

SWASHBUCKLING IN UNCHARTED WATERS: COMBATting DIGITAL PIRACY WITH DYNAMIC INJUNCTIONS IN EMERGING AUDIO-VISUAL MARKETS

KATE BISHOP*

ABSTRACT

Digital piracy threatens to sabotage developing creative economies. As the internet has grown, so has copyright infringement, and digital piracy is pervasive. Emerging digital economies have struggled to grow and compete under the weight of infringement that hinders investment and discourages creators. The digital economy in Kenya is one such growing creative industry that has experienced setbacks because of widespread infringement. The Kenyan government is working to improve copyright protection. Since 2019, the Kenyan Copyright Act has undergone several extensive changes. Creative industries have experienced a changing landscape from internal and external forces reacting to the fast pace of technological development.

Over a similar timeline, since 2019, India began using dynamic injunctions to fight digital piracy. A proactive, court-created tool, dynamic injunctions have proven effective against piracy of copyrighted works. Many countries have begun using flexible enforcement measures to keep up with digital piracy's changing nature. Dynamic injunctions extend injunctions beyond the original court order to include websites reposting the infringing content at a new web address.

One of the primary concerns of increased copyright enforcement is the need to maintain a balance between copyright protection and freedom of expression. Indian courts have implemented judicial oversight of expansion requests. Kenyan courts should follow the Indian example and interpret the law to allow for the creation of dynamic injunctions while limiting the power of such injunctions through judicial scrutiny.

* J.D. Candidate 2025, University of Wisconsin Law School. I dedicate this Comment to my family and friends for their endless support. I also thank Professor BJ Ard for his diligent editing, thoughtful conversation, and encouragement over the last two years. To all the creative people striving to make their mark on the world, I wish you fair winds and following seas.

Abstract.....	553
Introduction.....	554
I. The Problem With Pirates.....	557
II. Dynamic Injunctions: A New Cutlass?.....	559
A. The Delhi Case Study	560
III. Walking the Copyright Plank	564
A. A Boon for Rightsholders.....	566
B. What About Freedom of Expression?.....	569
IV. Will X Mark the Spot? Kenyan Compatibility with Dynamic Injunctions	571
A. Development of Creative Industries	573
B. Balancing Interests in Copyright Law	575
C. Dynamic Injunctions and the Kenyan Copyright Act.....	578
V. Conclusion.....	579

INTRODUCTION

In April 2023, the World Intellectual Property Organization (WIPO) approved a proposal submitted by the Kenya Copyright Board to address digital piracy.¹ The proposal called for a study to assess the current state of copyright law and consider potential enhancements to the regulatory framework, with the goal of introducing methods to improve online copyright enforcement.² This Comment will review the development of copyright law and digital piracy to suggest improvements to the Kenyan copyright framework.

Copyright law is administered at a national level but has international effects.³ Three of the largest audio-visual markets in the world—Hollywood (USA), Bollywood (India), and Nollywood (Nigeria)—approach copyright very differently.⁴ In the United States, copyright protection is seen as an outlier in the legal system, giving

¹ WIPO, Comm. on Dev. & Intell. Prop., Summary by the Chair, at 3 CDIP/30/3 (Apr. 28, 2023); see also WIPO, Comm. on Dev. & Intell. Prop., Revised Project Proposal Submitted by Kenya on Development of Strategies and Tools to Address Online Copyright Piracy in the African Digital Market, at 3, CDIP/30/4 Rev. (Apr. 28, 2023) [hereinafter *Revised Project Proposal*].

² *Revised Project Proposal*, *supra* note 1, at 1.

³ See Samuel Samiáí Andrews, *Creative Disruptions and Digital Copyright Regime of an African Film Industry: Nollywood's Present Continuous Path*, in 11 WIPO-WTO COLLOQUIUM PAPERS SPECIAL EDITION 170, 170–71, 184 (2020) [hereinafter Andrews, *Creative Disruptions*].

⁴ See *id.*; see *infra* Part IV.B.

rightsholders leverage to restrict free speech, and, thus, is carefully monitored so as not to expand too far.⁵ India's Bollywood, on the other hand, benefited from the use of experimental legal tools to protect copyright.⁶ Nigerian copyright law lagged behind industry development, an advantage in the early stages of development that other African nations sought to replicate, however this lag has harmed continued growth on the international stage.⁷

The rise of both e-commerce users and digital piracy prompted the Kenyan government to review the Copyright Board's methods of enforcement.⁸ The transition from film to digital production has made audio-visual industries more efficient but has heightened its vulnerability to digital piracy.⁹ The US International Trade Commission estimates that e-commerce will exceed half a billion users in Africa by 2025.¹⁰ Opportunities in digital markets have accelerated in African economies, leading to growth in both regional and national trade.¹¹ However, piracy costs the Kenyan creative economy approximately \$625 million annually.¹² Copyright holders are damaged by the proliferation of piracy websites offering illegally obtained content.¹³ Pirates then evade capture by duplicating the content at a different web address in *mirror sites*.¹⁴ The audio-visual industry experiences a high level of infringement, preventing

⁵ Cara Gagliano, *For Would-Be Censors and the Thin-Skinned, Copyright Law Offers Powerful Tools*, ELEC. FRONTIER FOUND. (Jan. 20, 2023), <https://www EFF.ORG/deeplinks/2023/01/would-be-censors-and-thin-skinned-copyright-law-offers-powerful-tools> [https://perma.cc/43ND-MW5R].

⁶ See generally Arpan Banerjee & Neil Gane, *Copyright piracy and cybercrime: enforcement challenges in India*, WIPO MAG. 44 (Dec. 2022).

⁷ See generally Ana Santos Rutschman, *Weapons Of Mass Construction: The Role Of Intellectual Property In Nigeria's Film And Music Industries*, 29 EMORY INT'L L. REV. 673 (2015).

⁸ *Revised Project Proposal*, *supra* note 1, at 1.

⁹ Gururaj D. Devarhubli & Anjani Singh Tomar, *A Critical Study on Copyright Violations in the Indian Entertainment Industry in the Internet Age*, 12 TURKISH ONLINE J. QUALITATIVE INQUIRY 1084, 1084–85 (2021) [hereinafter Devarhubli & Tomar, *Copyright Violations*].

¹⁰ *Id.*

¹¹ *Id.*

¹² Silas Kiprono Samoei & Brigit Flevian Akinyi, *Combatting Digital Piracy in Kenya's Film Industry*, 18 KENYA INST. FOR PUB. POL'Y RSCH. & ANALYSIS 1, 1 (2022-23) (converted Ksh 92 billion into USD on October 8, 2023).

¹³ *Id.*

¹⁴ See Ikenna U. Ibe & Noel N. Udeoji, *The Challenges and Prospects of Nigeria Copyright Administration in a Digital Artificial Intelligence Age*, 3 ABUAD PRIV. & BUS. L. J. 110, 123 (2019) ("[A] mirror site is an exact duplicate of another internet site used to provide multiple reliable sources of the same information . . .").

the Kenyan economy from fully realizing the economic benefits of growing digital markets.¹⁵

One potential solution is to allow for dynamic injunctions. In India, dynamic injunctions permit plaintiffs to file applications to extend granted injunctions to mirror websites despite those sites not being included in the original suit.¹⁶ The Indian film industry is the second largest in the world and has dealt with serious digital piracy issues.¹⁷ Piracy generates an estimated 35 percent more revenue than legitimate distributors.¹⁸ By using a case study of the Indian experience implementing dynamic injunctions and analyzing the possible benefits and drawbacks of a similar system in Kenya, this Comment considers whether implementing similar tools would be beneficial in emerging digital economies.

India first used dynamic injunctions to combat digital piracy affecting the film industry in 2019.¹⁹ The Delhi High Court adapted this tool from the Singapore judiciary in the case of *UTV Software Communications Ltd. v. 1337X.TO & Ors.* (“UTV”).²⁰ One of the main problems impacting online copyright enforcement is infringers escaping liability by moving pirated content to new web addresses.²¹ A primary goal of enforcement is to drive consumers toward legal sources of copyrighted content.²²

The following discussion will analyze the factors that contribute to the effectiveness of dynamic injunctions as well as the ethical

¹⁵ *Revised Project Proposal*, *supra* note 1, at 1.

¹⁶ *UTV Software Communication Ltd. & Ors. v. 1337X.To & Ors.*, (2019) SCC Online Del 1, 94–95 (India).

¹⁷ Gunjan Chawla & Nidhi Buch, *Impact of Online Digital Piracy on the Indian Film Industry: An Empirical Investigation into Consumer Behaviour*, 28 J. INTELL. PROP. RTS. 21, 21 (2023).

