



UPDATING THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION FOR THE DIGITAL AGE



CONSUMERS INTERNATIONAL

UPDATING THE UN GUIDELINES FOR CONSUMER PROTECTION

FOR THE DIGITAL AGE



KUALA LUMPUR 2013

About Consumers International (CI)

We are the global campaigning voice for consumers. Established in 1960, CI is the world federation of consumer rights groups. With over 240 member organisations spanning 120 countries, we serve as the only independent and authoritative global voice for consumer rights. We are a registered UK charity.

Published and produced by:

Consumers International

Regional Office for Asia Pacific
and the Middle East

Lot 5-1 Wisma WIM,

7 Jalan Abang Haji Openg,

TTDI, 60000 Kuala Lumpur, Malaysia

Tel: (603) 7726 1599 Fax: (603) 7726 8599

Updating the UN Guidelines for Consumer Protection for the Digital Age

Edited by: Jeremy Malcolm

Cover design by: Adrian Mendoza

Produced by: Jeremy Malcolm

Printed by: Image Magic Digital Printing Services

© Consumers International. Some rights reserved.



Creative Commons Attribution-Share Alike 3.0 Licence
creativecommons.org/licenses/by-sa/3.0/

ISBN: 978-0-9569943-7-0

Contents

Introduction 5

Commentary on proposed amendments 11

1 *Access to knowledge* 13

2 *Internet and telecommunications* 25

3 *E-commerce and digital products* 43

National perspectives 55

4 *India* 57

5 *Brazil* 71

6 *South Africa* 85

Emerging areas 93

7 *Empowering consumers as creators* 95

Introduction

Robin Brown, Charley Lewis and Jeremy Malcolm

*Foundation For Effective Markets & Governance,
LINK Centre of Wits University, and Consumers International*

IN 1985, THE UN GENERAL ASSEMBLY adopted the United Nations Guidelines for Consumer Protection. These Guidelines have had significant impact on public policy and law for the protection and empowerment of consumers across the world. Good policy and sound legislation based on the Guidelines now exists in most countries.

The roots of the adoption by the United Nations in 1985 of a comprehensive set of Guidelines for Consumer Protection are usually traced back to the 1962 call by then US President Kennedy for Congress to ensure greater legislative protection of consumers based on four fundamental rights, viz:

- The “right to safety” in respect of hazardous products;
- The “right to be informed” through accurate information about goods and services;
- The “right to choose” between a variety of quality products and services at reasonable prices;
- The “right to be heard” in policy formulation and in the exercise of their rights.¹

These Consumer Protection Guidelines were initially adopted by the General Assembly on 16 April 1985² and subsequently updated on 26 July 1999.³ They elaborate Guidelines based on seven basic legitimate needs of consumers:

- The protection of consumers from hazards to their health and safety;
- The promotion and protection of the economic interests of consumers;
- Access of consumers to adequate information to enable them to make informed choices;

¹ Kennedy, J (1962) ‘Special Message to the Congress on Protecting the Consumer Interest’, 15 March 1962, available online at <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-037-028.aspx>.

² UN (1985) ‘Consumer Protection’, Resolution A/RES/39/248, United Nations, New York, 16 April 1985, available online at <http://www.un.org/documents/ga/res/39/a39r248.htm>.

³ UN (1999) ‘Expansion of the United Nations guidelines on consumer protection to include sustainable consumption’, Resolution 1999/7, United Nations Economic and Social Council, New York, available online at <http://www.un.org/documents/ecosoc/res/1999/eres1999-7.htm>.

- Consumer education;
- Availability of effective consumer redress;
- Freedom to form consumer groups in order to present their views in decision-making processes affecting them;
- The promotion of sustainable consumption patterns.⁴

The guidelines themselves are organised under seven key areas (supplemented by some sector-specific measures), *viz*:

- Physical safety;
- Promotion and protection of consumers' economic interests;
- Standards for the safety and quality of consumer goods and services;
- Distribution facilities for essential consumer goods and services;
- Measures enabling consumers to obtain redress;
- Education and information programmes; and
- Promotion of sustainable consumption.⁵

The sector-specific measures currently cover food, water and pharmaceuticals,⁶ but are relatively limited in scope.

Based on these UN Guidelines, Consumers International (CI) has developed a set of eight fundamental consumer rights (supplemented by five consumer responsibilities: "Critical awareness; Involvement or action; Social responsibility; Ecological responsibility and Solidarity"). They are:

- the right to the satisfaction of basic needs;
- the right to safety;
- the right to be informed;
- the right to choose;
- the right to be heard;
- the right to redress;
- the right to consumer education;
- the right to a healthy environment.⁷

History of the Guidelines

The UN Guidelines for Consumer Protection were in the UN process at the same time as the Code of Conduct for Transnational Corporations (TNCs). The Code had started out as a proposed instrument to contain excesses of TNCs in the developing world.

⁴ UN (1999) 'Expansion of the United Nations guidelines on consumer protection to include sustainable consumption', Resolution 1999/7, United Nations Economic and Social Council, New York, available online at <http://www.un.org/documents/ecosoc/res/1999/eres1999-7.htm>, pp 2,3. The right dealing with the promotion of sustainable consumption was added in 1999.

⁵ UN (1999) 'Expansion of the United Nations guidelines on consumer protection to include sustainable consumption', Resolution 1999/7, United Nations Economic and Social Council, New York, available online at <http://www.un.org/documents/ecosoc/res/1999/eres1999-7.htm>. The final key area dealing with the promotion of sustainable consumption was the one added in 1999. Strangely the areas do not correspond with the basic consumer rights. Although the right of access to information is fairly widely covered under the various areas, freedom of association and the right to organise is omitted.

⁶ UN (1999) 'Expansion of the United Nations guidelines on consumer protection to include sustainable consumption', Resolution 1999/7, United Nations Economic and Social Council, New York, available online at <http://www.un.org/documents/ecosoc/res/1999/eres1999-7.htm>.

⁷ CI (nd) 'Consumer Rights', Consumers International, London, available online at <http://www.consumersinternational.org/who-we-are/consumer-rights>.

However, provisions to protect business interests, especially from nationalisation, were added and provisions to protect the interests of developing countries and their citizens were watered down. The Guidelines emerged and, in part, became the vehicle for some of the business regulatory elements lost from the Code. Not surprisingly they were opposed by certain business interests. The International Chamber of Commerce (ICC), not exactly a group balancing the interests of the north and south, pushed for the Code and strongly against the Guidelines. Nations lined, up with the USA, Japan and Germany echoing the ICC and the G77 on the other side.

CI (then called the International Organisation of Consumers' Unions) was represented at the UN by the indefatigable Esther Peterson. Esther, who had been consumer policy adviser to Presidents Johnson and Carter, commented at the time "It's amusing that opposition comes more strongly from business interests in countries where these guidelines already exist as laws or regulations."

In spite of strong opposition by the Reagan administration, on 16 April 1985 the UN General Assembly, by resolution 39/248, adopted the UN Guidelines for Consumer Protection by consensus.

The Code of Conduct for Transnational Corporations ultimately did not itself get anywhere. There was another attempt by business interests via the proposed OECD Multi-lateral Agreement on Investment. This failed too, but *TRIPS* and *TRIMS* Agreements (*TRIPS* – Agreement on trade-related aspects of intellectual property rights. *TRIMS* – Agreement on Trade Related Investment Measures) and bilateral trade agreements now give business many of the protections it was seeking.

It is important to note that the OECD was not one sided. Its Committee on Consumer Policy was a supporter of the Guidelines and contributed some of the thinking.

Provisions on sustainable consumption were absent from the 1985 Guidelines and were added on the motion of Argentina in 1999. This had its origins in the Rio Earth Summit and came to fruition after years of work coordinated by CI. These amendments were always understood to be "a first step"; the UN Secretary-General noting that in order to ensure "the relevance of the guidelines in the light of new economic trends," the Guidelines might also have to be expanded into "other areas, such as new information systems [and] telecommunication[s]".⁸ This is part of what CI now proposes in updating the Guidelines again for the digital age.

⁸ ECOSOC report E/1997/61, available online at <http://www.un.org/documents/ecosoc/docs/1997/e1997-61.htm>, paras 59 and 3.

Structure of the Guidelines

The Guidelines have two kinds of provisions. The first kind set out the assistance people everywhere should be given to advance and protect their interests as consumers of goods and services and the rules that should apply to protect them in circumstances where they cannot be expected to protect themselves. The second kind

of provisions in the Guidelines indicate how governments might best go about providing such assistance and making such rules including how they should cooperate with each other.

The provisions of the first kind, particularly with the additions on sustainable consumption in 1999 which originated at the 1992 Earth Summit in Rio, are quite comprehensive, although they have fallen behind current best practices with developments since then, particularly in relation to changes in information and communication technology, as this publication explains.

When national laws fully reflect the Guidelines they provide the legal basis for upholding the eight consumer rights that the international consumer movement has adopted. A very useful guide on what consumer protection laws need to cover to realise these rights was prepared by John Wood in 1996.⁹

No doubt both the first and second kind of provisions and their implementation should, at least for the foreseeable future if not beyond, be seen as works in progress. Social, economic and technological change means that consumer laws need continual updating and the same is likely to apply to the Guidelines. There is rather more work to be done in relation to the Guidelines' second kind of provisions than the first.

⁹ See Brown, R (2012) 'The UN Guidelines for Consumer Protection: Making Them Work in Developing Countries' in Malcolm, J (ed). *Consumers in the Information Society: Access, Fairness and Representation*. Consumers International, Kuala Lumpur, 2012, 113 at 132-136.

Literature on consumer protection guidelines

While there is considerable literature on various aspects of consumer protection, there is relatively little dealing with the role and content of consumer protection guidelines, apart from Harland's key 1987 piece, which gave an enthusiastic welcome to the Guidelines and rated "the unanimous adoption of the Guidelines to be a significant development in the recognition of the importance internationally of well-developed consumer protection policies" and suggested that they would "serve as a valuable starting point for the development of a comprehensive consumer policy, as well as a useful framework against which to review and evaluate existing policies".¹⁰

A strongly contrasting view from Weidenbaum, finds the Guidelines, on the one hand to constitute unwarranted meddling in the internal affairs of member states, and on the other both "vague and amorphous".¹¹

Subsequent scholarship and research seems to have sided more with Harland, who rates 39 citations on Google Scholar, as opposed to Weidenbaum's seven, though subsequent attempts to track the efficacy and impact of the UN Guidelines have been limited. The first is a 1990 report on progress in implementation of the Guidelines in which the UN Secretary-General noted that both developing and developed country governments "reported that the Guidelines had had a significant impact on their work" on consumer policy.¹²

¹⁰ Harland, D (1987) 'The United Nations Guidelines for Consumer Protection', *Journal of Consumer Policy*, No 10, p263.

¹¹ Weidenbaum, M (1987) 'The Case Against the UN Guidelines for Consumer Protection', *Journal of Consumer Policy*, No 10, p431.

¹² Secretary-General of the United Nations (1993). 'Consumer protection report'. *Journal of Consumer Policy* 16 (1).

A subsequent article suggests the Guidelines have been influential in setting standards across South America and in influencing the content of consumer codes, alongside the international consumer movement and a range of other historical and political factors.¹³

In 2001, CUTS International released a report on the State of the Indian Consumer which analysed the implementation of the Guidelines in India.¹⁴ The following year, the United Nations Environment Programme and CI released a report on the implementation of sustainable consumption policies pursuant to the 1999 amendments to the Guidelines.¹⁵

In a different and more recent context, Peltonen looks at the impact of the UN Guidelines on consumer protection measures in Finland, but neither attempts a critique nor makes substantive recommendations for revision.¹⁶

Revision of the Guidelines

In 2010, CI began to advocate for the revision of the Guidelines to update them for the digital age. At first, the revisions sought were limited to the area of access to knowledge (A2K), and by the end of the following year a draft set of proposed amendments on this topic had been prepared by CI members and released for comment. From early 2012, a programme of research was undertaken that would supplement these proposals with a base of evidence from the emerging economies of India, Brazil and South Africa. The results of that research are contained in this volume.

Meanwhile however, it had become clear that there would be merit in conducting a broader review of the Guidelines that could encompass other areas in which consumers were meeting new challenges since the Guidelines were last revised, and to address certain shortcomings that had been overlooked before.

In July 2012, with the participation of CI, the United Nations Conference on Trade and Development (UNCTAD) initiated a process to amend and improve the UN Guidelines on the basis of considerable changes to the consumer market.¹⁷ In support of that process, a questionnaire to take stock of existing consumer protection legislation was circulated by UNCTAD, on the basis of which an implementation report was prepared.¹⁸ CI supplemented this with a survey of its own members, covering the global state of consumer protection.¹⁹

CI's complete proposal for amendments to the Guidelines began to shape at a global meeting of its members held in New Delhi on 26-27 February 2013, and was subsequently finalised through an interactive online comment process that continued until 21 April 2013. In the process of integrating these new revisions, the existing A2K amendments were also revisited, condensed and improved.

The result is presented into publications, of which this is one.

¹³ Vaughn, R (1993) 'Consumer Protection Laws in South America', *Hastings Int'l & Comp. L. Rev.*, Vol 17, p 284.

¹⁴ CUTS International (2001), 'State of the Indian Consumer', available online at <http://www.cuts-international.org/CART/pdf/StateoftheIndianConsumer.pdf>.

¹⁵ UNEP and Consumers International (2004). 'Tracking Progress: Implementing sustainable consumption policies', available online at <http://www.unep.fr/shared/publications/pdf/DTIx0570xPA-TrackingProgress2.pdf>.

¹⁶ Peltonen, A (2008) 'Consumer Rights and Fair Competition — UN Guidelines on Consumer Protection', Mimeo, Finnish Consumer Agency, available online at <http://www.kuluttajavirasto.fi/File/1c76e8a1-8e93-4b12-b9b9-199766ca43d8/consumerandcompetition.pdf>.

¹⁷ UNCTAD (2012) 'Ad Hoc Expert Meeting on Consumer Protection: The interface between competition and consumer policies', United Nations Conference on Trade and Development, Geneva, 12-13 July 2012, available online at <http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=65>.

¹⁸ At printing time, only the draft report was available online, at <http://www.unctad.org/Sections/ditcccpb/docs/UNGCPImplementationReportv1.pdf>.

¹⁹ CI (2013) 'The State of Consumer Protection', available online at <http://www.consumersinternational.org/news-and-media/resource-zone/state-of-consumer-protection>.

The other publication sets out all of the amendments for which CI is advocating, based on the consultation process that we have completed with our members, in the form of a marked-up and annotated version of the Guidelines, with a brief introduction.

In contrast the present publication is limited to the amendments that relate to consumers in the digital age – which for the purposes of this publication we have divided into amendments on access to knowledge (chapter 1), Internet and telecommunications (chapter 2) and e-commerce and digital products (chapter 3). But whilst narrower in scope, it is deeper in its exploration of the issues raised by the amendments, as it contains the fruits of our research from India, Brazil and South Africa on that topic. In the first three chapters, experts from those countries provide their commentary on the proposed amendments as it relates to their countries.

In the following three chapters, we read case studies from India (chapter 4), Brazil (chapter 5) and South Africa (chapter 6) on how the consumer protection principles advanced in the proposed amendments to the Guidelines address problems that ordinary consumers actually encounter in cases such as buying and using digital content products, and accessing information online. We also include a final chapter 7 in which the same experts address emerging areas for consumers in the digital age, that are not dealt with in our current proposal for revision to the Guidelines, but could be addressed in a future revision.

The next step is for UNCTAD's Intergovernmental Group of Experts on Competition and Consumer Protection to consider the recommendations of CI and other stakeholders, as compiled by the UNCTAD's Secretariat, in developing a final text for intergovernmental approval. We hope that these publications will assist them in that endeavour, and that the result will be a stronger and more modern set of Guidelines for the protection of today's consumer.

Commentary on proposed amendments

1 Access to knowledge

Robin Brown

Foundation For Effective Markets & Governance

THERE HAS LONG BEEN WORLDWIDE ADVOCACY¹ for more equitable access to humanity's creative and scientific output. A substantial global movement, the Access to Knowledge Movement, has now been pressing for some years for reforms to rules at all levels governing access to knowledge and information of all kinds and in all forms. The movement has a wide and diverse membership including civil society groups, governments, progressive business, academics and many, many ordinary citizens of the world.

The central idea is that fundamental principles of justice, freedom, and economic development particularly as enunciated in the 1948 Universal Declaration of Human Rights and the subsequent Covenants cannot be realised without equitable access to knowledge. The need to reform copyright and patent law is argued, but also promoted are options other than intellectual property rights for the protection of creativity and innovation – for example, creative commons licensing and innovation prizes. Unlike most products, knowledge and information is today generally reproducible at minimal material and energy cost and is not scarce in the normal economic sense. There should be no significant barriers to prevent all people, rich and poor alike, from having virtually equal access.

There are a number of regulatory instruments of various kinds that can and should be reformed to ensure equitable access to knowledge. While it is not an instrument with regulatory force the UN Guidelines for Consumer Protection has had significant impact as a benchmark for rule-making globally and Consumers International, together with a number of collaborating organisations, believes adding access to knowledge provisions to the Guidelines would help significantly to carry forward reforms needed at global, regional and state levels.

¹ This paper is drawn from an earlier working paper published in the proceedings of Consumers International 2012 meeting "Consumers in the Information Society: Access, Fairness and Representation" by Robin Brown and Jeremy Malcolm, "Information and Communication and the Rights of the World's Consumers in the 21st Century: Updating the UN Guidelines for Consumer Protection", available at <http://A2Knetwork.org/infosoc2012-book>.

1.1 *The Guidelines and access to knowledge*

The position of the consumer has changed considerably since the Guidelines were first passed in 1985. In particular, consumers in the online and digital environment are now faced with both new opportunities (such as the rise of the consumer-creator), and new threats to their rights to participate in cultural, civic and educational affairs (such as the use of digital locks to limit fair use rights and access to the public domain). Such important issues of access to knowledge (A2K) are not covered by the UN Guidelines, nor by any other international instrument.

The Guidelines have the potential to bring progress in many areas of concern. Though they are “Guidelines for Consumer Protection” they are Guidelines for consumer policy more broadly. Consumer policy can be divided into three main subsets:

1. policy to empower consumers to act in their own interests – **Consumer empowerment policy**;
2. policy to provide for protection of consumers and action on their behalf in circumstances where, for one reason or another they are not able to fully prosecute their interests – **Consumer protection policy**; and
3. policy to ensure, as far as possible, consumers benefit from competition so that efficiency gains make standards as high as possible and prices as low as possible – **Competition policy**.

