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STUDY ON COLLECTIVE NEGOTIATION OF RIGHTS AND COLLECTIVE MANAGEMENT OF RIGHTS IN THE AUDIOVISUAL SECTOR

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1. The Annex to this document contains a Study on Collective Negotiation of Rights and Collective Management of Rights in the Audiovisual Sector, undertaken in the context of the Project on Strengthening and Development of the Audiovisual Sector in Burkina Faso and Certain African Countries (CDIP/9/13). The study was prepared by Ms. Tarja Koskinen-Olsson, International Adviser, Olsson & Koskinen Consulting Oy, Helsinki, Finland.

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

[Annex follows]

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

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Executive Summary

This study is commissioned as part of the Development Agenda (DA) Project on “Strengthening and Development of the Audiovisual Sector in Burkina Faso and Certain African Countries”². The ultimate goal of the project is to enhance creativity and creative industries in selected African countries. This will take place among others by improving audiovisual rights management and profitability of copyright and related rights based transactions. - The selected countries are Burkina Faso, Kenya and Senegal.

This Executive Summary highlights first how audiovisual rights management functions and then describes the main findings in the target countries. It ends up with three main conclusions to achieve the project goals.

Audiovisual Rights Management

The audiovisual industry plays a major role in society both economically and culturally. Audiovisual works are the result of collaborative effort by *creative collaborators*, such as screenwriters, film directors, composers and actors, and *financing partners*, such as film producers and broadcasters.

There is customarily a *contractual relationship* between creative collaborators and financing partners. Contracts deal with employment issues in film-making and issues relating to exploitation rights and remuneration attached to them. As audiovisual works are shown in numerous premises, such as cinema, television, home video, cable and satellite and the internet, contracts play a major role.

Contracts can be negotiated in different ways:

- (i) Individually between a creator or a performer and a producer;
- (ii) By collective negotiations between associations and guilds representing parties;
- (iii) By collective management organizations (CMOs) representing rights holders; and
- (iv) A combination of the alternatives.

Different countries have chosen different ways of negotiation, subject to their history, infrastructure and strength of the negotiating partners. There are no one-size-fits all solutions; rather every country needs to find the way that serves the local circumstances.

In countries with strong associations and guilds representing creative collaborators and financing partners, negotiations take often place between the representative bodies. This is called *collective negotiation of rights*. Remuneration paid to creative collaborators for various exploitation rights are centrally agreed upon. The actual remuneration is paid directly by each producer to the creators and performers of each work. Such royalties are called “residuals” in the United States, and the system itself “the guild system”.

Royalties can also be paid by a CMO, through the system called *collective management of rights*. Creative collaborators authorize a CMO to license all or some exploitation rights and collect remuneration thereof. This is the case for instance in France. Such a system can be

² CDIP/9/13: Project Activity 1

called collective management of *primary rights* in case of cinema and television, which are considered to be primary venues. – In such a system, financing partners collect their own remuneration directly from the user, for instance a television broadcaster.

Collective management is most common in the case of *secondary rights*. A typical example is remuneration for private copying, a system that exists in a number of countries in Africa and elsewhere. Another example is retransmission of broadcast programs, i.e. cases where whole television channels are transmitted via satellites to other countries and transmitted in cable networks. In these cases, collective management serves both creative collaborators and financing partners, as none of them could successfully exercise their rights individually.

There is a great variety in the CMOs' membership and examples range from:

- (i) CMOs for authors and/or performers of audiovisual works;
- (ii) CMOs for producers of audiovisual works; and
- (iii) CMOs for both creative collaborators and financing partners.

Separate CMOs for various groups of rights holders are often the result of history, legislative developments and local infrastructure.

Main Findings in the Target Countries

The scope of this study is to evaluate the applicability of two alternatives:

- (i) Collective negotiation of rights, and
- (ii) Collective management of rights.

In the selected African countries – Burkina Faso, Senegal and Kenya – *collective negotiation of rights* does not currently take place. Rather contracts are negotiated on an individual basis. In some cases there are no written agreements, or agreements are not clear enough to enable full exploitation of rights, in particular in foreign countries.

The scarcity of strong and representative associations or guilds of creative collaborators and financing partners does not support collective negotiation of rights in the target countries. In the absence of collectively negotiated contracts, it is important to create solid basis for *individually negotiated contracts*.

For *collective management of rights*, national legislative framework sets the scene. In Burkina Faso and Senegal audiovisual rights holders do not in many cases enjoy exclusive exploitation rights; they have only a right to receive equitable remuneration, for instance from television broadcasting. In Kenya, broadcasters can disseminate published audiovisual works without the consent of rights holders and without remuneration to them in cases where there is no licensing body, i.e. a CMO.

In many Francophone African countries, including Burkina Faso and Senegal, CMOs are so called *multipurpose organizations* and they manage rights in all categories of works, thus also in audiovisual works. Some Anglophone African countries have in recent years witnessed the establishment of *joint CMOs for all rights holders* in audiovisual works. - In Kenya, there is currently no CMO representing rights in audiovisual works.

In many African countries audiovisual works are performed widely in small premises, such as hairdressers, shops, restaurants, financial institutions, buses, etc. It would be virtually impossible for individual producers to oversee all such public performances. This is an additional reason to establish or strengthen collective management on the continent.

As the digital environment and online uses are rapidly increasing in all countries, it is of crucial importance to establish clear licensing mechanisms for on-demand services of audiovisual works. African films are popular in many markets and full exploitation of rights presupposes clarity in contracts and effective management of rights.

Main Conclusions

One of the main objectives of the project is to “advance the development of an effective and balanced framework and infrastructure for the exercise and management of IP rights-based transactions in the audiovisual sector”. A balanced solution ensures at the same time full exploitation possibilities for producers and fair remuneration to creative collaborators.

The main conclusions of the study target at improving a combination of *individual exercise of rights* and *collective management of rights*.

1. Guiding principles or best practices for individual contracts negotiated between creative collaborators and financing partners

- Clear contracts would establish a “chain of title”, meaning proof of all necessary permissions to make and market the film. Contracts should also ensure fair remuneration for creative collaborators for various exploitations.
- This would enhance the profitability copyright and related rights-based transactions.

2. Establishment or strengthening of collective management of audiovisual rights

- In all three target countries, there are strong legislative and infrastructure reasons to have CMOs that take into account the situation of all rights holders.
- Favorable national legislation is needed to enhance audiovisual rights management and ensure fair remuneration to creative collaborators

3. Establishment of effective licensing mechanisms for online, on-demand services

- National and Pan-African online platforms delivering films are being established, and African films are sought after on other continents, but in many cases rights are sold to foreign companies with an onetime payment, leaving local rights holders unaware of any future exploitations and benefits.
- Effective licensing mechanisms can be based on individual exercise or collective management of rights, subject to the country.

1. Background

This study is commissioned as part of the Project Activity 1 of the DA Project on “Strengthening and Development of the Audiovisual Sector in Burkina Faso and Certain African Countries” (CDIP/9/13) which addresses WIPO’s Development Agenda Recommendations 1, 2, 4, 10 and 11.

The ultimate goal of the project on strengthening and development of the audiovisual sector is to enhance creativity and creative industries in selected African countries. The three target countries are *Burkina Faso, Kenya and Senegal*.

Audiovisual works can be enjoyed in cinemas, on television, via satellite and cable, at home by way of rental or transmission from online platforms. The industry plays a major role in society both economically and culturally. Audiovisual works are the result of collaborative efforts by several creators and performers, and large investments on the part of production companies. The role of distributors and sales agents is pivotal in marketing films nationally and internationally.

The study describes and evaluates how collective negotiation and collective management of rights function in the audiovisual sector internationally and in particular in the African context.

The study takes as the starting point the current international legal framework concerning audiovisual works, including the Beijing Treaty on Audiovisual Performances (BTAP) from 2012, and national copyright laws in the three target countries.

The study takes into consideration the assessment and recommendations provided under the previous study prepared for the CDIP/9/13 project, namely “Scoping Study on Strengthening and Development of the Audiovisual Sector in Burkina Faso and Certain African Countries” (CDIP/12/INF/3). It also uses as reference material other WIPO studies on the subject matter, in particular WIPO Review of Contractual Considerations in the Audiovisual Sector (June 7, 2012, Publication no 1034E)³.

2. Main Objectives of the Study

The main objectives of the study are:

- To provide an objective factual assessment of current challenges faced by the three target countries Burkina Faso, Kenya and Senegal, in management of rights for authors, performers and producers in the audiovisual sector, while taking into consideration international practice and standards in this sector, and
- To identify priority areas and propose solutions which could be addressed under the DA Project CDIP/9/13 to improve audiovisual rights management and profitability of copyright and related rights based transactions of this sector in the three target countries.

The first scoping study (CDIP/12/INF/3) included a number of general strategic and specific recommendations. The most relevant ones for the present study are the following:

- *General strategic recommendation (6)*: Collective copyright management in the audiovisual sector should be reviewed and as required adapted to the digital environment, both to create market opportunities and empower the sector with exclusive rights where they can be commercially exploited, and to reform collection and distribution models applicable to statutory licenses and rights voluntarily assigned to collective management in order to generate adequate remuneration for rights holders.

³ Available at:

http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/review_of_contractual_considerations_in_av_sector.pdf

- *Specific recommendations (f)*: To help foster an efficient and integrated relationship between the audiovisual practitioners and relevant collective management organizations (CMOs) as links in the rights value chain, where collective management is the most appropriate approach to managing and monetizing rights in audiovisual works.

