term of copyright protection is subject to declaration with the BSDA and payment of a fee determined by the Minister of Culture (Article 157 SCA). The law provides for a new collective management organization to be established under private law, but the necessary decree has not yet been promulgated.

2.5.3. Copyright in the market context

“Downstream” copyright transactions with distributors on various platforms are rare but may provide a real opportunity for the industry’s growth if corresponding market opportunities for the exploitation of audiovisual works on various distribution platforms materialize. Banks have no experience and are reluctant to finance production projects unless guaranteed with real property. A scenario re-writing and competition workshop organized by one of Senegal’s leading new generation audiovisual producer, Oumar Sall, the winner of FESPCO 2013’s top award *Etalon d’or* with Alain Gomis’ *Tey*, is exploring co-financing options with a distributor and could be a step towards preproduction financing through copyright licensing. Broadcasters taking financial returns in the production of televised plays in exchange for distribution rights is another new trend in the same direction.

As it is sadly the case across the continent, the number of movie theatres has been declining and there are not enough new releases to sustain a profitable theatric exhibition market. International award winning works such as *La Pirogue* by Moussa Touré with the intervention of European co-producers find their ways to distribution in European theatres; however the vast majority of the domestic production hardly ever makes it to a large screen and the public at large. Initiatives such as a yearly popular open-air festival in Dakar attracting more than eight thousand viewers a day, or the Government’s *Une Commune, Une Salle de Cinéma* program and plans for low-cost neighborhood theatres are promising, but only the re-building of a critical mass of exhibition theatres and a greater number of releases would allow a viable market. To tap into foreign exhibition opportunities, the technical quality of domestic works needs to correspond to international state-of-the art standards (difficult without adequate funding) and the sector’s relations with distributors need to be developed and optimized, including in the area of copyright awareness, strategic management and digital cinema.

Senegal’s two public and nine commercial broadcasters benefit from a statutory license for the broadcasting of published videograms (Article 100 of the Senegalese Copyright Act of 28

January 2008) in effect translating into the payment a single yearly fee to the BSDA for the use of the domestic and foreign repertoire under its administration. As a consequence, broadcasters have little incentive to invest in the production or purchase of broadcasting rights in domestic audiovisual works, with the exception of low budget but increasingly popular televised plays. Although television broadcasters are required to pay a remuneration of only 4% of their total budget to the BSDA for all copyright content part of their broadcasts, some are paying zero. The planned shift from analogue to digital television is set to change the landscape and stands under review by a dedicated *Commission nationale du numérique*. Certain pan-African broadcasters used to, but no longer do, pre-buy broadcasting rights in and/or regularly schedule African movies, on grounds that are not well understood in the audiovisual sector.

Worldwide exploitation rights of a significant number of top domestic titles were sold in perpetuity to foreign distributors, typically the director/producer's only solution for raising necessary funding for his next production. The scope and validity of these transfers and assignments are not always clear. Leading Senegalese directors observe their works being broadcast on domestic and foreign channels without their authorization and absent any remuneration.

A legal VCD/DVD market does hardly exist. There are only a very few sales or rental points in Dakar and other major cities, and then the repertoire is mostly international. Domestic productions lack any advertising budget and are typically released in a few hundred VCD or DVD copies, and transferred mostly hand-by-hand by the producer to other professionals or consumers. Only popular comic plays produced with the support of a broadcaster generate sufficient demand. In most cases, successful movies are available in cheap pirated copies on the streets less than a week after their release, and even in the same shops selling both legal and illegal copies. Despite the labeling of genuine disks, enforcement authorities are not in a position to effectively deal with piracy in the absence of accessible legal alternatives. Yet a legal market at prices customers can afford is unlikely to effectively compete with piracy. An attempt by the BSDA to turn sellers of pirated copies into sellers of legal copies wearing BSDA t-shirts in the streets failed to gain rights holders' support. Again, broad exploitation assignments to foreign distributors cast a doubt on and inhibit exploitation opportunities for some of the most well-known domestic works.