¹⁸ *UTV Software Communication Ltd. & Ors.*, (2019) SCC Online Del 1, 57 (India).

¹⁹ Divij Joshi, *Breaking: Delhi High Court Issues India's First 'Dynamic' Website Blocking Injunction for Copyright Infringement*, SPICYIP (Apr. 12, 2019), <https://spicyip.com/2019/04/breaking-delhi-high-court-issues-indias-first-dynamic-website-blocking-injunction-for-copyright-infringement.html> [<https://perma.cc/2LU8-2T6H>].

²⁰ *Id.*

²¹ Prathiba M. Singh, *Evolution of Copyright Law – The Indian Journey*, 16 INDIAN J. L. & TECH. 38, 48 (2020) [hereinafter Singh, *Evolution of Copyright Law*].

²² Nigel Cory, *India and Website Blocking: Courts Allow Dynamic Injunctions to Fight Digital Piracy*, INFO. TECH. & INNOVATION FOUND. (May 29, 2019), <https://itif.org/publications/2019/05/29/india-and-website-blocking-courts-allow-dynamic-injunctions-fight-digital/> [<https://perma.cc/2J2A-8YKV>] [hereinafter Cory, *India and Website Blocking*]; see also Pranay Bali & Nayantara Malhotra, *To Block or Not to Block?: Analysing the Efficacy of Website Blocking Orders and Dynamic Injunctions in Combating Digital Piracy*, 11 INDIAN J. INTELL. PROP. L. 179, 188 (2020).

considerations of website blocking in the free market. This Comment considers possible strategies and potential outcomes of instituting a system of dynamic injunctions to improve the protection of emergent digital economies.

I. THE PROBLEM WITH PIRATES

Copyright protects artistic works that are fixed in a tangible form of expression.²³ Digital piracy has increased with the rapid growth of the global digital economy.²⁴ Threats to copyright holders, in turn, threaten the economy and societal wellbeing.²⁵ Online copyright protection primarily focuses on the audio-visual industry: unauthorized copies of films, television shows, and music being made available for consumers at the cost of the creators.²⁶ Rogue websites act as dealers of pirated content, and Internet Service Providers (“ISPs”) connect end users to rogue websites as an often-ignorant middleman.²⁷

Copyright holders have exclusive control over use, exploitation, and distribution of their works.²⁸ One of the fundamental tenets of copyright law is that protection of the arts encourages societal advancement.²⁹ One of the primary methods used to protect copyright is to funnel consumers toward legal sources by making illegal sources of content difficult to access.³⁰ While damages are often available as a

²³ Cynthia Nzuki & Chebet Koros, *Copyright Protection in Kenya: A Simplified Guide for Creatives and Intellectual Property Practitioners*, STRATHMORE UNIV. CTR. FOR INTELL. PROP. & INFO. TECH. L. 1, 5 (2022) (“Works must be original meaning that the author must have used enough effort and skill to create them. Copyright does not protect an idea itself but the expression of the idea in a physical form, for example in a book, song, computer program, etc.”).

²⁴ Bali & Malhotra, *supra* note 22, at 179.

²⁵ Tolu Olaloye, *Emerging Issues in Enforcement of Copyright in Africa: Kenya as A Case Study*, IP LINK-ASIA (June 24, 2022) <https://www.iplink-asia.com/article-detail.php?id=396> [<https://perma.cc/86PY-HXAX>].

²⁶ See KENYA COPYRIGHT BD., STRATEGIC PLAN 2017–2022 4 (2018).

²⁷ Gururaj D. Devarhubli & Anjani Singh Tomar, *A Critical Study on Liability of Intermediaries for Copyright Infringement - Analysis of Indian and German Position*, 24 J. LEGAL, ETHICAL & REGUL. ISSUES 1, 1–4 (2021) [hereinafter Devarhubli & Tomar, *Liability of Intermediaries*].

²⁸ John Walubengo & Mercy Mutemi, *Treatment of Kenya’s Internet Service Providers (ISPs) under the Kenya Copyright (Amendment) Bill, 2017*, 23 AFR. J. INFO. & COMM’N 1, 2 (2019).

²⁹ See Kimberlee Weatherall, *Safeguards For Defendant Rights and Interests in International Intellectual Property Enforcement Treaties*, 32 AM. U. INT’L L. REV. 211, 229–30 (2016).

³⁰ Nigel Cory, *How Website Blocking is Curbing Digital Piracy Without “Breaking the Internet”*, INFO. TECH. & INNOVATION FOUND. 1 (Aug. 22, 2016), <https://itif.org/publications/2016/08/22/how-website-blocking-curbing-digital-piracy-without-breaking-internet/> [<https://perma.cc/24GX-36B7>] [hereinafter Cory, *How Website Blocking is Curbing Digital Piracy*].

method of relief for copyright holders, injunctions are frequently used to stop infringement.³¹ If the rightsholder can prove infringement, courts may grant a notice and takedown order requiring ISPs to remove infringing content.³² However, injunctions are often ineffective in digital markets because infringers can easily move content to new web addresses.³³

To improve the viability of injunctions in the digital age, a growing number of countries have implemented dynamic injunctions for use in copyright infringement actions.³⁴ A dynamic injunction allows the rightsholder to add new web addresses to the original injunction through an expedited process rather than going back through the court system to file a new injunction.³⁵ Variations of this system have been utilized in the United Kingdom since 2011³⁶ and Singapore since 2018.³⁷ India implemented dynamic injunctions through court-created law established in *UTV* in 2019.³⁸ Plaintiffs in Indian courts may now submit applications to the Joint Registrar—an administrative body—to extend injunctions to new web addresses displaying the same infringing content.³⁹

Concerns over digital piracy increased globally in recent years due to a rise in illegal streaming platforms, ISPs that ignore piracy, and the anonymity offered by these intermediaries.⁴⁰ Copyright enforcement is hindered by the difficulties of establishing jurisdiction, the sophistication of cybercriminals, time delays, and inadequate staffing.⁴¹ Modern technology makes enforcement tools, like dynamic injunctions, important as it becomes cheaper and easier to distribute legal and illegal digital content.⁴² Piracy is an international problem. Unauthorized content is

³¹ See Prathiba M. Singh, J., WIPO, Advisory Comm. on Enf't, *Dynamic Injunctions and Other Injunctive Reliefs in India*, at 3–5, WIPO/ACE/15/11 (Aug. 26, 2022) [hereinafter Singh, *Dynamic Injunctions*].

³² Shashank Mohan Prasad, *Online Digital Piracy: The Role Of Dynamic Injunctions And The Way Forward*, CONTEMP. L. F. (Sept. 7, 2023), <https://tclf.in/2023/09/07/online-digital-privacy-the-role-of-dynamic-injunctions-and-the-way-forward/> [https://perma.cc/8N68-HPJ3].

³³ Singh, *Dynamic Injunctions*, *supra* note 31, at 4.

³⁴ Cory, *How Website Blocking is Curbing Digital Piracy*, *supra* note 30, at 2, 18.

³⁵ See Prasad, *supra* note 32.

³⁶ *Twentieth Century Fox Film Corp v. British Telecommunications Plc* [2011] EWHC 2714 (Ch), [2012] 1 All ER 869 (UK).

³⁷ *Disney Enterprises, Inc and Others v. M1 Ltd and Others* [2018] SGHC 206 at 22 [High Court of the Republic of Singapore]; see also Prasad, *supra* note 32.

³⁸ *UTV Software Communication Ltd. & Ors. v. 1337X.To & Ors.*, (2019) SCC Online Del 1, 94–95 (India).

³⁹ See Prasad, *supra* note 32.

⁴⁰ See Banerjee & Gane, *supra* note 6, at 44.

⁴¹ See *id.*, at 48.

⁴² Cory, *India and Website Blocking*, *supra* note 22.

available in foreign markets, but enforcement does not extend beyond the borders.⁴³ In the *UTV* case discussed below, the defendants did not answer any summons—likely because the infringing websites were hosted outside of India—and the Court instead heard only amicus curiae briefs.⁴⁴ Government procedures for combating digital piracy must be continually examined as technology advances. Copyright owners must be able to fight infringers quickly enough to avoid dilution of their intellectual property rights beyond repair.⁴⁵

II. DYNAMIC INJUNCTIONS: A NEW CUTLASS?

India faces a challenging enforcement environment coupled with a globally prominent audio-visual industry.⁴⁶ The entertainment industry has grown rapidly, reaching \$27.9 billion in 2023.⁴⁷ While it outpaces growth in comparable sectors globally, the entertainment industry accounts for less than 1 percent of India's GDP.⁴⁸ India has always been an injunction-friendly jurisdiction for intellectual property rights owners.⁴⁹ Nonetheless, due to technological capabilities, content can be moved to new web addresses that do not fall within the blocking order.⁵⁰ Controlling access is especially challenging when the infringing content is at its most valuable for a limited time, such as that of live entertainment and sporting events.⁵¹ Dynamic injunctions permit rightsholders to seek extensions of preexisting injunctions to block mirror websites.⁵²

⁴³ See Devarhubli & Tomar, *Copyright Violations*, *supra* note 9, at 1085.

