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LEGAL ISSUES TO CONSIDER WHEN IT
COMES TO DEVELOPMENT OF DIGITAL
APPS AND SERVICES

Demystifying the legal aspects of Trade and Development

The African population is mostly young with this demographic seeking knowledge and economic empowerment to face today's challenges. TripleOKLaw LLP has partnered with UNCTAD Youth Action Hubs Kenya chapter to demystify legal aspects of the SDGs and share in action-oriented conversations to empower the youth and marginalized communities.

Partner in Telecommunications, Media and Technology practice Janet Othero joined the first of our partner sessions on 31st October 2020 and shared this guidance on the legal landscape around the digital economy and the tie in to trade and development.

The full discussion is available at <https://fb.watch/IYmz82TGfS/>

1. How can youth protect Intellectual Property rights?

- Intellectual Property is quite wide, in the digital space, the inventions/innovations tend to go ahead of the existing laws or regulations, the law is playing catch-up.
- Kenya Intellectual Property scene has the necessary requirements & pieces of legislation to cover what would be considered sufficient, but then again, a lot it is left up to the Courts' interpretation.
- You have the Copyright Act that usually protects some source codes and computer programs that somebody may





develop, what applications (apps) certain software would be based off; you have the Trademark Act which normally and mainly protects things to do with logos or brands and image of certain products; you have the Industrial Property Act which mainly deals with things like patents that inventive innovations that do not exist in the market.

- The challenge now that you have is a lot of the young people that are dealing with things that are in the digital space are not really aware of what Intellectual Property rights and are not aware of what strides they can actually take to protect their innovations, products and their services.
- Even if they are aware of what they can protect, they are unwilling to take this step to protect them, this brings a challenge especially when you find a lot of them using social media platforms to sell products or services and they tend to borrow images from celebrities, copy images from multinational/big brands and promote them on their products.
- This is actually infringing on the image rights, copyrights and trademarks of the existing brands but because there's no proper enforcement mechanism and there's no one to educate them\make them aware of what Intellectual Property rights are about and how to protect them it goes on year after year and it's a wrong that keeps on being repeated.
- Intellectual Property is not really rocket science it's not so complicated, as lawyers there are some things about patents that we do not understand and we have to work with computer scientist to be able to break it down and offer protection within the various regulators.
- The first step is just be aware of what rights you have when you when you are innovating or developing something, once you are aware of what rights you may have then take the next step which is to protect your rights, so that when somebody infringes on them you're able to enforce and hold them liable/accountable and ultimately get some sort of relief for any infringement.

2. Where can the youth go to obtain information about Intellectual Property

- The first place would be to a lawyer's office (talking to a lawyer is like getting an insurance cover, you never know when you'll need it, but you need it at some point).
- If you're a business person in any sort of economy legal advice is always important in terms of ensuring compliance with what you're putting out there, compliance if you get investors who want to know whether your products and services are protected.
- It is necessary to ensure compliance on an overall basis because it is a health governance sort of thing.





- There are some institutions that have partnered with certain professional or government institutions to offer free training and free awareness programs e.g. Strathmore University has a CIPIT (The Centre for Intellectual Property and Information Technology Law) Center where they try to offer awareness or services to do with intellectual property in an affordable way; i-HUB partnering with TripleOKLaw and other people to run awareness programs; The Kenya Copyright Board (KECOBO); Kenya Industrial Property Institute (KIPI) and Communications Authority (CA).
- Once you know which regulatory body you want to approach or you want to deal with, go there or make a phone and just find out what are the minimum requirements, if they're not able to offer their assistance will refer you to some of the organizations or law firms they partner with.

3. Taxation of the Digital Economy on a Kenyan Context.

- There's a new regulation that's been introduced under the Income Tax Regulations of 2020 by KRA which seeks to tax digital services including download and streaming websites, platforms that provide for sale and exchange of products and services, online ticketing services, distance teaching and electronic data management such as cloud storage services.
- It provides that it shall tax 1.5% of the gross transactional value which means if you are one of those websites or platforms that's deriving income from people 1.5% of the income you're deriving from your customers will be taxed.
- If you're a platform provider that links buyers and sellers or something similar then the Commission that you receive at the end of the day for providing such a platform will be taxed at 1.5%.
- This is basically to companies or entities that will be offering services and products to people who are based in Kenya and it doesn't matter whether the entity itself is based in Kenya, as long as the services and the digital services they're offering are being enjoyed in Kenya they are liable to pay this sort of tax.
- The tax talks about gross transactional value in terms of measuring at the point of when a customer pays for something and the vendor or the platform provider or the digital service provider collects the money then the tax becomes accruable at that point.
- One of the challenges we're looking at is most of these platforms have very repeated business, within 24 hours they could get a lot of traffic in terms of people paying for items.





- We also have the social media platforms like Instagram and Facebook where people sell their products and services are exchanged, so how do you then monitor such a situation how do you sort of just govern it?
- This places the responsibility on the seller or the platform provider to of keep track of these transactions and account to KRA the income they have collected.
- It becomes a challenge to keep track when you have 20,000 to 1 million people on the platform all selling clothes and household goods and then once they move off Instagram they move to WhatsApp or Mobile telephone/text which becomes another platform where they're selling
- The promise is that further regulations will be put such as appointing digital tax service agents to monitor these sorts of things which is what will look out in terms of procedures for monitoring or collecting.
- Even on a normal basis just collecting your daily businessmen who are not physically located anywhere is already a challenge, so we want to see how they will implement this sort of thing
- If you're going to engage in any sort of digital service provision this is something you need to lookout for, don't wait for the tax man to come and tell you that this is what accrued or this is what you need to do, just practice healthy tax/financial discipline and be aware and declare.
- Talk to a tax advisor/tax practitioner, know what the challenges are and what the risks you're looking at and take safe practice to be declaring even before the regulator comes up with the regulations or now they'll be collecting these tax formula.

4. What Other Laws ensure inclusion of youth in the Digital Space?

- The Startup Bill was undergoing stakeholder comments, it's a good initiative in terms of young people can set up and have investors fund them for the innovation; Procurement Rules where a certain percentage of procurement are to go to youth making sure they get a percentage in terms of service and product delivery to the government; Ministry of ICT white box; Capital Markets Authority sandbox.
- No particular single legislation pushing for youth inclusion.





Conclusion

Know your rights, ignorance of the law is not a defense, there are many NGOs and organisations that help even if you don't have sufficient funds for legal fees.

For further information, contact tripleoklaw@tripleoklaw.com

About Us

This article was written as part of the UNCTAD15 Talks series. The initiative is to engage young people pre the ministerial conference is in conjunction with other partners with TripleOKLaw LLP as the legal insight contributors.

Sign up for UNCTAD Youth Talks. Youth Talks is bringing youth from around the globe to a central platform to engage in digital discussions on topics pre-UNCTAD15. Your voice is needed to make an impact. Below is the registration link to the UNCTAD Youth Talks. You can also continue discussing this conversation on UNCTAD discord platform. <https://mailchi.mp/7218982b2f75/unctad-youth-talks-sign-up>



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