The following modules for editorial priorities were recommended:

- *Module Five*: The minutiae of licensing audiovisual works to broadcasters and other platforms – issues arising from blanket or compulsory licensing; term of license, revenue transparency – this module should involve acquisition executives in national public and commercial broadcasters and/or online platforms.
- *Module six*: The role of CMOs – understanding the secondary/tertiary rights' value chain; issues of data gathering and transparency; revenue collection challenges in relevant secondary markets (e.g. private shops, video clubs, etc); using copyright documentation to claim revenue from foreign CMOs, etc.

3. Scope of the Study

The study includes two methods in management of rights in the audiovisual sector, namely:

- Collective *negotiation* of rights, and
- Collective *management* of rights

Collective negotiation and collective management of rights are two different ways of managing rights in the audiovisual sector. In *collective negotiations*, the main emphasis is on the relationship between associations and guilds of authors and performers on one side and producers on the other side. In *collective management*, the emphasis is on the work of a collective management organization (CMO) which manages copyright and related rights on behalf of a certain group or all rights holders of audiovisual works.

Both ways are viable and function well in various countries and infrastructures. They are also closely interlinked and can be combined.

The choice of a particular method of managing copyright and related rights needs to be done taking into account the economic, social and cultural infrastructure of each country and the existing national copyright legislation. Recommendations for legislative and other amendments are included in the study when and where it is considered important to achieve the overall goal of the project.

4. Structure of the Study

The study will address the following issues:

- Description of the *players* in the audiovisual industries and of their working relationship, at international level and in the African context;
- Analysis of the role of *contracts* in the audiovisual industry, of typical contractual provisions, main differences between contracts and collective agreements, and limitations in the effectiveness of contracts;

- Description of operations of *collective management* in the audiovisual sector, various types of collective management, assessments of its current role at international level and evaluation of its current importance in Africa;
- Factual and descriptive *assessment of the current challenges* relating to the effective management of audiovisual rights in the three target countries; and
- *Conclusions and recommendations* aimed at assisting the WIPO Secretariat and Member States in the scoping of project actions and deliverables leveraging international experience to the practical benefit of local needs to improve audiovisual rights management and profitability.

The study will include *concrete examples* and *case studies* of successful strategies and best practices taken from various international audiovisual markets.

In the following, these issues are highlighted one by one.

5. Players in the Audiovisual Industries

Moviemaking is a collective endeavor organized by the producer and involving many brilliant creative talents: writers, directors and actors, cameramen, designers, editors, and so on. Economic success depends on matching ideas with talent, obtaining relevant intellectual property (IP) rights and using them to attract finance from commercial film distributors⁴.

This study uses two generic terms - *creative collaborators* and *financing partners* – to illustrate the main groups in the audiovisual industries. Audiovisual works are the result of collaborative effort by these two groups. Creative collaborators include authors and performers. Financing partners include film producers, broadcasters for their in-house productions, and others to whom producers may have transferred IP rights.

In international copyright treaties, the term “cinematographic work” is used instead of an audiovisual work, which is used in this study. The term “audiovisual work” includes among others films, television shows, animations and documentaries; in principle any series of related images which shown together create an impression of movement. Whereas the work must have a visual element, the audio element is optional.

In the following, the *players in the audiovisual industries* are shortly described one by one, as audiovisual authors, performers and producers.

5.1. Audiovisual Authors

Audiovisual works were added to the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) as independent artistic works only in 1948. According to the Berne Convention “*ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed*”. Thus, there is no international standard for authorship or ownership of rights in an audiovisual work.

“*Authors who have brought contributions to the making of the work*” is the guidance given in the Berne Convention for countries to determine who is an author of an audiovisual work.

⁴ From Script to Screen – The Importance of Copyright in the Distribution of Films, WIPO, Creative Industries, Booklet No. 6, 2011, available at: http://www.wipo.int/export/sites/www/freepublications/en/copyright/950/wipo_pub_950.pdf

Audiovisual works may include *pre-existing works*. For instance it has become popular to base a film script on an existing novel. The audiovisual work can include a number of pre-existing musical works. In these cases, a permission to use pre-existing works is a prerequisite for filmmaking. The producer needs to be in a position to show that all permissions have been acquired. This is called copyright documentation or “chain of title”.

The following two examples show the great variety in how different regions and countries have defined authorship in an audiovisual work:

In the *European Union*, two copyright directives⁵ have established that at least the following shall be regarded as *authors* or *co-authors* of an audiovisual work:

- The principal director;
- The author of the screenplay;
- The author of the dialogue; and
- The composer of music specifically created for use in the cinematographic or audiovisual work.

In the *United States*, a film producer is regarded as “the sole author”, based on a legal assignment of copyright.

The situation in the three target countries is described at the end of this chapter.

5.2. Audiovisual Performers

The main international treaty in the field of *related rights* is the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention)⁶. The new international treaty, Beijing Treaty on Audiovisual Performances (BTAP)⁷ from 2012 deals specifically with the protection of *audiovisual performances*. - The treaty has not yet entered into force.

The BTAP includes the following definition (Article 2): “*performers*” are *actors, singers, musicians, dancers, and other persons, who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore*. - National laws can include definitions of performers for the given country.

A central issue in the BTAP concerns *transfers of rights* from performers to producers. Taken into account the plurality of national solutions, the treaty includes various ways for such transfers (Article 12):

- (i) A Contracting Party may provide in its national law that once a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorization provided for in Articles 7 to 11 of this Treaty shall be owned or exercised by or transferred to the producer of such audiovisual fixation subject to any contract to the contrary between the performer and the producer of the audiovisual fixation as determined by national law.

⁵ Rental and lending directive of 1992 (92/100/EEC) and term of protection directive of 1993 (93/98/EEC)

⁶ The treaty is administered by WIPO, UNESCO (United Nations Educational, Scientific and Cultural Organizations) and ILO (International Labor Organization)

⁷ The treaty is administered by WIPO

(ii) A Contracting party may require with respect to audiovisual fixations produced under its national law that such consent or contract be in writing and signed by both parties to the contracts or by their duly authorized representatives.

(iii) Independent of the transfer of exclusive rights described above, national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 and 11.

Article 10 concerns the right of making available of fixed performances and Article 11 the right of broadcasting and communication to the public.

Article 12 captures two essential issues: who disposes of the exclusive exploitation rights and what remuneration and in which form can be paid to performers for different exploitations of their performances.

5.3. Producers

The position of *film producers* is twofold. In some jurisdictions film producers are considered as “authors” of audiovisual works. In this case, it may be question of a *legal assignment* where legislation attributes ownership of rights to a third party, normally the producer or employer. - For example in the United States the producer holds the copyright in an audiovisual work and is deemed therefore as “the sole author”.

In some jurisdictions film producers base their rights on *presumptions of transfer* of rights from authors and performers to producers. The presumption of transfer can be either *rebuttable*, where the transfer is subject to contractual arrangements to the contrary, or *mandatory*, where the transfer of rights takes place automatically and inevitably when consent to the filmmaking is given by the author or performer.

For example in *Mexico*, the copyright law⁸ specifies who is considered to be an author of an audiovisual work as well as ownership of economic rights as follows (Article 97):

- I. *The director or maker;*
- II. *The authors of the plot, adaptation, screenplay or dialogue;*
- III. *The authors of the musical compositions; and*
- IV. *The photographer, the authors of cartoon and animated pictures.*

Unless otherwise agreed, the producer shall be considered the owner of the economic rights in the whole work.

National laws may include presumptions of transfer of rights when a film contract is concluded or provisions on presumption of transfer for *employed authors*. In the latter case, the concept of “employment” becomes critical. – For example in *Brazil*, authors and performers in television are to a large extent employees of the major broadcasters.

In some other jurisdictions, film producers base their rights on *contractually acquired rights* from authors and performers. In case of a rebuttable transfer of rights, a contract between authors/performers and producers becomes the instrument that specifies what rights are transferred to the producer. The producer thus relies on contractually agreed rights, and not on the presumption.

⁸ Federal Law on Copyright, 24 March 1997, Chapter III, Cinematographic and Audiovisual Works

Moreover, producers hold related rights in many jurisdictions.

In all instances, contracts play a major role in the audiovisual industry, as contracts between authors, performers and producers define the working relationship between the parties. Contracts customarily include two separate issues: *employment issues* and *rights issues*. The role of contracts is described in chapter 6.

5.4. Situation in the Target Countries

National legislation in the three target countries defines authorship/ownership in audiovisual works in the following way:

Burkina Faso (Law NO. 032-99/AN, English translation):

- Audiovisual works are specifically protected under the Burkina Faso copyright law (Article 5);
- Authorship of an audiovisual work belongs to the natural person or persons who have carried out the intellectual creation of this work. In the absence of proof to the contrary, the following shall be presumed to be the *co-authors* of a *collaborative audiovisual work*:
 - (a) the author of the script;
 - (b) the author of the adaptation;
 - (c) the author of the dialogue;
 - (d) the author of the musical composition, with or without words, specially composed for the work; and
 - (e) the director.
- The original owners of the moral and economic rights in an audiovisual work shall be the co-authors of this work;
- Contracts binding the producer and the author of an audiovisual work, other than the author of a musical composition with or without words, shall imply, unless otherwise stipulated and notwithstanding the rights afforded to the author, the *assignment to the producer of the exclusive exploitation rights* in the audiovisual work (Article 59).
- Remuneration shall be payable to the authors for each mode of exploitation; remuneration shall be paid to the authors by the producer (Article 60); and
- At least once a year the producer shall furnish the author or co-authors with a statement of income resulting from the exploitation of the work in respect of each mode of exploitation (Article 63).