⁴⁴ Eleonora Rosati, *India's first dynamic injunction issued to block access to 'rogue websites'*, IPKAT (July 15, 2019), <https://ipkitten.blogspot.com/2019/07/indias-first-dynamic-injunction-issued.html> [https://perma.cc/Y62K-GX2B].

⁴⁵ Saif Khan & Shobhit Agrawal, *Policing and Takedown Strategies for Rogue Websites*, WORLD TRADEMARK REV. (Feb. 2, 2023), <https://www.worldtrademarkreview.com/guide/anti-counterfeiting-and-online-brand-enforcement/2022/article/policing-and-takedown-strategies-rogue-websites> [https://perma.cc/D2MY-QGBR].

⁴⁶ Banerjee & Gane, *supra* note 6, at 44.

⁴⁷ Ashish Pherwani, *Reinvent: India's M&E sector is innovating for the future*, EY (Mar. 5, 2024), https://www.ey.com/en_in/insights/media-entertainment/reinvent-india-s-m-e-sector-is-innovating-for-the-future [https://perma.cc/7DR5-RDNP].

⁴⁸ Cory, *India and Website Blocking*, *supra* note 22, at 5.

⁴⁹ Singh, *Dynamic Injunctions*, *supra* note 31, at 3.

⁵⁰ *Id.* at 4.

⁵¹ Banerjee & Gane, *supra* note 6, at 48.

⁵² Singh, *Dynamic Injunctions*, *supra* note 31, at 5.

A. THE DELHI CASE STUDY

The 2019 Delhi case, *UTV*, justified the creation of dynamic injunctions in India by couching this new tool in a court efficiency argument.⁵³ Requiring copyright owners to perpetually return to the courts for new injunctions each time pirated content is moved to a new web address wastes both court and plaintiff resources.⁵⁴ The Indian Code of Civil Procedure empowers courts to make such flexible orders to prevent abuse of the judicial process.⁵⁵

The Delhi High Court is known for issuing judgments that pave the way for national changes; the creation of dynamic injunctions to advance copyright law is one such change.⁵⁶ Piracy investigations in India are the responsibility of state governments rather than being handled at the federal level.⁵⁷ The court looked to *Disney Enterprises, Inc. & Ors. v. MI Limited & Ors*, a 2018 Singapore decision, to develop the Indian model of dynamic injunctions.⁵⁸ The Singapore decision granted an order to block the infringing website's variants when the pirating service changed online locations to evade the blocking order.⁵⁹ Website blocking has been effective in other countries to drive users toward legal sources of content.⁶⁰ Through *UTV*, the Delhi High Court adapted this strategy to enact broad changes in the Indian legal framework for website blocking.⁶¹

In deciding to extend injunctions, the Delhi High Court asked whether a digital infringer should be treated differently from a physical one and whether blocking websites in their entirety makes one "an opponent of a free and open internet."⁶² The court answered both questions in the negative. It found that the Copyright Act makes no distinction between crime in the physical world and crime in the digital world and

⁵³ Bali & Malhotra, *supra* note 22, at 194–95.

⁵⁴ *Id.* at 185.

⁵⁵ *Id.* at 195.

⁵⁶ Cory, *India and Website Blocking*, *supra* note 22; see also Priyanka Mittal, *Delhi High Court turns 50: 10 landmark judgements through the years*, MINT (Nov. 1, 2016), <https://www.livemint.com/Politics/8htXBGVMn9rTm2J52sOSZO/Delhi-HC-turns-50-10-landmark-judgements-through-the-years.html> [<https://perma.cc/F84J-3GB9>].

⁵⁷ Banerjee & Gane, *supra* note 6, at 45.

⁵⁸ *UTV Software Communication Ltd. & Ors. v. 1337X.To & Ors.*, (2019) SCC Online Del 1, 26 (India).

⁵⁹ *Id.*

⁶⁰ *Id.* at 91.

⁶¹ Cory, *India and Website Blocking*, *supra* note 22.

⁶² *UTV Software Communication Ltd. & Ors.*, (2019) SCC OnLine Del 1, 67 (India).

that infringers should be treated the same.⁶³ The court stated that advocating for limits does not put the judiciary at odds with open internet principles.⁶⁴ The court was more reticent in defining where those limits are.

Copyright law is meant to ease the friction between the rights of copyright holders and internet users. The amicus curiae for the defendants in *UTV* argued that blocking should only be granted when there is *no* legitimate content on the website and that blocking must be proportionate to avoid the high cost of deploying such a system.⁶⁵ Persuasive authority from the Bombay High Court backed up this argument, holding that infringement required a quantitative test before an injunction could be issued.⁶⁶ While an authoritative test would provide a clear line to evaluate infringement; it would unfortunately *also* benefit pirates seeking to exploit such a clear boundary.

The *UTV* Court was not persuaded.⁶⁷ Concerned that an infringer would just add the necessary percentage of legitimate content to meet the quantitative test requirement, the court held instead that a qualitative test is needed.⁶⁸ The court laid out a non-exhaustive list of factors including:

1. whether the primary purpose of the website is to commit or facilitate copyright infringement;
2. the flagrancy of the infringement;
3. whether the detail of the Registrant is masked so that no traceable detail is available either of the Registrant or of the end user;
4. whether there is silence or inaction by such website after receipt of take down notices pertaining to copyright infringement;
5. whether the online location makes available or contains directories of the means to infringe copyright;

⁶³ *Id.* at 67.

⁶⁴ *Id.*

⁶⁵ Bali & Malhotra, *supra* note 22, at 193.

⁶⁶ Joshi, *supra* note 19.

⁶⁷ See *UTV Software Communication Ltd. & Ors.*, (2019) SCC Online Del 1, 73 (India).

⁶⁸ *Id.*

6. whether the owner of the online location demonstrates a disregard for copyright generally;
7. whether access to the online location has been disabled by orders from any court of another country related to copyright infringement;
8. whether the website contains guides to circumvent court orders disabling access to the website; and
9. the volume of traffic at or frequency of access to the website; and any other relevant matter.⁶⁹

The defendant's actions met the burden of proof, and the court determined that the entire website should be blocked.⁷⁰ The court in *UTV* found overwhelming evidence of infringement, but, in other cases, the choice to block an entire website (or possibly an expanding list of websites) for hosting infringing content may not be so clear cut. Such websites may include content not subject to copyright—information that would be made inaccessible to the public by a blocking order.

In developing a qualitative test in *UTV*, the court determined that an order must be both necessary and proportionate considering the nature of the infringement.⁷¹ The purpose of an injunction is to make legal sources of content more appealing to the consumer because of the added time needed to find infringing content once the injunction is implemented.⁷² However, because of the risk that an order may block non-infringing content, the injunction must be proportionate to that risk, with courts interfering no more than necessary to protect copyright.⁷³ Proportionality requires balancing the competing fundamental rights of intellectual property on one side and the right to freedom of expression on the other.⁷⁴ The court found that this balance weighs in favor of website blocking when rogue websites engage in online piracy.⁷⁵

⁶⁹ *Id.* at 68–69.

⁷⁰ *See id.* at 87.

⁷¹ *Id.* at 85.

⁷² *See id.* at 68; *see also* Cory, *How Website Blocking is Curbing Digital Piracy*, *supra* note 30, at 1.

⁷³ *UTV Software Communication Ltd. & Ors.*, (2019) SCC Online Del 1, 50 (India).

⁷⁴ *Id.* at 85.

