

Draft:
Developing a Positive Agenda on Copyright Issues for the CEMAC for EPA Negotiations

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Table of Contents

1. Key Concerns as to the Copyright Provisions in EPAs.....	1
2. Technological Protection Measures	1
2.1 Potential Impact of TPMs on access to and freedom of information	1
2.2 Technological Protection Measures.....	2
3. Greater Copyright Protections for the Benefit of CEMAC Countries	3
4. Scope and Interpretation of Exceptions and Limitations	3
4.1 The Public Interest Premises	3
4.2 Private use	4
4.3 Educational use.....	4
4.4 Three Step Test.....	4
4.5 Berne Appendix for Developing Countries	5
4.6 Harnessing the Region's Cultural Heritage	6
5. Collecting Societies: Opportunities and Challenges.....	7
5.1 What are the functions of a collecting society	7
5.2 Benefits of collecting societies to developing countries.....	7
5.3 Criticisms against collecting societies	8
5.4 Collecting societies in general	9
5.5 Controlling collecting societies	9
6. The Database Right.....	10
6.1 Copyright Protection	10
6.2 What is a database right?.....	10
6.3 Economic implications of sui generis database right	11
6.4 Database right.....	11
7. Conclusion.....	12
ANNEX 1: What are TPMS?	13
ANNEX 2: How TPMS work in the European Union and in the United States.....	13
ANNEX 3: The Human Right to Education.....	15
ANNEX 4: A Model Law on Collecting Societies	16
ANNEX 5: The EU Database Right	16

1. Key Concerns as to the Copyright Provisions in EPAs

This paper addresses the offensive and defensive issues of relevance for CEMAC countries when negotiating the section on copyright in IP chapters in future EPAs taking into consideration the levels of socio-economic development of CEMAC countries as well as their international obligations including flexibilities, limitations and exceptions relevant in addressing copyright issues. In addition, the copyright provisions as negotiated within the framework of the Cariforum Agreement will be compared with existing obligations for CEMAC countries and conclusions are drawn in this regard.

The key concerns are as follows:

- (a) the introduction of technological protection measures;
- (b) the general interpretation and scope of exceptions and limitations to copyright;
- (c) the enforcement of rights by collecting bodies;
- (d) the economic benefits of a database right

2. Technological Protection Measures

The two 1996 WIPO Internet Treaties introduced a new regulatory landscape for the governance of copyright and related rights, especially in the digital and internet context. The provisions dictate that contracting parties provide adequate legal protection and effective remedies against the circumvention of the effective technological measures that authors or other copyright owners (such as performers and sound recording companies) use *in connection* with the exercise of their rights and that restrict acts which they have not authorised and are not permitted by law.

In summary, the treaties envisage intellectual property owners locking up digital versions of works by employing technological protection measures.ⁱ

2.1 Potential impact of TPMs on access to and freedom of information

The question being posed by those concerned as to the diminishing public domain is: *how effective are the traditional copyright exceptions and defences against the "anti-circumvention measures" clauses?* Part of the problem is that the anti-circumvention or copy-control measures do not work uniformly and instead of merely preventing unauthorised reproduction, tend also to prevent playback of music completely. Thus, at least one organisation has protested to the US Copyright Office that the practical effect of these malfunctioning copy control measures has been to prevent consumers from accessing protected music.ⁱⁱ [See Annex 1].

The following matters are of concern:

- 1) TPMs go beyond allowing copyright owners to limit reproduction or communication of a copyright work;
- 2) TPMs can be used to stop anyone from *accessing* copyright works which (either by encoding, scrambling, encryption or other tools). This is beyond the scope of traditional copyright law;
- 3) TPMs can be employed to prevent a legitimate use of a work under the traditional copyright limitations and exceptions;
- 4) TPMs can be abused by digitally locking up non-copyright works especially compilations or databases of public domain materials.ⁱⁱⁱ

- 5) TPMs can, if unchecked, overprotect works by preventing private copying, fair use or fair dealing of a work
- 6) The WIPO provisions, as implemented in some countries, expose a lawful purchaser of a digital product to both civil *and* criminal sanctions if the lawful purchaser circumvents a technological lock to access forbidden material on the digital product.
- 7) TPMs have the potential to prevent access to the following types of material or data:
 - pure data or ideas, either wholly or substantially;
 - those material or data which are not subject to copyright protection under certain jurisdictions. These may include laws, government reports and court judgements (specific exceptions which are allowed under the Berne Convention and the TRIPS Agreement);
 - materials which have fallen out of copyright protection;
 - educational or historical documents which may be used in normal circumstances under a fair use or fair dealing or educational or a public interest defence.