As the *Declaration of Human Rights* and the *Covenant on Economic, Social and Cultural Rights* make clear, equitable access to knowledge represents a general set of rights of people which go beyond their rights as consumers of goods and services. However, a great many of access to knowledge rights can be construed as consumer rights. These fall into the following categories:

- Rights to knowledge so that consumers’ decisions about goods and services can be as fully informed as possible.
- Rights to knowledge so that consumers have access to goods and services necessary to realise their general right “To enjoy the benefits of scientific progress and its applications” (Article 15 1 (b) of the *International Covenant on Economic, Social and Cultural Rights*). For example, intellectual property rights should operate so that essential pharmaceuticals are available to all people.

Articles 11 and 12 of the *Covenant* apply:

11.1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

12.1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

- Rights to obtain freely, or if appropriate/necessary at a fair price, knowledge, available anywhere globally, of any kind (verbal, visual, aural), in any form (books, journals, films, music) and in any medium.
- Rights to obtain, available anywhere globally, at a fair price information processing and communication products and use them without unfair/unreasonable constraints by either states or producers.

1.2 *Basis of consumer rights to access to knowledge in human rights*

Article 27 of the Universal Declaration of Human Rights provides an underpinning for equitable access to knowledge and for intellectual property rights:

Article 27: Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

This Article is elaborated by Article 15 of the *International Covenant on Economic, Social and Cultural Rights* as follows:

1. The States Parties to the present Covenant recognise the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognise the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

The Covenant, a multilateral treaty, was adopted by the United Nations General Assembly in 1966 and came into force in 1976. It now has 160 parties (member states – the UN has 193) and six more have signed, but are yet to ratify it.

The *Berne Convention* and *TRIPS Agreement* go toward realisation of these provisions of the Covenant. While CI is not proposing revision of these instruments, the scheme of intellectual property rights operating globally at present arguably could be more balanced in terms of the protection of the intellectual property interests of corporations (corporate persons) as against equitably serving the interests of individuals (natural persons). Moreover, the scheme is seen by many as less than satisfactory in terms of paragraphs 1 (a) and (b) and in terms of “the diffusion of science and culture”.

Arguably the Covenant itself does not fully realise the first part of Article 27 of the Universal Declaration of Human Rights. The particular need for amendment of the Guidelines for Consumer Protection is that international IP law is, for the most part, oriented to uphold the rights of creators, while safeguarding the corresponding consumer rights is largely left to national law. Although they have implications for international rules, the Guidelines are very much intended to assist states to develop effective domestic consumer policy, regulation and administration.

The proposed amendments to the Guidelines reflect general rights to access to knowledge and information enunciated in the Covenant and in other texts. More particularly, key proposed amendments would assist to:

- Ensure that suppliers of digital content inform consumers of the effect of any applicable technical protection measures and information on interoperability with hardware and software.
- Stop suppliers from using technology to cripple digital products or unreasonably limit the ways in which consumers can use them.
- Require that the dissemination of consumer safety information, as well as codes and standards that impact consumers, are free of copyright constraints.
- Prohibit IP rights from being enforced in ways that trample on consumers’ human rights.

The proposed amendments have been drawn from best practices from around the world. For instance, the provision that requires consumers to be notified of technical protection mechanisms and interoperability limitations is drawn from new provisions in European consumer law. Other provisions are based closely on current legislative developments in Canada and Brazil. The amendments also make reference to relevant UNESCO documents and recommendations.

1.3 *Expert commentary on new or amended provisions in the Guidelines that relate to Access to Knowledge*

1. Objectives

Taking into account the interests and needs of consumers in all countries, particularly those in developing countries; recognizing that consumers often face imbalances in economic terms, educational levels, and bargaining power; and bearing in mind that consumers should have the right of access to non-hazardous products and the right to participate in cultural, civic and educational affairs, as well as the right to promote just, equitable and sustainable economic and social development and environmental protection, these Guidelines for consumer protection have the following objectives:

...

3. The legitimate needs which the Guidelines are intended to meet are the following: ...

(h) Access to knowledge; that is, more equitable public access to the products and tools of human culture and learning;

Tobias Schönwetter and Pria Chetty, South Africa: Legislative backing for general government support for safeguarding consumer access to knowledge can be derived from several pieces of legislation in South Africa.

According to s 16 of the *South African Constitution*, “[e]veryone has the right to freedom of expression, which includes – [...] (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research”. Furthermore, s 29 of the Constitution stipulates that everyone has the right to basic and further education, which the state, through reasonable measures, must make progressively available and accessible. Equally, s 30 of the Constitution determines that everyone has the right to use the language and to participate in the cultural life of their choice; and according to s 31, persons belonging to a cultural community may not be denied the right, with other members of the community, to enjoy their culture and to form, join or maintain cultural associations and other organs of civil society. Finally, s 32 states that “[e]veryone has the right of access

to – (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights”.

The *Consumer Protection Act* (CPA) includes in its objectives the provision of improved standards of consumer information. The Preamble establishes that the law is enacted to, amongst other intentions, improve access to, and the quality of information that is necessary so that consumers are able to make informed choices, provide for consumer education, including education concerning the social and economic effects of consumer choices and promote consumer participation in decision making processes concerning the marketplace and the interests of consumers. The CPA recognises in Section 8 as a fundamental right, the right of equality of a consumer in the consumer market. This section also stipulates that a supplier of goods or services must not unfairly exclude any person or category of persons from accessing any goods or services offered by the supplier.

The *Promotion of Access to Information Act* (PAIA) was enacted in 2000 to give effect to the constitutional right of SA citizens to access any information held by the State and other persons required for the exercise or protection of any rights.

The *Copyright Act* furthers consumer access to knowledge by allowing numerous permission-free uses of copyright protected materials through its set of copyright exceptions and limitations in ss 12 et seq, some of which are discussed in more detail below.

Vipul Kharbanda, Centre for Internet and Society, India: Article 19(1)(a) of the Constitution of India, 1950 which guarantees the freedom of speech and expression for every citizen also encompasses within its scope the right to receive information. Although the Constitutional position does not negate the possibility, the law in its current state does not put a positive obligation on stakeholders to provide information to consumers to fulfil this principle. In this background, a positive amendment in consumer law to advance the right to receive information may be a positive step.

General principles

6. Policies for the enforcement of intellectual property rights should seek to strike a fair balance between rewarding creativity and investment on the one hand, and the cultural, civic, health and educational rights of consumers and their economic and social development on the other.

Vipul, India: Although the minimum mandate under the TRIPS

Agreement is to provide for criminal proceedings in case of piracy on a commercial scale, under Sections 63, 63A, 63B, 64 and 65 of the Indian Copyright Act (which deal with criminal offences and penalties) even non commercial infringement of the Copyright Act might lead to imposition of criminal sanctions. However, in the Indian context, the law does not in any way suspend or hamper a consumer's access to the Internet or any communication network.

The Ministry of Human Resource Development itself recognises in its "Handbook of Copyright Law" that if copyright protection is applied rigidly, it can hamper progress of the society. However, copyright laws are enacted with necessary exceptions and limitations to ensure that a balance is maintained between the interests of the creators and of the community.

To strike an appropriate and viable balance between the rights of the copyright owners and the interests of the society as a whole, there are exceptions in the law. Many types of exploitation of work which are for social purposes such as education, religious ceremonies, and so on are exempted from the operation of the rights granted in the Copyright Act. Copyright in a work is considered as infringed only if a substantial part is made use of without authorisation. What is 'substantial' varies from case to case. More often than not, it is a matter of quality rather than quantity. For instance, if a lyricist copy a very catching phrase from another lyricist's song, there is likely to be infringement even if that phrase is very short.

Schönwetter and Chetty, South Africa: *The South African Copyright Act*, in s 27, only contains criminal sanctions for any person who, without permission:

- a) Makes for sale or hire;
- b) Sells or lets for hire or by way of trade offers or exposes for sale or hire;
- c) By way of trade exhibits in public;
- d) Imports into the Republic otherwise than for his private or domestic use;
- e) Distributes for purposes of trade; or
- f) Distributes for any other purposes to such an extent that the owner of the copyright is prejudicially affected,
- g) articles which he knows to be infringing copies of the work.

27. Governments should restrict suppliers of digital content products and services from employing technologies that have a significant effect of preventing consumers from using those products or services in ways that would otherwise be reasonable, lawful and safe. These include any network locking technologies that restrict the use of devices to particular operator networks. In the case of products that are sold or later supplied with software that is required for their normal operation, the consumer's use of such software cannot be taken as a waiver of the right to use the product as expressed above, nor as consent to the removal of any functionality that the product possessed at the time of purchase.

Vipul, India: Although Indian law does not provide for a prohibition on anti-circumvention technology, an argument could be made that the use of such technology constitutes a 'defect' in the good under the terms of the *Consumer Protection Act, 1986* and therefore should not be allowed (or at least entitle the consumer to compensation). Chapter 4 discusses this in more detail.

Neither does the law provide for a prohibition on product updates that block reasonable, lawful and safe uses, however, a similar argument could be made that such updates constitute a 'defect' in the good under the terms of the *Consumer Protection Act, 1986* and therefore should not be allowed (or at least entitle the consumer to compensation). This is also addressed in chapter 4 in the context of anti-circumvention measures. The same argument could be used for updates which would disable the consumer's access to functionality that the device or software possessed at the time of purchase.

Charley Lewis, LINK Centre, South Africa: The 'network locking' of mobile phones and other end-user devices is frequently applied to prevent customers, usually prepaid customers, from migrating to other networks. The practice was banned in the EU in 1996, but persists in some developing countries. In South Africa, the regulator banned network locking in 2008.² Conversely, SIM *unlocking* has recently specifically been made illegal in the USA without the carrier's consent.³

² Cellular News (2008) 'South Africa Bans Long Contracts and SIM Locking of Handsets', Cellular News, 20 June 2008, available online at <http://www.cellular-news.com/story/31939.php>.

³ Hart, A (2013) 'Unlocking your cell phone is now illegal without proving carrier consent', Examiner.com, Anschutz Corporation, Denver, CO, 26 January 2013, available online at <http://www.examiner.com/article/unlocking-your-cell-phone-is-now-illegal-without-proving-carrier-consent>.

70. Digital content products should be offered on terms equivalent to those sold in other formats, unless the consumer is clearly informed that different terms apply. This includes the normal incidences of product ownership, such as permanent possession, privacy of use, the ability to gift or resell such goods together with all of the rights with which they were first sold, and the ability to lend or perform them within a family, household or similar limited circle. To the extent required to facilitate these uses of such works, and to allow the consumer to access them at a convenient time and place, governments should allow consumers to time, space and format shift digital content products, to make temporary copies of them, and to bypass technical protection measures applied to them. Hindrance of the exercise of these rights should be prohibited by law. Where possible, consumers should have the opportunity to try a digital content product before final purchase.

Vipul, India: This provision broadly includes the rights of personal copying, format shifting, resale, private performance and circumvention. As for personal copying and format shifting, Section 52(1)(a) *Copyright Act* allows this in part. There is a broad exception which states that fair dealing of any work (other than a computer programme) for the purposes of private use, including research, is not copyright infringement. Under Sections 14 (d) and 14 (e) of the Act, if format shifting is taken to be an adaptation of format, then sound recordings and cinematograph films will be considered as allowed, since the right of adaptation is not a right vested in the copyright holder of sound recordings and cinematograph films. Furthermore, in other areas of law (like tax), the authorities have accepted time-shifting equipment, and in everyday life time/space/format-shifting continues unabated.

In case of works which are not computer programmes copying is allowed for, *inter alia*, private and personal use which extends to storage in an electronic medium only (Section 52(1)(a)). For computer programmes Section 52(1)(aa) of the *Copyright Act* allows for making of back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied.

As for private performance, though there is no specific exception under the *Copyright Act*, Section 52(1)(g) allows for the reading or recitation in public of reasonable extracts from a published literary or dramatic work. Section 52(1)(k) allows for the same in case of

a recording. Finally, Section 52(1)(za) allows for reproduction of literary, dramatic or musical works at government functions.

Regarding circumvention, Section 65A of the *Copyright Act* (inserted by the *Copyright (Amendment) Act, 2012*) introduced anti-circumvention measures in the Indian copyright regime. Nevertheless, this section makes circumvention illegal only if the purpose for which such circumvention is made is prohibited by the *Copyright Act*. This means that circumvention *per se* is not illegal, and is allowed if done to make copies for the purposes provided in the exceptions section of the *Copyright Act*.

Schönwetter and Chetty, South Africa: The circumvention of TPMs is arguably not permitted under South African law, even if circumvention is carried out to enable consumers to exercise their rights under existing copyright exceptions and limitations. This is the (perhaps unintentional) result of s 86 of the *Electronic Communications and Transactions (ECT) Act*. With the prevailing uncertainty and perhaps conflicting provisions of the copyright and electronic commerce law, legislators should consider addressing the conflict in either forms of the legislation and ensure that consumer rights are not unduly restricted.

South African law does not expressly address the issue of re-selling of copyrighted goods. The question as to whether copyrighted knowledge goods can be re-sold with all of the rights attached to it depends on whether the doctrine of exhaustion of rights applies. South African law recognises the doctrine of exhaustion of rights as it is applied within South Africa (ie in respect of an article first sold and re-sold within South Africa). Arguably it does not however, recognise exhaustion of rights where the article is first legally bought outside South Africa but is resold in South Africa without the South African rights holder's consent.

Clearly, no penalties for hindering the exercise of consumers' rights as referred to in the proposed amendment can be found in South African law.

Consumers Korea: The provision on private use was amended in Korea in 1987. The Korean private use provision is based on the Berne agreement as well as other countries' laws. Article 30 of Korean copyright law, which is for private use, is as follows: "It shall be permissible for a user to share a copyright work already being made public for the purpose of his personal, family or other similar uses within a limited circle. But this shall not apply to the sharing: 1. When a photocopying machine is set up for the public use; and 2. When user has already known that is infringement of property law."⁴

The background of this Article is for both protecting author's copyright work and extending consumer's benefit for using it. In reality, it is impossible that all of those sharing to get permission. Even if it were possible, it costs more than the benefit for the author. Limiting sharing for personal, family or other similar uses within a limited circle prevent authors' economic loss by confining

⁴ Korean copyright law, Article 30.

the use of copyright work only to certain numbers. On the consumer side, extending the limit of private use from personal to family or others within a limited circle is cost effective. Thus this Article, based on rational decision of consumers, guarantees both authors' benefit by confining the limit and consumer's benefit by extending the limit.

Sharing for personal, family or other similar uses within a limited circle means giving permission not for reproduction within a limited circle, but sharing within a limited circle after reproduction. The limited circle means personal, family and other relationships limited to a few who are linked together closely. For instance, if someone gains membership of online café or social activity but he doesn't know other members personally, it is not a limited circle. And if someone shares a copyright work with friends but those friends don't know each other, it is also not a limited circle. In case of online café or social activities managed by memberships, if non-members also can read and access a copyright work and members can be changed easily, it is also not a limited circle. Thus, a limited circle means a group with a common interest and a maximum size of about ten persons who know each other.⁵

With technological advancements, it is now possible for digital consumers to access, store and share copyright works using "web-hard" (Korean file sharing website) and P2P services. When someone downloads movies or music by web-hard or P2P service for personal use or sharing within a limited circle, it can be permitted. However, if the downloaded file is stored in a file sharing service and used by many and unspecified persons, it is not permitted.⁶ For example, 'Soribada', which is a P2P service for sharing music file in Korea, was ruled as infringing copyright law because it is not used within a limited circle.⁷

As we see in this example, while in the digital age we can access diverse copyright works easily, it also raises worries about industry's economic loss. Therefore, by restricting the conditions and objects of private use in the digital age, it can harmonise the protection of industry with the consumer's benefit.

⁵ Lee, Haewan (2007), Oh-Seungjong (2007), Huh, Heesung (2007).

⁶ Lee, Youngrock, Copyright Issue Report (2009), vol 1.

⁷ Seoul High Court sentenced at 2005.1.25

2 Internet and telecommunications

Charley Lewis

LINK Centre, Wits University

IN RECENT YEARS THE OECD HAS BEEN VERY ACTIVE in the area of consumer protection policy, issuing, *inter alia*, a number of policy guidelines focused on specific aspects of the broad ICT sector. These include:

- OECD Guidelines for Consumer Protection in the Context of Electronic Commerce;¹
- OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce;²
- OECD Recommendation on Consumer Dispute Resolution and Redress;³
- OECD Policy Guidance for Protecting and Empowering Consumers in Communication Services, which dealt with issues such as contracts, quality of service, emergency services, switching, number portability, bundled services, billing, dispute resolution, security and privacy;⁴
- OECD Policy Guidance on Online Identity Theft, which covered malware, spam, phishing and hacking;⁵
- Empowering and Protecting Consumers in the Internet Economy, which is listed here because of its currency (it covers social media along with e-commerce, and discusses current issues such as the legal landscape, information disclosure, contracts, unauthorised charges, misleading and fraudulent commercial practices, geographical issues, privacy, and dispute resolution and redress), although it is a report rather than a set of guidelines.⁶

The establishment of consumer protection policy guidelines in the broad ICT sector appears to have been attempted in relatively few

¹ OECD (1999) 'Recommendation of the OECD Council concerning Guidelines for Consumer Protection in the Context of Electronic Commerce', Organisation of Economic Co-operation and Development, Paris, available online at <http://www.oecd.org/sti/consumer/34023811.pdf>.

² OECD (2008) 'OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce', Organisation of Economic Co-operation and Development, Paris, available online at <http://www.oecd.org/sti/consumer/40879177.pdf>.

³ OECD (2007) 'OECD Recommendation on Consumer Dispute Resolution and Redress', Organisation of Economic Co-operation and Development, Paris, available online at <http://www.oecd.org/sti/consumer/38960101.pdf>.

⁴ OECD (2008) 'OECD Policy Guidance for Protecting and Empowering Consumers in Communication Services', Organisation of Economic Co-operation and Development, Paris, available online at <http://www.oecd.org/sti/consumer/40878993.pdf>.

⁵ OECD (2008) 'OECD Policy Guidance on Online Identity Theft', Organisation of Economic Co-operation and Development, Paris, available online at <http://www.oecd.org/sti/consumer/40879136.pdf>.

⁶ OECD (2013) 'Empowering and Protecting Consumers in the Internet Economy, OECD Digital Economy Papers No 216, Organisation of Economic Co-operation and Development, Paris, available online at <http://dx.doi.org/10.1787/5k4c6tbcvq2-en>.

other jurisdictions. Our research was only able to identify such Guidelines on the part of the Southern African Development Community (SADC) and Common Market for Eastern and Southern Africa (COMESA), in both cases driven by their respective communications regulatory associations.

SADC adopted an initial version of its Guidelines in 2004.⁷ These are specific to the telecommunications sector, and are organised around a set of fundamental principles contained in a 'Consumer Bill of Rights' along with a set of associated 'Consumer Protection Guidelines' (each of which elaborates on the corresponding Bill of Rights provision), both of which are summarised below.