Senegal (LAW No. 2008-09 of January 25, 2008, English translation):

- The Senegalese law specifically protects audiovisual works as “works consisting of sequences of moving images, with or without sound, known as audiovisual works” (Article 6.5);
- The initial ownership is by the natural person who created the work (Article 12);

- Audiovisual works are works of *joint authorship* (Article 26) and unless provided otherwise, the following shall be presumed to be the joint authors of such work:
 - (a) the author of the script;
 - (b) the author of the adaptation;
 - (c) the authors of the dialogue;
 - (d) the author of the musical composition, with or without words, specially composed for the work; and
 - (e) the director.
- There is a *rebuttable presumption of assignment* concerning audiovisual production contracts stating that “a contract binding the producer and the author of an audiovisual work, other than the authors of musical works with or without words, shall, unless otherwise stipulated, imply the assignment to the producer of *exclusive exploitation rights* in the audiovisual work” (Article 81);
- The producer shall, at least once a year, furnish the author and the joint authors with a statement of revenue from exploitation of the work in respect of each mode of exploitation (Article 85); and
- There is a similar presumption for performers’ rights and the performers’ remuneration may be proportional or a lump sum. It shall be paid for each mode of exploitation (Article 95.3).

Kenya (Copyright ACT, 2001):

- Audiovisual works are listed under works eligible for copyright (Article 22);
- In Article 2 (d) “Interpretation”, there is a general provision concerning audiovisual works stating that “author, in relation to audio-visual works, means the person by whom the arrangements for the making of the film were made;
- Based on this provision, copyright would customarily be vested with the producer; and
- The author of an audiovisual work enjoys a set of exclusive rights (Article 26).

5.5. Summary

At international level, stipulations in national laws define who is regarded as the author or co-author and the performer. National laws can include legal assignments or presumptions of transfer of rights, which can be rebuttable or mandatory. Alternatively, national laws can include provisions on audiovisual production contracts or employment contracts. Based on the above, *effective exploitation rights* are in many cases in the hands of producers. Authors and performers can receive remuneration for various exploitations on the basis of law or contracts or both.

At African level, the three target countries represent two different legal traditions: *Burkina Faso* and *Senegal* are both so called civil law countries with a “*droit d’auteur*” concept and tradition. *Kenya* is a common law country with an Anglo-Saxon tradition.

There are provisions on authorship/ownership of rights in audiovisual works in Burkina Faso, Senegal and Kenya. In all three target countries, *exclusive exploitation rights* are in the hands of producers. In principle, this provides legal certainty and enables the producers to effectively

seek financing for their productions and to market their works, both nationally and internationally.

Producers have a responsibility of paying remuneration to authors and performers in Burkina Faso and Senegal which is specific to each mode of exploitation. In principle, this ensures that authors and performers receive remuneration from all exclusive exploitation rights, and this remuneration is to be paid by the producer. In practice, however, there are few exclusive rights and they can be voluntarily mandated to CMOs in the two countries. This can create uncertainty in the marketplace.

5.6. Recommendations

The objective of the DA Project CDIP/9/13 is to contribute to further develop a *balanced situation* where financing partners have a possibility to draw benefit from all exploitations and where creative collaborators are recognized and receive adequate remuneration for the use of their contributions. - This chapter concerning players in the audiovisual industries and their working relationship gives rise to the following recommendations.

Recommendation 1:

In *Burkina Faso* and *Senegal*, it is important to clarify whether the producers or the local CMO manage *exclusive exploitation rights*. According to the copyright law, creative collaborators are ensured remuneration for all exploitations of audiovisual works based on their exclusive rights. Producers are obliged to pay such remunerations, unless otherwise agreed.

At the same time rights holders may voluntarily entrust the management of their exclusive rights to a CMO in the two countries. This situation makes it unclear who can effectively license for instance new digital online platforms that are emerging, because the rights may be vested with the producer or the CMO.

Discussions among all stakeholders are recommended to get full clarity in the management of exclusive rights and find effective licensing mechanisms for online, on-demand uses. – This recommendation is in line with the proposal in Module Five of the Scoping Study (CDIP/12/INF/3).

Recommendation 2:

To achieve a balanced situation in *Kenya* between the creative collaborators and financing partners it would be important to consider what role contracts can play in the relationship and how contractual rights could be enforced and exercised. Currently, contracts are in many cases non-existent, which as such is a hurdle for the audiovisual industry to become more professional.

Recommendation 3:

In general, the position of *film directors* merits special attention. In some African countries following the common law tradition, directors are not recognized as authors or co-authors of audiovisual works, following the legislative solution in the United Kingdom in early 1990s, prior to certain directives⁹ of the European Union.

⁹ Rental and lending directive of 1992 (92/100/EEC) and term of protection directive of 1993 (93/98/EEC)

6. Role of Contracts in the Audiovisual Industries

*In regard to intellectual property, contracts contain the final expression of the rights granted under international treaties and implemented in national legislation. By compensating rights holders and facilitating the exploitation of rights, contracts present the ultimate way in which copyright impacts on creators and creative industries*¹⁰.

This chapter is to a large extent based on the WIPO Review of Contractual Considerations in the Audiovisual Sector of 2012¹¹. It was carried out in consultation with stakeholders in the audiovisual sector. The review concerns contractual relations between *performers* and *producers*, but much of its content is applicable also to contracts between authors and producers, in particular to those authors who participate in the production, such as film directors.

Irrespective of the legal system of a country, contracts play a major role in the audiovisual sector. A contract between an author/performer and a film producer is of fundamental importance as it specifies *working conditions*, possible *transfer of rights* to the producer and *payments* due to authors/performers participating in an audiovisual work. There are two distinct issues that are covered by a contract:

- Employment related issues, and
- Rights related issues.

Whereas the rights related issues are more relevant in regard of this study, the two issues are shortly discussed in the following.

6.1. Typical Contractual Provisions

A contract regulates the relationship between the producer and performer or other contributor to the making of the audiovisual work. The mere fact of discussing and agreeing to a contract may be sometimes as important as the contract itself, because it provides an opportunity for the parties to agree *in advance, in writing*, on all the relevant terms and conditions applicable to the contributions in the audiovisual works.

Employment related issues

These provisions relate to the work to be done by the creative collaborator. There may be a range of obligations concerning participation in the production, such as working hours, punctuality, professional conduct and delivery dates. A fee to be paid is linked to rendered services.

Creative collaborators customarily receive an *upfront payment* or *initial fee* from the producer for their contribution to a project, whether it is a script, a score, the work involved in directing or acting. There can also be *additional fees* payable by producers for additional services, such as work in excess hours, travel time to locations, etc. Employment related issues do not generally have anything to do with IP rights.

¹⁰ Preamble by the Director General of WIPO to the WIPO Review of Contractual Considerations in the Audiovisual Sector, available at:

[http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/review_of_contractual_considerations_in_av_sector.p](http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/review_of_contractual_considerations_in_av_sector.pdf)

¹¹ The review was carried out by Ms. Katherine Sand, and it benefits from the comments from the International Federation of Film Producers (FIAPF) and the International Federation of Actors (FIA)

Rights related issues

An important purpose of contracts is to create a clear and unambiguous disposition of any *exclusive IP rights* that may be held by the creative collaborators. Contracts can include provisions on transfer of exclusive rights, where this does not take place on the basis of the law or conditions of transfers where the law provides a rebuttable presumption.

In cases where there is a legal assignment of rights to the producer, creative collaborators can receive *contractual rights* based on the contracts between the collaborators and producers. – This is for instance the case in the United States.

A central issue is to agree on *payments for subsequent uses* of the works or performances. The terms *secondary uses* and *secondary fees* are sometimes used in this context. Secondary fees are called by a range of terms, including “*residuals*”, “*royalties*” or simply secondary fees. Calculation can be based on a percentage of the initial fee, a percentage of the revenue received from the exploitation or another basis.

Payments for secondary uses can be distributed in different ways:

- Directly by the producer;
- Via an association or guild representing creative collaborators, or
- Through a collective management organization (CMO).

These secondary payments are different from any statutory or compulsory licenses included in the law or provisions on right to equitable remuneration that may be included in national legislation. Such payments are customarily managed by CMOs, as described in chapter 7.

6.2. Differences between Individual Contracts and Collective Agreements

Contracts can be *individually negotiated* between a creative collaborator and a producer, or they can be *collectively negotiated* between representatives of authors/performers and producers. The latter is also called the *guild system*.

Individual Contracts

Contracts between an individual author/performer and a producer govern among others the following:

- Initial payments;
- Working conditions;
- Transfer of exploitation rights; and
- Any subsequent remuneration that the producer pays to the author/performer.

It is customary that the creative collaborator receives an upfront payment for his work and rights specified in the contract. The contract can further specify what kind of subsequent payments are due and on what basis. It is up to each individual producer to follow all uses, report and pay subsequent remuneration that may arise from specified areas where subsequent remuneration is due.

In general, collective negotiating power is better for authors and performers than that of individuals. They may encounter the demand of *verbal contracts* or extremely rudiment contracts which they are asked to sign to ensure the job. The malaise of verbal or poorly drafted contract does not only fall on creative collaborators, but also inhibits the producer to

successfully distribute the film, because he is not in a position to show the existence of all necessary rights, i.e. the “chain of title”.

In some countries, associations or guilds representing creative collaborators and producers have negotiated *model agreements* to be used as a guideline in individual negotiations. The models are not binding as such, but can have great value in individual negotiations, as a collaborator can use the model as a sound basis for his or her individual negotiation.

