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Market research on the prevalence of online and informal Film and video game content distribution channels in South Africa

Film and Publication Board

May 2013

Contents

1. Executive Summary

The FPB commissioned Deloitte to research and determine the prevalence of online and informal distribution channels for films and video games in SA. This study does not constitute a legal opinion or analysis. This research project was merely a high level scoping exercise conducted in order to provide guidance on the possible regulation of informal and online content distribution.

The research conducted in this report revealed an informal market that is dominated by pirated DVD content. For the few informal distributors that do exist within the informal distribution sector, most of them do not register with the FPB due to:

- A lack of a fixed place of business (the FPB registration process requires distributors to submit their fixed business address); and / or
- A view that the registration and license costs are expensive and that that they do not receive any benefit in return; and / or
- A lack of awareness of the FPB and the FPB Act.

After considering the information on how benchmarked countries implemented regulation, and, taking into account the input from desktop research and interviews with industry stakeholders, it appears the FPB has a number of options at their disposal when it comes to distributors of informal content including:

- Register informal vendors by providing a new category of license such as a Hawker's License (which has less onerous administrative requirements and lower licensing fees); and / or
- Register informal vendors and provide government funding for distribution development for those that do (in conjunction with provincial Film Commissions).

The burgeoning issue of piracy and its lack of regulation needs to be addressed, but that is beyond the scope of this report.

The research conducted into the online distribution market by SA registered entities revealed that:

- There are minimal levels of SA registered companies that provide / distribute online film and video game content;
- SA online film content consumers prefer to purchase from established websites in foreign jurisdictions;
- SA online video game content consumers prefer to purchase from established websites in foreign jurisdictions or from South African mobile operators; and
- Online content is mostly accessed using mobile handsets.

After considering the information on how benchmarked countries implemented online content regulation, and, taking into account the input from desktop research and interviews with industry stakeholders, it appears the FPB has a number of options at their disposal when it comes to regulating online content including:

- Partnering with ISPA and WASPA (in the case of online content accessed via mobile) and allowing these associations to regulate using their Codes of Conduct, complaints mechanisms and take-down notices; and
- Accept the classification of content that has already been classified by other international bodies;
- Promote awareness around age restrictions and the importance of content classification amongst online consumers; and
- Promote a system of accredited self-regulation which allows online content vendors to display a digital certificate or "seal of approval" issued by the FPB which informs consumers that the vendor only sells duly classified content. This will provide a competitive advantage to such vendors as consumers generally prefer to purchase rated content.

With the growth of our population who has internet access, the issue of online piracy does need to be considered, but that is beyond the scope of this report.

The remainder of this report will outline the objectives, scope, methodologies, results and recommendations into the informal and online distribution markets in SA for films and video games.

2. Definitions

The following definitions apply throughout this report:

Term	Definition
DTI	Department of Trade and Industry
Film / s	Any sequence of visual images recorded in such a manner that by using such recordings such images will be capable of being seen as a moving picture and includes any picture intended for exhibition through any medium or device. Includes cinematic release, DVD rental and retail, Blu-ray Disc, internet, cell phones, tablets and other devices, video on demand/pay-per-view. Broadcasters are excluded from this definition as they are regulated by ICASA.
FPB	Film and Publication Board
GFC	Gauteng Film Commission
ICASA	Independent Communications Authority of South Africa
IPO	Independent Producers Organisation.
ISPA	Internet Service Providers' Association of South Africa
NFVF	National Film and Video Foundation
Non-retail	Small informal shops
SASFED	SA Screen Federation
Video game / s	A computer game, video game or other interactive computer software for interactive game playing, where the results achieved at various stages of the game are determined in response to the decisions, inputs and direct involvement of the game player or players. Includes console, PC, online and mobile games.
WASPA	Wireless Application Service Providers' Association

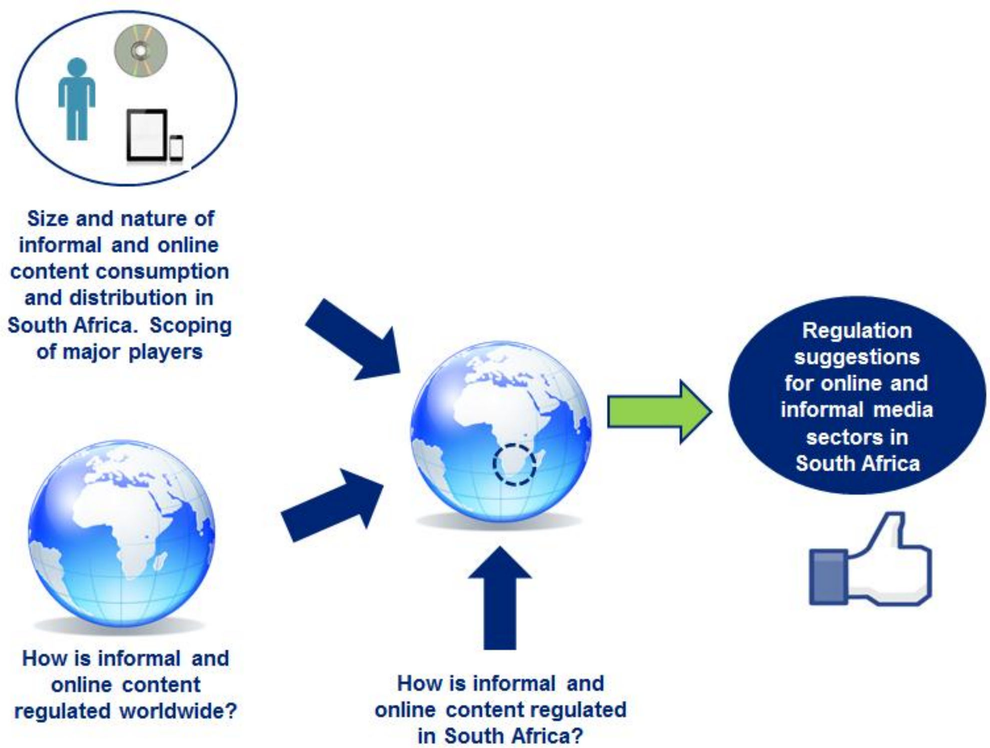
3. Objective

The FPB commissioned Deloitte to conduct a market scanning survey on the impact of online content distribution and the informal trading market on the media content distribution platforms in the country.

In conjunction with the FPB, Deloitte provided the following services:

- Development of a project plan detailing steps necessary for completion of the project;
- Provision of an outline methodology, including a qualitative and quantitative survey with distributors and consumers;
- The completion of a scoping exercise on major players in the online and informal media content distribution platforms;
- The completion of a benchmarking exercise on the regulation of these platforms in other jurisdictions; and
- Formulating recommendations on regulatory mechanisms that could be adopted by the FPB for both sectors.

This can be summarised as follows:



4. Scope

The scope of the project was limited to the following:

- "Content" is defined as film and video games;
- Pirated film and video games are excluded from this definition;
- "Online content distribution" is defined as original films and video games distributed by SA registered companies via the internet; and
- "Informal content distribution" is defined as original films and video games distributed by vendors that are not registered with the FPB, and are further limited to street vendors, small informal shops and flea market traders. This is limited to vendors operating within the borders of SA. It is further limited to physical goods, i.e. DVD's and game disks.

Thus, the market scanning surveys, as well as the scoping of major players, were limited to legitimate online and informal trade of film and video games as defined above.

International regulation benchmarking and regulation recommendations were limited to informal and online content distribution in countries as defined in paragraph 5.4.

5. Project Methodology

The project methodology used to achieve the objectives and deliver on the required services by Deloitte to the FPB was as follows:

5.1. Development of a project plan detailing steps necessary for completion of the project

A detailed project plan was compiled, discussed and agreed with the FPB on 23 January 2013.

5.2. Qualitative and quantitative survey with distributors and consumers

5.2.1. Informal sector

The informal sector were canvassed using a combination of surveys (both physical and online), and, meetings.

5.2.1.1. Physical surveys

Questionnaires were compiled by Deloitte in conjunction with the FPB. There were two separate surveys for consumers and distributors. The questionnaires were multiple choice format and English only. The questionnaires sought to answer the following questions:

- Consumers:
    - Age, race, gender, residence and monthly household income;
    - Method of purchasing / playing / watching films and video games;
    - Reasons for the choice method of purchasing / playing / watching films and video games;
    - Frequency and value of purchases / rentals of films and video games;
    - Attitude towards informal traders; and
    - Attitude towards pirated films and video games.

- Distributors:
  - Type (entity versus individual);
  - Content distributed;
  - Customer bases;
  - Distribution footprint;
  - Units distributed;
  - Average retail value distributed; and
  - Challenges faced whilst trading.

The physical surveys were conducted by an independent survey company, Plus 94 Research ("Plus94"), and used the following approach:

- The three main urban centres of SA, i.e. Johannesburg, Cape Town and Durban were targeted. The Johannesburg population is larger than that of Cape Town and Durban, thus a slightly higher number of interviews were assigned. Please note that any extrapolation done would be limited to urban areas only.

- Consumers that were approached included:
  - Consumers who purchase DVDs and video games from street vendors;
  - Consumers who purchase DVDs and video games from flea market traders; and
  - Consumers who purchase DVDs and video games from small shops in the CBDs.

- Distributors that were approached included:
  - Street vendors;
  - Flea market traders; and
  - Small shop owners in the defined CBDs.

- Consumers were intercepted at key central nodes in CBDs such as taxi ranks, shopping centres, outdoor markets and flea markets. As part of the process of intercepting respondents, the following modalities applied:
  - Each interviewer was assigned an interview node from which to recruit respondents;
  - The interviewer randomly selected a potential respondent from the individuals walking past the node. Every third individual who walked past the node was approached by the interviewer; and
  - Once a selected individual had agreed to participate in the survey, the interviewer commenced with administering the questionnaire.

- Intercept interviews were also utilised for interviews with street vendors, flea market traders, and small store traders. Interviewers sought potential respondents out by:
  - Starting at an pre-assigned starting points in the CBD or flea market;
  - Once at the starting point, the interviewer walked to the closest potential respondent at a trading spot (whether it was a street vendor's or flea market trader's table, or small store);
  - Once a respondent had been selected, qualified for inclusion in the survey, and completed the survey, the interviewer skipped two trading spots in order to select the next potential respondent.

- The research company suggested that a total of 600 respondents (500 consumers and 100 distributors) would be sufficient in terms of allowing a generalisation of the entire SA population within a margin of error of 4.38% at the 95% confidence level.
- Per Plus 94, in terms of the margin of error, it is commonly assumed that a margin of error less than 5% is statistically valid.

- For adequate statistical analysis, each consumer sample cell needed to be larger than 30 respondents to allow for cross analysis at the data analysis phase of the research.
- The breakdown of consumers and distributors that were approached by the survey company was as follows:

Consumers	Johannesburg Respondents	CapeTown Respondents	Durban Respondents	Total Respondents
Consumers who purchase from:				
Street Vendors	80	60	60	200
Flea Market Traders	60	45	45	150
CBD Retail Trader	60	45	45	150
Total Consumers	**200**	**150**	**150**	**500**
Distributors	**Johannesburg Respondents**	**CapeTown Respondents**	**Durban Respondents**	**Total Respondents**
Type of Distributor:				
Street Vendors	20	15	15	50
Flea Market Traders	13	6	6	25
CBD Retail Trader	13	6	6	25
Total Distributors	**46**	**27**	**27**	**100**

Please note that as areas and types of consumers were pre-identified, any extrapolation of results will be limited to these demographics. Also, any applicants that could not speak English would have been excluded from the survey.

5.2.1.2. Online surveys

- The online surveys were conducted by Deloitte;
- Questionnaires were compiled by Deloitte in conjunction with the FPB. There were separate surveys for consumers and distributors;
- The questionnaires were in a multiple choice format and English only.
- The questionnaires sought to answer the following questions:

- Consumers:

  - Age, race, gender, domicile, monthly household income;
  - Method of purchasing / playing / watching films and video games;
  - Reasons for the choice method of purchasing / playing / watching films and video games;
  - Frequency and value of purchases / rentals of films and video games;
  - Attitude towards informal traders; and
  - Attitude towards pirated films and video games.

- Distributors:

  - Type (entity versus individual);
  - Content distributed;
  - Customer bases;
  - Distribution footprint;
  - Units distributed;
  - Average retail value distributed; and
  - Challenges faced whilst trading.

- Deloitte distributed the survey using the Deloitte network. This network consists of 3,500 Deloitte employees, plus, a database of approximately 2,500 film and video game industry stakeholders.

5.2.1.3. Meetings

Deloitte held meetings with the following stakeholders in the informal film and video game sectors:

- Film producers who produce and distribute DVDs from MNet's low budget Bubble-gum films;
- Magic Factory (Multichoice);
- Ex-producers of etv's Ekasi Movies;
- Chicco Twala, the leading producer of low budget films for the broader demographic; and
- Alan Fabers, Straight2DVD.

Deloitte also held meetings with representatives from the formalised stakeholders in the film and video game sectors:

- FPB;
- DTI;
- SAFACT;
- NFVF;
- SASFED;
- Nu Metro;
- Indigenous Films; and
- Gauteng Film Commission.

5.2.2. Online sector

5.2.2.1. Surveys

- The physical and online surveys used in the informal sector were also used to investigate the online sector (i.e. the same questionnaires were used and the same consumers and distributors were asked both informal and online related questions);
- The online survey was conducted by Deloitte; and
- Questionnaires were compiled by Deloitte in conjunction with the FPB. There were separate surveys for consumers and distributors.

Please note that the effectiveness of the online survey was limited by the number of respondents that completed the survey.

5.2.2.2. Meetings

Meeting were held with the following stakeholders in the online film and video game sectors:

- ISPA; and
- WASPA.

5.3. Completion of a scoping exercise on major players in the online and informal media content distribution platforms

In order to optimise the scoping exercise on major players in the online and informal film and video game distribution platforms (as previously defined), the following was done:

- The FPB distributor database was obtained;
- Desktop research was performed to identify further players; and
- Meetings were held with industry stakeholders to identify other players.

5.4. Completion of a benchmarking exercise on the regulation of these platforms in other jurisdictions

Deloitte conducted desktop research and held meetings in order to benchmark the regulation of online and informal video game and film distribution in other jurisdictions.

Meetings were held with the following stakeholders:

- ISPA;
- WASPA;
- FPB; and
- SAFACT.

The following criteria were used to identify countries that were relevant comparatives for the regulatory benchmarking exercise:

- Socioeconomic similarities to SA; and
- Regulatory power similarities to SA.

We reviewed the following documents given to us by the FPB:

- Film and Publication Board Compliance Monitoring Strategy (13 April 2011);
- Content Classification and Regulation in SA, A Review for the Film and Publication Board (September 2012); and
- Report on the Mandate of the Film and Publication Board (5 December 2011).

It has been noted that reports tended use either socioeconomic or regulatory power similarities, but not both. We built on current research (where relevant) and found examples of countries where both factors may exist. In some cases though, such as in online sectors, one needed to look to first world countries to determine the latest thinking around regulation and classification.

The countries that were agreed to and used to benchmark regulation were as follows:

Country	Regulatory Body (Content Classification)	Commentary
Kenya	Kenya Film Classification Board ("KFCB") Mandated Films and Stage Play Act Cap 22 of Kenya	• The KFCB regulates the creation, broadcast, possession and distribution of film in Kenya with a view to promote national values and morality. • Kenya has a similar socioeconomic landscape to SA. They are a country with a developing online community and they also have a large informal content distribution sector, similar to that of SA.
Nigeria	National Film and Video Censor Board as mandated by Act 85 (1994) ("NFVCB").	• The NFVCB's mandate is to regulate the Nigerian film industry. Their mission is to contribute to the positive transformation of the Nigerian society through the censorship and classification of films and video works whilst balancing the need to preserve freedom of expression within the law, and limit social harm caused by films. • Nigeria has a similar socioeconomic demographic with a very large informal distribution sector. Its film industry, Nollywood, is the third biggest in the world and is largely driven by the informal distribution of DVD's ("direct to DVD distribution"). Nigeria has introduced the "Nigeria in the Movies" initiative to

		regulate this sector, including a new distribution framework. • It is noted in the Pygma Consulting Report (5th December 2011) that Nigeria had been researched previously, but that it was felt that it was less developed than SA and thus not a good comparative. There have been many developments within Nigeria and we feel it is worth relooking at Nigeria as a benchmark country, especially for the informal content distribution sector.
United Kingdom	British Board of Film Classification (As well as the Internet Watch Foundation and ParentPort)	We will build on the previous research done by BridgeIT on 16 September 2012 in the event that any progress has been made in classifying / regulating online content.
United States	Motion Picture Association of America	We will build on the previous research done on 15 December 2011in the event that any progress has been made in classifying / regulating online content.

5.5. Recommendation of regulatory mechanisms that could be adopted by the FPB for both sectors.

In recommending the regulatory mechanisms that could be adopted by the FPB, the following procedures were performed:

- A gap analysis was conducted between the international and SA methods used to classify and regulate the informal and online content distribution sectors;
- Combining the results from the surveys, meetings and desktop research to determine the practicality of the suggestions; and
- Finalising the recommendations and reporting to the FPB.

6. Qualitative and Quantitative Survey with Consumers and Distributors

As documented in Section 5, both physical and online surveys were utilised to conduct qualitative and quantitative research on the informal and online distribution of films and video games in SA. Both consumer and distributor sectors were surveyed.

The remainder of this section details the following:

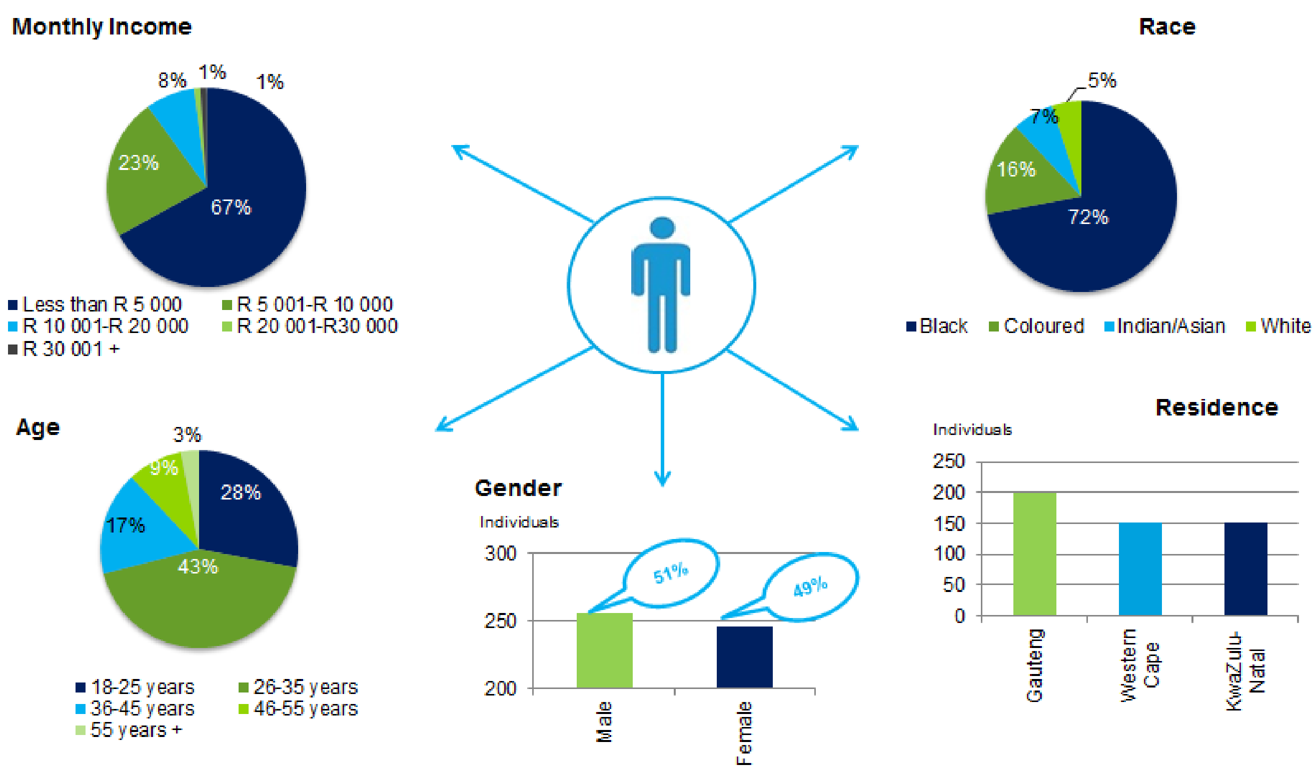
- Physical survey results; and
- Online survey results.

6.1. Physical Survey Results

6.1.1. Consumers

6.1.1.1. Age, Race, Gender, Domicile and Monthly Household Income

The majority of survey respondents were Black (please note that Asian and Indian respondents are separately classified for purposes of the survey), aged between 26 -35 years and earned less than R5 000 personal income per month. The split between male and female was more or less equal:

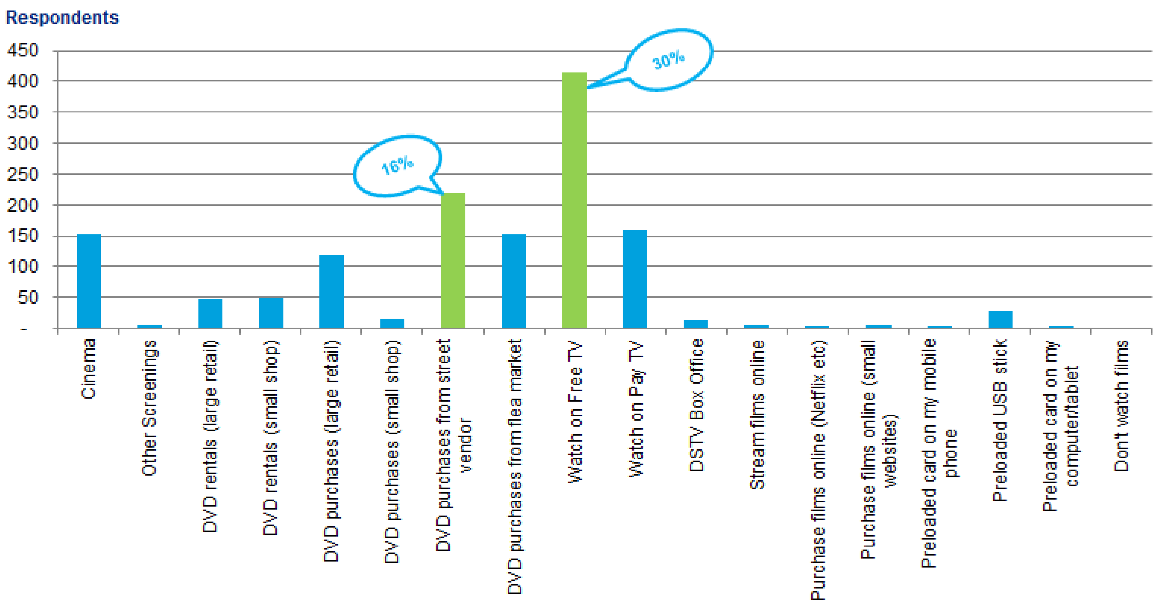


Areas in which respondents resided were predetermined by Plus94.

6.1.1.2. Methods of Accessing Films

6.1.1.2.1. Films

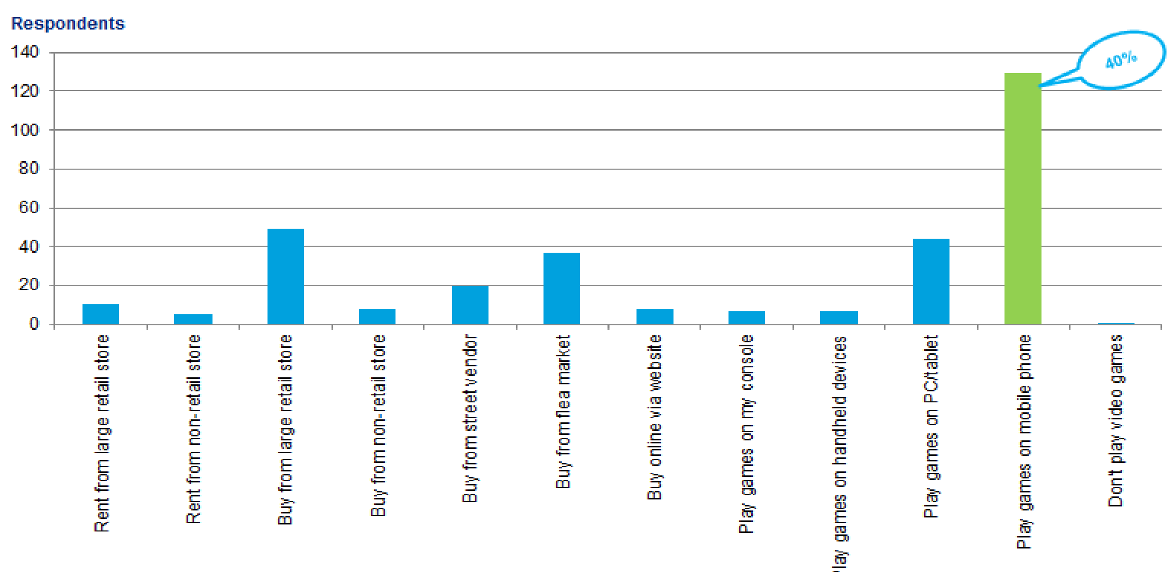
30% of respondents accessed film content via Free TV. 16% purchased films on DVDs from street vendors. The balance of respondents watched films in cinema, on Pay TV or purchased DVDs from flea markets or large retail stores. Minimal online activity was reported (less than 1% of respondents).



The split between formal and informal purchases / rentals was 68% and 32% respectively.