⁷ SADC (2004) 'Consumer Protection Guidelines', Southern Africa Development Community & Telecommunications Regulatory Association of Southern Africa, Gaborone, April 2004, available online at <http://www.itu.int/ITU-D/projects/ITUECACP/hipssa/docs/SADCConsumerProtectionGuidelines.pdf>.

<i>Consumer Bill of Rights</i>	<i>Consumer Protection Guidelines</i>
Disclosure	Disclosure (Solicitations, Billing)
Choice	Consumer Choice
Privacy	Privacy
High Quality, Reliable Service	Reliable, High Quality Service
Accurate Bills and Redress	Accurate Bills and Redress
Market Abuse	Market Abuse
Responsive Regulatory Authority	Responsive Regulatory Authority

Clearly, the correlation between this set of Guidelines and the UN Guidelines is limited.

A revised set of SADC ICT Consumer Protection Guidelines was adopted in 2011.⁸ This version dispenses with the articulation between a Bill of Rights setting out high-level principles and the more detailed associated Guidelines. The Consumer Rights section is now more closely aligned to the UN Guidelines, but lack the degree of regulatory detail set out in the previous SADC Guidelines. A set of Consumer Obligations has now also been added. These are summarised as follows:

⁸ SADC (2011) 'SADC ICT Consumer Rights and Protection Regulatory Guidelines', Southern African Development Community, Gaborone, available online at <http://www.crasa.org/download.php?doc=docpubeng71.pdf>.

- Consumer Rights:
 - The right to safety;
 - The right to be informed;
 - The right to consumer education;
 - The right to choose;
 - The right to be heard;
 - The right to remedy;
 - The right to access basic ICT services;

- The right to privacy;
 - The right to clear and accurate billing;
 - The right to responsive regulatory authority
- Consumer Obligations:
 - Payment of bills for services;
 - Proper use of products and services;
 - Genuine claim;
 - Environmental protection;
 - Respect contractual obligations in customer service agreements;
 - Respect the privacy of other users.

While the revised set of consumer rights is now rather more closely aligned with the set of fundamental rights developed by Consumers International, it contains some clauses carried over from its predecessor, and a new universal access clause. In addition, seemingly tacked on at the end is a clause dealing with ‘Specific Guidelines for Consumer [sic] with Special Needs’, for which there is, now atypically, a set of associated ‘Guidelines on Policy and Regulatory Remedies Focusing on People with Special Needs’.

The initial set of Consumer Protection Guidelines adopted by COMESA in 2007⁹ appears to be largely a copy and paste from the 2004 SADC Guidelines, with some additions and some clear editorial errors.

The ‘Consumer Bill of Rights’ sports 13 clauses with the addition of six new consumer rights, viz: “Non-Discrimination, Safety, Consumers [sic] advocacy groups, Dispute Resolution and Redress, Public Participation and Enforcement, and Fairness.

The associated set of Guidelines includes sections dealing with Broadcasting/Content, Data Protection, and Postal services, but nothing offering guidance for the implementation of any of the additional six consumer rights.

There is also reference in the Table of Contents to an entire section dealing with the establishment, funding and implementation of a “Telecommunications Consumer Protection Fund”, but no mention of this occurs in the text, which concludes instead with a short section dealing with “Support for Consumers Associations”.

With funding support from the IDRC of Canada, the author and Russell Southwood were engaged to revise the COMESA Consumer Protection Guidelines, and presented a set of recommended changes to the CRASA AGM in Victoria Falls in July 2012.¹⁰ These changes were adopted, subject to the incorporation of comments from member states by August 2012.¹¹ No comments were received and a final set of Guidelines was sent to ARICEA, but nothing further has been heard.

The Draft COMESA Guidelines follows the model of its SADC and COMESA predecessors, but much more consistently so, setting

⁹ COMESA (2007) ‘Policy Guidelines on Consumer Protection’, Common Market for Eastern and Southern Africa, Lusaka, February 2007, available online at <http://programmes.comesa.int/attachments/103Policy%20Guidelines%20on%20Consumer%20Protection%20Feb%202007.pdf>.

¹⁰ ARICEA (2012) ‘COMESA Policy Guidelines on Consumer Protection: Draft Recommended Update’, Association of Regulators of Information and Communication for Eastern and Southern Africa, Lusaka, available online at <http://www.ariceaonline.org/attachments/article/16/ARICEA-2011-Updated%20Consumer%20Protection%20Guidelines%20draft.pdf>.

¹¹ ARICEA (2012) ‘Report of the 8th Annual General Meeting of Regulators of Information and Communication for Eastern and Southern Africa (ARICEA)’, Association of Regulators of Information and Communication for Eastern and Southern Africa, Lusaka, available online at [http://www.ariceaonline.org/attachments/article/18/8th%20ARICEA%20AGM%20final%20report%20with%20annexes%20\(2\).pdf](http://www.ariceaonline.org/attachments/article/18/8th%20ARICEA%20AGM%20final%20report%20with%20annexes%20(2).pdf).

out a set of 13 fundamental Consumer Rights, each of which is spelled out in detail in its associated Guidelines section. These are partly derived from the preceding COMESA Guidelines, and partly from research undertaken by the authors into international best practice in the sector, and comprise the following:

- Legal Basis for Protection;
- Responsive Institutional Framework;
- Freedom of Choice;
- Transparency and Disclosure;
- High Quality of Service;
- Accurate and Comprehensible Billing;
- Channels for Redress;
- Non-Discrimination;
- Fair and Responsible Marketing;
- Fair and Reasonable Treatment;
- Personal Privacy and Security;
- Health and Safety;
- Representation and Voice; and
- Access to Information.¹²

Earlier this year CI requested the author to develop and propose recommendations on CI's then current draft proposed amendments for the UN Guidelines, on the basis of the work undertaken by the author and Russell Southwood through the course of two IDRC-funded projects looking at consumer protection in the telecommunications and Internet sectors in Africa. These two projects culminated in the development of the draft COMESA Consumer Protection Guidelines¹³ outlined above, which were derived from the research and based on what the authors considered to be international best practice.

The amendments on Internet and telecommunications services that appear below are those developed by Consumers International and its members after incorporation of some of the recommendations made by the author on those topics. Amongst the proposed amendments are new provisions for the Guidelines that would:

- Address consumers' loss of control over their personal information online, including the preventative measure of limiting the information that is collected about consumers to begin with, as well as treatment of security and remedies against the loss of personal information.

¹² ARICEA (2012) 'COMESA Policy Guidelines on Consumer Protection', Draft Recommended Update, mimeo in the possession of the author.

¹³ ARICEA (2012) 'COMESA Policy Guidelines on Consumer Protection', Draft Recommended Update, mimeo in the possession of the author.

- Promote public access to codes, standards and compliance documentation, as well as safety information, over the Internet.
- Promote the creation, dissemination and preservation of content in diverse languages and accessible formats.
- Promote affordable access to the Internet, and require governments and businesses to uphold the principles of network neutrality.
- Ensure that consumers retain access to their own data in formats that they can use, through the use of open standards.

Although the author's recommendations were taken into account in finalising the text of these amendments (and other amendments to the Guidelines, some of which are found only in the accompanying publication), due to the collaborative nature of the drafting process not all of those recommendations were incorporated. As such, the final text of the amendments should not be taken to be specifically endorsed by the author.

2.1 Further recommendations from the COMESA Policy Guidelines on Consumer Protection

Although they are not part of the current proposed revisions to the Guidelines as set out below, a number of suggested additions to the UN Guidelines under the broad classification of electronic communications are made for future consideration. The recommendations are drawn from an analysis of the draft COMESA Consumer Protection Guidelines¹⁴ developed by the author and Russell Southwood, looking at those provisions of the draft COMESA Guidelines, either not already covered in the UN Guidelines or the proposed amendments to them, or specific to electronic communications.

- Governments must ensure that consumer protection requirements exist in respect of all relevant electronic communications services, including at least: fixed and mobile telephony, Internet and broadband services, radio and television broadcasting. Consumer protection measures should also be extended to associated services enabled or mediated by means of electronic communications services, such as mobile banking and electronic commerce.
- Governments must ensure that quality of service standards for electronic communications are clearly specified and benchmarked in accordance with international norms as defined by the ITU from time to time.

Quality of service standards should be specified in respect of and be appropriate to all relevant classes of service, including

¹⁴ ARICEA (2012) 'COMESA Policy Guidelines on Consumer Protection', Draft Recommended Update, mimeo in the possession of the author.

at least: voice telephony (fixed and mobile), Internet, data and broadband services, and radio and television broadcasting.

Quality of service standards should contain both objective and subjective components, including those related to supply of service, network and service availability, faults and repairs, service quality, customer experience assessment, provision of designated universal service obligation (USO) services including free emergency calls, billing, and level of customer complaints and redress.

QoS standards should apply equally to all licensees falling within a particular class of service, with any variation in QoS standards clearly based on objective criteria.

- Governments should ensure that the basis for customer billing in respect of electronic communications services is clearly spelt out both in advance at the point of sale, and on an ongoing basis either through a bill received by post-paid customers or through clear information provided for pre-paid customers at the point of sale or on request.

Electronic communications licensees should be required to provide customers with detailed and itemised billing information that provides a clear, unbundled breakdown and attribution of all fees, rates and charges in respect of the contracted products and services.

The procedure for querying or disputing bills should be clearly specified in a clear statement on the bill, along with contact details via which queries can be made to the licensee, timeframes for redress and information on how the complaint can be escalated if not resolved.

Consumers are entitled to claim reimbursement in cases where charges can be shown to be erroneous.

- Governments must ensure that electronic communications licensees are required to report to the sector regulator, at least on an annual basis, information and statistics related to all complaints received from customers.

Information about customer complaints, including, but not limited to, numbers of complaints and their breakdown by category, status and operator, is regularly made publicly available, preferably on the website of the regulator.

Findings in respect of complaints that have been escalated to the regulator are publicly made available, preferably on the website of the regulator.

- A national toll-free number is specified via which telephony service providers are required to allow consumers to contact the emergency services 24 hours a day, seven days a week in case of an emergency.

- Governments must ensure that advertising standards regulations are in place to protect television viewers and radio listeners from advertising that contains misleading statements, omissions or misrepresentations based on claims that cannot be substantiated, or is likely to mislead consumers. Such regulations should also deal with the appearance of products within programmes through product placement.
- Governments must ensure the provision of public broadcasting that is mandated in terms of specific public interest content and programming criteria, and universal access and service requirements.

2.2 *Expert commentary on new or amended provisions in the Guidelines that relate to Internet and telecommunications*

10. All laws, regulations and non-statutory instruments such as codes, standards and compliance and relevant research reports which are related to the protection and advancement of the interests of consumers and the public at large, should be freely, accessibly and publicly available, including via the Internet.

Robin Brown, Foundation For Effective Markets & Governance, Australia: Such a statement of principle is unexceptional in relation to laws and regulations of a state and should be accepted without contest. Non-statutory instruments are becoming more and more important in regulating markets, but often they are privy to an industry or profession. Regulation to protect consumers or the public at large is less effective than it might be when consumers or citizens in general cannot measure the conduct of a business or an industry or profession they observe or suffer against the rules that business, industry or profession has set for itself. At present, for example, important standards adopted by the International Standards Organisation, such as ISO 26000 which sets a benchmark for social responsibility for organisations, are only available at a price.

Charley, South Africa: The research underpinning the Draft COMESA Guidelines suggests that authorities frequently and erroneously consider hard copy publication to be sufficient to meet transparency requirements, and that compliance and research reports are often not considered. For similar reasons, the language

specifying that information is to be provided “including via the Internet” is found in several other provisions throughout the text also (for example article 16 on the provision of safety information).

Vipul, India: Section 4(1)(a) of the *Right to Information Act*, 2005 envisages the inauguration of an online information access regime in India through its insistence that every public authority “maintain all its records duly catalogued and indexed in a manner and form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated.”¹⁵ Furthermore Section 4(2) of the Act directs every public authority to constantly endeavour to take steps to provide as much information “suo motu to the public at regular intervals through various means of communications, including the Internet, so that the public have minimum resort to the use of this Act to obtain information.” These two sections have been interpreted by the High Court of the province of Punjab and Haryana in the case of *H C Arora v State of Punjab and others*,¹⁶ to mean that there is a statutory obligation on the government authorities to place all the Acts and Rules in force in the state (including consumer protection rules) on the websites of the various government departments.

As a matter of practice, the accessibility of national Laws and Regulations on the Internet for free is still better but state laws and regulations as well as national and local codes and standards are not freely available and have to be paid for if you buy them from the authorities which publish them, and sometimes these can be very expensive indeed. Clearly, it seems that the codes and standards (for example various standards from the Bureau of Indian Standards) seem to be sold for a profit purpose by the authorities as opposed to laws and regulations which, even when sold from government outlets are sold at a nominal value essentially to cover the cost of paper, labour, etc.

It must also be noted that the Department of Science and Technology has come out with a National Data Sharing and Accessibility Policy for making non-sensitive data produced and available with public authorities available to all for enabling rational debate, better decision-making and use in meeting the needs of civil society.

¹⁵ Although various states have e-governance projects of their own.

¹⁶ Available at <http://www.rtifoundationofindia.com/hcarorastateofpunjab-451>.

Objectives

(i) To safeguard consumers against the unauthorised collection, use, disclosure or loss of their personal information;

11. Governments and businesses should ensure effective consumer control of personal data. Collection of personal data (including Internet usage information and IP addresses) should be made through free, informed and positive consent (opt-in), and only when strictly necessary, in an open and transparent way and wherever practicable and lawful. Confidential personal data should be protected against unauthorized use, and in any event, its use should be minimised. Those affected by any personal data breach must be promptly notified of the details of the breach and of the available means of redress.

Vipul, India: Body corporates may only collect sensitive personal information for lawful and necessary purposes.¹⁷ While collecting such information, body corporates are required to ensure that the individual is informed (i) that the information is being collected; (ii) the purpose thereof; (iii) the intended recipients; (iv) the name and the address of the agency collecting information and the agency that will retain the information.¹⁸ This provision protects privacy as it reflects the principle of limited collection while also ensuring that individuals are informed of why, how, and by whom their information is being collected, thus working to place the control of information in the hands of the individual.

Section 43A of the *Information Technological Act* deals with data protection and mandates corporate bodies “who possess, deal or handle” any “sensitive personal data” to implement and maintain reasonable security practices; failing which they would be adequately held responsible and penalised.

With regard to a consumer’s personal privacy, Rule 4 of the *IT (Reasonable security practices and procedures and sensitive personal information or data) Rules, 2011* require all corporates’ dealing with sensitive personal data to provide a privacy policy to “all providers of information” ie consumers etc. The provision requires corporate bodies¹⁹ who ‘receives, possesses, stores, deals, or handles’ any ‘sensitive personal data’ to implement and maintain ‘reasonable security practices’, failing which, they are held liable to compensate those affected.

However India does not have sufficient data minimisation stand-

¹⁷ Section 43A of the Act and Rule 5(2)(a), (b) of the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011.

¹⁸ Section 43A of the Act and Rule 5(3)(a), (b), (c), (d,) of the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011.

¹⁹ Body corporate means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities.

ards or practices, for eg even if one has to go to the Indian Railways'²⁰ website to book a ticket, it first requires a person to register an account and requires details such as exact date of birth, etc which might be reasonable while booking a ticket but there does not seem to be any reason for requesting such information while registering an account.

Schönwetter and Chetty, South Africa: The South African Constitution stipulates in Article 14 that “everyone has the right to privacy, which includes the right not to have [...] (d) the privacy of their communication infringed.” In addition, the *common law* right of privacy is protected under the law of delict.

The *Electronic Communications and Transactions (ECT) Act* contains an entire chapter on the protection of personal information (chapter viii). It applies to personal information that has been obtained through electronic transactions and prescribes principles for electronically collecting personal information. According to these principles, express permission is required for the collection, collation, processing or disclosure of any personal information unless other laws permit or require such activities (s 51(1)). Furthermore, s 51 stipulates that written permission of the data subject is required for the collection, processing or disclosure of any personal information on data; a data controller may not electronically request, collect, collate, process or store personal information not necessary for the lawful purpose for which the personal information is required; a data controller may not disclose any of the personal information to a third party unless required or permitted by law or specifically authorised by the data subject.

A new piece of legislation, the *Protection of Personal Information (PoPI) Bill*, is currently being discussed and it is expected that the Bill will be enacted later this year. PoPI aims to regulate the collection and processing of personal information by both private and public bodies, including the State. The Bill contains a wide definition of “personal information” and prescribes the following eight principles for the processing of personal information:

Principle 1: Accountability

The party or institution that holds personal information must give effect to the principles for the protection of personal information as set out in the Bill.

Principle 2: Processing limitation

Personal information must be collected directly from the data subject and may only be processed with the consent of the data subject, or where it is necessary to comply with a legal obligation, public law duty or contractual obligation.

Principle 3: Purpose specification

Personal information must be collected for a specific, explicitly defined and legitimate purpose. The data subject should be aware

²⁰ Railways is not run privately in India but by a government ministry.

of the purpose for which the information is collected, and who the likely recipients of the information will be.

Principle 4: Further processing limitation

Personal information may not be processed further in a way that is incompatible with the purpose for which the information was collected initially. Therefore, if information was processed for the purpose for which it was collected, it may only be processed further if it can be shown that the purpose for further processing is compatible with the original purpose. The Bill provides guidelines to assist with such an assessment.

Principle 5: Information quality

The person or institution that determines the purpose and means for processing personal information should ensure that the information is complete, not misleading, up-to-date and accurate.

Principle 6: Openness

Personal information may only be collected if the Commission was notified. Furthermore, where personal information of a data subject is collected, the person or institution responsible for such collection must ensure that the data subject is aware of:

- The fact that the information is being collected;
- The name and address of the person or institution collecting the information;
- Whether or not the supply of the information by that data subject is voluntary or mandatory and the consequences of failure to reply; and
- Where the collection of information is authorised or required under any law, the particular law to which the collection is subject.

Principle 7: Security safeguards

The Bill requires the implementation of technical and organisational measures to secure the integrity of personal information, and to guard against the risk of loss, damage or destruction of personal information. Also, personal information should also be protected against any unauthorised or unlawful access or processing.

Principle 8: Data subject participation

A data subject is entitled to the particulars of his or her personal information held by any institution or person, as well as to the identity of any person that had access to his or her personal information. The data subject is also entitled to require the correction of any information held by another party.

As far as notification requirements are concerned, the Bill requires that “[w]here there are reasonable grounds to believe that

[...] personal information has been accessed or acquired by any unauthorised person” the body collecting the information must notify the Regulator and the data subject as soon as reasonably possible by mail, email, on the website, in news media or as directed by the Regulator.

These provisions are backed up by numerous enforcement provisions, including civil remedies.