⁷⁵ Nikhil Purohit, *Delhi High Court's Dynamic Injunction in Favour of Disney: An Unclear and Overbroad Exercise*, SPICYIP (Aug. 3, 2020), <https://spicyip.com/2020/08/delhi-high-courts->

The Delhi High Court in *UTV* did not delve into the analysis of what qualifies as “rogue.”⁷⁶ Critics of the decision caution that dynamic injunctions should be used with strict scrutiny to avoid unfairly limiting freedom of expression.⁷⁷ The court started building the framework for proper website blocking but did not finish setting parameters in its decision. Leaving the meaning of “rogue” so open to interpretation is concerning. The court addressed the possibility of blocking tools being used in bad faith to censor websites for unrelated purposes but discarded it as a rare concern compared to the many instances of infringement the holding is meant to combat.⁷⁸

One of the clear difficulties in tackling digital piracy is the ability to launch mirror websites within seconds.⁷⁹ It would not be proportionate to require plaintiffs to identify individual infringing web addresses, as this would require ongoing and considerable effort with little to show for it.⁸⁰ Dynamic injunctions work to combat the speed at which digital pirates are able to circumvent the injunction through mirror sites.⁸¹ Courts are also freed from constant monitoring and adjudicating of the issue in new injunction cases.⁸²

To avoid inadvertently making ISPs arbiters of the law in India, the Delhi High Court determined that the Joint Registrar (an administrative entity) would approve requests to extend injunctions.⁸³ As there is a need for judicial scrutiny, the court found that it would be inappropriate for ISPs to judge whether the evidence provided by an affidavit would be sufficient to support the extended blocking order.⁸⁴ ISPs have an obligation to take down infringing content upon receiving notice and are allowed safe harbor from being implicated in the infringement if they do so.⁸⁵ ISPs play an increasingly active role in infringement and derive significant revenue as

dynamic-injunction-in-favour-of-disney-an-unclear-and-overbroad-exercise.html
[<https://perma.cc/DU3H-7KR7>].

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *UTV Software Communication Ltd. & Ors.*, (2019) SCC Online Del 1, 41 (India).

⁷⁹ Rosati, *supra* note 44.

⁸⁰ *UTV Software Communication Ltd. & Ors.*, (2019) SCC Online Del 1, 87 (India).

⁸¹ *Id.* at 93–95.

⁸² *Id.* at 95.

⁸³ *Id.* at 95–96.

⁸⁴ *Id.* at 95.

⁸⁵ Singh, *Evolution of Copyright Law*, *supra* note 21, at 49.

a result.⁸⁶ In turn, courts, globally, have become much stricter with ISPs.⁸⁷ The Court in its order instead delegated power to the Joint Registrar of the Delhi High Court, acting in an administrative capacity.⁸⁸

Courts must consider whether disabling access to a website is in the public interest.⁸⁹ According to the Delhi High Court in *UTV*, disabling access is in the public interest if the measure is fair, proportionate, and effective in the given circumstances rather than creating a barrier to trade.⁹⁰ The Joint Registrar has become a safeguard against rightsholders bringing their complaints directly to ISPs, which cannot appropriately apply this test.⁹¹ If the content presented to the Joint Registrar is overwhelmingly infringing, then injunctions against such rogue websites are justified as being in the public interest.

The Indian system outlined in *UTV* allows appeals by infringing websites and suggests warnings and fines for end users who may not understand that their behavior infringes copyright.⁹² Website blocking alone is insufficient. To fight online piracy, government funding is needed for educational campaigns about infringement, as well as increased focus on law enforcement to investigate criminal copyright infringement.⁹³

III. WALKING THE COPYRIGHT PLANK

As of early 2018, forty-two countries used some type of website blocking to help fight digital copyright infringement and this number continues to grow.⁹⁴ Court orders protecting intellectual property rights are expensive, difficult to obtain, and time-consuming.⁹⁵ Dynamic injunctions significantly increase the effectiveness of website blocking as a remedy for rightsholders.⁹⁶ Nonetheless, there is great concern about the threat of overreach from the use of website blocking. The primary fear is that non-infringing content will be the victim of blocking, either through innocent

⁸⁶ Khan & Agrawal, *supra* note 45.

⁸⁷ *Id.*

⁸⁸ Joshi, *supra* note 19.

⁸⁹ Rosati, *supra* note 44.

⁹⁰ *Id.*

⁹¹ Singh, *Dynamic Injunctions*, *supra* note 31, at 5.

⁹² *UTV Software Communication Ltd. & Ors. v. 1337X.To & Ors.*, (2019) SCC Online Del 1, 97 (India).

⁹³ *Id.* at 40.

⁹⁴ Cory, *India and Website Blocking*, *supra* note 22.

⁹⁵ Rosati, *supra* note 44.

⁹⁶ *Id.*

mistakes, malicious intent of the rightsholder, or overzealous blocking by the ISP.

Pirated content is primarily disseminated for commercial gains.⁹⁷ The loss of revenue earnings because of piracy may ultimately reduce incentives for copyright owners to invest in quality products.⁹⁸ Digital piracy increases investment risks and stifles the growth of these industries.⁹⁹ However, end users easily justify their infringement because access is convenient and quick and the probability of being discovered—let alone punished—is low.¹⁰⁰ Copyright protects and encourages the development of the arts, but the fast pace of technological growth has required a recalibration of the framework for intellectual property protection.¹⁰¹

Governments may employ enforcement strategies that make legitimate sources more appealing to end users by driving up time and effort costs to find sites hosting pirated content.¹⁰² The enforcement system developed in India through *UTV* may have high upfront costs, but the creation of the process will reduce maintenance costs for all parties.¹⁰³ Evidence shows that site-blocking has been an effective means of directing traffic to legal sources, but there is concern that over-blocking may occur, which runs the risk of censoring non-infringing content.¹⁰⁴ *UTV* found that the concern that legitimate content would be blocked was small in proportion to the harm of the infringing content and was “not reason enough to avoid shutting down the website.”¹⁰⁵

The Delhi High Court’s proportionality rationale is not universally held. Especially for a US audience, the thought of a party being able to return to the judicial system with the same cause of action for the same material sounds like giving plaintiffs a second bite at the apple. However, dynamic injunctions are a new tool to combat a new problem. Technological advancements have outpaced the law in this area, requiring

⁹⁷ Devarhubli & Tomar, *Copyright Violations*, *supra* note 9, at 1088.

⁹⁸ Jayesh Varsani, *Fighting Against Digital Piracy in the Streaming Age*, *CARTESIAN* (Nov. 15, 2019), <https://www.cartesian.com/fighting-against-digital-piracy-in-the-streaming-age/> [https://perma.cc/8FPG-93P].

⁹⁹ Bali & Malhotra, *supra* note 22, at 183.

¹⁰⁰ Devarhubli & Tomar, *Copyright Violations*, *supra* note 9, at 1088.

¹⁰¹ Singh, *Evolution of Copyright Law*, *supra* note 21, at 52.

¹⁰² *UTV Software Communication Ltd. & Ors. v. 1337X.To & Ors.*, (2019) SCC Online Del 1, 33 (India); Cory, *How Website Blocking is Curbing Digital Piracy*, *supra* note 30, at 8.

¹⁰³ *UTV Software Communication Ltd. & Ors.*, (2019) SCC Online Del 1, 37 (India).

¹⁰⁴ *Id.* at 49.

¹⁰⁵ *Id.* at 49–50.

courts to reshape existing law rather than wait for the legislature to catch up.

A. A BOON FOR RIGHTSHOLDERS.

Judge Manmohan, writing in the *UTV* opinion, stated, “while website blocking will not solve online piracy—no single tool, law, or practice will—it does reduce it while increasing the consumption of legal content.”¹⁰⁶ The goal of website blocking is to encourage end users to use legitimate sources to access copyrighted content. Consumers typically know they are consuming pirated material, but they do not believe their consumption is wrong and, thus, have no incentive to change their behavior.¹⁰⁷ In the past, the cost of effort to access pirated content deterred many potential end-user infringers.¹⁰⁸ Recent technological advancements have reduced this cost compared to the price of accessing content legally.¹⁰⁹ As streaming becomes more common, the internet poses many challenges for effective protection of intellectual property.¹¹⁰ Since end users are often apathetic to copyright concerns, enforcement strategies must convince consumers to use legal sources.¹¹¹

Dynamic injunctions are effectively changing consumer behavior.¹¹² Traditional injunctions only block a single pirate site and consumers simply go to the next available pirated content.¹¹³ Consumer behavior only changes once a sufficiently large number of pirate sites are blocked, making it too inconvenient to continue searching for infringing content.¹¹⁴ By eliminating links to pirate sites from the first page of search engine results, the casual consumer will switch to legal content, even though pirate links were available past the first page of results.¹¹⁵

¹⁰⁶ *Id.* at 40.

¹⁰⁷ Satish Kumar Mishra et al., *Indian Film Industry and Copyright Piracy Issues in India: A Growing Concern*, 10 INT’L J. INNOVATIVE RSCH. TECH. 640, 644 (2023).

¹⁰⁸ Varsani, *supra* note 98.

¹⁰⁹ *Id.*

¹¹⁰ Singh, *Dynamic Injunctions*, *supra* note 31, at 4.

¹¹¹ See Prashat Iyengar, *Fake Facts: An Incredible Look at Piracy Statistics in India*, 5 INDIAN J. L. & TECH. 80, 92 (2009).

¹¹² Cory, *India and Website Blocking*, *supra* note 22.

