

## DRAFT PIECE FOR DISCUSSION

### Developing a Positive Agenda on Copyright Issues for the ECOWAS for EPA Negotiations

Marisella OUMA\*

#### Abstract

Increased protection of copyrights is an important part of the IP Agenda especially in the digital environment. For the ECOWAS, there may be important benefits but also significant costs in adding to the type of copyright protection already provided for in the Berne Convention and the TRIPS Agreement. The EPAs raise many negotiation and implementation challenges regarding policy coherence and maintenance of flexibilities and exceptions that have been designed to safeguard certain public interest goals and advance development objectives. When negotiating the EPAs, the ECOWAS member states should consider their political, social economic and technological impact.

#### Introduction

In the recent past, the United States, Japan and the European Union have been negotiating Economic Partnership Agreements with economic blocs such as the Southern Common Market (Mercosur), the Six Nation Gulf Corporation council (GCC), Southern African Development Corporation among other ACP regional groups. These EPAs include chapters on intellectual property rights. There has however been some concern that the chapters on intellectual property rights require the members states of the economic blocs include TRIPS plus protection. These include the provisions in the WIPO Internet Treaties, the protection of non-original databases as well as a guarantee on the general protection and enforcement of intellectual property rights.

The European Commission is currently negotiating Economic Partnership Agreements (EPA) with six groups of African, Caribbean and Pacific (ACP) Countries. The EU, in previous drafts to the ACP countries, has requested compliance with the substantive provisions of the new WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. The EU has mentioned the need to provide *sui*

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\* The author is the Acting Executive Director of the Kenya Copyright Board. She is also a Doctoral Associate at the Queen Mary University of London completing her thesis on Enforcement of Copyright in sub Saharan Africa.

*generis* database protection and the incorporation of stronger enforcement measures. At the end of March 2007, the European Union submitted a proposal to CARIFORUM, which contains the most comprehensive chapter on intellectual property rights.<sup>1</sup> The Eastern and Southern African Countries have submitted a draft proposal to the EU.<sup>2</sup>

There are however several concerns that have arisen from the draft proposals which require TRIPS plus protection. The protection of non original databases, the protection and enforcement of copyright in the digital environment, and how these will impact access of copyright protected works especially in the cases of public interest such as education. This paper will focus on the protection of copyright in the digital environment with a view to developing a positive agenda on copyright issues for the ECOWAS in the EPA negotiations.

### **1.1. Copyright Protection in the ECOWAS**

It is trite to state that the ECOWAS member states provide for copyright protection based on the Berne Convention and subsequently the TRIPS Agreement. The LDCs within the ECOWAS have until 2013 to ensure conformity with the TRIPS Agreement and are currently only required to ensure that they provide for national treatment and MFN.<sup>3</sup> Ghana has enacted a new copyright law while Nigeria has constantly been amending the copyright Act to ensure that it conforms to the international norms and at the same time cater for the local interests.<sup>4</sup> In Senegal and Mali, have copyright laws that were passed in 1974 incorporating the provisions contained in the Berne Convention. In summary, the ECOWAS laws provide for:

- a) The grant of exclusive rights such as reproduction, communication to the public, importation of the work translation and adaptation.
- b) Exceptions and limitations to the exclusive rights.

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<sup>1</sup> See complete proposal at [http://www.bilaterals.org/IMG/doc/EC\\_non-paper\\_on\\_IPRs\\_text\\_for\\_EPA.doc](http://www.bilaterals.org/IMG/doc/EC_non-paper_on_IPRs_text_for_EPA.doc)

<sup>2</sup> See "Economic Partnership Agreement between Eastern and Southern Africa and the European Community – Title VI- Intellectual property rights", 4<sup>th</sup> Draft EPA/8<sup>th</sup> RNF/24-8-2006. Draft text at <http://www.bilaterals.org/IMG/pdf/DRAFT-EU-ESA-EPA-24-Aug-2006.pdf>

<sup>3</sup> LDCs in the ECOWAS include Burkina Faso, Mali, Togo, Niger, Guinea Bissau.