2.2 Technological protection measures - CEMAC negotiators should consider:

- (a) TPMs are not part of the TRIPS Agreement.
- (b) There are various ways to implement the WIPO Treaties. The simplest route is to adopt the WIPO language, but make it clear that TPMs must be subject to existing exceptions and limitations within the national copyright law. Both the EC and the US implementation of the provisions are complicated, unwieldy and require extensive supporting infrastructure to monitor abuse of the provisions by rights holders [See Annex 2].
- (c) Countries like the UK and Germany have provided extensive provisions to safeguard users, which require Ministerial or Patent Office supervision; the US Copyright Office similarly polices by having bi-annual consultations on the detrimental impact of TPMs on library and educational use. Do CEMAC countries have the capacity to provide for such constant monitoring of abuse?
- (d) The WIPO provisions provide no grounds for TPMs to be used by rights holders to prevent *access* to lawful purchasers of digital product to access the product. This safeguard should be reflected in strong statutory language.
- (e) The WIPO provisions provide no grounds for allowing provisions on TPMs to override traditional copyright defences such as private use, research or educational uses. This safeguard should be reflected in strong statutory language.
- (f) TPMS work best in an infrastructure that allows a private copying “right” (not an exception) *and* a private copying levy system. Without statutory or infrastructural safeguards, or without a fully-fledged private copying plus levy scheme in place, it is not advisable to incorporate TPMs in domestic copyright legislation.
- (g) A major concern in the EU is that TPMs can be employed to stop the progress of technology by allowing rights holders to sue manufacturers and suppliers of decryption and decoding hardware and software tools. Are there adequate checks and balances to

ensure that encryption and other related technological research and study is not stifled?
The US legislation has specific exceptions in relation to research software tools.

- (h) CEMAC negotiators should note that the Bangui Agreement specifically prohibits protection to:
- official texts of a legislative, administrative or judicial nature or to the official translations thereof;
 - news of the day;
 - simple facts and data.^{iv}

3. Greater Copyright Protections for the Benefit of CEMAC Countries

CEMAC countries can benefit from copyright protection by considering the following factors:

For users:

- (a) a clearer definition of exceptions and limitations within the law, especially in relation to teaching, educational, research and private use;
- (b) the reinforcement of copyright provisions on the protection of traditional and cultural expressions, and designs.

For authors:

- (a) the need to introduce well-regulated collecting societies to ensure adequate and fair remuneration to authors and performers, taking into account traditional economies and important local industries;
- (b) the introduction of a non-waivable right of remuneration for authors, composers and performers from publishers, sound recording companies, film companies and broadcasters.

4. Scope and Interpretation of Exceptions and Limitations

What type of exceptions and limitations to copyrights would be useful to CEMAC countries in the future especially in order to facilitate access for

- (a) educational use,
- (b) library use, and
- (c) other public interest uses?

Are such limitations and exceptions already available under the Bangui Agreement?^v

4.1 The public interest premises – CEMAC negotiators should consider:

- (a) The preamble of the OAPI-Bangui Agreement which confirms that Article 8, TRIPS Agreement is part of the general ethos of intellectual property rights. Article 8 sets out that WTO Members, when formulating or amending intellectual property laws, have a right to adopt measures necessary to promote the “*public interest*” in order to promote the socio-economic and technological development of the country;

- (b) Any implementation of the WIPO Treaties should incorporate the premise within both treaties that Member States should recognise the “the need to maintain a balance between the rights of authors and the larger *public interest*, particularly education, research and access to information...”;
- (c) These premises are also in accordance with the general human right to education [see Annex 3].

4.2 Private use - CEMAC negotiators should consider:

- (a) the Bangui Agreement provides for free private use of works without compensation;
- (b) this position should not be conceded without careful consideration as the current EU stance of requiring “adequate compensation” for all uses is based on a private copying levy system being in place under domestic legislation.

4.3 Educational use - CEMAC negotiators should consider:

- (a) the Bangui Agreement provides for free use of works for teaching, examination, non-commercial library and archival use, and for illustration purposes;
- (b) this position should not be conceded without careful consideration as the current EU stance of requiring “adequate compensation” for all uses is based on a private copying levy system being in place under domestic legislation.

4.4 Three Step test - CEMAC negotiators should consider:

- (a) All exceptions and limitations under international and EU copyright legislation are subject to the 3 Step test; the test is a set of constraints on the exceptions and limitations to exclusive rights under national copyright laws. The most important version of the test is that included in Article 13 of TRIPs.
- (b) This is not a similar position under Bangui Agreement which appears to subject only a few of the exceptions and limitations specifically to the test; the Bangui Agreement, therefore, is more generous in its scope of exceptions and limitations than the EU copyright law; these provisions are to be maintained. [READS A BIT AWKWARDLY]
- (c) There are concerns with the 3 step test, especially if in negotiations it is implied that existing or new exceptions or limitations in national laws are unlawful under TRIPs/WIPO Treaties.
- (d) The terms are, at best, vague, and ultimately depends on the nature of the work and how national legislations and tribunals seek to define the test; there is currently no accepted international interpretation of the test
- (e) In any event, developing countries can use the ambiguity of both national provisions and Article 13, TRIPs provisions to carve out more specific educational/technological exemptions in their copyright laws.

- (f) it is also worthwhile to note that the United States' general defence of "fair use" may not pass the 3 step test, and the fair use limitation under US copyright law does not require "adequate compensation" to be paid to the rightsholder.
- (g) The EU directive on copyright law sets out very lengthy and clear exceptions and limitations including the use of the works for educational and library purposes; but all these exceptions and limitations are subject to the general "adequate compensation" rule, and also the 3 step test. A number of decisions from national courts have caused consternation as the EU national courts are using the 3 step test in order to interpret exceptions and limitations in a narrow light.

