

An Assessment of Artistic Freedom: Kenya





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Foreword

The year 2022 was significant for Selam; We celebrated our organisation's 25th anniversary, which gave us an opportunity to put together our five-year plan for the continent. This plan includes advocacy and lobbying strategies inspired by the African Union's Plan of Action on Cultural and Creative Industries, whose objectives include, among others, Fostering creativity and innovation for socio-political development, job and wealth creation, and Creating an enabling environment for the growth of Africa's cultural and creative industries. As part of our efforts to contribute to an enabling environment for creatives to freely express themselves, we carried out research in eight African countries to assess the state of artistic freedom in order to understand the lobbying and advocacy strategies required to advocate for creatives' freedom of expression.

The research was part of our Pan African Network for Artistic Freedom project, which was launched in 2021 to promote artistic rights through research, capacity building, network building, and lobbying governments for better policies for the sector. PANAF is being implemented in collaboration with culture and civil society organisations in Nigeria, Kenya, Rwanda, Ethiopia, Uganda, Mozambique, Zambia and the Gambia. The researchers examined the legal frameworks that govern artistic expression, identified the major government agencies, national stakeholders, and artistic unions to be engaged in the lobbying process, and provided an overview of how copyright laws protect artistic works and whether practising artists benefit from them.

The reports note that authorities limit this right across the eight countries, particularly with regard to artists perceived to be government critics. Through direct and indirect means, these artists' ability to perform, display, or disseminate their work is constrained. As a result, few artists remain willing to publicly express their critical opinions or explore contentious themes in their work as a result, and those who do risk facing harsh repercussions. The methods used by the authorities to stifle critical artistic expression, include harassment, intimidation, threats, interference, legal pressure, arrest, imprisonment, and torture with a majority of victims being musicians, film-makers and cartoonists. Finally, the report contains a number of recommendations to authorities and other stakeholders for concrete steps needed to improve the situation of artistic freedom of expression in each country. This report is very essential as it will help sustain Freedom of expression which is at the heart of artistic practice and mission. The sustainability of artistic freedom of expression is critical to the continent's democracy; increasing transparency and accountability within the governments and leaders.

Selam is proud of our partners and researchers for overcoming the challenges and completing this research, especially given the sensitivity of the subject matter. We also want to express our gratitude to all the stakeholders and artists who took part in the data collection process. And finally, the results and achievements of our work are simply not possible without the support of our donors, the Swedish Arts Council. To that end, Selam will continue to work with its partners and other cultural organisations to lobby governments to make it possible for artists to freely express themselves and distribute their work in the interests of socioeconomic development and job creation. In addition, this year will see the launch of a literature review and study to provide context for the challenges faced by women in the cultural and creative sectors, as well as feasible recommendations for achieving gender equality.



Teshome Wondimu

Founder and Executive Director - Selam
April, 2023





***Expression
is a Right***

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17. Peter Mudamba - Film
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19. Mwongela Kamenchu - Music
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Executive Summary

The research report delves into the issue of artistic freedom in Kenya, focusing on the right of Kenyan artists to seek, receive, and impart information and ideas of all kinds, regardless of frontiers. It provides an overview of both local and international legal frameworks that are applicable to artistic freedom of expression. The study highlights limitations to artistic freedom based on provided principles of legality, legitimacy, necessity, and proportionality.

The research examines the actions and inactions of the Kenyan government that encroach upon artistic freedom, specifically through restrictive legislation, ambiguous policies, and vague regulations. It explores the relationship between at-risk artists and the government and offers commentary on organizations offering support to at-risk artists. The study also investigates business practices that violate the human rights of artists in Kenya. It reveals how years of investing in building fan bases may be lost through policy processes that deny users appropriate protections, especially in the use of social media platforms.

Furthermore, the report analyses the gender imbalance, especially in leadership positions within the arts industry, with women's representation at the lowest or, in certain cases, none at all. This gender imbalance is a significant challenge to the promotion of artistic freedom in Kenya.

The research aims to provide the Pan African Network for Freedom of Expression (PANAF), artists, audiences, and advocates with knowledge and data on the state of artistic freedom in Kenya. This, in turn, presents opportunities to design, develop, and incubate programs that contribute to the promotion of artistic freedom ideals.

The study highlights that artistic freedom is a fundamental human right and is essential for the development of a vibrant arts and creative industry. However, in Kenya, artists face several challenges that limit their ability to exercise their artistic freedom fully. The report identifies these challenges and provides recommendations on how to address them.

One of the key recommendations is to engage with the government to ensure that the legal and regulatory framework for artistic freedom is in line with international human rights standards. This includes ensuring that laws and policies related to artistic freedom are not vague or overly restrictive. The report also recommends that artists and civil society organizations work together to advocate for the protection of artistic freedom.

The study examines the gender disparity in leadership positions within the culture industry, with some cases having no representation of women at all, or only a very minimal representation. Generally, the report suggests that there are prospects for creating, developing, and nurturing programs that will help promote the ideals of artistic freedom.



A handwritten signature in black ink, appearing to read 'Tabu Osusa'.

Tabu Osusa

Executive Director
Ketebul Music

Acronyms

CMO	Collective Management Organisation.
CAK	Communications Authority of Kenya
MCSK	Music Copyright Society of Kenya
NFT	Non-Fungible Token
KAMP	Kenya Association of Music Producers
KECOBO	Kenya Copyright Board
KFCB	Kenya Film Classification Board
KIPPRA	Kenya Institute of Public Policy Research & Analysis
PRISK	Performance Rights Society of Kenya
UN	United Nations
UNESCO	United Nations Educational Scientific & Cultural Organisation

Table of Contents

Executive Summary	7
1. Introduction to Political and Legal Factors Affecting Artistic Expression in Kenya	10
2. Legal Framework for artistic rights in Kenya	12
2.1. Introduction to National & International Legal Frameworks.	12
2.2 Primary & Secondary Analysis	14
2.3 Findings from Stakeholder Interviews.	17
3. Limitations to Artistic Freedom of Expression: Regulation of Online & Offline Content	20
4. Swot Analysis of CCIS Frameworks Regarding Artistic Freedom of Expression in Kenya	21
5. Threats to Artistic Freedoms in Kenya	22
6. Analysis of How at-Risk Artists Relate with the Government of Kenya	24
7. Organizations supporting at Risk Artists	26
8. Analysis of major Artist Associations in the Kenya Creative Sector	27
9. Gender Analysis & Role of Women in Major Artist Organizations	30
10. Analysis of Major Stakeholders to be Engaged by PANAF	32
11. How Copyright Law Protects Artistic Works in Kenya	35
12. Why artists are not benefiting from the Kenya Copyright Act	37
13. Conclusions & Recommendations: Gaps Presenting Potential Opportunities to Enhance Artistic Freedom	38
References	42

1. INTRODUCTION TO POLITICAL AND LEGAL FACTORS AFFECTING ARTISTIC EXPRESSION IN KENYA

This research promotes the empirical view that the rationale behind freedom of art is that art creates a platform for discussions within civil society, and civil society dialogue prepares the way for the further development of democratic constitutional rights. Kenyan artists have a deep history of contributing to Kenya's democratic processes. Unfortunately, Kenya presents a mixed bag of opportunities & threats as regards artistic expression. The research adopts the ideological view that Freedom of Artistic Expression prevents the State from interfering in artistic processes of production, distribution, and consumption. It obligates the Kenya government to protect this against interference by a third party and on a general level, it obligates the State to secure the availability of adequate material resources for the production, distribution, and consumption of art. The research adopts the opinion suggesting that Freedom of art prohibits prior censorship and other types of State manipulation, except the censorship of children's films, which is authorized by a special restrictive constitutional provision relating to freedom of expression. The Research also adopts the position that Freedom of art also limits legislators' power to enact criminal sanctions that seek to regulate the form, shape, or content of artistic expressions for example legislation concerning obscene or blasphemous expressions.

The Research uncovers that Kenya has a mixed bag of threats and opportunities related to artistic expression. A common view across various cultural sectors examined is that the most limiting factor to artistic freedom is the low and fluctuating income of professional artists in Kenya.

The Kenya Cultural Market presents a mixed bag of threats and opportunities as a result of the context in which international & regional laws that seek to promote artistic freedom including the right to create without censorship and intimidation have been domestically implemented. The Kenya market presents empirical challenges related to the right to have one artistic work supported, distributed, and remunerated. There is a big threat presented by how the economic and social-cultural rights of Kenyan artists are being protected. Insecurity also presents a threat to the diversity of Kenyan artists. The willingness to take artistic risks and fully use their freedom of expression can be linked to a lack of appropriate legal protections against hatred and online harassment.

Kenya has laws that deal with criminal behavior including hate speech that incites violence. Kenya has laws that protect children from harmful content. Other laws such as those dealing with libel, insult, and slander exist. Kenya has also in recent years enacted and amended laws related to terrorism & public security. These laws have traditionally presented problematic situations for journalists and artists who were affected by the criminal nature of sanctions-related breaches associated with expression issues. It is thus a positive thing that Kenya declared laws that were criminalizing defamatory conduct unconstitutional.¹ This was a great victory for artistic expression since the threat of criminal defamation prosecution was a great hindrance to journalistic & artistic expression. Unfortunately, Kenya seems to have reintroduced the criminalization of defamatory acts through the Computer Misuse & Cyber Crimes Act.

There is evidence that a wide range of actors in Kenya has created obstacles or imposed restrictions on some aspects of artistic expression & creativity. This includes the State and non-State actors in their spheres of influence. These actors include mass media; broadcasting; telecommunications, internet, and production companies; educational institutions; extremists; organized crime; religious authorities; traditional community leaders; corporations; social media companies; distribution companies; retailers; sponsors as well as civil society groups such as parents & religious associations. Homophobia appears to be deeply rooted within Kenyan religious and political rhetoric. This long history of state-sponsored discrimination is compounded by confusion brought about by conflicting judicial decisions as regards discrimination and violations against LGBTQ Kenyans.

1 Constitutional Petition No 397 of 2016 Jaqueline Okuta & Jackson Njeru Versus AG & DPP



**Say no to
~~Censorship~~**

2. LEGAL FRAMEWORK FOR ARTISTIC FREEDOM OF EXPRESSION IN KENYA

2.1 Introduction to National & International Legal Frameworks

Analysis of the legal framework for artistic expression in Kenya is founded on the deep-seated need to analytically review the historical developments related to Kenya's legal policies regarding artists and their expressions. The Constitution of Kenya recognizes international law and provides that it is part and parcel of Kenyan law. The domestication and application of international & regional laws and policies around freedom of expression & intellectual property and how artistic rights are expressed are responsible for the current state of Freedom of Artistic Expression in Kenya. The research analyzes how the constitution and law regarding freedom of expression have been implemented since August 2010. It also examines the threats and opportunities presented by the application of Copyright law in Kenya as regards the economic aspects of the creation, ownership & distribution of works to determine the legal and economic effects of Kenya copyright in contributing to the general proposition that the most limiting factor to artistic freedom in Kenya today is the low and fluctuating income of professional Kenyan artists.

a. Components of the Rights to Artistic Freedom of Expression

Kenya is a signatory to the conventions related to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). The Constitution of Kenya draws verbatim from the provisions of these international laws. The freedom of opinion under Article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) is an absolute right, not subject to any interference. Article 19 of the Universal Declaration also promises the protection of the right to seek, receive and impart information and ideas through any media, while Article 19(2) of the ICCPR expressly provides that the right includes the expression "orally, in writing or print, in the form of art, or through any other media" Article 33 of the Constitution of Kenya 2010 gives strong protection to the right to freedom of expression, subject to the exclusions of Article 33(2). Article 34 protects freedom of the media, and Article 35 protects access to information.

According to various reports by the United Nations, there is empirical evidence to support the proposition that Artistic freedom exists within, and is protected by, a framework of interconnected rights, including privacy, freedom of thought, conscience and religion and belief, association and assembly, and participation in cultural life. According to various UN sources, Artistic expressions are present in public, political, religious & commercial life. In a nutshell, these reports assert that every human being enjoys the right to freedom of expression and creativity to participate in cultural life and to enjoy the arts.