In addition to the aforementioned pieces of legislation/proposed legislation, the South African *King III Report on Corporate Governance* requires the Board to ensure that information assets are managed effectively (principles 5.6). According to Recommended Practice 5.6.1, this includes that [t]he Board [...] ensure[s] that there are systems in place for the management of information which should include information security, information management and information privacy.

Section 11 of the *CPA* provides for the consumer’s right to privacy including the right to refuse to accept or require another person to discontinue or pre-emptively block an approach or communication that is intended for direct marketing. The application of the right extends to the right to demand that the person responsible for the direct marketing desist from initiating any further communication.

Finally the *Promotion of Access to Information Act* established certain grounds for the refusal of access to records where a request has been made under the Act. One such ground is the mandatory protection of privacy of natural (third party) persons where the disclosure would involve an unreasonable disclosure of personal information about a third party. (This section is however subject to certain limitations for instance, where the information was publicly available or the person has consented to the disclosure (see section 34.) There is also a mandatory protection of confidential information which cannot be disclosed where the disclosure would constitute an action for breach of a duty of confidence (see section 37). Mandatory protection of commercial information (records containing trade secrets, financial, scientific, or technical information where the disclosure would prejudice the commercial or financial interests of third parties is specified, under section 68.

39. Governments should adopt universal access and service objectives for essential goods and services. Some such services are identified in section 1 of these guidelines as needing to be ‘universal’. There should be scope for national designation of certain emerging services (such as the internet) as ‘essential’.

Vipul, India: The National Telecom Policy, 2012 seeks to recognise telecom, including broadband connectivity as a basic necessity, like education and health and work towards 'Right to Broadband'. Furthermore, it seeks to lay special emphasis on providing reliable and affordable broadband access to rural and remote areas by appropriate combination of optical fibre, wireless, VSAT and other technologies. Meanwhile the government still promulgates policies such as the Cyber Café Regulations which make access to the Internet more expensive.

Regardless much remains to be done to ensure access to the disadvantaged and disabled population of the country. India ratified the UN Convention on the Rights of Person with Disabilities (UN CRPD) in September 2007, and the convention subsequently came into force in May 2008. This convention required that India make a number of changes to its laws, policies, regulations, notifications, programmes, and schemes. As part of this process of bringing the legal instruments of India into compliance with the UN CRPD, the Indian government was required to consult with disabled people and their organisations on how best to fulfil the CRPD mandates. A number of NGOs participated in this process and many recommendations were made to the government. Some recommendations involved expanding existing disability-specific legislation, while others involved taking general legislation and making it disability inclusive. Although very little has been done by the government to enable better rights and access to disabled persons.

~~40.~~ 48. Bearing in mind the need to reach ~~rural consumers~~ isolated and illiterate consumers, Governments should, ~~as appropriate~~, develop or encourage the development of consumer information programmes in the mass media. Government policy should promote the creation, dissemination and preservation of content in diverse languages and accessible formats, including local content suited to domestic or regional needs.

Schönwetter and Chetty, South Africa: South Africa's *Constitution*, in s 6, states the 11 official languages of the Republic. It further stipulates: "Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages." The national and provincial governments may use any of the official languages, taking into account usage, practicability, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the

province concerned. Municipalities must take into account the language usage and preferences of their residents. Government must regulate and monitor their use of official languages, and all official languages must enjoy parity of esteem and must be treated equally. In addition, a Pan South African Language Board is tasked with promoting official and other languages (including sign language and languages commonly used by communities) or for religious purposes in South Africa such as German, Greek, Hindi, Urdu, Arabic, Hebrew and Sanskrit.

The Constitution further stipulates in s 30 that “[e]veryone has the right to use the language [...] of their choice”. Section 31 adds that “[p]ersons belonging to a [...] linguistic community may not be denied the right, with other members of that community - (a) to [...] use their language; and (b) to form, join and maintain [...] linguistic associations and other organs of civil society”.

A new *Language Bill* is currently being discussed, aiming, among other things, at requiring the adoption of language policies by national departments, national public entities and national public enterprises; providing for the establishment and functions of a National Language Unit; providing for the establishment and functions of language units by national departments, national public entities and national public enterprises; facilitating intergovernmental coordination of language policies; and providing for matters connected therewith.

Regarding the availability of content in diverse formats, the *Consumer Protection Act*, section 1, defines “good” to include anything marketed for human consumption, tangible objects, literature, music, photographs, films, games, information, software and other intangible products or a licence to use such intangible products, regardless of form or medium. In sec 1, the Consumer Protection Act defines “licence” to mean the authority, regardless of its specific title or form, issued to a person and in terms of which that person is either (a) authorised in terms of a public regulation to conduct business; or (b) authorised by another person to (i) access any facility of use any goods or (ii) supply any goods or services.

Section 3 of the CPA provides that the purpose of the CPA includes the establishing of a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient and [...] responsible for the benefit of consumers generally; and reducing any disadvantages experienced in accessing any supply of goods or services by consumers, for instance, whose ability to read and comprehend certain consumer information such as notices or labels is limited by low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented.

One of the responsibilities of the Commission established under the CPA is to conduct research and propose policies to the Minister in relation to any matter affecting the supply of goods and services, including proposals for legislative, regulatory or policy initiatives

that would improve the realisation and full enjoyment of consumer rights of persons mentioned above.

Section 31 of *PAIA* provides that a requester of information (under the Act) whose request for a record of public body has been granted must, if the record – (a) exists in the language that the requester prefers, be given access in that language; or (b) does not exist in the language so preferred or the requester has no preference or has not indicated a preference, be given access in any language the record exists.

49. Bearing in mind the value of the Internet as a channel for consumer education, including long distance learning and knowledge sharing between consumers, governments should facilitate universal access to the Internet through affordable telecommunications and Internet costs with special consideration given to the needs of public service and educational institutions, and of disadvantaged and disabled population groups.

Schönwetter and Chetty, South Africa: The *Electronic Communications and Transactions (ECT) Act*, in sec 6, aims at safeguarding universal access by all citizens to Internet connectivity and electronic transactions by requiring the creation of a national e-strategy that outlines strategies and programmes to:

- provide Internet connectivity to disadvantaged communities;
- encourage the private sector to initiate schemes to provide such universal access;
- foster the adoption and use of new technologies for attaining universal access; and
- stimulating public awareness, understanding and acceptance of the benefits of Internet connectivity and electronic transacting.

Vipul, India: The office of the Adviser to Prime Minister on Public Information Infrastructure and Innovations was established in 2009 to create a framework for a robust Public Information Infrastructure. Furthermore, an implementation plan for creating a National Optical Fibre Network (NOFN) to provide Broadband connectivity to 250,000 Panchayats in the country is being worked upon under the aegis of the Department of Telecommunications.

Section 52(1)(i) of the Indian Copyright Act maintains that any work may be reproduced by a teacher or a pupil in the course of instruction. With regard to research, it is covered under Section 52(1)(a)(i), but it would depend if such research or activity falls

within the purview of “fair use”. However, this limitation of “fair use” is not applicable to Section 39(a) which allows making any sound recording or visual recording for research purpose. The above exception does not apply to computer programmes.

With respect to distance education, the position in the Act does not seem to be explicit. It states that any work may be reproduced by a teacher or a pupil in the course of instruction. The term “course of instruction” doesn’t seem to be limited statutorily. Regarding all cinematograph films and sound recordings, Section 52(1)(j) provides that “the audience [must be] limited to such staff and students, parents and guardians of the students and persons directly connected with the activities of the institution”. Even this limitation does not seem to expressly bar reproduction for the purpose of distance education.

On the policy front, the National Knowledge Commission Report of 2008 also says that the development of open and distance education is imperative to achieve the objectives of expansion, excellence and inclusion in higher education. Its recommendations on distance education focus on creating a national ICT infrastructure and developing web-based common open resources. The NKC also recommended that the production of quality content and leveraging global open educational resources needs to be focused in a comprehensive manner. We also need to encourage open access for all material research papers, books, periodicals etc.

50. Governments and businesses should afford consumers the right to access neutral networks so that consumers would have the right to attach devices of their choice, the right to access or provide content, services and applications of their choice, and the right for this access to be free from discrimination according to source, destination, content and type of application.

Vipul, India: The Telecomm Regulatory Authority of India’s Report on Application Services talks about network neutrality and mentions the steps taken by the Federal Communications Commission with regard to freedom and openness of the Internet such as adoption of the Open Internet Rules but seems very non-committal saying that the issue of network neutrality for ASPs providing services on the OTT model will be dealt with as and when required.

It must be noted that in the absence of any enforceable guidelines to protect network neutrality it becomes very easy for ISPs to block content even when they are not required to do so, for eg recently in the case of *M/s. R. K. Productions Pvt. Ltd. v. BSNL and others*, the

Madras High Court granted a “John Doe” injunction to the producers of the motion picture “3” against all ISPs preventing them from allowing copying of the said motion picture. Although the Order nowhere even suggested that the ISPs do that by blocking any P2P sharing sites, a number of ISPs blocked some popular P2P sites such as thepiratebay.org, etc. in alleged compliance with the order.

Schönwetter and Chetty, South Africa: No regulation currently exists in South Africa regarding net neutrality. There is, however, some debate on this issue, especially in light of discussions about legislation aiming at banning all Internet pornography.

Section 83 of *PAIA* establishes certain functions of the Human Rights Commission of South Africa to promote access to information. These include making of recommendations for the development, improvement, modernisation, reform or amendment of this Act or other legislation of common law having a bearing on access to information held by public and private bodies and procedures in terms of which public and private bodies make information electronically available.

3 E-commerce and digital products

Jeremy Malcolm

Consumers International

THE TUNIS AGENDA FOR THE INFORMATION SOCIETY, which was one of the output documents of the World Summit on the Information Society in 2005, deals with the issue of online consumer protection in the following text:

47. We recognize the increasing volume and value of all e-business, both within and across national boundaries. We call for the development of national consumer-protection laws and practices, and enforcement mechanisms where necessary, to protect the right of consumers who purchase goods and services online, and for enhanced international cooperation to facilitate a further expansion, in a non-discriminatory way, under applicable national laws, of e-business as well as consumer confidence in it.

The proposed amendments to the UN Guidelines respond to this call, in providing legislators with more specific guidance about the areas of protection that are needed for consumer in the digital age. We have been careful not to “reinvent the wheel” in our recommendations, and have drawn as far as possible on the excellent work of the OECD’s Consumer Policy Committee, in which CI is also a participant. In fact new paragraphs 66, 67, 68, 69 and 72 of the Guidelines are taken almost verbatim from the OECD’s 1999 Guidelines for Consumer Protection in the Context of Electronic Commerce. These paragraphs mainly address the need for parity in the consumer protections provided in online and offline transactions, and are still just as relevant today as when they were written.¹

But there is one major aspect in which the OECD text has become dated, and where there is a lacuna to be filled by our proposals for the Guidelines. This is in providing parity not only between online and offline transactions, but also between digital and analogue (or tangible) goods. The distinction is simply this: you can

¹ See also the other OECD instruments referred to on page 25.

purchase a paperback book from a bookshop, or you can purchase it online; but in either case, in principle your rights are the same. Yet if you purchase an e-book rather than a paperback (and whether you purchase it from a bookshop or online), your rights may not be the same. This is the new problem that the OECD recommendations don't yet address,² that we aim to address in our proposals, drawing from a variety of current sources including the recent EU Consumer Rights Directive.³

Underpinning our proposals is the observation that the emergence of digital products has upset the balance between rewarding creativity and investment on the one hand and educational and developmental rights of consumers on the other. For example, suppliers of digital goods too often assert the need to lock up digital technologies to prevent consumers from using them in new and innovative ways. These restrictions are frequently anti-competitive, unnecessary to protect the supplier's legitimate interests, and abusive of consumer rights.

There are two ways in which these restrictions are put in place:

- Small print in copyright licence agreements is used to procure consumers' consent to limitations on their use of electronic products, or to constrain their exercise of lawful copyright flexibilities. These terms of service are frequently too long and complex to read. For example, to purchase a compact disk in a music store, no terms and conditions are required to be accepted other than those printed on the label. To do so from the Apple iTunes store, one must agree to 56 pages of small text.
- Technology is used in a similar way to enforce hidden restrictions on how digital content products may be used, copied, shared, accessed using open source software, or on particular devices. Compounding this, under national law it is frequently illegal to bypass these technological restrictions, even for a lawful purpose. For example, although the law may allow consumers to use an extract from a DVD in an educational project, it may be both technically difficult to do this due to the DVD's copy protection technology, and illegal to even try.⁴

Some of ways in which these two techniques can be misused are obvious – most of us have experienced the annoyance of a locked mobile phone handset, or a video file that won't play on our computer – but others may surprise you. For instance, you may not have considered that fine print and digital locks can be used to render the digital goods that you purchase worthless on the second-hand market. This is done legally by ensuring that you are not “purchasing” digital content but only “licensing” it, and technically by locking that content to your device or user account, or bundling it with single-use online content vouchers. This allows the supplier to eliminate competition from the legitimate second-hand market.⁵

Small print and digital locks can also stop you from accessing content that you have paid for. In 2009, 17-year-old student Justin

² It should be noted that the OECD is currently working on new recommendations on digital content products, but at the time of printing these have not yet been finalised. CI has provided comments on these through the Consumer Policy Committee, based upon our proposals for the UN Guidelines.

³ New paragraph 30 of the Guidelines is based closely on Article 5 of the EU Consumer Rights Directive (Directive 2011/83/EU).

⁴ Recognising this, the right for American consumers to bypass DVD copy protection for such purposes was granted by the US Copyright Office in 2010, and this was extended in 2012 to include taking clips from online movies: see McSherry, Corynne and Hofmann, Marcia, 'The 2012 DMCA Rulemaking: What We Got, What We Didn't, and How to Improve the Process Next Time', 2 November 2012, available online from <https://www.eff.org/deeplinks/2012/11/2012-dmca-rulemaking-what-we-got-what-we-didnt-and-how-to-improve>.

⁵ See Orland, Kyle 'Examining Sony's Internet-free method for blocking used game sales', 4 January 2013, available online from <http://arstechnica.com/gaming/2013/01/examining-sonys-internet-free-method-for-blocking-used-game-sales/>.

Gawronski lost all of the notes and annotations that he had added to the Kindle e-book version of George Orwell's "1984" for a school assignment, when Amazon silently deleted the book from his Kindle. Amazon did this in reliance upon terms of service that allowed it to take away access to purchased e-books at any time and for any reason.⁶ Justin had purchased the book legitimately (and his purchase price was refunded when the book was deleted), but according to Amazon, the publisher had not cleared the rights properly.⁷

The same techniques can be used to take away functions from products that you have already purchased. In 2010, Sony remotely updated previously-purchased Playstation 3 consoles to remove their ability to run other operating systems, which had been an advertised feature of the consoles.⁸ Any consumer who declined to accept this update would be barred from accessing Sony's Playstation Network to play multiplayer games. Similarly, in 2011, US phone company Verizon remotely updated previously-purchased phones to remove their ability to operate as wireless Internet hot-spots.⁹ Thanks to the small print in the terms of service, consumers had no recourse against these companies.

For the global consumer movement, this is unacceptable. CI's bottom line is that in general consumers of digital goods should not have fewer rights than those who purchase equivalent analogue goods. Amongst the provisions on digital products and services that we are proposing for the UN Guidelines to address this issue are those that would:

- Limit the use of unnecessarily long and complex standard contractual terms of service, and prohibit a supplier from purporting to unilaterally change them without notice or consent of the consumer.¹⁰
- Require that digital content products be offered on terms equivalent to those sold in other formats, unless the consumer is clearly informed that different terms apply. This includes the normal incidences of product ownership, and the technical ability to legally make use of these.
- In particular to provide consumers with the right to perform time, space and/or format shifting,¹¹ temporary copying,¹² and/or circumvention of digital locks¹³ for purposes of gaining lawful access to digital content products.
- Require consumers of digital content to be provided with information about its functionality, including any applicable technical protection measures that may inhibit use, and interoperability information.
- For products that are supplied with software that is required for their normal operation, disallow the consumer's notional agreement to a software update as authority to constrict their use of the product as purchased.

⁶ Honan, Mat, 'Remote Wipe of Customer's Kindle Highlights Perils of DRM', 22 October 2012, available online at <http://www.wired.com/gadgetlab/2012/10/amazons-remote-wipe-of-customers-kindle-highlights-perils-of-drm/>.

⁷ See Stone, Brad, 'Amazon Erases Orwell Books From Kindle', 17 July 2009, available online from <http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html?r=0>.

⁸ Kuchera, Ben, 'Hacker vows to fight Sony's PS3 update, restore Linux', 30 March 2010, available online at <http://arstechnica.com/gaming/2010/03/hacker-vows-to-fight-sony-ps3-update-restore-linux-support/>.

⁹ Bode, Karl, 'Verizon Cripples Embedded Android Hotspot Functionality, Making Your Device Less Useful and More Expensive', 11 July 2011, available online at <http://www.dsireports.com/shownews/Verizon-Cripples-Embedded-Android-Hotspot-Functionality-115097>.

¹⁰ Many national consumer laws have general protections against misleading and deceptive conduct that may inhibit practices such as these, and in the United States, the case of *Harris v. Blockbuster, Inc.* (2009) 622 F.Supp.2d 396 prohibits the unilateral change of contract terms.

¹¹ The copyright laws of countries such as Australia, New Zealand, Canada, and the European Union provide provision for time, space and/or format shifting.

¹² The enjoyment of digital works also often involves the automatic creation of temporary copies as an adjunct to the act of playback. Such copies, which have no independent economic value, are typically allowed under a limitation to copyright at the national level (for example, this is the only compulsory copyright limitation under the EU Copyright Directive).

¹³ The Trans-Pacific Strategic Economic Partnership is an example of an international instrument that explicitly permits signatories to "establish provisions to facilitate the exercise of permitted acts where technological measures have been applied" (Article 10.3).

- Require that digital content products that consumers either create themselves and host online, or purchase for consumption, be supplied and stored in open and interoperable formats that they can use, to facilitate access without tying them to a single proprietary vendor.¹⁴

Last but not least, just as consumers are penalised if they seek to infringe upon the rights of a copyright owner, so too a supplier should be penalised for taking away the legal rights of the consumer through sly contractual or technological tricks. Such a provision, that would penalise a supplier from hindering consumers from exercising lawful fair uses of copyright works, is an emerging best practice that has been proposed for Brazil's next copyright law.¹⁵ In conjunction with this, it is very important that online consumers have effective, low-cost avenues of alternative dispute resolution.

¹⁴ This is particularly important for online ("cloud") services in which consumers store content such as documents, photographs, and creative works, so that if the service provider terminates its service, they will be able to extract that content and move it elsewhere.

¹⁵ Draft Law on Copyright and Neighbouring Rights, section 46(VIII), available online from <http://www.gpopai.usp.br/blogs/files/2010/08/braziliancopyrightbillconsolidatedjune2010.pdf>.