¹¹³ Brett Danaher et al., *Copyright Enforcement in the Digital Age: Empirical Evidence and Policy Implications*, 60 COMM’NS ACM 68, 74 (2017).

¹¹⁴ Michael D. Smith, *What the Online Piracy Data Tells Us About Copyright Policymaking*, Hudson Institute: Policy Memo 1, 5 (Apr. 17, 2023).

¹¹⁵ *Id.* at 4–5.

Consumers' apathy is primarily due to the convenience and abundance of pirated content options; making these sites more difficult to find will push consumers to use legitimate sources.

Litigation is too expensive for copyright holders to consider without effective remedies to warrant the process.¹¹⁶ The burden placed on rightsholders to repeatedly obtain new injunctions for related websites is too great.¹¹⁷ This burden is made worse when other countries do not act to enforce copyright.¹¹⁸ In response, the EU uses blocking injunctions when the host site is outside the country and thus beyond the reach of its judiciary and copyright law.¹¹⁹ This remedy would be more effective if it could be enforced against mirror websites.¹²⁰

Website blocking alone is not a complete solution. The question is not whether a blocking order *can* be circumvented, but whether it *will* be circumvented.¹²¹ The goal of website blocking is to make it sufficiently difficult to access infringing content so that the casual consumer will be encouraged to shift to a legal provider.¹²² The success of website blocking rests on how inconvenient the intervention makes ongoing piracy.¹²³

Dynamic injunctions contribute to the success of website blocking by allowing a single injunction to reach infringing content across mirrored sites, frustrating the efforts of consumers and increasing their search costs.¹²⁴ In 2012, the UK blocked access to a single large piracy site, but legal consumption did not increase.¹²⁵ When UK policymakers simultaneously blocked access to nineteen sites in 2013 and an additional fifty-three in 2014, the use of legal subscription services went up an average of 12 percent.¹²⁶ This instance demonstrates the effect of

¹¹⁶ Arpan Banerjee, *Copyright Piracy and The Indian Film Industry: A "Realist" Assessment*, 34 CARDOZO ARTS & ENT L. J. 609, 670–71 (2016).

¹¹⁷ Singh, *Dynamic Injunctions*, *supra* note 31, at 5.

¹¹⁸ Joshi, *supra* note 19.

¹¹⁹ Lukas Feiler, *Website Blocking Injunctions under EU and U.S. Copyright Law—Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?* 44 (TTLF Working Paper No. 13, 2012), https://law.stanford.edu/index.php?webauth-document=publication/203758/doc/slspublic/feiler_wp13.pdf [<https://perma.cc/A4L3-CPKG>].

¹²⁰ Joshi, *supra* note 19.

¹²¹ Feiler, *supra* note 119, at 61.

¹²² Cory, *India and Website Blocking*, *supra* note 22.

¹²³ Danaher et al., *supra* note 113, at 73.

¹²⁴ *Id.*

¹²⁵ Cory, *How Website Blocking is Curbing Digital Piracy*, *supra* note 30, at 13–14 (describing a study conducted by Carnegie Mellon University on the expansion of website blocking in the United Kingdom).

¹²⁶ *Id.*

funneling consumers toward legal content through website blocking. The flexible scope of dynamic injunctions is beneficial to the enforcement of digital content copyright with how quickly technology changes.¹²⁷

Copyright law typically favors ISPs over rightsholders. ISPs are obligated to prevent the transmission of infringing content but enjoy safe harbor from liability.¹²⁸ By shifting responsibility for takedowns to a private actor, governments create the risk of collateral censorship.¹²⁹ ISPs do not want to be held liable for piracy and may become overzealous, blocking content that may not be infringing. To avoid over-blocking, ISPs are given (limited) immunity from liability.¹³⁰ For a court to issue a website blocking order, a website must primarily or predominantly share infringing content.¹³¹ This test helps strike the proper balance between the interests of rightsholders and freedoms of speech, expression, and trade.¹³² Many ISPs initially opposed website blocking.¹³³ Nonetheless, as frameworks were enacted without placing large burdens on them, many ISPs began to actively support website blocking orders.¹³⁴

More countries are raising the bar for what is expected from ISPs as active members of the digital economy.¹³⁵ Even in countries that do not use dynamic injunctions, ISPs have voluntarily agreed to use a graduated response system of warnings and penalties when infringement is detected.¹³⁶ Governments incentivized this responsible behavior among ISPs to enhance the effectiveness of dynamic injunctions.¹³⁷ However,

¹²⁷ Berdien van der Donk, *How Dynamic Is a Dynamic Injunction? An Analysis of the Characteristics and the Permissible Scope of Dynamic Injunctions under European Law after CJEU C-18/18*, 15 J. INTELL. PROP. L. & PRAC. 1, 2 (2020).

¹²⁸ Devarhubli & Tomar, *Liability of Intermediaries*, *supra* note 27, at 5.

¹²⁹ See Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 295–96 (2011); *see also*, J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298 (1999) (referencing the term ‘collateral censorship’ coined by Balkin).

¹³⁰ Wu, *supra* note 129, at 295–96.

¹³¹ Joshi, *supra* note 19.

¹³² Bali & Malhotra, *supra* note 22, at 197–98.

¹³³ Cory, *How Website Blocking is Curbing Digital Piracy*, *supra* note 30, at 20.

¹³⁴ Nigel Cory, *A Decade After SOPA/PIPA, It's Time to Revisit Website Blocking*, INFO. TECH. & INNOVATION FOUND. (Feb. 25, 2025, 7:10 PM), <https://itif.org/publications/2022/01/26/decade-after-sopa-pipa-time-to-revisit-website-blocking/> [https://perma.cc/443K-9CW2] [hereinafter Cory, *A Decade After SOPA/PIPA*].

¹³⁵ *Id.*

¹³⁶ Danaher et al., *supra* note 113, at 71.

¹³⁷ Tejaswini Kaushal & Ram Manohar Lohiya, *Unleashing the Copyright Protection Jedi: Evaluating the Effectiveness of Dynamic Injunctions*, NLIU CELL STUD. INTELL. PROP. RTS. (Feb. 25, 2025, 7:19 PM), <https://csipr.nliu.ac.in/copyright/unleashing-the-copyright-protection-jedi-evaluating-the-effectiveness-of-dynamic-injunctions/> [https://perma.cc/5GLT-CQHH].

ISPs are prohibited from general monitoring and cannot proactively monitor content; the rightsholder still must do the hard work of identifying specific infringing content and infringers.¹³⁸

B. WHAT ABOUT FREEDOM OF EXPRESSION?

Critics of website blocking want to ensure that access to information is not jeopardized because of efforts to stop infringement. While copyright law is subject to several treaties, enforcement is not an international undertaking.¹³⁹ Dynamic injunctions may be implemented to varying degrees depending on the country.¹⁴⁰ The primary concerns regarding dynamic injunctions are the level of scrutiny needed for blocking requests and the potential danger of bad actors using copyright law as a weapon against free expression.

Assessing whether to include “re-appearing . . . infringing content” in an existing injunction requires judicial oversight if the content is not identical.¹⁴¹ Critics argue that ISPs should not be empowered to decide whether content is similar enough to the content that incurred the original injunction.¹⁴² The court in *UTV* empowered the Joint Registrar to make these decisions rather than allow an ISP to adjudicate.¹⁴³ However, the Joint Registrar is an administrative entity, not a judicial one.¹⁴⁴ The question then becomes whether this power exceeds the capacity of the office and should, instead, be a judicial responsibility; especially if this test requires strict scrutiny to ensure there is no infringement on the freedom of expression.¹⁴⁵

Critics worry that website blocking injunctions will be overbroad. Copyright law provides the legal tools to restrict speech.¹⁴⁶ Copyright law can be exploited in coordinated attacks on free speech and political activity because it provides rightsholders with the ability to remove speech from the internet without going to court.¹⁴⁷ Dynamic injunctions that follow

¹³⁸ See Feiler, *supra* note 119, at 21.

¹³⁹ *Id.* at 73.

¹⁴⁰ van der Donk, *supra* note 127, at 18.

¹⁴¹ *Id.* at 11.

¹⁴² *Id.* at 10.

¹⁴³ *UTV Software Communication Ltd. & Ors. v. 1337X.To & Ors.*, (2019) SCC Online Del 1, at 96 (India).

¹⁴⁴ Purohit, *supra* note 75.

¹⁴⁵ *Id.*

¹⁴⁶ Gagliano, *supra* note 5.