The spectrum of artistic expression is wide and dynamic, ever-changing, and expanding, and cannot be limited by some kind of transactional definition. Moreover, Article 19 of the ICCPR protects expressive media and, in the context of art, refers to "the form of art". This language avoids the difficult, often deeply contested, and subjective problems of definition ('what is art?') by instead focusing on the expression's form. Put another way, whether one is considering painting, music, sculpture, film, photography, cartooning, performance, drama, comedy, or any other discipline (or non-discipline), digital or otherwise (and forms that cannot be identified or articulated today), the question is not, 'does this media have artistic merit or qualify as art?' Neither is it a value judgment ('is it good?' or 'is it of social benefit?'). On the contrary, Article 19(2) must be read to govern expression through any media, including artistic forms, regardless of how art itself is defined or evaluated. One cannot deprive a particular expressive work of protection by calling it, for instance, propaganda. Human rights law neither preferences nor prioritizes certain forms of expression over others; all are to be protected and promoted, with limitations subject to the same legal framework.²

² Report of the UN Special Rapporteur on freedom of religion or belief, Prof. Heiner Bielefeldt, Report on the relationship between the right to freedom of religion or belief and the right to freedom of opinion and expression, A/HRC/31/18, 23 December 2015.

The human rights legal framework for artistic freedom of opinion and expression requires, first, evaluating the rights at issue; and second, assessing whether restrictions may lawfully be applied in Kenya.

b. Individual and Social Dimensions of Artistic Freedom

Article 19(2) of the ICCPR protects the rights of individuals to seek, receive and impart information and ideas of all kinds through any media of their choice, including in the form of art. It is a robustly articulated right, facilitating not only the fundamental human curiosity of learning (seeking and receiving) and sharing (imparting), but also framing the object of such activity as broadly as possible (information and ideas of all kinds). The Human Rights Committee emphasized in General Comment 34 the dual rights of seeking/receiving, on the one hand, and imparting, on the other, in the context of media freedom.³

It is for this reason that the research adopts a position that the right to freedom of artistic expression includes the right to freely contribute to and disseminate artistic expression and creation, through individual or joint practice, and also to freely experience, access, and enjoy artistic expression. The Constitution of Kenya enshrines the provisions of Article 19(2) by guaranteeing every Kenyan the right to receive and impart information.

Empirical evidence shows that in both the American & European continents, the provisions of article 19(2) of the ICCPR are used as guiding principles. For example, the Inter-American Court of Human Rights has held that a restriction or limitation affects both speakers and audiences. For example, in the case of *Palamara Iribarne v. Chile*, the Court held that when Chilean military criminal justice authorities prevented Palamara from publishing a book nearing publication and dissemination, it violated both dimensions of freedom of expression.⁴

In the case of *Ivcher-Bronstein v. Peru* the Court held that by separating Mr. Brostein from the control of Channel 2 and excluding journalists from one of the programs, the State not only restricted their right to circulate news, ideas, and opinions but also restricted the right of all Peruvians to receive information, therefore limiting their freedom to exercise political options and develop fully in a democratic society.⁵

c. Freedom to Impart Regardless of Frontiers

The European Court of Human Rights has recognized the instruments guaranteeing freedom of expression explicitly protects the transboundary scope of the right. Individuals enjoy the right to receive information from and transmit information and ideas of all kinds too, places beyond their borders.⁶ The research didn't uncover any evidence that the African Human Rights court has had an opportunity to address itself in such a case and the jurisprudence of the court is still in its infancy having been established in 2013.

d. Relationship between Freedom of Expression and Opinion

According to The UN Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression are "closely related, with freedom of expression providing the vehicle for the exchange and development of opinions". They are nonetheless conceptually and practically independent of one another, even if they are engaged in a perpetual feedback loop, in which information and ideas help inform and develop an opinion, which may then be considered and articulated to oneself before being expressed, which in turn may further help develop one's or others' opinions, and so on. It is the internal process (thought and opinion) interacting with the external (expression).

3 Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression. 12 September 2011. UN doc. CCPR/C/GC/34, pg 13-14 (hereinafter: General Comment 34)

4 IACtHR, Case of *Palamara-Iribarne v. Chile*. November 22, 2005. Series C No. 135.

5 IACtHR, Case of *Ivcher-Bronstein v. Peru*. February 6, 2001. Series C No. 74.

6 The European Court of Human Rights cases of *Ahmet Yildirim v. Turkey*, (2012); *Cox v. Turkey*, (2010); Case of *Groppera Radio AG and Others v. Switzerland* (1990).

Article 19(1) of the ICCPR guarantees the right to freedom of opinion, which should be understood as including the right to form an opinion, to develop an opinion by way of reasoning, and to hold an opinion without interference. The right to hold an opinion without interference is considered a “fundamental element of human dignity and democratic self-governance. It is a guarantee so critical that the Covenant does not allow interference, limitation, or restriction. Analysis of the above international Human rights law obligates Kenya to ensure enabling environments and protect the exercise of the right to freedom of expression. Kenya also must ensure that private entities do not interfere with the freedoms of opinion and expression. The UN Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in 2011, emphasize State duties to ensure environments that enable businesses to respect human rights. It is also clear from the Guiding Principles that Kenya’s duty to protect includes a duty to take appropriate steps to prevent, investigate, punish, and redress human rights abuse by third parties. In the Guiding Principles, States are urged to exercise adequate oversight to meet their international human rights obligations when they contract with or legislate for, business enterprises to provide services that may have an impact on the enjoyment of human rights.⁷

2.2 PRIMARY & SECONDARY ANALYSIS

a. Findings from Literature Review

The consultant undertook a desk review to identify earlier research that had been done on the creative industry in Kenya regarding artistic freedom of expression and copyright. The review considered definitional issues and scope, legal & business environment challenges, and the recommendations that have been made for policy prescriptions to revamp the industry. Information from the desk review has been further validated during the in-depth interviews with various stakeholders.

b. Literature Review Challenges Facing the Freedom of Artistic Expression & Copyright Business Environment of the Creative Industry

Various studies referenced as part of the literature review for this assignment have examined challenges that are embedded and affect freedom of artistic expression in the creative economy. They have also identified how copyright affects the creative economy. These reports have shown the inadequacy of the policy environment in delivering a robust and growing creative industry capable of employing thousands of women and youth. Instead, policy and regulatory positions have made the investment climate and business environment unfriendly for the creative industry players. Moreover, available evidence suggests that the limited market for creative industry goods and services is due to a lack of coherent government policies that promote the free creation and distribution of creative goods. For instance, the lack of a law to guide streaming in Kenya. The study also uncovered the limited available literature on artistic freedoms in Kenya and copyright.

Studies conducted in the past on a range of the creative industry development dynamics also focused on analyzing challenges the industry faces in implementing policies in the creative industry in Kenya. The studies made use of the policy analysis framework which focused on the interrelation and influence of the context, content, process, and the actors in the policy development and implementation as a precursor of policy success or failure. The studies also considered the creative industry market dynamics to identify growth challenges and make recommendations for lasting solutions for the industry.

⁷ The Guiding Principles contain three chapters or pillars: protect, respect, and remedy. Each defines concrete, actionable steps for governments and companies to meet their respective duties and responsibilities to prevent human rights abuses in company operations and provide remedies if such abuses take place.

Based on the literature review, challenges faced by artists regarding their freedom of expression:

- Threats emanating from the application of laws limiting freedom of artistic expression.
- Threats emanating from the incoherent nature of government policies have resulted in an environment of uncertainty for copyright-based industries.
- Threats emanating from copyright stakeholder conflicts that haven't been resolved by legislation for example legislation on streaming which is absent.
- Threats emanating from government powers to enforce prior censorship in film.
- Threats emanating from the failure to operationalize regulations, policies, and laws guaranteeing freedom to access information.
- Threats emanating from the discriminatory treatment of LBGTQ+ Expressions.
- Failure of artist organizations and industry associations to effectively advocate on matters promoting the economic status of artists.
- Threats emanating from the colossal failure of collective management organizations.
- Threats that emanate from endless litigation on copyright and freedom of expression and association since 2010.
- Lack of capital: The Creative industry suffers from a lack of funds to enable proper investments in the sector. Access to start-up funds is difficult due to low-income levels and lack of network, especially among women and youth in the industry.
- Lack of entrepreneurial skills: Various studies indicate that there is a massive dearth of business or entrepreneurial skills in the creative industry. Micro, small and medium-sized enterprises (MSMEs) and small and medium-sized enterprises (SMEs) constitute the majority of businesses in the creative industry and as such, are characterized by limited or lack of skills to sustain business survival. The studies recommend that skills development programs and vocational training courses are needed as a matter of urgency to help the industry's businesses grow. The creative industries should be linked with institutions of higher learning with the view to broaden the understanding of how to run small businesses as well as general knowledge.
- Lack of industry cohesiveness and weak associations for collective bargaining: The creative industry in Kenya lacks cohesiveness, leadership, and engagement platforms to champion policy advocacy. Literature reveals that as much as the sectors would like to engage, there are no proper platforms for policy advocacy, or for the public sector to interact with the private sector.
- Lack of infrastructure and institutions: This includes inadequate institutional support and lack of exhibition spaces, culture, and arts centers among other infrastructures.
- Insufficient understanding of Intellectual Property Rights (IPRs): There is a lack of knowledge and understanding of the copyright laws within the industry and how creative industry entrepreneurs can use them to protect their creative work from rampant piracy. Sihanya. B et al's Study on Intellectual Property in Kenya (2009) revealed that new developments especially in the Information and Communications Technology (ICT) sector have made the fight against piracy even more difficult. They further state that new ICT-based systems for enforcement need to be adopted by the Kenya Copyright Board (KECOBO) to eliminate the piracy menace and also recommend participatory policy reviews to follow likewise.

Endogenous growth theories propose that growth originates from within a system and focuses on education, training, and the development of new technologies as major factors that determine the growth of an economy. New endogenous theories suggest that a country's long-term growth rate could be influenced by government policies, among others, the protection of intellectual property (IP) (Idris, 2002). On the same note, Thompson and Rushing (1999) affirmed that the IP regime is important in influencing the behavior of the entrepreneur in encouraging innovation, applying the innovation, introducing it to the economy, and marketing the product in an innovative way (Thompson and Rushing, 1999).

- Limited market access: From the literature review, it is evident that markets and access to markets have been major challenges for entrepreneurs in the creative industry. Similarly, local markets are not well-developed due lack of consumer appreciation and public policies that promote the consumption of foreign goods as opposed to locally curated products and services.

The studies conclude that the challenges facing the creative industry in terms of freedom of artistic expression and management of copyright can be ameliorated through several interventions namely:

- Build strong creative industry engagement platforms for creative industries. Studies recommend strengthening associations, bringing various industry sub-sector stakeholders together through institutional capacity-building initiatives.
- Initiate massive entrepreneurship and enterprise development programs for the creative industry. The studies suggest the provision of practical business skills education to women and youth in all areas relevant to the industry. Without proper training in business skills, initiatives will start and fold within a few months. Investing in education and skills enhancement is crucial.
- The government should initiate an all-inclusive policy reform process with the creative industry's private sector. The studies recommend that a participatory process will help deliver a conducive investment climate and business operating environment for the creative industry.
- The government and the private sector should come up with innovative ways of funding the creative industry's economic activities to spur growth and development.
- Initiate the creative industry competitiveness agenda by introducing productivity enhancement programs through the use of ICT. The boom of digital technology can open up the industry to the region and abroad.

c. Literature Review on the Music Industry's Ecosystem

The following common challenges affecting the music industry's business environment have been identified by both The Kenya Association of Music Producers (KAMP) in a report published by KECOBO and a study commissioned by British Council in 2014:

- Limited entrepreneurial abilities in almost all stakeholders in the music industry.
- Lack of cohesiveness in the industry including in existing associations such that the industry cannot effectively engage with the government.
- Need for financing or a fund to spur growth and development in the entire creative industry.
- The uncertain tax regime for creatives.
- A definitive lack of qualified, dedicated music business agents to engage in marketing, promotion, and overall development of music productions and the industry as a whole.
- An apparent lack of direct policies that ensure effective implementation of mechanisms to protect, promote, and empower music production institutions.

d. Literature Review on the Fashion and Design Industry's Ecosystem

The following challenges facing the fashion and design industry were identified in various reports a) The Kenyan Textile and Fashion Design Industry (KTFD) report on the role of fashion designers and small tailors in the fiber-to-fashion value chain (2015), b) The African Cotton & Textile Industries Federation (ACTIF) policy research study on the Kenyan Textile Industry (2013), and c) The Ministry of Industrialization and Enterprise Development publication on the Kenya Apparel & Textile Industry (2015):

- Lack of policy coherence and institutional alignment.
- Low level of value addition and a disconnect between the apparel sector and the rest of the value chain in the industry. Poor coordination among the various players in the value chain-textile wholesalers, retailers, fashion designers, etc.
- Supply-side constraints with regards to quality and price of fabrics, with a focus on afro-centric cloth and garments.
- Lack of funding from both the government and the industry. Access to credit and finance is difficult more so for MSMEs that characterize this industry.
- A weak business environment characterized by harsh regulations and heavy licensing fees, and no infrastructural facilities or space for SME operators in the industry.
- High cost of production and built-in systemic inefficiencies like the use of old and outdated machinery. The quality of yarn and fabrics produced in Kenya is poor for the world market.

