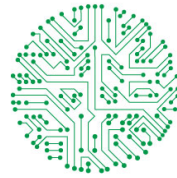


ARTICLE 19



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ARTICLE 19 EASTERN AFRICA

**JOINT MEMORANDUM ON THE PROPOSED CO-REGULATION FRAMEWORK FOR AUDIO-VISUAL CONTENT
CLASSIFICATION FOR BROADCAST AND OVER THE TOP (OTT)/VIDEO ON DEMAND (VOD) SERVICES**

TO:

THE KENYA FILM AND CLASSIFICATION BOARD

4 APRIL 2022



4 April 2022

The Kenya Film Classification Board,
Uchumi House 15th Floor,
P. O. Box 44226-00100,
Nairobi, Kenya
info@kfcg.go.ke

Dear Sirs,

JOINT MEMORANDUM ON THE PROPOSED PROPOSED CO-REGULATION FRAMEWORK FOR AUDIO-VISUAL CONTENT CLASSIFICATION FOR BROADCAST AND OVER THE TOP (OTT)/VIDEO ON DEMAND (VOD) SERVICES

ARTICLE 19 Eastern Africa is a regional human rights organization duly registered in 2007 as a non-governmental organization in Kenya. It operates in fourteen (14) Eastern Africa countries and is affiliated to ARTICLE 19, a thirty three (33) year old leading international NGO that advocates for freedom of expression collaboratively with over ninety (90) partners worldwide. ARTICLE 19 Eastern Africa leads advocacy processes on the continent on behalf of, and with, our sister organizations ARTICLE 19 West Africa and ARTICLE 19 Middle East and North Africa.

KICTANet is a multistakeholder platform for people and institutions interested in ICT policy. The network is a think tank that catalyzes policy reforms in the ICT sector, and it is guided by four pillars: policy advocacy, stakeholder engagement, capacity building and research. KICTANet's guiding philosophy encourages synergies for ICT policy-related activities and initiatives. As such, the network provides mechanisms and a framework for continuing cooperation and collaboration in ICT matters among industry, technical community, academia, media, development partners, and Government.

JOINT MEMORANDUM BY ARTICLE 19 EASTERN AFRICA AND KICTANET TO KFCB

ARTICLE 19 and KICTANet present this joint memorandum in response to the call by the Kenya Film Classification Board (KFCB). We have jointly reviewed the proposed co-regulation framework and the guidelines and state as follows:

1. The proposed Co-regulation Framework for Audio-visual Content Classification for Broadcast and Over-the-top (OTT)/Video on Demand (VOD) Services and the Film and Stage Plays (Film Classification) Guidelines, 2022 as currently developed, is in our considered view, unconstitutional, unfeasible and impractical.
2. The proposed co-regulation framework and guidelines viewed collectively, constitute an undue, unwarranted and unjustifiable limitation to freedom of expression, and they entrench censorship of content through an opaque and illegal mechanism.
3. The proposed co-regulation framework and guidelines therein are ultra vires, as the Film and Stage Plays Act, the Kenya Information and Communications Act, or the Kenya Communication (Broadcasting) regulations 2009 do not grant the Kenya Film Classification Board, any power to restrict content or regulate Over-the-top (OTT) or Video on Demand Services.
4. The proposed co-regulatory framework and guidelines have been developed without adequate evidence-based research or studies conducted or provided by the Kenya Film Classification Board demonstrating the need for the proposed regulatory framework or the guidelines.
5. The proposed co-regulatory framework and guidelines have been developed without adequate and meaningful consultation of key stakeholders.
6. The framework fails to provide for the responsibility of classifiers from applicable entities especially where they receive proprietary content for classification before such content is distributed or exhibited. Such classifiers owe proprietors a duty of care and confidentiality to ensure their intellectual property rights are respected.
7. We are cognisant of the need to promote national values and principles of governance, the protection of children from harmful content and the classification of film content. Nevertheless, we emphasise that this should be done in a legal, precise, efficient, measured and non-discriminatory manner that promotes human rights as enshrined under the constitution and international human rights standards.

Based on the foregoing, we propose that the Co-regulation Framework and the Guidelines be abolished pending meaningful multi-stakeholder engagement, evidence-based research from Kenya, and legislative amendments to ensure conformity with the constitution.

Below are our detailed comments and recommendations. If you would like to discuss this analysis further, please contact the undersigned.