3.1 *Expert commentary on new or amended provisions in the Guidelines that relate to e-commerce and digital products*

3. The legitimate needs which the guidelines are intended to meet are the following: ...

(j) To promote parity in the treatment of consumers of goods and services specific to, or mediated through, electronic communications, (including online or digital products or services), compared with consumers of analogous products and services provided in offline or analogue form;

European Bureau of Consumers Unions (BEUC): Consumers are entitled to 'technical neutrality'. They should have the same rights online as offline. Digital technology must not be used to take away established consumer rights.

Consumers should benefit from new technologies. Policies must ensure that consumers and creators benefit fully from technological development – industry must not have the power to impose excessive control over digital content.¹⁶

¹⁶ Consumer Digital Rights Declaration (2007), available online at <http://web.archive.org/web/20070816145505/http://www.consumersdigitalrights.org/cms/fulldeclaen.php>.

~~21.~~ 26. Consumers should be protected from such contractual abuses as: one-sided standard contracts, unfair contract terms, exclusion of essential rights in contracts, the use of unnecessarily long or complex wording in contracts, variations or additions to the terms of use of a product or service to which the consumer does not freely agree, contracts of unreasonably long duration, billing for distinct products or services as a bundle that cannot be disaggregated, and unconscionable conditions of credit by sellers. Cancellations and renewals of contracts must be governed by fair terms and conditions. Service contracts which do not meet legal requirements of fairness and intelligibility should not be enforceable by the service provider.

Vipul, India: The courts have generally felt a need to protect the individuals against the possibility of exploitation inherent in such complex or one-sided contracts. Although technically the individual consumer would have agreed to such a contract but apart from such technical consent, the courts have laid down certain principles or extra conditions which a standard form contract has to abide by for it to be enforceable viz.:

- Reasonable notice: If the person signing the contract is not given reasonable notice of all the terms contained in such contract, especially terms which are unusual, then such contract may not be enforceable.¹⁷
- Fundamental breach of contract: If the terms of the contract seek to limit the liability of the vendor or impose additional obligations on the individual which could result in a breach of any of the fundamental or main obligations that one expects from such a contract, then such clauses may not be enforceable.¹⁸
- Exclusion of unreasonable terms: Another mode of protection is to exclude unreasonable terms from the contract ie a term which would defeat the very purpose of the contract or if it is repugnant to the public policy.¹⁹

Charley, South Africa: The use of contracts unreasonably long duration as a means to lock customers into particular service providers is an issue that has come under scrutiny on the part of regulators, and is dealt with under Clause 7.3 of the draft COMESA Guidelines.

¹⁷ *Henderson & others v. Stevenson*, 1875 2 R (HL) 71, *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd*. [1988] 1 All ER 348.

¹⁸ *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co Ltd* [1970] 1 QB 447.

¹⁹ *Lily White v. R. Mannuswami*, AIR 1966 Mad.13.

A further problematic area in contracts, often affecting mobile phone users, is the failure to provide disaggregated information on services and associated charges.

In 2008, the South African regulator, ICASA, attempted to regulate handset subsidies and to deal with contracts of excessive duration and without proper transparency in respect of costs, charges and subsidies,²⁰ but in 2011 it finally conceded that this was the province of the National Consumer Commission.²¹

Schönwetter and Chetty, South Africa: The *Consumer Protection Act* provides the consumer, under section 22, with the right to information in plain and understandable language which includes the provision of the information in form prescribed by legislation, or in plain language such that a person with average literacy, skills and minimal experience should be able to understand the content, significance and import of the consumer information being communicated.

28. Standard provisions in non-negotiated product licenses should not prevent consumers from exercising the limitations and exceptions recognised in domestic intellectual property laws.

²⁰ See Gross, I, Lewis, C & Southwood, R (2011) 'Consumer Best Practices in the Telecoms Sector', LINK Centre, University of the Witwatersrand, Johannesburg, ISBN: 978-1-920463-92-2 (print on demand), ISBN: 978-1-920463-93-9 (online), available online at <http://link.wits.ac.za/papers/Grosset-al-2011-Consumer-Best-Practice.pdf>, p16.

²¹ Mawson, N (2011) 'ICASA hangs up on handset subsidies', ITWeb, Johannesburg, 2 Jun 2011, available online at <http://www.itweb.co.za/index.php?option=comcontent&view=article&id=44195>.

Schönwetter and Chetty, South Africa: The extent to which copyright exceptions can be overridden by contractual arrangements is unclear under South African Copyright law.

The *Consumer Protection Act* also addresses knowledge goods and services. Section 1, defines "good" to include anything marketed for human consumption, tangible objects, literature, music, photographs, films, games, information, software and other intangible products or a licence to use such intangible products, regardless of form or medium. The definition of "service" in that section of the CPA includes any work or undertaking performed by one person for the direct or indirect benefit of another, the provision of any education, and information and the provision of access to, of a right of access, to any activity or facility.

~~23.~~ 30. Governments should encourage all concerned to participate in the free flow of accurate information on all aspects of consumer products, including in the case of digital content products and services, the effect of any applicable technical protection measures and information on interoperability with hardware and software.

BEUC, Europe: Digital goods need to interoperate with hardware or software. Taking into consideration the rapid development of digital technologies, the risk that digital goods may no longer be playable on older software/hardware or not compatible with modern software/hardware increase the risks for the consumer not being able to use them according to his expectations. The application of Technical Protection Measures (TPMs) amplifies the problem of playability and interoperability, since the consumer is usually required to use specific software or equipment to read files covered by TPM. TPM can also restrict the possibilities of files transfers between different platforms or devices.²²

Vipul, India: Currently the Copyright Act allows technology protection measures to be broken in various instances for legal use. However, there is a lacuna in the law when it comes to providing information on interoperability issues in that there is currently no such legal requirement under Indian law.

²² BEUC. Digital Products: How to Include them in the Proposal for a Consumer Rights Directive. 2010, p.3 available from <http://docshare.beuc.org/docs/2/FPHNFGIDEPIPEFDLLOGMAMGKPDWD9DB1BN9DW3571KM/BEUC/docs/DLS/2010-00506-01-E.pdf>.

~~18.~~ 23. Governments should adopt or maintain policies that make clear the responsibility of the producer to ensure that goods meet reasonable demands of durability, ~~reliability~~ utility and reliability, including interoperability with other associated goods through conformity with relevant open standards, and that they are suited to the purpose for which they are intended, and that ~~the seller distributors~~ should see ensure that these requirements are met. Similar policies should apply to the provision of services.

71. Governments and industry should support, use and contribute to the development of open and interoperable standards for digital content products supplied to or hosted for consumers. Suppliers who provide a service to host such products online (other than a content streaming service) should also provide the means for consumers to extract them from online storage by that supplier, using open formats and protocols.

Vipul, India: The government of India notified the Draft National Policy on Open Standards for e-Governance on 26 May 2009 which provides a set of guidelines for the consistent, standardised and reliable implementation of e-Governance solutions, to ensure seamless interoperability of various e-Governance solutions developed by multiple agencies and avoid vendor lock-in. Meanwhile, the interoperability framework for e-Governance is also being finalised. Furthermore the Electronic Delivery of Services Bill, 2011 which provides that the government should shall deliver all public services through electronic modes, except those that cannot be delivered electronically also allows departments to notify electronic governance standards as may be necessary for ensuring interoperability, integration, harmonisation and security of electronic services.

It must be noted that all the abovementioned measures are only limited to the field of e-Governance and are currently not applicable to the private commercial sphere.

Schönwetter and Chetty, South Africa: Our findings are that there is currently no support for this clause in South African law. An opportunity is presented for South Africa to consider the benefits of the promotion of open and interoperable standards that for instance, promote access to digital works by disabled persons or permit the availability of digital works on various devices. Where interoperable standards is not feasible, then the role of Internet service providers to render the works available in the format of the consumer's choice should be considered. The legitimacy of such amendments should be subject to ordinary regulatory impact assessment and consultation to determine the technical and financial implications of such legislated duty on the Internet service providers. Notably, such responsibility is likely to impact the limitation of liability of Internet service providers under chapter 11 of the Electronic Communications and Transactions Act, for instance under Section 73(1) (c) where Internet service providers are required to perform the functions in an automatic, technical manner without

selection of the data and modification of the data contained in the transmission to benefit from the limitation of liability as a “mere conduit” in the provision of Internet services.

~~32.~~ 40. Governments should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations, to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Such procedures should include collective redress, and should be available in online and offline modes as appropriate. They should take particular account of the needs of low-income consumers, and should be initiated at the level of the retail provider before being referred to a higher level body such as an Ombudsman.

~~34.~~ 42. Information on available redress and other dispute-resolving procedures should be made available to consumers, including via the Internet. The information should be in clearly-expressed plain language, preferably a preferred official language of country in question according to the consumer’s choice.

Charley, South Africa: Language difficulties faced by poor or disempowered consumers emerged as a common issue in research into consumer protection in Africa.²³ The proposed amendment strengthens the transparency requirement in Clause 42 (now 34) of the UN Guidelines to include dealing with complaints in plain language and in the preferred language of the complainant.

It is also important that complaints and redress procedures include publicising information on the nature and incidence of consumer complaints.²⁴

66. Consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce.

Organisation for Economic Cooperation and Development (OECD) Committee on Consumer Policy (CCP): Governments,

²³ Lewis, C & Southwood, R (2011) ‘Empowering Regulators to Protect Consumer Rights in the ICT Sector’, LINK Centre, University of the Witwatersrand, Johannesburg, available online at <http://link.wits.ac.za/papers/Lewis-Southwood-2011-CRREA-Research-Report-Final.pdf>.

²⁴ Gross, I, Lewis, C & Southwood, R (2011) ‘Executive Policy Brief: Consumer Best Practices in the Telecoms Sector’, LINK Centre, University of the Witwatersrand, Johannesburg, available online at <http://link.wits.ac.za/papers/CRREA-2011-Best-Practice-Policy-Brief.pdf>.

businesses, consumers and their representatives should work together to achieve such protection and determine what changes may be necessary to address the special circumstances of electronic commerce.²⁵

67. Businesses engaged in electronic commerce with consumers should provide accurate, clear and easily accessible information about themselves, the goods or services offered, and the terms and conditions on which they are offered, to enable consumers to make an informed decision about whether to enter into the transaction.

²⁵ These and the succeeding comments are drawn from the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (1999), available online at <http://www.oecd.org/internet/consumer/34023811.pdf>, which CI contributed to as a participant in the OECD Committee on Consumer Policy. See also the resources referred to on page 25.

OECD CCP: Such information should be clear, accurate, easily accessible, and provided in a manner that gives consumers an adequate opportunity for review before entering into the transaction. Where more than one language is available to conduct a transaction, businesses should make available in those same languages all information necessary for consumers to make an informed decision about the transaction.

Businesses should provide consumers with a clear and full text of the relevant terms and conditions of the transaction in a manner that makes it possible for consumers to access and maintain an adequate record of such information.

68. To avoid ambiguity concerning the consumer's intent to make a purchase, the consumer should be able, before concluding the purchase, to identify precisely the goods or services to be purchased; identify and correct any errors or modify the order; express an informed and deliberate consent to the purchase; and retain a complete and accurate record of the transaction.

OECD CCP: The consumer should be able to cancel the transaction before concluding the purchase.

69. Consumers should be provided with easy-to-use, secure payment mechanisms and information on the level of security such mechanisms afford.

OECD CCP: Limitations of liability for unauthorised or fraudulent use of payment systems, and chargeback mechanisms offer powerful tools to enhance consumer confidence and their development and use should be encouraged in the context of electronic commerce.

72. Governments, business and consumer representatives should work together to educate consumers about electronic commerce, to foster informed decision-making by consumers participating in electronic commerce, and to increase business and consumer awareness of the consumer protection framework that applies to their online activities. Governments and businesses should be further guided by the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (2001).

OECD CCP: Governments, business, the media, educational institutions and consumer representatives should make use of all effective means to educate consumers and businesses, including innovative techniques made possible by global networks.

Governments, consumer representatives and businesses should work together to provide information to consumers and businesses globally about relevant consumer protection laws and remedies in an easily accessible and understandable form.

National perspectives

4 India – Consumer Protection Laws and the Online Environment

Vipul Kharbanda

Centre for Internet and Society

THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION (UNGCP) are an international reference point for various consumer movements to guide and navigate themselves towards a more empowering regime for consumer laws. However, as with all such codifications, new developments in technology and business practices bring about a need for continuous change and evolution so that the Guidelines do not lose their relevance and are capable of handling new and emerging issues facing consumers today. It is in this background that the existing UN Guidelines on Consumer Protection are proposed to be revised so as to incorporate changes arising out of such emerging issues and especially, the ever-expanding digital marketplace.

As an example of this same process at the national level, this paper seeks to address the issue of the applicability of Indian consumer laws,¹ as they exist today, to the digital paradigm. We will be dealing in this paper with purchases made online from various sellers including purchases of digital goods.

¹ In India this refers mainly to the Consumer Protection Act, 1986 and the case laws thereunder.

Applicability of COPRA in the Digital Paradigm

To answer the question whether physical ‘goods’ sold online or digital goods sold online or through a shop can be brought under the purview of the *Consumer Protection Act, 1986* (“COPRA”) we need to ask exactly what are the requirements for any transaction to come under the purview of COPRA. The main requirements for

such a transaction are:

1. There should be a 'good' or 'service' sold or provided;
2. Such good or service must be 'sold' ie there must be a 'sale';
3. There should be a 'defect' in the good or 'deficiency' in the service;
4. The consumer should file a complaint in the District Consumer Disputes Redressal Forum ("*District Forum*") or State Consumer Disputes Redressal Commission ("*State Commission*") which has jurisdiction over the matter.

We will now see if transactions relating to online purchase of physical goods or digital goods fulfil the above listed four requirements or not. In order to make an effective analysis we will always assume that consideration has passed from the consumer to the seller, however, at various times we will change the scenarios to see whether the legal analysis and the consumer laws can be applied to all scenarios or only in certain situations.

Requirement 1. There should be a 'Good' or 'Service' sold or provided

This issue is fairly straightforward when it comes to online purchases of physical goods but may not be as simple to answer where digital goods are considered. This beckons the question whether digital goods can be classified as 'goods' under the COPRA. The definition of 'good' under the COPRA refers back to the definition of 'good' under the *Sale of Goods Act, 1930* ("*SOGA*"). The definition of "goods" under the SOGA is "Goods means every kind of movable property other than actionable claims and money, and includes stocks and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale". The term "property" has been defined in SOGA to mean the general property in goods and not merely a special property. The definition of "goods" in the SOGA is also of wide import and means every kind of movable property.

Therefore "goods" would comprehend tangible and intangible properties, materials, commodities and articles and also corporeal and incorporeal materials, articles and commodities. "Goods" under the SOGA would also include software or computer programmes because if a distinction is sought to be made between tangible and intangible properties, materials, commodities and articles and also corporeal and incorporeal materials, the definition of goods will have to be rewritten of comprising tangible goods only which is impermissible.² A Full Bench of the Supreme Court of India has in *Tata Consultancy Services v. State of Andhra Pradesh*,³ held canned software to be a 'good' sold under the Sales Tax Act and therefore liable to sales tax.

² *Tata Consultancy Services v. State of Andhra Pradesh*, 5 November, 2004, available at <http://www.indiankanoon.org/doc/549926/>.

³ 5 November, 2004, available at <http://www.indiankanoon.org/doc/549926/>.

The test in this regard as laid down by the Full Bench of the Supreme Court is this:

A 'goods' may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of transmitted, transferred, delivered, stored and possessed. *If a software whether customised or non-customised satisfies these attributes, the same would be goods.*⁴ (Emphasis Supplied)

Although the above statement was made in the context of a taxation statute,⁵ the principles insofar as they relate to determining the nature of computer programmes should apply even outside the realm of taxation. In another case, examining whether computer programmes could be covered under the scope of COPRA, the Supreme Court of India in *Birla Technologies Limited v Neutral Glass and Allied Industries Ltd.*,⁶ held in the facts of that case that the software made for Neutral Glass and Allied Industries amounted to a sale of goods by Birla Technologies for commercial purpose. Since the sale was for commercial purpose, the Supreme Court held that the case would not come within the scope of the COPRA, however the court seems to have more or less accepted the notion that software would be a 'good' under the COPRA.

Therefore, it can be said that both online purchases of physical goods as well as sale of digital goods can also be covered under the ambit of COPRA.

Requirement 2. Such 'good' or 'service' must be 'sold' ie there must be a 'sale'

This question is again simple when asked in relation to sale of physical goods using the Internet but may not be so when talking about digital goods. When a purchase of a physical good is made using the Internet, a sale may be said to have occurred when the ownership of the good passes from the seller (website) to the buyer (consumer) and the payment and delivery are complete. However the question whether sale of software⁸ would actually constitute a 'sale' requires a little more analysis. This exact issue was under discussion before the Supreme Court of India in the case of *Tata Consultancy Services v. State of Andhra Pradesh*,⁹ (although in the context of sales tax) and a Full Bench of the Supreme Court addressed this issue in detail. This issue is important because as we have seen, most non-customised software is actually attempted to be *licensed* and not *sold*.

The Court held that the 'sale' of canned software¹⁰ would be a sale of goods and therefore liable to be taxed under the Sales Tax Act. We are here more concerned with the reasoning of the Court which was that software may be intellectual property but such personal intellectual property contained in a medium is bought and sold and is an article of value. It is sold in various forms like floppies, disks, CD-ROMs, punch cards, magnetic tapes, etc and each

⁴ *Tata Consultancy Services v. State of Andhra Pradesh*, 5 November, 2004, available at <http://www.indiankanoon.org/doc/549926/>.

⁵ The definition of "goods" under that statute was Section 2(h) of the said Act reads as follows: "2(h) 'goods' means all kinds of movable property other than actionable claims, stocks, shares and securities, and includes all materials, articles and commodities including the goods (as goods or in some other form), involved in the execution of a works contract or those goods used or to be used in the construction, fitting out, improvement or repair of movable or immovable property and also includes all growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale and also includes motor spirit."

⁶ 2011 (97) AIC 4 (SC).

⁷ Please note that the judgment being discussed and relied on heavily in this section was not given in the context of the COPRA but actually was in the context of the Sales Tax Act, which has a specific definition of 'sale' as well as 'goods'. However, since the definitions therein are wide, and because of the lack of authority in this regard, we can try to apply the same analysis for the COPRA.

⁸ In this article the term "software" includes in its scope all sorts of computer programmes and data because the reasoning and legal analysis can be applied to both types of data.

⁹ 5 November, 2004, available at <http://www.indiankanoon.org/doc/549926/>.