<sup>4</sup> The Copyright Act of Ghana was passed in 2005 while the Copyright Act of Nigeria of 1999 has provisions for the exceptions and limitations and even incorporates the provisions found in the Berne Appendix. See paragraph 1.2. below

Several countries have yet to make specific provisions for the “digital” Agenda” such as the protection of technological protection measures.<sup>5</sup>

At the regional level, there are two Intellectual property organisations that deal with intellectual property rights; The African Intellectual Property Organisation (OAPI) of which most ECOWAS member states belong to except Ghana and Nigeria and the African Regional Intellectual Property Organisation (ARIPO) of which Ghana is a member.<sup>6</sup> The Bangui Agreement recognises the exclusive rights granted to the rights holders subject to certain exceptions such as the use of the works for teaching and non profit library and archival services.<sup>7</sup>

## 1.2 Exceptions and Limitations

“.....due account also have to be taken of the fact that the ideal principles whose triumph can only progress gradually on the so varied countries that we wish to see joining the Union. Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly, in my opinion, by the public interest. The ever growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses.....<sup>8</sup>

The need to balance the rights of the rights holders and the public interest in the case of copyright protection is a major policy issue that has to be considered. Access to information is vital for development especially in developing countries. This is emphasised by the WCT and the WPPT.<sup>9</sup> The WCT and the WPPT introduce TRIPS plus obligations. The rights granted reduce the scope of exceptions and limitations provided under the TRIPS Agreement by widening the scope of reproduction and introducing new rights for the copyright holders. These include arrangement and selection material in databases, introduction of rental rights, the right of “making available”, and the protection of technological protection measures.<sup>10</sup>

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<sup>5</sup> Section 42 one of the Copyright Act of Ghana of 2005 makes it illegal to circumvent TPMs. Mali, Burkina Faso, Niger, Guinea Bissau, do not have such provisions in place yet.

<sup>6</sup> OAPI was created under the Bangui Agreement of 1977. It has 16 member states Including Burkina Faso, Côte d’Ivoire, Niger, Senegal, Guinea, Guinea Bissau and Togo.

<sup>7</sup> Article 13 and 14 of the Bangui Agreement.

<sup>8</sup> Numa Droz Chairman of the 1884 Berne Conference. For further reading, see Ficsor M., *The law of Copyright and The Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford, New York: Oxford University Press; 2002) Chapter 5 ‘Digital Agenda – Limitations and Exceptions’.

<sup>9</sup> See Article 10 WCT and Article 16 WPPT.

<sup>10</sup> See Articles 4, 5, 6, 7, and 8 of the WCT.

The European Union and the United States have implemented the exceptions and limitations but with a wider interpretation of the 3-step test especially in relation to education and library use. The ECOWAS should consider an approach that allows for broad interpretation of exceptions and imitations.

The EU directive on harmonisation of copyright clearly lays out the exceptions and limitations including the use of the works for educational and library purposes.<sup>11</sup> The list is long and exhaustive. Similar provisions will be found in the copyright laws in Nigeria and Mali.<sup>12</sup> Several ECOWAS member states grant fairly narrow limitations and exceptions.<sup>13</sup> The provision of narrow exceptions and limitations are likely to present problems especially in the digital environment.

The ECOWAS member states like other developing countries try to balance these interests by providing for exceptions and limitations to the exclusive rights granted to the copyright holders especially for educational and library uses. These exceptions are however very narrowly construed. The 3-step test is the guiding principle on exceptions and limitations. Under the 3-step test countries may introduce any limitation or exception to the economic rights to copyright holders under the TRIPS Agreement for as long as;

- a) It is limited to special cases
- b) It does not conflict with the normal exploitation of the work
- c) It does not unreasonably prejudice the legitimate interests of the rights holder.

When negotiating the EPAs, the ECOWAS should ensure that the limitations and exceptions are not narrowly construed in order to facilitate access to information and ensure that the copyright holder is protected and not prejudiced. The limitations and exceptions should take into account the educational needs of the country in terms of educational material. The availability of such material is also an important factor. In Mali for instance, the copyright Act allows the Minister responsible for the arts and culture to authorise public

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<sup>11</sup> Article 5 of Directive 2001/29/EC of the European Union Parliament and Council of 22<sup>nd</sup> May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>12</sup> See the second schedule to the Nigerian Copyright Act Cap 68 as amended and Article 37 of the Copyright Act of Mali.