4.5 Berne Appendix for Developing Countries - CEMAC negotiators should consider:^{vi}

- (a) The 1971 Paris Act of the Berne Convention contains an Appendix, now part of the TRIPS Agreement, which allows compulsory licensing in relation to mass reproduction and translation of works for educational purposes.
- (b) Specifically, the Appendix provides that, subject to compensation to the copyright owner, there is a possibility of granting non-exclusive and non-transferable compulsory licensing in respect of (i) translation for the purpose of teaching, scholarship or research, and (ii) reproduction for use in connection with systematic instructional activities, of works protected under the Convention.
- (c) The Annex's provisions have been rarely utilised as they are extremely complicated and laden with restrictions.^{vii} Indeed, only eight developing countries are currently availing themselves of the two options. Another country has adopted option (ii) alone.^{viii}
- (d) A positive view of the 1971 Appendix is that it acts as an incentive to authors and publishers, and is a bargaining tool for developing countries to enable a degree of practical co-operation with the possibility of establishing an affordable book supply system. This is the case with the *International Student Edition* versions of many textbooks which are available in Asia but not North America or Europe;
- (e) A cautious view is that the Appendix is limited in the following manner:
 - it is so highly detailed and complicated that it exceeds the original Berne Act in length;
 - although the Appendix does permit compulsory licensing of works if voluntary negotiations over translations and reproduction rights are not successful, the provisions are extremely complex;^{ix}
 - the Appendix only extends to translation and reproduction rights, and does not apply to broadcasting or other communication rights
 - therefore, online or digital transmission of works do not come within the exceptions;
 - the Appendix contains no provisions for free educational use or for any reduction in duration of copyright.

4.6 Harnessing the Region's Cultural Heritage - CEMAC negotiators should consider

It should be understood that copyright law is non-discriminatory in that all authors, irrespective of country of origin, have the potential to employ copyright to realize the income generating potential of their works. In many developing countries, one of the most important issues is the threats faced by many traditional artisans from the copying and mass production of handicrafts by outsiders, who thereby deprive artisans of a source of income.^x Copyright law can assist such authors.

Of particular concern are the following factors:

- (a) Subject matter to be protected under copyright law is open-ended, and there is no bar to extending copyright law to include traditional art, design, drama, performances and music. Thus, Chinese copyright law extends copyright protection to the traditional Chinese rhyming speeches – *quyi*. Omani law protects folkloric art and literature created by groups which are expressions of their cultural identity and which are passed from one generation to another and which “constitute one of the essential elements of the traditional national popular heritage”. Mexican law, on the other hand, extends copyright protection to “works of popular culture” and to “national symbols”. “Popular culture” is defined as “literary and artistic works, works of popular art of craft works, and also all original manifestations in local languages, and the practices, customs and traditions of the multi-cultural society constituting the Mexican State that do not have an identifiable author.”
- (b) The misrepresentation and distortion of cultural expressions. For example, when people are paid to do performances on television or in front of tourists, the cultural context is often lost and the performance becomes a “show”. It may well be shortened to conform to a schedule. In such ways a traditional performing art can be distorted, devalued and perverted.^{xi}
- (c) The popularity of traditional music can generate income for musicians and performers but there can also be severe exploitation. Unfixed traditional music is generally considered to be in the public domain, meaning that other musicians may be able to adapt it and copyright the result – though, it should be noted that under the WPPT, fixation is *not* a requirement for copyright protection and thus unfixed performances can be protected.
- (d) Correct usage of digital rights management can also help ensure that traditional performances are properly sourced and acknowledged through every exploitation.
- (e) In all these cases, there should be either an agency or a specialized collecting society (as in the case of Australian Aboriginals) to enforce both the moral and economic rights of the group as a whole.

5. Collecting Societies: Opportunities and Challenges

5.1 What are the functions of a collecting society?

Individual authors have limited ability and power to monitor and obtain payment for each and every use of their authored work, especially on an international scale and in relation to use of digital works on the Internet.

Collecting societies act on behalf of their author-members and collect license income and royalties from users (for example, radio and television stations, networks) and establishments (for example, restaurants and universities) that use or present their members' works.

Collective management organisations have several functions:

- the management of rights on behalf of their members, which entails the authorisation to license the work, collect and distribute any remuneration thereof;
- the acquisition of market power (monopoly status) in order to enhance their members' opportunities;
- many collective management organisations have important social and cultural functions (see below).

5.2 Benefits of collecting societies to developing countries

The aggregation of rights within one legal entity allows authors to wield some considerable market power and cultural influence which would be ordinarily unavailable to an individual rights owner. The following are the positive outcomes of a collecting society within a country:

- 1) Collecting societies can channel a percentage of collected income or undistributed royalties towards
 - a. activities that support young talent
 - b. offering economic support for the realisation of innovative projects in a country/region
 - c. establish a social or pension fund for the benefit of older/retired members.
- 2) In terms of economic efficiency, collecting societies are the perfect mechanism to rectify any possible economic harm suffered by authors and performers, especially since individual authors and performers have no bargaining power vis-à-vis sound recording and film companies, publishers and broadcasters.^{xii}
- 3) Collective management is in the interest of both authors and those users who find themselves faced with increasingly lengthy and costly searches for rights clearance, which often proves incomplete.
- 4) The significance of collective management has been further enhanced by the developments in cable distribution, digitisation techniques and multimedia production which have led to a strong increase in the dissemination and use of copyright works. This can lead to increased income generation for authors and performers.