Collective Negotiations

In cases where collective negotiations lead to *binding agreements*, we talk about collective negotiations. Collective negotiations are particularly suited for countries where there are *strong associations and guilds* representing creative collaborators and financing partners. The existence and effectiveness of such associations/guilds vary from country to country, depending on a range of legal, cultural and historic factors. The existence of organized and representative associations is also dependent on whether there exists an audiovisual industry which is of sufficient size and structural solidity.

Collective agreements customarily include *minimum contractual terms*. Individual collaborators can use their bargaining power to negotiate better or varying terms as long as the terms in the collective agreement are observed.

Example from the United States

In the United States where the producers are deemed to be the author of an audiovisual work, the payment and working conditions of creative collaborators are determined by collective agreements negotiated between professional guilds and producers' associations. Guilds act on behalf of authors and performers in a similar way as labor unions; they negotiate, enforce and administer collective contracts that establish the minimum terms and conditions for all work being made by their members. Based on the size of its entertainment industry, the guilds are powerful in the United States.

Union requirements establish the salaries and general employment terms for creative collaborators, the transfer of usage rights and royalty payments that are due to authors and performers following the initial release of a work, called “residuals”. The guilds handle any disputes and use their collective negotiation power, including strikes, if they are not in agreement with a proposal put forward by the producer's organizations. The Writers Guild of America (WGA) (www.wga.org), the Director's Guild of America (DGA) (www.dga.org) as well as the Screen Actors Guild (SAG) (www.sag.org) are examples of guilds negotiating with producers' associations. Negotiated contracts can be found at the websites of the three unions, for writers, directors and actors respectively.

6.3. Limitations in the Effectiveness of Contracts

There are limitations to the effectiveness of contracts. In the following, some of these are shortly discussed.

Contracts only bind the contracting parties and thus *enforcement of contracts vis-à-vis third parties* is often problematic. The producer may have disappeared after the production of the work, for instance due to insolvency.

Contracts also have a *geographical coverage* which is problematic in case of international co-productions that are becoming increasingly important in the audiovisual industries.

6.4. Situation in the Target Countries

National legislations in the three target countries include provisions on contracts as follows:

Burkina Faso:

- The Copyright Act contains a number of provisions on contracts involving copyright transactions, including general principles such as *written form* and *fair terms*; the full assignment of rights in future works shall be null and void (Article 42);
- A possibility to renegotiate a contract in case the author suffers a prejudice (Article 44); and
- Provisions on *audiovisual production contracts* (Article 59 to 67) include detailed provisions on assignment to the producer of exclusive exploitation rights unless otherwise agreed; remuneration payable to the authors for each mode of exploitation with statements at least one a year.

Senegal:

- The Copyright Act includes rules governing certain contracts, including audiovisual production contracts, such as written form for contracts (Articles 81 to 85); and
- The law provides a *rebuttable presumption of rights* to the producer of exclusive exploitation rights in the audiovisual work (Article 82) and the producer has a responsibility to render accounts with a statement of revenue from exploitation of the work in respect of each mode of exploitation.

Kenya:

- Rights holders enjoy exclusive rights subject to statutory and fair dealing exceptions; the rights can be assigned and licensed (Article 33);
- No assignment of rights and no exclusive license shall have effect unless it is in writing (Article 33.3); and
- There are no specific provisions on audiovisual contracts.

6.5. Summary

In general, audiovisual production contracts can be *individually negotiated* between a creative collaborator and a producer. Alternatively, contracts can be *collectively negotiated* between representative associations or guilds of creative collaborators and producers. In countries where collective negotiations take place, parties customarily negotiate minimum standards that each individual contract needs to fulfill. An individual author or performer can use his or her bargaining power to negotiate better terms.

Collective negotiations are a powerful way of achieving a balanced situation between creative collaborators and financing partners. However, associations or guilds do not exist in all countries, or they lack necessary negotiating power. In some countries associations and guilds exist, but they are not very active.

In all three target countries, contracts need to be in writing. Most contracts are *individually negotiated*, but not always concluded with all rights holders. Exclusive exploitation rights are in

general transferred to producers by way of law and/or contracts. - Producers are in principle in a position to conclude exploitation contracts with users; either pre-sale or upstream contracts with financiers or downstream contracts with users of completed audiovisual works. However, it happens that producers sell their rights to foreign partners with onetime remuneration and lose any ability to benefit from further exploitation of the work in foreign countries.

Exploitation of copyright rights for financing of audiovisual works is limited and licensing of major users of audiovisual works does not take place as broadcasters and other major users can draw benefit from *statutory licenses* or *fair dealing provisions* included in the laws of the target countries. This means that major exploitations are collectively managed as is the case in Burkina Faso and Senegal. Alternatively, they take place without the consent of rights holders, as is the case in Kenya with broadcasting rights in the absence of a licensing body, i.e. a CMO.

In Burkina Faso and Senegal producers are obliged to pay remuneration for all exclusive exploitations to the creative collaborators, with at least yearly statements. The fact that some rights holders mandate the management of their exclusive rights to CMOs make the situation unclear (see recommendation 1).

6.6. Recommendations

Well-drafted contracts are a key factor for an effective and balanced exercise of rights, ensuring both their efficient exploitation and equitable remuneration to creative collaborators. As a result, financing partners would be in a position to show “chain of title” to subsequent users, including foreign partners, enhancing their negotiating power. Creative collaborators would be ensured remuneration for all exploitations, either from the producer, representative association or the collective management organization, or a combination of them.

Recommendation 4:

In the absence of representative guilds or associations, some *guiding principles* or *best practices* in contracts would be helpful in standardizing the obligations of both creative collaborators and financing partners. Such practices can be further developed to guidelines or model agreements in a country where there are representative associations and guilds.

The WIPO Review on Contractual Considerations in the Audiovisual Sector of 2012 forms an excellent basis for further consideration and progressive implementation of appropriate tools and business rules for the management of audiovisual rights, in accordance with the DA project objectives. – This recommendation is in line with the proposal in Module One of the Scoping Study (CDIP/12/INF/3).

7. Collective Management

Collective management is a system in which rights holders authorize a collective management organization (CMO) to manage their rights. In the audiovisual industry, rights holders include creative collaborators and financing partners, subject to provisions in national law.

A CMO functions as a facilitator between two markets, that of rights holders and users. A CMO needs a mandate from rights holders to manage their exclusive rights and to grant licenses to those who use audiovisual works in their operations.

In cases where individual exercise of rights is does not function well in practice or does not lead to a desirable outcome, collective management can be an effective solution. Greater

effectiveness and lower transactions costs in handling IP rights is a rationale to consider collective management.

7.1. Description of Operations of CMOs

Audiovisual CMOs, as well as CMOs serving other creative industries, do the following on behalf of rights holders:

- *Negotiate* the tariffs and other licensing conditions with users of audiovisual works;
- *Grant licenses* to users of audiovisual works;
- *Collect* the agreed remuneration at given intervals; and
- *Distribute* the revenue to those rights holders whose works have been used.

CMOs also need to *monitor* what works have been used in order to be able to distribute the collected revenue to eligible rights holders. Reporting of performed works is customarily an important obligation that a user needs to undertake under a license agreement.

Rights holders have the obligation to *document* their audiovisual works to the CMO in a standardized manner. This is also one way to ensure that a clear “chain of title” exists.

Distribution of remuneration is done combining rights holders’ work documentation and users’ reports. That is how CMOs can work out a correct distribution.

7.2. Legal Framework for Collective Management

Collective management organizations can manage both exclusive rights when mandated by rights holders to do so or they can manage cases where rights holders have only a right to equitable remuneration. In the latter case, collective management is in practice the only way to manage such remuneration rights.

Exclusive rights

When rights holders enjoy *exclusive rights* under national copyright law, they can decide whether to exercise their rights individually or mandate a CMO to manage some or all of their rights collectively. Collective management is thus *voluntary*.

Case Study: Israel

TALI (the Collecting Society of Film and Television Creators in Israel Ltd.), (www.tali-rights.org.il), founded in 2000, represents Israeli screenwriters and directors. Each TALI member has full control over the number of screenplays and/or directed works and rights therein, that he turns to TALI’s management, and he can exclude any works or rights at any stage.

Right to equitable remuneration

In cases where there is a *statutory or compulsory license* in the law, the consent of rights holders is not needed but they have a right to receive *equitable remuneration*. CMOs do not license the users in this case, but only collect the remuneration that is customarily determined by a competent authority and distribute the revenue to eligible rights holders.

Case Studies: Burkina Faso and Senegal

The copyright laws in Burkina Faso and Senegal include a number of statutory licenses, and for instance broadcasters do not need to get a license from the rights holders or their CMO, they just pay an equitable remuneration that is fixed by a relevant authority.

Unwaivable right to remuneration

In some countries, the concept of an *unwaivable right to remuneration* is introduced to guarantee remuneration to audiovisual authors and performers in cases where their exclusive exploitation rights are transferred to producers. This is the case for instance with *rental right* in the European Union. The fact that the right is constructed as “unwaivable” is to ensure that authors/performers actually receive payments, whether through contracts or collective management. In some countries, collective management is obligatory.

Case Study: India

The Copyright Amendment Act, 2012 states that performers and authors of literary and musical works used in cinematographic works or in sound recordings have a right to receive continuing royalties for the use and exploitation of their works or performances used in cinematographic works.