<sup>13</sup> See Section 19 of the Ghana Copyright Act of 2005 and Article 10 of the Copyright Act of Senegal.

libraries, non commercial documentation centre, scientific institutions, educational establishments and any cultural association recognised by the Government to reproduce literary works in any amount that are necessary to carry out their activities subject to payment of equitable remuneration to the rights holder.<sup>14</sup>

It would be beneficial for The ECOWAS to examine the EU list of exceptions and limitations and exceptions as well as the fair use provisions in the United States<sup>15</sup>

Clearly, several member states have not taken advantage of the flexibilities under the Berne Appendix that was subsequently incorporated into the TRIPS Agreement. The Appendix to the Berne Convention was as a result of the controversial negotiations on access to learning and educational materials in 1967. It replaced the proposed Stockholm protocol.<sup>16</sup> The developing countries were of the opinion that the protection of copyright under the Berne Convention was likely to hinder the access to educational material as the developing countries relied on the material from other countries.

The Appendix was a compromise but limited. Under the Appendix, member states may issue compulsory licences for the use of copyright works without the permission of the copyright owner as long as the owner is adequately compensated. Although these flexibilities are limited, they could be incorporated into the law to ensure the flow of information especially for educational purposes.<sup>17</sup> It is important to make provisions for compulsory licensing where the availability of the copyright work is limited and is required for educational and library services. There are notable concerns arising from the Berne Appendix especially in relation to access to information. A country has to wait for 3 years after the works have been published before they can notify the World Intellectual Property Organisation of their intention to issue a compulsory license. During this three-year waiting period, the copyright owner may exercise his right to translation. There is a risk of the information becoming obsolete and once the owner has exercised his right, the developing country can no longer issue a compulsory license for translations.<sup>18</sup>

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<sup>14</sup> Article 37 of the Copyright Act of Mali.

<sup>15</sup> Article 5 of Directive 2001/29/EC of the European Union Parliament and Council of 22<sup>nd</sup> May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>16</sup> For further reading see Irwin A. Olian, *International Copyright and the Needs of the Developing Countries: The Awakening at Stockholm on Paris*, 7 Cornell Int'l L.J 81 (1974).

<sup>17</sup> See third schedule of the Nigerian Copyright Act, which provides for compulsory licensing of copyright protected works under specific circumstances.

<sup>18</sup> Article II of the Berne Appendix.

The Berne Appendix also contains a provision for licensing of reproduction of works for systemic activities. The licence can only be issued for five years after first publication, three years in the case of scientific works and seven years for works of fiction, poetry, drama, music and art.

So far very few countries have taken advantage of the provisions of the Berne Appendix. Nigeria has included the provision for compulsory licensing.<sup>19</sup>

Since the protection of copyright and the provision of exceptions and limitations is all about balancing the copyright holder's interests and the public interest, it is important to clearly define what constitutes public interest in the ECOWAS context.

## 2.0 Digital Copyright

The use of the internet in Africa is not as widespread as it is in other parts of the world due to limited infrastructure. The debate on the impact of digitisation and the Internet is rarely discussed in the context of Sub Saharan Africa. Internet penetration although slow is a reality and there are various copyright issues that have to be addressed when negotiating the EPAs.

The two "Internet" treaties, WCT and WPPT were initiated as a result of the need to address copyright issues in the digital environment. The two treaties are important in the EPA negotiations as they provide the normative basis for digital copyright. It is notable that the provisions of the Appendix to the Berne Convention have been incorporated into the TRIPS Agreement and also apply to the "Internet Treaties". Access to electronic journals is essential for educational and research institutions. The flexibilities in the Berne Appendix are too restrictive in the digital environment.<sup>20</sup>

The provisions of the treaties may be broadly interpreted as in the case of the European Union or they may be more restrictive as implemented in the United States.<sup>21</sup> The Internet treaties recognise the need to develop and maintain the protection of copyright and at the

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<sup>19</sup> Third schedule of the Nigerian Copyright Act, which provides for compulsory licensing of copyright protected works under specific circumstances

<sup>20</sup> Ruth. L. Okediji, *Moving the pro-development IP Agenda forward: Preserving Public Goods in Health, Education and Learning*. Bellegio 29 November -3 December 2004

<sup>21</sup> See the United States Digital Millennium Copyright Act (DMCA) and the Directive 2001/29/EC of the European Union Parliament and Council of 22<sup>nd</sup> May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

same time maintain a balance between the interests of the rights holder and the greater public interest such as education, research and access to information.<sup>22</sup> The provisions for the protection of technological protection measures should thus be narrowly construed to ensure the access of information.