- 5) The collective power of these organisations within the global market is strengthened by the reciprocal relationships with other collecting societies in other countries. This allows such organisations to monitor and license each other's repertoires.
- 6) This also results in a co-ordinated effort to influence market and governmental policies. In order to facilitate such cross-border payments and transactions, international organisations have a set of harmonised principles and model agreements. The more prominent of these organisations include IFRRO, BIEM, and CISAC.
- 7) A further result of this reciprocity is large memberships and international ties which allow societies to collect substantial license fees.

5.3 Criticisms of collecting societies

A model rights management organisation would be continuously obliged to offer effective administration on the one hand, and to comply with their duties on the other hand.

The following are matters of concern, especially to countries wishing to set up a collecting society in an area:

- 1) The tasks undertaken by collecting societies (monitoring usage of works and collecting income) entail a highly complex and broad organisational structure. Sometimes the cost of setting up and running a collecting society can reduce the impact of licensing income to the author.
- 2) The licence or tariff rates set by the societies can be too high which has an adverse impact on cultural and research environments. Due to the monopolistic position of collecting societies in specific fields of activity, societies can set license or tariffs at a higher rate than the market rate.
- 3) Collecting societies work well only if the local country has a highly developed competition law authority to monitor the practices of the collecting society, or a specialised copyright tribunal (as in Canada) which sets the tariff rates, or a specialised committee comprising users, trade bodies and government officials to monitor the tariff rates (as in Germany).
- 4) Should there be only one society in one area or industry (the usual European model), or should there be competing societies which can prevent anti-competitive practices, but such competing collecting societies can also be confusing for a user who is not sure which society holds the rights for a particular work (the US model in music).
- 5) Some countries allow "*extended collective licensing scheme*" which refers to a system where agreements between collecting society and the user have a binding effect on both society members as well as the non-represented right-holders. Thus, the extended collective agreement license conferred on a user will give the user the right to use certain works despite the fact that authors of those works are not represented by the organisation; non-represented right-holders will be treated on an equal basis as represented right-

holders.^{xiii} Such countries however have a strongly regulated regime where collecting societies are subject to governmental authority.

- 6) Authors are often not sufficiently protected under copyright law against abuse of power by collecting societies. Their works are licensed under conditions which they would not agree to, or they have no guaranteed right of equitable remuneration where collecting societies have licensed their work under blanket licences.

5.4 Collecting societies in general - CEMAC negotiators should consider:

The preamble of the OAPI-Bangui Agreement encourages the creation of associations of national authors in those member States where such bodies do not exist. Nevertheless, it is imperative that negotiators consider the following public policy factors:

- (a) A developing country with no creative industries may not need to set up a collecting society in any area.
- (b) If the country can identify local industries that need both economic and cultural support, such as crafts industries, indigenous art and design, local music, then a collecting society may be beneficial in helping fledgling traditional economies grow into a fully fledged industry.
- (c) Collecting societies can also perform non-copyright tasks such as regulating “authenticity certificates” for traditional or indigenous goods and services (as in the case of the Australian Aboriginal societies which are in charge of authenticating genuine Aboriginal art).
- (d) Does the country have the economic capability of building and maintaining a collecting society?
- (e) In order to represent the needs and interests of users, governments should promote the creation of trade associations or interest-based groups such as university/library or museum consortiums either locally or regionally. Such associations can ensure low licensing fees or none i.e. a local stakeholder group who has to deal with licensing is often the first group that grapples with the content and scope of the law.

5.5 Controlling collecting societies - CEMAC negotiators should consider:

- (a) Do CEMAC countries have the technical capacity to regulate and control the activities of the collecting society?
- (b) All European Union Member States national laws, for instance, have some sort of regulatory mechanism within their national copyright laws which contain specific provisions delimiting the society's activities and subjecting the society to independent supervision.

- (c) The licences and tariffs should be monitored so that there is no overriding of copyright law, especially in relation to exceptions and limitations.
- (d) Collecting societies must be supervised and monitored. There should be a competition authority to address any anti-competitive effect which results from the activities of collecting societies.
- (e) There is also a need for independent supervision to ensure equitable licensing practices of collective management organisations, with special emphasis on the tariff rate.
- (f) There may also be a need for governmental regulation which focuses on the author-society relationship, to ensure the author has his right share of income, and that the collecting society is transparent in its income collection and distribution. Such supervision should further ensure that collecting societies' accounts and administrative practices are open to regular audits.

[See Annex 4 on a model example which controls collecting societies]

6. The Database Right

6.1 Copyright protection

The legal protection of collections under *copyright* law is not a novel proposal. Article 2(5), Berne Convention^{xiv} provides that copyright protection can be available for “collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations”.

Many EU Member States offer protection to non-creative compilations under copyright and quasi-copyright rules.^{xv} Besides these quasi-copyright rules, unfair competition law is another favoured option for protecting compilations.