6.1.1.2.2. Video Games

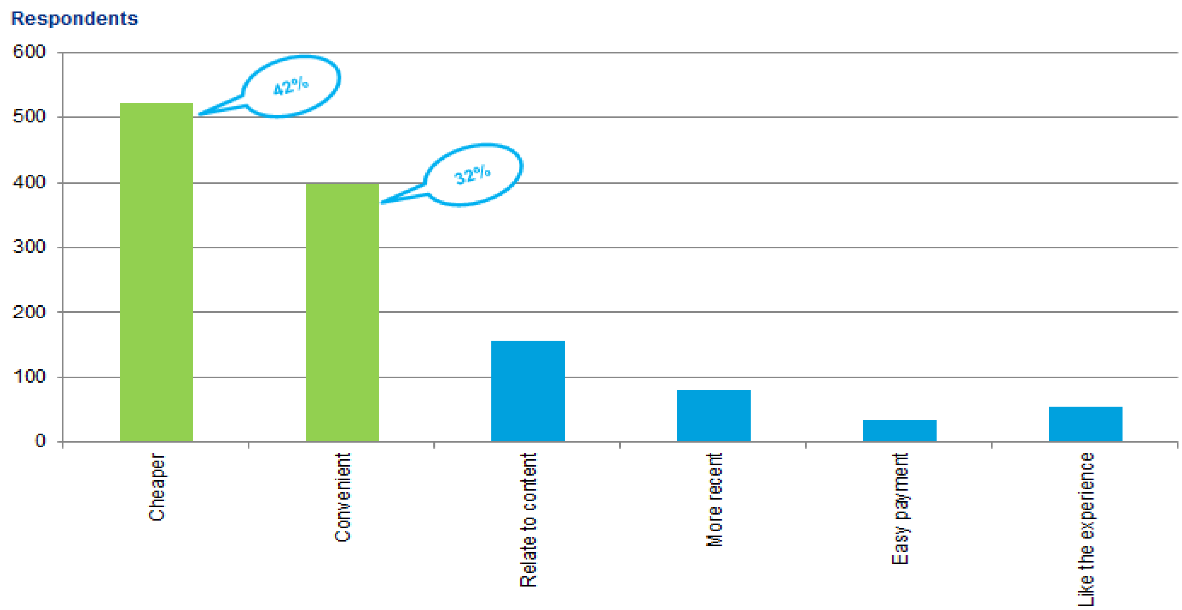
For those respondents that played video games, 40% purchased and played games on their mobile phones:



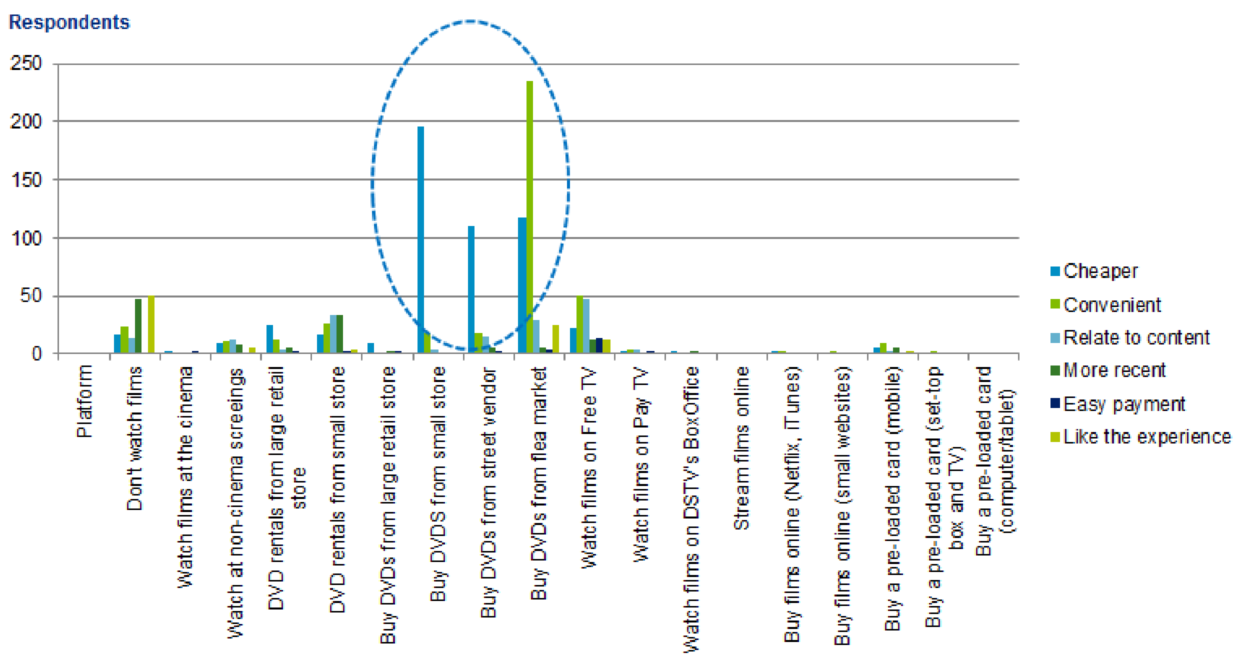
6.1.1.3. Reasons for the Choice of Method of Purchasing / Playing / Watching Films and Video

6.1.1.3.1. Films

Affordability and convenience were dominant factors in determining which method respondents chose to access and watch films:

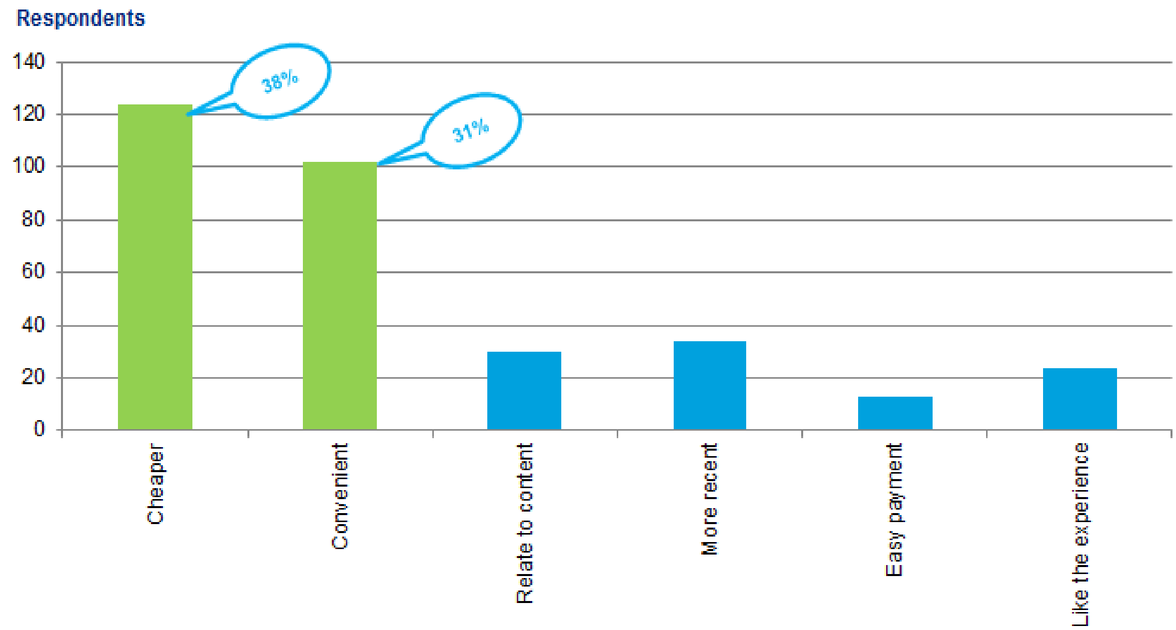


Affordability and convenience were dominant factors in decision-making when consumers purchased from the informal market, i.e. small stores, street vendors and flea markets:

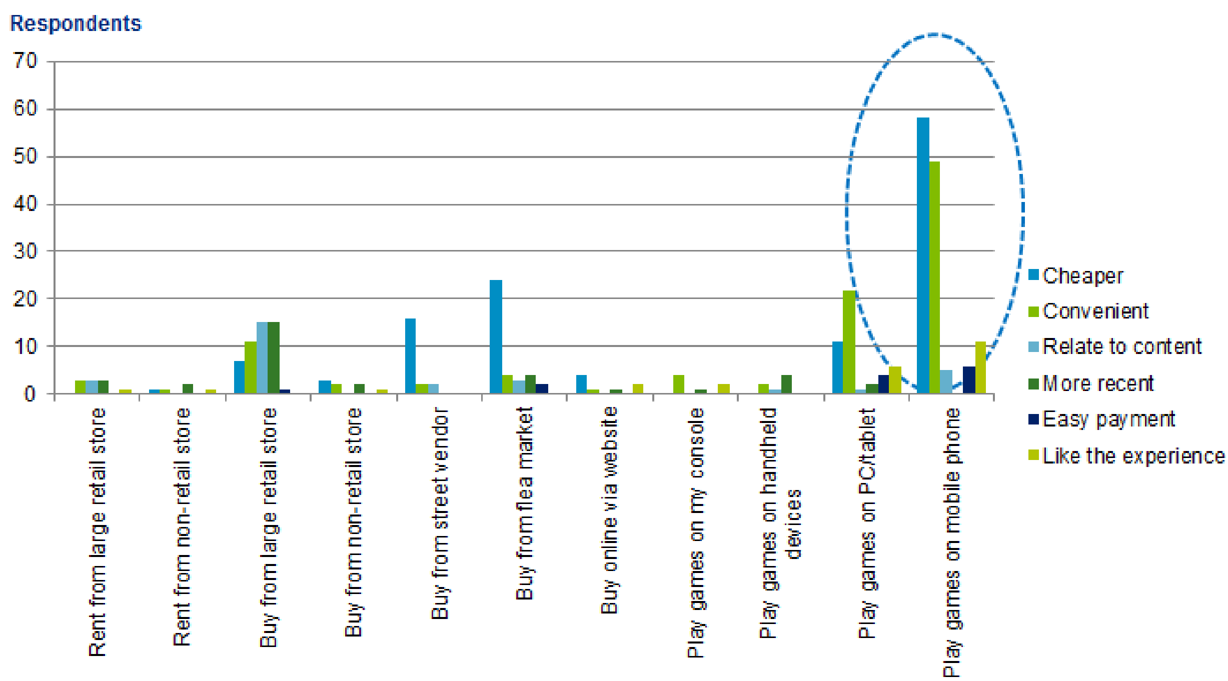


6.1.1.3.2. Video Games

Affordability and convenience were key factors in determining which method respondents chose to purchase / rent video games:



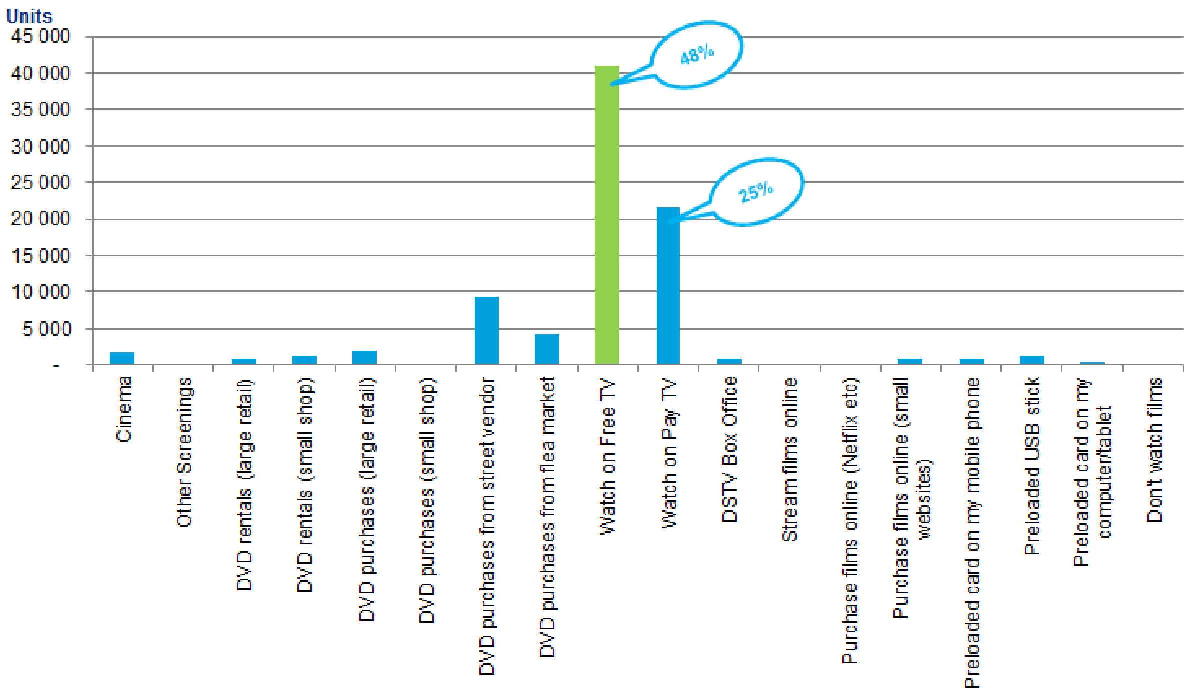
Affordability and convenience were significant key factors in decision-making when consumers purchased and played games on mobile:



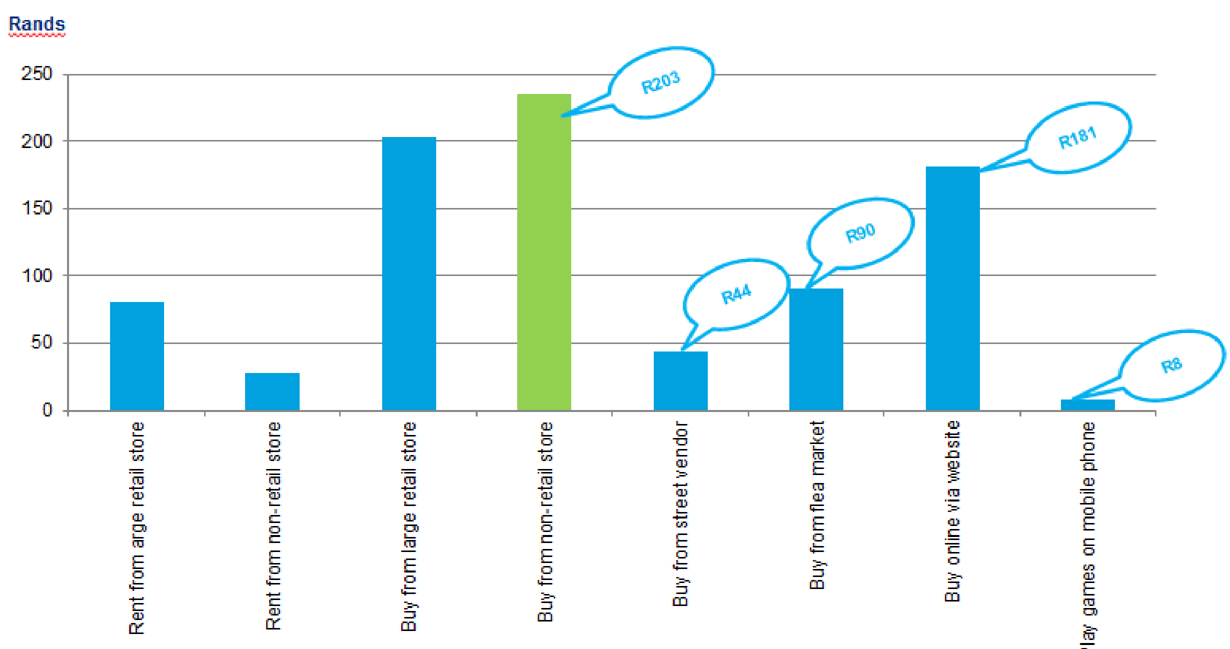
6.1.1.4. Frequency and Value of Purchases / Rentals of Films and Video Games

6.1.1.4.1. Films

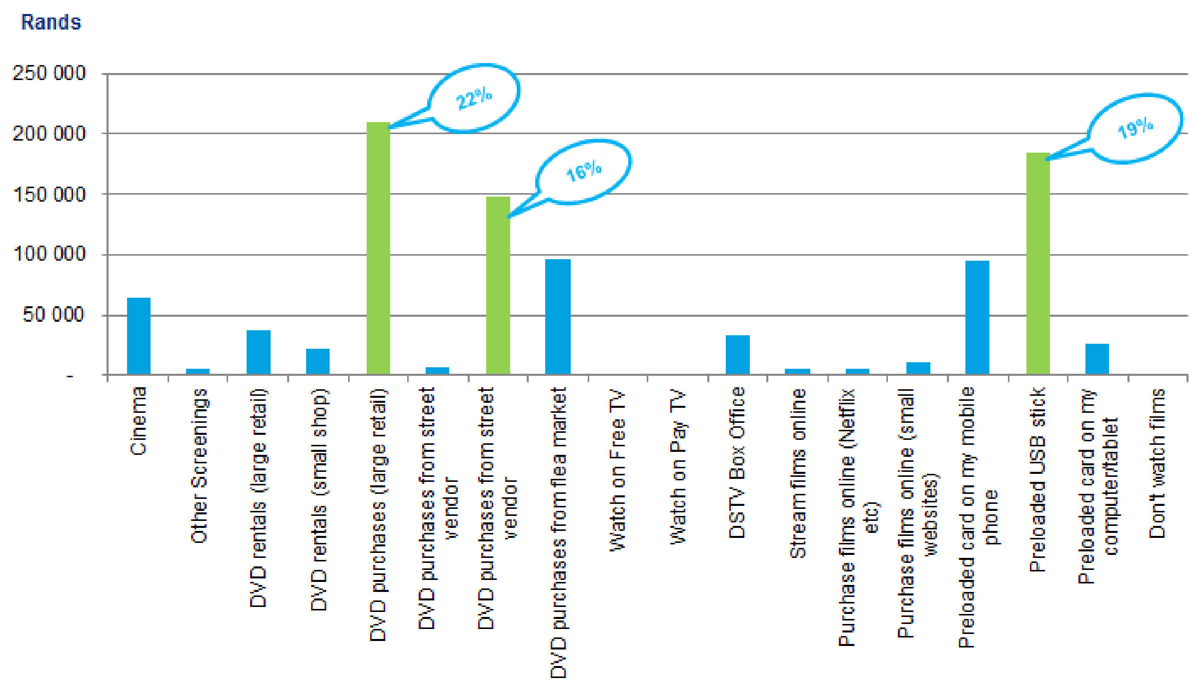
Respondents reported the highest total number (units) of films watched was on Free TV and Pay TV.



Respondents reported that the highest prices paid per film were DVDs purchased from non-retail stores and retail stores, and, online via websites:



Respondents purchased the highest total value (Rands) of films from large retail stores, street vendors and films preloaded on USB sticks:



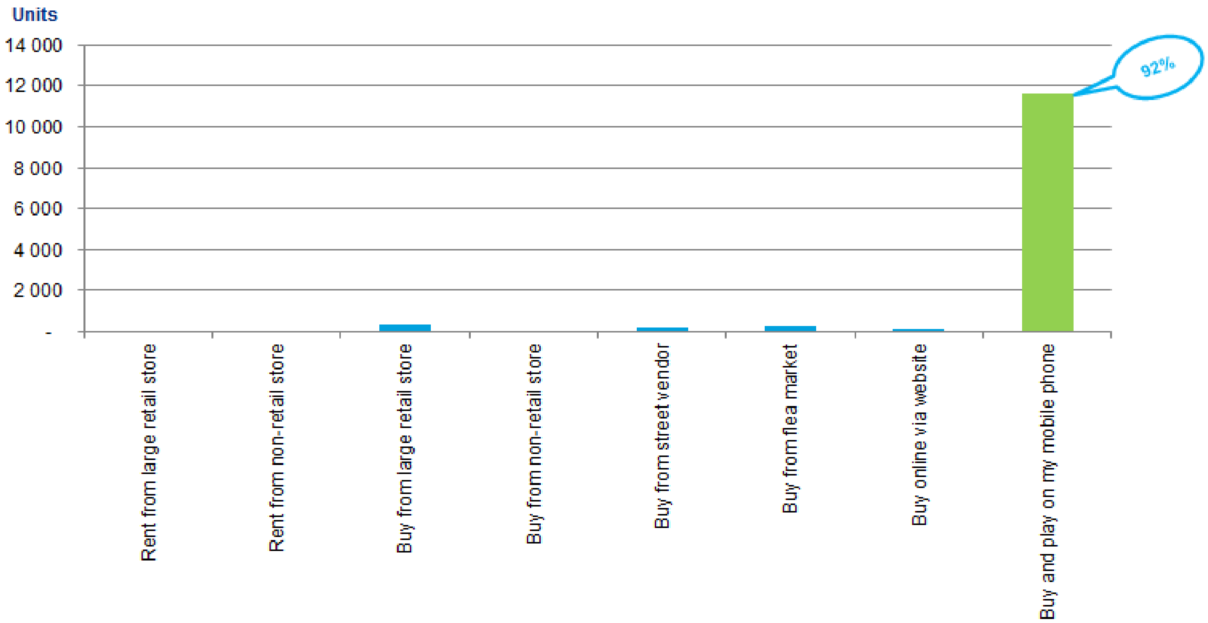
The total value of film purchases / rentals reported in the physical survey was R983,006 and is broken down as follows:

Platform	Total Respondents	Total Units	Average Units	Average Price	Total Value
Cinema	153	1 631	11	42	68 438
Other Screenings	5	78	16	70	5 460
DVD rentals (large retail)	47	814	17	52	41 999
DVD rentals (small shop)	50	1 251	25	20	25 470
DVD purchases (large retail)	118	1 908	16	105	200 324
DVD purchases (small shop)	15	149	10	44	6 506
DVD purchases from street vendor	219	9 196	42	14	128 492
DVD purchases from flea market	152	4 171	27	32	133 335
Watch on Free TV	415	40 981	99	-	-
Watch on Pay TV	159	21 581	136	-	-
DSTV Box Office	12	757	63	94	70 969
Stream films online	7	122	17	57	6 971
Purchase films online (Netflix etc)	2	70	35	63	4 375
Purchase films online (small websites)	6	831	139	64	52 769
Preloaded card on my mobile phone	4	764	191	101	77 164
Preloaded USB stick	28	1 349	48	103	138 995
Preloaded card on my computer/tablet	4	465	116	47	21 739
Total					**983 006**

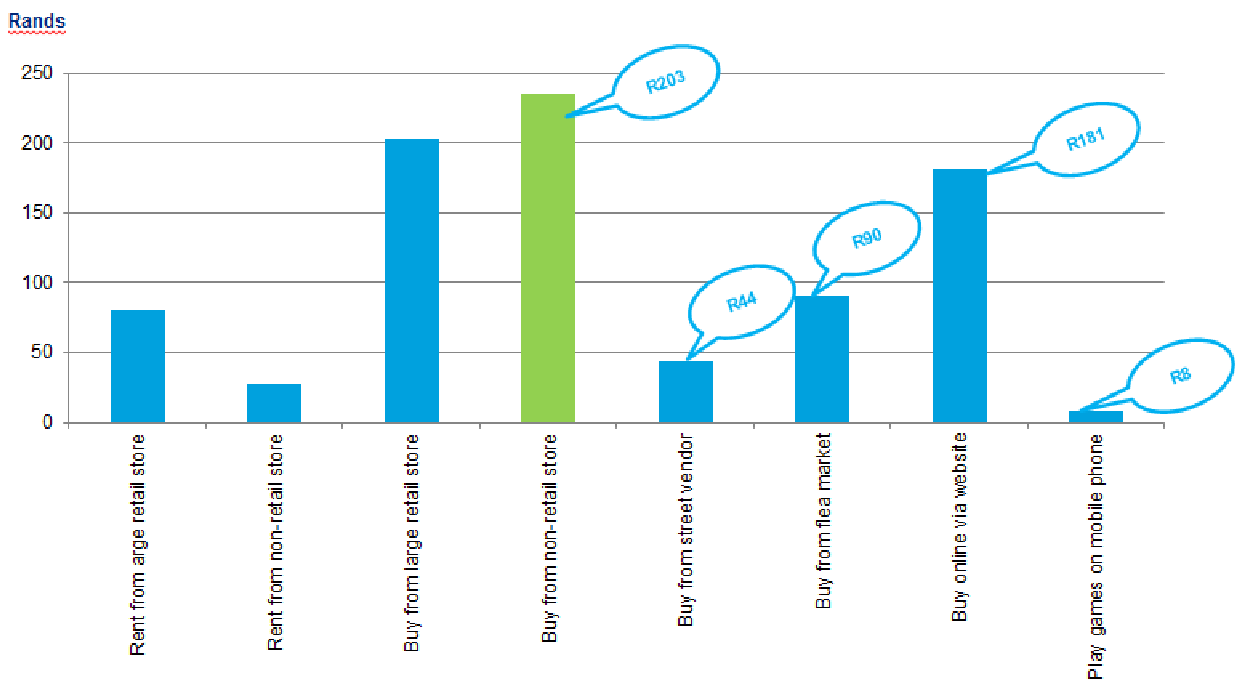
Average units indicate units per respondent per annum. Thus, the highest frequency of purchases / rentals of films were firstly films watched via Free TV, and, secondly films watched on PayTV.

6.1.1.4.2. Video Games

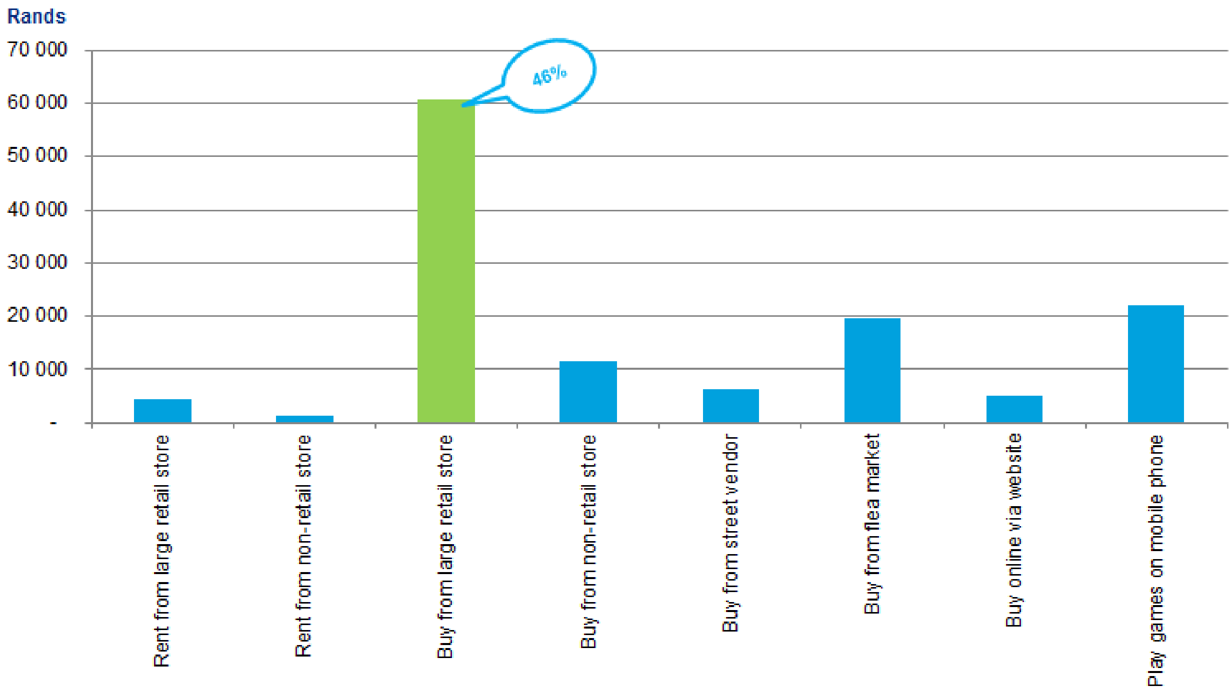
92% of video games (units) purchased were mobile phone games. Other game formats purchased were minimal:



At R203, video games purchased from non-retail stores carried the highest price per unit. Mobile games, on the other hand, were the cheapest price at R8 per game:



Video games purchased at large retail stores made up 46% of the total Rand value of video game purchases / rentals surveyed:



The total value of video game purchases / rentals reported in the physical survey was R230 837 and is broken down as follows:

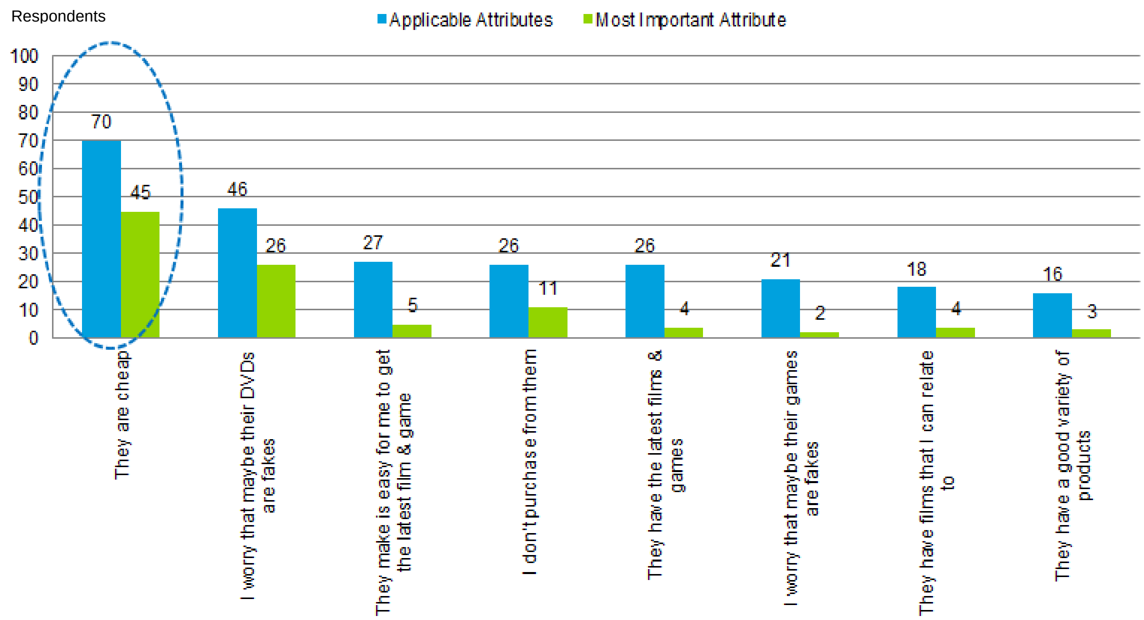
Platform	Total Respondents	Total Units	Average Units	Average Price	Total Value
Rent from large retail store	10	57	6	81	4 611
Rent from non-retail store	5	57	11	27	1 539
Buy from large retail store	49	321	7	203	65 229
Buy from non-retail store	8	36	5	235	8 460
Buy from street vendor	20	175	9	44	7 691
Buy from flea market	37	303	8	90	27 393
Buy online via website	8	109	14	181	19 776
Buy and play on mobile phone	129	11 634	90	8	96 138
Total					**230 837**

Average units indicate units per respondent per annum. Thus, the highest frequency of purchases / rentals of video games were those purchased on mobile phones.

6.1.1.5. Attitude Towards Informal Traders and Pirated Films and Video Games

Overall, it appeared that while consumers felt that the goods sold by informal traders (i.e. street vendors, flea market vendors, and small traders) were affordable, they did have concerns about the legitimacy of the content that these distributor carried.

However, if one examines what respondents considered to be the most important attribute, it appears that the issue of affordability far outweighed concerns about the fact that the goods are pirated:



6.1.1.6. Conclusion

The following high-level conclusions can be drawn from the physical consumer survey:

Film

- Free TV dominates the way in which respondents access and watch films;
- The key reason reported for accessing films this way was convenience, followed closely by affordability. This is not surprising given the low disposable income profile of customers interviewed;
- The level of engagement with informal distribution for film purchases is fairly high, with 16% of consumers purchasing DVDs from street vendors, and, another 11% from flea market vendors;
- For the consumer group interviewed, the informal film distribution market is valued at R261 827 (street and flea market vendors). If one adds small DVD shops / rental outlets, this figure totals R293 803; and
- The level of engagement with online distribution for films is very low, and is valued at R64 115.

Video Games

- The majority (81%) of consumers interviewed do not play video games;
- Of the 19% that do play video games,92% of them access and play them via their mobile phones; and
- Interaction with video games distributed either through informal or online distribution avenues was minimal (less than 1%).