- Lack of market readiness and unfair competition from good quality second-hand imported garments. Kenya is a sophisticated market for fashion wear (very westernized) with limited ethnic and traditional wear, however, Kenyan designers are not integrated into the domestic textile and clothing value chain. Also, they have great difficulty entering the formal retail trade.

e. Business Environment Challenges for the Film Industry

The following common challenges facing the film industry in Kenya have been identified by reports including a) J.R Edwards (2008) on-Building a Self-Sustaining Film Industry in Kenya, and b) KECOBO Copyright News, Issue. 13 on the Kenya Film Industry:

- Limited financing, mainly lack of commercial loans for film producers;
- Shortage of technical skills in the film industry e.g. in editing, graphics making, and sound recording;
- Piracy and unlicensed video halls; The poor regulatory framework in Kenya means that people can still watch films illegally on the internet. A case in point, after the Kenya Film Classification Board (KFCB) banned *The Wolf of Wall Street*, approximately 2 – 3 million DVDs were purchased.

f. Business Environment Challenges for the Arts and Crafts Industry

The Ubunifu (2016) report that focused on six main categories of the creative industry, namely literary arts, performing arts, visual arts and crafts, media arts, and cultural heritage and design, highlighted the business environment challenges as follows:

- Limited or lack of infrastructure to support sub-sectors.
- No existing engagement platforms between government agencies and the creative industry private sector. The situation is worsened by little or inconsistent engagement between industry players and weak associations across the creative industry.

g. Conclusion

From the literature, it is recognized that research on the creative industry in Kenya has been limited to date. Literature available demonstrates that growth in the creative economy has been impeded by an assortment of challenges similar to those across the sub-sectors identified above, as a result of policy lapses, enforcement, and absence in certain areas. The review also shows that the weak private sector has been detrimental to the industry's growth and development.

It is observed that the process of policy formulation and development in the creative industry in Kenya takes place at the top bureaucratic level and thereafter policies are cascaded to the bottom for implementation. The policy formulation and development process excludes major actors who are important at the implementation stage. The entire process lacks consultation and public participation, for example, the National Policy on Culture and Heritage (2009) lacked stakeholder participation. The process of licensing CMOs lacked public participation until 2019 when the courts demanded that KECOBO conduct public participation. Many government policies between 2013 & 2022 have been struck down by courts due to a lack of public participation. This led to low levels of participation during the policy development process and ownership of the policy by stakeholders. This situation is replicated in other scenarios, which has contributed to apathy toward policy implementations. The review also takes cognizance of the weak market structures and the dearth of entrepreneurial abilities, which indeed have impeded the growth of business in the creative industry. We also take note of the fact that the funding of business activities within the industry has proved difficult, as the only existing source is commercial with high-interest rates.

2.3 FINDINGS FROM STAKEHOLDER INTERVIEWS

Qualitative research was conducted between September and December 2022 as part of this study. In-depth interviews with key informants from the creative industry were held to validate results from the literature review on the business environment challenges in the industry and to explore the sub-sector challenges based on the new perspective of informants. During the exercise, a total of 20 respondents were drawn from the four creative industry sub-sectors using the purposive sampling technique. They are Music, Arts & Crafts, Film, and Fashion. Respondents were also drawn from government departments including KECOBO, KFCB & KIPPRA. Other respondents include key officers of MCSK, KAMP & PRISK.

Brief Descriptive Analysis of Interview Outcomes

1. Music Industry

In the music industry, all identified policy and regulatory matters as detrimental to the sectors' growth. They highlighted the weak enforcement of copyright laws and the lack of IP awareness in the industry. While a majority of respondents stated that low entrepreneurial skills remained a challenge, others decried the lack of funding. Respondents also strongly noted that the music industry lacks cohesiveness and platforms for engaging themselves and the government. The Colossal Failure of CMOs was a common running thread that was highlighted by all the respondents. Some respondents also mentioned low music industry funding. Funding seemingly featured less of a challenge to the music industry. According to respondents, if the government was to introduce a 75% local content rule (this would be a local content rule requiring local media stations to play 75% local music) can be implemented to the latter, the industry players will make more income and therefore invest more in technology for music development. The funding problem in the industry is mentioned in the National Music Policy (NMP) in 2012. It is envisaged by the industry that funding will help the sub-sector grow once disbursed. Respondents from KECOBO cited the legal framework as one of the areas in need of urgent review. A holistic review was preferred as opposed to the current piecemeal amendments. They also cited the need for artists who are CMO members to instill credible leadership in the organizations to end pilferage and mismanagement of royalty.

On recommendations, the respondents desired that there should be a policy and regulatory review with a focus on strengthening laws that regulate the streaming and digital music business. They were adamant that the powers of the regulator need to be reviewed so that it plays a bigger role in ensuring CMOs pay royalties. Similarly, the respondents want the Communications Authority of Kenya to push for higher consumption of local content by increasing the local content quota from 40 to over 60 %. The respondents want a formal policy engagement platform with the government.

2. Arts and craft industry

From the interviews, most of the respondents cite piracy as a major problem in the arts and crafts industry compared to some who stated that lack of entrepreneurial skills among industry members was the major challenge. A majority agreed that regulatory instruments were big challenges to the sector, highlighting weak copyright laws, enforceability problems, and a weak KECOBO. Other challenges mentioned included -a lack of funds and the absence of well-developed markets. On recommendations, the respondents put the development of art and craft infrastructures (arts and crafts galleries, cultural centers, heritage houses, etc.) as an immediate area that requires intervention to spur activity. Most expect the government to spur activity by establishing a fund for the industry, while others responded that there is a need to upscale entrepreneurial culture and upgrade skills in the industry. They also recommended that regulatory frameworks that characterized the policy environment should be improved.

3. The Film Industry

According to 80% of the respondents, prior censorship by the KFCB is a serious challenge to the freedoms and rights to artistic expression. KFCB on the other hand believes it is right in engaging in prior censorship unless the courts or parliament say otherwise. Despite the sector being advanced in terms of human resources, the cost of production of films is still very high on account of difficulties in funding films. Respondents who are film producers identified licenses by counties and taxation as a key challenge and an impediment to growth. They cited the regulatory regime as complex and encouraging corruption because of the need to acquire numerous licenses when filming in the counties. The respondent cited the pending cases in court concerning LGBTQ+ expressions as an impediment. The respondents highlighted the cost of compliance, confusion with the laws and implementing agencies, and lastly weak copyright laws, as challenges. They also mentioned the flooding of the local market with foreign content as a major challenge. Respondents also stated that the film

industry lacks film development infrastructures, sites, and much-needed funds to support investment in film. The majority identified the problem of cohesiveness and lack of stronger association, while the remaining considered limited business skills and training, and no appropriate film schools as key challenges for the film industry. Respondents highlighted the need to review the taxation regime for the film industry so that clarity, simplification, and transparency can prevail. Also under regulations, the respondents want copyright law to be strengthened so that enforcement can be effective to the extent that piracy is reduced and controls of foreign content coming into the country are in place. All the respondents recommended that the film industry needs to have stronger associations and engagement platforms where industry issues can be articulated and the approach to the government is coherent. They cited the failure of artist associations in the film industry that have not been able to address the labor-related rights of actors. They believe that the lack of such structures has affected coordination and led to cartels emerging in the sub-sector instead. The respondents recommended that the central government in partnership with the private sector, county governments, and development partners work together to support the industry in developing film industry infrastructures, which include filming sites, among others.

4. Fashion and Design

During in-depth interviews, respondents identified a weak policy framework as the main problem for the sub-sector. They cited a lack of policies to promote the growth of the local fashion market. The marketplace-related constraints identified by respondents were: include: uncompetitive practices emerging from the export processing zone (EPZ) who are allowed to sell in the local market, import of second-hand clothes, and lack of market infrastructures such as selling space, malls, and supermarkets. They also identified limited or lack of entrepreneurial skills as a challenge in the sub-sector while the remaining 20% noted that funding has been a major challenge.

In response to recommendations on the identified challenges, the respondents want the government to work with the private sector to develop the fashion and design industry value chain for the sub-sector to thrive. Among the suggestions under this are: building strong business links within the chain, value chain financing, and governance. They also recommended putting in place some market support systems and infrastructures like low-rental workstations for both producing and selling.

2.4 Conclusion

From the in-depth interviews and literature review, it is found that the creative industry sub-sector players have a good understanding of the challenges that affect their freedom of artistic expression which includes their right to freely engage in commerce. These challenges can be summarized broadly into the following categories:

- Policy and regulatory constraints.
- Weak private sector associations and absence of engagement platforms.
- Limited enterprise development and entrepreneurship.
- Market access and infrastructures constraints.
- Funding constraints.

Recommendations for the above challenges have been prescribed and further articulated in section 10 of this report. Further, recommendations from the literature review and in-depth interviews with key informants are aggregated to form final recommendations in this report from which a roadmap is drawn.

3. LIMITATIONS TO ARTISTIC FREEDOM OF EXPRESSION: REGULATION OF ONLINE & OFFLINE CONTENT

Article 24 of the Constitution of Kenya provides constitutional safeguards for the limiting of rights and freedoms vis a vis international legal instruments such as the African Charter on Human Rights & ICCPR. Limitations must consider the protection of public interest and the rights of individuals. The structures of limitation clauses are in general form and limit all sets of rights or in a specific form that limits specific rights. ICCPR does not have a general limitation clause and instead opts for a right-specific limitation clause. The African Charter embodies three types of limitations: right-specific norm-based limitations; right-specific claw-back clauses and the general limitation clause. Kenya's 2010 Constitution uses a single-clause approach in limiting the rights. The constitution lays the foundation for limiting rights in Kenya.

While the right to freedom of opinion is absolute, the right to freedom of expression may be subject to specific and narrow limitations. Article 19 (3) of the ICCPR provides that any restriction on freedom of expression must meet the following conditions:

- a. Legality:** Restrictions must be "provided by law". In particular, they must be adopted by regular legal processes and drafted with sufficient precision to enable an individual to regulate their conduct accordingly and it must be made accessible to the public. Restriction may not be unduly vague or overbroad such that it could confer unfettered discretion on officials. Secretly adopted restrictions fail this fundamental requirement. The assurance of legality should generally involve the oversight of independent judicial authorities.
- b. Legitimacy:** Any restriction, to be lawful, must protect only those interests enumerated in article 19 (3): the rights or reputations of others, national security or public order, or public health or morals. The Human Rights Committee cautions that restrictions to protect "public morals" should not derive "exclusively from a single tradition", seeking to ensure that the restriction reflects principles of non-discrimination and the universality of rights.
- c. Necessity and proportionality:** States bear the burden of proving a direct and immediate connection between the expression and the threat. They must demonstrate that the restriction protects, or is likely to protect, the legitimate State interest at issue. States must also prove that the restriction it seeks to impose is the least intrusive instrument among those that might achieve the same protective function. Where the harm to freedom of expression outweighs the benefits, a restriction to the right cannot be justified.

Article 20(1) of the ICCPR requires the legal prohibition of all "propaganda for war," while Article 20(2) requires States to prohibit by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". States are not, however, obligated to criminalize such kinds of expression.