It is notable that there are several member states within the ECOWAS who are parties to the treaties although they are yet to incorporate the specific provisions into their national laws. It is imperative that the ECOWAS member states consider the following when negotiating the EPAs.<sup>23</sup>

- The digital environment offers a medium for the exchange and dissemination of information and is increasingly being used by developing countries
- Access to copyrighted works for education and research are an important tool in the economic growth and development of the region.
- The public interest has to be taken into consideration.
- The availability of education and research material within the digital environment
- The flexibilities offered under the Berne Appendix
- The shift to digital environment
- Technological protection measures and their impact on use of copyright material on the internet
- Access to publicly funded information in the digital environment.

## **2.1 Enforcement measures in the digital environment**

To protect the material on the internet, the WIPO Internet treaties for the protection of the technological protections measures such as encryptions, encoding, scrambling and other technological tools that may be used to prevent the use of copyright material in the digital environment. It is notable that prior to the Internet era, the copyright holder had to rely on copyright to exercise his exclusive rights. The rights holder had more control in terms of reproduction and distribution of his works. But the Internet provides a challenge as the works are reproduced and disseminated to a wider group and once the material has been put on the Internet, and then the control becomes an issue.

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<sup>22</sup> See preamble to the WCT and WPPT.

<sup>23</sup> Burkina Faso, Mali, Guinea, Senegal and Togo became party to the treaties between 2002 and 2003 but their domestic laws are yet to be revised.

This has resulted in the use of technological protection measures to ensure that only the authorised parties have access to copyright material in most cases at a cost. The problem arises where works would otherwise have been accessible due to the limitations and exceptions granted by the law or legitimately purchased. The laws make it illegal for anyone, other than the copyright holder to circumvent the technological measures that have been employed by the rights holder. It would effectively lock out legitimate users within the digital environment.

The use of technological measures should not defeat the spirit of the 3-step test for the setting limitations and exceptions. That means the use that falls within exceptions and limitations should not be subject to technological protection measures.

One pertinent question is whether or not the ECOWAS member states have the capacity to provide enforcement measures in the digital environment. The answer to this question will depend on two factors; one, what is the extent of digitisation and Internet penetration in the ECOWAS member states. Two, what is the status of the legal framework in relation to copyright in the digital environment. Studies of the existing laws within the region reveal that there are no specific provisions on enforcement within the digital environment although several member states as stated earlier are signatories to the WIPO Internet treaties.

ECOWAS should thus ensure that the chapter on copyright does not make provisions for technological measures that will result in lock in of works especially those that are within the public domain in the digital environment. The lock in can only be avoided if the limitations and exceptions are well worded to ensure that educational and research institutions have access to information especially in the digital environment. The provisions should allow the circumvention of technological protection measures where the use will be for educational and research purposes, where the works have fallen into public domain, non-commercial purposes and where the users have legitimately acquired the works.

## **2.2 Potential Effects of Technological Protection Measures (TPMs) on Internet access and use**

The WCT provides that member states shall provide adequate legal protection to curtail circumvention of any technological measure used by the copyright holders to ensure that their exclusive rights are not



infringed upon.<sup>24</sup> The use of technological protection measures is likely to have a negative impact on the ECOWAS member states if they are stringently applied. The language used should reflect the position of the member states. The TPMs are likely to have the following effects on the ECOWAS member states:

- The TPMs are likely to lock in works that are within public domain or would under the non digital environment be subject to the limitations and exceptions envisaged under the Berne Convention and the TRIPS agreements.
- It would limit the dissemination of information across the digital environment
- It is likely to make access to such information more restricted and in some cases more expensive

There are however some positive implications of the TPMs in the ECOWAS states. The ECOWAS member states are also authors of copyright works and they would thus be encouraged to use the digital networks to disseminate their copyright protected works as they are assured of copyright protection over the Internet.

The TPMs if included in the agreement should not restrict access to information and at the same time, should ensure that copyright is protected. Prevention of anti circumvention of the TPMs is confined to acts that are not authorised by the copyright holder such as unauthorised reproduction.