General

From the above conclusions, one can surmise that:

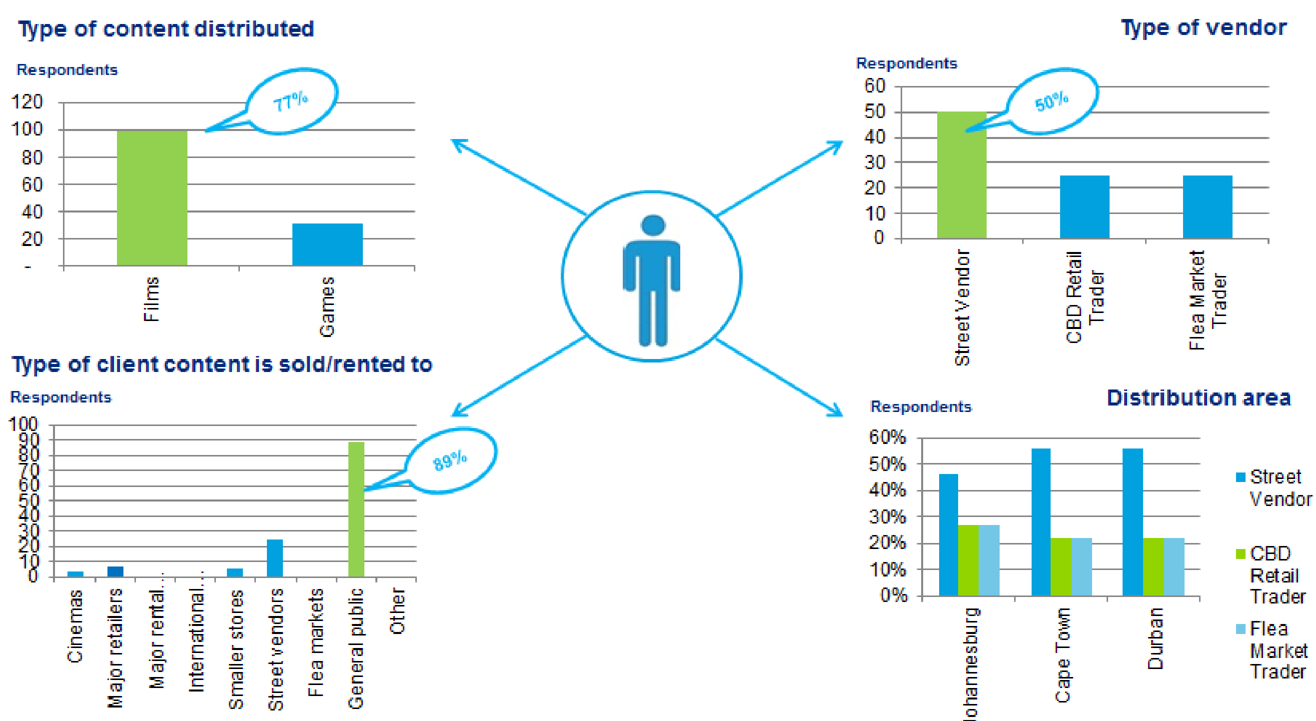
- Affordability and convenience drive consumer behaviour in the sector surveyed;
- Given that the average consumer surveyed earns less than R5 000 per month, it is logical that price will play a major role in decision-making around purchases / rentals of films and video games;
- For this reason, street vendors, flea markets and mobile game distributors who sell cheap content have featured as preferred points of access;
- Equally, Free TV which is the cheapest content of all (taking the annual TV license into account), prevails as the viewing method of choice; and
- As the formal and online sectors sell / rent more expensive content or necessitate the purchase of costly computers and broadband, these sources of film and video games do not feature as preferred methods of watching and acquisition in this sector surveyed.

Content aired on Free TV and Pay TV is regulated by ICASA. However, content sold by the informal sector is unlikely to be regulated unless the original content was classified by the FPB. Thus, in order to ensure that the consumer is protected against inappropriate content, the FPB should investigate ways in which it can classify and regulate content in this sector.

6.1.2. Physical Surveys – Distributors

6.1.2.1. Profile of Distributor

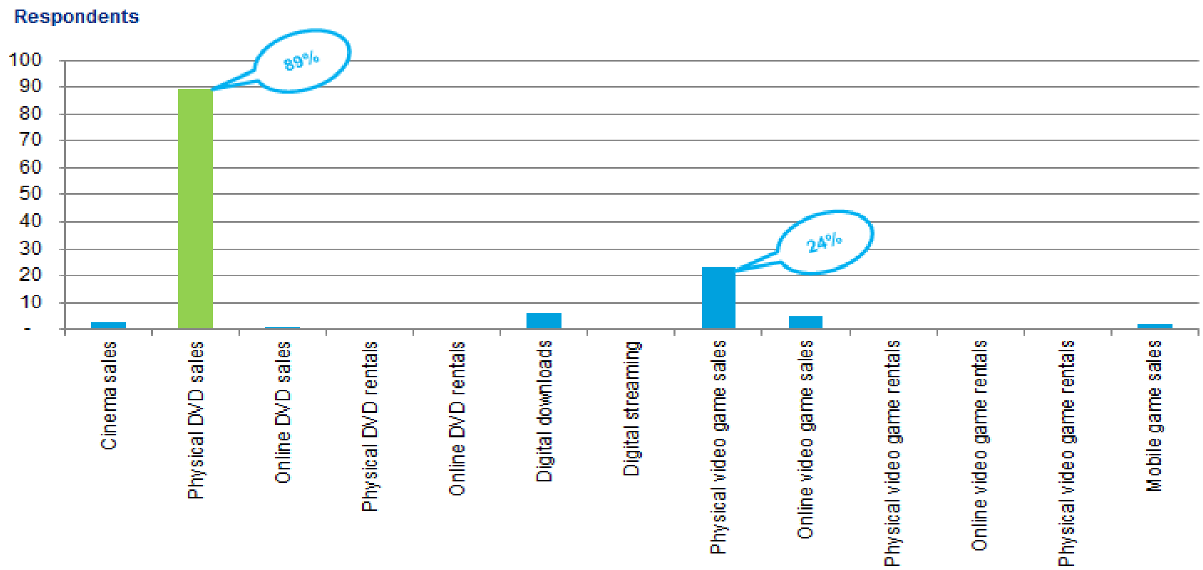
The majority of distributors surveyed were street vendors selling films to the general public. Respondents distributed in a localised fashion, i.e. they did not tend to distribute in more than one area / province:



Areas of place of business of vendors were predetermined by Plus94.

6.1.2.2. Content distributed

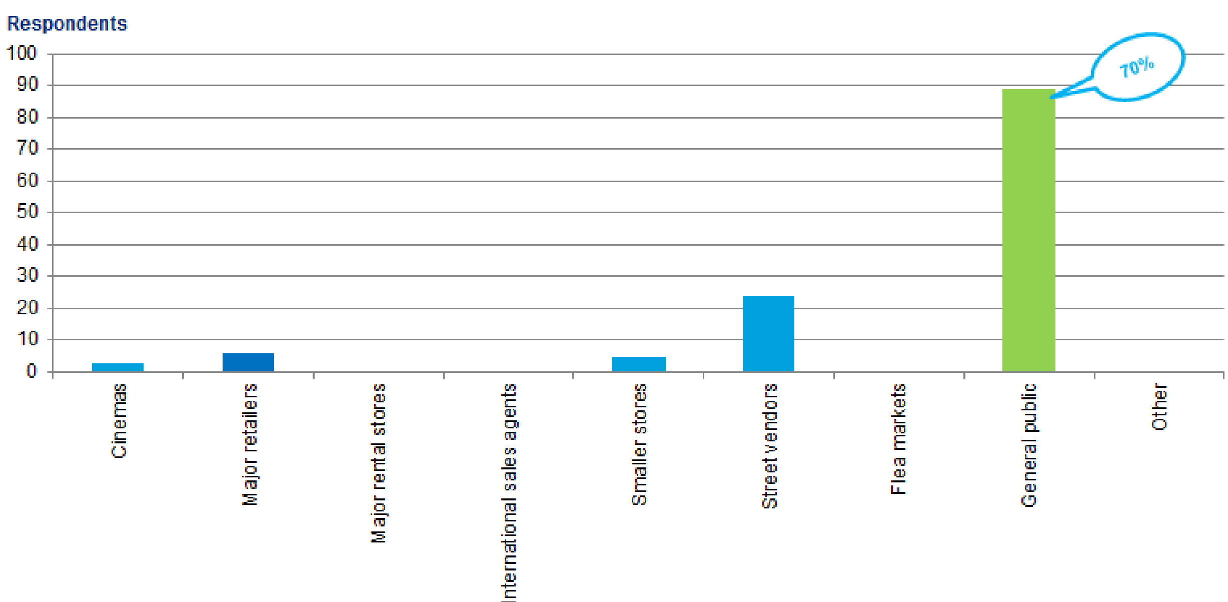
The majority of content sold by distributors was of a physical form, with 89% of distributors selling physical DVDs and 24% selling physical video games. Film and video game content sold via non-physical platforms were not prominent:



92% of street vendors, 88% of flea market traders, and 84% of retail traders sold physical DVDs. The sale of physical DVDs was the primary type of content sold by street vendors, as this segment did not appear to sell other types of content. Flea market and retail traders had a more diverse variety of goods sold as 28% of flea market traders and 56% of retail traders sold physical games.

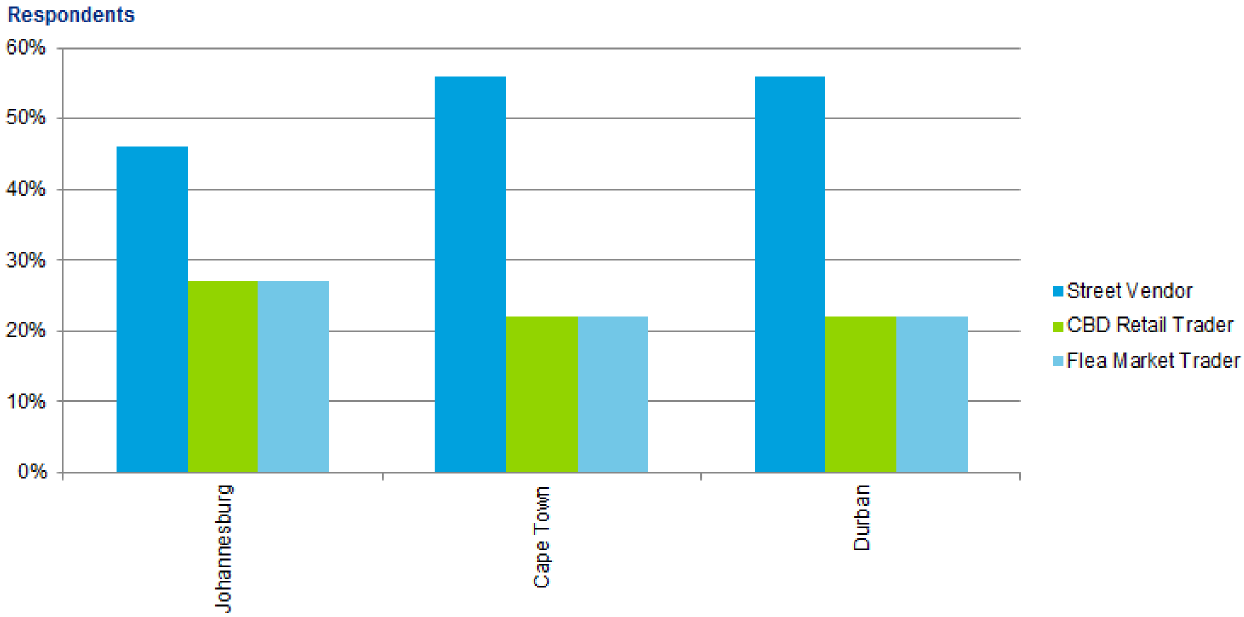
6.1.2.3. Customer bases

70% of distributors reported that their client base is the general public, with street vendors coming in at a distant second:



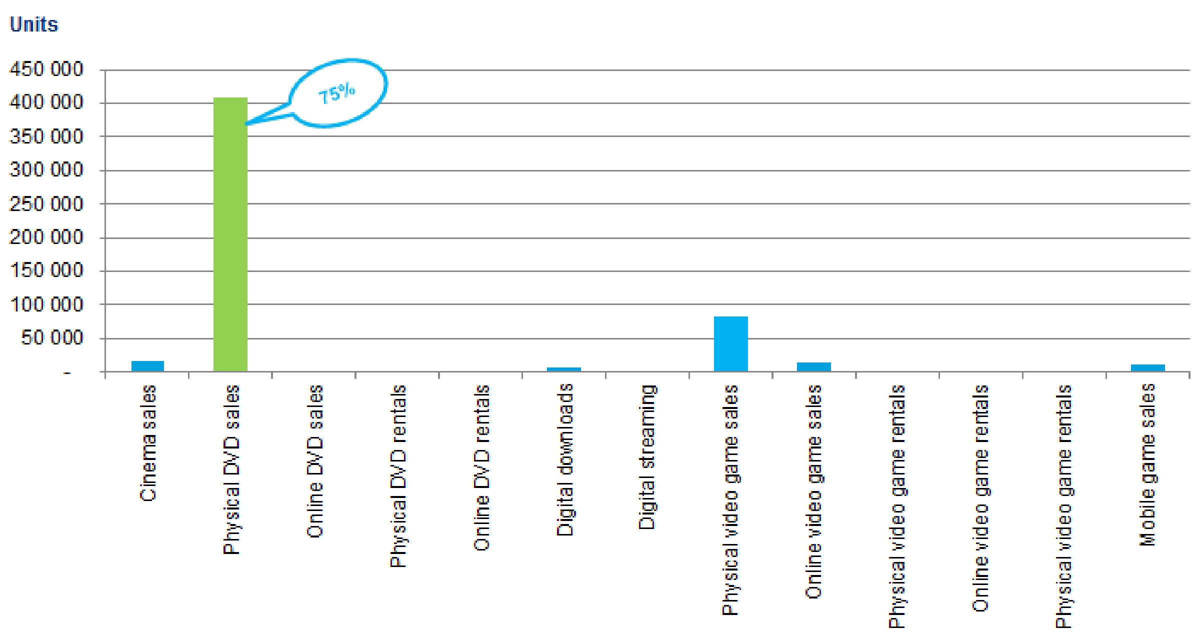
6.1.2.4. Distribution footprint

Most distributors reported distributing only in one area, i.e. in a localised fashion:

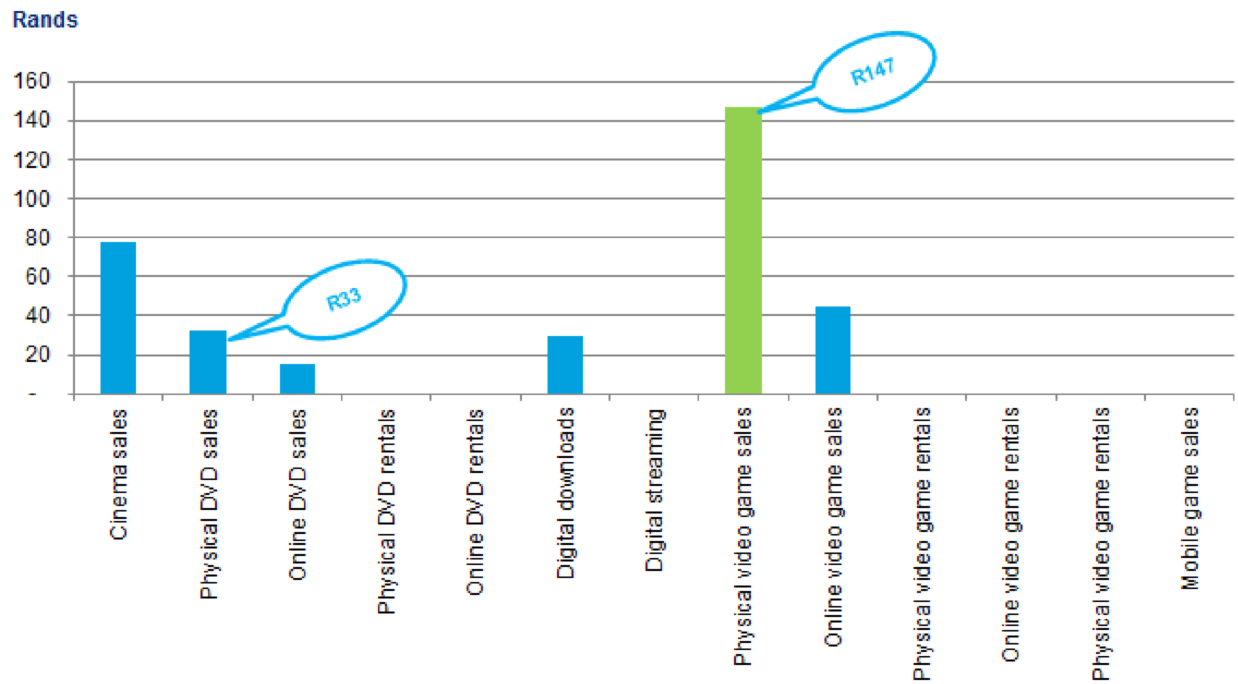


6.1.2.5. Units distributed

The highest number of units distributed was physical film DVD sales (75%).

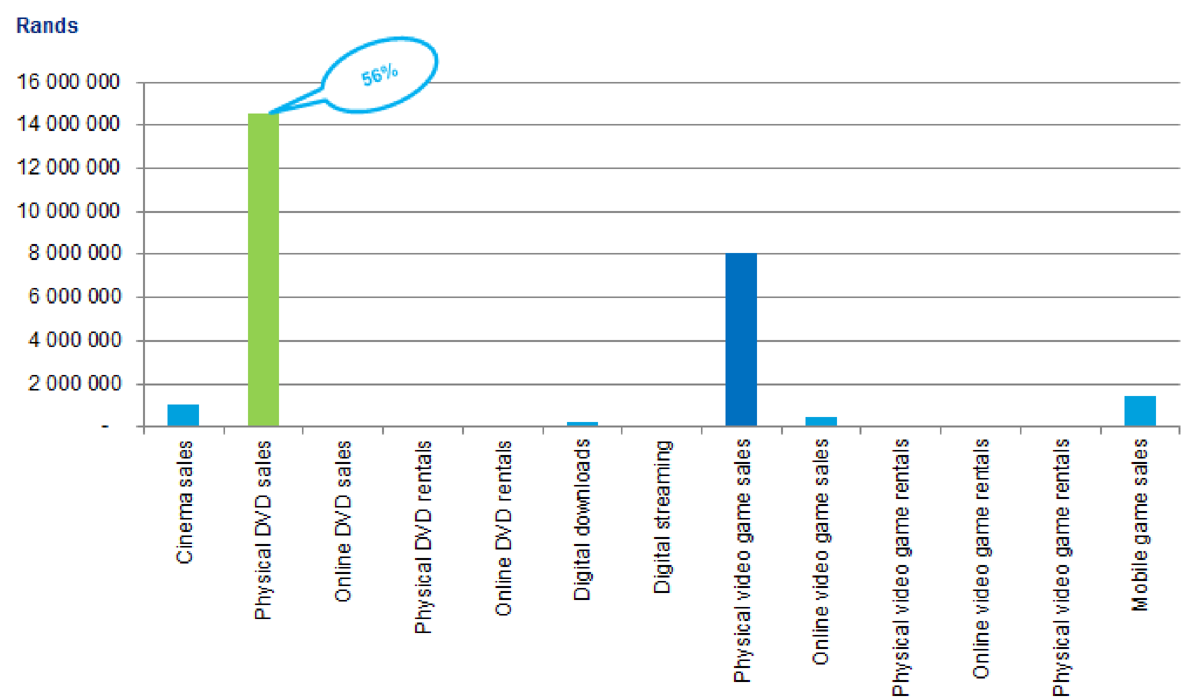


The highest selling price reported was R147 for physical video game sales:



The average price received by distributors for films sold on physical DVDs was R33. The lowest price paid for physical DVDs was R13 from street vendors. Flea market traders were three times as expensive at R41, and retail traders were five times more expensive at R64.50 per DVD.

Physical DVD sales made up 56% of the total film and video games sales in the market surveyed:



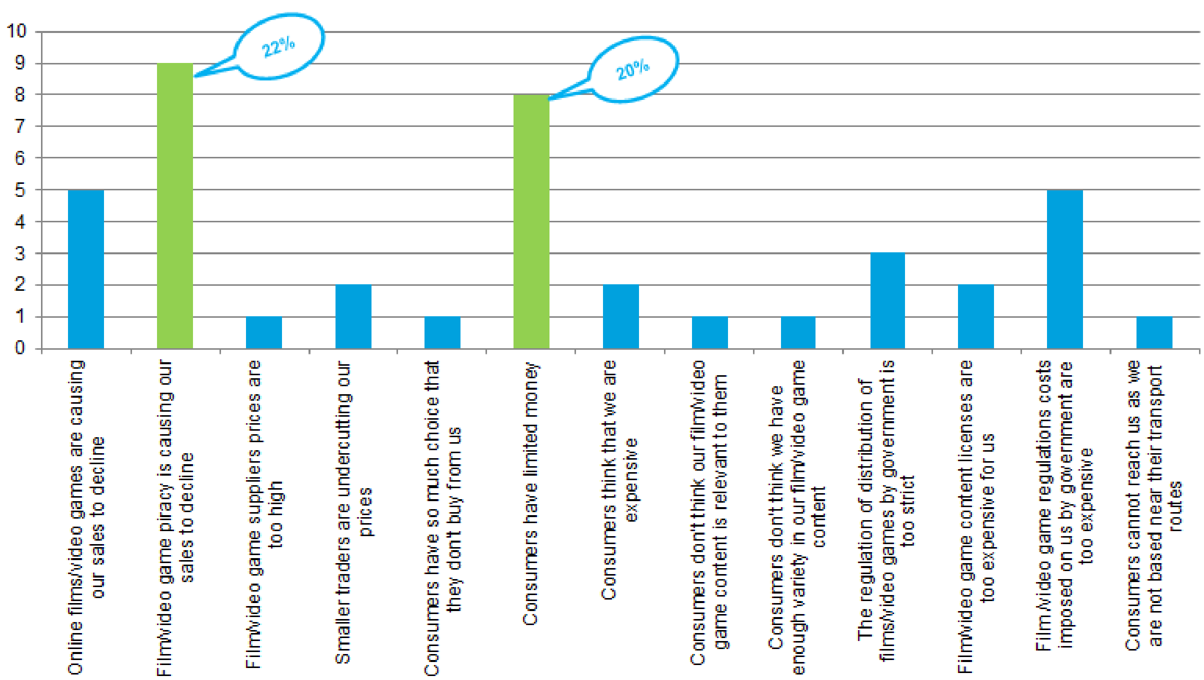
The total value of film and video games sales / rentals reported was an estimated R25 882 750 and is broken down as follows:

Platform	Total Respondents	Total Units	Average Units	Average Price	Total Value
Films for cinematic release	3	17 440	5 813	77	997 560
DVDs for physical purchase	89	407 535	4 579	33	14 583 460
DVDs for online purchase	1	300	300	15	4 500
DVDs for physical rental	-	-	-	-	-
DVDs for online rental	-	-	-	-	-
Digital films for downloading	6	6 700	1 117	30	258 000
Digital films for streaming	-	-	-	-	-
Video games for physical purchase	23	82 920	3 605	147	8 117 730
Video games for online purchase	5	15 300	3 060	45	471 500
Video games for physical rental	-	-	-	-	-
Video games for online rental	-	-	-	-	-
Online video games	-	-	-	200	-
Mobile video games	2	11 500	5 750	-	1 450 000
Total	**129**	**541 695**	4 199		**25 882 750**

Average units indicate units per respondent per annum. Thus, the highest frequency of sales / rentals was films for cinematic release followed by mobile phone game sales. On average, distributors sold 4 579 DVDs per annum. The average volume sold for physical video games was 3 605 units per annum.

6.1.2.6. Challenges Faced Whilst Trading

Respondents felt that piracy and the limited amount of disposable income of consumers were negatively affecting their sales:



Conclusion

The following high-level conclusions can be drawn from the physical distributor survey:

Film

- Films sold on DVDs were the most frequently reported content distributed at 89% of all respondents;
- Distributors sold an average of 4 579 units of physical DVDs per annum, which is equivalent to 382 DVDs per month or 88 DVDs per week;
- Street vendors had the highest sales volumes of physical DVDs over other distributors, and their prices seemed to be the lowest at R13.90 per DVD; and
- Online distribution was minimal with sales of digital film download and online DVDs being reported at 1%.

Video Games

- 19% of distributors reported selling video games; and
- Although the highest number of units sold was mobile games, the total value of video games sold was dominated by the sale of physical games.

Film and Video Games

- The majority of content sold was of a physical format such as DVD;
- Members of the general public represented the biggest consumer market for film and video game content at 70%; and
- When asked about some attributes that potentially affected the functioning of their business, 20% of the distributors conceded that consumers have limited money, while 22% of them felt that piracy is causing their sales to decrease.

General

From the above, one can conclude that:

- As all distributors interviewed fell into the informal distribution sector, one can use the total value of R25 882 750 to quantify the value of informal distribution surveyed;
- The online value of this sector interviewed totals R729 500 (3% of the total market surveyed);
- The general public is the main customer;
- Physical goods dominate online goods and films sold on DVD make up over half the market;
- Mobile is a significant video game format;
- The distributors acknowledge that their customers have low disposable income and price their content accordingly; and
- Regulation by government is seen as expensive.

Given the size of the informal distribution industry, and, the fact that most of the trade is directly to the general public and not through another regulated entity, regulation of the informal sector is a priority then in order to ensure that distributors comply with content classification rules in order to protect the general public.

6.2. Online Survey

6.2.1. Consumers

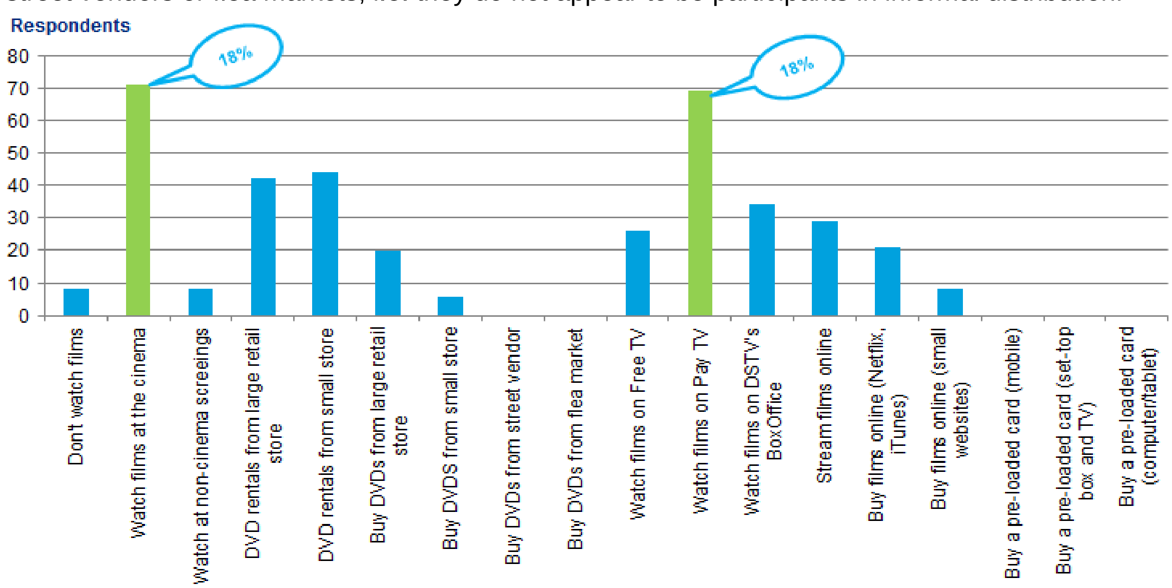
6.2.1.1. Age, Race, Gender, Domicile and Monthly household income

The average respondent is white, aged between 26 -35 years, lives in Gauteng and earns over R30 000 per month. The split between male and female was more or less equal:

6.2.1.2. Method of Purchasing / Playing / Watching Films and Video Games and Why

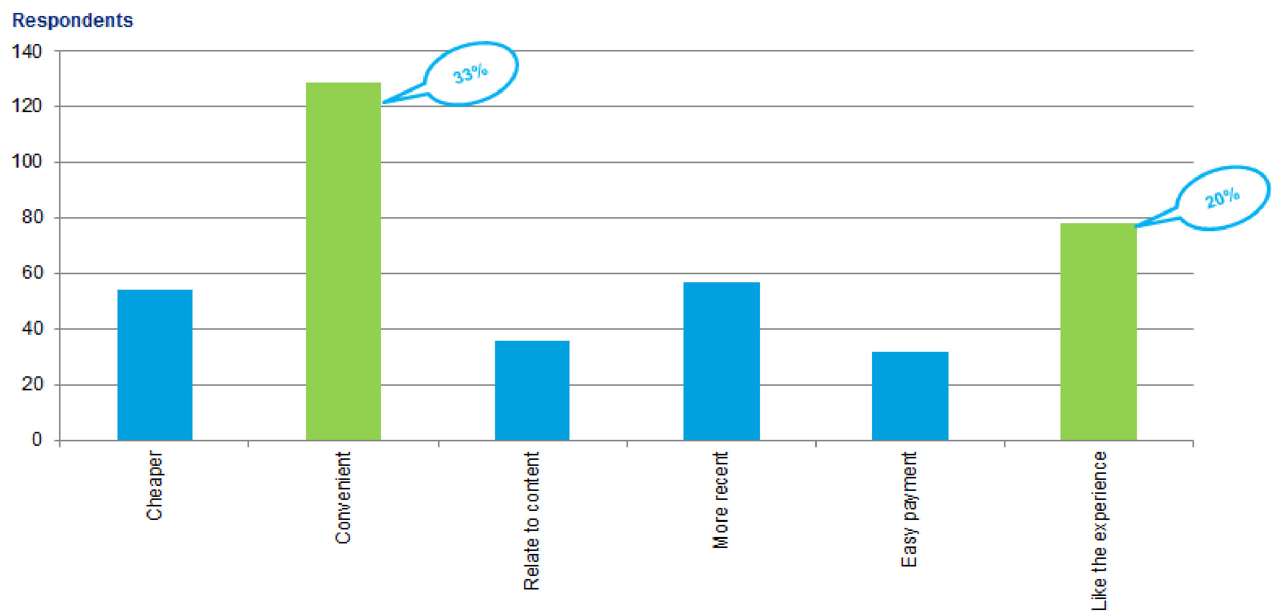
6.2.1.2.1. Films

Most respondents watched films at the cinema or on Pay TV. Respondents do not appear to purchase from street vendors or flea markets, i.e. they do not appear to be participants in informal distribution:

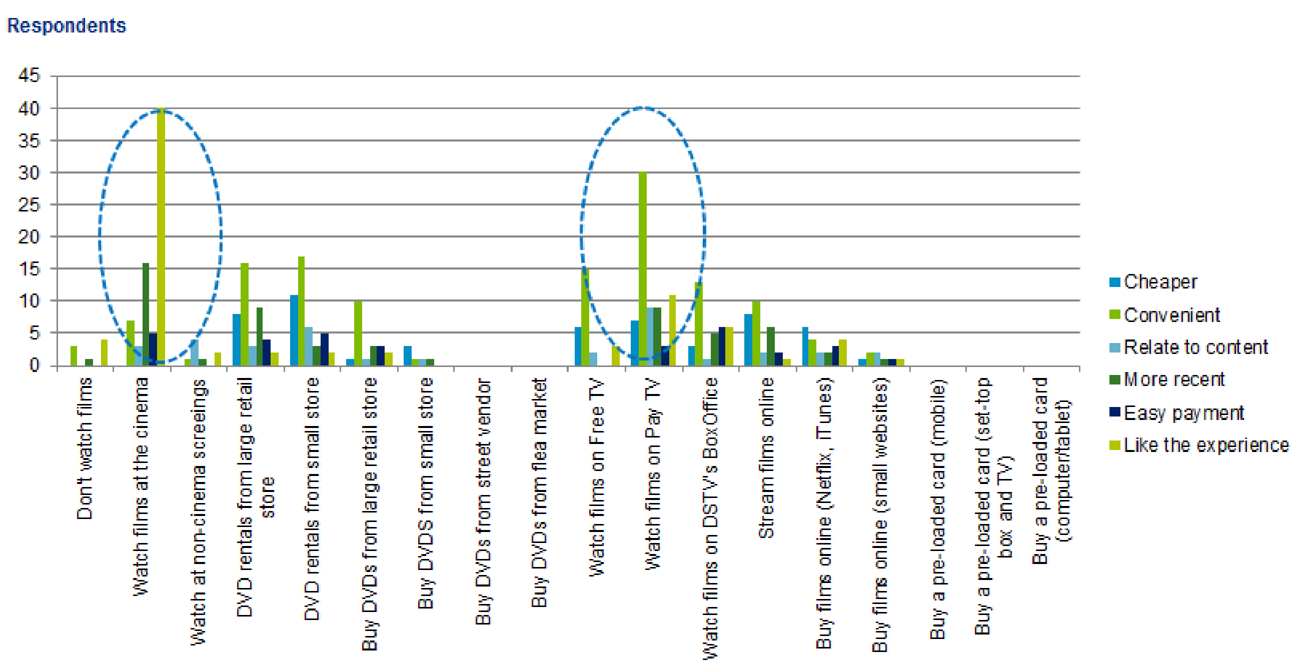


Respondents do purchase online, but tend to favour established online websites.