¹⁰ Which was the term the Court used for non-customised software which is sold off the shelf.

of these mediums in which the intellectual property is contained is a marketable commodity. A programme containing instructions in computer language is subject matter of a license, it has its value to the buyer and is useful to the person who intends to use the hardware, *viz*, the computer in an effective manner so as to enable him to obtain the desired results. Therefore the Court concluded that such software indisputably becomes an object of trade and commerce. These mediums containing the software are not only easily available in the market for a price but are circulated as a commodity in the market. What is essential for an article to become goods is its marketability. Since software is always circulated in the market as a marketable commodity, it can be said that software is goods and sold in the market as an object of trade and commerce.

Using the above analysis, an argument could be made that the so-called license by software makers to use the software is actually a sale and not a plain vanilla license. However, this argument has not been tested in courts and is not backed by case law specific to the COPRA. This is an issue which, in the e-commerce paradigm and specifically in the context of sale of digital goods has a huge significance when it comes to protection of consumer rights. As discussed above, if it is a good sold to a consumer, then it can definitely come within the scope and ambit of the COPRA and the consumer would have all the remedies available to it under the COPRA to claim compensation for a 'defect' in the good.

Requirement 3. There must be a 'defect' in the good

The COPRA defines "defect" to mean any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law of the time being in force under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods. Some instances where goods have been held to be defective are electric household appliances which were not in accordance with the standards prescribed by ISI and therefore were unsafe,¹¹ a gas cylinder with excessive gas has also been held to be a defective good.¹² Therefore in terms of physical goods whether sold over the Internet or not, the concept of 'defect' would not change, but digital goods which have DRM measures applied to them might require some more examination as discussed in Part II of this paper.

The definition of "defect" under the COPRA is an exhaustive one which (in legal terms) means it would be difficult to imagine that the Courts would recognise any defects which are not covered specifically by the definition. Any type of defect not mentioned in the definition may not be entertained by Consumer Forums. This would be the last hurdle that e-commerce consumers would have to cross before they can claim the rights available under the COPRA.

¹¹ *Farooq Hazi Ismail Saya v. Gavabhai Bhesania* (1991) 2 CPJ 452 (Guj.).

¹² *Dayanand A. Avasare v. Bharat Petroleum Corporation Ltd.* (1993) 1 CPR 278 (Mah.).

Requirement 4: Consumer should file a complaint in the forum which has jurisdiction

Once a consumer claims that the good sold to him is defective the consumer has to approach the forum which has jurisdiction over the matter. There can be various situations that can arise while doing online purchases and there may be certain situations in which the COPRA may not be applicable, for eg if the transaction is a cross-border transaction and there is a clause specifying the governing law and place of disputes resolution. On the other hand if the contract has taken place entirely in India and the vendor is an Indian entity, then it would be highly likely that the transaction would be governed by the COPRA. However in a situation where the vendor is not a resident of India (for eg Amazon), but the transaction is governed by Indian law even then it cannot be said that the consumer forum would not have power to try the case. Just because the vendor is not a citizen of India and does not reside in India does not mean that he cannot be sued. Section 13(4)(i) of the COPRA specifically provides that the district consumer forum shall have the same powers as a court under the Civil Procedure Code in the matter of summoning and enforcing attendance of any defendant or witness. Now Order V, Rule 25 of the Code of Civil Procedure specifically provides for the procedure for service of notice where the defendant does not reside in India and does not have any agent in India. Reading the above two provisions, it can safely be said that just because the party complained against resides outside India, it cannot be said that the provisions of COPRA would not apply to a transaction entered into with that party.

Another possible question that might arise is whether the online retailer can escape liability for defect in the goods by claiming that if it is a manufacturing then the manufacturer should be sued and not the retailer, for eg eBay selling Reebok shoes which turn out to be defective. Generally speaking when a consumer finds defect in the goods, he sues the person from whom he bought the goods. This is because the consumer has privity of contract with the seller. If the defect is a manufacturing defect, the consumer may sue both the manufacturer as well as the seller. Thus, the manufacturer is a possible party, and not a necessary party.

Digital Rights Management (DRM) Measures

Another very important issue that comes to the fore when dealing with consumer issues and digital goods is whether DRMs on digital goods such as e-books and digital music be considered as “defects” in the goods as defined under COPRA.

To put this question in a more relevant context, the question here exactly is whether the restrictions imposed on software through

DRMs can be considered as ‘defects’ in goods. A defect is defined in the COPRA as “any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods”.

If we look at the whole gamut of rights that a consumer would get if he buys a particular item and view DRMs as a means of restricting such rights, an argument could be made that such restrictions are a defect in the quality and potency of the goods. For the purpose of illustration let's look at the example of books and e-books, books are tangible goods that can be owned, sold, and passed on as personal property without any limitation. The sale of individual books is governed by the SOGA while their content and intellectual property is regulated by the Copyright Act.

A physical sale of books automatically brings to effect several other ancillary rights and obligations such as the right of resale, right to make copies of certain pages, right to lend, etc. In the case of e-books which have restrictive DRMs, some of these rights may get restricted, for eg DRMs may not allow for selective copying of certain pages of the books, right to lend it to a friend or relative, etc.

Looking at the standard example of Amazon e-books in the e-book licensing space; it seems that the below processes are fairly typical and more or less the norm while engaging in this both as a consumer and licensee¹³:

- In most countries, the user cannot own an e-book. The format of the book is secret and only proprietary user restricting software can read it all;
- In most jurisdictions, where DRMs are in play, copying is simply impossible rendering this far more restrictive than copyright provisions of use;
- Vendors/owners like Amazon can delete the e-book using a back door and in this format would not even amount to an infringement under the licensing regime.

If the article manufactured has any fault, imperfection or shortcoming in the quality etc, then it would be considered as defective goods. Considering the provisions contained in the Constitution of India and the provisions contained in the *Indian Contract Act*, it is not open to a person to supply a defective machine. If a person buys a generator which is creating noise, then it can be said that there is a shortcoming in the quality or the standard which is required to be maintained. A generator may run perfectly and there may not be any fault at the time of running the machine but while operating the machine if it is creating more noise than the prescribed level, it can be said that there is a defect in the manufacture. Now an e-book may also let a consumer read its contents perfectly well but that is not the only criteria to determine whether an item

¹³ <http://stallman.org/articles/internet-sharing-license.en.html>

is defective or not. One has to see whether the person getting the e-book can exercise all the rights that a buyer of a good commonly has such as the right to resale, the right to make copies for personal use, the right to lend, the right to gift, etc. If DRM measures associated with an e-book (or any other digital file) prevent the consumer from exercising these commonly assumed rights of a buyer, then an argument could be made that such measures constitute a 'defect' in the goods under the COPRA. However, it is entirely possible that such an argument would be rejected by the courts and therefore it would be much more beneficial to the interests of consumers if the COPRA specifies that sale of digital goods whether as a license of otherwise would be considered as a 'sale' under the Act and would grant the consumers all accompanying ownership rights such as the right of resale, lending, etc that buyers are otherwise entitled to.

The proposed amendments to the UN Guidelines on Consumer Protection also reflect this concern through changes to articles 23 and the new 24 which talk about technology protection measures and updates which may affect the functionality of the original product. From the discussion of Indian law as it stands today, it appears that an argument could be made that such technological protection measures would entitle the consumer to damages, however since this argument has not been tested at all it would seem that a clear provision such as that contained in the proposed amendments would protect the rights of consumers to a greater extent.

Nevertheless, it must be noted that if the 'sale' is backed by an online agreement (as is usually the case) it would be difficult for the consumer to argue that such DRMs are a defect in the goods since the manufacturer/retailer would know that the consumer had entered into an agreement which specifically excluded these rights. Although even this argument is not iron clad and there is scope for the consumer to wriggle out of the extremely strict clauses that such contracts contain since they are standard form contracts.

Indian law requires that for a contract to be valid there must be an offer and an acceptance. It is in the essence of acceptance, that it must be made fully conscious of and alive to the terms and conditions of the proposal. A standard form contract is a contract between two parties that generally does not allow for any negotiation and is often a contract that is entered into between unequal bargaining partners. Within such standard form contracts the individual usually has no choice but to accept, ie it is usually a 'take it or leave it' sort of a deal. This is why the courts have generally felt the need to protect the individuals against the possibility of exploitation inherent in such contracts. They have therefore laid down certain principles or extra conditions which a standard form contract has to abide by for it to be enforceable *viz.*:

- **Reasonable notice:** If the person signing the contract is not given reasonable notice of all the terms contained in such contract, then such contract may not be enforceable. *In the context of e-books an argument can be made that at the time of purchasing an e-book the*

consumer is made to accept a long standard form contract which on most occasions is not read or understood by an ordinary netizen. It can be argued that such contracts are deliberately made obtuse so that consumers do not read them carefully and simply agree to the terms and conditions contained therein.

- **Fundamental breach of contract:** If the terms of the contract seek to limit the liability of the vendor or impose additional obligations on the individual which could result in a breach of any of the fundamental or main obligations that one expects from such a contract, then such clauses may not be enforceable. *In the context of e-books it can be argued that rights such as resale, lending, gifting, copying for personal use, etc are rights fundamental to a contract of sale that the buyer expects and any clause in a contract which seeks to limit these rights of the consumer should be struck down.*
- **Exclusion of unreasonable terms:** Another mode of protection is to exclude unreasonable terms from the contract ie a term which would defeat the very purpose of the contract or if it is repugnant to the public policy. *If a contract seeks to limit rights of a buyer which he is allowed by law to exercise then an argument could be made that such a contract is unreasonable and contrary to public policy.*

From the analysis above, one can say that there may be a reasonable or at least an arguable case to be made to the effect that DRMs which violate the right to resale, lend, copy for lawful purposes, etc may render a good 'defective' and thus give a consumer the chance or opportunity to move against the vendor in a consumer forum under the COPRA. That said, it must be kept in mind that this issue has received very little judicial attention and therefore the analysis above is quite theoretical and untested.

A similar argument could be made with regard to updates which would disable the consumer's access to functionality which the device or software possessed at the time of purchase. It could be argued that such updates make the good defective because in effect they prevent the consumer from using the good to its fullest thereby leading to a shortcoming in the quality of the good thereby constituting a "defect" in terms of the Consumer Protection Act, 1986 and therefore should not be allowed (or at least entitle the consumer to compensation).

The above principle is very similar to what the proposed amendments to the UN Guidelines on Consumer Protection seek to achieve, albeit a bit more directly through proposed amended article 26 (now 21) which is as below:

~~21.~~ 26. Consumers should be protected from such contractual abuses as: one-sided standard contracts, unfair contract terms, exclusion of essential rights in contracts, the use of unnecessarily long or complex wording in contracts, variations or additions to the terms of use of a product or service to which the consumer does not freely agree, contracts of unreasonably long duration, billing for distinct products or services as a bundle that cannot be disaggregated, and unconscionable conditions of credit by sellers. Cancellations and renewals of contracts must be governed by fair terms and conditions. Service contracts which do not meet legal requirements of fairness and intelligibility should not be enforceable by the service provider.

Although the law in India does not protect the individual consumer from extremely long, verbose and one-sided contracts in every instance the principles enumerated above do incorporate and reflect the spirit of article 26 of the Guidelines.

Anti-Circumvention

The anti-circumvention provision in the Indian Copyright Act was added by the Copyright (Amendment) Act, 2012 *viz.* Section 65A(1). This section adopts an approach which is quite different from that in most other jurisdictions in that it makes circumvention illegal only if the purpose for which such circumvention is made is prohibited by the Copyright Act. This means that circumvention *per se* is not illegal, and is allowed if done to make copies for the purposes provided in the exceptions section of the Copyright Act. Proposed amended article 70 of the UN Guidelines for Consumer Protection seems consistent with the Indian approach, which gives anti-circumvention measures much wider protection and makes them illegal only when they are used with the intention of infringing somebody else's copyright.

The Indian approach may in fact be better than that suggested by the proposed amendments to the UN Guidelines on Consumer Protection since the latter is still open to an interpretation where the user/maker of the anti-circumvention device may have the obligation to prove that such measures are being used only for permitted purposes, however in the Indian approach it will be the obligation of the complainant/prosecution to prove that the anti-circumvention measures are being used for infringing purposes.

Unfair Trade Practice

Under the COPRA a complaint can also be filed against a vendor not only when there is a defect in the goods sold but also if the vendor indulges in an 'unfair trade practice'.¹⁴ An unfair trade practice is defined, *inter alia*, as a the practice of making any statement, whether orally or in writing or by visible representation which, (i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model; or (vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services. It must be kept in mind that a misleading advertisement or a misrepresentation in an advertisement for a good has very often been interpreted by Indian Courts as an unfair trade practice.¹⁵

Such misrepresentations in the digital arena have rarely been taken to court and therefore there is no case law to suggest how the courts would receive application of these provisions in the digital paradigm. A very interesting case in point is online music sales. When a consumer goes to an online shopping site such as Amazon, iTunes, Flipkart, etc the first thing that one notices is that they never say "license music" or "music license just a click away" rather they always use the term "buy" music or "buy" e-books. In fact the entire getup of the website usually does not use the word "license" till one goes to the fine print in some "web policy" page or "terms and conditions" page or just before the consumer finally pays for the music or the e-book. Although not yet tested in the courts, looking at the purpose of COPRA and the way courts have interpreted and enforced the terms thereof, a good argument can be made that the practice of using the word "buy" throughout on online advertisements for e-music and e-books as well as on the shopping websites themselves might be construed as an unfair trade practice under the COPRA.

¹⁴ The definition of "Unfair Trade Practice" under the COPRA is given in Annexure I.

¹⁵ (i) *Cox & Kings (I) Pvt. Ltd. v. Joseph A. Fernandes*, 1 (2006) CPJ 129 (NC) where a cruise was advertised for 2 nights 3 days in a deceptive manner such that the consumer effective got only 1 night and 2 days, was held to be an unfair trade practice;

(ii) *Society of Catalysts v. Star Plus T.V.*, IV (2008) CPJ 1 (NC). A TV channel and mobile operator conducted a competition claiming prizes will be distributed out of funds collected through SMS but distributed prizes for only part of the funds collected, this was also held to be an unfair trade practice; etc.

Conclusion

It emerges from the discussion above that although there is no bar in the existing framework of Indian laws that prevents their application to digital transactions, the untested nature of such issues coupled with the strongly one-sided contractual framework adopted by most of the vendors in the digital marketplace do seem to suggest that the laws in India would do well to specifically recognise the rights of consumers in the digital paradigm.

As this paper shows, although Indian laws are broad enough to be interpreted liberally to protect consumers in the digital marketplace, the lack of specific guidance on this issue (be it legislative, executive or judicial) makes it very uncertain as to which way the laws will be interpreted if presented with a real life situation. It must be added that if Indian laws are amended to bring

them broadly in line with the proposed amendments to the UN Guidelines on Consumer Protection then such an amendment would not in any way go against the principles on which the consumer laws in India operate, but will only serve to clarify and simplify the application of these laws in the ever changing digital paradigm. In fact Indian laws seem to incorporate certain principles such as the wide definition of “Unfair Trade Practice” and the take on anti-circumvention measures that could lead to a very competent consumer protection regime in the digital paradigm if the existing sections are bolstered by amendments which specifically relate to the emerging issues address in the proposed amendments to the UN Guidelines.

Annexure I

Section 2(1)(r): “*unfair trade practice*” means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely;

- (1) the practice of making any statement, whether orally or in writing or by visible representation which,—
 - i. falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
 - ii. falsely represents that the services are of a particular standard, quality or grade;
 - iii. falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;
 - iv. represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;
 - v. represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
 - vi. makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
 - vii. gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof;

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;
 - viii. makes to the public a representation in a form that purports to be

- i. a warranty or guarantee of a product or of any goods or services; or
- ii. a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;
- ix. materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;
- x. gives false or misleading facts disparaging the goods, services or trade of another person.

Explanation.—For the purposes of clause (1), a statement that is—

- (a) expressed on an article offered or displayed for sale, or on its wrapper or container; or
 - (b) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or
 - (c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public, shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained;
- (2) permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

Explanation.—For the purpose of clause (2), bargaining price means—

- (a) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or

- (b) a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold;
- (3) permits—
 - (a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole;
 - (b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest;
- (3A) withholding from the participants of any scheme offering gifts, prizes or other items free of charge, on its closure the information about final results of the scheme.

Explanation.— For the purposes of this sub-clause, the participants of a scheme shall be deemed to have been informed of the final results of the scheme where such results are within a reasonable time, published, prominently in the same newspapers in which the scheme was originally advertised;

- (4) permits the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, constructions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;
- (5) permits the hoarding or destruction of goods, or refuses to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services.
- (6) manufacture of spurious goods or offering such goods for sale or adopts deceptive practices in the provision of services.

5 Brazil

Guilherme Varella and Mariana Valente

Brazilian Consumer Defense Institute (Idec)

About Idec

INSTITUTO BRASILEIRO DE DEFESA DO CONSUMIDOR (Brazilian Institute for Consumer Defense) (Idec) is a Brazilian non-profit consumer's organisation, founded in 1987. Idec's mission is to promote education, awareness, protection of consumer rights and ethics in consumer relations, with full political and economic independence. It has no ties with any corporations, governmental entities or political parties. Idec's meta-mission is: to help ensure that all citizens have access to essential goods and services and to social development, sustainable consumption, the planet's health, and consolidation of democracy in Brazilian society. For Idec, the concept of consumer is not restricted to those who participate in the market, exercising their purchasing power, but also covers those who cannot access essential goods and services due to lack of purchasing power.

Idec conducts studies and research, promotes campaigns, mobilises public opinion and pressures companies and governments to improve consumer relations in the country. It also participates in national and international forums that define public policies in the area of consumer relations. It publishes a monthly magazine, *Revista do Idec*; information on its website (<http://www.idec.org.br>); and numerous other publications. Furthermore, it presents and tracks legal procedures to defend the collective and diffuse interests of consumers in general and of Idec's members.

Idec is a member of the Brazilian Internet Steering Committee (<http://www.cgi.br/>), as one of the four representatives of civil society, and participates in other important instances of consumers' representation in this field. The monitoring and intervention activities conducted by Idec on a regular basis are part of a broader strategy for political intervention. The strategy aims to coordinate

actions to press decision-makers, to defend and represent the consumers' rights and interests, to produce information, to provide training, to intervene in the media, and to coordinate and mobilise the consumer movement. All of these activities are orientated by Guidelines developed from research on each of these issues: food, health, public services (telecommunications, electricity and water and sanitation), Internet, access to knowledge, quality and safety of products and services, banking services, education on consumption. Sustainable consumption, international trade, and corporate social responsibilities are cross cutting issues.

Idec has worked nationally and internationally on the issue of copyright from the consumers' point of view. With the support of Consumers International, the Ford Foundation and the Open Society, Idec develops projects to debate the issues and to foster consumer awareness with regard to copyright. Through its advocacy, Idec helps to consolidate improvements in Brazilian law to reach a balance between recognition of the author and access to cultural heritage.