The study has come across evidence showing that the National Cohesion & Integration Commission of Kenya (NCIC) and the DPP have since the year 2013 prosecuted two music artists on hate speech charges related to their music. Kenya doesn't have a string of successfully prosecuted hate speech cases and there is a lot of uncertainty on what exactly is hate speech. In 2012, John Mwangi aka John De Mathew a Kenyan-based Kikuyu Benga Musician was charged in a hate speech case ahead of the 2013 Kenya general election. He was acquitted in June 2014. He was accused of composing a song titled "Witwite Hiti" (You have turned yourself into a Hyena) which the state considered to have hidden coded messages of hate. Analysis of available evidence shows that between 2013 & 2022, the National Cohesion & Integration Commission recommended the prosecution of 3 artists on allegations of hate speech. They are Muigai Wa Njoroge, Kamande wa Kioi & the late John De Mathew.

Kenya presents a unique case for developing knowledge around artistic expressions that amount to hate speech. In April 2022, the NCIC issued public statements targeting the use of popular political jargon in music. Top of the list was a reference to a popular Gengetone song Sipangwingwi by Kenyan artists ExRay Taniua Featuring Trio Mio & Sylvia SSaru. The song has over 7.8 million views on YouTube. The Kenya Kwanza Coalition which adopted the song as part of its campaign slogan won the presidential general election in August 2022. Despite the lack of clear easy-to-understand the policy and common knowledge on what amounts to hate speech by artists, NCIC continues to publish lists of words that they consider as hate speech. This is a threat to artistic expression since the NCIC seems to target artistic expressions associated with political movements & election cycles.

There is evidence uncovered in subsequent chapters showing that Kenya exercises prior censorship in film in a manner that has resulted in constitutional litigation around the legality of prior censorship especially as regards LGBTQ expressions. Whereas LGBTQ advocacy organizations are recognized in Kenya, LGBTQ expressions are prohibited. This can only be undone through successful constitutional litigation that may result in the enactment of compliant prior censorship regulations.

4. ANALYSIS OF CCIS FRAMEWORKS REGARDING ARTISTIC FREEDOM OF EXPRESSION IN KENYA

Strengths

Kenya is a democratic country with a constitutional dispensation that entrenches the concepts of rule of law and due process. Kenya has an intellectual property legal system that protects the rights of artists in terms of declaring their economic, moral, and property rights. Freedom of expression is a constitutionally guaranteed right. Artists have the right to access any information in the hands of the state. Artists have the right to form organizations that advance their economic and moral interests. Kenya has a judicial system with a mandate of protecting the constitutional rights of Kenyans. Kenya has public departments mandated to promote cultural industries including ministries dedicated to promoting CCIs.

Weaknesses

There is a broad disconnect between the vigorous application of limitations to artistic rights versus the application of economic rights policies and systems that deliver fair equitable compensation to rights holders. There are stakeholder conflicts of interest in the CCI industries that can only be resolved through legislation that creates clear pathways for the enforcement of economic rights. For example, it is highly unlikely that the media houses failing to comply with copyright license provisions will highlight the artist rights they are violating. Independent media that can play a role in highlighting artistic freedom of expression issues are greatly underfunded and to survive, they avoid reporting on business human rights violations of their advertisers who may be infringing on artistic rights through their conduct, goods & services. There is no formalized group or organization regularly bringing together policymakers and CCI groups resulting in a slow pace for urgent reforms in copyright and other CCI sectors hurting from the uncoordinated nature of various creative industries sectors. Visual artists in Kenya for instance don't have a CMO and can therefore not benefit from public display, use, and distribution of their works in instances where they are unable to individually license.

Opportunities

The study adopts the position that artistic freedom of expression problems in Kenya are hidden opportunities for PANAF to grow its advocacy influence in Kenya. Despite the growing importance of CCIs in the GDP debate, there is evidence that some policies, laws, and practices are inhibiting the ability of artists to fully express themselves. Global consensus on the freedom of expression is that it must adopt a human rights approach promoting the rights of artists to economically participate in cultural life through the creation of markets and the adoption of policies promoting the distribution and sale of cultural goods and services.

The opportunities explored in the study arise from the need to build capacity, common knowledge, and understanding between the various CCI stakeholders because of their conflicting approaches toward promoting the status of the artist. The principle of public participation entrenched in the Kenya constitution which demands that the government engage in public participatory processes before undertaking administrative action creates an opportunity for developing public participatory programs targeting CCIs regarding freedom of expression issues.

With the prominent rise of digital economy conversations post covid, there is an equally growing rise for advocacy on digital expression because of practices that public and private players engage in and which threaten artistic freedom of expression online.

5. THREATS TO ARTISTIC FREEDOMS IN KENYA

The study adopts the position that there is evidence showing that both government and private sector exhibit conduct that threatens certain aspects of artistic freedoms such as the right to express opinions in any medium without censure. Media-based companies are also culpable because of their relationship with the creators of content. Media-based companies struggle to embrace the concept of fair equitable compensation for creators of artistic works that their services perform in public. Artist rights organizations have contributed to the development of an uncertain ecosystem for the collective administration of rights and are struggling to impart their footprint in the Kenyan economy.

5.1 Threats arising from Government action & inaction

Governments operate based on written laws, policies, and regulations. The study, therefore, reviews policies and laws that are being implemented by the government despite their potential threats to freedom of expression.

5.2 Prior Censorship in Kenya

Kenya exercises Prior Censorship of films and other artistic forms of expression. Prior censorship entails the suppression of expression before it has circulated. Consequently, prior censorship prevents not only the individual whose expression has been censored but also all of society, from exercising their right to seek and receive information or ideas. The United Nations has passed Human Rights Resolutions that term the conduct unacceptable in democratic countries.⁸ Whereas Kenya is a party to this resolution Kenya continues to exercise prior censorship in film and visual arts.

The Special Rapporteur in the field of cultural rights and the Special Rapporteur on freedom of opinion and expression have recommended that States abolish prior-censorship bodies or systems where they exist and use subsequent imposition of liability only when they meet the narrow conditions provided under the article 19 (3) and 20 of the ICCPR.

On the other hand, the UN recommendations and regulations seem to be providing an alternative route where prior censorship bodies exist. The Kenya Film Classification Board exercises prior censorship and seems to be guided by the exceptions provided under UN recommendations. The recommendations allude to the fact that prior censorship may be necessary for some situations. Classification bodies or procedures – those designed to guide parental decision-making – may help inform parents. In those instances, the UN urges governments to ensure that (a) classification bodies are independent; (b) their membership includes representatives of the arts field; (c) their terms of reference, rules of procedure, and activities are made public; and (d) effective appeal mechanisms are established. Particular attention should be paid to ensuring that the regulation of access by children does not result in prohibiting or disproportionately restricting access for adults. This is the approach taken by Kenya. However, the Classification Board has exceeded its powers by engaging in censorship that affects access to adults when it should only be confined to access by children.

Artistic freedom is especially at risk of prior censorship, through the banning of movies, books, public art, and theater plays. Demands for quick, automatic removals also risk new forms of prior restraint that already threaten creative endeavors in the context of copyright and the excessive filtering and blocking of online content.

Despite this, content-based restrictions on expression – that do not comply with international human rights law and standards – remain in the penal code. Section 132 of the Penal Code criminalizes anyone whose statements or acts incite defiance of or disobedience to public officers or “calculated to discredit” them, making it punishable by up to three years imprisonment. These extremely vague terms enabled its routine misuse by state officials against government critics. Section 194 of the Penal Code contains provisions for criminal defamation. Both provisions were declared unconstitutional by the High Court of Kenya in 2017 but are yet to be repealed. Another provision of particular concern is Section 181 of the Penal Code, which prohibits the “distribution and exhibition of indecent content with the potential to corrupt morals”, punishable by imprisonment for 2 years or a fine of seven thousand shillings. In practice, this provision has granted significant and excessive leeway for the authorities to repress artistic expression, particularly for LGBTI-related content.

⁸ UN General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Frank La Rue on the right of the child to freedom of expression, A/69/335, 21 August 2014, 87.

5.3 Access to Information & the Kenya Access to Information Act

The right to information (RTI) enables the public and civil society to access information held by public bodies and empowers them to hold their leaders accountable, develop a fuller understanding of the world, and ensure other human rights. The right to information is an important tool for holding governments to account, as it requires them to be more transparent in their activities, for example in the way they spend public finances. This not only helps fight corruption, but it helps build stable and resilient democracies, where the powerful are genuinely accountable. The protection of whistleblowers to be able to reveal information of public interest is also crucially important.

Enacted on 21 September 2016, the Access to Information Act gave life to Article 35 of the Constitution of Kenya 2010, which guarantees every Kenyan the right to seek access to and obtain information from public bodies and private bodies acting in a public nature. This right is also anchored in global and regional instruments ratified by Kenya, such as Article 19 of the International Covenant on Civil and Political Rights and Article 9 of the African Charter on Human and Peoples' Rights. The latter is further elaborated through the Declaration of Principles on Freedom of Expression and Access to Information in Africa.

In addition, in 2018, President Uhuru Kenyatta issued an Executive Order directing all public institutions to fully disclose and publish public procurement information and manage them through a centralized electronic platform. This order strengthened the right access to information in the country.

Protection for whistleblowers is also a fundamental principle of Access to Information. Individuals who release information on wrongdoing – whistleblowers – must be protected from any legal, administrative, employment-related sanctions, reputational and physical harm. Unfortunately, Kenya has a history of failing to protect whistleblowers. This is evident by the outcome of the cases of David Munyakei⁹ in the Goldenberg scandal, John Githongo in the Anglo-Leasing scandal,¹⁰ Spencer Sankale in the Mara Heist¹¹, Ali Gire¹² the Kenya Airways employee who blew the whistle on the China Southern flight debacle, and most recently the grisly murder of Ms. Jennifer Wambua,¹³ who was working at the National Land Commission and was reportedly a key state witness in a corruption case. The lack of overarching comprehensive legislation to protect whistleblowers in Kenya has not only left them vulnerable to retaliation but has also exacerbated the culture of silence and secrecy, allowing corruption and abuse of office to thrive.

Under Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution is limited in respect of information whose disclosure is likely to:

- a. Undermine the national security of Kenya.
- b. Impede the due process of law.
- c. Endanger the safety, health, or life of any person.
- d. Involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made.
- e. Substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained.
- f. Cause substantial harm to the ability of the Government to manage the economy of Kenya.
- g. Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration.
- h. Damage a public entity's position in any actual or contemplated legal proceedings.
- i. Infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

⁹ <https://nation.africa/kenya/life-and-style/lifestyle/tragic-tale-of-goldenberg-whistleblower--599910?view=htmlamp>

¹⁰ <https://www.bbc.com/news/world-africa-31733052>

¹¹ <https://www.kenyans.co.ke/news/43426-4-crafty-ways-maasai-mara-vc-used-steal-exposed-citizen-tv>

¹² <https://www.pulselive.co.ke/news/suspended-kq-staff-gire-ali-who-exposed-239-passengers-at-jomo-kenyatta-international/491p3n6>

¹³ <https://www.the-star.co.ke/news/2021-03-16-murdered-nlc-official-was-witness-in-sh122m-fraud-case/>

Information relating to national security is expressly stated in Access to Information Act no. 31 2016 Part II.

Kenya has not enacted the Access to Information regulations required to operationalize the Access to Information Act. These regulations are important in the exercise of access to information and in promoting accountability in the public sector.

5.4 Why Regulations Matter

The full realization of the right of access to information depends upon the issuance of regulations by the Cabinet Secretary of ICT, Innovation, and Youth Affairs as required under Section 25 of the Act. Without these regulations in place, there is a lack of clarity concerning how information can and should be requested, the format in which the responsible authorities should provide information, as well as remedies in the event of non-compliance, among other things.

Since 2018, there has been an ongoing initiative to develop the Access to Information Regulations through a collaborative effort between the CAJ, the Ministry of ICT, the National Law Reform Commission (NLRC), and ARTICLE 19 as a representative of civil society. In June 2021, the Commission on Administrative Justice published the regulations and is still seeking comments from the general public as part of the public participation process.