¹⁴⁷ *Id.*

specific infringers pose an even greater risk to freedom of expression.¹⁴⁸ Someone who infringed in the past may not always be infringing. Injunctions are, instead, designed to encompass the same *content* from the original injunction.¹⁴⁹

Over-blocking has the potential to jeopardize the availability of legal content.¹⁵⁰ Judge Manmohan dismissed this concern in the *UTV* opinion, stating that enforcement misuse is rare.¹⁵¹ However, others have suggested developing different standards depending on the reason for the injunction. An injunction sought for copyright protection would receive different scrutiny than one attempting to silence alleged defamation.¹⁵²

The risk of weaponized copyright law was a main concern for US legislators when they considered bills between 2010 and 2012 that would have implemented website blocking orders for digital piracy. The US Digital Millennium Copyright Act uses a “notice and takedown” procedure where content owners can request that infringing content be removed.¹⁵³ The Stop Online Piracy Act and the Protect Intellectual Property Act were introduced to reduce foreign piracy.¹⁵⁴ Both bills failed due to vague language that could risk large amounts of non-infringing content being removed without judicial oversight.¹⁵⁵

The Electronic Frontier Foundation and other organizations fought the Stop Online Piracy Act and the Protect Intellectual Property Act.¹⁵⁶ Arguing that bad faith actors could create a blacklist to censor websites without judicial findings that the sites had infringed valid copyright.¹⁵⁷ The analysts at the Information Technology and Innovation Foundation were skeptical of these critiques, and believed that a balance could and should be found between preserving the benefits of a free and

¹⁴⁸ van der Donk, *supra* note 127, at 606–08.

¹⁴⁹ *Id.* at 611.

¹⁵⁰ Prasad, *supra* note 32.

¹⁵¹ *UTV Software Communication Ltd. & Ors. v. 1337X.To & Ors.*, (2019) SCC Online Del 1, at 41 (India).

¹⁵² See van der Donk, *supra* note 127, at 609.

¹⁵³ Ash Johnson, *22 Years After the DMCA, Online Piracy Is Still a Widespread Problem*, INFO. TECH. & INNOVATION FOUND. (Feb. 7, 2020), <https://itif.org/publications/2020/02/07/22-years-after-dmca-online-piracy-still-widespread-problem/> [<https://perma.cc/LGH7-H36K>].

¹⁵⁴ *SOPA/PIPA: Internet Blacklist Legislation*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/coica-internet-censorship-and-copyright-bill> [<https://perma.cc/KCY3-7MM4>].

¹⁵⁵ See *id.*

¹⁵⁶ *Id.* (“[T]hese bills were defeated by an enormous online campaign started by EFF and a handful of other organizations, which culminated in the Internet Blackout on the January 18, 2012.”).

¹⁵⁷ *Id.*

open internet and efforts to stop digital piracy.¹⁵⁸ The US expects other countries to protect Hollywood against film piracy but does not reciprocate in kind, claiming freedom of expression.¹⁵⁹ Dynamic injunctions have become more prevalent worldwide.¹⁶⁰ Critics concerned about individual freedoms must also consider collective responsibility and the fact that cybercrime is, still, a crime.¹⁶¹

Access to information is a fundamental right, and one of the primary goals of copyright is the advancement of society, not just the protection of the creator.¹⁶² As an alternative to website blocking, copyright holders could synchronize international release dates, making legal content more accessible and removing the incentive to use pirate sites.¹⁶³ The use of dynamic injunctions for website blocking can be effective against digital piracy, but the evidentiary requirements to extend injunctions should be clearly delineated.¹⁶⁴

IV. WILL X MARK THE SPOT? KENYAN COMPATIBILITY WITH DYNAMIC INJUNCTIONS

The Kenyan Strategic Plan 2017-2022 and Vision 2030 both detail long-term development plans to make Kenya more globally competitive.¹⁶⁵ A significant part of these development plans include building infrastructure to better protect creative industries.¹⁶⁶ This also fits in with a larger-scale project ratified by the African Union to better address infringement as part of the Digital Transformation Strategy for Africa (2020-2030).¹⁶⁷ Digital advancement in the audio-visual industry has made Kenya a prime candidate for international trade via internet-based sales.¹⁶⁸

One of the flagship projects of Vision 2030 is to establish programs to develop the performing arts, in part through the protection of

¹⁵⁸ Cory, *How Website Blocking is Curbing Digital Piracy*, *supra* note 30, at 1–2.

¹⁵⁹ Banerjee, *supra* note 116, at 641.

¹⁶⁰ van der Donk, *supra* note 127, at 3.

¹⁶¹ Cory, *A Decade After SOPA/PIPA*, *supra* note 134, at 17.

¹⁶² See Weatherall, *supra* note 29, at 230.

¹⁶³ See Danaher et al., *supra* note 113, at 70.

¹⁶⁴ Bali & Malhotra, *supra* note 22, at 201.

¹⁶⁵ KENYA COPYRIGHT BD., STRATEGIC PLAN 2017–2022 x–ix (2018).

¹⁶⁶ *Id.* at 2

¹⁶⁷ *Revised Project Proposal*, *supra* note 1, at 1.

¹⁶⁸ Samoei & Akinyi, *supra* note 12, at 1.

creative industries.¹⁶⁹ The Kenyan WIPO proposal stressed the need to develop and improve institutional capacity to make intellectual property enforcement more efficient.¹⁷⁰ As of the end of August 2024, the WIPO project team was studying enforcement and the impacts of infringement.¹⁷¹ The recent progress report from October 2024 listed the next steps as approving country-level project plans and selecting expert consultants.¹⁷² The progress report underlined the importance of effective cooperation amongst key players that may have divergent views on the solutions to growing digital piracy.¹⁷³

With a growing number of users online, digital piracy is also increasing.¹⁷⁴ A study from 2022 including Kenya, South Africa, Nigeria, Ghana, and Tanzania found that, of the 17.4 million visits to the top-ten websites hosting pirated content, Kenyan users alone made up 40 percent of that figure.¹⁷⁵ The rapid development of audio-visual markets spurred digital piracy.¹⁷⁶ Digital advancement improved the distribution of internet-based products, but, at the same time, made it easier for infringers to access content without paying royalties.¹⁷⁷

The Kenyan Copyright Act allows notice and takedown orders, but the courts could interpret the statute to create dynamic injunctions. As the Kenyan digital economy grows, the government should maximize the creative potential of the industry by protecting creators and content.¹⁷⁸ If Kenyan courts were to follow the Indian model and create dynamic injunctions, Kenya could build investment opportunities and promote the country on the global stage.

¹⁶⁹ KENYA COPYRIGHT BD., STRATEGIC PLAN 2017–2022 2 (2018).

¹⁷⁰ *Revised Project Proposal*, *supra* note 1, at 1.

¹⁷¹ WIPO, Comm. on Dev. & Intell. Prop., Progress Reports – Ongoing Development Agenda Projects, at ANNEX X, 2, CDIP/33/3 (Oct. 4, 2024).

¹⁷² *Id.* at 3.

¹⁷³ *Id.*

¹⁷⁴ Olaloye, *supra* note 25.

¹⁷⁵ IIPA, IIPA 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 98 (2023), <https://www.iipa.org/reports/special-301-reports/> [<https://perma.cc/G9RT-UQXB>].

¹⁷⁶ Andrews, *Creative Disruptions*, *supra* note 3, at 173.

¹⁷⁷ Samoei & Akinyi, *supra* note 12, at 1.

¹⁷⁸ See Nigel Cory, *Adaptive Antipiracy Tools: An Update on Dynamic and Live Blocking Injunctions*, INFO. TECH. & INNOVATION FOUND. (Oct. 22, 2020), <https://itif.org/publications/2020/10/22/adaptive-antipiracy-tools-update-dynamic-and-live-blocking-injunctions/> [<https://perma.cc/B95D-TFQA>].

A. DEVELOPMENT OF CREATIVE INDUSTRIES

In the past, leading African film economies—Nigeria and Kenya—have not attracted large foreign investment, possibly because of the legal lag in copyright law.¹⁷⁹ Weak copyright law allowed infringement to flourish.¹⁸⁰ Rampant digital piracy makes ventures riskier and investors become disincentivized.¹⁸¹ Piracy actively harms growth and development and, in recent years, the Nigerian government has worked to strengthen its digital intellectual property laws, culminating in the passage of an amended Copyright Act in 2022.¹⁸² In that same year, Nigeria's entertainment and media industry had a compound annual growth rate of 16.5 percent.¹⁸³ Internet advertising is expected to be the fastest growing market segment in Kenya—in 2022 the annual growth rate was 9.8 percent.¹⁸⁴ Digital piracy is a serious problem in Kenya and continues to affect investment opportunities for creative industries.¹⁸⁵ African creative industries are incredibly diverse, but deliberate public policy and proactive legal strategy is required to promote these industries globally.¹⁸⁶

The Nigerian film industry (Nollywood) has influenced the development of film industries in other African countries.¹⁸⁷ Nollywood initially developed rapidly, in large part because of a *lack* of copyright law.¹⁸⁸ Digital technology, from the outset, allowed for quick film production but, also, made it simple for pirates to illegally replicate.¹⁸⁹ As Nollywood began to draw more international attention, Nigeria worked to become compliant with the World Trade Organization's Trade-Related

¹⁷⁹ Samuel Samiá Andrews, *Reforming Copyright Law for a Developing Africa*, 66 J. COPYRIGHT SOC'Y U.S.A. 1, 13 (2019) [hereinafter Andrews, *Reforming Copyright*].