Convenience and viewing experience were key factors in determining which method respondents chose to watch films:

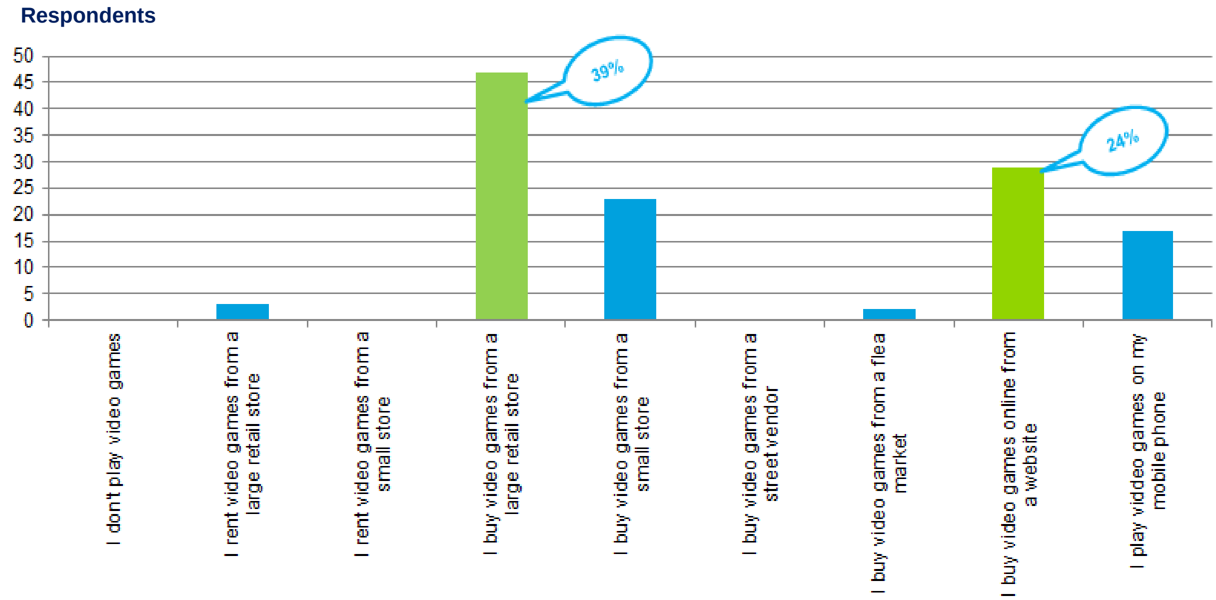


The dominant reason for watching films at cinemas was viewing experience, whereas respondents watched Pay TV primarily because of convenience:



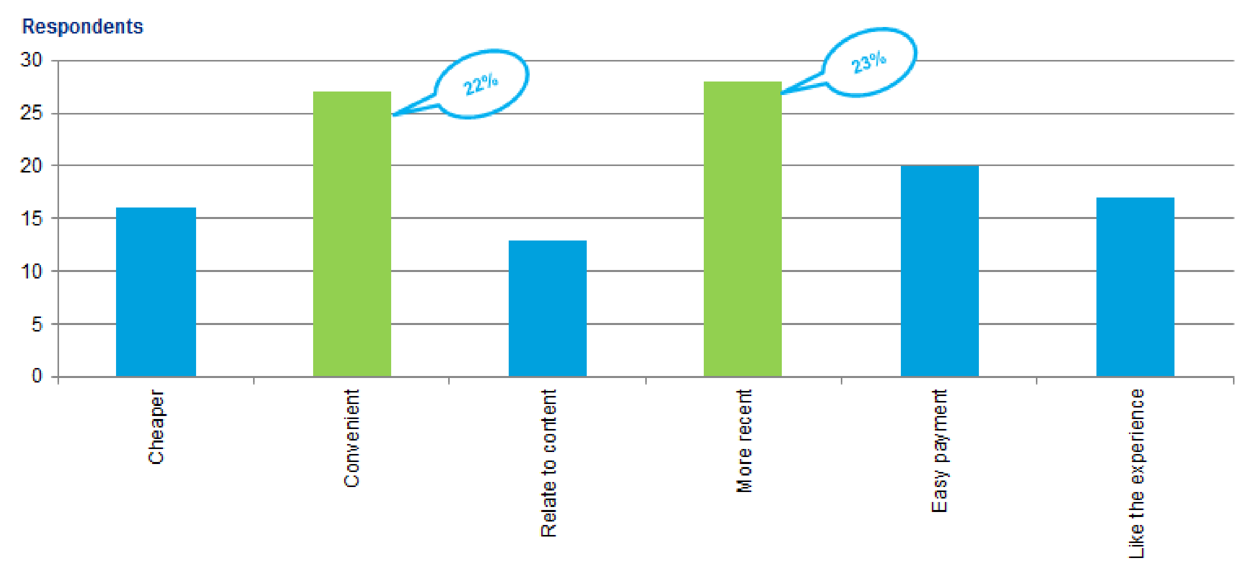
6.2.1.2.2. Video Games

Most respondents purchased video games from large retail stores. Online purchases were also prominent:

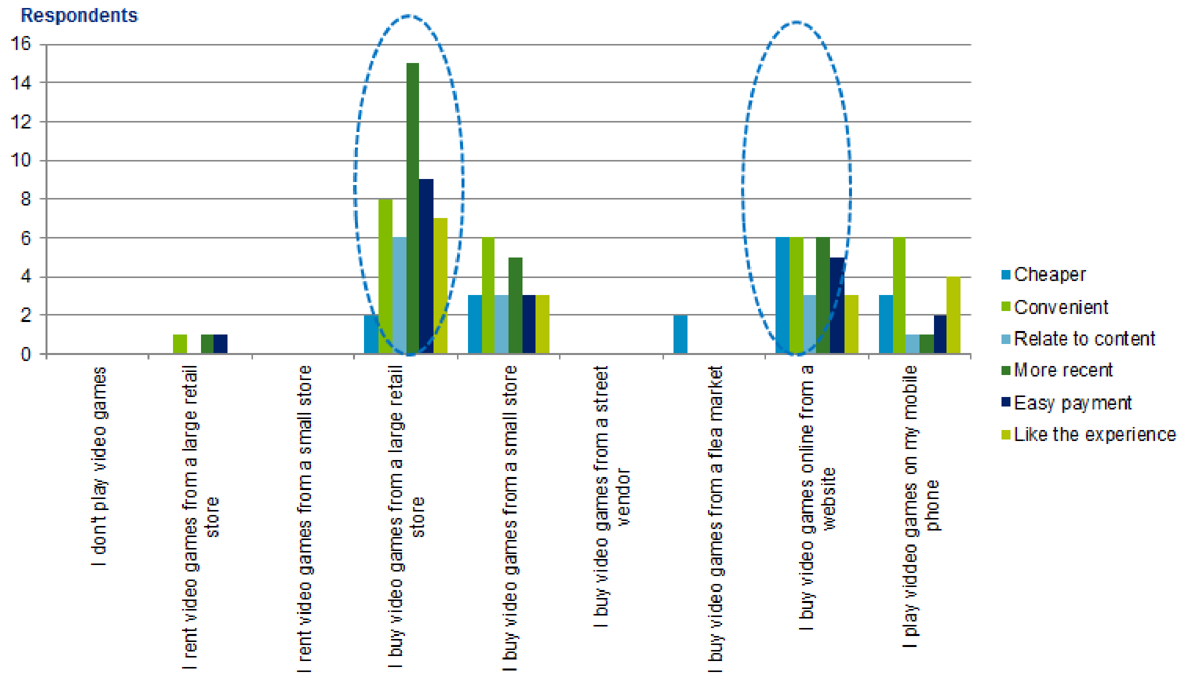


Respondents do not appear to purchase from street vendors, and hardly ever from flea markets, i.e. not participants in informal distribution.

The dominant drivers of consumer buying behaviour of video games are convenience and accessing the most recent content:



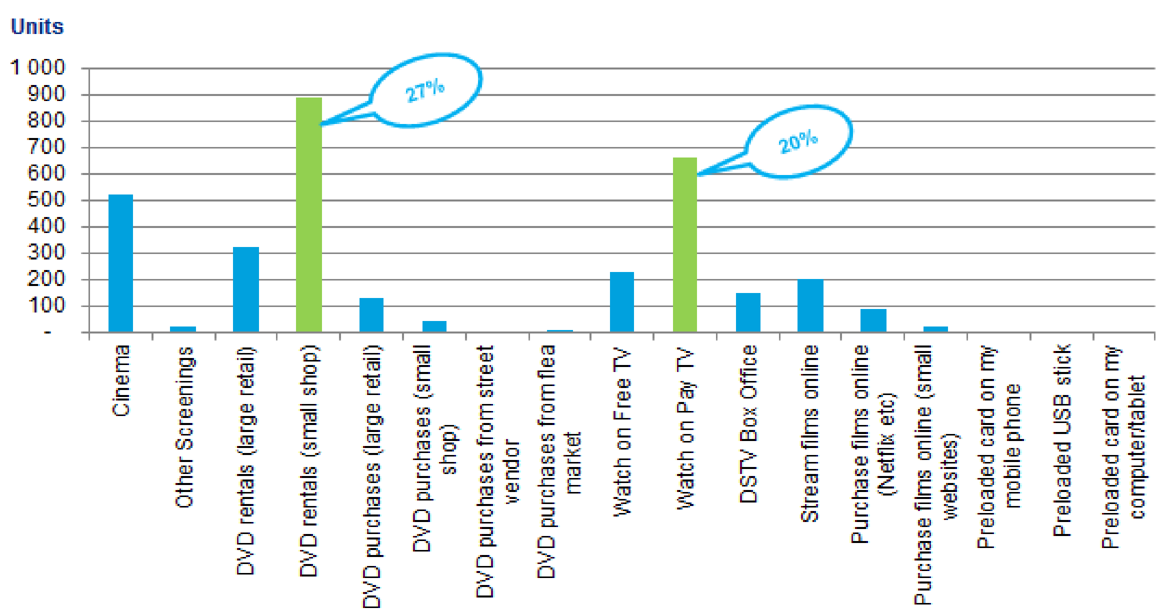
The key driver for video game purchases from large retail stores was to access the latest content. Although this a driver in the online purchase of video games, price and convenience in those purchases play a role too:



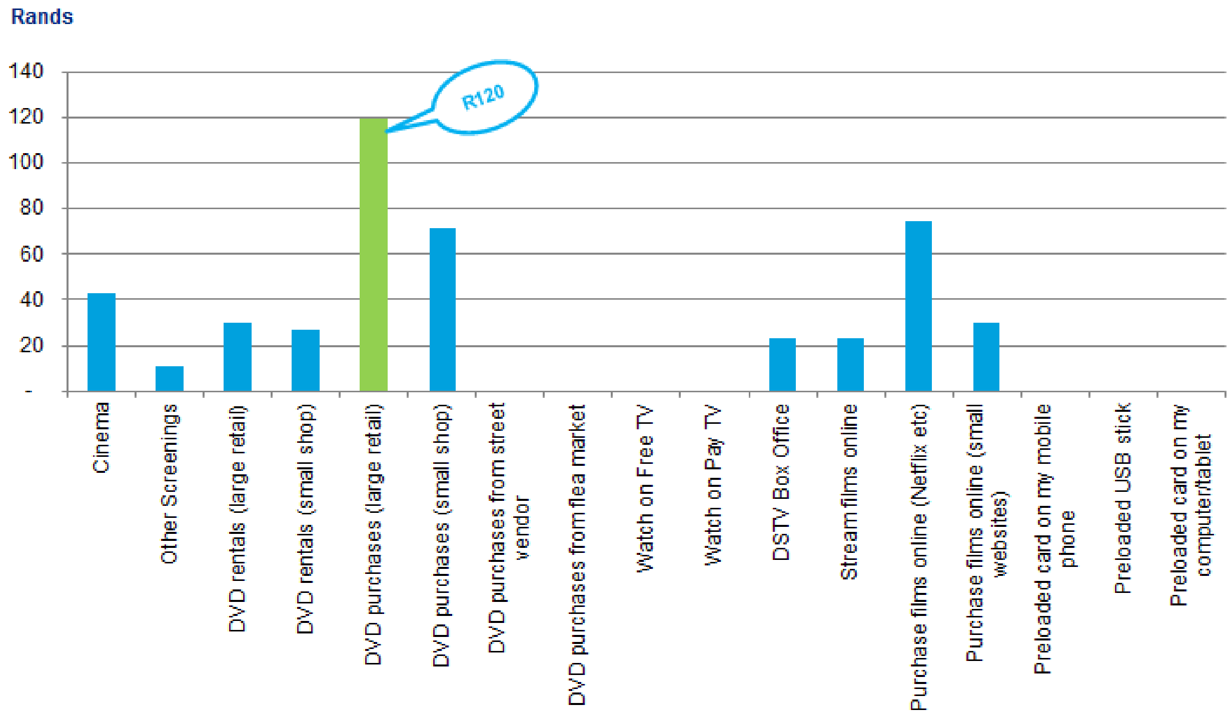
6.2.1.3. Frequency and Value of Purchases / Rentals of Films and Video Games

6.2.1.3.1. Films

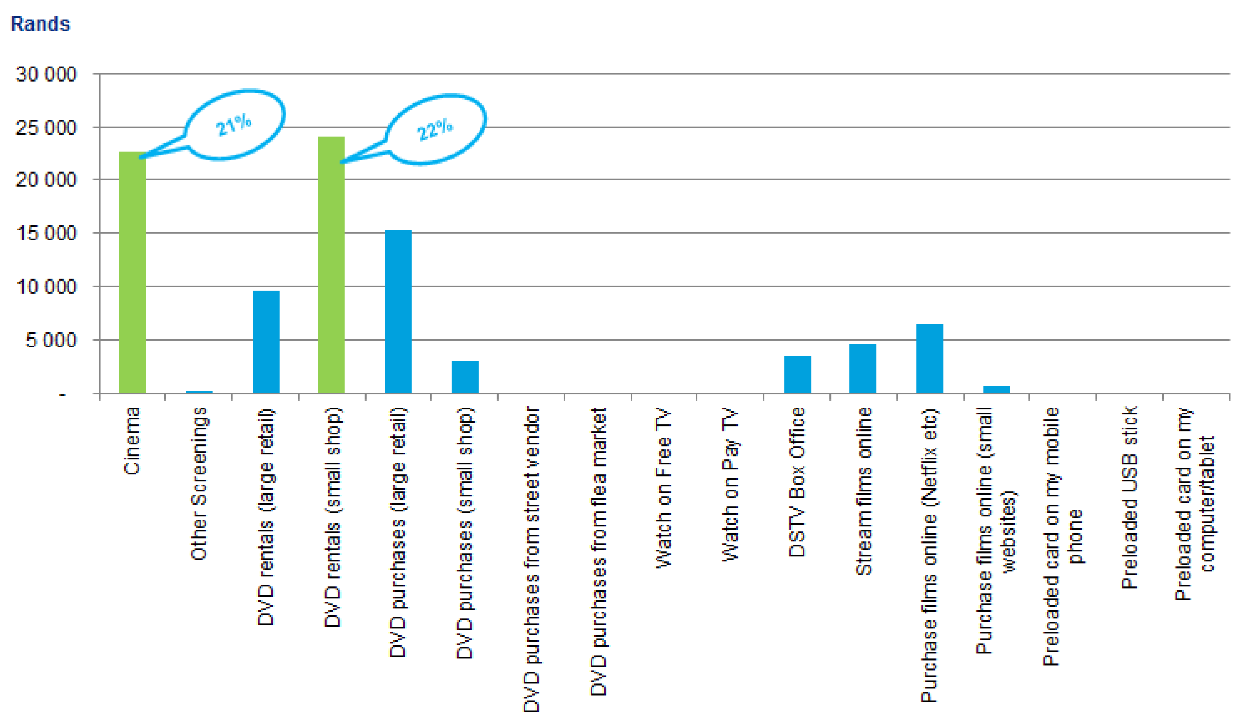
Respondents reported the highest number (units) of films watched were from renting DVDs from small shops or from watching films on Pay TV:



Respondents reported that the highest prices paid for films were DVDs purchased from large retail stores, followed by films purchased online from websites such as Netflix or iTunes:



Respondents reported spending the highest total Rand values on cinema tickets and film DVDs purchased from small shops:



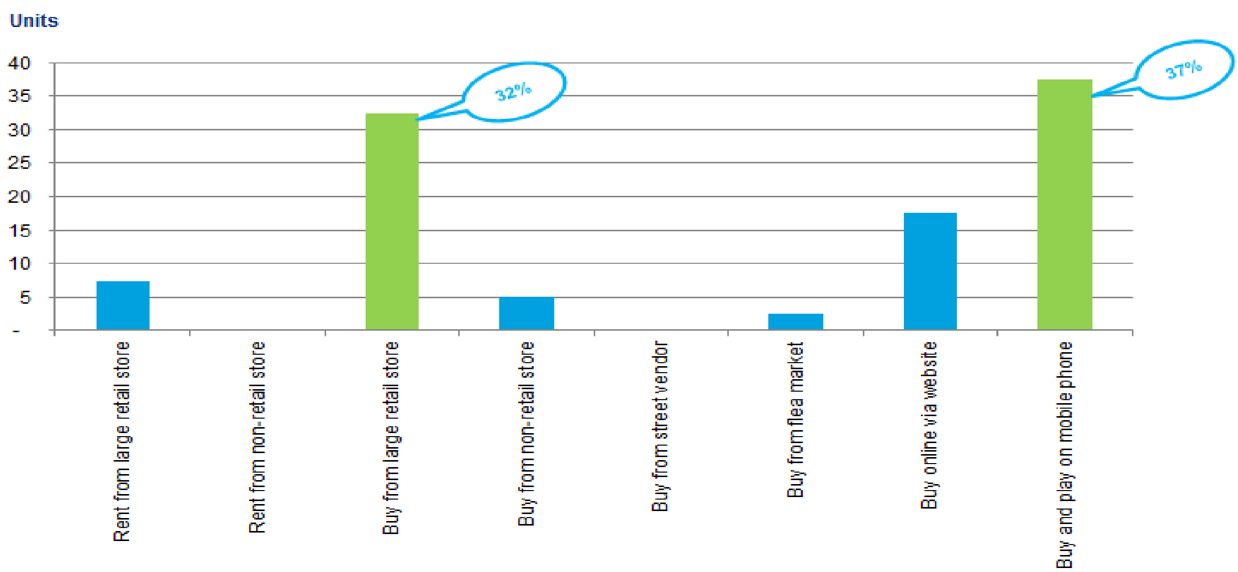
The total value of film purchases / rentals reported in the online survey was R90 338 and is broken down as follows:

	Respondents	Units	Units	Price	Value
Cinema	71	525	7	43	22 625
Other Screenings	8	25	3	11	269
DVD rentals (large retail)	42	325	8	30	9 738
DVD rentals (small shop)	44	885	20	27	24 006
DVD purchases (large retail)	20	128	6	120	15 244
DVD purchases (small shop)	6	43	7	72	3 046
DVD purchases from street vendor	-	-	-	-	-
DVD purchases from flea market	-	3	-	-	-
Watch on Free TV	26	233	9	-	-
Watch on Pay TV	69	660	10	-	-
DSTV Box Office	34	153	4	23	3 494
Stream films online	29	205	7	23	4 684
Purchase films online (Netflix etc)	21	88	4	74	6 475
Purchase films online (small websites)	8	25	3	30	758
Preloaded card on my mobile phone	-	-	-	-	-
Preloaded USB stick	-	-	-	-	-
Preloaded card on my computer/tablet	-	-	-	-	-
Total	**378**	**3 295**			**90 338**

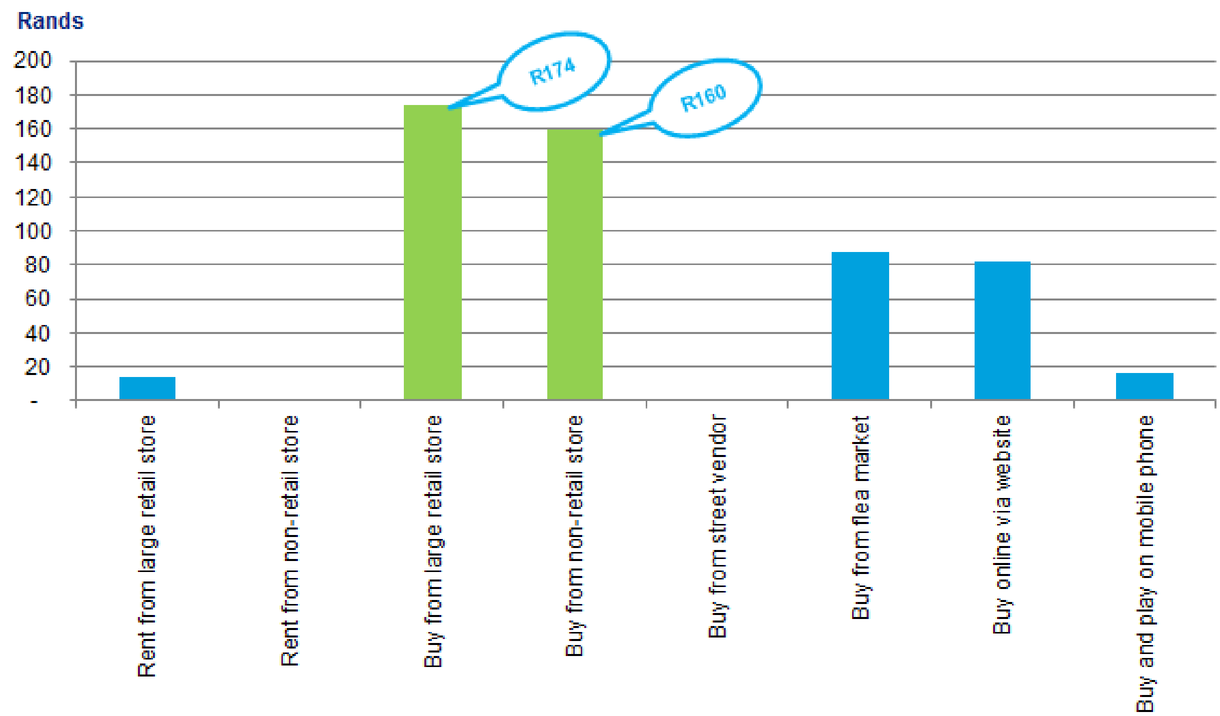
Average units indicate units per respondent per annum. Thus, the highest frequency of purchases / rentals of films were firstly DVD rentals from a small shop, and secondly watching films on Pay TV.

6.2.1.3.2. Video Games

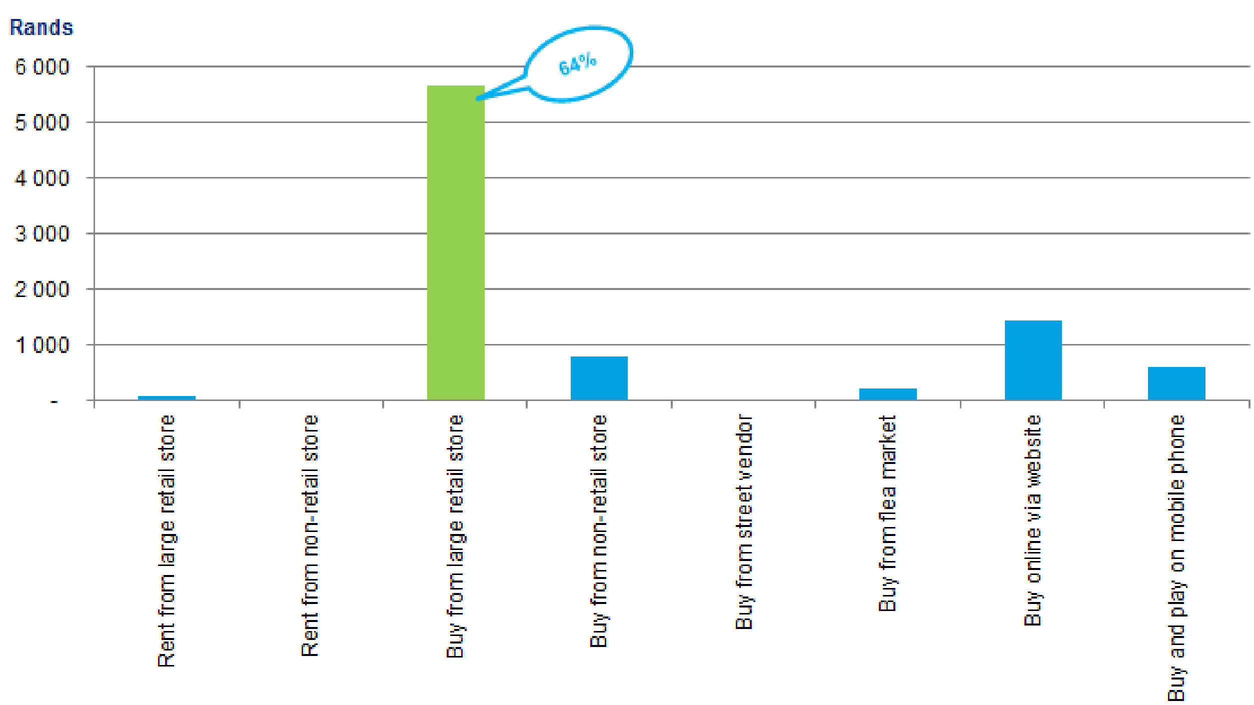
Respondents reported the highest number of video games bought / rented from large retail stores or on mobile platforms:



Respondents reported that the highest prices paid for video games were DVDs purchased from large retail stores and non-retail stores:



Respondents reported spending the highest total Rand values on video game purchases from large retail stores:



Purchases from the informal market (e.g. street vendor and flea markets) were minimal.

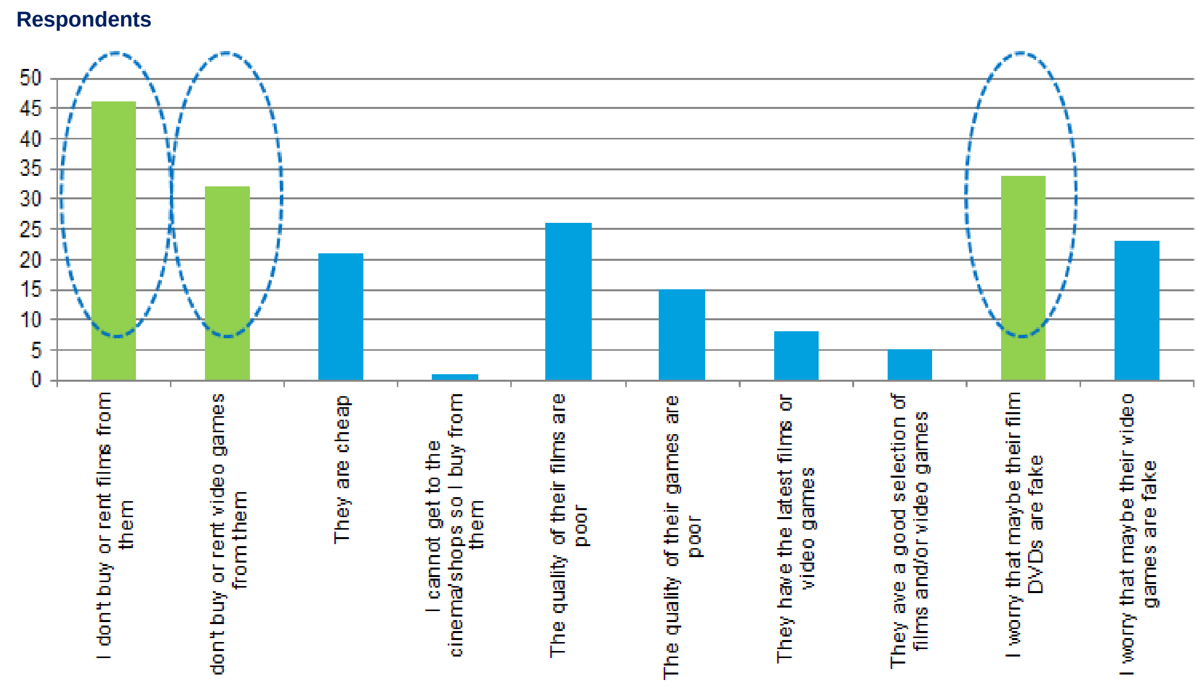
The total value of film purchases / rentals reported in the physical survey was R8 827 and is broken down as follows:

Platform	Total Respondents	Total Units	Average Units	Average Price	Total Value
Rent from large retail store	3	8	2.50	14	105
Rent from non-retail store	-	-	-	-	-
Buy from large retail store	47	33	0.69	174	5 650
Buy from non-retail store	23	5	0.22	160	798
Buy from street vendor	-	-	-	-	-
Buy from flea market	2	3	1.25	88	219
Buy online via website	29	18	0.60	82	1 436
Buy and play on mobile phone	17	38	2.21	17	619
Total	**121**				**8 827**

Average units indicate units per respondent per annum. Thus, the highest frequency of purchases / rentals was video game rentals from a large retail store at 2.5 units per respondent per annum.