The streaming and downloading of audiovisual content are not yet available to most Senegalese residents. When available, Internet connections are still too slow and/or unreliable. But this situation may rapidly evolve, and Internet may soon become the main access point to domestic audiovisual works also to a local audience. Websites and online discussion forums offering illegal, free access to Senegalese audiovisual content are fast developing. Meanwhile, innovative online services in particular targeting a growing Diaspora market with high-speed Internet connections are developing, such as Dakar headquartered AfricaFilms.tv, a legal download and streaming website for films from/about Africa and the Diaspora, created with initial funding from the European Commission. Also, the BSDA collects fees and distributes royalties for online communication to the public of audiovisual works. The BSDA has licensing contracts with major multinational corporations, but the remuneration accruing to audiovisual rights holders is at best symbolic if at all existent. In light of this situation, it is high time for reviewing audiovisual stakeholders' opportunities to strategically manage and protect their Internet distribution and communication to the public rights.

Although the broadcasting and private copy of audiovisual works are subject to statutory licenses and other rights subject to voluntary assignment to collective management by the BSDA, remuneration of rights holders for such exploitation of their works is scarce. The situation prevailing for related rights to be cleared in audiovisual productions is unclear and uncertain to stakeholders. The on-going restructuring of the BSDA provides an opportunity to reconsider the scope and administration of audiovisual rights, subjected to compulsory and

facultative collective management, and to enhance the system in order to adequately remunerate rights holders.

Beyond the records and the assistance of the *Direction de la Cinématographie* and the BSDA, mechanisms facilitating audiovisual rights transactions, such as model contracts, industry conventions, collective negotiation, audiovisual rights sales points or rights transactions legal training initiatives are not sufficiently available or ill-adapted to market needs. Specialized legal counsel is not readily available and in most cases unaffordable. Co-productions with foreign producers often result in most exploitation rights being transferred abroad in exchange for funding; a situation that could evolve if domestic funding increases and copyrights are exploited more strategically. New trends and opportunities for pan-African co-productions equally presuppose copyright awareness and strategic management. The sector has been calling for the copyright framework to become fully operational and the establishment of a *Centre National de la Cinématographie* to provide further support.

PART THREE

CONCLUSIONS AND RECOMMENDATIONS

Based on identified challenges and opportunities for copyright utilization and management to the benefit of the strengthening and development of the audiovisual sector in Burkina Faso, Kenya and Senegal, we recommend that the WIPO Secretariat, in consultation with the National Project Coordinators in the target countries, design the workshops, online training module, collective management study and other project actions and deliverables, taking into account the following observations:

3.1. General strategic recommendations

- 1) A more efficient utilization and management of copyright presupposes structural market changes leading to the development of commercial exploitation opportunities. Whereas copyright is only a piece of the puzzle, a strategic review of copyright utilization in the domestic audiovisual sector and a comparative analysis with the practices and opportunities in leading foreign markets can act as a catalyst for addressing underlying market issues and developing domestic strategies adapted to the local context.
- 2) Greater awareness of the possibilities for a strategic use of copyright for the financing and exploitation of audiovisual works in an increasingly digital environment are indispensable ingredients for the development of professional and competitive production and financing capacities and for the full exploitation of audiovisual works' economic potential, domestically and abroad.
- 3) Where they exist, legal frameworks on copyright protection in the digital environment need to be made fully operational; where they do not exist, a revision of the legislation and ratification of WIPO Internet Treaties should be urgently considered as Internet legal and illegal distribution is rapidly changing the market.
- 4) Respect for and effective enforcement of copyright continues to be faced with a number of challenges, including the development of viable legal distribution channels capable of serving a population in remote areas and at prices customers can afford. But even if sales and rental prices are adapted to local purchasing power, a legal market can only develop if supported by steady enforcement against the importation and distribution of illegal copies.
- 5) As some of the first websites providing access to African movies are illegal, copyright enforcement should also consider the development in consultation with stakeholders of appropriate mechanisms, such as notice and take down procedures and cooperation with foreign countries where illegal websites are hosted, to protect audiovisual copyright on the Internet. Other forms of digital piracy, such as the free peer-to-peer passing on of audiovisual works on Internet discussion forums or mobile devices using Bluetooth technology also need to be addressed. Doubts about the enforceability of rights on any distribution platform threaten the value and economic exploitation potential of a work; if systemic, such doubts cast a severe shadow on the sustainable development of the sector as a whole.
- 6) Collective copyright management in the audiovisual sector should be reviewed and as required adapted to the digital environment, both to create market opportunities and empower the sector with exclusive rights where they can be commercially exploited, and to reform

collection and distribution models applicable to statutory licenses and rights voluntarily assigned to collective management in order to generate adequate remuneration for rights holders.