In advocating for the enactment of the regulations, there is a need to acknowledge that the effective realization of the right to information goes beyond the passage of the law. There is a need to accentuate its importance as a driver of accountability, transparency, and good governance in the realization of the agenda 2030 Sustainable Development Goals (SDGs), and Vision 2030. While a lot of emphasis has been placed on capacity building and awareness creation for public officials, citizens remain unaware of their rights to access information. Much more still needs to be done.

6. ANALYSIS OF HOW AT-RISK ARTISTS RELATE WITH THE GOVERNMENT OF KENYA

6.1 Discriminatory Treatment of Gay & Lesbian (LBGTQ+) Expressions

Kenya is one of many African countries that outlaw homosexuality and same-sex marriage. Although the country has a thriving civil society sector, including LGBTQI+ organizations that have been at the forefront of the cause for many years, social acceptance remains low, with enduring risks and vulnerability for people of the community.

There is empirical evidence to show that there are legal processes in the form of lawsuits challenging the constitutionality of criminalizing homosexuality. Until the cases are concluded it is impossible at this stage to explore the effect of the suits on LBGTQ matters.

Despite the existence of civil society championing gay rights, the courts that directed the registration of LBGTQ associations seem to be limiting the freedom of expressing LBGTQ matters in the film as per the ruling of the Rafiki film case that is the subject of ongoing appellate court processes.

Artistic Rights First



7. ORGANIZATIONS SUPPORTING AT RISK ARTISTS

a. Gay & Lesbians Coalition of Kenya

The Gay and Lesbian Coalition of Kenya is the Umbrella Body Representing LGBTQ organizations and voices in Kenya. The Gay and Lesbian Coalition of Kenya has been instrumental in establishing (and re-establishing) working relationships and alliances with Government institutions and Civil Society organizations through which to inspire a society that appreciates diversity and recognizes that everyone has a right to equal opportunities irrespective of their real or perceived sexual orientation, gender, and expression. GALCK envisions a safe and enabling environment for all. A space where the fundamental principles of human rights, equality, and non-discrimination, and the protection of Lesbian, Gay, Bisexual, and Queer are guaranteed; where all Kenyans regardless of their sexual orientation, gender identity, or expression are accorded their rights and freedoms as guaranteed by the Constitution of Kenya 2010.

b. Talanta Africa

Talanta is a performing art, culture, and media organization that engages creative approaches to amplify the LGBTQ voices of vulnerable members of society. The organization believes in a society united in one accord and adheres to strict dictates of the rule of law and one which does not define people based on sexuality by placing performing arts, culture, and media at the key of advocacy on sexual rights, children development, and young people and LGBTQ participation in governance and development processes, leadership and governance; and climate justice.

c. Creative Economy Working Group

The Creative Economy Working Group (CEWG) is a network of civil society organizations in Kenya. The goal of CEWG is to promote creativity, innovation, and the diversity of the cultures of the people of Kenya as drivers of community well-being, social development, and economic growth. CEWG believes that this goal can be realized through the development of facilitation policies and legal instruments and the establishment of strong and innovative institutions. Therefore, the network works closely with state and non-state institutions in policy reform, safeguarding cultural diversity and protecting artistic freedom. The network has been involved in the development of the Kenya National Cultural Policy, the National Kiswahili Council Bill; the Music Policy; the Film Policy; the Copyright amendment Act; the Tradition Knowledge and Cultural Expressions Act, the Draft National Intellectual Property Policy; review of the Kenya Cultural Centre Act; among other policy and legal instruments. The network has organized numerous forums on the cultural and creative industries to identify gaps and provide capacity development. Within Film, they are currently funding litigation regarding the ban on the Kenyan Movie Rafiki.

Challenges facing the organizations

The Challenges faced by the organizations predominantly surround funding for advancing their programs. Organizations championing LGBT issues have to contend with the fact that Lesbian, gay, bisexual, and transgender (LGBT) persons in Kenya face legal challenges not experienced by non-LGBT residents. For example, Sodomy is a felony as per the provisions of Section 162 of the Kenyan Penal Code, punishable by 14 years imprisonment, and any sexual practices between males (termed "gross indecency") is a felony under section 165 of the same statute, punishable by 5 years imprisonment. While female same-sex sexual activity is not explicitly prohibited by law, lesbians, bisexual women, and transgender people are not recognized in the Kenyan Constitution and are discriminated against, covertly.

On 24 May 2019, the High Court of Kenya refused an order to declare sections 162 and 165 of the penal code criminalizing same-sex relations unconstitutional. The Case is currently being litigated at the Court of Appeal and may finally end up in the supreme court before a clear legal and constitutional position can be adopted by Kenya. Kenya does not recognize any relationships between persons of the same sex. Same-sex marriage seems to be banned under the Kenyan Constitution a matter yet to be determined by the Kenya supreme court. There are no explicit protections against discrimination based on sexual orientation and gender identity. Adoption is prohibited for same-sex couples.

Transgender people have historically suffered discrimination, and there are no statutory provisions relating to transgender rights. However, there have been a series of court rulings in favor of transgender rights, such as the right to change the names appearing on legal documents. It is currently unclear as to whether these rulings constitute substantive law on the issue of changing legal gender. GLACK has a history of successfully fighting for the registration and recognition of LGBTQ organizations in Kenya. They had to seek legal redress to be registered as an advocacy organization for LGBTQ matters.

Another challenge for the organizations is that Kenyan society is highly conservative, and a large majority of people hold negative views of LGBTQ people. Homosexuality is “largely considered to be taboo and repugnant to [the] cultural values and morality” of Kenya. Despite this, public support has slowly been growing and various organizations are working to protect and improve LGBT rights. The supreme court may get an opportunity to rule on whether the state has the right to ban LGBTQ artistic expressions.

8. ANALYSIS OF MAJOR ARTIST ASSOCIATIONS IN THE KENYA CREATIVE SECTOR

8.1 Contextual Analysis

The research has categorized major artist organizations under 2 categories:

- a. Collective Management Organizations (CMOs)
- b. Advocacy & Welfare Groups

The research focuses on CMOs for the sole reason that they are the largest artist associations with preexisting relationships with the government and are formally organized with democratically elected directors and functional secretariats. They represent thousands of artists. They also hold the keys to unlocking the potential of their member’s economic rights. They are mandated by law to negotiate licenses with the public. One of the greatest challenges in the Kenya CCLs is that there is no easily accessible and reliable database to identify formally incorporated artist associations and informal associations. Many advocacy and welfare groups are informally organized. The formally registered associations are mostly stuck in the startup phase. Many lack a dedicated online profile and are most visible on social media. Their officials mostly operate voluntarily.

8.2 Collective Management Organizations

Kenya’s legal framework providing for the setting up & operations of collective management organizations is riddled with several uncertainties, especially regarding the management of digital rights and copyright licensing, and royalty management. Kenya has 3 operational CMOs and two defunct CMOS. They are:

- a. Music Copyright Society of Kenya
- b. Kenya Association of Music Producers
- c. Performance Rights Society of Kenya
 - KOPIKEN- not active
 - Music Publishers Association of Kenya – not active

There are no CMOs registered/ licensed yet for film, visual arts, books, theater & drama. There is an opportunity for PANAF to raise critical advocacy voices for these underrepresented groups.

Before 2017 CMOS operated independently of each other even though KAMP & PRISK have had joint working operations for a period each with their independent boards and CEOs but sharing infrastructure such as a secretariat and collecting agents. Since 2017, the regulator KeCoBo requires CMOs to jointly roll out their operations in a system where one license is jointly issued by the 3 CMOS, and then the CMOs divide revenue based on agreements entered between themselves.

8.3 Music Copyright Society of Kenya (MCSK)

MCSK is a non-governmental, non-profit making organization that is mandated to administer economic rights for authors, composers, arrangers, and publishers of musical works in Kenya and other affiliate societies by collecting royalties from music users and distributing the same to the rightful owners. MCSK is registered under the Kenya Companies Act as a Company Limited by Guarantee. The society was registered in 1983 as a company under number C.5/83. It is licensed by the Kenya Copyright Board. Between 2012, 2017, 2018, 2020, 2021 & 2022, the CMO has been embroiled in legal & regulatory controversies leading to the loss of its license to operate as a CMO. After the recent court ruling in October 2022 that resolved that the parties work amicably and a new licensing phase begins, there is uncertainty as to whether the CMO will be in a position to comply with the KeCoBo Regulations for CMOS.

8.3.1 MCSK Gender Assessment

The Current Board of MCSK has no female directors. Over the years the society has employed female CEOs however the representation of women on the board does not meet the Kenya Constitutional provisions on the two-third gender rule that prohibits public authorities and departments from being populated by more than two-thirds of a particular gender. Because MCSK operates based on a public license its structures must comply with the Kenya constitution's gender principles. There is a need for a legal/ statutory /constitutional audit of its operations to determine compliance with gender matters. There is no evidence of a gender policy to guide its governance operations.

8.3.2 MCSK Needs Assessment

Ownership of Copyright begins with the Author. In Kenya, Music MCSK occupies a central and critical role for music authors, publishers, songwriters, and composers of music. Despite its mission statement to become the most effective and efficient music royalty collector and distributor, MCSK has for several years been marred by numerous allegations of financial mismanagement of royalty incomes leading to its deregistration as a CMO over 5 times.

There is empirical evidence showing that the society has a leadership crisis that has compromised its ability to deliver to members. It is currently the subject of litigation with stakeholders who should either be its customers as licenses or with its members. It has lacked a credible business plan that can turn around its operations and win the favor of its members and the confidence of the government.

The CMO has a governance challenge. For instance, the AGM slated for November 2022 is coming from a backdrop of failed promises to hold timely and credible elections. A forensic audit of MCSK by KeCoBo has resulted in a crisis about whether MCSK could be a trustworthy manager of royalties. Several staff members including a former CEO are charged in court with financial fraud-related cases. There is abundant evidence showing that the CMO leadership is lacking financial management & transparency skills.

HR practices of the CMO are in dire need of review, upscaling & support through training, outsourcing, and review of hiring practices. The dismal performance and incompetence in discharging duties leading to deregistration are primarily a result of the hiring and retaining of incompetent CMO staff. In a recent ruling by the High Court of Kenya, the High Court declared MCSK as a vexatious (malicious) litigant after MCSK alleged in court papers that it was not a CMO hence its decision to operate outside the Kenya Copyright Act framework. This is even though MCSK has always represented itself to the public as a CMO. The CMO requires Human Resources capacity building.

The lack of a credible royalty distribution policy has resulted in a situation where all members of the society are paid an equal share after all the organization's expenses have been deducted. The distribution rules don't meet international standards regarding the distribution of royalty.

The Lack of a Credible & Reliable Monitoring System. MCSK hasn't invested significantly in the information technology infrastructure necessary for running a CMO efficiently. Record keeping is still largely manual. MCSK doesn't have a credible royalty system to monitor the use of its member's works. It relies on media stations that are inconsistent in supplying data regarding their use. Of licensed copyright. The CMO cannot function competently without its independent system. Whereas MCSK has spent millions of Kenya shillings in acquiring various assets such as vehicles it remains a mystery as to why the CMO has not invested in an efficient CMO Information Technology system.

There is an abundance of evidence showing MCSK is violating the rights of artists to receive financial information regarding the monitored use of their member's works. Most of the members interviewed for this study claim they have never received a royalty statement from MCSK despite several years of membership. The members interviewed also claim they have never received details of how many times their music has received airplay, which is an international standard for efficient CMO management.

Urgent Need for Member Education on Operations and management of CMOS. Without the requisite body of knowledge, members of the CMO will continue to retain unsuitable persons in management. Since artists are shareholders of the organizations, there is a growing need for strategic education to enable members of the CMO to make competent business decisions at annual general meetings. CMO members need to develop a culture of retaining independent professionals such as lawyers and financial consultants to help them form oversight mechanisms for CMO operations to check excesses of management.

8.4 Kenya Association of Music Producers (KAMP)

The Kenya Association of Music Producers (KAMP) is the body representing the rights and interests of producers of sound recordings whose membership comprises record labels. Incorporated in 2003, KAMP was registered and granted its license to operate as a collective management organization (CMO) in May 2008, by the Kenya Copyright Board (KECOBO). It has a history of having regulatory challenges with the copyright regulator. However, for the first time in its history, it was deregistered by KeCoBo in 2021 & 2022 over claims of failing to adhere to financial management guidelines on royalty distribution. It has joint operations including shared offices with the Performance Rights Society of Kenya.