6.2.1.4. Attitude Towards Informal Traders and Pirated Films and Video Games

Most respondents indicated that they did not buy films or video games from informal vendors. The major concern was that films and video games were fake (i.e. pirated):



6.2.1.5. Conclusion

The following high-level conclusions can be drawn from the online consumer survey:

Film

- Consumers favour cinemas and Pay TV for the watching of films;
- The key reasons reported for accessing films this way were viewing experience and convenience;
- Affordability did not feature as a motivation for purchasing behaviour;
- The level of engagement with informal distribution for film purchases is minimal, with hardly any respondents purchasing DVDs from street vendors or flea markets. Many respondents were concerned that the films were fakes;
- For the consumer group interviewed, no one purchased any content goods from the informal distribution sector;
- More content is purchased in physical form than, and consumers tended to favour established websites such as Netflix, iTunes and Amazon; and
- For the consumer group interviewed, the online film distribution market is valued at R11 917.

Video Games

- 24% of this consumer group reported playing video games;
- Video games purchased from retailers and played on their tablets / PC's were the most favoured;
- If games were purchased online, the established websites such as iTunes and Netflix were favoured over smaller websites;
- For the consumer group interviewed, the online video game distribution market is valued at R1436;
- Convenience, optimising the playing experience, and, accessing the latest video games were they key drivers behind buying behaviour. Affordability was not a factor in this consumer group;
- There was minimal interaction with the informal market, with many respondents reporting that they do not purchase video games from street vendors or flea markets. One of the reasons given was that they were concerned that the video games were fake; and
- For the consumer group interviewed, the informal video game distribution market is valued at R219.

General

From the above, one can conclude that:

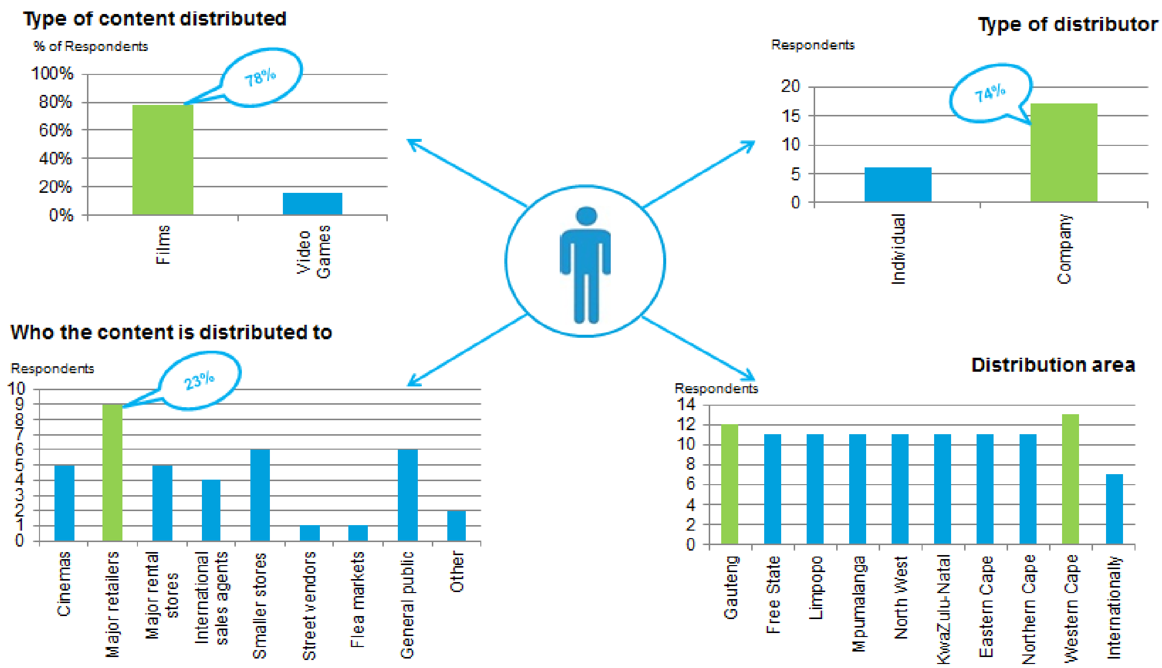
- The key drivers for purchases of films and video games are convenience, experience and accessing the latest content. Affordability is not a factor;
- Physical purchase and rentals of films and video games in the formalised market are dominant in this consumer group;
- Most physical purchases are through major retailers, cinema groups or broadcasters – all of which are regulated; and
- Online purchases are through established international websites carrying international content – most are subject to self-regulation and are beyond the jurisdiction of the FPB.

Most content accessed by participants of the online survey are already subject to FPB regulation or are beyond the jurisdiction of the FPB.

6.2.2. Online Surveys – Distributors

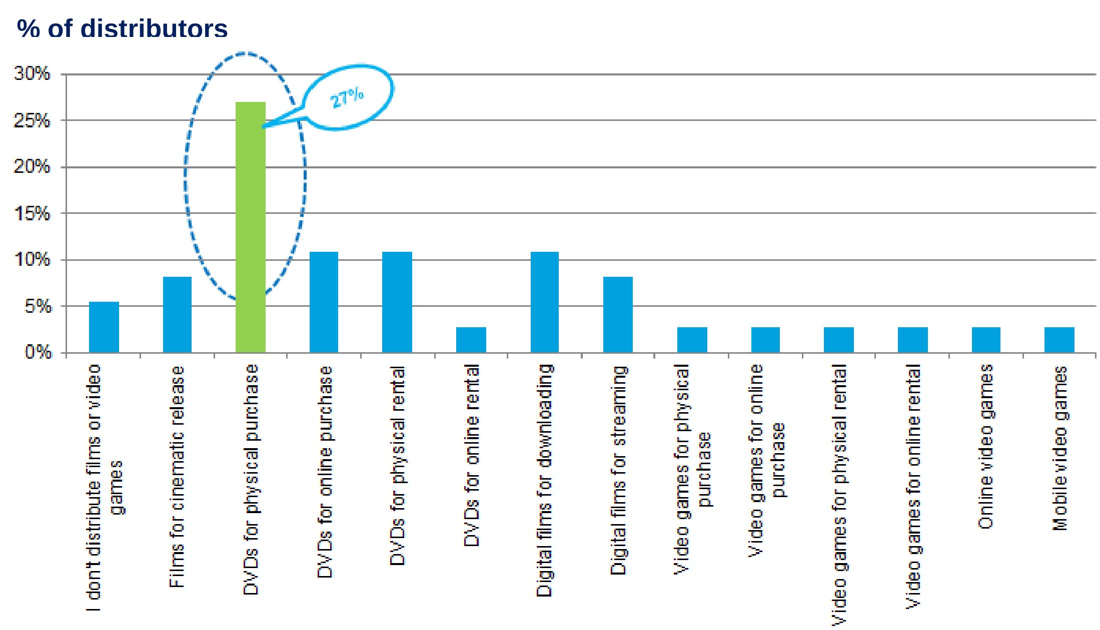
6.2.2.1. Profile of Distributor

The most common respondent was a company selling films to major retailers. Respondents distributed fairly uniformly throughout SA's provinces:



6.2.2.2. Content distributed

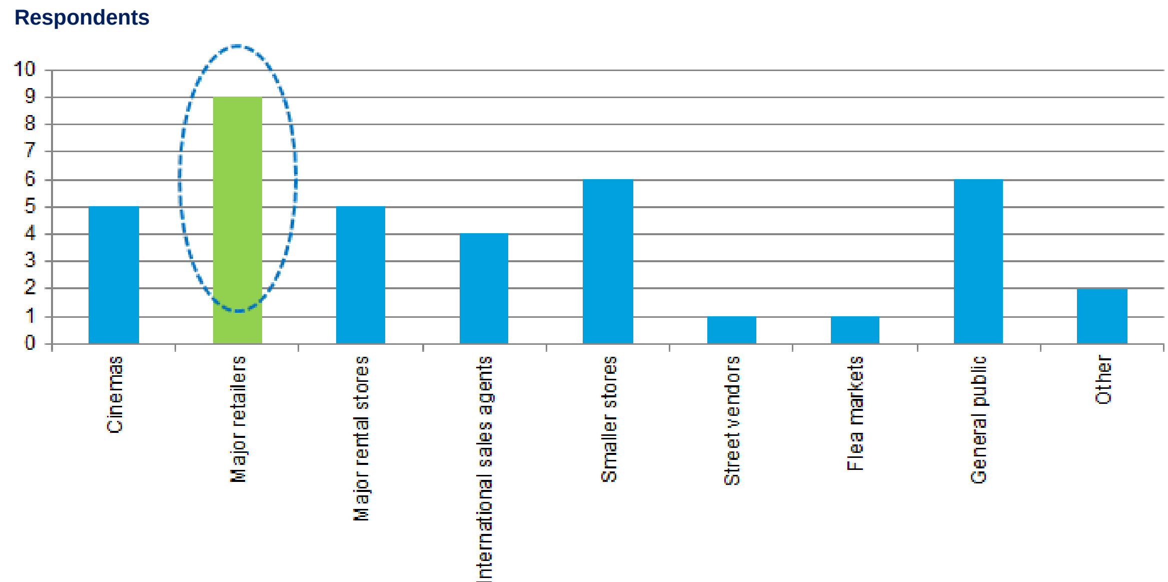
27% of distributors responded that they sell films on physical DVDs:



Online DVD sales and rentals, as well as digital downloads and streaming of films were also prominent.

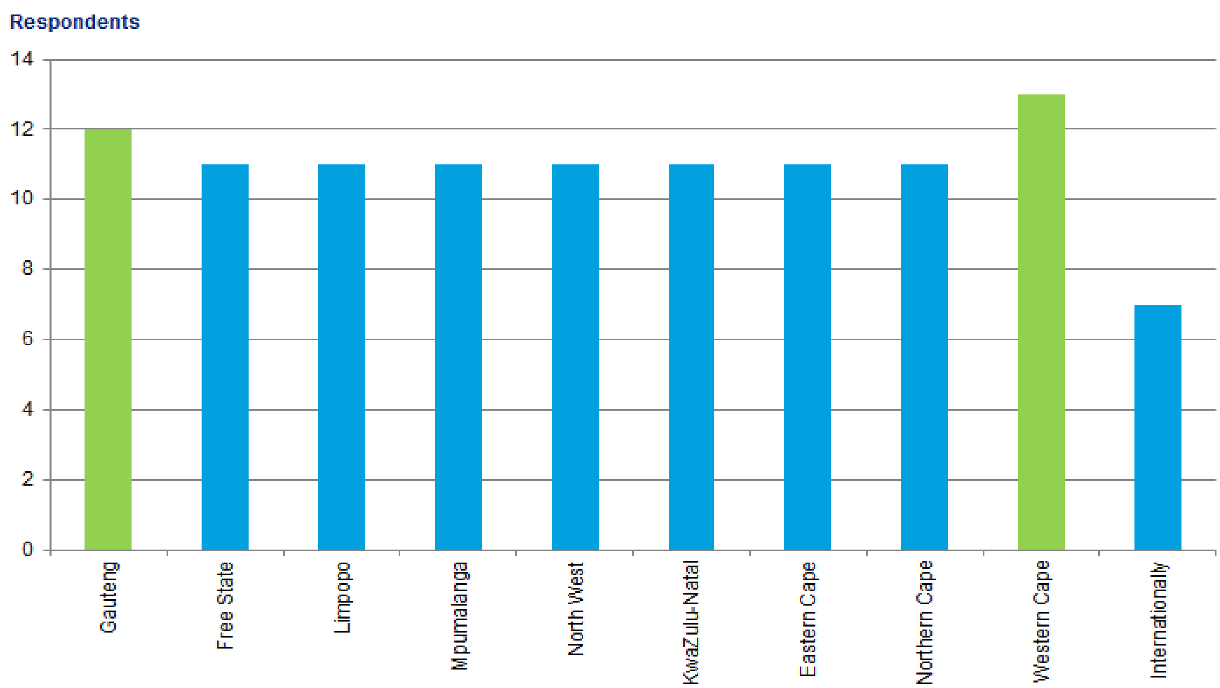
6.2.2.3. Customer bases

Most distributors responded that they distribute to major retailers. (This takes the form of physical DVDs):



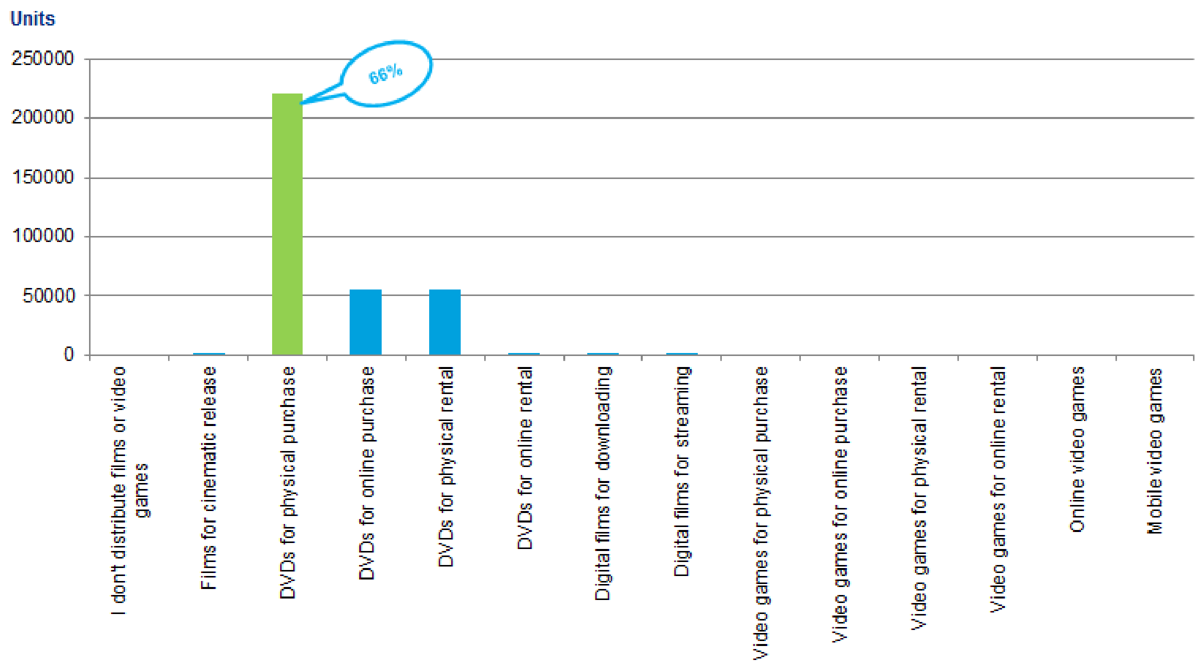
6.2.2.4. Distribution footprint

Respondents distribute to all Provinces evenly, with the Western Cape and Gauteng being marginally higher than the rest of the Provinces:

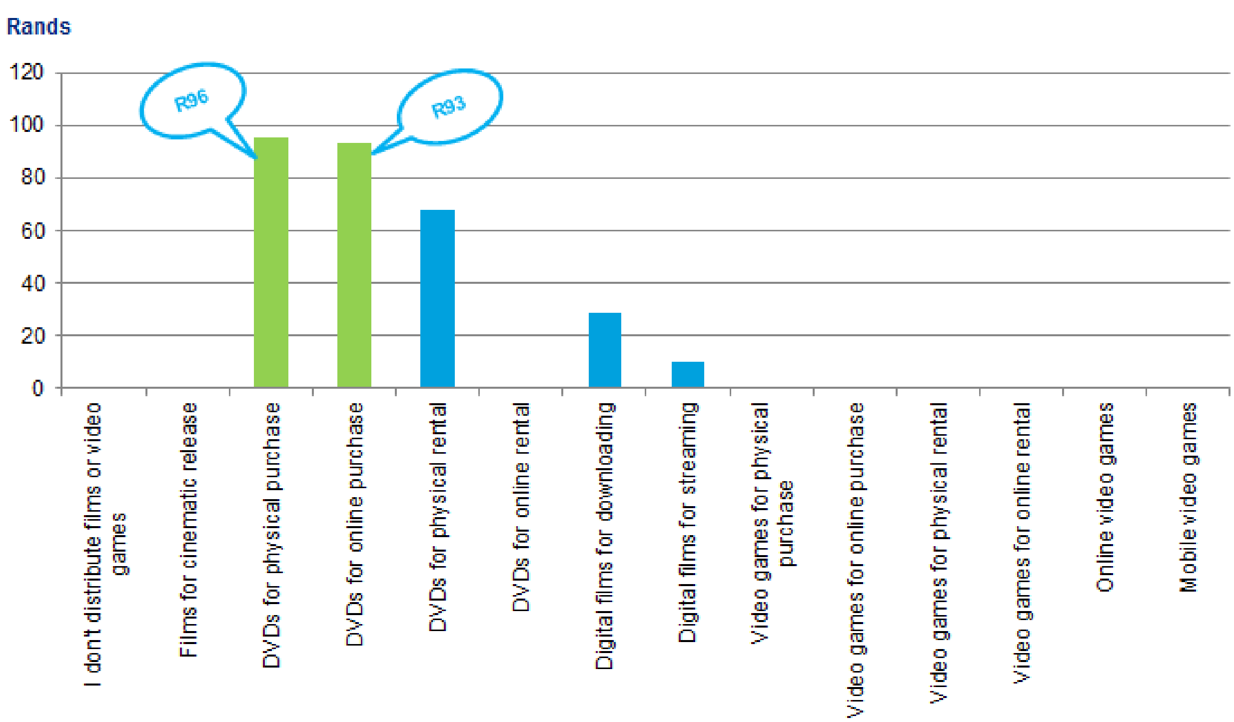


6.2.2.5. Units distributed

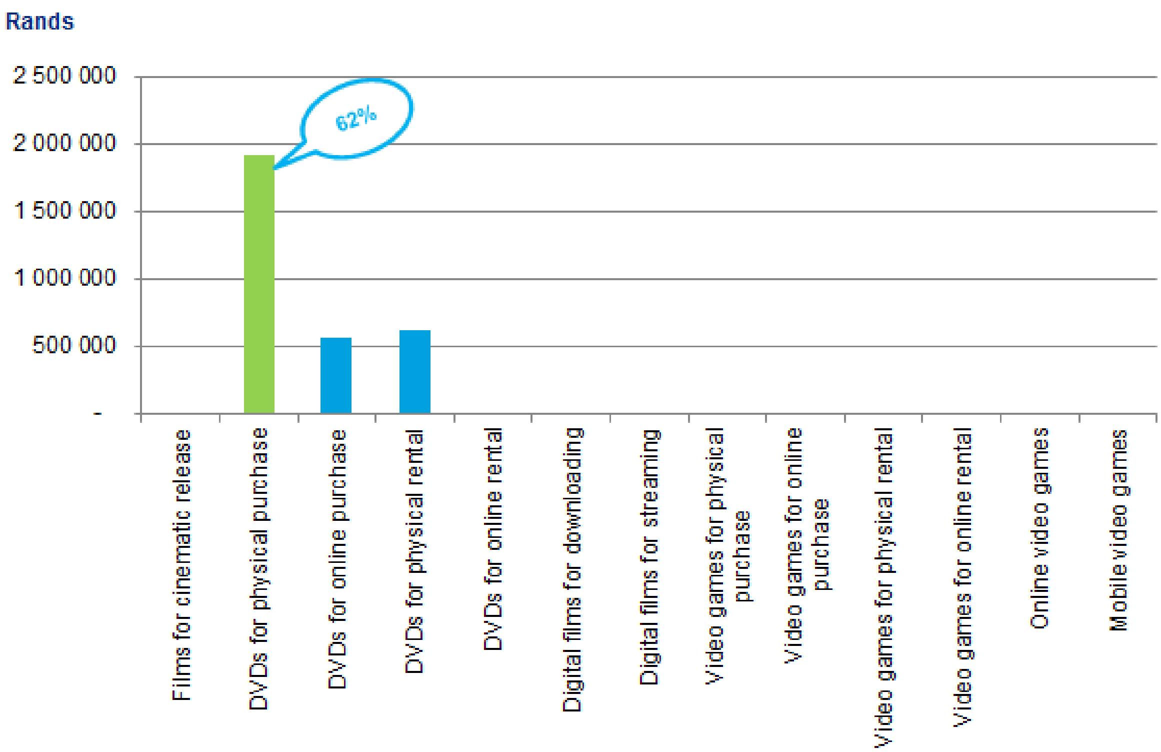
The highest total unit sales recorded were from the sale of DVDs:



The highest sales prices were reported on physical DVD sales, closely followed by online DVD sales:



The highest sales totals were reported on physical DVD sales:



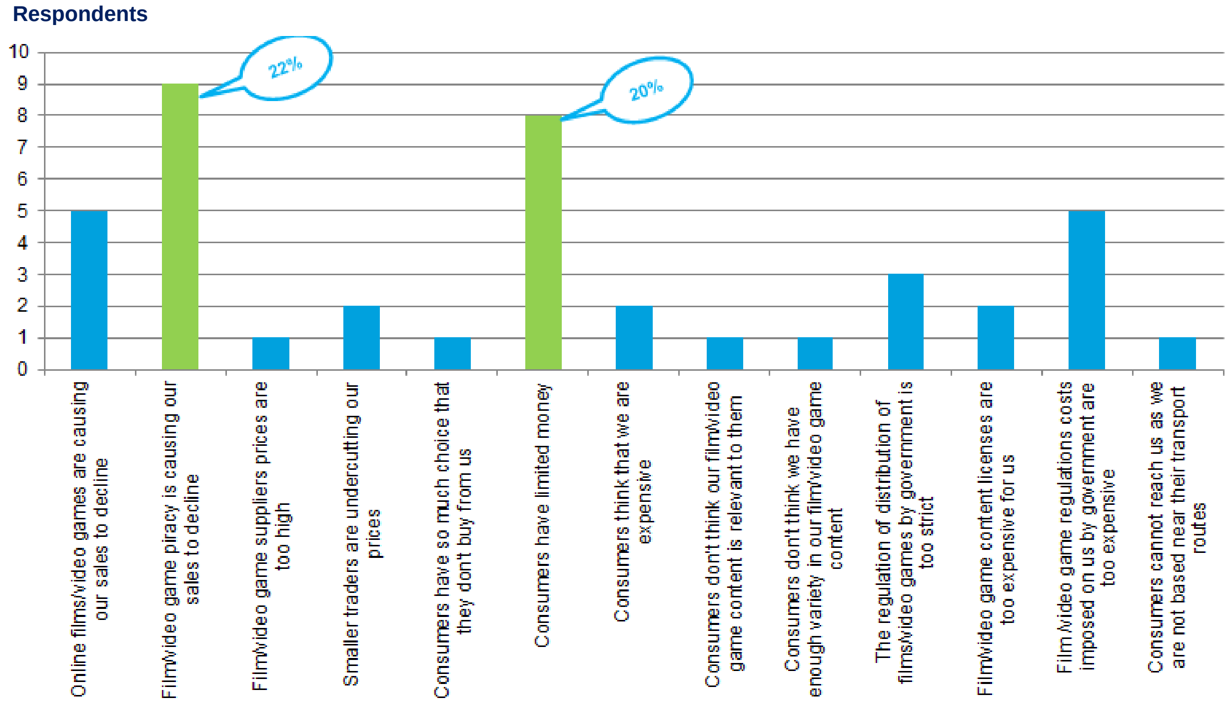
The total value of film and video games sales / rentals reported was an estimated R3 115 572 and is broken down as follows:

Platform	Total Respondents	Total Units	Average Units	Average Price	Total Value
Films for cinematic release	5	150	30	-	-
DVDs for physical purchase	11	220 703	20 064	96	1 916 099
DVDs for online purchase	9	55 101	6 122	93	569 372
DVDs for physical rental	6	55 101	9 183	68	622 942
DVDs for online rental	2	50	25	-	-
Digital films for downloading	4	701	175	29	4 991
Digital films for streaming	3	651	217	10	2 168
Video games for physical purchase	-	-	-	-	-
Video games for online purchase	-	-	-	-	-
Video games for physical rental	-	-	-	-	-
Video games for online rental	-	-	-	-	-
Online video games	-	-	-	-	-
Mobile video games	-	-	-	-	-
Total	**43**	**332 455**			**3 115 572**

Average units indicate units per respondent per annum. Thus, the highest frequency of sales / rentals of films were firstly physical DVD sales, with physical DVD rentals coming in at second place.

6.2.2.6. Challenges Faced Whilst Trading

Respondents felt that piracy and the limited amount of disposable income of consumers were negatively affecting their sales:



6.2.2.7. Conclusion

The following high-level conclusions can be drawn from the online distributor survey:

Film

- 78% of content sold by respondents were films. 27% of films were sold on DVD's; and
- Online films also featured but were half of the DVD sales.

Video Games

- 22% of sales reported were video games; and
- Physical games and online rentals were the most frequently reported.

Film and Video Games

- The majority of sales were to large retailers; and
- Piracy and low consumer disposable income were the most reported challenges faced by distributors.

General

From the above, one can conclude that:

- Retailers are the main customer; and
- Physical goods dominate online goods.

Thus, most distribution occurs to entities that are already regulated and registered with the FPB.

6.3. Summary of Physical Versus Online Survey

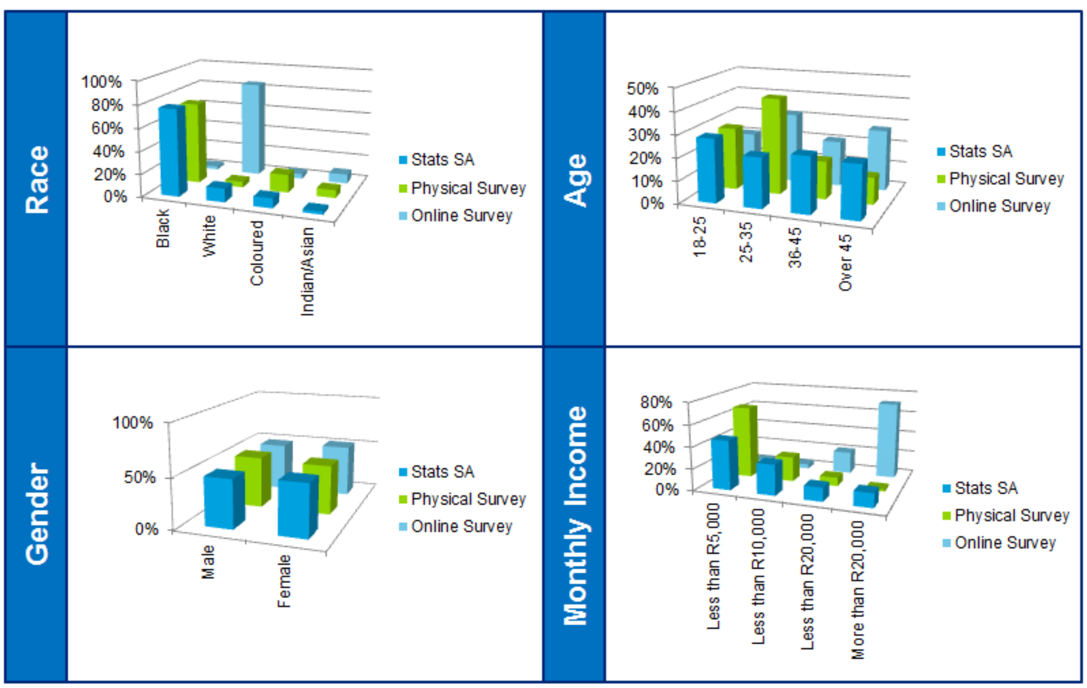
Consumers

A high-level summary of the results of the physical versus the online survey reveals two very different profiles of consumers:

Category	Physical Survey Dominant Factor	Online Survey Dominant Factor
Race	Black	White
Age	26-35	26-35
Gender	Equal	Equal
Household Income	Less than R5,000	R30,001 and above
Film	Free TV, DVDs purchases from street vendor	Cinema, Pay TV
Video Games	Purchased and played on mobile phone	Retail store purchases, played on PC/tablet
Main drivers	Affordability, convenience	Experience, convenience, most recent content
Attitude towards informal trade	Affordability overrides piracy concerns	Piracy concerns, not trusted

In order to ascertain which survey is more representative of the SA population, one needs to compare the consumer's profile against a reliable source of information, i.e. Statistics SA.

The comparison reveals that the physical survey is a closely aligned to Stats SA's 2011 profile of the SA population:



Thus, it would appear that the physical survey results could be used to estimate the purchasing and distributing trends of the broader demographic in SA. Of concern, though, are the high levels of illegitimate content included in the films and video games purchased.