¹⁸⁰ See Andrews, *Creative Disruptions*, *supra* note 3, at 170, 173.

¹⁸¹ Bali & Malhotra, *supra* note 22, at 183.

¹⁸² See generally *Nigeria – Media and Entertainment*, *Country Commercial Guides*, INT. TRADE ADMIN. (June 6, 2023), <https://www.trade.gov/country-commercial-guides/nigeria-media-and-entertainment> [https://perma.cc/RQ8S-PPQH].

¹⁸³ ALINAH MOTAUNG & CHARLES STUART, *AFRICA ENTERTAINMENT AND MEDIA OUTLOOK 2023–2027* 7–10 (2023), <https://www.pwc.co.za/en/assets/pdf/pwc-africa-entertainment-and-media-outlook-2023.pdf> [https://perma.cc/J2PN-UKAP].

¹⁸⁴ *Id.* at 11.

¹⁸⁵ See Porter Anderson, *IPA and Kenyan Publishers Blast 'Unacceptable' Copyright Bill*, PUBL'G PERSP. (Feb. 14, 2022), <https://publishingperspectives.com/2022/02/ipa-and-kenyan-publishers-blast-unacceptable-copyright-bill/> [https://perma.cc/97D6-8T6C].

¹⁸⁶ Andrews, *Reforming Copyright*, *supra* note 179, at 4–5.

¹⁸⁷ Rutschman, *supra* note 7, at 693.

¹⁸⁸ *Id.*, at 701.

¹⁸⁹ Andrews, *Creative Disruptions*, *supra* note 3, at 173.

Aspects of Intellectual Property Rights (TRIPS) Agreement to meet international standards for copyright protection.¹⁹⁰ Where the lack of copyright law allowed significant advances in the nascent stages of the Nigerian creative economy, lagging copyright law began to negatively affect the market as internet dependence grew.¹⁹¹

The Nigerian amended copyright law addressed digital issues specifically and was written to improve effective administration, regulation, and enforcement of digital copyright.¹⁹² The amendment created provisions for takedown notices and empowered ISPs to take all reasonable steps to prevent re-uploads of infringing content.¹⁹³ Increasing compliance with international standards may enable the industry to capture large-scale monetization.¹⁹⁴ Other African countries followed the Nigerian model to develop their own film industries, but the Nigerian rate of success is likely unrepeatable.¹⁹⁵ The internet has developed rapidly since the emergence of Nollywood in the 1990s.¹⁹⁶ Creative industries in other developing digital economies now face greater piracy concerns in these early stages.¹⁹⁷

Increased protection and enforcement of intellectual property rights will create new opportunities in digital markets through technological innovation.¹⁹⁸ The development of intellectual property law will dictate how the industry grows.¹⁹⁹ Kenyan films are increasingly being picked up by streaming platforms, such as Netflix and Showmax.²⁰⁰ The government should incentivize continued creation through protection,²⁰¹ but, so far, there has only been low levels of coordination within the Kenyan government.²⁰² To compete on the global stage, the government needs to

¹⁹⁰ Rutschman, *supra* note 7, at 703–04 (referencing the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement signed between WTO member countries).

¹⁹¹ See Andrews, *Creative Disruptions*, *supra* note 3, at 173.

¹⁹² Wale Adedeji, *Copyright Policy and the Nigerian Music Industry in the Era of Digitalization*, 7 J. L. ANTHROPOLOGY 13, 29 (2023).

¹⁹³ TEMPLARS THOUGHTLAB, A NEW DAWN FOR COPYRIGHT PROTECTION IN NIGERIA 3–4 (2023), <https://www.templars-law.com/app/uploads/2023/06/A-New-Dawn-for-Copyright-Protection-in-Nigeria-Final.pdf> [<https://perma.cc/6QKQ-MEG3>].

¹⁹⁴ Rutschman, *supra* note 7, at 703–04.

¹⁹⁵ *Id.* at 700.

¹⁹⁶ See generally Andrews, *Creative Disruptions*, *supra* note 3, at 172–73.

¹⁹⁷ See Rutschman, *supra* note 7, at 703–04.

¹⁹⁸ See *Revised Project Proposal*, *supra* note 1, at 1–2.

¹⁹⁹ Andrews, *Creative Disruptions*, *supra* note 3, at 171.

²⁰⁰ Nzuki & Koros, *supra* note 23, at 6.

²⁰¹ *Id.* at 12.

²⁰² Samoei & Akinyi, *supra* note 12, at 2.

further develop regulation and enforcement to come into compliance with international standards and avoid exploitation abroad.²⁰³

B. BALANCING INTERESTS IN COPYRIGHT LAW

The Kenyan legislature strengthened copyright law in recent years to improve protections for artists.²⁰⁴ However, increased enforcement can also be used as a tool against free expression.²⁰⁵ The protection of rightsholders must always be kept in check so it does not infringe on the lawful expression of others.²⁰⁶ The Kenyan Copyright Act was amended in 2019; the important additions, for purposes here, are Sections 35B–D.²⁰⁷ Just two years later, a bill was proposed to repeal Sections 35B–D,²⁰⁸ but was met with opposition and subsequently dropped.²⁰⁹ Kenyan legislation has ping-ponged between extremes when it comes to copyright reform. The industry would benefit from an option that provides more judicial oversight while still working swiftly enough to be effective in the current digital environment.

The 2019 amendment to the Copyright Act added notice and takedown provisions that had not previously existed in Kenya.²¹⁰ These provisions empower copyright holders and ISPs to block websites predominantly used to share infringing content.²¹¹ Notice and takedown provisions are common in many countries throughout the world.²¹² Section 35B of the Copyright Act provides the framework for takedown requests and Section 35C implements a conditional safe harbor for ISPs to avoid contributory liability for infringement.²¹³ Within this framework, copyright owners need only provide an affidavit to the ISP stating

²⁰³ *Id.*, at 1–2; see also Andrews, *Creative Disruptions*, *supra* note 3, at 171.

²⁰⁴ Cynthia Nzuki, *Developments in Kenya's Copyright Law: The Copyright (Amendment) Act of 2022*, STRATHMORE UNIV. CTR. FOR INTELL. PROP. & INFO. TECH. L. (June 7, 2022), <https://cipit.strathmore.edu/developments-in-kenyas-copyright-law-the-copyright-amendment-act-of-2022/> [<https://perma.cc/T5FW-QH79>].

²⁰⁵ See generally Gagliano, *supra* note 5.

²⁰⁶ Feiler, *supra* note 119, at 75–76.

²⁰⁷ See also Samoei & Akinyi, *supra* note 12, at 2.

²⁰⁸ The Copyright (Amendment) Bill, No. 44 (2021) Kenya Gazette Supplement No.192 1261, 1264.

²⁰⁹ Nzuki, *supra* note 204.

²¹⁰ The Copyright (Amendment) Act, No. 20 (2019) Kenya Gazette Supplement No. 160 § 35A–35C.

²¹¹ Walubengo & Mutemi, *supra* note 28, at 6.

²¹² *What is a DMCA Takedown?*, DMCA, <https://www.dmca.com/FAQ/What-is-a-DMCA-Takedown> [<https://perma.cc/V3EH-YWE4>] (last visited Jan. 11, 2024).

²¹³ The Copyright Act (2022) Cap. 130 §§ 35B–35C (Kenya).

ownership, validity, and good faith.²¹⁴ ISPs must comply with takedown requests within forty-eight hours to take advantage of the safe harbor provision in 35C.²¹⁵ This legislation converts ISPs from potential contributory infringers to enforcers of copyright law with the capability to grant or deny access to their services.²¹⁶ While ISPs are in a prime strategic position to take down websites, this may vest private entities with too much power.²¹⁷

The Copyright Act gives extrajudicial capacity to ISPs in deciding whether to comply with a notice and takedown request.²¹⁸ Takedown requests must describe the claim with specificity but ISPs have very limited time to determine if the claim is legitimate.²¹⁹ ISPs are incentivized to comply with all requests as they are not liable for wrongful takedowns but *are* liable if they do not block the site within forty-eight hours of receiving notice.²²⁰ This policy creates a high likelihood that lawful websites will be affected and freedom of expression will be put at risk.²²¹ Critics of the statute's language suggest that takedowns should be part of a court process where infringement claims are under judicial scrutiny.²²²

The 2019 amendment has faced criticism since its enactment, with concern that its language skews too far in favor of rightsholders.²²³ The standard of proof for takedown requests only requires the good faith of the rightsholder sending the request.²²⁴ This is a low bar when the threat of liability pushes ISPs to act in favor of parties sending takedown requests without substantial review.²²⁵ The Act also shields ISPs from liability for wrongly blocking websites later found to be non-infringing.²²⁶

The Copyright (Amendment) Bill 2021 originally included clauses to repeal Sections 35B–D to remove ambiguity in the role of

²¹⁴ *Id.* § 35B.