8.4.1 Gender Assessment

The Board of the CMO has 8 directors. Two out of eight are female directors. Some of its members interviewed for this research indicate that the CMO has had a history of failing to conduct credible elections. The board has had a history of leadership wrangles pitting directors against each other in court. This is a major contributor to the negative gender disparity on the board according to some members of the CMO. There is a disparity between the number of male and female studio producers with evidence showing there are more male producers. This is attributable to the broad societal challenges women face in terms of accessing opportunities compared to their male counterparts. The organization can highlight the role of women producers in the music sector. There is no evidence of a publicly known policy to advocate gender issues in the organization. The organization has a history of having a minority number of women directors.

8.5 Performance Rights Society of Kenya (PRISK)

PRISK administers performers' rights relating to broadcasting, communication to the public, making available by wire or wireless including transmission to subscribers to diffusion or any digital service, copying or similar reproduction such as digital copying, and any form of use of such works. PRISK negotiates and sets tariffs with the different users of sound recordings and audio-visual works. Concerning any exploitation of works,

8.5.1 Gender Assessment

Out of 8 Board of Director Positions, 2 positions are occupied by women. The disparities are caused by challenges similar to the other CMOS. There is no evidence of a policy to guide mainstreaming of gender issues. The CMO however has a history of employing women CEOs. PRISK has had governance challenges leading to its deregistration in 2021 and 2022. The governance challenges are a contributing factor to the gender gap in the organization.

Needs Assessment of KAMP-PRISK Operations

KAMP and PRISK have had joint operations for several years. Whereas they represent 2 distinct rights holders they elected to merge some of their operations before the regulatory requirement for CMOs to cooperate based on joint operations. Before 2017, MCSK collected royalty separately from KAMP and PRISK, a situation that was unpopular with music users who constantly demanded a single licensing point for the 3 CMOS.

Both KAMP & PRISK lack a modern credible system for monitoring the use of their member's works. Consequently, they have long-standing disputes with their members concerning payments of royalty. Their reliance on data from media hasn't been a success because of the failing obligations of broadcast organizations in Kenya regarding compliance with their music copyright license obligations.

The distribution rules of both organizations are not compliant with international standards governing the monitored use and distribution of music royalty. The 2 CMOs need capacity development regarding the monitored use of music copyright.

The two organizations lack recognition/awards programs for their members consequently many eligible artists have not joined the CMOs and morale is low among their members because of the unresolved royalty collection challenges prevailing over the years.

Both organizations need capacity development in client care and stakeholder engagement. This calls for an organizational change approach in which management of joint operations is restructured to purposefully improve stakeholder relationships.

A joint human resources audit is needed to determine staff competence as regards the development of copyright business systems for their members & client care. The audit will also resolve issues surrounding the duplicity of roles performed by both organizations.

Both organizations have had challenges conducting their AGMs in compliance with the Companies Act. There is a need for capacity development for their members on how companies and CMOs run.

There is a need for members of the 2 CMOS to appoint independent directors tasked with overseeing the directors appointed at the AGM so that there is a complementary monitoring system of checks and balances for possible excess and abuse of power by their boards and management.

Doubts about financial transparency and good governance can only be eroded through a transparency and financial literacy program targeting their members and management of the CMOS so that there is a commonality of expectations. The success of this has a lot of bearing on the regulatory environment and systems the regulator puts in place in the 2023 and subsequent licensing periods. The CMOs cannot achieve this desired goal without external partners who will bring credibility & transparency to the process.

9. GENDER ANALYSIS & ROLE OF WOMEN IN MAJOR ARTIST ORGANIZATIONS

Overview

Women are still affected by gender stereotypes about leadership roles or even certain professions, resulting in segregation in certain activities. Gender stereotypes about leadership help to explain, for example, why even after so many years, Kenya still has few female film directors, music producers, and creative directors, among other prominent roles in the creative industry compared to their male counterparts.

Women working in the creative industry also suffer from the same injustice that affects female professionals in other sectors of the economy. They face limited participation in decision-making processes, fewer opportunities for continuous training, capacity building, and networking, less access to resources, and significant wage differences. Wage inequality between men and women is more significant in this sector with women earning on average 67.8% of men's salaries, as compared to 82.8% in other sectors.

There is a major limitation to gender-related statistics. For instance, the first film census is being undertaken by the Kenya Film Commission in 2022. Kenya doesn't have a comprehensive database for the creative sector and therefore getting exact figures on gender and other variables like income, and sector numbers are difficult. This is a major gap and failure by the government because it is the official custodian of the economic data of citizens. The Kenya Kwanza government elected in August 2022 has promised in its manifesto to develop an artist database that will be a creative economy skills portal.

Kenya's gender equality commitments regarding the advancement of gender equality, women, and girls' empowerment are enshrined in the Constitution of Kenya, legal policy environment, and outlined in various gender machinery mandates. Kenya has not been able to achieve the gender equality principles in the constitution. Gender inequality exists in Kenya because women are victimized by circumstances leading to them not being given equal opportunities as their male counterparts. This hinders their efforts to give their best outputs in the creative sector thus slowing down the development of the creative sector in Kenya. Despite the existence of labor laws, there is evidence showing gender discrimination in employment. In 2019, Equileap published a report on gender equality in Kenya, finding that on average, women earn 32% less than their male counterparts, compared to 23% globally.

There is a need for accelerating policy programs that entrench gender concerns in the management of CMOs. There is a need for reforms creating more room for women leadership on the boards of Kenyan CMOs in compliance with constitutional gender principles because of the public interest nature of CMOs.



10. ANALYSIS OF MAJOR STAKEHOLDERS TO BE ENGAGED BY PANAF

10.1 Public Sector Stakeholders

a. Ministry of Sports Youth & Culture

Drives policy formulation for Cultural Industries in Kenya and houses critical cultural institutions such as the Department of Culture, Sports Fund, National Museums, Theater, etc. Because of the growing need to entrench human rights thinking in the cultural sectors, they are a key stakeholder for PANAF.

b. Ministry of Information & Communication Technology

Is responsible for driving digital economy programs affecting the creative economy. They must ensure that the digital economy respects and promotes digital artistic rights.

c. Ministry of Trade & Industry

Can play a critical role in mediating disputes and building bridges between artist rights organizations and trade associations representing users of music copyrights such as pubs, restaurants, etc. They have a crucial role in promoting international trade in cultural goods & services.

d. Ministry of Transport & Infrastructure

The relationship between public transport operators and collective management organizations has been sour, often leading CMOs to deploy services of the police to ensure copyright compliance. According to data from the National Transport and Safety Authority, there are over 700 registered matatu Saccos in Kenya serving more than 80,000 vehicles. When the vehicles don't pay for music licenses, they violate artists' economic rights. The transport sector has the potential to generate billions of shillings for the Kenyan music industry. It is also one of the sectors that are non-compliant with copyright obligations.

e. Department of Culture

Because this is the department of government tasked with advising the government on cultural matters together with developing cultural infrastructure and policy, they are a crucial stakeholder in terms of public-private partnerships in Kenya.

f. Kenya Copyright Board

Because of the digital revolution that has elevated the profile of digital copyrights, the board plays a critical role in likening copyright societies administering artistic rights & has a statutory mandate to educate the public on copyright matters. It holds the keys to collective management success in Kenya.

g. National Museums

National Museums of Kenya (NMK) is a state corporation established by an Act of Parliament, the Museums and Heritage Act 2006. NMK is a multi-disciplinary institution whose role is to collect, preserve, study, document, and present Kenya's past and present cultural and natural heritage. This is to enhance knowledge, appreciation, respect, and sustainable utilization of these resources for the benefit of Kenya and the world, for now, and posterity. An important stakeholder in documenting & preserving Kenyan culture.

h. Kenya National Theater

Is the government department tasked with promoting the live performance of music, dance, plays or dramatic works? They will be a critical stakeholder in efforts to build theaters & live public performance sights in the counties. Artistic sources cited the lack of performance spaces for rehearsals and training and limited options for live performances in the counties.

i. Kenya Police

After the launch of the Digital Forensic Laboratory, the police will play a crucial role in fighting digital crimes such as piracy which is a major threat to artists' economic rights in Kenya. It is estimated that Kenya loses 92 billion Kenya Shillings to piracy. Artistic groups need to build working relationships with police departments investigating and prosecuting online piracy. Online security is a crucial component of a thriving digital economy. Music, Film, and other digital expressions are constantly under threat of piracy.

j. Directorate of Public Prosecutions (DPP)

There is empirical evidence to show that the DPP and the National Cohesion & Integration Commission have previously charged musicians for composing hate speech songs. In light of freedom of expression limitations prohibiting hate expressions, there is a need for public education on what forms of artistic expressions border on or are hate speech.

k. Kenya Institute of Public Policy Analysis (KIPPRA)

Kenya Institute of Public Policy Analysis (KIPPRA) is the government body tasked with conducting public research that informs government policy. They have begun developing capacity for the creative economy and continue to grow their database of creative economy stakeholders.

l. Judiciary

The judiciary is increasingly playing a crucial role in the resolution of artistic disputes in copyright & contract. With the development of small claims courts, the artistic community requires more engagement with the judiciary. Because of how judicial proceedings are captured and expressed in the media, there is a growing need for sensitization on expressions around judicial proceedings.

m. Kenya National Commission on Human Rights

There is no evidence of any initiatives targeting the resolution of business practices violating human rights principles of CCI stakeholders such as performers whose rights are violated by business practices violating copyright. They are the de-facto public body with a constitutional duty to promote the advancement of Human Rights in and out of government.

10.2 International Stakeholders

a. African Union (AU)

Because of the Pan-African nature of PANAF's approach to artistic rights, the AU becomes a crucial partner in building the capacity of CCI stakeholders across Africa. It requires partnerships with organizations advancing artistic economic rights across Africa. The African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights continue to attract calls for strengthening the complementarity between them as enshrined in the Protocol to the African Charter on Human and Peoples Rights. PANAF has an opportunity for incubating artistic freedom of expression issues in emerging complementary efforts.

b. International Confederation of Societies of Authors and Composers (CISAC)

The global leader bringing together collective organizations globally & is a crucial partner in reforms targeting CMOs in Kenya. Has the ability to provide capacity development for local CMOs.

c. World Trade Organization (WTO)

The debate about trade and culture has a long history, but the application of WTO rules to cultural products such as films, radio, and books remains one of the most divisive issues in the organization. Because PANAF seeks to engage policymakers on policies around artistic goods and services, a critical understanding of why WTO members in Africa treat each other differently arises. Because WTO programs affect AU programs there is a need for continued efforts to build consensus between African countries trading in cultural goods and services. PANAF can develop an economic rights voice for artistic expressions in WTO programs targeting cultural goods and services.

d. UNESCO

Since 2013 Kenya has had a national commission on UNESCO enacted through an Act of parliament. The role of the commission is to promote UNESCO activities in Kenya through knowledge sharing and capacity development. The commission can be a great ally in advancing UNESCO policies affecting artistic rights in the Kenya government and can become a support partner for PANAF activities in Kenya advancing UNESCO recommendations regarding the status of artists.

10.3 Private Sector Stakeholders

a. Collective Management Organizations

Despite their enormous potential they struggle to fulfill their economic mandate to members and through their conduct, they violate artists' rights to receive commercial information about their music. They hold the key to the financial success of a large number of artists and are a critical stakeholder for PANAF.

b. Streaming Companies

Major streaming platforms have a market presence in Kenya even though the copyright act is silent and inadequate in terms of protecting the streaming rights of artists in Kenya.

c. Transport Sector Operators

Because of the enormous potential of public service vehicles in generating income for local artists, PANAF has an opportunity to raise a voice for the economic interest of artists in the transport sector to end the long-term adversarial relationship between public transport operators, police & CMOS.

d. Hospitality Industry

The long-standing music license disputes between CMOs and public spaces playing music will only cease upon the development of dialogue platforms where users of copyright such as representatives of pubs and restaurants can fairly negotiate license tariffs with artist rights organizations. This gap creates an opportunity for developing conversations around artistic economic rights within the sector. These players are crucial in promoting live performances and are licensed by county governments making them a key ally for county-based artists' rights engagements.

e. Media

Media owners have the potential to play an effective role in promoting Kenyan artistic expression. They are also some of the biggest violators of artistic economic rights because of unfair copyright regulations that seem to enable them to escape copyright compliance in terms of licenses. They have the potential to become a critical source of income for artists & CMOs. Valuing the license cost of music used by media is a classical debate yet to be settled in legislative policy or practice. PANAF has an opportunity to develop a space for media voices amplifying the voice of artistic economic rights crusaders through strategic media engagement.