The following information gathered from the survey supports the view that much of the content is pirated:

- DVD sales dominate the informal distribution market;
- The average price of DVDs sold by street vendors is R33, with street vendors selling DVDs for a low as R16 – these prices are well below the retail DVD prices of R99 to R200;
- The majority of DVDs examined by researchers were:
- Sold with washed-out / unclear graphics on the physical disks;
- Sometimes sold without DVD covers ;
- Sold with poor print quality of DVD covers (if there were covers);
- The possible use of informal vendors as distributors of licit goods has been a topic of repeated discussion in South Africa. The major distributors of Hollywood films, represented by SAFACT, have generally rejected this approach as too complicated. According to James Lennox (CEO of SAFACT in 2009, "There are some obstacles to this for legitimate industry players, including the need to comply with Street Trading Bylaws, paying of minimum wages, acceptable working conditions, all of which if adhered to make the "informal" trading environment ineffective. The Road Traffic Act, for instance, prohibits selling by licensed street vendors within five meters of a junction. All pirated product sold by street vendors is sold within five meters of a junction, thus exposing the employers of "legitimate" traders operating in this zone to possible prosecution."[1] The film content on the streets can thus only be pirated content.

These deductions are corroborated by meetings with stakeholders that operate within the informal distribution market in various roles, i.e.:

- SAFACT (anti-piracy agency);
- Diret2DVD (informal distributor of legitimate content);
- Chicco Twala (informal producer and distributor of legitimate content);
- SASFED (representative body of the SA Film Industry);
- Various film producers who operate in the informal distribution market for film.

Our scope for the purposes of this report was to determine the prevalence of legitimate film and video game content distributed in the informal market. The survey results appear to show that very little of this content is legitimate. Thus, in order to quantify the value of legitimate film and video content distributed in the informal market, one cannot use the survey results and, instead, one needs to go to the local content producers to determine whether it is being sold legitimately through the informal trade or not, and, to quantify how much they estimate that the legitimate market is worth. This is covered in Section 7 of this report.

One can, however, estimate the total size of the informal market (including both legitimate and illegitimate content distributed). Please note that this is not a statistical extrapolation and should not be relied upon or published.

The assumptions used in the calculation of the estimated informal sector are in line with the methodology and are as follows:

- The physical survey revealed that the average consumer was between 26 to 35 year old and Black;
- The survey was conducted in urban areas (major cities) only; and
- The survey was only conducted on people above 18 years of age.

[1] Social Science Research Council, Media Piracy in Emerging Economies, Natasha Primo and Libby Lloyd, 2010, http://piracy.americanassembly.org/wp-content/uploads/2011/06/MPEE-PDF-Ch3-South-Africa.pdf

Thus, extrapolation will only be done over the following:

- Individuals 20 years and older, but not over 65 years (as we will assume that they are retired and not purchasing content in the informal sector);
- Black individuals;
- Individuals who live in the metropolitan or cities/large towns;
- All population statistics will be sourced from the latest Stats SA 2011 survey;
- Only the informal sales platforms will be used to calculate the informal sector (e.g. other screenings, small CBD shops, street vendors, flea markets and USB sticks);; and
- We will assume that the buying behaviour of those surveyed is representative of the broader population.

Using these assumptions and applying them to the informal line items in the physical consumer survey, the informal sector can be estimated at R9 billion. Please see Annexure E for a detailed calculate of the estimated market value of the informal distribution market for films and video games.

If one looks at the legitimate estimate of the informal market of R150 million (as documented in Section 7 of this report) versus the estimate total informal market value of R9.9 billion, it would appear that the legitimate market is only 1.5% of the total informal market. This is corroborated in the meetings with stakeholders who estimated the pirated component of the total informal market to be at 99 to 100% of the total market.

For online content, it would appear that online content purchases are minimal in the informal market (mostly restricted to mobile games), and, in the formal market, the online survey revealed that where online content is purchased, it is accessed from established, international websites. As the online survey sample was not a representative sample (as the number of respondents to the online survey was too low), we have augmented the research with market research and interviews. This is covered in Section 7 of this report.

7. Scoping exercise on major players in the online and informal media content distribution platforms

Desktop research and stakeholder interviews in the film and video game industries were conducted to identify major players in the online and informal media content distribution sectors. This was done in order to allow for the estimation of the prevalence of these sectors in SA.
Informal and online sectors are addressed separately in this section.

7.1. Informal Media Content Distribution

The following entities / individuals appear to be the major players in informal distribution of films in SA:

- Chicco (Sello) Twala;
- MNet's "Bubblegum" film producers; and
- Etv's "Ekasi" film producers.

7.1.1. Chicco (Sello) Twala

The GFC and the NFVF referred us to Mr. Twala given that he has been active for a number of years in the informal film industry production and distribution sectors.

Mr. Twala produces films with production budgets of between R180 000 and R250 000.
The productions are funded by broadcasters, the IDC, self-funded, or, funded by government and corporate sponsors / advertisers.

His first film sold more than 120,000 copies at R35 per copy, i.e. revenue of R4.2 million. The second film sold more than 400 000 copies at R35, i.e. revenue of R14 million. The third film was not nearly as successful as it was significantly affected by piracy and sold only 40 000 copies.

Mr. Twala has now adjusted his model to counteract piracy, effectively allowing him to produce and distribute his content for free. This is done by using a sponsorship / advertising funding model in conjunction with piggy-backing on the distribution network of a newspaper that is popular in the broader demographic. Sponsors and advertisers from the corporate and public sectors pay to advertise in the films and on the covers of the DVDs.

Mr. Twala's content appears to be classified and regulated as:

He has indicated that he is registered with the FPB and that all his films are classified through the FPB; or
In the case where the films are commissioned by broadcasters, they are classified and regulated by the broadcasters (an ICASA requirement).

Mr Twala estimates that the total informal film industry value is not worth more than R300 million at the moment. He estimates, however that the pirated trade is 20 times higher than this (i.e. for a film where he does 40,000 copies, the pirates are selling 1 million copies).

Mr Twala feels that the DVD format will eventually die when the broadband and mobile downloading of films becomes possible – he is of the opinion that consumers will be willing to watch films on their mobile phones. (This trend will be dealt with in Section 7.2.1 of this report).

7.1.2. Bubblegum Film Producers

MNet commissions film producers to make films for their Msanzi Channel. These films are aimed at the broader demographic and are called Bubblegum Films. These are low budget films – the producers are given the funds upfront to cover production costs, and, in return, MNet retains the TV rights. The producers retain the DVD rights and are allowed to commercialise these rights.

As MNet is a broadcaster, these films are classified and regulated by ICASA. From discussions with the Bubblegum Film Producers, their ability to commercialise the DVD rights for their films has been limited – piracy and the lack of a good distribution network in the informal sector have limited their ability to sell their DVDs.

7.1.3. Ekasi Movie Nights / Film Producers

eTV commissions film producers to produce films for their free-to-air TV channel. These films are aimed at the broader demographic and are called Ekasi Movies. These are low budget films – the producers are given the funds upfront to cover production costs, and, in return, eTV retains the TV rights.

The DVD and other screening rights are commercialized through Ekasi Movie nights. Two mobile broadcasting vans travel through townships, providing screenings of Ekasi movies. DVDs are sold at these screenings. Up to 30 000 DVDs were reported as sold at their last12 screenings. DVDs are sold at R60 per DVD, which means that the estimated revenue from DVD sales in the informal market could be R1.8 million or higher per annum.

As eTV is regulated by ICASA, these films are classified and regulated.

7.1.4. Summary

All informal media content producers documented above distribute films. There does not appear to be a major informal distribution of video games. Our understanding from the surveys performed is that distributors sell small volumes of video games, and that these distributors are mostly CBD shop-owners. All producers above are either:

- Registered with the FPB, and, have classified and licensed their content with the FPB; or,
- Are under the auspices of ICASA as the content was commissioned by broadcasters.

However, the distributors of the film content developed for the broadcasters on platforms such as DVD and USB sticks are not necessarily registered with the FPB.

The legitimate informal market is estimated at R150 million per annum. (Mr. Twala has estimated it at more than R300 million, but our calculations come in closer to less R150 million).

The illegitimate content trade has been estimated at far higher than this, but, as this is beyond the scope of our mandate for this project, we will not comment on it here.

7.2. Online media content

Before one can analyse internet content producers / distribution, on first needs to understand the following:

- The profile of SA's online market; and
- How South Africans access online content.

7.2.1. The SA online landscape

In SA the internet is currently accessed principally through mobile devices. Mobile access spending accounted for 71% of total access spending in 2011, compared to 30% in 2007. This is due to:

- Smartphones becoming more popular;
- The wireless infrastructure being available to more people than the broadband infrastructure; and

- The relatively high broadband prices limiting wired broadband penetration.

During the past five years mobile access spending grew much faster than wired broadband spending. With new international cables coming online and faster growth in the number of fixed broadband households, the expectation is that wired broadband will become the faster-growing sector during the next five years, with growth of 17.9% projected over the forecast period. The mobile access spending market is, however, expected to remain the largest component of the Internet access spending market throughout the forecast period. (Source: Deloitte Digital).

7.2.2. How SA's population access online content

The table below shows how South Africans across various demographics are accessing the internet:

	Access internet via computer	Access internet via cellphone	Access internet via both platforms	Do not access internet
Total adult population	15%	18%	11%	50%
Average household income	R20,879	R16,970	R20,527	R5,836
Average age	33	28	30	42
Average LSM	8.3	7.7	8.3	5.1
15-24	32%	46%	39%	20%
25-34	28%	30%	31%	18%
35-49	28%	19%	24%	26%
50+	12%	5%	6%	36%
Black	51%	61%	56%	82%
Coloured	8%	10%	9%	9%
Indian	6%	6%	6%	2%
White	35%	23%	30%	7%
Male	55%	53%	54%	46%
Female	45%	47%	46%	54%

Source: Deloitte Digital; Stats SA

The above table mirrors the results of our research:

The average profile of consumers in the physical survey correlates with the profile shown in the last column above. These consumers earned on average R5 000 per month or less and were black. They also represent the broader demographic in SA. The surveys that were conducted indicated that these consumers favour the purchasing of physical film and video game content from informal vendors, and, that apart from the purchase of mobile games, tended not to purchase online. Of the people in this demographic 50% do not use the internet at all.

Consumers in the online survey were in the higher income brackets (the average monthly income for respondents was above R30 000). They survey revealed that they still favoured physical content, but also purchased some of their content online. These consumers tend to match the first 3 columns of the table above where the average household income is R16 970 and above. These columns show that this demographic is a narrower part of the adult population and tends to access internet via computer or cellphone, or both.

Further research shows that most people in SA access the internet via mobile phone, as per the table below:

Online / internet access type	2013 (Estimated ZAR Millions)	% of Total
Wired: dial up	540	3%
Wired: broadband	4,489	26%
Mobile access	12,180	71%
Total internet and mobile access spending	**17,209**	**100%**

Source: Deloitte Digital

7.2.2.1. Broadband

Broadband users are typically shared between 3 major players in SA:

Broadband player	2011 % of Broadband Market
Vodacom	60%
MTN	20%
Telkom	12%
CellC and other	**8%**
Total Broadband	**100%**

Source: Deloitte Digital

SA is currently one of the more advanced countries in Africa. It ranks third in broadband subscribers behind Egypt and Algeria.

7.2.2.2. Mobile Access

SA is the 15th largest telecommunications market in SA[2].

The table below details key SA mobile performance indicators:

Performance Indicators	
SA population	51.8 million people
Total mobile connections (active sim cards)	66.1 million people
Mobile penetration	128%
Estimated active smartphones	12 milli0n
Estimated mobile data penetration	39%

Source: Deloitte Digital; Mobile Operator Financial Results, Stats SA Consensus 2011, Informal Telecoms and Media

This is relevant when analysing the online consumption / distribution of films and video games because:

- SA has one of the highest mobile penetration rates amongst developing markets globally;
- In order to view video games and films on mobile, one needs a high-end feature phone, or better yet, a smartphone. SA has 12 million active smartphones and the number is growing. Smartphones currently make up approximately 20% of the active mobile connections[3];

[2] International Telecommunications Union, December 2012
[3] Deloitte Digital Research

- One also needs the means to access and pay for mobile data costs (used when downloading and streaming online content). Currently there is a 39% penetration rate in the total active mobile connections market;
- Smartphones are showing exponential growth in SA as the costs of phone devices and data are decreasing[4]; and
- As a result, the ability for users to access films and video games using mobile access is set to grow.

The broader demographic currently can mostly only afford “dumb” phones (i.e. low end phones with no internet access) or “feature” phones (mid-range phones with limited internet access). This means that they are only able to access sms’s, mms’s, wallpapers, ringtones and basic games. However, the growth rate and switch over to smartphones is high, and by 2016 the number of mobile internet access subscribers is expected to reach 23.1 million (it was 5.8 million in 2011)[5].
The FPB needs to be cognisant of these trends, as the regulation of film and video game content accessed via mobile is set to increase exponentially and the regulation thereof will be a mammoth task.

Currently, much of the mobile content is provided by the following service providers via Vodacom (Vodafone Live!), MTN (MTN Play), Cell C and Telkom’s 8ta:

Content Aggregator	**Website**
Mahindra Comviva	www.Mahindra.comviva.com
Content Connect Africa	www.contentconnectafrica.co.za
On Mobile	www.onmobile.com
Rancard	www.Randcardmoblitiy.com
Spice Africa	www.spiceafrica.cim
Starfish International	www.starfishmobile.com
WASP	**Website**
Buongiorno SA	www.buongiorno.com
eXactmoible	interactive@exactmobile.com
Ancher Mobile (formally Multimedia Solutions)	http://archermobile.com
Viamedia	www.viamedia.co.za
Zed Mobile	www.info@zed.com

Source: Deloitte Digital

Looking at the sheer volume of the content on these websites, it will be a difficult if not impossible task for the FPB to regulates and classify all the content using its traditional classification and compliance systems. This content would be self-regulated under WASPA if accessed via a mobile device. The WASP will then have already agreed to follow WASPA’s code of conduct, and will be regulated by their complaints mechanism.

Social media, sports, news and information sites still dominate the content viewed and downloaded. However, as broadband becomes faster and reduces in cost, the popular content categories are likely to start including films and higher-end games.

ISPA, the industry representative body for SA’s internet service providers, stated that there are very little online distributor of film or video game content that is sold by companies on SA registered websites.

Further to this, desktop reviews of major video game websites such as Xbox, Sony, Nintendo and Microsoft show that all domains are all international.

To end, this would appear to confirm our survey results which showed that:

- Mobile video games were the most popular online content accessed;

[4] *Ibid*: 3
[5] *Ibid*: 3

- The broader demographics do not purchase film and non-mobile video games online;
- The higher LSM's do purchase online but tend to favour international websites (i.e. international domains) which are beyond the jurisdiction of the FPB.

8. Regulation of online and online media content distribution platforms in other jurisdictions

8.1. Introduction

In this section we will evaluate how the online and informal film and video game distribution sectors are regulated in other jurisdictions in order to compare such regulatory frameworks to SA. Ultimately, this comparison will provide input into the recommendations give to the FPB for regulating these distribution sectors.

8.2. Countries selected for comparison to SA

As per the methodology documented in Section 5 of this report, we will evaluate the following countries for the purposes of this benchmarking exercise:

- Nigeria;
- Kenya;
- The United Kingdom ("UK"); and
- The United States of America ("USA").

Nigeria and Kenya were selected for the comparison due to their socioeconomic similarities to SA. Both countries are developing African economies which face many of the same challenges as SA does:

- High percentage of the population which is either unemployment or lives on minimal monthly income;
- Growing informal economy servicing the needs of the broader demographic; and
- Similar profile re broadband development, internet penetration and computer literacy.

Comparing the regulatory frameworks for the informal and online video game and film distribution sectors in Nigeria and Kenya will allow us to gain an understanding of how countries with similar socioeconomic environments are dealing with challenges in regulating these industries. The comparison is not perfect though as SA has a more developed legal system. The levels of protection afforded to intellectual property rights ("IP") in SA are far more aligned to developed Western economies than to other African countries.

To ensure a balanced and fair comparison we will also benchmark the regulatory environment for the informal and online video game and film distribution sectors in SA against two developed countries. For the comparison we have selected the USA and the UK due to the following reasons:

- Both of countries have well developed regulatory institutions with comparable jurisdictions; and
- Both countries can be considered leaders in terms of regulating the trade of physical and online content goods due to the maturity of their content markets and technological advancement.

The following research studies previously conducted or commissioned by the FPB were considered in this benchmarking exercise:

- Film and Publication Board Compliance Monitoring Strategy (13 April 2011);
- Content Classification and Regulation in SA, A Review for the Film and Publication Board (September 2012); and
- Report on the Mandate of the Film and Publication Board (5 December 2011).

The research conducted previously focused on the full mandate and jurisdiction of the FPB. This comparative study will be limited to the online and informal distribution sectors. We will evaluate how the distribution of content via these channels is currently regulated in SA and compare this to the practices identified in the countries identified for the study.

It should be noted that the regulatory framework we are assessing is limited to the regulation and classification of films and video games in terms of the informal and online distribution sectors. The legality and other statutory requirements applicable to the transactions will not be assessed.

8.3. SA's regulatory environment

8.3.1. The Film and Publication Board

The Film and Publication Board is mandated by the Film and Publications Act (65 of 1996) ("the FPB Act) to regulate the creation, production, possession and distribution of films, games and certain publications.

8.3.1.1. The FPB Act

The FPB Act as amended, regulates the creation, production, possession and distribution of films, games and certain publications in SA.

The purpose of the Act is to:

- "Provide consumer advice to enable adults to make informed viewing, reading and gaming choices, both for themselves and for children in their care;
- Protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences; and
- Make the use of children in and the exposure of children to pornography punishable."[6]

In terms of section 18(1) of the FPB Act any person who distributes or exhibits any film or game in SA must:

- Register with the FPB as a distributor of films and/or video games; and
- Must "submit for examination and classification any film or game that has not been classified, exempted or approved".

Any person who sells or rents out films or games without being registered with the FPB would be guilty of an offence under section 24A of the Act.

The FPB Act defines "distribute" widely and the term includes:

- To sell, hire out or offer or keep for sale or hire and, for purposes of sections 24A; and
- Per section 24B, to hand-out or exhibit a film, game or a publication to a person under the age of 18 years, and also the failure to take reasonable steps to prevent access thereto by such a person.

Certain institutions are excluded from this requirement if the regulations governing such institutions are complied with. These entities are:

- A newspaper that is published by a member of a body recognised by the Press Ombudsman; and
- A broadcaster who is subject to regulation by the ICASA for the purposes of broadcasting.

[6] The Films and Publications Act (65 of 1996) as amended

This benchmarking exercise does not include published or broadcast content and the exclusion of such content from the jurisdiction of the FPB has no effect on this study.

The FPB Act does not differentiate between distribution models. Broadcasters and *bone fide* newspapers are excluded from content classification by the FPB but apart from these exclusions the act does not refer to the platform of delivery. The distribution of films and video games through the informal and online sectors should thus be treated uniformly.

8.3.1.2. Enforcement of the FPB Act

The FPB uses the following procedures to regulate and assess compliance by distributors to the FPB Act:

- Once a film or video game have been rated by examiners, a certificate of registration is issued to the distributor / exhibitor;
- The distributor is required by the FPB to:
    - Display the certificate number and appropriate age restriction symbol on all film / video game packaging; and
    - Display the certificate number and appropriate age restriction symbol on all film / video game promotional material, and, comply with regarding locations etc.; and
- To assess compliance, the FPB's compliance officers:
    - Inspect premises;
    - Inspect promotional material; and
    - Inspect content for sale / hire.
- Non-compliant distributors may be subjected to the following:
    - Confiscation of content (by the South African Police force);
    - Destruction of content; and / or
    - Imprisonment of up to five years, a fine, or both.

8.3.2. Self-regulation

In addition to the legislatively mandated regulation of films and video games by the FPB in SA there are institutions which self-regulate the distribution of such goods within their respective industries. For the purposes of this study we will include:

- ISPA; and
- WASPA.

8.3.2.1. ISPA

ISPA is a SA Internet industry body responsible for furthering the interests of the internet access and service provider industries. In terms of section 71 of the Electronic Communications and Transactions Act (25 of 2002) ("the ECT Act") ISPA has been recognised as an Industry Representative Body ("IRB") by the Minister of Communications.

In terms of section 71(2) of the ECT Act, the Minister may only recognise an IRB body if:

- Its members are subject to a code of conduct;
- Membership is subject to adequate criteria;
- The code of conduct requires continued adherence to adequate standards of conduct; and
- The representative body is capable of monitoring and enforcing its code of conduct adequately.

ISPA's members are bound by the association's code of conduct which requires all members "to meet certain standards in terms of privacy, consumer protection, spam and the protection of minors".

Section 73 of the ECT Act states that a "service provider is not liable for providing access to or for operating facilities for information systems or transmitting, routing or storage of data messages via an information system under its control" if certain requirements are met. To qualify for the protection offered by the ECT Act a service provider must be a member of an IRB and the service provider must have adopted and implemented the official code of conduct of that IRB.

ISPA regulates unlawful activity through a complaints system with associated take-down notifications. The ECT Act places no obligation on ISPs to "monitor the data which it transmits or stores; or to actively seek facts or circumstances indicating an unlawful activity." A member of the public can lodge a complaint with ISPA where alleged illegal content such as child pornography is distributed over an ISP's network. ISPA will then issue a notice to the ISP which will take-down the illegal website. In terms of section 77(3) of the ECT Act an ISP "is not liable for wrongful take-down in response to a notification."

Internet service providers ("ISPs") are mandated to register with the FPB in terms of section 27A (1) of the FPB Act. This section also requires ISPs to "take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography."

8.3.2.2. WASPA

WASPA is a voluntary self-regulatory body responsible for regulating mobile-based value added services providers ("WASPs"). The association has achieved industry wide adoption with Vodacom, MTN and CellC having made membership to WASPA a prerequisite to providing mobile-based value added services via the companies' networks.[7]

WASPA follows a comparable model of self-regulation to ISPA but the association relies on pro-active monitoring and reactive measures. Pro-Active monitoring is done by a team of monitors that tests and evaluates services offered by WASPs to check whether these comply with WASPA's code of conduct and advertising rules. The reactive regulatory process relies on complaints logged with WASPA.

Only transactions that utilise a mobile network's billing or transmission mechanisms are subject to WASPA's regulation. WASPA does not regulate content such as films and video games per se but rather regulates the advertising of content over mobile networks. Where a content provider advertises content over a mobile network but to obtain the content a consumer has to access a WAP portal only the advertisement will be subject to WASPA's regulation.

WASPA blacklists providers of alleged illegal content in a process that is similar to the take-down notices issued by ISPA.

8.4. Creating a framework for comparisons

8.4.1. Introduction

In order to compare the regulatory frameworks of the selected countries, we have used hypothetical examples for both the informal and online distribution sectors of films and video games. These examples will contain the core elements representation of distribution in the relevant sector.

[7] http://www.waspa.org.za/about/index.shtml

8.4.2. Informal Distribution

To reiterate, "informal content distribution" is defined as original films and video games distributed by street vendors, small informal shops and flea market traders which are not registered with the FPB.
The following transaction will be used to gauge how informal trade is regulated in Nigeria, Kenya, the UK and the USA:

- A vendor trading from a temporary stall at a train station sells movies and games on DVD. The vendor trades in cash and does not have the facilities to accept credit or debit cards.

Using the transaction based approach will allow us to identify the challenges associated with regulating the sector.

We will attempt to answer the following questions for each jurisdiction we are evaluating:

- Does the vendor have to be registered in order to sell content goods?
- If registration is required, is it with an industry body or government regulator?
- Is the industry self-regulated or government regulated?
- In terms of what rules or legislation are these bodies empowered to fulfil their regulatory tasks?
- How is compliance enforced?
- Which entities are responsible for clearing movies and video games for public consumption and assigning age restrictions?

We will only evaluate the trade of physical goods in the informal sector as the survey revealed that the level of online content in this sector is very low in SA. The comparison will also not deal with whether the goods are legitimately traded or illicit goods. Evaluating and benchmarking measures to curb the piracy of content falls outside the scope of this study.

Online distribution

To reiterate, "online content distribution" is defined as original films and video games distributed by SA registered companies, using websites and the internet.

The following transaction will be used to gauge how the online distribution of films and video games is regulated in Nigeria, Kenya, the UK and the USA:

- A consumer after logging onto the website of an online retailer specialising in movies and games purchases a movie by means of Download-To-Own ("DTO"). The online retailer is registered in the same country as where the customer is based which will be the country being assessed.

Using the transaction based approach will allow us to identify the challenges associated with regulating the online sector.

We will attempt to address the same regulatory queries listed in the informal section of this report.

The comparison will not deal with whether the goods are legitimately traded or illicit goods because evaluating and benchmarking measures to curb the piracy of content falls outside the scope of this study.

8.5. Nigeria

8.5.1. The legislation and regulations

The National Film Video Censors Board ("NFVCB") of Nigeria is the media regulator that is responsible for the censorship and public exhibition of films and ancillary matters. The NFVCB is constituted and empowered in terms of the National Film and Video Censors Board Act (85 of 1993) ("the NFVCB Act").

In terms of the NFVCB Act:

- No person shall carry on the business of distributing or exhibiting a film or video work, unless he is a holder of a license granted by the NFVCB (section 25);
- A distributor or exhibitor of a film or video work must keep a register including the following details:
    - The title and registered length of the film or video work;
    - Information regarding whether or not the film or video work is a Nigerian film or video work; and
    - The classification and other details of censorship approval for the film or video work (Section 26).

The NFVCB Act in terms of section 28 mandates that no person shall distribute or exhibit a film or video work unless it is registered with the NFVCB.

The following video work is however exempted under section 53 of the Act if certain requirements are complied with:

- Video work designed to inform, educate or instruct;
- Video work concerned with sports; or
- Video games.

In addition the supply of a video recording shall be deemed an exempted supply if it is “neither a supply for reward; nor a supply in the course or furtherance of a business.” Any person who distributes or exhibits a video recording that contains video work in respect of which no classification certificate has been issued is guilty of an offence under section 66 of the NFVCB Act.

The Preview of Films and Video Works Regulations (S.I. 6 of 2000) (“the Film and Video Regulations”) were published as subsidiary legislation to the NFVCB Act. The Film and Video Regulations require that a film or video work presented to the NFVCB for registration and classification must include a declaration of copyright ownership.

The NFVCB regulations (S.I. 25 of 2008) published on 15 August 2008 in clause 3 indicate that the NFVCB has the power to “withdraw an approval for a registered film or video work if a case of piracy and plagiarizing of plots is discovered or proven against a producer… while a report for appropriate action shall be filed with the Nigerian Copyrights Commission.”

8.5.2. Applying the regulations to the informal distribution

To establish how the Nigerian regulator controls the informal trade we will apply the rules documented in 8.5.1. to the following transaction:

- A vendor trading from a temporary stall at a train station in Nigeria sells movies and games on DVD. The vendor trades in cash and does not have the facilities to accept credit or debit cards.

The NFVCB Act does not differentiate between different classes of traders such as formal or informal. A “distributor” is defined as a person engaged in the business of leasing, hiring or selling films or video works. The vendor selling the DVDs at the station will be a distributor of films.

In order to legally act as a distributor of films the vendor will require a license granted by the NFVCB and will be only be able to sell films registered with the regulator. The vendor will have to comply with the record keeping requirements of the NFVCB Act. If the vendor was only selling video games no license will be required as video games are one of the exempted works in terms of section 53 NFVCB Act.

In terms of the Film and Video Regulations “premises” include any vehicle, vessel or stall. The vendor selling the films at the train station is trading as a distributor of films from a premise. The premise that the vendor is trading from will have to be registered if the vendor will be “exhibiting” the films.

8.5.3. Applying the regulations to online distribution

The following transaction will be used to gauge how the online distribution of films and video games is regulated in Nigeria:

- A consumer logs onto the Nigerian registered website of an online retailer which specialises in movies and games and purchases a movie by means of DTO.

The NFVCB Act defines a “distributor” as a person engaged in the business of leasing, hiring or selling films or video works. No distinction is drawn between the platforms used for a transaction. The online retailer will be a distributor of films in terms of the Act.

To operate as a legal distributor of films in Nigeria the online retailer will:

- Require a license granted by the NFVCB;
- Only be able to sell registered films; and
- Have to comply with the record keeping requirements of the NFVCB Act.

If the online retailer only trades in exempted works as described in section 53 of the NFVCB Act no registration would be required.

8.5.4. Enforcement of the NFVCB Act

The NFVCB uses the following procedures to regulates and assess compliance by distributors to the NFVCB Act:

- Once a film has been rated by examiners, a certificate of classification or registration seal is issued to the distributor / exhibitor;
- The distributor is required by the NFVCB to:
    - Display the registration seal, appropriate age restriction symbol (using the colour coded system), and, advisory message detailing the predominant theme of the film on all media storage packaging;
    - Display the classification number, appropriate age restriction symbol, and, advisory message detailing the predominant theme of the film on all poster designs and promotional material (including trailers);
    - Include a vocal alert at the beginning of each film, including the advisory message and classification; and
    - Register the distribution / exhibition premises.
- To assess compliance, the NFVCB’s compliance officers:
    - Inspect premises;
    - Inspect promotional material; and
    - Inspect content for sale / hire.
- Non-compliant distributors may be subjected to the following:
    - Withdrawal of the films from circulation;
    - An obligation on the distributor to publish a quarter page notice of such withdrawal in two national daily newspapers, national TV and national radio services;

- Carry out such other actions as directed by the Board of the NFVCB; and /or
- Imprisonment of up to six months, a fine of up to N300 000, or both.

8.5.5. Conclusion

The following conclusions can be drawn re Nigeria's regulatory environment:

- Nigeria implements a system of strict regulation in terms of the exhibition and trade of films and video works;
- The legislation does not differentiate between different classes of distributors or the platform used for a transaction;
- The regulations governing the trade of content goods are applied uniformly;
- Distributors and exhibitors of films and video works are required to register with the NFVCB and trading without a certificate is prohibited;
- Traders are further restricted to selling only registered films or video works unless the content is exempted; and
- Non-compliance with certain sections of the NFVCB Act is an offence that carries a fine or jail term as penalty.

The regulatory framework pertaining to the trade in physical films and video works implemented in Nigeria has many similarities to the SA system:

- Regulation of trade in physical films and video works is based on registration, classification and licensing; and
- Monitoring with harsh penalties are consequences of non-compliance.

Nigeria, however, exempts video games distributors from registering with the NFVCB, whereas the FPB does not.