6.2 What is a database right?

The term “database” covers many types of electronic and digital products, including e-books, directories, share price indices, on-line information services, and indeed, the whole Internet can be perceived as a database conceptually. The *sui generis* right is expressed in the EC Database Directive as follows:

"Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database."^{xvi}

6.3 Economic implications of sui generis database right

The ostensible economic aim of the database right is the provision of incentives for the protection of the investment required in producing and marketing value-added products for the economic well-being of the region concerned, and to curtail the activities of the parasitical free rider.^{xvii}

In 2005, the European Commission's Evaluation of the Database Directive declared as follows:

"The economic impact of the "sui generis" right on database production is unproven. Introduced to stimulate the production of databases in Europe, the new instrument has had no proven impact on the production of databases. Data taken from the *GDD* show that the EU database production in 2004 has fallen back to pre-Directive levels [...] Is "sui generis" protection therefore necessary for a thriving database industry? The empirical evidence, at this stage, casts doubts on this necessity."

The Report pointed out that the number of databases appearing in the *Gale Directory of Databases* for 2004 was just *three* databases more than the total listed shortly before the Directive came into force.^{xviii} Therefore, it is not necessarily true that the *sui generis* protection is crucial to the continued success of the publishing and online industries.^{xix} Moreover, there are now serious concerns as to the harm the database right may cause in the educational and scientific area (see Annex 5).

6.4 Database right - CEMAC negotiators should consider:

- a) The inclusion of non-original databases goes beyond any obligation under current intellectual property agreements and conventions. The only region which has the sui generis database right is the European Union (EU), and those countries who have introduced it under an EC EPA.
- b) Copyright protection may be sufficient for the needs of CEMAC countries. The Bangui Agreement provides for the protection of databases defined as "compilation of data or facts". The law further allows countries to protect "collections of works, of expressions of folklore or of simple facts or data, such as encyclopedias, anthologies and databases, whether reproduced on a medium that may be processed by a machine or in any other form, which, by reason of the selection, coordination or arrangement of their contents, constitute creations of the mind."^{xx} If the CEMAC countries are signatories of the Berne Convention, then this is sufficient for the purposes of Article 2(5).
- c) Do or could the existing copyright laws within CEMAC countries offer protection of factual databases under their copyright laws? In this respect, CEMAC negotiators should note that the Bangui Agreement specifically prohibits protection to:
 - official texts of a legislative, administrative or judicial nature or to the official translations thereof;
 - news of the day;
 - simple facts and data.^{xxi}
- d) Do or could CEMAC countries offer protection of factual databases under other intellectual property laws such as unfair competition law?
- e) Is there empirical evidence that there is widespread piracy or unfair misappropriation of databases in CEMAC countries?

- f) The database right in Europe was intended to stimulate the growth of databases in Europe. Nevertheless, there has been no evidence of growth in this industry since the database right directive was introduced in the EU in 1996.
- g) Will introduction of the new right lead to curtailment of all types of follow-on or incremental innovation which may lead to a more improved version, and hence be of overall benefit to the economy?

7. Conclusion

The current nature of copyright law is the necessary and efficient response to the need of authors and publishers to appropriate the economic value of copyright works from users. Nevertheless, developing countries must realise that copyright law today must also be made and interpreted from the “public interest” perspective.

The international regime on copyright is set out under the TRIPS Agreement, but there is no consensus in the major developed countries as to how these provisions are to be interpreted. Moreover, the WIPO Treaties are new, and are still being subjected to national implementation and interpretation. Thus the major challenge for all stakeholders is to realize that these provisions are ultimately a matter of domestic legislation and interpretation.

There is now the growing realisation of the potential impact of current copyright policies on educational and development policies. These copyright policies and their concurrent implication on the issue of access to education should not be ignored in any future EPA negotiation.

Developing countries should ensure that national provisions take advantage of the wide flexibilities provided in the TRIPs by retaining their current limitations and exceptions, or extending their limitations and exceptions for the research, education and scientific usage of copyright material.

A provision on general “public interest” is recommended and is compatible with the general principles of TRIPS which sanction the full usage of ideas and concepts (Art 9.2 TRIPS) and allow member states to formulate pro-technology, anti-competitive policies (Arts 8, 40 TRIPS). Moreover, international human rights law encourages member states to have public interest policies which allow users to “freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,” (Art 27(1), Universal Declaration on Human Rights).

The following are a summary of recommendations:

- (a) negotiators should be careful in giving away concessions and accepting TRIPs plus provisions such as the provisions on TPMs and the database right;
- (b) no provision introduced on TPMs should be introduced unless and until a thriving and regulated collecting management environment has been set up domestically;
- (c) for most countries, technical assistance in setting up a regulated collecting society environment will be necessary;

- (d) limitations and exceptions as set out in the Bangui Agreement are sufficient for the moment;
- (e) further provision should be made to introduce the general preamble of the WIPO Treaties regarding public interest into national laws/EPAs;
- (f) the EU principle of "adequate compensation" should be avoided unless the domestic law provides for a private copying levy system.

ANNEX 1

WHAT ARE TPMS?

Below are examples of technological measures employed by the copyright owners, and show how they may obstruct the exercise of such legitimate rights.