7) The financing of audiovisual production through the pre-sale of distribution rights is largely unknown, including to operators of funds and bankers. Producers, distributors, broadcasters and financial experts involved in or potentially capable of funding audiovisual productions would be more likely to engage in such transactions if aware of foreign market practices and empowered with tools to evaluate funding requests.

8) The exploitation of pan-African and foreign financing, production and distribution opportunities could benefit from increased management and legal support, both in terms of available resources and participation in pan-African and international film markets. Contractual practices should be assessed and improved in order to empower producers to exploit their works on various platforms and markets.

9) In coordination with on-going initiatives, a review of practices and the development of a process and methodology for more systematically gathering statistical data on the audiovisual sector and copyright transactions should be undertaken with a view to optimizing copyright management and facilitating an evaluation of strategies and policies on the utilization of copyright in the audiovisual sector over time.

10) The sector's motivations and ambitions, as well as the three governments' commitment and support, constitute ideal conditions to conduct training and case studies in search for solutions to the practical challenges facing the exploitation of audiovisual works and efficient copyright utilization, especially in digital media. Exposing the audiovisual sector's professionals and officials to the copyright practices in leading foreign audiovisual markets, contextualized case studies focused on raising production finance through copyright and a review of collective copyright management practices can help the development of market strategies and public policies adapted to the local context and global market.

3.2. Specific recommendations

Actions and deliverables should be designed to address the practical needs of the audiovisual production sector in the participating Member States, including the following objectives:

- (a) Through the apprenticeship of *chain of title best practice*, to support the evolution of these audiovisual production sectors towards a sustainable economic model capable of attracting inward investment into creative projects and monetizing films and other audiovisual works as economic assets at home and abroad;
- (b) To develop the sectors' skills in *financial management and accountancy*, where these intersect with copyright and chain of title, in order to help develop their capacity to monetize creative packages into exploitable copyright assets;
- (c) To stimulate *cross-border cooperation* between the audiovisual production industries of the participating Member States, with a specific focus on skills development in the area of copyright-based transactions for the co-development, co-production and coordinated exploitation of films and other audiovisual works;
- (d) To develop the sectors' skills in *using copyright-based transactions to sell and export* audiovisual works to foreign markets;

- (e) To develop the sector's skills in *copyright and licensing-based negotiations* with key buyers in the rights value chain (e.g. theatrical distributors, broadcasters, Internet VoD platforms);
- (f) To help foster an efficient and *integrated relationship between the audiovisual practitioners and relevant Collective Management Organizations (CMOs)* as links in the rights value chain, where collective management is the most appropriate approach to managing and monetizing rights on audiovisual works;

Based on the core objectives outlined above, the following modules should be considered as editorial priorities for the project:

- 1) **Module One:** Copyright documentation/chain of title - a skills' kit on the disciplines of clearance of rights in all creative elements entering into a finished film/audiovisual work, including talent agreements;
- 2) **Module Two:** Copyright-based transactions and financial/accountancy skills - focus on financial skillset production financing based on rights' pre-sales and other required elements; exploration of multi-party production finance agreements, the "revenue waterfall", deductions structures, the role of the collection agent, etc.;
- 3) **Module Three:** use of rights' based transactions in cross-border co-productions - how rights and copyright are split in co-productions, territorial exclusivities, etc.;
- 4) **Module Four:** selling rights internationally - the role of the sales agents; the territorial distribution agreement; rights-based transactions with international multi-territory platforms, etc.;
- 5) **Module Five:** the minutiae of licensing audiovisual works to broadcasters and other platforms - issues arising from blanket or compulsory licensing; term of license, revenue transparency - this module should involve acquisition executives in national public and commercial broadcasters and/or online platforms;
- 6) **Module Six:** the role of CMOs - understanding the secondary/tertiary rights' value chain; issues of data gathering and transparency; revenue collection challenges in relevant secondary markets (e.g. private shops, video clubs, etc.); using copyright documentation to claim revenue from foreign CMOs, etc.

These modules may be combined into different training sessions and should make use of case studies borrowed from local and international productions, designed within a variety of legal standards, budgets and production values, in order to illustrate the entire spectrum of practical issues linked to the use of copyright and related rights in the process of bringing a project to production and through to distribution.

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