8.6. Kenya

8.6.1. The legislation and regulations

The Kenya Film Classification Board ("KFCB") is the regulator responsible for ensuring that films screened and distributed to the public in Kenya conform to the "national aspirations and culture". The KFCB has replaced the Kenya Film Censorship Board and is a body corporate established in terms of the Film and Stage Plays Act (Cap 222 of 1968 as amended) ("the FSP Act").

In terms of section 15 of the FSP Act the KFCB is mandated to:

- Regulate the creation, broadcasting, possession, distribution and exhibition of films; and
- License and issue certificates to distributors and exhibitors of films.

The KFCB is empowered to:

- Prescribe the procedures for applying for a license to operate as a distributor or exhibitor of films; and
- Prescribe the guidelines to be applied in the classification of films.

In terms of the Kenya Information and Communications Act (2 of 1998 as amended) the KFCB is also responsible for the classification of television programmes screened by broadcasters in Kenya.[8]

The FSP Act defines a "film" as "a cinematographic film, recorded video cassette film, recorded video discs, any recorded audiovisual medium, and includes any commentary… music or other sound effect,

[8] Section 46B (1) of The Kenya Communications (Amendment) Act (1 of 2009)

associated with the film…" This definition does not seem to include video games nor is the term video game included in the Act.

In terms of the FSP Act:

- No person may exhibit or distribute any film to the public unless the person is registered as an exhibitor or distributor by the KFCB and has been issued with a certificate(section 12(1));
- No film shall be "distributed, exhibited or broadcast, either publicly or privately, unless the KFCB has examined it and issued a certificate of approval in respect thereof" (section 12(2); and
- Any person who fails to comply with these requirements will be guilty of an offence.

There are exceptions to these conditions:

- Documentaries approved by the Kenya Institute of Education; and
- Films restricted for use in the medical profession;

are not subject to these provisions.

In July 2011 the Ministry of Information and Communication released the draft Kenya Film Policy ("KFP"). The initiative of formulating a national film policy was launched in 2009 with the aim of consolidating all government bodies that deal with the film industry. The KFP was drafted after wide consultation with stakeholders and film industry players. The draft KFP prescribes the legal framework which will govern the collective film industry.

Section 3.2 of the KFP lists the strategies to be deployed and the proposed actions to be implemented to improve the film industry in Kenya. Item 3.2(o) of the list cites the following planned initiative:

"Reviewing film classification, in light of the rapid technological advancements taking place in the film and related industries including animations. Film classification will therefore be re-engineered to encompass the different formats that comprise the film industry."

This shows that the Kenyan government is aware of the challenges in regulating the film industry as a result of technological advancements pertaining to the manner in which content is distributed and consumed. The steps that will be taken to streamline the regulatory process in the light of these challenges are not known yet.

8.6.2. Applying the regulations to the informal distribution

To establish how the Kenyan regulator controls the informal trade we will apply the rules cited above to the following transaction:

- A vendor trading from a temporary stall at a Kenyan train station sells movies and games on DVD. The vendor trades in cash and does not have the facilities to accept credit or debit cards.

The FSP Act does not differentiate between formal and informal traders. Section 12(1) of the Act states that "no person (own emphasis added) shall exhibit any film at an exhibition to which the public are (*sic*) admitted or distribute such film unless he is registered as an exhibitor or distributor by the Board and issued with a certificate."

Exhibit is defined in the Act as to "take part or assist in the giving or making of any exhibition." An exhibition in terms of the FSP Act means "the projection of a film or other optical effect by means of a cinematograph or similar apparatus."

The vendor selling the DVDs will not be exhibiting the films but will be classified as a distributor.

To legally sell the DVDs the vendor will:

- Have to register with the KFCB as an operator of a video library/shop and pay an annual subscription fee of approximately 215 SA Rand ("ZAR").
- As part of the registration process, have to sign a declaration stating that it is illegal to display, sell or hire out any film before it is censored and an appropriate classification label has been affixed; and
- Have to have the marketing material used by the vendor, such as movie posters, approved by the KFCB for public display before being used.

If the vendor fails to comply with these regulations the vendor will be guilty of an offence and could be liable to a fine or subject to imprisonment in accordance with section 32 of the FSP Act.

8.6.3. Applying the regulations to online distribution

We will establish how the online distribution of films is regulated in Kenya in terms of the following transaction:

- A consumer logs onto the Kenyan registered website of an online retailer which specialises in movies and games and purchases a movie by means of DTO.

The online retailer selling the films will be classified as a distributor and will be regulated accordingly.

The FSP Act does not differentiate between the platforms used to execute a transaction. Section 12(1) of the Act states that no person shall distribute a film unless he is registered as a distributor by the KFCB and issued with a certificate.

The online retailer will be subject to the same regulations as the physical vendor in terms of trading in films.

8.6.4. Enforcement of the FSP Act

The KFCB uses the following procedures to regulate and assess compliance by distributors to the FSP Act:

- Once a film has been rated by examiners, a certificate of classification or registration seal is issued to the distributor / exhibitor;
- The distributor is required by the KFCB to:
  - On occasion, issue the KFCB with a bond, with or without sureties, to secure that the film will comply with the conditions in the film license;
  - Display the certificate number and appropriate age restriction symbol (using the colour coded system) on all film packaging; and
  - Display the certificate number and appropriate age restriction symbol (using the colour coded system) on all film promotional material.
- To assess compliance, the KFCB's compliance officers:
  - Inspect premises;
  - Inspect promotional material; and
  - Inspect content for sale / hire.
- Non-compliant distributors may be subjected to the following:
  - Revoking of the certificate and distribution license;
  - Confiscation and / or destruction of the film; and / or
  - Imprisonment of up to 5 years, a fine of up to 100,000 shillings, or both.

8.6.5. Conclusion

The following conclusions can be drawn regarding Kenya's regulatory environment:

- The exhibition and distribution of movies in Kenya are strictly regulated;
- Entities which undertake such activities have to register with the KFCB;
- Failing to register with the KFCB constitutes an offence that could carry a fine or imprisonment;
- All movies including the marketing material for a movie has to be classified by the KFCB;
- The exhibition or distribution of any film that was not classified by the KFCB is an offence liable to a fine or imprisonment; and
- The KFCB is also responsible for the classification of films that will be broadcast in Kenya.

The KFCB's mandate does not seem to include the regulation and classification of video games. The definition of film in the FSP Act does not cover video games nor does the Act refer specifically to video games.

The regulator is aware of the challenges posed by the rapid technological developments affecting the distribution and consumption of content. To address these challenges the Kenyan government has released a draft policy which will streamline the regulation of the film and related industries. The details of how the regulation of film exhibition and distribution will be amended are not yet known.

8.7. UK

8.7.1. The legislation and regulations

The Video Recordings Act (1984 Chapter 39 as amended) ("the VRA Act") governs the supply of hard copy video works in the UK. In January 2010, the Video Recordings Act 2010 came into force. This Act simultaneously repealed and immediately revived without any amendment the VRA Act, in order to correct a procedural error made during the passage of the VRA Act in 1984.

The VRA Act defines "video work" as any series of visual images, with or without sound, produced electronically by the use of information contained on any disc, magnetic tape or any other device capable of storing data electronically and shown as a moving picture.

The VRA Act requires that:

- Video works must be submitted to the British Board of Film Classification ("BBFC") for a statutory age rating before it can be supplied as a physical product to the public. Thus any device capable of storing a video recording has to be rated by the BBFC before such a device holding stored video works can be supplied to the public[9];
- Supply is defined as "supply in any manner, whether or not for reward, and, therefore, includes supply by way of sale, letting on hire, exchange or loan…"; and
- The supply of a video recording will however be an exempted supply if it is not made for reward or if the supply was not made in the course or furtherance of a business.[10]

Certain exempt video works do not have to carry age ratings and can be sold to consumers of any age. A video work is exempted from the rating requirements of the VRA Act if taken as a whole the work is:

- Designed to inform, educate or instruct;
- Concerned with sport, religion or music; or
- A video game.

[9] Department for Culture, Media and Sport. Consultation on Exemptions to the Video Recordings Act… 9 May 2012.
[10] Section 3(2) of the Video Recordings Act (1984 Chapter 39 as amended)

This exemption does not apply if the video work, to any significant extent, depicts adult-type content such as sex, gross violence or criminal behaviour.[11]

In terms of section 9(1) of the VRA Act:

- Supplying or offering to supply a video work for which no classification certificate has been issued is an offence unless the supply is an exempted supply or the video work is an exempted work;
- The offence of supplying a video work which has not been classified carries upon conviction a fine, imprisonment or both;
- Product packaging and storage media must be labelled with the appropriate age rating; and
- It is an offence to supply classified work in breach of the age rating on its classification certificate.

Enforcement of the system is done by Trading Standards Officers who carry out checks on retailers to ensure products are labelled and sold in accordance with the law.

No special license is required to supply video works in the UK except for the supply of adult content for which a sex shop license is required as such works may only be distributed through licensed adult stores.[12] In the UK the video works being supplied has to be classified but the vendors dealing in such goods do not require any separate registration.

The Video Standards Council ("VSC") of the UK is a self-regulatory body established in 1989 which fulfils two basic roles:

- "It is a standards body for the video and video games industries and has a Code of Practice designed to ensure that both industries show a duty of care in their dealings with customers and the public generally;" and
- It is the UK regulator responsible for the age rating of video games supplied in the UK using the Pan-European Game Information rating ("PEGI") system. In fulfilling this role it uses the name Games Rating Authority ("GRA").

On 30 July 2012 the PEGI system was effectively incorporated into UK law and the GRA was appointed as the statutory body responsible for the age rating of video games in the UK using the PEGI system. This means that the age classification of games rated "12", "16" or "18" under the PEGI system will have statutory backing but games suitable for the younger age groups remain exempt from age rating.[13]

Laurie Hall, Director-General of the GRA said: "Although the VSC has been rating games using the PEGI system since 2003, our role as the UK statutory video games regulator provides a new and challenging dimension to our work which, as always, places child-protection and parental information at the forefront of what we do. We look forward to our new role with relish using a proven games ratings information system."

Previously the UK had two age ratings systems for video games, BBFC and PEGI, but since 30 July 2012 PEGI has become the single age rating system for all video games in the UK.

In terms of the PEGI system:

It is illegal for a retailer to sell a video game with a PEGI rating to an individual with an age lower than the assigned age classification.

Video games only suitable for players older than 12 years could still be exempt if such games are primarily concerned with music, sports, religion or education, provided the games do not include scenes depicting gross violence, sex or criminal activity as specified in section 2(2) of the VRA Act.

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[11] http://www.bbfc.co.uk/education-resources/student-guide/legislation/video-recordings-act
[12] http://www.bva.org.uk/frequently-asked-questions-faq#Do_I_need_a_special_licence_to_open_a_video_DVD_store
[13] Ibid: 9

The VRA Act only regulates physical copies of video works. Consumers are increasingly accessing content online through a variety of digital platforms. The Department for Culture, Media and Sport has indicated that it is working on initiatives to include the "same information and labelling available online as in the offline world". To this extent there are currently a number of voluntary classification and labelling schemes available for online content in the UK.

The BBFC offers a voluntary online classification system to digital service providers:

- Providers which join BBFC Online are allowed to display the BBFC age ratings that were awarded to physical video works should the same content be offered online;
- BBFC Online covers most non-physical video content distribution including DTO, Streaming services and VOD;
- Providers using the BBFC's classifications for their online content pay a licensing fee under the BBFC Online service;
- BBFC Online then issues an "electronic black card" which can be affixed to the start of a content file replicating the manner in which the BBFC certificates are shown at the beginning of films screened at cinemas; and
- Producers can also apply for age ratings for content that has only ever been intended for online distribution under the BBFC's Watch and Rate service which was launched in December 2010.[14]

BBFC Online members include most of the major film studios[15] as well as prominent aggregators and platforms operators including BT Vision and Netflix. At the end of January 2012 the BBFC Online had issued 214 000 certificates for individual video works. However, not all of the major digital service providers are members of the BBFC Online and some choose to apply their own age ratings to products offered over their platforms. Prominent providers which choose to ascribe their own ratings are LoveFilm and iTunes.[16]

8.7.2. Applying the regulations to the informal distribution

To establish how the informal trade in video works is regulated in the UK we will apply the rules cited above to the following transaction:

- A vendor trading from a temporary stall at a UK train station sells movies and games on DVD. The vendor trades in cash and does not have the facilities to accept credit or debit cards.

The VRA Act does not require vendors trading in video works to obtain a certificate or license in order to legitimately trade such goods unless the vendor is selling adult content for which a sex shop license is required. The VRA Act simply requires that all video works be classified by the relevant regulatory body before such content is supplied to the public. Films need to be classified by the BBFC and Video Games by the GRA.

Supplied is defined widely but excludes supplies made that are not for gain or that are not made in the furtherance of a business. The vendor trading from the informal stall at the station is selling films and video games and accordingly the vendor will only be able to sell classified video works.

If the vendor is trading solely in exempted goods, such as video games suitable for kids younger than 12 years of age, the vendor will be able to sell the goods without any registration or classification certificate.

If the vendor sells any video works which have not been classified and are not exempted the vendor will be guilty of an offence which carries a fine, imprisonment or both in terms of section 9(1) of the VRA Act

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[14] http://www.bbfc.co.uk/about-bbfc/media-centre/creative-industries-minister-welcomes-bbfc-watch-and-rate-scheme

[15] BBFC Online members include the following studios: Walt Disney Studios, 20th Century Fox, Warner Brothers, Paramount Pictures, Universal Pictures, Lions Gate, etc.

[16] *Ibid: 9*

8.7.3. Applying the regulations to online distribution

We will determine how the online distribution of films and video games is regulated in the UK in terms of the following transaction:

- A consumer logs onto the UK registered website of an online retailer which specialises in movies and games and purchases a movie by means of DTO.

No special license is required to supply video works in the UK. Retailers trading in video works do not have to register to be able to legally operate.

The VRA Act only regulates physical copies of video works but there are currently a number of voluntary classification and labelling schemes available for online content in the UK. The BBFC offers a voluntary online classification system to digital service providers and producers can apply for age ratings for content that has only ever been intended for online distribution under the BBFC's Watch and Rate service.

8.7.4. Enforcement of the VRA Act

The BBFC uses the following procedures to regulate and assess compliance by distributors to the VRA Act:

- Once a film or video game has been rated by examiner, a certificate of classification called a "black card' is issued with the film's unique registration number on it.
- The distributor is required by the BBFC to:
    - Display the black card number and appropriate age restriction symbol (using the colour coded system) on all film or video game packaging; and
    - Display the black card number and appropriate age restriction symbol (using the colour coded system) on all film or video game promotional material.
- To assess compliance, the BBFC:
    - Works in conjunction with police and Trading Standards Officers;
    - Provides certificate of evidence if needed;
    - Inspects premises;
    - Inspects promotional material; and
    - Inspects content for sale / hire.
- Non-compliant distributors may be subjected to the following:
    - Revoking of the black card;
    - Forfeiture of the film or video game; and / or
    - Imprisonment of up to 2 years, a fine of up to £20 000, or both.

8.7.5. Conclusion

The following conclusions can be drawn pertaining to the UK's regulatory environment:

- The UK implements a system of strict regulation pertaining to the classification of physical trade of video works;
- Government sanctioned bodies are responsible for the age classification of films and video games and these ratings are statutorily enforced;
- To supply a video work which has not been classified is an offence which carries upon conviction a fine, imprisonment or both;

- The UK system does not require distributors and retailers of video works to register but rather mandates the rating and classification of the video works being traded. A distinction between the physical trade and online distribution is made;
- The VRA Act applies only to the physical trade and does not regulate online distribution;
- A voluntary regulation system administered by the BBFC has been implemented for online films in an attempt to standardise the classification of contentment across the various distribution platforms; and
- This voluntary regulation initiative does not carry any legal bearing and is merely a system implemented to assist consumers.

Video games for the age group 12 years and above are classified by the GRA using the PEGI system. It is illegal to sell video games to an individual with an age lower than the assigned age classification.

8.8. USA

8.8.1. The legislation and regulations

The USA does not have a statutorily enforced system of content regulation for films and video games at state or federal level. The film and video games industries rely on self-regulation by industry bodies. The USA has a rich history of attempted regulation of the film industry but following a series of Supreme Court decisions the government sanctioned censorship and regulation of films was abandoned.[17]

The Motion Picture Association of America, Inc. ("MPAA"), together with its subsidiaries and affiliates, forms the industry organisation for the American motion picture, home video and television industries. The MPAA rating system is used for rating films and associated advertising for certain audiences in the USA. The MPAA's rating system is administered by a non-government agency known as the Classification and Ratings Administration ("CARA"). "CARA's mission is to afford parents the tools they need to make informed decisions about what their children watch."[18] The submission of a movie for a rating by a filmmaker is voluntary and is not required by law. "However, the overwhelming majority of filmmakers have their movies rated, and each member of the Motion Picture Association of America has agreed to have all its theatrically released movies rated."[19]

The Entertainment Software Rating Board ("ESRB") is the non-profit, self-regulatory body that assigns age and content ratings for video games in the USA. The ESRB was established in 1994 by the Entertainment Software Association. As part of its self-regulatory role to the video game industry the ESRB also enforces industry-adopted advertising guidelines and helps ensure responsible web and mobile privacy practices. The ESRB rating system encompasses guidance about age-appropriateness, content, and interactive elements.[20]

Despite content regulation not being statutorily enforced certain content is illegal in the USA. An example of this is child pornography which is illegal under federal law in all states. The Supreme Court found child pornography to be legally obscene which have been declared by the Court to fall outside the scope of the free speech protection in the first amendment. As a result child pornography is obscenity which unlike some other forms of pornography does not enjoy protection under the first amendment and is illegal.[21]

8.8.2. Applying the regulations to informal distribution

To establish how the informal trade in films and video games are regulated in the USA we will apply the regulations cited above to the following transaction:

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[17] Olson, K. 2009. Movie Censorship. Lehigh University, Bethlehem, PA 18015
[18] http://www.filmratings.com/what.html
[19] *Ibid: 18*
[20] http://www.esrb.org/about/index.jsp
[21] Burns, AI. 1987. Remarks of Arnold I Burns Before the Florida Law Enforcement Committee on Obscenity, Organized Crime and Child Pornography. NCJ 109133.

- A vendor trading from a temporary stall at a USA train station sells movies and games on DVD. The vendor trades in cash and does not have the facilities to accept credit or debit cards.

There is no statutory enforcement of film classification in the USA. The film industry utilises a voluntary rating system which is administered by the CARA. Adoption of the self-regulation has been broad and "the Motion Picture Association of America has agreed to have all its theatrically released movies rated."

Similarly there is no legally enforced classification system for video games. The ESRB is a self-regulatory body that assigns age and content ratings for video games in the USA. The rating system has been widely adopted by game publishers and is supported by virtually all major national retailers.[22]

The vendor selling films and video games does not have to be registered with any authority to legally trade in physical content goods. There is a high likelihood that the goods being sold by the vendor would have been voluntarily rated by an industry organisation if the films or video games are mainstream goods.

Even though the films and video games do not have to be rated to be legally sold the vendor can still be guilty of an offence if it is trading in illegal goods such as child pornography.

8.8.3. Applying the regulations to online distribution

To determine how the online distribution of films and video games is regulated in the USA we will evaluate the following transaction.

- A consumer logs onto the USA registered website of an online retailer which specialises in movies and games and purchases a movie by means of DTO.

As cited previously in this report the USA does not have a mandatory rating process in place for films and video games. These goods are voluntarily rated by self-regulatory industry organisations.

The online retailer does not need to be registered to legally sell films and video games in the USA. Despite that the films and video games do not have to be rated to be legally sold the online retailer could be guilty of an offence if it is trading in illegal goods such as child pornography.

8.8.4. Enforcement of the CARA rating system

The MPAA uses the following procedures to regulate and assess compliance by distributors who voluntarily register using the CARA rating system:

- Once a film has been rated by examiners, a certificate of classification is issued with the film's unique registration number, office seal of the MPAA and age restriction symbol on it;
- The distributor is required by the MPAA to:
    - Display the CARA registration number and appropriate age restriction symbol on all film packaging; and
    - Display the CARA registration number and appropriate age restriction symbol on all film promotional material.
- To assess compliance, the MPAA:
    - Inspects premises;
    - Inspects promotional material; and
    - Inspects content for sale / hire.

[22] *Ibid: 20*

- Non-compliant distributors may be subjected to the following:
  - Revoking of the CARA rating;
  - Suspension of the rating process (if the film has been distributed before rating is complete); and / or
  - Suspension of the rating process for any other films submitted by the distributors to CARA.

8.8.5. Conclusion

The following conclusions can be drawn in terms of the USA's regulatory environment:

- The USA does not have a statutorily enforced system of content regulation for films and video games at state or federal level;
- The film and video games industries rely on self-regulation by industry bodies;
- Despite content regulation not being statutorily enforced certain content is illegal in the USA such as child pornography which is prohibited in terms of federal law across the USA.

The self-regulation initiatives implemented in the film and video game industries have been successful and are supported and enforced by the major stakeholders in these sectors.

8.9. Conclusion

A summary of the regulations and compliance measures in the benchmarked countries in the distribution of films and video games sectors is as follows:

8.9.1. Informal distribution regulation

Informal distribution measures the physical distribution of films and video works.

8.9.1.1. Films

Informal - Films Country	SA	Nigeria	Kenya	UK	USA
Statutory Act	FPB Act	NFVCB Act	FSP Act	VRA Act	None
Regulator - Statutory	FPB	NFVCB	KFCB	BBFC	None
Classification of content	√	√	√	√	
Registration of distributor	√	√	√		
Distribution Licenses	√	√	√		
Register of film or video work		√			
Declaration of copyring ownership		√			
Self-regulation					CARA
Classification of content					√
Child pornography illegal	√	√	√	√	√

The African countries are more regulated than the UK and the US when one examines the above summary for the distribution of physical films.

Nigeria and Kenya are similar to SA, with Nigeria requiring additional proof of ownership and administrative processes. Kenya is also responsible for regulating broadcast content whereas SA and Nigeria are not.

The UK regulates classification of content and does not require the registration or licensing of distributors.

The US does not perform any statutory regulation of content and instead relies on a system of self-regulation.
In all countries, the distribution of child pornography is illegal.

8.9.1.2. Video games

Informal - Video Games Country	South Africa	Nigeria	Kenya	UK	USA
Statutory Act	FPB Act	None	None	VRA Act	None
Regulator - Statutory	FPB	None	None	GRA	None
Classification of content	√			Yes	
Registration of distributor	√				
Distribution Licenses	√				
Register of film or video work					
Declaration of copyring ownership					
Self-regulation					ESRB
Classification of content					√
Child pornography illegal	√	√	√	√	√

SA and the UK appear to be the only countries that have statutory regulation of video game content. Nigeria and Kenya do not regulate video games, and the US relies on self-regulation.

In all countries, the distribution of child pornography is illegal.

8.9.2. Online distribution regulation

8.9.2.1. Films

Online - films Country	SA	Nigeria	Kenya	UK	USA
Statutory Act	FPB Act	NFVCB Act	FSP Act	None	None
Regulator - Statutory	FPB	NFVCB	KFCB	None	None
Classification of content	√	√	√	√	
Registration of distributor	√	√	√		
Distribution Licenses	√	√	√		
Register of film or video work		√			
Declaration of copyring ownership					
Self-regulation	ISPA, WASPA			BBFC Online	CARA
Classification of content				√	√
Child pornography illegal	√	√	√	√	√

The African countries are more regulated than the UK and the US when one examines the summary for the distribution of films online.

SA, Nigeria and Kenya all require classification, registration and licensing of online films. Both the UK and the US rely on self-regulation for film classification.

In all countries, the distribution of child pornography is illegal.

8.9.2.2. Video games

Online - video games Country	South Africa	Nigeria	Kenya	UK	USA
Statutory Act	FPB Act	None	None	None	None
Regulator - Statutory	FPB	None	None	None	None
Classification of content	√			√	
Registration of distributor	√				
Distribution Licenses	√				
Register of film or video work					
Declaration of copyring ownership					
Self-regulation	ISPA, WASPA			BBFC Online	ESRB
Classification of content				√	√
Child pornography illegal	√	√	√	√	√

SA appears to be the only country in the study that has statutory regulation of video game content. Nigeria and Kenya do not regulate video games, and the UK and the US relies on self-regulation.

In all countries, the distribution of child pornography is illegal.

8.9.3. Compliance measures

The table below summarises the compliance measures of each country researched:

Country Non-compliance consequences	SA	Nigeria	Kenya	UK	USA
Confiscation of content	√	√	√	√	
Destruction of content	√	√	√		
Maximum imprisonment	5 years	6 months	5 years	2 years	
Maximum fine	Not specified	N300,000	100,000 shillings	£20,000	
Obligation by distribution to publish quarter page notice on various media platforms		√			
Revoking license	√	√	√		
Revoking classsification certificate	√	√	√	√	√
Suspension of rating process					√

The table below summarises the consequences for non-compliance is as follows:

Country Non-compliance consequences	SA	Nigeria	Kenya	UK	USA
Confiscation of content	√	√	√	√	
Destruction of content	√	√	√		
Maximum imprisonment	5 years	6 months	5 years	2 years	
Maximum fine	Not specified	N300,000	100,000 shillings	£20,000	
Obligation by distribution to publish quarter page notice on various media platforms		√			
Revoking license	√	√	√		
Revoking classsification certificate	√	√	√	√	√
Suspension of rating process					√

All countries researched require distributors to display the film registration number and age restriction symbol on packaging and promotional material for films, and where relevant, for video games. Compliance is generally enforced using inspections, the revocation of licenses, confiscating of content, imprisonment and fines. The exception to this is the USA where classification is voluntary and non-compliance results in revocation of ratings and the suspension of any rate process.

8.9.4. High level conclusion

From the research conducted, it would appear that the more developed the country, the less regulation and compliance measures that are used. Self-regulation by industry bodies are favoured in the more developed countries, and, apply to the distribution of both physical and online content.

Regardless of the country, classification of content is deemed important, and, child pornography is illegal.

9. Recommendations

9.1. Introduction

As specified in Section 3 : Methodology, Deloitte undertook to provide the FPB with recommendations on potential regulatory mechanisms that could be adopted by the FPB pertaining to the online and informal video game and film distribution sectors.

The recommendations made below are based on insights gained from:

- The results of surveys conducted (Section 6);
- The interviews held with the industry stakeholders listed in the project plan (including Section 7); and
- The regulatory benchmarking exercise (Section 8).

All recommendations made take into account:

- Relevant limitations currently experienced by the FPB; and
- The role that the FPB has to fulfil, i.e. to "provide consumer advice to enable adults to make informed viewing… and gaming choices, both for themselves and for children in their care; protect children from exposure to disturbing and harmful materials…; and make the use of children in and the exposure of children to pornography punishable."[23]

[23] *Ibid: 1*

The informal and online distribution sectors for films and video games are dealt with separately in this section.

9.2. The informal distribution sector

9.2.1. Insights from survey results

Our physical and online surveys indicated the following regarding the informal distribution market:

- The broader demographic in SA is the main consumer of films and video games in the informal distribution market;
- Pirated physical content (i.e. DVDs) dominates the distribution of films and video games in this market;
- Other forms of consumption of films that are favoured are Free and Pay TV;
- Mobile games is the favoured choice of video game consumption;
- Affordability and convenience are the key drivers for decision-making around film and video game purchasing; and
- Regulation by government is seen as expensive by the distributors.

9.2.2. Insights from interviews with industry stakeholders

The following dynamics in the informal distribution sector were highlighted by industry stakeholders:

- Legitimate content in the informal market is limited and mostly regulated by either ICASA or the FPB;
- There are high levels of illegitimate content;
- Informal vendors generally have no fixed place of business and find the administration requirements of the FPB onerous;
- There is a low awareness of the FPB and the FPB Act amongst the informal vendors;
- Informal vendors that are aware of the FPB Act regard the registration and licensing fees as an expense with no benefit to them; and
- There is a need for alternative regulation methods for the informal distribution market.

9.2.2.1. Legitimate content is limited and mostly regulated

Industry stakeholders indicated that:

- Legitimate physical film content is produced locally by Free TV, Pay TV and local film producers;
- The majority of this content is either broadcast or distributed through the formal distribution platforms;
- A small percentage of legitimate local content is sold through the informal distribution platforms e.g. DVDs by Chicco Twala, eKasi movie producers and Bubblegum Film producers;
- Many stakeholders estimated the percentage of legitimate content distributed in the informal market at 0% to 1% of the total informal market; and
- Legitimate video game content sold is mostly restricted to mobile games.

As ICASA regulates the broadcasters and their commissioned content (eKasi and Bubblegum Films), and Chicco Twala is registered with the FPB, it would appear that most of the legitimate informal film content is classified and the distribution chain is regulated. The only exception to this is DVD copies of broadcast content that is sold by film producers through the informal distribution market. This would appear to be the eKasi and Bubblegum Film producers.

9.2.2.2. Physical content dominates the informal market

Stakeholders indicated that the main method of selling film and video game content was on DVDs or USB sticks. This is largely due to the following:

- DVDs and USB sticks allow for mass duplication at a low cost (using low quality DVDs);

- DVDs and USB sticks allow for the storage of more than one film / video game;
- Even consumers with low disposable income have DVD players in their residences;
- The latest DVD players have USB ports;
- DVDs and USB sticks do not require internet connectivity or access to a computer; and
- DVDs and USB sticks are portable.

Another emerging trend is the sale of films and video games on hard drives – the consumer can use their own or can buy a pre-loaded hard drive from pirates.

The use of DVDs, USB sticks and hard drives makes the informal content hard to regulate and track as:

- It is sold in small quantities per individual;
- Sold to many individuals;
- In multiple locations; and
- It is easily hidden.