- Access locks: Such technological locks can prevent access to works which are not subject to copyright protection at all, for example where the work comprises wholly or substantially pure data or ideas, or comprises materials which are not subject to copyright protection under certain jurisdictions (such as laws, government reports and court judgements), or the work comprises public domain materials which have fallen out of copyright protection. Another scenario which librarians have often complained of is when the work is subject to copyright protection, but the user merely wishes to inspect the work prior to purchasing but is unable to do so without circumventing the technological lock.
- Copy locks: Such technological measures allow access to the work but prevent copying altogether even where the user wishes either to copy insubstantial parts of the work (which is a non-infringing act under copyright law) or where the user has a valid defence for copying parts of the work (for example, archival usage or fair use).
- Access and/or copy limit locks: This is where the technological measure allows a lawful purchaser of the copyright work to access (and maybe to copy) the product but limits the number of times this may be done. For example, the user may only play a CD-ROM for a certain number of times before access is denied completely and the purchaser may have to buy or license a new version of the data.
- Playback locks: This is a variation on the above themes but merely limits the ability of the lawful purchaser to play the work on one type of media rather than another. Thus, recent CDs have been released which allow playback on regular CD audio players but not in CD-Rom drives of personal computers--the argument being that this prevents unauthorised downloading and uploading of music on the internet.

ANNEX 2

HOW TPMS WORK IN THE EUROPEAN UNION AND IN THE UNITED STATES

Both the US and EU laws have introduced a new right of control for rights owners which goes beyond the WIPO Treaties, without introducing commensurate measures to protect the user.

TPMS in the EU

Within the EU context, Article 6(4) of the Copyright in the Information Society Directive sets out the infrastructure within which TPM work.^{xxiii} On the one hand, the Directive provides for a right to fair compensation to intellectual property owners for reprographic reproduction, private copying, and for reproduction of broadcast programmes by certain public institutions; the term “fair compensation” is a thinly veiled reference to the private copying levy schemes which operate in most European civil law systems.^{xxiii} Thus, the TPM rules operate within this European legal framework in most of the Member States. Collecting societies are pressed to take into account, when collecting the private copying levy, the presence or absence of technical protection measures and rights management information.^{xxiv}

However, this has raised difficulties in many European civil law countries as the private copying levy appears to presume that every citizen has a “right to copy”, since compensation is built into the levy system. TPMs have upset this user and consumer “right” as it curtails their ability to exercise an excepted use. In 2006, the French Supreme Court in the *Mulholland Drive* case held that copyright owners can assert their TPMs against users. In doing so it reversed the Court of Appeals’ ruling that the TPMs unduly restricted the private copying exception under the French copyright law. According to the Supreme Court, private copying was not an absolute right for consumers, only an exception to an author’s rights – an exception which, as all exceptions under French law, should be strictly construed.^{xxv}

Indeed, the problem of TPMs has proved so difficult that the French legislature tackled it by providing for the establishment of the “Authority for the Regulations of Technical Measures” (*Autorité de régulation des mesures techniques*). This body was duly created in 2007 with the objective of ensuring the interoperability of all DRM systems and allowing the private copies.^{xxvi} The attempt to regulate and limit (and even neutralise) DRMs caused a furore and led to an unexpected statement by Steve Jobs, the Apple CEO:

Imagine a world where every online store sells DRM-free music encoded in open licensable formats. In such a world, any player can play music purchased from any store, and any store can sell music which is playable on all players. This is clearly the best alternative for consumers, and Apple would embrace it in a heartbeat ... Every iPod ever made will play this DRM-free music. Though the big four music companies require that all their music sold online be protected with DRMs, these same music companies continue to sell billions of CDs a year which contain completely unprotected music... Much of the concern over DRM systems has arisen in European countries. Perhaps those unhappy with the current situation should redirect their energies towards persuading the music companies to sell their music DRM-free.^{xxvii}

Both EMI and Apple now release TPM-free music for Apple’s iTunes service. Thus, in European and industry terms, TPMs are not considered necessary or indeed helpful for creative innovation.

TPMs in the US

The US federal copyright law allows for TPMs under its Digital Millennium Copyright Act (DMCA) 1998. Importantly, the Act has a specific mandatory provision in s.1201(f) for reverse engineering for the purpose of interoperability between software components – these are similar to the EU's Computer Program Directive.^{xxviii} Moreover, the courts appear to be somewhat cautious in allowing the DMCA to create monopolies by tying in protected works to manufactured goods.^{xxix} The US copyright statute explicitly provides, in respect of the anti-circumvention measures, that:

"Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use."^{xxx}

ANNEX 3

THE HUMAN RIGHT TO EDUCATION^{xxxi}

The human right to education implicitly carries much larger public welfare and communitarian elements than compulsory elementary education alone. It is said that it “epitomizes the indivisibility and interdependence of all human rights”.^{xxxii} After all, it is not just the individual but also society which has an interest in having an educated society and citizenry.^{xxxiii} Moreover, international human rights discourse recognises that education is an indispensable means of realising other human rights. It empowers the poor, women, and children from exploitative and hazardous labour, it protects the environment, and is a financial investment for States.^{xxxiv} The right to education can also be considered as both a civil right and a political right, as it also is directed to the “full development of the human personality and the sense of its dignity”.^{xxxv}

The gist of the education components as found in Article 26 of the Universal Declaration of Human Rights and Articles 13-14 of the International Covenant on Economic, Social and Cultural Rights, is as follows:

- education shall be directed to the full development of the human personality and the sense of its dignity
- to secure *compulsory, free* primary education
- to ensure secondary education is made generally available and accessible to all, especially by the progressive introduction of *free* education;
- to ensure higher education is made equally accessible to all, on the basis of capacity, in particular by the progressive introduction of *free* education;
- fundamental education shall be encouraged or intensified.