Section 18 (1) of the Copyright Act confirms that rights can be assigned wholly or partially, provided that, among others:

“Provided also that the author of the literary or musical work included in a cinematographic film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than communication to the public of the work along with the cinematographic film in a cinema hall, except to legal heirs of the authors or to a copy right society for collection and distribution and any agreement to contrary shall be void.”

There is a separate provision for sound recordings not forming part of any cinematographic film.
– This is an example of an unwaivable right to remuneration.

Based on this provision, screenwriters and their association the Film Writers’ Association of India (FWA) are in the process of establishing a CMO to manage screenwriters’ rights, under the acronym SCRIIPT (Society for Copyright Regulation of Indian Intellectual Properties for Film and Television).

Exceptions and limitations

In cases where a copyright law includes an exception to or limitation of (exceptions/limitations) an exclusive right, the user may use the work without the consent of the rights holders and without remuneration to them. This is constructed as fair use or fair dealing provisions in some national laws.

Case Study: Kenya

The Kenyan copyright law includes a provision concerning the use of audiovisual works in broadcasting activities. The rights holder does not control the broadcasting of a literary, musical or artistic work or audiovisual work already lawfully made accessible to the public with which *no licensing body is concerned* (Article 26 (j)). Broadcasters thus have a possibility to show

published audiovisual works freely, where there is no CMO functioning in the audiovisual industry. When rights holders mandate a CMO to manage their broadcasting rights, broadcasters need to ask for their permission, i.e. get a license from the CMO. – Rights holders of musical works embedded in audiovisual works have a right to get equitable remuneration.

7.3. Various Types of Collective Management

In the audiovisual industries, various types of CMOs have been established to assist rights holders to manage their rights collectively. Their role and functions vary greatly in different jurisdictions and countries. Their scope in terms of representation of rights holders and rights is diverse and reflects to large extent historical, economic, social and cultural specificities of the country.

The main groupings of rights holders are the following:

- CMOs for *authors*, such as screenwriters and directors;
- CMOs for *performers*, such as actors and dancers;
- CMOs for *film producers*;
- CMOs representing jointly *all audiovisual rights holders*; and
- *Multipurpose CMOs* representing all categories of works.

In the following, a few examples from different parts of the world are listed to show the great variety of CMOs in the audiovisual field.

Authors: Example of Argentina

In Argentina for authors' rights, there are separate CMOs for screenwriters and directors. *Sociedad General de Autores de la Argentina* (AGENTORES) (www.argentores.org.ar) represents all writers, including screenwriters. Another CMO, *Directores Argentinos Cinematográficos* (DAC) (www.dac.org.ar) represents directors of audiovisual works. This is largely due to historic developments, AGENTORES being the oldest CMO in Latin America; its predecessor was founded in 1910. While DAC was founded already in 1958, it started its activities as a CMO in 2003 when film directors were recognized as authors of audiovisual works.

Performers: Example of Chile

In Chile for related rights, ChileActores (www.chileactores.cl) represents actors and collects remuneration for communication to the public in all its forms, such as cinema, television, cable, hotels and transportation vehicles.

Producers: Example from Colombia and internationally

In *Colombia*, producers of audiovisual works have established Egeda Colombia, Entidad de Gestión Colectiva de Derechos de los Productores Audiovisuales (www.egeda.org.co). For instance all premises open to the public with a television set need to acquire a license from EGEDA. The same applies to cable operators.

Internationally, audiovisual producers have established their own centralized organization to manage rights and remuneration from *retransmission of broadcasts*, for instance in cable

networks. The Association for the International Collective Management of Audiovisual Works (AGICOA) (www.agicoa.org) is situated in Switzerland and it is an international CMO for audiovisual producers.

All audiovisual rights holders: Example from Ghana

The Audio-Visual Rights Owners Association of Ghana (ARSOG) (www.arsog.org) was established in 2011 to function as a joint audiovisual CMO. It represents producers, writers, actors and music in audiovisual productions. ARSOG is in the early stages of its operations.

Multipurpose CMO: Example from Algeria

Office National des Droits d'Auteurs et des Droits Voisins (ONDA) (www.onda.dz) is the multipurpose CMO in Algeria and represents all categories works and rights holders in the field of copyright and related rights.

7.4. Assessment of the Current Role of Collective Management in the Audiovisual Industry at International Level

Whereas audiovisual CMOs are relatively old phenomena in some developed countries, many developing countries currently consider how collective management could contribute to the economic development of their audiovisual industries. The adoption of the Beijing Treaty on Audiovisual Performances has intensified the discussions, as performers are considering different options to manage their rights.

Some CMOs function as multipurpose CMOs and manage also some or all rights of audiovisual rights holders. This is the case in *Burkina Faso* and *Senegal*. Such multipurpose CMOs have customarily started their practical activities in the field of music, and subsequently broadened their activities to other genres of works.

In general, local infrastructure, social, economic and cultural and legal parameters are decisive when a country discusses the most appropriate solution. In all cases, it is important to ensure that the producer is in a position to finance, produce and distribute the audiovisual work.

There are various ways of organizing payments to key contributors. Some of the exploitations can be characterized as *primary exploitations*, for instance cinema and television. Collective management is in some cases applied only to subsequent uses after the primary exploitation. Sometimes these rights are called *secondary or tertiary*. It is however important to note that the distinction between primary and secondary or tertiary rights is getting very blurred in today's media landscape.

The range of rights that are managed collectively on behalf of rights holders vary greatly from country to country. The following is a *non-exclusive list of rights or remuneration* that are in practice managed collectively in some countries. Management can be based on voluntary mandates or on law.

In other countries the same rights are licensed individually. In the *United States* for example, commercial operators, such as the Motion Picture Licensing Corporation, grant general licenses for some of the uses on behalf of individual producers. The corporation performs similar tasks as a CMO.

Theatrical exhibition

Theatrical exhibition is managed collectively only in a few countries, for example in Spain and Poland. Most often, producers conclude agreements with distributors who market the films to cinemas. Sales agents are entrusted with the licensing of foreign rights. Producers pay remuneration to creative collaborators as agreed in contracts between the parties.

TV broadcasting

In some countries, CMOs manage television broadcasting on behalf of their members. For instance in *Spain, Italy and Poland*, the *broadcaster as the final distributor* is considered by law to be responsible for payments to the authors and performers. These are paid through the relevant CMOs. Such a provision makes it clear that it is an obligation of the broadcaster, and not of the producer, to pay remuneration to authors and performers. – Producers conclude an agreement with the broadcaster individually.

Case Study: France

In *France*, audiovisual authors can transfer the management of their rights to CMOs¹² that negotiate licensing contracts and establish tariff rates with broadcasters. This is independent of direct licensing by the film producer who negotiates its own remuneration with the broadcaster. The CMOs can also conclude reciprocal representation agreements with foreign similar CMOs and ensure remuneration from foreign exploitations to their authors.

Rental

In *Europe*, the rental right is subject to an *unwaivable right to equitable remuneration*. Member States may stipulate in national law that this remuneration right is subject to obligatory collective management. This is the case for instance in *Germany* where rental rights are collectively managed.

Case study: Spain

The CMO for *performers* in *Spain*, Artistas, Interprètes, Sociedad de Gestión (AISGE) (www.aisge.es), has concluded an agreement with the video shops. The tariff structure of 2005 is based on the area (square meters) of the video shop, as it is considered that this correlates to the amount of available audiovisual works. Special conditions apply to video clubs. In both cases, there is a minimum payment which is 1.5 % from rental revenue.

Cable retransmission

Television channels can be sent to satellites (up-link), relayed to other countries (down-link) and distributed to households through cable networks (cable retransmission).

Cable retransmission rights and remuneration thereof are customarily managed collectively, as it would be very difficult to clear individually the rights in thousands of individual programs included in each television channel. For this reason, cable retransmission is subject to *obligatory collective management* in the European Union.

¹² Société des Auteurs et Compositeurs Dramatiques (SACD) (www.sacd.fr) and Société Civile des Auteurs Multimédia (SCAM) (www.scam.fr)

Cable retransmission rights cover the cover the rights of authors, performers, film producers and broadcasters.

Case Study: Sweden

For instance in *Sweden*, there is a joint or “umbrella” CMO, COPYSWEDE (www.copyswede.se), managing cable retransmission rights and acting on behalf of all rights holders through mandates or cooperation agreements. COPYSWEDE is authorized to conclude a global agreement and grant a *package license to cable operators*. The license can be given for approximately 100 different broadcast programs relayed in Sweden. Also programs outside Europe are included, such as Arab News Network (ANN), Eri TV (Eritrea), Channel One TV (Iran), Universal (Somalia) and Télévision Tunisienne (Tunisia). This reflects the great number of different nationalities living in Sweden and wanting to watch television programs in their national languages.

Private copying remuneration

Exception to or limitation of the exclusive right of reproduction in case of *private use* is included in the copyright laws in many countries. Most countries of the European Union and a number of countries on other continents have decided to pay rights holders in the music and audiovisual industries remuneration or compensation for widespread private copying. Such remuneration is most often paid in form of fees or levies on recording equipment and blank carriers. These fees have also been called *blank tape levies*.

Case Study: Paraguay

The copyright law of Paraguay (1998) and regulations (2011) stipulate that remuneration is levied on media and equipment to be paid by importers and manufacturers. The size of the levies is set by the relevant government authority and is currently set at 0.5 % of the price of the equipment and carriers. Maximum 10 % of the collected revenue can be used for collective purposes of rights holders. The collection of the levies started in 2011 and yielded approximately € 730.000¹³. The distribution scheme of the video levies allocates an equal share (one third) to authors, performers and producers each.