9.2.2.3. High levels of illegitimate content

Industry stakeholders indicated that most of the physical content sold in the informal distribution sector is pirated:

- One informal producer / distributor estimated that for every film he produces and distributes, he can legitimately sell 40,000 copies. The pirates, on the other hand, are copying these DVDs and are selling 1 million copies (i.e. more than 20 times the legitimate trade);
- SAFACT estimates that the trade in illicit physical content is worth R200 million per year. This figure was calculated based on the size of the legitimate trade of content in SA and the total value of illegal goods seized during the year; and
- Most stakeholders interviewed estimated that the levels of pirated content in the informal market were between 99% and 100% of the informal market.

- The proliferation of pirated content is driven by market demand which in turn is driven by the economics of the broader demographic, i.e.:

  - Monthly income of less than R5 000 and thus very little disposable income – the low prices of pirated content makes it affordable. Pirated content is typically sold at prices between R13 for one film / video game and R60 for 5 films/ video games. The high cost of legitimate content makes it unaffordable;
  - The need for easy and cheap access to content – pirated content is sold at places where consumers live and commute. Distribution outlets of legitimate content are not easily accessible; and
  - Pirates sell content at the right price, at the right time and in the right place.

Legitimate content suppliers find is unfeasible to sell content at the pirated prices because:

- Supplier prices are high and inflexible; and
- The overheads incurred to match the pirate distribution system and footprint are prohibitive.

Further to this, the possible use of informal vendors as distributors of licit goods has been a topic of repeated discussion in South Africa. The major distributors of Hollywood films, represented by SAFACT, have generally rejected this approach as too complicated and do not supply street vendors. The film content on the streets thus can only be pirated content.[24]

9.2.2.4. Informal vendors generally have no fixed place of business

[24] *Ibid*: 1

Informal traders by definition generally have no formal place of business. They tend to trade at:

- High traffic intersections;
- Flea markets and Saturday markets;
- High traffic transport hubs such as train stations and taxi ranks (Park station and Belville station are the main trading points.);
- In townships – often approaching consumers at their residences; and / or
- Home, i.e. operators which produce and market their goods from home. Marketing of the DVDs are done via social media, email distribution lists and on sale and auction sites.

This trade is dominated by pirates who keep mobile to avoid being detected as they are distributing illegal content. Legitimate traders have to keep mobile too to remain competitive with the pirates.

Thus, to regulate this market is logistically extremely difficult.

As it is a registration requirement of the FPB Act that distributors provide a legitimate place of business address, the informal vendors are unable or unwilling to comply.

In addition to this, informal distributors find the administrative requirements of the FPB onerous – tax clearance certificates, registered company documents, etc. are required to register as a distributor. Informal distributors are often sole proprietors trading in their personal capacities rather than through a legal entity and cannot produce the required supporting documentation. Thus, they are unable to register with the FPB.

9.2.2.5. Low awareness and buy-in amongst the informal sector re the FPB Act

Industry stakeholders indicated that:

- The levels of awareness and education amongst consumers and distributors in the informal sector of the FPB Act and associated regulations are very low – it was reported that the methods used to create awareness are not effectively reaching the broader demographic;
- The perception exists among informal traders that registering as a distributor with the FPB is a costly and unaffordable exercise; and
- Informal vendors do not perceive that there is any direct or immediate upside as a result of registering with the FPB.

9.2.2.6. Low awareness in terms of the ethical repercussions of piracy

- Many informal distributors do not know why pirated content is undesirable (and even if they do, they sell illegitimate content to survive and the ethics of piracy becomes less of a priority); and
- Many consumers of content purchased from the informal distributors prioritised affordability over the legitimacy of the content.
- This needs to borne in mind when creating awareness campaigns targeting this sector.

9.2.2.7. Proposed regulatory methods

Industry stakeholders contributed the following proposed methods of regulating the informal distribution market for films and video games:

- Awareness campaigns which speak to the broader demographic should be done on the right platforms to help distributors and consumers understand why classification and regulation of content is important. A good example of how this was done successful was the AIDS campaigns conducted by Love Life - they went into the townships with teams to spread the message;

- The FPB's registration fee could be used to provide infrastructure / support to the informal distribution market – thus distributors would see an upside to registering and licensing content with the FPB;
- A hybrid model of government control and self-regulation was suggested;
- One needs to enlist the help of the umbrella bodes e.g. Informal Traders Association, Street Vendors Association, Hawkers Association, FABCOS etc. when accessing the informal distributors and disseminating information;
- A model that can be enforced consistently across all vendor types needs to be implemented, i.e.it was felt that the FPB should implement a system where formal and informal distributors are treated equally;
- "Hawkers Certificates" could be used to register informal vendors (instead of formal vendors' certificates). This will enable an understanding of the trade and inform who is participating in the informal trade;
- A carrot and stick approach could be introduced. One needs incentives and penalties. Government funding should be dependent on complying with the regulations. No FPB registration means no government funding; and
- It was suggested that the FPB is currently housed in the wrong government department – Home Affairs. It was felt that the FPB should be moved from Home Affairs as the regulation of content does not fall within the mandate of Home Affairs. Home Affairs does not have any incentive to support the FPB in terms of legislation and funding. A suggestion was that the FPB would be better placed under Arts and Culture or Communications.

Although it is outside the scope of this report, the following anti-piracy measures were suggested:

- Provide a viable, legitimate, affordable film and video game content source so that informal distributors have an alternative to pirated content;
- The introduction of awareness campaigns and a legitimate alternative to pirated goods will promote self-regulation; and
- Use advertising to sponsor content production, and, use existing distribution networks such as logistics companies, newspapers etc. to distribute content for free – the pirates will then be unable to compete.

9.2.3. Insights gained from regulatory benchmarking

9.2.3.1. Film content

The benchmarking exercise revealed the following:

- The African countries researched (including SA) are more regulated than the UK and the US in terms of film content;
- Nigeria and Kenya are similar to SA in terms of classification and regulation, although Nigeria requires additional proof ownership and record-keeping;
- Kenya is also responsible for broadcast content, whereas SA and Nigeria are not;
- The UK regulates classification of content and does not require the registration or licensing of distributors;
- The US does not perform any statutory classification and regulation of content, and instead relies on a system of self-regulation;
- In all countries, the distribution of child pornography and the sale of pirated content is illegal; and
- No distinction is made between informal and formal distribution sectors.

It is difficult to assess the effectiveness of the Nigerian and Kenyan regulations and compliance procedures introduced because after repeatedly contacting the statutory bodies, we were unable to find anyone to confirm that the measures were successful. What we do know is that piracy is still rife in these areas and attempts to introduce a strict distribution framework in Nigeria was not met favourably by the market and has had limited success[25].

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[25] Time World, 20 September 2011, Welcome to Nollywood: Nigeria's Film Industry Is More Prolific than Hollywood — and Faces Even More Piracy; http://www.time.com/time/world/article/0,8599,2084382,00.html

There is no statutory enforcement of film or video game classification in the USA. The film and video game industries utilise voluntary rating systems. Despite the classification of films being voluntary the adoption of self-regulation in the USA has been widely implemented. The Motion Picture Association of America has agreed to have all its theatrically released films rated and the ESRB video game rating system has been widely adopted by game publishers and is supported by virtually all major national retailers in the USA.

9.2.3.2. Video game content

The benchmarking exercise revealed the following:

- SA and the UK appear to be the only countries researched that have statutory regulation of video game content;
- Nigeria and Kenya does not regulate video games at all;
- The US relies on self-regulation (including classification); and
- No distinction is made between the informal and formal distribution sectors.

9.2.4. Incompatibility of the informal vendor with the FPB's registration requirements

In SA, in terms of section 18(1) of the FPB Act any person who distributes or exhibits any film or game in SA must register with the FPB as a distributor of films. The FPB Act defines "distribute" widely and any person who conducts business in the selling, hiring out or exhibition of films will be classified as a distributor. Thus, all vendors trading in films or video games are required to register with the FPB. This is independent of the nature of the trade and includes formal and informal vendors. The platform used for distribution is also irrelevant. The registration requirement applies equally to an informal vendor trading on foot at an intersection, a large retailer selling films or a website that offers films for sale without any consideration of whether it trades in physical or digital goods.

Given the nature of informal vendors' activities, with no fixed place of business and vending practices driven by survivalist mentalities and piracy it is not surprising that there is a low level of business formalisation. They are not typically registered for tax or with CIPA, and, they do not have the requisite documents required for FPB registrations, i.e. tax clearance, certificates, proof of business registration and other supporting documents.[26]

The FPB's requirements make it virtually impossible for the informal trader selling physical content goods to comply with the FPB Act.

The market factors described above has led to a decoupling between the compliance of the formal and informal sectors to the FPB Act and regulations. This situation is untenable as the legal requirement for compliance applicable to these sectors is similar.

9.2.5. Conclusion

The following key points can be deduced for the informal film and video game distribution market in SA:

- The levels of legitimate informal distribution are very low in comparison to the whole informal distribution market;
- Those informal distributors that are aware of the FPB cannot meet the administrative hurdles of the FPB and find the licenses unaffordable;
- Pirated content makes up the lion's share of this market of the informal distribution trade;
- Distributors of pirated content will not register themselves as they are trading illegally and do not want to be registered.

[26] "Registration as a Distributor or Exhibitor of Films" can be downloaded at http://www.fpb.org.za/classifications/registration-forms-regulations?view=docman

The following proposals are made in light of these deductions:

9.2.5.1. Classification of content remains compulsory

The distribution of unrated content impairs a consumer's ability to make informed decisions and should not be tolerated. Thus, the distribution of films or video games that have not been classified by the FPB should be in contravention of the law as is currently the case. All content should be classified before it is allowed to be distributed.

The product packaging and storage media of physical content goods must be labelled with the appropriate age rating and it is an offence to supply classified work in breach of the age rating on its classification certificate.

Dealing with awareness around age restrictions and the importance of content classification amongst consumers is paramount – this needs to be done using platforms and messaging that talks to the broader demographic.

9.2.5.2. Regulation of content

The FPB has a number of options at their disposal when it comes to regulating distributors of informal content. The FPB can:

- Exclude informal distributors from compulsory registration, provided that the content is classified with the FPB. This is along the line of the UK and the US models.
  Shortcomings of this option are:

  - Formal vendors who are already registered with the FPB might see this as inequitable and will request that they are also not required to be registered or pay registration fees; and
  - Since the FPB relies on the registration fees for its own commercial viability, the lack of registration fees will affect its long-term sustainability unless another income stream can be sourced; or

- Register informal vendors by providing a new category of license such as a Hawker's License. This license should have less onerous administration requirements and lower licensing fees to accommodate the lack of business address and affordability issues. This license will allow the FPB to track the trends in this sector and to continue regulating it; and / or
- Register informal vendors and provide government funding for distribution development in conjunction with provincial Film Commissions. This will allow informal vendors to establish a distribution network and to provide content at prices that can fight piracy. It will also address the perception that distributors do not receive any value / benefits in return for registering and paying registration fees.

9.2.5.3. Applying recommendations for the informal distribution sector to the framework used for regulatory comparison

The following transaction was used to determine how the informal trade of physical content goods is regulated in the countries chosen for comparison:

- A vendor trading from a temporary stall at a train station sells movies and games on DVD. The vendor trades in cash and does not have the facilities to accept credit or debit cards.

In order to practically illustrate the recommendations made, to increase the efficiency of regulating the informal content distribution sector, we have applied the recommendations to the hypothetical transaction.

In terms of section 18(1) of the FPB Act any person who distributes or exhibits any film or game in SA must register with the FPB as a distributor of films and/or video games and is obliged to "submit for examination and classification any film or game that has not been classified, exempted or approved".

The vendor selling the movies and games on DVD will be classified as a distributor in terms of the FPB Act and is required to register as such. The vendor will fall within the category of distributors created for informal traders such as a "Hawker's Licence" which allows it to complete a simplified registration process. Instead of having to comply with the onerous administrative requirements posed to general distributors the vendor will be able to register using an Identity Document ("ID") or passport and will not have to produce a registered business address and Tax Clearance Certificate, etc. Relying on an ID document or passport is practical as most informal vendors trade as sole proprietors in their own names and do not have fixed places of business.

Obtaining a "Hawker's Licence" will require a minimal administrative fee. Informal vendors will be incentivised to register with the FPB under this category as it will enable them to potentially gain access to funding or distribution assistance from industry bodies such as the NFVF and various Film Commissions. The informal distribution sector should be aware of the benefits associated with registration as the FPB will have embarked on a grassroots campaign to educate distributors and consumers who are active in this sector about the risk and rewards of non-compliance.

As a registered distributor the vendor will only be entitled to sell duly classified physical content goods and will have to submit all unclassified movies and games to the NFVF for a rating prior to selling such content. As part of the funding assistance available to registered informal distributors the vendor should be able to apply for assistance to help pay the classification fee. Subsidising the classification of selected informally produced and distributed content is a measure that will develop the local film industry and should be considered as an industry development expense.

Failing to comply with the provisions of the FPB Act could lead to criminal prosecution and the vendor might be convicted if it fails to comply with the provisions as described above.

9.3. Online distribution

9.3.1. Insights from survey results

Our physical and online surveys indicated the following:

- The vast majority of South African consumers still purchase physical film and video games content; and
- Those consumers that do purchase content online tend to favour well-established websites.

9.3.2. Insights from interviews with industry stakeholders

The following dynamics in the online distribution sector were highlighted by industry stakeholders:

- Limited number of SA distributors of online film and video game content;
- Shifting online jurisdictions;
- High volumes of online content; and
- Online access is mostly via mobile.

9.3.2.1. Limited number of local online content distributors

From discussions with ISPA, there appears to very little content hosted on local websites. The reasons for this are more than likely due to the following trends in the broader demographic:

- Lack of computer literacy;

- Lack of access to computers;
- Unaffordability of computer and broadband; and
- Expense of mobile data costs.

Many of the stakeholders interviewed shared this view and attributed it to the same factors as ISPA.

The slowness of broadband and the lack of market locally have resulted in a slower growth curve in terms of the adoption of online content in SA.

The diaspora's demand for online African content is large, but, is distributed by ex-pats who operate from jurisdictions outside of SA (and thus outside the jurisdiction of the FPB). Examples of such distributors include iRoko, Reel Africa and AfricaTV.

Content that can be accessed online via mobile is self-regulated by the mobile companies (Vodacom, MTN and CellC) and WASPA.

9.3.2.2. Shifting jurisdictions

The online environment is unique as internet users have the ability to freely browse webpages hosted anywhere in the world. A user can swiftly and seamlessly switch between a South African and a foreign website. The internet transcends national boundaries and sovereign territories which presents unique challenge for regulators, consumers and content providers.[27]

Traditional methods of media consumption can be regulated relatively easily due to all activities occurring within a country's boundaries. The consumption of media over the internet has altered this dynamic as a consumer now has the option of accessing a content provider regulated under an alternative system if the content that the consumer desires is not available within their own jurisdiction. An excellent example of such conduct is the fairly common practice where individuals based in SA open USA-based iTunes accounts in order to access content that is unavailable in the SA iTunes store.[28]

Also, should a regulator attempt to restrict content hosted on a SA website, the content producer will in all likelihood just simply move their content onto another website in another jurisdiction.

9.3.2.3. High volumes of content

The online environment has brought a new dimension to content production and consumption:

- Since the advent of the YouTube era the amount of user-generated content produced and consumed has grown exponentially; and
- In addition to this, the amount of studio produced films, smartphone apps and games has also risen significantly.

This has placed an unmanageable burden on regulators which are unable to process the significant volume of content available on the internet through traditional mechanisms.

A recent example of this is Apple choosing not to release approximately 101 000 games over its iTunes platform to the SA market as a direct result of the FPB's regulatory requirement which obliges it to submit each game for a rating prior to distribution. Apple queried the process of having to submit each game for a rating despite it having an internationally accepted internal system that classified the games offered by the company.[29]

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[27] http://ijlit.oxfordjournals.org/content/18/2/142.abstract

[28] http://open-us-itunes-account-south-africa.blogspot.com/

[29] As per the minutes to the Portfolio Committee for Home Affairs meeting with the FPB held on 11 October 2012 where the FPB's annual report was presented to the committee. Full report and minutes available at http://www.pmg.org.za/report/20121011-film-and-publication-board-their-annual-report-and-financial-statemen

The FPB is aware of the challenges pertaining to the regulation of online content and has acknowledged that the current system is unable to accommodate the web offering of major international content providers such as Apple due to capacity and other constraints. The FPB Act requires all films and games to be rated before being distributed in SA but Blackberry and HTC were allowed to distribute content through the companies' respective application ("app") stores without such content being rated while a solution to the challenge is found. Apple chose to not make similar content available in its app store as the company did not want to be in contravention of the FPB Act.[30]

A situation where non-compliance with the FPB Act is condoned due to shortcomings in the regulatory framework is unsustainable and needs to be addressed in order to ensure the effective regulation of the online environment.

9.3.2.4. Mobile Internet Access Dominates

Section 7 details that the majority of South Africans that do access the internet do so using their mobile phones.

9.3.2.5. Proposed regulatory measures

Industry stakeholders offered the following regulatory proposals:

- A system that shuts down websites that promote illegal content should be implemented;
- The use of self-regulation should be introduced while the market is still small;
- Government funding should be dependent on complying with the regulations. No FPB registration equals no government funding;
- A good complaints mechanism is effective – users will complain if content is offensive;
- ISPA would like to work closer with the FPB. ISPA cannot enforce FPB's classification of content as the volumes are too high. It's not possible. ISPA is specifically seeking to finalise a protocol around the reporting of child pornography to SAPS and the FPB, who then deal with it alongside the SA Police Force. There needs to be procedures around preservation of evidence, assessment of material etc.;
- Introduce an "opt-in" model for adult content. In other words, you cannot access adult content on the default setting. You need to actively opt in to watch it;
- Co-regulate with self-regulating entities like WASPA. WASPA has been highly efficient and effective at regulating content and advertising provided by WASPs. The organisation has the buy-in from the mobile operators and has an excellent working relationship with these networks; and
- Make the FPB more accessible to industry bodies. Including bodies such as WASPA in the planning and execution of regulations and initiatives could positively affect the impact and success. Measures proposed may be technically impractical: hence more interaction is required to devise solutions.

9.3.3. Insights gained from regulatory benchmarking

The benchmarking exercise revealed the following:

- The African countries researched (including SA) are more regulated than the UK and the US in terms of film content;
- SA, Nigeria and Kenya all require classification, registration and licensing of online films;
- The UK and the US rely on self-regulation for online film classification;
- SA has ISPA which regulates internet service providers;
- SA has WASPA which regulates WASPS in SA; and
- In all countries, the distribution of child pornography and the sale of pirated content are illegal. These are infringements in terms of laws independent of the regulations governing the classification of content.

[30] *Ibid: 29*

The FPB has already taken steps to ease the burden it faces in the online environment:

- Section 24C of the FPB Act places an obligation on internet access and service providers which provide child-oriented services such as chat rooms and social media to moderate these services "to ensure that such services are not being used by any person for the purpose of the commission of any offence against children"; and
- ISPs are mandated to register with the FPB and to "take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography" in terms of section 27A (1) of the FPB Act.

9.3.4. Conclusion

The following key points can be deduced for the online film and video game distribution market in SA:

- The levels of legitimate film and video game content distribution online from websites hosted in SA appears very low;
- In countries with developed online communities, voluntary classification and self-regulation has been adopted. This is as a result of high volumes of online content which makes it virtually impossible to regulate using a statutory mechanism or by ISPs;
- Regulation of online content distributors can be done using the existing structures of ISPA and WASPA (in the case of online content accessed via mobile) or through voluntary mechanisms which rely on consumers' preference for classified content as this enables informed decision making;
- Classification of content that has already been classified by other international bodies should be accepted by the FPB where possible; and
- Dealing with awareness around age restrictions and the importance of content classification amongst consumers is paramount.

It was established that the volume and variety of content available for online distribution requires an alternative approach as the system of classifying all content prior to the release for public consumption is unable to effectively regulate the online environment. It was shown that the FPB is aware of these challenges as indicated by the inconsistencies between the FPB Act and the manner in which the app stores of certain major international content providers were allowed to operate.

The FPB has implemented measures to assist it with fulfilling its mandate in the online environment. Section 27A (1) of the FPB Act requires all ISPs to register with the FPB and to "take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography." These initiatives unfortunately do not include measures for establishing the suitability for content to be consumed by different audiences.

It has also been stated that the platform over which content is distributed should impact on the manner in which the platform is regulated because the characteristics of a distribution mechanism directly impact on the ability to monitor and intervene in that channel. The online environment enables real time monitoring and immediate intervention from any location. These characteristics make the online distribution sector more suited to a system where offensive content is removed after the fact when an erroneous classification or illegal content is discovered. Both ISPA and WASPA implement systems where users can report offensive or illegal content with the result being that access to such content is blocked over the relevant network.

The nature of the content being distributed should also be considered when implementing a regulatory mechanism. The regulatory steps implemented to remove illegal content from a network and to assist parents in choosing a suitable film for their children should be different. The mechanism for enforcing such compliance could however be similar.

9.3.4.1. Partnering with industry Stakeholders

Based on our assessment of the online content distribution sector we are of the opinion that the FPB could be successful in carrying out its mandate of enabling consumers to make informed decisions by constructively partnering with the industry stakeholders in the online environment. This initiative will have to closely coincide with creating consumer awareness about the benefits of having a standardised system of content classification across the physical goods and online environments.

Cellular telephones represent the primary form of internet access to the majority of South Africans.[31] WASPA is a voluntary self-regulatory body responsible for regulating mobile-based value added services. it has achieved industry wide adoption with Vodacom, MTN and CellC having made membership to the organisation a prerequisite to providing mobile-based value added services via the companies' networks.[32] WASPA has incorporated the FPB Act into its code of conduct and advertising rules and relies on the definitions and classification guidelines in the FPB Act to classify content.
Despite the successful self-regulation of the mobile-based value added services industry administrated by WASPA no formal partnership between the FPB and WASPA exists. In terms of the regulatory system currently in place the FPB is responsible for regulating all films and video games distributed via mobile platforms. The following paradox exists in relation to regulating content distributed over mobile networks. The FPB has acknowledged that it is unable to regulate the mobile environment in terms of the current system. WASPA has effectively been self-regulating value added services, which include films and video games, based on the definitions and classification guidelines in the FPB Act. If the FPB formally partnered with WASPA and assisted it through closer collaboration, training and classifying of content, etc. the FPB would be delivering on its mandate to assist consumers in making informed decisions about the content they and their children consume on their mobile phones.

Entering into a formal a partnership as described above should be achieved relatively easily as WASPA has indicated that it is seeking greater collaboration with the FPB and the FPB Act already includes sections which place an oversight responsibility on industry stakeholders. Section 24C of the Act requires internet access and service providers providing child-oriented services such as chat rooms and social media to moderate these services "to ensure that such services are not being used by any person for the purpose of the commission of any offence against children."

The FPB should assist industry bodies which represent service providers in the online environment in self-regulating their members based on the principles contained in the FPB Act. A self-regulation model based on formal collaboration will ease the burden currently placed on the FPB while holding the industry bodies accountable to complying with guidelines issued by the FPB.

9.3.4.2. Partnering with International Regulatory Systems

Some content is produced for a global audience and is consumed internationally. The global phenomenon of Angry Birds, a video game first released for Apple's iOS in December 2009[33] before being adapted for alternative operating systems and devices, has been downloaded 1.7 billion times since the games initial launch. Content such as Angry Birds, that is sold across the world by most of the major online app stores, should not require a separate classification by the FPB. Such content has already been subjected to the internal rating processes of numerous international vendors such as Apple's iTunes. Content classification is not just conducted by individual vendors such as Apple but also by multi-platform industry organisations such as PEGI and ESRB.

The FPB needs to implement a system that enables it to approve the classification and rating systems of certain vendors and organisations. Content approved in terms of these systems should not require a classification by the FPB before it can be distributed in SA.

[31] http://www.moneyweb.co.za/moneyweb-technology-news/inside-sas-internet-community
[32] *Ibid: 7*
[33] hp://en.wikipedia.org/wiki/Angry_Birds

An approach that incorporates the approved regulatory systems of other entities will enable the FPB to successfully execute its mandate. Relying on classifications issued by approved entities will enable consumers to make informed decision and will free up resources that the FPB can utilise to protect children from exposure to or from the use in pornography.

9.3.4.3. Awareness campaigns

Partnering with industry stakeholders should coincide with public awareness campaigns on illegal content and the dangers associated with unrated content. An informed and educated public eases the burden placed on the regulator responsible for classifying films and video games as the public demands properly rated content from commercial vendors. This trend can be clearly observed from the regulatory approaches adopted in the USA and the UK. Commercial providers can also be incentivised into supporting a voluntary self-regulatory system through allowing such vendors to advertise that they support responsible, family friendly practices as endorsed by the FPB.

9.3.4.4. Enabling mechanisms for voluntary online regulation

In the UK the BBFC offers a voluntary online classification system to digital service providers. Providers which join BBFC Online are allowed to display the BBFC age ratings that were awarded to physical video works should the same content be offered online. This initiative applies to most non-physical video content distribution including DTO, Streaming services and VOD. Producers can also apply for age ratings for content that has only ever been intended for online distribution under the BBFC's Watch and Rate service.

The FPB should consider implementing a model based on the system utilised in the UK for the regulation of online content. Voluntary online regulation should be promoted based on consumer preference for classified content. The FPB should be able to promote this system to online content vendors on the premise that consumers would be more inclined to purchase content online if they are assured that the content has been vetted by a trusted industry organisation such as the FPB.

SA does not differentiate between online and physical content goods as is done in the UK. The classifications awarded to films and video games in physical format should thus apply equally to content distributed online. The initiative should thus rather focus on getting producers to submit content that was created specifically for online distribution.

Online content distributors which register with the FPB should be allowed to display a digital certificate or "seal of approval" issued by the FPB which informs consumers that the vendor complies with the requirements of the FPB Act. This will provide a mechanism to FPB registered online distributors to differentiate themselves from non-registered competitors.

9.3.4.5. Applying recommendations for the online distribution sector to the framework used for regulatory comparison

The following transaction was used to determine how the online distribution of films and video games is regulated in the countries chosen for comparison:

- A consumer after logging onto the website of an online retailer specialising in movies and games purchases a movie by means of DTO. The online retailer is registered in the same country as where the customer is based which will be the country being assessed.

In order to practically illustrate the recommendations made pertaining to online distribution we have applied the recommendations to the hypothetical transaction.

The online retailer is a registered business in SA and will be classified as a distributor of content in terms of the FPB Act and will accordingly be required to register with the FPB.

The FPB would have been running an active campaign to create consumer awareness about the benefits of having a standardised system of content classification across the physical goods and online environments. An informed and educated public eases the burden placed on the regulator responsible for classifying films and video games as the public demands properly rated content from commercial vendors.

The website would be incentivised to register with the FPB because it will entitle the website to display a digital certificate or “seal of approval” issued by the FPB which proves that the website only sells duly classified content. In SA a uniform rating system applies to online and physical content goods. Digital versions of physical content goods which were rated would not have to be rated again prior to online distribution. Where a film sold via the website was created specifically for online distribution the website should be able to submit the movie for a rating to the FPB online. Once a rating has been issued the classification should be displayed as part of the information listed on the website for the film.

Games sold online by the website should be rated by the FPB in the same manner as films unless such films have already been classified in terms of accepted international rating systems. If a video game was assigned a rating in accordance with the PEGI or ESRB rating systems it should not be required that the video game is again rated by the FPB. A similar system should apply to accredited online vendors such as Apple’s iStore.

The majority of content and games sold online in SA is purchased by cellular telephone users who purchase content and games utilising the mobile networks’ transmission and billing mechanisms. Vendors selling content in this manner are already subject to regulation by WASPA. The FPB will have entered into a formal partnership with WASPA which will ensure that games purchased in this manner do not require a FPB classification prior to being sold in SA.

10. Conclusion

The research conducted in this report revealed an informal market that is dominated by pirated content. For the few informal distributors that do exist within the informal distribution sector, most of them do not register with the FPB due to:

- A lack of a fixed place of business (the FPB registration process requires distributors to submit their fixed business address); and / or
- A view that the registration and license costs are expensive and that that they do not receive any benefit in return; and / or
- A lack of awareness of the FPB and the FPB Act.

After considering the information on how benchmarked countries implemented regulation, and, taking into account the input from desktop research and interviews with industry stakeholders, it appears the FPB has a number of options at their disposal when it comes to distributors of informal content including:

- Amend the FPB Act so that informal distributors are excluded from compulsory registering, provided that the content is classified with the FPB (this is along the line of the UK and the US models. However, given that the FPB relies on the registration fees for its own commercial viability, and, given that formal vendors may see this as prejudicing them, this may not be feasible); or
- Register informal vendors by providing a new category of license such as a Hawker’s Licenses (which has less onerous administration requirements and lower licensing fees); or
- Register informal producers and provide government funding for distribution development for those that do (in conjunction with provincial Film Commissions).

The burgeoning issue of piracy and its lack of regulation need to be addressed, but that is beyond the scope of this report.

The research conducted into the online distribution market by SA registered entities revealed that:

- There are minimal levels of SA registered companies that provide / distribute online film and video game content;
- SA consumers purchase online film content from established websites in foreign jurisdictions;
- SA consumers purchase online video game content from established websites in foreign jurisdictions or from mobile operators; and
- Online content is mostly accessed using mobile handsets.

After considering the information on how benchmarked countries implemented online content regulation, and, taking into account the input from desktop research and interviews with industry stakeholders, it appears that the FPB has a number of options at their disposal when it comes to regulating online content including:

- Partnering with ISPA and WASPA (in the case of online content accessed via mobile) and allowing them to regulate using their Codes of Conduct, complaints mechanisms and take-down notices;
- Accept the classification of content that has already been classified by other international bodies;
- Promote awareness around age restrictions and the importance of content classification amongst online consumers; and
- Promote a system of accredited self-regulation which allows online content vendors to display a digital certificate or "seal of approval" issued by the FPB which informs consumers that the vendor only sells duly classified content. This will provide a competitive advantage to such vendors as consumers generally prefer to purchase rated content.

With the growth of our population who has internet access, the issue of online piracy does need to be considered, but that is beyond the scope of this report.