The issues are as follows. First, should intellectual property rights be subject to the right of education? And if yes, how should this subjugation of intellectual property rights be implemented?

The 1999 General Comment No. 13 on the right to education^{xxxvi} states that part of the aim of the provision is to make States set up an adequate infrastructure to facilitate the proper functioning of educational institutions.

provisions sanctioning *free* educational usage of materials within most intellectual property laws, and especially within the international copyright system.

Thus, it seems inevitable that the educational needs of individuals should be taken into account within the international intellectual property framework. Yet there is a dearth of provisions sanctioning *free* educational usage of materials within most intellectual property laws, and especially within the international copyright system.

ANNEX 4

A MODEL LAW ON COLLECTING SOCIETIES

A model law, for example, would set out a comprehensive code detailing all the conditions, duties and activities of societies, and negotiators need to consider whether these duties can be enforced against collecting societies:^{xxxvii}

- a duty on rights management organisation to administer on equitable terms the rights and claims of all right holders;
- a duty to distribute the collected revenues in a non-arbitrary manner;
- a duty render accounts and auditing on an annual basis;
- a duty provide information to any person as to whether they administer exploitation rights in a given work, or have given licences on behalf of a member;
- a duty to establish a tariff plan for approval;
- placing the rights management organisations under supervisory control of the relevant government office who would confer the initial authorisation and offer continuous supervision;
- maintaining a strict independence of roles and powers between the government, the collecting society and trade associations (thus ensuring that the same persons do not hold positions in organisations with conflicting interests);
- ensure a further layer of regulatory control is placed via the special dispute resolution mechanism; ensure that the procedure and final decisions of such a mechanism are integrated into the civil law procedural system; ensure a final layer of regulation under the competition/monopoly authority

ANNEX 5

THE EU DATABASE RIGHT

The following matters are of concern within the EU concerning the EU database right, and should be taken into account if parties are asked to implement the EU version of the database right:

- 1) Harm to research and education: The EU database right may harm research, educational and scientific communities that would have been able to use databases under specific exceptions and limitations, and/or under the general defences such as “private use” or “educational use” or “fair dealing”. The EC database right can prevent users not only from downloading and printing the contents of a database, but also the loading and running of electronic or on-line databases. This is beyond the scope of traditional copyright law.
- 2) Indefinite term of protection:^{xxxviii} Under traditional copyright law, one cannot argue that a fresh term of copyright protection arises in a work from the mere “verifying” of the contents of the work or from minor updates or editorial corrections to the work. The opposite is true under the database right. A database right can be ever-greened. A fresh term of protection can be triggered for the whole database, irrespective of the fact that the pre-existing (and possibly public domain) data or materials in the collection have not been changed or amended, but merely verified or changed in a minor manner. This is a serious implication for the academic and scientific communities.^{xxxix}
- 3) There are extremely narrow limitations and exceptions: The problem with all sui generis systems is that while the rights are carefully carved out for rights owners, a heavy societal cost is often imposed in the form of narrowed exceptions and limitations. There are no realistic limitations and exceptions for educational and scientific uses. There is no general private use exception for electronic databases except that the lawful user may make use of insubstantial parts of the database. No person can distribute or make available a non-electronic database to other persons within the family circle, even though there may be no accompanying element of profit/commerce or market harm to the database proprietor. The exception for “teaching or scientific research” is narrow.^{xi} The limitations are also subject to the 3 step test.^{xli}
- 4) No third party use allowed: There is the added problem that there are no general exceptions in relation to usage of the database by non-lawful person.

June 2005 (with some firms promising to the Clinton Foundation a price of \$140).¹

¹ Medecins Sans Frontieres, *Untangling the Web of Price Reductions* (8th Edition), June 2005, p.10.

- i Art.11, WIPO Copyright Treaty and Art.18, WIPO Performances and Phonograms Treaty. For a full account, see Ficsor, M., *The Law of Copyright and the Internet*, Oxford: Oxford University Press, 2002, chapter 11.
- ii See www.copyright.gov/1201/2003/hearings/schedule.html.
- iii For examples of technological measures employed by the copyright owners, and how they may obstruct the exercise of such legitimate rights, see Dutfield, G. and U. Suthersanen, "The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity". *Intellectual Property Quarterly* 379-421, 2004, at 399.
- iv Article 7, Annex VII, Bangui Agreement.
- v Chapter IV, Annex VII, Bangui Agreement.
- vi Extract from G. Dutfield and U. Suthersanen, *Global Intellectual Property Law*, Edward Elgar, (forthcoming September 2008), Chapter 12. Also see Chapter 9, *Policy Discussion Paper on Intellectual Property Rights and Development*, UNCTAD-ICTSD Project on Intellectual Property Rights and Sustainable Development, 2003.
- vii Correa, C.M. (2000), *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options*, London, New York and Penang: Zed Books and Third World Network.
- viii Commission on Intellectual Property Rights, "Integrating Intellectual Property Rights and Development Policy", Report of the Commission, London, September 2002,100.
- ix Correa, C.M., *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options*, London, New York and Penang: Zed Books and Third World Network, 2000.
- x G. Dutfield, *Protecting Traditional Knowledge and Folklore*, UNCTAD-ICTSD Case Study, October 2002.
- xi G. Dutfield, *Protecting Traditional Knowledge and Folklore*, above.
- xii See U. Suthersanen, Collectivism of Copyright: The Future of Rights Management in the European Union, in *Oxford Yearbook of Copyright and Media Law*, (Oxford University Press:2000) pp.15-42; and P. Schepens, *UNESCO Guide to the Collective Administration of Authors' Rights*, UNESCO:2000, <http://unesdoc.unesco.org/images/0012/001206/120677e.pdf>.
- xiii See for example the Swedish Law No. 729 of December 30, 1960, on Copyright in Literary and Artistic Works.
- xiv Berne Convention for the Protection of Literary and Artistic Works, (Paris version, 1971).
- xv Scandinavian countries provided a limited term of protection to producers of non-original compilations under the "catalogue" rule. See also Graham Dutfield and Uma Suthersanen, THE INNOVATION DILEMMA: INTELLECTUAL PROPERTY AND THE HISTORICAL LEGACY OF CUMULATIVE CREATIVITY, I.P.Q. 2004, 4, 379 at 411.