Educational copying

Broadcast programs are also used in educational establishments and this includes the rights of reproduction and distribution of copies or communication to the public via the internet. Clearance of rights for all rights holders, including the broadcasters, takes place through the services of CMOs in a number of countries.

In some other countries this use is covered by an exception/limitation or fair dealing provisions, as is the case for example in Kenya.

¹³ Source: International Survey of Private Copying, WIPO and Stichting ThuisKopie, the Netherlands

Case study: Australia

The Australian Copyright Act¹⁴ allows educational institutions to copy from television and radio, provided payment is made to copyright owners. Screenrights (www.screenrights.org) was established in 1990 to administer this provision. Screenrights licenses educational institutions in Australia and New Zealand, enabling them to copy broadcast material, and put these copies on internal networks or e-mail them to staff and students. - Online delivery has rapidly replaced the distribution of physical copies to schools.

Communication to the public/making available to the public

Relevant uses cover both online transmission of broadcasts and new on-demand services. CMOs can adapt their agreements with broadcasters to also cover online uses of the programs, such as catch-up services, where programs are available a certain period after primary sending.

Online platforms offering streaming and download services on demand are getting more frequent also in Africa with enhanced connectivity and bandwidth, Kenya being an example of countries with emerging services. Also foreign services are interested in offering African films from their platforms.

Small public performances

There are many instances of so called *small public performances* where audiovisual works are shown in hotels, bars, restaurants, buses, airplanes, and financial institutions. Audiovisual works are also shown also at hairdressers, beauty salons, etc.

Case Study: Ghana

The joint CMO for all audiovisual rights holders, ARSOG, in Ghana is currently starting its activities and negotiating with many users. Audiovisual works are shown all over the country and it would be practically impossible for individual producers to license all these premises.

Other secondary uses

Other secondary rights can also be managed collectively and examples range from public lending to use of programs in television archives. Digitization projects customarily entail a large number of works and audiovisual archives are digitizing their collections in many countries.

7.5. Situation in the Target Countries

National copyright legislation and availability of collective management in the three target countries looks the following:

Burkina Faso:

- The *Bureau Burkinabé du Droit d’Auteur* (BBDA) (www.bbda.bf) was established in 1985. It serves as the country’s only collective management organization and it is by its nature a *multipurpose CMO*;

¹⁴ Section 35 and paragraph 6 Schedule 2 Copyright, Designs and Patents Act 1988

- BBDA has managed copyright rights in audiovisual works from the very beginning and related rights since 2011;
- BBDA manages statutory licenses for *broadcasting* and *communication to the public* of commercially published videograms (Article 79) and *private copy* of audiovisual works (Article 82);
- Rights holders may also voluntarily assign their exclusive rights to the BBDA for management (Articles 95 and 96);
- In practice, most audiovisual rights are collectively managed through the BBDA;
- The total collection of BBDA in 2012 was approximately EUR 1,5 million (CFA 995 476 559), the population being 16,5 million in the same year;
- According to BBDA, the total distribution to audiovisual rights holders was in 2012 EUR 124 787 (CFA 81 869 991):
 - (i) EUR 94 954 was distributed to related rights holders as private copying remuneration (more than 90 %) and as remuneration rights; and
 - (ii) EUR 29 833 was distributed to copyright holders.
- The private copy remuneration in total yielded in € 416 356 in 2011 for both music and audiovisual. According to the law, 50 % of the revenue is used for collective purposes of rights holders¹⁵. BBDA is also in charge of this collective share.
- Burkina Faso has ratified the WIPO Internet Treaties (WCT and WPPT) in 2002, and is a signatory to the Beijing Treaty on Audiovisual Performances.

Senegal:

- The Bureau Sénégalais du Droit d'Auteur (BSDA) (www.bsda.sn) has served as the country's only collective management organization since 1973, being a *multipurpose CMO* with some 8 000 members;
- BSDA has managed copyright rights in audiovisual works, but not related rights;
- The copyright law of 2008 provided for new collective management organizations to be established under private law, to replace the activities of BSDA;
- A committee (comité de pilotage) prepared for the establishment of the new CMO, by name GECAPES (*La Société Civile de Gestion Collective des Auteurs, Artistes-Interprètes, Producteurs et Éditeurs*);
- The statutes of the new multipurpose CMO were approved on December 18, 2013 and at the same time a new Administrative Council was nominated consisting of 36 members in three sectors, as follows:

¹⁵ Source: International Survey of Private Copying, WIPO and Stichting ThuisKopie, the Netherlands

- (i) Authors (18): three representatives of audiovisual works, musical works, works of visual art, dramatic works, literary works and choreographic works;
 - (ii) Performers (9): three actors, musicians and dancers; and
 - (iii) Producers/publishers (9): three phonogram producers, audiovisual producers and literary publishers.
- The Senegalese law contains a statutory license for the *communication to the public on any platform, except the internet* of videograms published for commercial purposes, against payment of an equitable remuneration (Article 100);
 - This benefits among others broadcasting organizations which do not need to ask for permission, just to pay the equitable remuneration which is determined by a special commission;
 - Rights holders also have an option to commission the CMO with management of their exclusive rights (Article 112);
 - The total collection of BSDA was approximately EUR 565 000 in 2012 (CFA 375 335 617), the population being 13,7 million in the same year;
 - According to BSDA, the total collection for rights in audiovisual works was in 2012 EUR 101 152 (CFA 67 357 630); some 95 % of the total coming from analogue television;
 - The new law includes a number of novelties: remuneration for private copying, resale right and related rights;
 - The practical operation of GECAPES is about to start after the governance was agreed at the close of 2013.
 - Senegal has ratified the WIPO Internet Treaties (WCT and WPPT) in 2002, and is a signatory to the Beijing Treaty on Audiovisual Performances.

Kenya:

- Rights holder enjoy exclusive rights subject to statutory exceptions and fair dealing provisions; these rights can be assigned and licensed;
- Broadcasting organizations can benefit from a statutory exception and use lawfully published audiovisual works as long as no licensing body exists (Article 25 (j));
- A statutory license for broadcasting organizations apply against payment of remuneration to authors of musical works imbedded in audiovisual works and the remuneration shall be fixed by the competent authority in cases where there is no agreement of the compensation to be paid (Article 27);
- Kenya has not ratified the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)) and the communication to the public/making available right is unclear under the current law;
- Kenya is a signatory to the Beijing Treaty on Audiovisual Performances;

- This lack of clarity sets constraints to full enjoyment of digital rights management;
- The Kenyan copyright law contains a provision on private copying remuneration for sound recordings, but implementation is missing;
- Amendment to the current law is under preparation and the current draft includes private copying remuneration also for audiovisual works; and
- Currently no CMO functions in the field of audiovisual works, but preparations have been going on aiming to establish an appropriate structure.

7.6. Evaluation of the Current Importance of Collective Management in Africa

In Francophone Africa, CMOs are customarily so called multipurpose organizations and represent all categories of rights holders and manage many different rights. They have generally started their operations with musical works and over time expanded their activities to include other categories of works, including audiovisual works.

It is not easy to evaluate the effectiveness of the management of audiovisual works, as tariffs in many cases cover all categories of works. For instance in Burkina Faso, broadcasters pay a remuneration of 4 % of their total revenue to broadcast any works, national or foreign. The existence of statutory licenses ensures certain collection from a large variety of different exploitations, but does not make effective negotiation and licensing by rights holders possible. Thus, IP rights cannot be used effectively in pre-sale negotiations to attain initial funding. The strategic use of IP rights in downstream negotiations concerning further exploitations is also limited, as statutory licenses cover almost all exploitations. On demand, online platforms are, however, an important future licensing option.

In Anglophone African countries, audiovisual CMOs are relatively new phenomena. Specialized audiovisual CMOs exist in *Ghana* and *Uganda*¹⁶, but they are in early stages of their operations. A similar organization, AVRS¹⁷, has been registered in *Nigeria* and it is currently applying for the approval of the Nigerian Copyright Commission (NCC), as required by the law. The multipurpose CMO, COSBOTS¹⁸, in *Botswana* is currently planning expansion of its activities to cover also audiovisual works.

Both the Ghanaian and Nigerian CMOs are *joint organizations for all rights holders*, both creative collaborators and financing partners. In both countries this approach was found to be the most beneficial for all stakeholders and at the same time the most convenient for users of audiovisual works, as they do not need to apply for licenses from several sources. The multipurpose structure in Botswana has the same outcome.

The above list is not inclusive, but shows the trend. Interest in the management of audiovisual works is on the increase in Africa and elsewhere and many countries consider what would be the best option.

¹⁶ Uganda Federation of Movie Industry (UFMI)

¹⁷ Audio-Visual Rights Society (AVRS) of Nigeria (<http://avrsnigeria.com>)

¹⁸ Copyright Society of Botswana (www.cosbots.com)

7.7. Summary

Any country wanting to establish or strengthen the management of audiovisual works would benefit from a solid knowledge of market realities. Analysis can take place using a *business plan* as a tool. Such a plan is a first market analysis and it can be later on developed into strategic and operational plans, if rights holders decide to establish a CMO to manage their rights.

7.8. Recommendations

Collective management starts with solid knowledge about the markets that it is supposed to serve, i.e. the market of rights holders and the market of users.

Recommendation 5

The drafting of a *model business plan for an audiovisual CMO* could constitute a template for all other sub-Saharan countries that plan to strengthen collective management in the field of audiovisual works.