11. HOW COPYRIGHT LAW PROTECTS ARTISTIC WORKS IN KENYA

Copyright refers to an exclusive bundle of rights granted by law to authors of literary works; producers of audiovisual works and films; architects; performers; broadcasters and other creators of literary, musical, artistic, audio-visual, and sound recordings and broadcasts. Copyright protects the expression of an idea from being copied without authorization. It does not protect the concept or the idea. It is in the public interest that creators of artistic works are motivated for them to promote their creative activity for the cultural, social, and industrial progress of any country. The Copyright system, therefore, provides the legal safeguards necessary for creativity to thrive. This is done by safeguarding the interests of the right holders and at the same time giving them the incentive to create. Where creative authors are assured that their rights will be protected and enforced, creative industries thrive.

11.1 Authorship and Ownership under Kenya Copyright Law

Under Kenyan law, the first owner of a copyrighted work is its creator. An author in the case of Literary work is the person who wrote the work. This also is the position for software, which is treated as a literary work. For Musical works, it is the composer. For Sound recording, it is the producer. For Cinematographic work, it is the producer. In Photographs, the photographer is the author. For Computer generated work the person who caused the work to be generated. An author may, however, license or transfer their rights, wholly or in part, the same way physical property is dealt with. All assignments or licenses must be in writing as required by the Copyright Act. This results in ownership being held by a person who is not the author. A person who creates a work during employment or on commission may own the copyright if there is an agreement to that effect.

11.2 Works Covered by Copyright in Kenya

The works falling under the following categories are copyright works:

- Literary
- Musical
- Audio-visual
- Artistic works
- Sound recordings
- Broadcasts

Others include novels, poems, plays, computer programs, databases, musical compositions, broadcasts, photographs, sculptures, architectural drawings, and maps amongst others.

11.3 Rights under Copyright

Kenyan Copyright protection offers artistic rights owners the following:

a. Economic rights

These are the rights to:

- Reproduce in any material form
- Adapt or translate
- Distribute to the public by way of sale, rent, lease, hire, loan, or importation
- Broadcast the whole or part of the work
- Communicate the work to the public
- Perform the work in public

Any unauthorized exercise of these rights is an infringement of copyright. The law provides for criminal sanction and civil remedies to the rights holder in the case of copyright infringement.

b. Moral rights

This entitles the author to claim authorship of the work and object to distortion or mutilation prejudicial to his honor or reputation. These rights are independent of economic rights and are non transferable at all.

c. Related Rights

- Rights of producers of sound recordings
- Broadcasters' rights
- Performers' rights

11.4 Term of Copyright

In various parts of the world, copyright protection varies from work to work depending on authorship and their nature. In Kenya, Copyright protection lasts for the life of the author plus 50 years. If the author is unknown, the period of protection is 50 years from the date it is published. In the case of joint authorship, the copyright will last for the lifetime of the authors and 50 years after the death of the last author. Audio-visual works, photographs, sound recordings, and broadcasts are protected for 50 years from the date of first publication.

11.5 Foreign works

Artistic foreign works in Kenya are protected. This applies to all foreign works of member states of the World Trade Organization and Berne Convention which are eligible for protection in their respective countries.

11.6 Exceptions and Limitations

Not all uses of a work protected by copyright without express permission amount to infringement in Kenya. There are certain circumstances where such use is allowed by law. This is known as fair dealing. This constitutes the payoff that the creator owes to the state in return for the exclusive economic benefit granted by the copyright.

The law permits the exercise of the author's reserved rights for:

- Research
- Private use
- Criticism or review
- Reporting of current events

All this is subject to acknowledgement of the source. Fair dealing provisions are more stringent in the case of computer programs.

11.7 First Ownership

The initial ownership of copyright vests in the creator of the work. Where the work has been created during the course of employment or on commission, the employer or the person who commissioned the work is deemed to be the owner.

11.8 Assignment and Licensing

The copyright owner has the right to sell, license, or bequeath their economic rights to another person. The transfer of these rights should be in writing. The rights may be transferred in part or in full. Once the rights have been sold, the person who sold them (or assigned them) will no longer have any claim to them. However, in the case of a license, the rights will revert to the person who licensed them once the license comes to an end.

11.9 International Copyright Regime in Kenya

Kenya is a member of the World Trade Organization (WTO). The WTO Treaty includes the Trade-Related Aspects of Intellectual Property (TRIPS) Agreement that defines international standards of intellectual property. The TRIPS Agreement adopts the minimum standards of the Berne Convention except for minimal changes. Registration of Copyright protection is vested in the work once it is in a concrete form without the need for registration. This position is observed worldwide. The Kenya Copyright Board is however required under Kenyan law to maintain a data bank of authors and their works by registering copyright works. This registration is voluntary. Non Registration does not deny authors any rights under the Copyright Act.

11.10 Kenya National Rights Registry

The National Rights Registry (NRR) portal is the central repository of the Kenya Copyright Board collating details about the ownership of various copyright works. This portal is used by copyright holders allowing them to register and view/download copyright certificates. The portal allows rights holders of the following types of works: music, video, spoken word, literary works, etc.

12. WHY ARTISTS ARE NOT BENEFITING FROM THE KENYA COPYRIGHT ACT

Threats Emanating from Implementation of Copyright Laws & Regulations

The implementation of Copyright presents a challenge for both the public sector and private sectors. The state of collective management in Kenya is uncertain with empirical evidence showing critical stakeholders including the government and CMOs have been embroiled in court disputes against each other over the years. There are disputes concerning the management of digital music & copyright in court. There is a vague and ineffective legal framework for the management of digital copyright. CMOs which are the custodian of artist rights have no role in licensing their music to streaming companies in Kenya.

Visual expressions including film, photography, and visual arts have no protection from the collective organization system. Their right to protection from illegal exploitation and right to remuneration is in jeopardy because of the lack of dedicated CMOs to protect these unrepresented interests.

Threats Emanating from lack of strategic funding and investments supporting distribution of local copyright have created a situation where Kenyan artists predominantly rely on foreign distribution partners whose terms and benefits are constantly at variance with the expectations of Kenyan artists because of local conditions and other factors such as double taxation of royalties because of a well-coordinated distribution system founded on reciprocal agreements between artist rights organizations in various countries. For over a decade, Kenyan CMOs have been unable to provide support solutions for licensing and monitoring distribution systems operating in Kenya.

Worldwide you don't need to register a copyright to own it. It exists automatically whether expressed in the form of a book, photo, or music. After creation, the most immediate and basic need for the creator is to derive economic benefit from the exploitation of the created copyright. Unfortunately, the Kenya copyright sector is infamous for its unfair commercialization. The unfairness draws its origins from a legal framework that has been faced with legal uncertainties brought by inadequate legislation that has left out critical provisions securing the digital rights and royalties generated from licensing artistic works. Major social media platforms like Facebook and Google don't pay Kenyan artists for their content even though Facebook has announced a global royalty program for content creators.

Loopholes in legal and regulatory provisions have created an unhealthy ecosystem where stakeholders are constantly at loggerheads. There are several copyright-related cases in court between stakeholders regarding the management of artistic expressions in music & film causing uncertainty in the management of the economic rights of Kenyan artists.

The Copyright Act has failed to provide for proper management of music data and digital music rights clearly and expressly. MCSK is in court against Safaricom over the licensing of digital Music. The largest mobile telecommunication company in Kenya doesn't pay license fees to the 3 Kenyan CMOS before it uses the CMOs music catalog. Instead, they rely on opaque mobile data supply agreements with third parties who are not licensed by CMOS. This is dangerous because the third parties lack the requisite ownership data of music and can therefore not guarantee the compensation of all rights holders entitled to royalty payments. They are not custodians of data on music rights holders.

There is empirical evidence to show that users of copyright are exploiting weak regulatory frameworks to avoid their obligations to owners of the copyright. There is evidence showing that various broadcasters including mainstream media outlets have not been fully compliant with their obligations to negotiate and pay for music licenses. This process is also not provided for in the Copyright Act leading to uncertainty over the licensing processes. CMOs and various copyright users in media, the hospitality industry & transport sectors have been at loggerheads over music license compliance. It is common practice for CMOs to use police to enforce license compliance. In 2019 for instance, the Communications Authority of

Kenya jointly with Kenya Copyright Board issued public notices to broadcasters violating copyright regulations to comply with copyright licensing obligations or they will be subjected to regulatory action. Compliance issues persist.

Whereas the Copyright Act mandates KeCoBo to undertake copyright education, the majority feeling by various stakeholders interviewed for this study feel the regulator hasn't done much in terms of developing a sustainable copyright education program, especially for critical stakeholders such as legislators who hold the legislative fate of CCIs.

13. CONCLUSIONS & RECOMMENDATIONS:

Gaps and Opportunities to Enhance Artistic Freedom

The Draft Assessment Report specifically highlights existing threats identified in the legal audit of the frameworks affecting artistic freedoms of expression. The threats are analyzed under three categories. It also highlights opportunities for PANAF programming. The opportunities arise from business cases made out of threats around policy, practical capacity development & lack of infrastructure providing opportunities for lobbying & awareness efforts. Engagement with counties for instance provides an opportunity to explore public financing of cultural activities. The legal audit identifies key national & public policy priority areas. It covers:

1. Threats arising out of Legal & Public Policy gray areas causing confusion, unfair competition, and distortion of cultural markets.
2. Threats arising out of the failure of the Private Sector to put in place complementary mechanisms necessary for the commercialization of Intellectual Property by Cultural Industry stakeholders.
3. Threats arising out of lack of funding for critical infrastructures necessary to build and develop collection and distribution systems for books, pictures, music, films, performance, and visual artists.

The Assessment Report also identifies opportunities for PANAF Networks. Because PANAF seeks to promote human rights and participate in the development of expression programs promoting the economic interests of artists, we have reflected on emerging digital opportunities that are backed by empirical data. Opportunities exist in research, policy advocacy, stakeholder education, stakeholder engagement, knowledge sharing & curation of art-based business development incubators.

The research relies on collected data and responses from various stakeholders. There is a widespread lack of knowledge on essential topics such as freedom of expression, access to information, satire, defamation & profiling. This is also fueling fear of expression due to the repercussions of online harassment, and fear of defamation-related trouble. Homophobia is rampant & rife. Fear of online profiling and harassment is contributing to fears of expression. There is a general feeling of hopelessness and disappointment among music artists regarding the future of income from streaming & collective licensing schemes.

Critical copyright stakeholders in the public & private sectors are embroiled in court battles. The stakeholders include CMOS, Kenya Copyright Board, DPP, DCI, EACC, ISPs, Ministry of Sports, Culture, Youth, ICT, Trade & Industry, KIPPRA, AU, CISAC, WIPO, ARIPO, Media Council, Media Owners, Judiciary, Streaming Companies, Kenya Human Rights Commission, Pangaa Sanaa, Sports Fund, Data Commissioner, KFCB, KFC, Department of Culture, Museums, Council of Governors, County Economic Forums, County Assemblies, Office of Controller of Budget, Auditor General. The study does not venture into the merits and demerits of the cases because of the sub-judice rule that prohibits commentary on live cases. The report however highlights some of the key lawsuits.

In terms of internet & emerging cultural industry issues, Kenya has laws and regulations that in one way or another regulate access to the internet, regulate internet content, and allow for the blocking, removal, and filtering of content. This is a big threat that also presents an opportunity. The obligation to report illegal content primarily lies with the content owner who can issue a takedown notice. Kenya has taken a positive step by shielding internet service providers from the liability of third-party content. If Kenya did not take this approach, ISPs would embark on censorship practices that may end up defeating their important role as providers of infrastructure for information rights of access, privacy & freedom of expression. Fear of liability for third-party content would fuel mass censorship. However, these protections are lacking essential provisions such as the need for ISPs to keep a record of all takedown notices they receive. A threat presented by this is what

would happen when an ISP pulls down content as a result of a takedown notice that turns out to be malicious or is counter-claimed with malice. Whereas the legal framework provides that it is a criminal offense to provide false information which leads to the malicious pulling down of content, ISPs are under no express or implicit duty to maintain an accurate record that genuine victims can use to seek legal redress for damages. It is also silent in instances where the ISP fails to act. Who bears the costs of initiating judicial action at the high court? This is disadvantageous to artists and invites public review.