²¹⁵ *Id.* §§ 35A–35B.

²¹⁶ Walubengo & Mutemi, *supra* note 28, at 6.

²¹⁷ *Id.*

²¹⁸ *Id.* at 5.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Mugambi Kiai, *Kenya: Copyright Bill Must Respect International Standards of Free Speech*, ARTICLE 19 (Jan. 12, 2022), <https://www.article19.org/resources/kenya-proposed-copyright-amendment-bill-must-respect-free-speech/> [<https://perma.cc/7WM3-ZRHR>].

²²² Walubengo & Mutemi, *supra* note 28, at 7.

²²³ Kiai, *supra* note 221.

²²⁴ Walubengo & Mutemi, *supra* note 28, at 7.

²²⁵ *Id.*

²²⁶ *Id.*

ISPs.²²⁷ After backlash from the audio-visual industry,²²⁸ the Kenyan Legislative Committee Report recommended removal of these clauses.²²⁹ The Copyright (Amendment) Bill 2021, as written, was an overcorrection. Rather than revising the language to provide more regulation for ISPs, the bill would have removed these sections wholesale. Repealing Sections 35B–D would have removed major pathways for copyright holders to seek relief from infringement.²³⁰

The Kenyan Legislative Committee Report received public comments that legislation to repeal copyright protection would indicate to the international community that Kenya would not guarantee privacy and freedom of online content.²³¹ This concern was well founded, as the bill was noted in the International Intellectual Property Alliance 2023 Special 301 Report to the US Trade Representative.²³² The mere act of introducing this legislation was seen as an indicator of weakening copyright protection in Kenya.²³³

Copyright protection has a direct effect on international trade and foreign investment.²³⁴ Maintaining and increasing foreign direct investment in film production is important to the Kenyan government's long term strategic planning²³⁵ and was another concern expressed in the Kenyan Legislative Committee Report regarding the 2021 bill.²³⁶ The 2022²³⁷ and 2023²³⁸ Amendments to the Copyright Act did not attempt to make further changes to Sections 35B–D and they remain as first enacted in 2019.²³⁹ Legislation to adequately protect copyright should be upheld,

²²⁷ The Copyright (Amendment) Bill, 2021, 192 Kenya Gazette Supplement 1261, 1264 (2021).

²²⁸ Joyce Wamucii Ndumia, *Impacts and Lessons From the Copyright Amendment Act, 2022*, KAIRU & MCCOURT ADVOCATES (July 20, 2022), <https://www.kairumccourt.com/news4.html> [https://perma.cc/8C5Z-JEJE].

²²⁹ Report on the Consideration of the Copyright (Amendment) Bill, 2021, Departmental Committee on Communication, Information, and Innovation 1, 39–40 (Feb. 2022) [hereinafter *Committee Report*].

²³⁰ Nzuki, *supra* note 204.

²³¹ *Committee Report*, *supra* note 229, at 32–33.

²³² IIPA, *supra* note 175, at viii.

²³³ *Id.*

²³⁴ Andrews, *Creative Disruptions*, *supra* note 3, at 171.

²³⁵ See KENYA COPYRIGHT BD., STRATEGIC PLAN 2017–2022 4 (2018).

²³⁶ *Committee Report*, *supra* note 229, at 32–33.

²³⁷ Ndumia, *supra* note 228.

²³⁸ See The Copyright and Related Rights Bill, 2023, A Legislative Proposal by The Kenya Copyright Bd.

²³⁹ The Copyright Act (2023) Cap. 130 § 35 (Kenya).

but these systems must be scrutinized to ensure they do not impair the free expression of non-infringing content.

C. DYNAMIC INJUNCTIONS AND THE KENYAN COPYRIGHT ACT

The Kenyan copyright regime continues to be a problem for its government. The legislature cannot repeal the sections of the Copyright Act that address the role of ISPs, but concern remains that the provisions give undue power to these private entities. Under the current system, copyright holders can send requests directly to ISPs without going through the courts, forcing ISPs to act as adjudicators.²⁴⁰ There is a solution. Section 35D includes a provision that allows copyright holders to petition the courts for an injunction that accomplishes the same goal of blocking access to infringing content.²⁴¹ Although, as with the Indian courts, there is a significant concern for the speed and effectiveness of these orders when digital pirates simply direct traffic to mirror websites. Judicially created dynamic injunctions could be the answer for the Kenyan creative industry.

The language of the Copyright Act should be interpreted by the courts to allow for dynamic injunctions. Section 35D(1)(c) of the Copyright Act states:

The High Court may, upon application under subsection (1), grant an order requiring . . . an internet service provider to prevent or impede the use of its service to access an online location, service or facility situated in or outside Kenya that is used to infringe copyright as replaced, amended or moved *from time to time*.²⁴²

The inclusion of the language “from time to time” could be interpreted by the courts to provide legislative justification for the creation of dynamic injunctions. This would not overly burden the courts and would furnish more consideration for freedom of expression. While notice and takedown requests would still be available through 35B, copyright holders would be incentivized to go through the courts instead. This is because a court-ordered dynamic injunction has the flexibility to block mirror sites without a new order. While the notice and takedown request procedure bypasses the courts to reach the ISPs directly, such a request only blocks that *particular* infringing website. If copyright holders were

²⁴⁰ Walubengo & Mutemi, *supra* note 28, at 5–6.

²⁴¹ The Copyright Act (2019) Cap. 130 § 35 (Kenya).

²⁴² *Id.* (emphasis added).

encouraged to first go through the court system, it would alleviate the concern that private entities were adjudicating infringement complaints.²⁴³

Kenyan critics have expressed concern about the lack of evidentiary standards in the current notice and takedown request system.²⁴⁴ The Indian system has faced similar criticism over the evidentiary standards required to issue an injunction.²⁴⁵ By creating dynamic injunctions, the Kenyan judiciary has the discretion to determine if it needs a higher evidentiary standard to issue an injunction.

Copyright enforcement does not have just one solution as it must be approached from multiple angles to be successful. Education is an important and ongoing method of fighting copyright infringement.²⁴⁶ Both enforcement officers and end consumers require ongoing education about the public good of copyright and the harm caused by infringement. As the internet continues to develop, new technology will allow for easier distribution of copyrighted works and easier methods for infringers to evade detection.²⁴⁷

V. CONCLUSION

Digital piracy harms creative industries worldwide but rooting out this problem can have severe consequences for internet freedom. Many countries—including both Kenya and India—have implemented some form of notice and takedown procedure to combat rogue websites profiting from infringing content. As the internet evolves, the methods for protecting copyright must evolve too.

Dynamic injunctions extend injunction orders to mirror websites that have substantially the same content as in the initial application. This court-created tool has been effective in many countries to encourage legal consumption of copyrighted content while not being overly burdensome to the rightsholders. Despite these benefits, the potentially expansive scope of dynamic injunctions requires careful scrutiny to ensure this tool is not misused. Critics warn that bad actors may exploit the ability to extend injunctions to silence free speech and illegally limit freedom of expression.

²⁴³ Walubengo & Mutemi, *supra* note 28, at 7.

²⁴⁴ *Id.*

²⁴⁵ Bali & Malhotra, *supra* note 22, at 201.

²⁴⁶ Olaloye, *supra* note 25.

²⁴⁷ Kaushal & Lohiya, *supra* note 137.

To defuse these concerns, countries have adopted dynamic injunctions under judicial oversight. In India, this oversight comes in the form of expanding the duties of the Joint Registrar rather than leaving adjudication to ISPs. Kenya's copyright law has notice and takedown request procedures in place, but a lack of government oversight has left the balancing of free speech and protection of copyright in the hands of private companies. The Kenyan courts should interpret the Copyright Act to allow the creation of dynamic injunctions with oversight, either through the judiciary or through an administrative body, similar to the Indian approach. Copyright infringement is amorphous, and enforcement of rights must be flexible to battle changing methods of digital piracy.