A plan concerning the *rights holders' market* would clarify the number of different authors, performers and producers, including their associations. For a CMO it is of paramount importance to reach to as many rights holders as possible. - The second part of a business plan would analyze the *licensing or revenue collection market* and amount to an approximation of maximum collection that is possible on the basis of market realities.

Based on a business plan, the effectiveness of the current multipurpose CMO in Burkina Faso, the prospective for the newly established multipurpose CMO in Senegal and an appropriate structure for collective management of audiovisual works in Kenya can be analyzed.

Recommendation 6

In *Burkina Faso* and *Senegal*, rights holders cannot effectively license *broadcasters* and this excludes an important source of revenue and a possibility to negotiate pre-sale funding with the broadcasters. However, broadcasters are obliged to pay equitable remuneration as fixed by the competent authorities. It would be important to disseminate information on the *size of the remuneration and modalities of distribution to audiovisual rights holders* so that they are well aware and understand how the system functions.

Recommendation 7

In *Kenya*, the foundation of a CMO would be needed to license among others broadcasters. A statutory exception concerns broadcasting of audiovisual works lawfully made accessible to the public *with which no licensing body referred to under section 46 is concerned* (Article 26 (j)). – The existence of a licensing body would change this situation. This could be achieved by either amending the statutes of an existing CMO or by creating a new structure. In both cases it would be import to ensure the participation of creative collaborators and financing partners.

Recommendation 8

In *Kenya*, the granting of digital rights as provided under the WIPO Internet treaties (WCT and WPPT) would benefit stakeholders in the audiovisual industries and enable effective use of IP rights in the network environment. – Both Burkina Faso and Senegal have ratified the WCT and WPPT, but licensing of digital rights is still in the pipeline (see also recommendation 11).

Recommendation 9

In Burkina Faso and Senegal, a public review of how the revenue from private copying remuneration is or will be distributed to audiovisual rights holders would be important to enhance common understanding of private copying remuneration. - International practice is well documented in the International Survey on Private Copying¹⁹, compiled by WIPO and Stichting ThuisKopie, the Netherlands.

In Kenya, amendment of the law is in the pipeline to include private copying remuneration also for audiovisual rights holders. A review of distribution principles could enhance the case, as audiovisual rights holders are concerned about the distribution scheme.

Collection and distribution of private copying remuneration would benefit from *regional discussions and capacity building*. This is also due to the fact that CMOs in different countries need to distribute the remuneration to foreign rights holders as well.

8. Assessment of Current Challenges

This chapter is in the main based on information provided in the scoping study of 2013 (CDIP/12/INF/3). It includes a detailed description of the state of play in the three target countries. Whereas there are differences in individual countries, the following is a synopsis of the current inefficiencies in the marketplace.

- Lack of reliable data and statistics about the audiovisual market and players therein;
- Lack of copyright awareness in the production, distribution and financial sectors;
- Contracts are nonexistent or poorly drafted leading to uncertainty in the ownership of rights, as producers cannot ensure a “chain-of title” to potential users of their films;
- Untapped funding potentials for audiovisual productions;
- Insufficient distribution and exploitation opportunities;
- Piracy affecting negatively the market for DVD and VCD distribution;
- Poor theatrical market due to the scarcity of operating movie theatres;
- New media platforms, streaming and downloading services, are only beginning due to slow internet connectivity; and
- The potential of global markets is not exploited.

8.1. Situation in the Target Countries

Burkina Faso

The *Bureau Burkinabé du Droit d’Auteur* (BBDA) is the multipurpose CMO in the country.

The following remuneration rights/exclusive rights are collectively managed by BBDA:

- Statutory license for theatric exhibition;
- Statutory license of broadcasting;
- Statutory license for other communication to the public, excluding online rights;
- Statutory license for sale or rental of videograms;
- Statutory collection of private copying remuneration; and
- Voluntary management of online exploitations: communication to the public right/making available right.

¹⁹ http://www.wipo.int/export/sites/www/freepublications/en/copyright/1037/wipo_pub_1037.pdf.

Whereas the above scheme of collection areas is fairly covering, the revenue to audiovisual rights holders remains limited. Broadcasters pay a yearly fee of 4 % to the BBDA against authorization to broadcast any copyrighted content of their choice. This covers all categories of works, both national and foreign.

The existence of statutory licenses safeguards certain remuneration, but does not make effective licensing of different exploitations possible. Consequently, broadcasters' participation in film funding against pre-sale is not an option.

As new online platforms emerge, it is important to plan and execute effective licensing mechanisms for these services.

Senegal

The *Bureau Sénégalais du Droit d'Auteur* (BSDA) has managed statutory licenses for all communication to the public on any platform *except for internet*. Thus commercial uses can take place against payment of an equitable remuneration as determined by a special commission;

The following is a snapshot of the situation that has prevailed:

- Two public and nine commercial broadcasters benefit from the statutory license for the broadcasting of published videograms against the payment of a single yearly fee for the use of domestic and foreign repertoire;
- Television broadcasters are required to pay a remuneration of 4 % of their total budget for all copyright content part of their broadcasts; however, in practice some stations are not fulfilling their obligations;
- Piracy is a major threat and a legal DVD/VCD market hardly exists, despite the labeling of genuine discs with holograms and alike;
- Worldwide exploitation rights are frequently sold in perpetuity to foreign distributors;
- Streaming and downloading services of audiovisual content are not yet available to most Senegalese people due non-existent, slow or unreliable internet connections; and
- BSDA has not managed related rights in audiovisual works.

The restructuring of collective management and the establishment of GECAPES as a new multipurpose organization creates an opportunity. It is up to the new structure to initiate collection of private copying remuneration and management of related rights, among other tasks.

Kenya

There are four authorized CMOs in Kenya; one managing rights in musical works²⁰, one for performers' rights²¹ and one for record producers' rights²². Moreover, there is a CMO for the text- and image-based industries²³ managing paper and digital copying. There is currently no specific CMO in the audiovisual field, but the performers' CMO is constituted as to include also audiovisual performers.

²⁰ Music Copyright Society of Kenya (MCSK) (www.mcsk.or.ke)

²¹ Performers Rights Society of Kenya (PRISK) (www.prisk.or.ke)

²² Kenya Association of Music Producers (KAMP) (www.kamp.or.ke)

²³ KOPIKEN, The Reproduction Rights Society of Kenya (www.kopiken.org)

- The Kenyan audiovisual sector has started to realize the potential of global markets;
- Piracy is undermining the DVD/CVCD market, despite the hologram system;
- Kenyan works have had little opportunities as national broadcasters have preferred popular foreign content, but this is changing;
- Online consumption of films is progressively penetrating the Kenyan market as broadband connection becomes available; the services of Buni TV serve as an example;
- The development of digital rights strategies in the audiovisual sector is constraint by uncertain communication to the public/making available to the public rights under Kenyan law; these rights are included in the WIPO Internet Treaties (WCT and WPPT).

8.2. Summary

Apart from current collection of remuneration from broadcasting in Burkina Faso and Senegal, and potential remuneration in Kenya, there are other areas of collection that merit attention.

Online uses replace traditional rental of videograms in all major markets and this trend is progressively installing also in Africa, albeit there are challenges with internet connectivity and insufficient bandwidth. Sites with Pan-African audiovisual content are emerging and it is important to monetize these uses.

On-demand, online uses fall under exclusive rights under the WCT and WPPT and there is a market opportunity to effectively license these emerging exploitations. The lack of legal services leads to illegal uses, to the detriment of all rights holders. It is therefore important to license potential services swiftly and effectively, be it by individually by producers or by CMOs.

In Africa, audiovisual works are generally shown publicly in a wide variety of premises, such as bars, community halls and financial institutions. These so called *small public performances* are areas where collective management is particularly feasible, as it would be difficult, if not impossible, for individual producers to grant the innumerable permissions and collect royalties from small venues, from hairdressers to busses and financial institutions.

Private copying remuneration can be an important revenue source for all rights holders in the audiovisual industries. It is effectively collected in Burkina Faso and the law of 2008 includes a provision to this effect in Senegal. Practical implementation is foreseen in 2014. Some other examples of countries with private copying remuneration on the continent are Botswana, Ghana and Nigeria effective from 2014 onwards.

8.3. Recommendations

To overcome the current challenges and enhance the overall profitability of the audiovisual markets, a number of recommendations are proposed.

Recommendation 10

Piracy is a major factor affecting negatively the development and livelihood of the audiovisual sector. Piracy makes it impossible to market profitably national audiovisual works, as foreign works are available in quantities with almost no price. A *concerted effort against audiovisual piracy* in both East-Africa and West-Africa would have a positive effect on the market.

The development of legitimate retail outlets, online platforms and similar infrastructure measures, and incentives for their creation, could constitute one of the long-term ways on reducing piracy.

Recommendation 11

Effective licensing of *online on-demand platforms*, both national and Pan-African, is important to tap the potential income from the very beginning. The providers of online services may demand multi-territorial licenses that cover several countries.

It is important that rights holders and CMOs representing them are well aware of new licensing parameters and prerequisites in order to be in a position to offer effective licensing services. WIPO could partner with the national competent authorities and organize *workshops on online licensing for audiovisual works*. As it is important that different countries cooperate in licensing, such workshops could be organized on a *regional* level, eventually for Francophone and Anglophone countries in a group.

Recommendation 12

Sub-Saharan countries that have established or are in the process of establishing *joint CMOs for all categories of rights holders* in the audiovisual sector would benefit from sharing of experiences, comparison of their business plans and licensing efforts. WIPO is in a good position to organize *practical workshops and training sessions* in collective management of audiovisual works. Among the topics to be included in such capacity building is negotiations with broadcasters.