Sincerely,

Mugambi Kiai

ARTICLE 19 Eastern Africa

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Grace Githaiga

KICTANet

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JOINT MEMORANDUM BY ARTICLE 19 EASTERN AFRICA AND KICTANET TO KFCB

Matrix Presentation of Proposals and Justifications on the Framework

Guideline	Provision	Proposal	Justification
I	Scope Digital content creators with significant number of followers or subscribers	Delete provision	<p>The framework fails to sufficiently define who is a digital content creator. Use of phrase ‘significant number of followers or subscribers’ leaves the legislation open to subjective interpretation and gives wide discretion to bring unsuspecting internet users under the ambit of this framework.</p> <p>The International Telecommunications Union classifies digital content as either commercial content or user generated content and highlights that classification regulation generally should apply to commercial content.¹</p> <p>In South Africa, the Film and Publication Board highlights the challenges of attempting to control and classify User Generated Content. Specifically the framework states, ‘<i>The Board can not use its finite resources to attempt to classify and regulate UGC in general.</i>’</p> <p>Instead, the Board opts to regulate specific instances where content violates provisions of the Films Act.² This can either be done by the board on its own motion or on the complaint of any member of the public.</p> <p>Secondly, the regulations also state that they only apply to applicable entities with physical presence in Kenya. This is unlikely to offer additional protection from harmful content from providers without physical presence. It may also lead to significant strain on platforms without sufficient resources to implement classification requirements.</p>
II	General Principles	Delete Provisions	These provisions seek to unjustifiably limit free expression contrary to article 24 and 33 of the Constitution of Kenya. ³ Article 33, while giving everyone artistic

¹ The International Telecommunications Union, ‘The Challenge of Managing digital Content’ Paper for the ITU-TRAI Regulatory Roundtable’ 21-22 August 2017, New Delhi India. <<https://www.itu.int/en/ITU-D/Regional-Presence/AsiaPacific/Documents/Events/2017/August-RR-ITP-2017/ITU%20Report%20Regulatng%20Digital%20Content%202017%20Final.pdf>>

² Films and Publications Board, FPB Online Regulation Policy (APRIL 2016) <<http://www.fpb.org.za/wp-content/uploads/2016/08/online-content-regulation-policy-2016.pdf>>

³ The Constitution of Kenya, Article 33

<<https://www.klrc.go.ke/index.php/constitution-of-kenya/112-chapter-four-the-bill-of-rights/part-2-rights-and-fundamental-freedoms/199-33-freedom-of-expression>>

	<p>Factors to consider when deciding content to exhibit</p> <p>i. Content which jeopardizes the security of the country</p>		<p>creativity, states that this freedom does not extend to propaganda for war, incitement to violence, hate speech or advocacy for hatred.</p> <p>Principle 6 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information states that National Security should be used to restrict free speech where it is likely to cause incitement to violence.⁴ Principle 7 further explains expressions that ought not be considered a threat to national security including criticism of government entities or foreign nations unless such criticism is intended to incite violence.</p> <p>Therefore, the threshold set by the regulations impose a disproportionate limitation to free expression beyond the limit of incitement to violence.</p>
2	Classification Panel Levels	Abolish system	<p>These guidelines propose a classification and regulation of all digital content. This is in our considered view, unfeasible and impractical. These places a significant financial and procedural burden on content and platform providers. This proposal creates a draconian mechanism which may lead intermediaries to censor and block content. In addition, the Board does not have the human and technical capacity to review and classify the vast amounts of digital content prior to its publication. This will create a significant bureaucratic bottleneck, and in effect, censorship by design.</p>

⁴ ARTICLE 19, 'The Johannesburg Principles on National Security, Freedom of Expression and Access to Information'
 < <https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf> >

Matrix Presentation of Proposals and Justifications on the Film and Stage Plays (Film Classification) Guidelines, 2022

Guideline	Provision	Proposal	Justification
General	Guidelines	Seek an amendment to the Film and Stage Plays Act and the Kenya Information and Communications Act	<p>The Board’s functions and ‘regulatory powers’ under section 15 of the Film and Stage Plays Act are only limited to examining films, imposing age restrictions, giving consumer advice, issuing certificates to distributors and exhibitors of films, and development of guidelines to be applied in the classification of films. In this regard, the attempt to develop a regulatory framework is therefore ultra-vires the functions of the board.</p> <p>Secondly, the Act regulates films defined as “cinematographic film, recorded video cassette film, recorded video discs, any recorded audiovisual medium, and includes any commentary (wherever spoken and whether the person speaking appears in the film or not), and any music or other sound effect, associated with the film, and any part of a film”. By reason of this definition, these co-regulation framework and guidelines do not extend to Over The Top and Video on Demand Services.</p> <p>Thirdly, the framework and the guidelines, by proposing to restrict certain types of content including those not limited by the constitution through guidelines, is ultra-vires the powers and functions of the Board. The Board does not have the power to establish a regulatory framework, and neither should such an important mechanism be developed as a guideline. A right or fundamental freedom may only be limited by legislation in the terms and means provided under article 24 of the constitution.</p> <p>It would be important for an amendment to the Act to clearly provide this regulatory power to the Board. Therefore, the Proposed Co-regulation Framework and the Guidelines therein are ultra vires, as the Film and Stage Plays Act, the Kenya Information and Communications Act, or the Kenya Communication (Broadcasting) regulations 2009 do not grant the Kenya Film Classification Board, any power to regulate Over-the-top (OTT) or Video on Demand Services.</p>