### **3. Protection of non - original data bases by ECOWAS member states**

The protection of non-original databases by the European Union goes beyond the TRIPS Agreement. The *sui generis* protection is granted to protect databases that represent qualitative and or quantitative substantial investment for a period of 15 years.<sup>25</sup> The question that arises is whether or not to protect such investments under the intellectual property regime especially since copyright laws emphasis on originality; that is, skill and judgement and not on 'the sweat of the brow'.<sup>26</sup> The protection of electronic databases recognises the

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<sup>24</sup> See Article 11 of the WCT. A similar provision is to be found the Article 16 of the WPPT Agreement.

<sup>25</sup> See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases at <http://europa.eu.int>

<sup>26</sup> For the work to be original, it has to originate from the author; the product of his intellectual creativity embodying skill and judgement. See *Feist Publications, Inc. v Rural Telephone Service Co.* 499 US 340 (1991).

investment and labour used to produce the database and prevent third parties from unduly exploiting the contents without compensating the author of the database.

The ECOWAS members states are users of the material contained in non original databases especially for education and research purposes. The extension of *sui generis* protection to the protection of non original databases is likely to affect the access from electronic databases. It is notable that the ECOWAS members protect the original databases as literary works. The protection of non-original databases precludes the access to the information contained therein.

The question here is whether or not the protection of non-original databases as in the case of EU is likely to result in any economic benefits for ECOWAS. Being consumers and not originators of the non-original databases, the protection is likely to lock out the use of any material that is contained in the database. It also means that access to the information contained in the database will have to be at a consideration, which may be too expensive for the ECOWAS members.

It is also notable that material that would otherwise be in the public domain under copyright law might become inaccessible due to the fact that it has been included in an electronic database that is protected. Since the members are still in the process of digitisation, there is a possibility of a commercial entity creating databases and obtaining protection locking out the government, educational and research institutions from accessing vital information.

Given the current socio-economic status of most of the ECOWAS states, it would be presumptuous to include the protection of non original databases in the EPA negotiations especially since they are not part of the minimum standards of IP protection as provided under the TRIPS Agreement, the WCT and the WPPT.

#### **4. Traditional designs, Folklore**

Protection of expressions folklore and the traditional designs is one of the topics being discussed at the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The national laws have provisions for the protection of expressions of folklore.<sup>27</sup> Unclear It is notable that the various copyright works within the region are influenced by expressions of folklore such as music.

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<sup>27</sup> Section 28 of the Nigerian Copyright Act, Article 8 of the Copyright Act of Mali, Section 4 Copyright Act of Ghana 2005. These provide specifically for the protection of expressions of folklore.

The traditional designs are evident in the textiles and the fashion industry as in the case of the *Kente* cloth from Ghana. The *Kente* cloth is a traditional cloth whose design and weaving technique is believed to have originated from the village of *Bonwire* of the Ashanti in Ghana.<sup>28</sup>

Given that the works form an integral part of copyright protected works, it is important to ensure that their protection does not prevent the flow of information. The protection should include protection against commercial exploitation by third parties.

Protection of traditional designs and folklore should be included in the EPA negotiations as it facilitates the use of works that would otherwise be restricted to specific communities within the ECOWAS state. The member states should propose the provision of a *sui generis* kind of protection, as it has not been addressed in the international treaties such as TRIPS.

## Conclusion

The international regime on copyright is already defined under the TRIPS Agreement which sets the minimum standards of protection that member states are expected to implement. ECOWAS has member states that are beneficiaries of the extension of the transition period under TRIPS for LDC. While negotiating the EPAs it is important to take this into consideration to avoid the application of TRIPS plus provisions that might be detrimental to the interests of the ECOWAS member states. They have to put in place legal provisions that prioritise the public interest in the ECOWAS.

The legal protection of TPMs should be kept to a minimum so as not to reduce the scope of exceptions and limitations offered by the local and international regime. Where TPMs have been applied, the ECOWAS should consider licensing agreements to provide access to material in the digital environment especially the electronic journals. The provision for the protection of non-original databases should be excluded in the EPA chapter on intellectual property as its inclusion is likely to have a negative impact on access and dissemination of information, which is vital in sustainable development.

The protection of copyright in the digital environment and the reduction of piracy may be desirable for the ECOWAS region but it is

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<sup>28</sup> Betty Mould Iddrisu "The Legal Protection of Traditional Knowledge: Perspectives of the protection of Traditional Knowledge and folklore in Ghana". Paper Presented at the 5<sup>th</sup> IPA Copyright Conference February 2002, Accra, Ghana.

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Marisella Ouma

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important to consider the costs of implementing strong copyright protection measures.