9. Conclusions and Recommendations

No one-size-fits-all solution exists to strengthen and develop the audiovisual sector in the target countries. The current situation is different in each of the three countries. However, a lot can be done in all countries to improve audiovisual rights management and profitability of copyright and related rights based transactions of the audiovisual sector.

This study includes three main conclusions and twelve recommendations, which are listed below. They are drawn from experiences and good practices in different countries, without making reference to any particular country, as mere replication of another country's practices is not deemed to be fruitful.

Main Conclusions

One of the main objectives of the project is to “advance the development of an effective and balanced framework and infrastructure for the exercise and management of IP rights-based transactions in the audiovisual sector”. A balanced solution ensures at the same time full exploitation possibilities for producers and fair remuneration to creative collaborators.

The main conclusions of the study target at improving a combination of *individual exercise of rights* and *collective management of rights*.

- I. *Guiding principles or best practices for individual contracts negotiated between creative collaborators and financing partners*
 - Clear contracts would establish a “chain of title”, meaning proof of all necessary permissions to make and market the film. Contracts should also ensure fair remuneration for creative collaborators for various exploitations.

- This would enhance the profitability copyright and related rights-based transactions.
- II. *Establishment or strengthening of collective management of audiovisual rights*
 - In all three target countries, there are strong legislative and infrastructure reasons to have CMOs for certain areas that take into account the situation of rights holders.
 - Favorable national legislation is needed to enhance audiovisual rights management and ensure fair remuneration to creative collaborators.
- III. *Establishment of effective licensing mechanisms for online, on-demand services*
 - National and Pan-African online platforms delivering films are being established, and African films are sought after on other continents.
 - Effective licensing mechanisms can be based on individual exercise or collective management of rights, subject to the country.

Recommendations

The study includes altogether twelve recommendations. They can be grouped under the following headings describing the main substance of each measure:

- Appropriate tools and business rules for contractual relationships between creative collaborators and financing partners (relates to main conclusion I);
- Business plans for CMOs, including collection and distribution of remuneration (relates to main conclusion II);
- Licensing practices for the online environment (relates to main conclusion III); and
- Building respect for IP (general infrastructure recommendation)

In the following, the twelve recommendations included in the study are grouped under the respective main heading:

Appropriate tools and business rules in contractual relationships between creative collaborators and financing partners

One of the aims of the CDIP project is that creative collaborators are recognized and receive adequate remuneration for the use of their contributions. This goal can be achieved by clear contractual relationships with adequate safeguards for creative collaborators or amending copyright laws, when and where appropriate.

Recommendation 4:

In the absence of representative associations and guilds, guiding principles or best practices in contracts would be helpful in standardizing the obligations of both creative collaborators and financing partners. Such practices can be further developed to guidelines or model agreements in a country where there are representative associations and guilds. - This recommendation is in line with the proposal in Module One of the Scoping Study (CDIP/12/INF/3).

Recommendation 2:

To achieve a balanced situation in *Kenya* between the creative collaborators and financing partners it would be important to consider what role contracts can play in the relationship and how contractual rights could be enforced and exercised. Currently, contracts are in many cases non-existent, which as such is a hurdle for the audiovisual industry to become more professional.

Recommendation 3:

In general, the position of film directors merits special attention. In some African countries following the common law tradition, directors are not recognized as authors or co-authors of audiovisual works, following the legislative solution in the United Kingdom in the early 1990s, prior to two directives²⁴ of the European Union.

Business plans for CMOs, including collection and distribution of remuneration

Collective management is to a large extent the prevailing way of audiovisual rights management in Burkina Faso and Senegal. In Kenya, collective licensing would enable licensing of broadcasters.

Recommendation 5:

In all three target countries, it would be beneficial to write a business plan including both markets involved in collective management. A plan concerning the rights holders' market would clarify the number of different authors, performers and producers, including their associations. For a CMO it is of paramount importance to reach to as many rights holders as possible. - The second part of a business plan would analyze the licensing or revenue collection market and amount to an approximation of maximum collection that is possible on the basis of market realities.

Based on a business plan, the effectiveness of the current multipurpose CMO in Burkina Faso, the prospective of the newly established multipurpose CMO in Senegal and the appropriate structure for collective management in Kenya can be analyzed.

Recommendation 6:

In Burkina Faso and Senegal, rights holders cannot effectively license broadcasters. However, broadcasters are obliged to pay equitable remuneration, fixed by the competent authorities. It would be important to disseminate information on the *size of the remuneration and modalities of distribution to audiovisual rights holders* so that they are well aware and understand how the system functions.

Recommendation 7:

In Kenya, the development of a CMO would be needed to license broadcasters. A statutory exception concerns broadcasting of audiovisual works lawfully made accessible to the public with which no licensing body referred to under section 46 is concerned (Article 26 (j)). – The existence of a licensing body (CMO) would change this situation. This could be achieved either by amending the statutes of an existing CMO or by creating a new structure. In both cases, it would be important to ensure the participation of creative collaborators and financing partners.

Recommendation 9:

In Burkina Faso and Senegal, a public review of how the revenue from private copying remuneration is or will be distributed to audiovisual rights holders would be important to enhance common understanding of private copying remuneration. - International practice is well documented in the International Survey on Private Copying.

²⁴ Rental and lending directive of 1992 (92/100/EEC) and term of protection directive of 1993 (93/98/EEC)

In Kenya, amendment of the law is in the pipeline to include private copying remuneration also to benefit audiovisual rights holders. A review international practice in distribution principles could enhance the adoption of the law. Audiovisual rights holders are concerned about the distribution scheme.

Distribution of private copying remuneration would benefit from regional discussions. This is also due to the fact that CMOs in different countries need to distribute the remuneration to foreign rights holders as well.

Recommendation 12:

Sub-Saharan countries that have established or plan to establish joint CMOs for all categories of rights holders in the audiovisual sector would benefit from sharing of experiences, comparison of their business plans and licensing efforts. WIPO is in a good position to organize practical workshops and training sessions in collective management of audiovisual works. Among the topics to be included in such capacity building is negotiations with broadcasters.

Licensing practices for the online environment

New online, on demand services offering films are emerging and it is important establish effective licensing practices at the very beginning.

Recommendation 1:

Discussions among all stakeholders are recommended to get full clarity in the management of exclusive rights to tap the emerging market possibilities of new media and online platforms. – This recommendation is in line with the proposal in Module 5 of the Scoping Study (CDIP/12/INF/3).

In Burkina Faso and Senegal, it is important to clarify whether the producers or the local CMO manage exclusive exploitation rights. According to the copyright law, creative collaborators are ensured remuneration for all exploitations of audiovisual works based on their exclusive rights. Producers are obliged to pay such remunerations, unless otherwise agreed.

At the same time rights holders may voluntarily entrust the management of their exclusive rights to a CMO in the two countries. This situation makes it unclear who can effectively license for instance new digital online platforms that are emerging, because the rights may be vested with the producer or the CMO.

Recommendation 8:

In Kenya, the granting of digital rights as provided under the WIPO Internet treaties (WCT and WPPT) would benefit stakeholders in the audiovisual industries and enable effective use of IP rights in the network environment.

Recommendation 11:

Effective licensing of online on-demand platforms, both national and Pan-African, is important to tap the potential income at the outset. The providers of online services may demand multi-territorial licenses that cover several countries. - WIPO could partner with the national competent authorities and organize workshops on online licensing practices for audiovisual works, eventually for Francophone and Anglophone countries in a group.

Building respect for IP

Recommendation 10:

Piracy is a major factor affecting negatively the development and livelihood of the audiovisual sector. Piracy makes it impossible to market profitably national audiovisual works, as foreign works are available in quantities with almost no price. A concerted effort against audiovisual piracy in both East-Africa and West-Africa would have a positive effect on the market.

Indicators and criteria for evaluation

Taken the above conclusions and recommendations into account, the next question is to consider what *indicators of success* can be set to verify the effects of the recommended measures.

In the DA project plan, the following indicators are set:

- Increase in the number of intellectual property-based transactions for the licensing of audiovisual rights through collective negotiations and collective licensing practices and implementation of guidelines; and
- Increase and development of the infrastructure for the licensing of audiovisual rights compatible with international standards through collective management organizations.

Number and profitability of intellectual property-based transactions

The first indicator can be measured by the developments in licensing of *digital rights and new online platforms*, either through individual exercise or collective management, pending on the choice in each country. As it is question of exclusive exploitation rights, it is up to the rights holders to decide how to license digital rights.

There are two baseline criteria to measure the development in the online sector:

- The number of licensees (=online platforms delivering films); and
- The collected revenue from digital rights licensing.

Currently very few, if any, licensing activities have taken place. Yearly follow-up of the baseline criteria is recommended.

Licensing of audiovisual rights through collective management organizations

The second indicator refers to developments in collective management of audiovisual rights. In that, the number of rights holders embraced in the activities is one central criterion. For instance in Senegal with its current restructuring, a goal is to at least double the number of rights holders. In Kenya, if a structure for the collective management of audiovisual rights will be set up, the number of rights holders is one central measure to follow.

There are three baseline criteria to measure the development in collective management:

- (i) Number of rights holders of audiovisual works as members of the CMO

- (ii) Total collection of remuneration for audiovisual works
- (iii) Distribution of collected remuneration to rights holders of audiovisual works.

Currently, the starting point exists in Burkina Faso and Senegal. In Kenya, no CMO is yet functioning in the audiovisual sector, so the follow-up is possible after the establishment, if that takes place.

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