Idec is a Full Member of Consumers International, a federation that brings together more than 240 consumer organisations that operate worldwide. It is part of the National Forum of Civil Entities of Consumer Defense which is designed to strengthen the consumer movement throughout the country; Abong - Brazilian Association of NGOs; and thematic networks such as FBOMS (Brazilian Forum of NGOs and Social Movements for Environment and Development), REBRIP (Brazilian Network for the Integration of Peoples, and the Front for the Restriction of Advertising of Unhealthy Foods to Children.

Online music and film market in Brazil and CI amendments

Over the past three years, Idec has developed extensive research in the fields of online music and film market in Brazil, from the standpoint of consumer protection and access to knowledge. These investigations resulted in reports and two articles, published in Idec's magazine (*Revista do Idec*): *Serviço Desafinado* (Out of Tune Service), April 2011, and *Tempos Modernos* (Modern Times), April 2012, aimed at raising consumer awareness about problems related to these markets in Brazil. The results of the research are closely related to several of the CI amendments and serve as very concrete arguments towards its adoption.

Among all the amendments proposed, those that can be grouped under the following themes are directly related to the Brazilian online cultural market, as evidenced by Idec's works:

- a) Right to information, transparency and clarity;
- b) Standard contracts;

- c) Interoperability;
- d) Right to culture and education;
- e) DRM (Digital Rights Management);
- f) Parity with offline world;
- g) Personal information; and
- h) Global and regional inequalities and access to Internet.

The amendments relate also to the themes of education regarding these items and consumer rights in general, as well as net neutrality. These themes are only indirectly related to the results of the research, and will be discussed within a political framework in this paper.

a) Right to information, transparency and clarity

Many of CI's proposed amendments to the UN Guidelines for Consumer Protection are aimed at advancing consumers' rights regarding access to information as well as transparency and clarity regarding the nature and details of the services provided and the service provider. In this sense:

- New item 66 asserts that digital consumer protection should be no less transparent than that applied to other forms of commerce, from which formulation can be inferred that compensating provisions in national legislations may be applicable.
- The addition to item 26 ensures that consumers are protected from "the use of unnecessarily long or complex wording in contracts, variations of additions to the terms of use of a product or service to which the consumer does not readily agree".
- New item 67 emphasises the importance of information regarding identification of the business, effective channels of communication with consumers, effective resolution of disputes, and clear information about terms, conditions and costs of a transaction, so as to enable the consumer to make informed decisions as to enter it or not; new item 68 relates to being able to correct the transaction and keep a record of it.
- The addition to item 30 foresees that, in the case of digital content products, the free flow of information between concerned parties should be applied to DRM, when present, and interoperability; new item 11 suggests the need for transparency when it comes to the collection of personal data.
- New item 68 relates to sufficient information regarding the products and the possibility of correcting the transaction and keeping a record of it; the addition to item 16 provides that safety information is conveyed "including via the Internet".

A closer look at the online music and film markets in Brazil reveals that, in the past two years, most of these provisions were overseen by content providers. Although general consumer protection provisions are readily applicable to digital markets, there seems to be a need for clearer and more detailed rules when it comes to a market in which terms and conditions are the main instrument of contact between the parties.

In the online film market, for instance, Idec's research in 2012 identified that, of the four biggest companies in the field, three of them did not clearly and sufficiently convey information in their respective standard contracts; one of these companies did not provide the terms and conditions until the service was contracted; and another, which also offered physical film rental, did not offer a contract for the digital service. Two of these companies practiced misleading advertising as to their services, promising unlimited access when restrictions actually apply, and publicising a deceptive catalogue size.

One of these companies explicitly stated that terms and conditions, including those that describe the services, could be unilaterally altered, without the consumer's consent; two of them presented a grave absence of identification of the business, and one of them did not even provide a communication channel for consumers.

Research from 2011 looking at the music market revealed that out of three content providers, two made their terms and conditions available only when consumers completed the transaction; two did not provide identification information on their homepages; and one did not provide a telephone number for communication with customers. None of the companies provided any information as to possible procedures if the customer faces any problems with the service.

The current abuses practiced by content providers could be avoided by a proper legal framework that complied with CI's suggested amendments.

b) Standard contracts

CI's amendments address consumer rights relating to standard contracts, taking into consideration that, in digital enterprises, these unilaterally-built instruments are generally the only contact the consumer has with the conditions of the transaction and the only place where he can find information as to liability, terms of use and how to proceed in case of problems. The amendments regarding this issue are:

1. Addition to item 26, providing that one-sided standard contracts are adequately short and clear, and that they aren't modified without express agreement by the consumer (see also new item 67 about pre-contractual information to be given in online transactions).

2. New item 28 which states that these contracts should not prevent consumers from exercising their rights as expressed by limitations and exceptions to intellectual property laws (also expressed in a different wording by new item 70).

In fact, Idec's research about the digital film market points out several problems with regard to the enterprise's standard contracts. One of the four companies studied in the research provides a contract that, based on United States law, disrespects basic rights provided by Brazilian consumer's legislation and is considered, therefore, abusive. Two of the companies do not offer easy access to their contracts; one of them actually only provides the contract once the consumer has contracted its services, and the other regulates its physical rent service but not the digital service. One of the enterprises allows for unilateral modification of the clauses (on the side of the enterprise), including for restriction of the service, without the consumer's consent – an abusive situation that the CI amendments address through the new wording of items 26 and 67. Three of the companies actually predict unilateral termination in case of any alleged violation of copyrights. Considering that the terms of use of these services do not respect exceptions and limitations provided by Brazilian law, as will be discussed later on in this paper, this termination could be abusive and limit uses that would otherwise be permitted. This situation is exactly what items 28 and 70, added to the UN Guidelines, would address.

In the online music market, a few problems regarding standard contracts were also revealed. One of the services obliges the consumer to contract a monthly plan, even though the object of the transaction is the sale of one single song. Another service offers an "opt out" checkbox for authorising marketing from the service and its partners, a practice considered to be unfaithful and to not sufficiently convey informed decisions. These and other abusive clauses which will be specifically discussed in this paper make the case that companies should be obliged to be clear, faithful and straightforward in their standard contracts.

c) Interoperability

When it comes to consumer rights relating to digital cultural goods, one of the most specific and important principles to be observed is interoperability. Since digital goods must run on specific equipment and software, it is an absolute precondition that the consumer is free to choose between all the available options, including, particularly, free and open software. Any limitation to the possibilities of enjoying the product can be considered a contemporary equivalent to tying sales.

In the CI amendments, new item 71 suggests that governments use and support the development of open and interoperable standards for digital content products, thereby preventing interoperability problems. Suppliers of content who host content should also

allow for extraction of that content from their host, also using open formats and protocols.

In Brazil, the digital film and music providers are far from offering products that abide with the principle of interoperability. All companies analysed with regard to their digital film limit their services to specific televisor brands or specific operating systems when it comes to watching movies on a personal computer. Only one of them provided interoperability with Linux, but it limited its television service to three brands. When it comes to digital music providers, the three services offered formats only compatible with Microsoft products.

This context demands a better protection of the principle of interoperability, which can be better achieved by a systematic support of open standards.

d) Right to culture and information

The right to access to culture and information underlies all CI amendments to the UN Guidelines. To be concise, the Access to Knowledge movement, as embraced by Idec, understands that recent changes in the fruition of cultural and educational goods due to the growth of the Internet and other information technologies provide for unprecedented possibilities of advancing human rights related to information, but the full consummation of these possibilities is being menaced by restricting laws and technologies.

The CI amendments propose that the rights to participate in cultural, civic and educational affairs are included in the very objectives of the UN Guidelines (Item 1), thereby demonstrating that, in an information society, consumer protection must care for a policy for informational goods. This is reinstated in the inclusion of item (h) to the legitimate needs which the Guidelines should meet (Item 3), with the following wording: “access to knowledge; that is, more equitable public access to the products and tools of human culture and learning”. Many of the amendments are directed to protecting these rights, but we could point to specific ones:

- New item 6 foresees that “policies for the enforcement of rights over digital content products should seek to strike a fair balance between the object of creativity and investment in the provision of those products, with the cultural, civic and educational rights of consumers and their needs for economic and social development”.
- The addition to item 14 guarantees that regulations for consumer protection should be consistent with “international principles that protect human rights and social, cultural and economic rights of all people”.
- Existing rights of accessing culture and knowledge should not be restricted by digital management technologies (DRM), as stated in new item 27, nor by standard contracts and licenses, as stated

in new item 28. Consumers must also be provided with the right to bypass technical protection measures in case their existing rights are being restricted (new item 70).

This paper has already pointed out that, in Brazil, digital services in general oblige consumers to agree to a clause stating that the service can be terminated in case of any supposed violations of copyrights. The standard contracts usually prohibit any copying of the digital products, especially when services are provided by streaming. From that we can infer that even legitimate copies would be considered by the service as a violation of either copyrights or the terms of use. It is also very common that, when goods can be downloaded, DRM provides that the goods can be reproduced in a limited number of devices, or that they are disabled after the termination of the contract. These are unjustifiable provisions and put consumers of digital goods at a disadvantage to consumers of physical goods, as will be explored ahead.

Although content industries are trying to build a discourse that promotes the idea that informational goods are less protected because of information technologies, these technologies are in fact allowing that these existing rights are restricted, and that all sorts of consumer access are controlled by providers. This is a strong statement for amending the UN Guidelines for Consumer Protection so that user rights are reinstated.

e) Digital Rights Management

Building on the previous points herein discussed, it is a matter of course that digital rights management (DRM) technologies should not be allowed to restrict legally established rights. Where the legislation allows for limitations and exceptions to copyrights, for instance, a technology would not be allowed to eliminate them, establishing an artificial and unjustifiable imbalance in the relationship between content producers and users. The following CI amendments relate to this issue:

- New item 27 states that “governments should restrict suppliers of digital content products and services from employing technologies that have a significant effect of preventing consumers from using those products or services in ways or for purposes that would otherwise be reasonable, lawful and safe”.
- Addition to item 30 suggests that governments encourage all concerned to participate in the free flow of accurate information, including “the effect of any applicable technical protection measures”.
- As previously indicated, new item 70 recommends that governments should allow consumers to “bypass technical protection measures applied to them” in case they see their rights restricted.

All four digital film providers researched by Idec restricted downloading of films to a limited number of devices, and had measures for locking the files after the contract had expired, even though the films had been legally bought. All of them have measures against copy and reproduction, although certain copies and reproductions are allowed by copyright legislation. As to the digital music sector, two out of the three researched companies used DRM to limit the number of possible copies to three, while one of them used it to prohibit copying in absolute. Two of them block downloaded songs after the contract expires. With such measures, the consumer is tied to the provider, and is placed at a disadvantage in comparison with those consuming film or music via physical media.

f) Parity with offline world

Some CI amendments seek to raise the protection of digital goods consumers to the level of protection granted to consumers in the offline world. This might mean creating specific provisions so as to establish equality between differing situations. These amendments are:

- Addition of letter (j) to the item 1, establishing that one of the objectives of the UN Guidelines is to “promote parity in the treatment of consumers of online or digital products or services, and similar products and services provided in offline or analogue form”.
- Addition to item 30, determining that governments encourage free flow of information also “in the case of digital content products”.
- New item 66, regarding electronic commerce, stating that “Consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce”. All provisions under new section “Electronic commerce and digital products and services” seek to promote parity with the offline world, determining that businesses engaged in e-commerce must provide adequate information regarding identification and resolution of problems and disputes, as well as sufficient and accurate information as to the goods and services offered, since making informed decisions might be more challenging when dealing online.
- Item 70 states that “digital content products should be offered on terms equivalent to those sold in other formats, unless the consumer is clearly informed that different terms apply. This includes the normal incidences of product ownership, such as permanent possession, privacy of use, the ability to gift or resell such goods together with all of the rights with which they were first sold, and the ability to lend or perform them within

a family, household or similar limited circle". This means that governments should allow consumers "to time, space and format shift digital content products, to mail temporary copies of them, to bypass technological measures applied to them".

A clear point has been made regarding digital film and music markets in Brazil as to how user rights are restricted in comparison with regular offline transactions. The idea that a legally bought product could stop functioning after a certain period, or that its functions could be remotely frozen because of a unilateral suspicion of copyright infringement, would be unthinkable a decade ago, and is unthinkable when it comes to physical products. The very idea of ownership is being challenged by this disparity of treatment between online and offline situations. It is, therefore, essential that national regulators understand the need to extend protection to online transactions, interfering in what can be a very unfair system toward the consumer.

g) Personal information

Another problem with online consumer relations is that it has the potential of exposing the consumer excessively when it comes to personal data. Not only is the consumer of digital services and products obliged to reveal many different sorts of personal identification to perform a simple transaction, but also online transactions expose the consumer to tracking and storing of shopping and navigating patterns. Further, there is no clear policy on data protection nor third-party targeting. At the same time, some information such as details about past transactions might be of interest to the consumer, and should therefore be protected against loss.

CI amendments address these matters as follows:

- Addition of letter (i) to item 1, so that one of the objectives of the UN Guidelines is to "safeguard consumers against the collection, use, disclosure or loss of their personal information without their consent".
- New item 69 states that "consumers should be provided with easy-to-use, secure payment mechanisms and information on the level of security such mechanisms afford".
- New item 11 determines that "Governments and businesses should ensure effective consumer control of personal data", that collection of personal data should be by consent of the consumer only when strictly necessary, and that such "personal data should be protected against unauthorised use, and in any event, its use should be minimised". Consumers are to be notified of any personal data breach and offered redress.

When it comes to observing current practices in the Brazilian market regarding personal information, Idec's research about digital film services identified that one of the four analysed businesses

had no policy whatsoever as to security and privacy of personal data. It used its service's standard contract to try to waive liability regarding loss of users' data, and to determine that any information disclosed by consumers on social networks that relates to the service might be used for "improving" the service, using very general language. The same company declared that it used cookies and "a variety of other technologies" to collect "information about how users interact with the service". The type, amount or exact destination of the data was not revealed. The use of cookies was also declared by two other services neither of which provided further information as to what data is collected and processed; one of them also declared that the information could be transferred to third parties.

As to the online music sector, one of the three companies in the research made participation in their service dependant on a login to other services, eg, Facebook or Windows Live ID. This practice associates the transaction with a load of other personal information about the consumer which they were not necessarily knowingly sharing.

Clear and detailed information as to the quality and amount of data collected, as well as details of its storage and usage, is essential to allow consumers to make informed decisions about whether or not to contract a service or product. Several business models are based on commercialising users' personal information with users unaware of how much data they are actually sharing. Few countries have adopted data protection policies; the CI amendments would be an important influence and build a common discourse.

h) Global and regional inequalities and access to Internet

Underlying these problems is the reality of the digital divide, which is often a fact even inside the borders of a nation. CI amendments address the issue:

- New item 49 determines that governments "facilitate universal access to the Internet through affordable telecommunications".
- New item 48 foresees that "government policy should promote the creation, dissemination and preservation of content in diverse languages and accessible formats, including local content suited to domestic or regional needs".

In fact, the online film market research evidenced that, out of the four analysed companies, three established a broadband speed which is superior to Brazil's average, meaning that access to these services is restricted to a minority who can afford the conditions imposed. It was also observed that there was an enormous disparity between the international and Brazilian catalogues in the only example of a multinational company that restricted titles in its Brazilian service. This disparity was also observed in the prices

in the online music market wherein the national content providers charged much higher prices than the multinational services.

Political context: Copyright Law Reform

The research on the Brazilian digital markets was used to inform the draft of the amendments to the UNGCP. However, the strategies adopted to develop these amendments were also informed by Brazil's current political context, so that they are able to produce effective change within the country. The goals of the amendments are the same as Brazil's main goals with regard to access to knowledge and consumers' defence in the information society, ie, the Internet Regulation Framework ("Marco Civil da Internet"), and the reform of copyright law. These are all areas on which Idec has campaigned in recent years. IdecThe status of each is discussed ahead.

In Brazil, copyright is ruled by law 9.610, 1998 (Copyright Law). Since its implementation, this legislation has remained unchanged in spite of new demands for access to culture and knowledge, new opportunities arising from technological innovations, and increasing use of the Internet. There is ongoing reform of copyright law since 2004 when a long process was started by the Ministry of Culture, which, since 2007, conducted debates, public hearings, and organised two public consultations on the Internet (2010 and 2011) with input from various organisations working in this area (Idec was among them). Innovations in the resulting project included legalising private copying, interoperability and important limitations and exceptions to copyright.

In 2012, the process was discontinued by the Ministry of Culture, due to a change in leadership in the beginning of that year. No further information about the status of the official discussion was revealed. On 3 September 2012, Idec organised a workshop for the Network for the Copyright Law Reform, bringing together 22 people representing 18 organisations to discuss: (i) the political context of copyright law; (ii) a draft bill being processed in the House of Representatives; and (iii) networking strategies, among which were CI's amendments to the UN Guidelines. It was an important opportunity for reactivating a civil society network that had been dismantled by the discontinuance of the process, and to resume the public pressure on government and parliament.

On 13 September 2012, the new head of the Ministry of Culture was named. Marta Suplicy is thought to be in favour of the continuity of copyright law reform. In fact, she brought back the former director of intellectual rights for the Ministry, Marcos Souza, who had been responsible for conducting the reform process between 2007 and 2010. This context suggests new perspectives being brought to bear on public participation and to reform itself. On 1 October, Idec participated in a public hearing with the Minister

of Culture in which it advocated for the necessity of the reform for access to culture and knowledge, and delivered to the new Minister the booklet “Copyright under debate” and other materials, articles and studies.

Not much has happened since, and, although there are reasons to be optimistic, it is also known that the Ministry has stated that it is in favour of the “notice and take down” system which states that the Internet Service Provider is liable for infringing content once it receives a claim of copyright infringement without a judicial decision being needed – a system that allows for private power abuse and censorship.

The Consumers International *IP Watchlist*, to which Idec actively contributed, put Brazil in the position of the fifth most restrictive country among all other surveyed countries. The international (and Brazilian) launch of the research, on 23 April 2012, had wide national repercussions, including being used in a hearing in the Senate on 24 April 2012, about the discontinuation of the Copyright Law reform by the Ministry of Culture. Still, during 2012, a separate bill was introduced to Congress in the context of a Copyright Law reform (bill 3133/12). Proposed by Mr. Nazareno Fonteles, it incorporated several of the positions proposed by the public consultation processes, and is aligned to Idec positions. It is to be seen as an opportunity in light of the stagnation of the previous process. Its processing, however, came to a halt in the second half of 2012 because of the municipal elections and is expected to be resumed during the first half of 2013.

The amendments to the UN Guidelines were used by Idec in its advocacy and partner organisations articulation work, making profit of the international force and visibility of this instrument, and of its function of raising consumer awareness about their rights in the sphere of copyright.