The government of Kenya has digitized its services. Even though some functions remain manual, Copyright & other critical government services have been digitized. Post-Covid, everyone is angling for a digital stake. Despite this tremendous economic trajectory, the Cultural Sectors especially around performance-based arts continue to suffer the negative consequences of a legal and policy environment that has done more to deny artists legitimate royalty income from the public performance, broadcast, and distribution of their works in digital & analog spaces.

Access to Streaming Data Information. The Private Sector continues to present interesting opportunities for the Kenya cultural market. For example, there are Kenyan and international companies providing music-related streaming & public performance services. On the flip side, there is empirical evidence that shows the operations of these companies in terms of their access to information around their streaming policies, royalty calculation systems, monitoring & use are opaque. Commercial terms are changed at will inviting an investigation into their regulatory & commercial practices.

There is an opportunity to enhance the economic competitiveness of the Kenya Music Industry by participating in local and international efforts to build credible scientific music charts for the Kenyan music market. As artists continue to crowd-fund and even create Non-Fungible Tokens (NFTs) in the Kenya market, the need for a credible chart network has never been so important. There is an opportunity for the development of networks promoting national and county-based charts. Charts enhance competition between artists. It provides a spotlight for gauging what fans enjoy. Chart numbers will be crucial for creatives seeking to use their IP for funding. Charts help identify the popularity of multiple genres of music. There exist global standards for charting various genres of music. Charts provide a great opportunity for award programs and recognition of talent opportunities. Charts create a system of checks for CMOs since the most popular music equates to higher royalty income for rights holders.

There is an opportunity for building an NFT-focused knowledge-sharing society. There is evidence to show that whereas the government & private sector continues to pursue blockchain technology and integrate the same into their systems, the Cultural Industry lacks sufficient knowledge hubs for NFT-related ventures. This presents both threats and opportunities. Because artists have perennially been at the negative end of the stick as to how technology interrupts their IP rights, there are legacy opportunities PANAF can tap into. There is evidence to show that Kenyan visual artists are investing in NFTs. There are more visual artists than music artists in the NFT space. Blockchain technologies have the potential to solve financial transparency issues associated with Kenyan CMOs.

There is an opportunity to build a digital music coalition in Kenya. PANAF seeks to become the voice for artists suffering challenges resulting from economic, policy, and legal factors. Because of the digital challenges such as the lack of a digital CMO, there is an opportunity to develop thought leadership around digital copyright & streaming. There is an opportunity for the capacity development of legislators who are ultimately tasked with bridging this gap.

There is an opportunity regarding the visual arts sector. Whereas Kenya has legislated for the artist's royalty resale right, there is no evidence indicating any government research that is backing the implementation of policy to make the artist royalty a reality. If properly done, this policy can ensure that visual artists continue to earn a royalty whenever their works are sold. It requires a robust discussion involving the copyright office, revenue authority, ministry of ICT, Museums, etc.

Artistic freedom relies on the correct application of information rights. Information rights include Access to information, Privacy & freedom of expression frameworks. There is empirical evidence indicating that a combination of factors affects artistic freedoms in Kenya. In Kenya, artists are not able to access data about the monitored use and distribution of their works. However, artists registered with global platforms & CMOs based in America and Europe get regular monthly statements and royalty cheques. There is an opportunity for PANAF to stir and ignite policy debates around commercial information rights for artists. There is empirical evidence indicating neither the copyright office nor CMOS has data protection and privacy guidelines for the copyright sector. There is an opportunity for championing an artists-focused data privacy campaign with the office of the Kenya Data Commissioner. There is empirical evidence that the office has been conducting Data Protection & Privacy capacity-building programs for various sectors. This can be a unique partnership promoting public-private sector engagement for the Kenyan artistic community issues around data privacy and protection.

There is an opportunity for building a legal aid network for the Kenya cultural sector. Many Kenyan artists continue to suffer a sustained lack of access to proper legal advice whenever they engage in commercial activities related to the creation or distribution of work. Risks surrounding the expression of ideas like defamatory suits present legal threats to artistic expression. There is a great need for an independent art-based legal action advisory group. Because legal services will continue to be available to a limited number of artists there is a business case for either designing and building an in-house solution or building a coalition of actors who can be tasked with finding and operationalizing such a venture.

There is an opportunity to build creative business tools for helping artists in the counties build business teams. Freedom of artistic expression entails the right to participate in cultural life through distribution & remuneration systems. Artists in these counties will not be able to scale the heights of success without the use of digital tools that can help them build teams and markets. An opportunity to examine the latest industry trends growing the independent music industry presents itself.

There is empirical evidence showing that most music artists in Kenya are independent and not affiliated with the major labels. Technology continues to fuel the rise of independent artists. If it is possible for Kenyan farmers to adopt technology in agriculture in terms of identifying markets, it is equally possible for Kenya to adopt technology and solutions that can enable public spaces and performance venues in the counties to connect musicians to their fans and new music audiences.

Opportunity to Build a Public Participation Coalition & Database for the creative sector. The Data revolution means that the government will have to engage the public in policy decisions that affect the cultural industry. Empirical evidence shows that public institutions have a history of failing to conduct public participation. Empirical evidence shows that most public participation methods are led by public authorities. Because Kenya has never enacted the Public Participation Bill introduced to parliament in 2019 there is no credible mechanism for measuring the effectiveness and genuineness of public participation practices in the Kenya cultural sector. For instance, there is no empirical evidence provided by public authorities indicating that Kenya is better off without CMOs for film, visual arts, books, music, etc yet regulatory and industry decisions are based on actions lacking public participation.

Kenyan Books deserve an opportunity to be licensed by both the Public and private sectors. Whereas academic-based publishers have various associations that lobby & dialogue with the government & teachers non-fictional books such as stories suffer setbacks. The first threat is the lack of a functional CMO for writers of books. Because of weak digital copyright systems, illegal downloads of books cost writers millions of shillings daily in lost royalties. The fight against illegal downloads is left to the artist. There isn't a well-funded public hotline to fight illegal streams. There is an opportunity to build the capacity of police to join the fight against illegal downloads that have been linked as sources of funding crime.

There is no evidence of policy providing that the National Broadcaster adopts and translates Kenyan books into film and other audiovisual productions. Books create fodder for film generation. There isn't evidence of a vibrant cultural network linking book authors to filmmaking opportunities and vice versa. Broadcasters in Kenya are only under obligation to broadcast 40% locally sourced content. Used as a measuring stick this can mean that only 40% of Kenyan screen performers can survive on local expressions. There is no artist-focused labor union for creatives engaged by the national broadcaster. The standards used by the government in its labor practices should be standard. PANAF seeks to promote artistic expression and an opportunity to develop a forum bringing together books and film stakeholders. Because of the stratified roles in film, there is a significant investment in the rise of film companies and crews. An opportunity to create an intellectual knowledge network between books, filmmakers, and film financiers is ripe for the Kenya market. There is an opportunity to promote a professional film market for young writers and filmmakers. There is no policy evidence to show why the Kenya National Broadcasting Corporation has no physical and digital presence in the 47 counties. There is an absence of policy guidelines on how county communication frameworks can be integrated into the national broadcasters' infrastructure to promote the creation of local content from the 47 counties.

Sports Arts & Social Development Fund & Funding Music & Film related Sports Expressions. There is an apparent financing gap in the framework of funding cultural industries like music and film. There are initiatives such as the move by the public sector to build recording studios that can be interpreted as public efforts to fund the arts. However, there is no empirical evidence showing that such investments have had a generational impact on music or the constituencies they were built for. There is no solid regulatory anchor for funding films despite the existence of public bodies regulating & promoting the film industry. Existing film funding programs appear to be a one-off without sustainability mechanisms. The traditional role of film agents continues to be a curse rather than a blessing. Film agents in Kenya have perennially failed to organize collectively in ways promoting local investment & capacity development. An opportunity to lobby the sports fund presents itself. The short-term solution to financing music and film may lie in the sports fund. Lobbying efforts bringing together film-

makers who can make film-inspired flicks arise. An opportunity to promote music in sports through sports music festivals funded by the fund arises. This presents an opportunity for PANAF to research the funding structure of the fund. It also requires the identification of locally inspired sports stories that can be translated into film.

There is an opportunity for establishing a public policy incubation program in collaboration with the Kenya Institute of Public Policy Research and Analysis (KIPPRA). There is empirical evidence indicating that KIPPRA is not adequately supporting public policy research in the arts. There is very scarce public research data on the arts even though it is a publicly funded body that should be financing public policy research for the cultural sector. Information from KIPPRA indicates that they presently don't have any major initiatives they are driving in the arts. PANAF has an opportunity of building research and analysis of cultural sector issues with this publicly funded entity. More research and analysis are needed in the area of royalty systems, commercialization practices, technologies for cultural industries, digital trends, emerging challenges in commercializing IP, international development of markets, etc.

Satire & Defamation Expressions Opportunity. We indicated that despite the High Court of Kenya declaring that the criminal aspects of defamation were unconstitutional because defamation is civil in nature, Kenya adopted the Computer Misuse and Cyber Crimes Act which seems to be reintroducing the criminalization of defamation. This is because spreading information that turns out to be false is a criminal offense under the Act. This dispute is in court. Defamation is the publication of untruths about a person or product or institution. It involves reputation. There is also empirical evidence showing that Kenyan visual artists face threats of intimidation and unfair criticism regarding expressions related to high-voltage topics such as corruption, gender identity, sexual orientation, and religion. For instance, one of the interview sources of research data indicates that despite putting out a paid call for visual artists to submit drawings geared at enhancing public messaging on corruption the call wasn't successful as it involved calls to depict the political class & civil service involved in ethics violations and allegations of corruption. The greatest fear by members of the visual network was the fear of online attacks by political supporters of affected politicians. Further interrogation of the source shows that this fear could also be anchored on the failure of visual artists to understand their freedom of expression rights as regards satirical depictions, creation of animated public characters, and avoiding defamation. There is an opportunity for building the capacity of visual artists through a digital capacity development program targeting the education of visual artists.

Funding County Cultural Programs. Without a well-researched County Budgeting Public Policy Guide the Cultural Sectors will fail to tap available opportunities for public funding of arts in Kenya. There is no evidence of the existence of public financial management guidelines specifically developed for the Cultural industries. Consequently, artist organizations and artists lack a guide for developing proposals geared towards the public finance of cultural sector activities like music festivals, theater, carnivals, shopping festivals, etc. Interestingly, there is evidence that the collaboration of public infrastructure and the arts has some level of success with acting groups getting gigs for reenacting set books/literature books. There is an opportunity to study and develop a resource guide that can help artists competently undertake public participatory activities geared towards the funding of cultural-related activities.

Expressions around Advocacy on Fashion Issues. There is an absence of a credible study or guide that seeks to explain why the Kenyan fashion and textile industry relies on the second-hand clothes import market despite Kenya being one of the largest exporters of clothes and fabric through the EPZ. Approximately 50 million Kenyans wear clothes that are mostly not made in Kenya. Decades of slow growth have resulted in the loss of traditional knowledge associated with traditional clothing designs. There is policy evidence of discussions around revamping the cotton industry. The policy suggests the fashion industry in Kenya can create jobs for fashion-based entrepreneurs from farms to clothing stores. These abnormalities in policy provide an opportunity for PANAF to initiate research-based engagement with KIPPRA and other agriculture and ministry of trade stakeholders aimed at providing public policy direction for the Kenya fashion industry. Artists are increasingly becoming fashion entrepreneurs with an interest in clothing lines. There is empirical evidence showing merchandising is on a growth trajectory. There is an opportunity for PANAF to join existing fashion industry initiatives seeking to express knowledge within the fashion industry value chain. The Kenya fashion advocacy council is a potential advocacy partner for PANAF.

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