- xvi Article 1, European Parliament and Council Directive on Legal Protection of Databases, 96/9/EC, 11 March 1996, OJ L 77/20, 27 March 1996 (henceforth referred to as the EC Database Directive).
- xvii Recitals 7,8,10 and 12, EC Database Directive.
- xviii DG Internal Market and Services Working Paper, *First evaluation of directive 96/9/EC on the legal protection of databases*, Brussels, 12 December 2005, available at http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf. This paper is highly recommended reading in relation to the nature and impact of the database right.
- xix The survey was addressed to 500 European companies and organisations involved in the database industry (publishers, suppliers of data and information, database manufacturers, distributors, etc.) and 101 replies were received.
- xx Articles 2 and 6, Annex VII, Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization (Bangui (Central African Republic), February 24, 1999.
- xxi Article 7, Annex VII, Bangui Agreement.
- xxii Directive 2001/29 of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society.
- xxiii *Ibid.*, Articles 5(2)(a), (b), (e).
- xxiv *Ibid.*, Articles 6-7.
- xxv *P v Universal Pictures Video France*, Cass. Civ. 1ère, February 28, 2006; more intriguing was the French Supreme Court's application of the "three-step" test under Article 5(5), InfoSoc Directive, which derives from Article 9(2), Berne Convention and Article 13, TRIPS Agreement. See also Maxwell, W. and J. Massaloux, "French Copyright Law Reform: French Supreme Court Upholds Legality of DVD Anti-copy Measures". *Entertainment Law Review* 17(5), 2006, 145.
- xxvi Décret n° 2007-510 du 4 avril 2007 relatif à l'Autorité de régulation des mesures techniques instituée par l'article L. 331-17 du code de la propriété intellectuelle, available at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MCCB0700270D>.
- xxvii Jobs, S., "Thoughts on Music", at <http://www.apple.com/hotnews/thoughtsonmusic/>.
- xxviii Article 6, Council Directive 91/250 of May 14, 1991 on the legal protection of computer programs.
- xxix See *Chamberlain Group, Inc v Skylink Technologies, Inc* 381 F.3d 1178 (Fed. Cir. 2004); *Lexmark Int'l, Inc v Static Control Components, Inc* 387 F.3d 522 (6th Cir. 2004); cf *Davidson & Associates v Jung* 422 F.3d 630 (8th Cir. 2005) (*Blizzard v BnetD*). See also Burk, D.L., "Legal and Technical Standards in Digital Rights Management Technology". *Fordham Law Review* 537, 2005.
- xxx US Copyright Act, s.1201(c)(1).
- xxxi Extract from G. Dutfield and U. Suthersanen, *Global Intellectual Property Law*, Edward Elgar, (forthcoming September 2008), Chapter 12.

xxxii Committee on Economic, Social and Cultural Rights, Accordingly, factors to be taken into account include (i) teaching materials; (ii) library facilities; (iii) computer facilities; and (iv) information technology.

Thus, it seems inevitable that the educational needs of individuals should be taken into account within the international intellectual property framework. Yet there is a dearth of 20th session, *General Comment No. 11 on the plans of action for primary education* (art.14), E/C.12/1999/4, 10 May 1999.

xxxiii Morsink, J., *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, Philadelphia: University of Pennsylvania Press, 1999, at 212-215, explaining that the drafting of Article 26, UDHR was influenced by the many delegates who emphasised the link between education and civic training.

xxxiv Committee on Economic, Social and Cultural Rights, 21st session, *General Comment No. 13 on the right to education* (Art.13), General E/C.12/1999/10, 8 December 1999.

xxxv Morsink *op cit.*, at 212-215; and Art. 13, ICESCR.

xxxvi CESCR, *General Comment No. 13, op cit.*

xxxvii The following example is based on the special German Law on the Administration of And Neighbouring Rights of September 9th, 1965.

xxxviii Recitals 54, 55, Art. 10, Database Directive.

xxxix Recital 54, Database Directive.

xl Recitals 50 and 51, articles 8(1), 9(1), 9(b) Database Directive.

xli Art. 8(2), Database Directive.