General	Use of vague terms and phrases such as: “lacks refinement or taste”, “strong details”, “unsuitable content”, social unacceptable”, “disturbing content”		The use of vague and ambiguous terms is problematic as it will result in subjective interpretation. In addition, it will fail to uphold the principles of legality, legal certainty and the rule of law under article 10 of the Constitution of Kenya, 2010.
5 (4) 6 (2) 7 (2) 8 (3) 16	Restricted content on: Violence and Crime Sex, Obscenity and Nudity Occult and Horror Drugs, Alcohol or Other harmful content Restricted Films	Delete Provisions	<p>As per the framework, restricted content can not be exhibited, broadcast or distributed commercially.</p> <p>The classification of online content before it is published and pre-publication review of such content restricts, and imposes an unjustifiable, and disproportionate restriction to freedom of expression, opinion, and access to information and creates a risk of unaccountable censorship. The guidelines in their current form, do not comply with both international human rights standards, and the Bill of Rights under the Constitution of Kenya, 2010.</p> <p>The Constitution under article 33 imposes restrictions on freedom of expression, which includes <i>propaganda for war; incitement to violence; hate speech; or advocacy of hatred that— constitutes ethnic incitement, vilification of others or is based on any ground of discrimination specified or contemplated in Article 27 (4)</i>. These guidelines go beyond the categories specified under the constitution and will apply to all digital content produced.</p> <p>Indeed, paragraph 32 of the General Comment 34 states that limitations on free speech to protect morals must be understood from the universality of human rights and principle of non-discrimination and not from a single tradition (social, philosophical, or religious).⁵ Further, the comment explains that restrictions to free expression must be both necessary and proportionate. These provisions grant overly broad and subjective powers to classifiers to restrict content while less restrictive means could be employed such as ranking such content as adult content. These broad restrictions of content may cause applicable entities to</p>

⁵Human Rights Committee ‘General Comment No. 34, Article 19: Freedoms of Opinion and Expression’ CCPR/C/GC/34 (Geneva, 2011)
< <https://www.justiceinitiative.org/uploads/5332d9b3-c57a-4d5c-9a99-89b7da93889f/UNHRCgeneral-comment34-20110725.pdf>>

			<p>police content and thus encourage piracy and violation of intellectual property rights where films are illegally sourced. Thus, the guidelines should be narrowly targeted, precisely described and proportional to the risk posed.</p> <p>Finally, regulation 16 perpetuates discrimination of homosexual related film content. During Kenya’s periodic review, Kenya received recommendations to adopt a comprehensive anti-discriminatory law affording protection to all individuals irrespective of sexual orientation or gender identity. Additionally, article 27 of the constitution prohibits discrimination of any person on grounds of sex or sexual orientation.⁶</p>
23 (a)	Television advertisement on alcoholic drinks shall not be broadcast during the watershed period	<p>Insert the following phrase immediately after the word period</p> <p>‘Without a health, safety and age advisory message’</p>	<p>Once more, the need to protect children must be balanced against the right to know or access information and other commercial interests of business owners in Kenya.</p> <p>Regulation 9 of the Kenya Information and Communications Consumer Protection Regulation) 2010 already prohibits broadcasters from glamorizing or marketing alcoholic, tobacco or other harmful products to children without prescribing time limitations for advertisement of alcoholic advertisements.⁷ Additionally, promotion of alcoholic drinks is regulated under part VI of the Alcoholic Drinks Control Act, 2010 which prescribes measures to protect children while balancing commercial and public interest.⁸</p>

⁶ UNGA, ‘Report on the Working Group on the Universal Periodic Review’ Human Rights Council 44th Session (June 2020)

< <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/070/40/PDF/G2007040.pdf?OpenElement>>

⁷ Kenya Information and Communications (Consumer Protection)Regulation 2010

< http://kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=No.%202%20oP%201998#KE/LEG/EN/AR/K/NO.%202%20oF%201998/SUBLEG/HC_157>

⁸ Alcoholic Drinks Control Act, 2010 Part VI < http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%204%20oP%202010#part_VI>