Brazilian Context: Internet Regulation Framework

The CI amendments to the UN Guidelines were also developed and advocated in the context of the debate of the Internet Regulation Framework (“Marco Civil da Internet”). During its articulation, Idec and other civil society institutions defended the inclusion of privacy and data security measures, responsibility of providers, clearer rules relating to consumer rights, and net neutrality, understood as indispensable to protect against discrimination of contents.

A draft bill, resulting from a public consultation process, was proposed by the Ministry of Justice in 2010, and was sent to Congress in 2011. Idec and civil society in general had been pushing for the approval of the Internet Regulation Framework before any other laws that had a criminal approach to Internet issues. However, both cybercrimes projects of law above were approved by

Congress on 7 September 2012, (although one of them received as many changes as to make it void of any efficacy). This meant that one of the main arguments for the urgent adoption of the Internet Regulation Framework (“a civil law before a criminal law”) was broken, and that the other arguments had to be more evidenced from then on.

In the second half of 2012, the Internet Regulatory Framework went to Plenary of the House of Representatives five times, and discussion came to a halt in every one of the occasions. Two powerful economic lobbies are pressing to stop the voting or to change its text: the copyright industry and the telecommunication companies. The first one tried to insert an exception to the “judicial notice and take down rule” from the bill, stating that the rule does not apply to copyright infringement. The telecommunication sector was lobbying to break net neutrality.

A public letter was sent on 10 July 2012, to the rapporteur of the bill, deputy Alessandro Molon, written by Idec and three partner organisations (GPOPAI-USP, GP Cult-UFRRJ and NEDAC-UFRJ), arguing against the private judgment for removal of contents by Internet providers; this provision was then effectively deleted from the draft bill. In order to press for voting on the Internet Regulation Framework before the municipal elections in October 2012, Idec and several other entities (CTS/FGV, Intervozes, MegaNãO, etc.) launched the campaign #MarcoCivilJá, publicly pressing the Legislative and Executive Powers for approval. Idec provided tools on its website for citizens to send messages directly to deputies, secretaries and ministers, and a campaign was launched on Twitter, Facebook and other social networks. A network of 30 Brazilian (including Idec) and 20 international organisations also published, on 7 August 2012, a public letter, “Civil society statement in support of the Brazilian ‘Marco Civil da Internet’”, asking for immediate approval of the bill, which was widely circulated and sent to all deputies and ministries concerned.

Unfortunately, the draft bill was not approved before the elections, and has not been approved up to today. Between October and November, the lobbies grew stronger and continued to work on obstructing its voting. During the process, the draft bill was amended to give regulatory competence regarding network neutrality to Telecommunications National Agency (Anatel), where telecommunication companies exert more influence, rather than by a presidential decree; and to allow non-judicial takedown orders of Internet content supposedly protected by copyright.

Facing these changes, Idec mobilised civil society and suggested another public letter to the rapporteur of the project and to all congressmen, in addition to the Ministries of Justice, Culture, Communications and Institutional Relations secretary, which was signed by 21 organisations and three important Internet activists. The demand that neutrality be regulated by presidential decree was agreed, but the negative provision about copyright remains, creat-

ing strong judicial uncertainty as to procedures regarding copyright infringement.

Not much has advanced to overcome the lack of a legal framework regarding privacy protection. Without specific protection, personal data and consumer interests are valuable objects, without reasonable rules to protect privacy and defend consumers against aggressive virtual marketing and behavioural publicity. The draft bill on data protection elaborated by the Department of Consumer Protection and Defense (DPDC) under the Ministry of Justice has undergone public consultation in the past few years, but the results of the process have not been published, therefore, it may transpire that the Ministry of Justice will not send the draft bill to Congress until a major advance is observed regarding the Internet Regulation Framework.

Conversely, when it comes to consumer protection in electronic commerce, an important presidential decree (Decree n. 7962) was published on 15 March 2013, that addresses a few of the proposed CI amendments. The purpose of the decree is to oblige companies to provide, when it comes to electronic commerce, clear information about the product, the service and the enterprise, as well as an easy communication service, and to respect the consumers' right of cancellation. Besides detailed information about the product and the transaction, companies should provide, before the service or product is contracted, a summary of the standard contract; all violations to these rules subject enterprises to the penalties of the Consumers Defense Code.

Conclusion

Considering both the analysis of the digital content markets in Brazil and the broader political context of discussions regarding copyright, access to knowledge, net neutrality and privacy rights, the CI amendments are an important tool to promote effective scenario change. In fact, the very proposal of the amendments has been justifying a series of Idec's advocacy actions in these fields, since they summarise many of the positions related to consumer protection and access to knowledge in the digital environment. As well as some of these positions finding recent adoption in the Brazilian legal context, others have not yet been officially discussed, and many are the object of some of the most important legislative disputes Brazil is now facing. This reinforces the importance of their adoption on such an influential level.

6 South Africa

Tobias Schönwetter and Pria Chetty

CONSUMER PROTECTION AIMS AT PREVENTING THE ABUSE of superior bargaining power by the sellers and suppliers of goods and services.¹

Until recently, South Africa lacked a comprehensive approach to consumer protection. Instead, isolated provisions in numerous pieces of legislation dealt with different aspects of consumer protection. For instance, South Africa's Constitution – the supreme law of the land – addresses some typical consumer concerns when granting, among other things, the rights to be heard and informed (s 16), the right to access to information (s 32), the right to safety (s 12), the right to access the courts (s 34), the right to education (s 29), the right to privacy (s 14), and the right to a healthy environment (s 24). Additional consumer protection measures are provided for in the following pieces of legislation²:

- The Electronic Communications and Transactions (ECT) Act;
- The National Credit Act;
- The Competition Act;
- The Counterfeit Goods Act;
- The Copyright Act;
- The Financial Advisory and Intermediary Services Act;
- The Promotion of Access to Information Act;
- The Standards Act;
- The Housing Consumers Protection Measures Act;
- The Long Term Insurance Act; and
- The Short Term Insurance Act.

¹ Cassim, "Consumer protection and the Credit Agreements Act", THRHR 1984 (47), p. 311.

² In addition, a number of statutory professional bodies, eg the Law Society and the Estate Agents Board, as well as several self-regulatory bodies, eg Consumer Credit Association, the Direct Marketing Association of South Africa, exist to assist consumers who have been subjected to conduct jeopardising their consumer rights. While statutory bodies operate within a legal framework prescribed by legislation, self-regulatory bodies usually create their own Codes of Conduct, thereby filling the vacuum left by the absence or inadequacy of government regulation.

In 2011, South Africa's approach to consumer protection issues changed drastically when the country's new Consumer Protection Act (CPA) was introduced. The Act approaches the issue of consumer protection comprehensively and strives to promote and advance the social and economic welfare of all consumers in South Africa. It provides a framework of legislation, policies and government authorities to regulate consumer-supplier interaction, and applies to every transaction occurring within South Africa for the supply of goods or services, unless the transaction is exempted from the application of the Act.³ According to its preamble, the Act seeks to:

- promote and protect the economic interests of consumers;
- improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs;
- protect consumers from hazards to their well-being and safety;
- develop effective means of redress for consumers;
- promote and provide for consumer education, including education concerning the social and economic effects of consumer choices;
- facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests; and
- promote consumer participation in decision-making processes concerning the marketplace and the interests of consumers.

The CPA stipulates nine fundamental consumer rights⁴, ie, the right of equality; the right to privacy; the right to choose; the right to disclosure and information; the right to fair and responsible marketing; the right to fair and honest dealing; the right to fair, just and reasonable terms and conditions; the right to fair value, good quality and safety; and the right to supplier accountability.

These recent legislative developments in South Africa's consumer protection environment are directly linked to the existing set of consumer protection good practices as expressed in the UN Guidelines of Consumer Protection (UN Guidelines). Before drafting and introducing the CPA, the South African Department of Trade and Industry commissioned a research project to review the then-existing status quo of consumer protection in South Africa and recommend a more suitable consumer protection regime for the country. The review included an international legislative benchmarking study; group discussions with stakeholders such as industry associations, sector regulators, NGOs, professional bodies, business and consumers; an analysis of existing consumer protection measures; surveys and statistical analysis; and a general audit of the consumer protection environment in South Africa.

³ Jacobs et al, Fundamental consumer rights under the consumer protection act 68 of 2008: a critical overview and analysis, available at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=1752916&download=yes> (accessed on 28 May 2012) at 303 and 309.

⁴ See Chapter 2 of the CPA.

In 2004, this review resulted in the publication of the Draft Green Paper on Consumer Policy Framework. This document, in turn, made express mention of the UN Guidelines, referring to it as the “benchmark for national consumer protection strategies” which the Government aims to put into effect through various measures.⁵ The UN Guidelines therefore played an important role in the drafting process of South Africa’s new Consumer Protection Act when the CPA in its preamble stipulates that one of the reasons for introducing this legislation was “to give effect to internationally recognised customer rights”, there is no doubt that the UN Guidelines spell out many of these internationally recognised customer rights.

The UN Guidelines, adopted in 1985 and amended in 1999, have become a valuable set of principles for consumer protection for legislators aiming to introduce good policy and sound legislation in this area not only in South Africa but in many countries around the world.⁶ More specifically, “[i]n countries where governmental interest in consumer protection is relatively recent, they define essential issues to be dealt with[, while] [i]n countries where consumer law is more developed, they provide a checklist against which existing laws can be evaluated to see whether certain areas need strengthening and to help pinpoint any gaps that may exist”.⁷ In its current form, the UN Guidelines identify and address eight legitimate consumer needs, namely:

- Physical safety;
- Economic interests;
- Standards for safety and quality of consumer goods and services;
- Distribution of essential goods and services;
- Redress;
- Education and information;
- Sustainable consumption; and
- Health.

The link between the nine fundamental consumer rights provided in South Africa’s CPA and the eight consumer needs spelled out in the UN Guidelines is clear.

It is worth noting that the issue of “sustainable consumption” was only added to the UN Guidelines in 1999, and it was noted in this context that there might be a need “to [further] expand their scope to cover new areas where consumer protection is desirable”.⁸ Consumers International (CI) played a key role in the 1999 amendment to the Guidelines, resulting in the addition of provisions addressing “sustainable consumption”.

CI is now putting forward a proposal to further expand the UN Guidelines, which includes amongst other areas, provisions on Access to Knowledge (A2K) in order to enhance more equitable

⁵ On page 9 and 49

⁶ ECOSOC report E/1995/70, available at <http://www.un.org/documents/ecosoc/docs/1995/e1995-70.htm> [accessed on 30 May 2012].

⁷ Ibid.

⁸ ECOSOC report E/1997/61 at para. 55, available at <http://www.un.org/documents/ecosoc/docs/1997/e1997-61.htm> [accessed on 30 May 2012].

access of consumers to creative and scientific output. CI believes that recent technological advancements have made equal access possible in theory but that an enabling legislative environment is needed to take full advantage of new access opportunities. CI has identified the UN Guidelines as one instrument through which necessary reforms at the global, regional and state level in the area of A2K can be carried forward due to the UN Guidelines' impact as a benchmark for rule-making globally.

South Africa's aforementioned recent legislative developments in the area of consumer protection, combined with an existing vibrant A2K movement, make the country a viable case study to support the amendments to the UN Guidelines drafted by CI. The access to knowledge movement in South Africa gained momentum around 2004 when several projects were started by civil society stakeholders such as the Access to Learning Material project and subsequently the African Copyright and Access to Knowledge (ACA2K) project. Access to knowledge is seen as key in South Africa within, for example, the education environment (an environment that produces generally poor results). Access to education materials is mentioned in Section 29(1) of the South African Constitution as the right to a basic education, including adult basic education and further education, which the State, through reasonable measures, must progressively make available.

The objective of this paper, and the authors' commentary in chapters 1 to 3 above, is to support the proposed additions to the UN Guidelines, as put forward by CI. It does this by (a) linking the proposed additions to existing good practices in South Africa, and (b) identifying unmet needs that those provisions would address which do not yet form part of South Africa's legal landscape but are expressed in government policies and private sector initiatives.

At this point, the issues of A2K and consumer protection in South Africa are somewhat artificially dealt with in silos and this paper will show the linkages that require the issues to be considered comprehensively.

Support for the proposed amendments to the UN Guidelines in SA law

The proposed amendments on which we will focus are those on the issue of Access to Knowledge (A2K). While this issue is approached from various angles, emphasis is on access to copyright protected works. Among other things, the proposed amendments call for parity in the treatment of digital and analogue works, for the prevention of abusive practices such as licensing terms or technological locks that impede the access to or use of digital works, and for policies that allow consumers to effectively exercise copyright exceptions and limitations (eg for personal and family use or for activities such as time-, space-, and format-shifting). In addition,

the proposed guidelines suggest measures to support and/or improve open and interoperable standards; the creation, dissemination and preservation of content in diverse languages and accessible formats; the right to access neutral networks; effective consumer control of personal data; and data minimisation practices.

In light of the fact that the proposed amendments to the UN Guidelines emphasise access to copyright protected subject matter, South African copyright law provides a natural starting point for examining if and to what extent South African law supports or necessitates the proposed amendments. In addition, however, other pieces of legislation address some of the issues presented in the proposed guidelines and therefore need to be considered, particularly in instances where the proposed amendments go beyond or do not address copyright issues. As a final step, the proposed amendments need to be seen in, and gauged against, South Africa's overarching policy framework towards A2K and consumer protection as evidenced, for instance, by Green and White Papers, government programmes, Departmental initiatives and the like. This latter step can reveal areas where a disconnect exists between the law on the books and overall government strategies and objectives.

South African copyright law is governed by the Copyright Act of 1978 and its accompanying Regulations of 1978. Even though a few provisions were amended, added or removed since, there is no doubt that the Copyright Act in its current form is outdated and does not properly address the digital environment and many of its challenges.⁹ This said, some support for the proposed amendments can be found in South Africa's Copyright Act and/or other pieces of legislation.

Our section-by-section analysis of the proposed amendments to the UN Guidelines, linking the proposed amendments to South African laws and policies (chiefly the Copyright Act of 1978), has been incorporated into chapters 1 to 3 above. Where there is no legislative support for the proposed amendments, however, we have attempted to examine whether in the South African context such changes to the legislative landscape are desirable.

We have also provided comments in chapter 7 below about possible future amendments to the Guidelines (although they are not proposed in the current round) that would expand consumers' access to cultural and educational materials, and empower them to create and innovate. Amongst these are provisions that would promote the maintenance of a rich and accessible public domain (ie works that are not copyright protected), provide limited protection for government and government-funded works, and provide archive and library-specific copyright exceptions and limitations.

⁹ Armstrong et al, *Access to Knowledge in Africa – The Role of Copyright* at p. 268.

Conclusion

Our analysis in chapters 1 to 3 above and chapter 7 below has shown that there is already significant legislative support in South Africa for the proposed amendments to the UN Guidelines. This is because South Africa has recently strengthened its consumer protection and other related laws. Most importantly, however, several provisions of South Africa's Constitution – the highest law of the country – can be cited to support the general objective behind the proposed amendments. In addition, various government and private sector initiatives call for increased access to knowledge mechanisms, recognising the crucial role access to knowledge plays for development in the country.

Against this backdrop, it is concerning, moreover, that South Africa's key piece of legislation for ensuring adequate access to knowledge and cultural goods – the South African Copyright Act – is outdated and insufficiently speaks to and addresses digital technologies and the opportunities provided by such technologies for increased consumer access to and consumption of culture and knowledge. This was confirmed by a recent study examining the relationship between copyright law in South Africa and access to knowledge. It essentially concluded that the Copyright Act does not make use of many of the flexibilities contained in the TRIPS Agreement and other international copyright treaties, particularly in relation to copyright exceptions and limitations. The Copyright Act

does not properly address the digital environment and its challenges. The ability to promote access to learning materials by, for instance, creating adaptations of copyright-protected works for the sensory disabled, is hindered by the threat of copyright infringement. Many existing copyright exceptions and limitations in the South African Act and Regulations – especially the provisions on fair dealing – are generally considered to be too vague by both rights-holders and users. The failure to provide clarity for fair dealing in digitised works, for instance, hinders the distribution of knowledge through the efficient distribution mechanisms of ICTs. In addition, despite progress in electronic communications access in South Africa, the ECT Act, through its protection of TPMs, may attach criminal liability to materials usage that is legitimated by the Copyright Act.¹⁰

¹⁰ Armstrong ... p. 268.

The study criticises that some access-enabling developments, such as the adoption of the FOSS (Free and Open Source Software) policy, are insufficiently supported by or even conflict with the Copyright Act. It therefore argues that the copyright environment in South Africa does not maximise effective access to knowledge.

One way of addressing and finally overcoming the disconnect between, on the one hand, South Africa's outdated and access-restricting copyright legislation and more progressive and access-enabling legislation such as the Constitution as well as recent policies and initiatives on the other, is to implement certain changes to the UN Guidelines as proposed by Consumers International. In

line with Constitutional objectives, these amendments articulate legislative strategies to improve consumer access to knowledge, mainly in the area of copyright law. Even though no comprehensive review process regarding South Africa's Copyright Act is currently underway, South Africa's lawmaker will have to revise current copyright legislation in the foreseeable future in order to align the law with digital realities. Against the backdrop of South Africa's previous consideration of the UN Guidelines when drafting the Consumers Protection Act, it is to be expected that equal consideration will be given to the instrument when overhauling the country's copyright legislation. From a South African perspective, therefore, the amendments to section H of the UN Guidelines proposed by Consumers International are timeous and deserve support as there is not only a basis in South Africa's highest legal order for them but because they could also help overcome existing contradictions in South African law.

Effective adoption of the UN Guidelines related to consumer rights, in the specific field of the Internet, new technologies and access to knowledge, should exceedingly contribute to the process of changing the outline of standards and public policies aimed at compatibility of the fundamental rights to education, information, culture and copyright.

Emerging areas

7 Empowering consumers as creators

Jeremy Malcolm

Consumers International

CONSUMERS INTERNATIONAL (CI) HAD MORE DIFFICULTY in deciding what to leave out of its proposal for amendment of the Guidelines than in coming up with ideas to include. As such, there are some emerging areas on which work was done towards the preparation of amendments, but which were omitted in the end. Although their excision from the draft was a difficult decision, in doing so we were conscious of the need to keep the amendments to a manageable length, not to descend into too much detail in particular sectoral areas, and to remain within the generally accepted bounds of consumer policy.

In this context there are two main emerging areas of consumer policy that did not finally find a place in this round of proposed amendments. One of these was set out by Charley Lewis in chapter 2, namely a set of amendments dedicated to improving consumer protection practices in the area of telecommunications. Though we decided that these were too specific for the Guidelines at this time, they will still be useful in the development or improvement of consumer protection codes for the telecommunications sector.

The other emerging area, which will be the subject of this chapter, was the potential for consumer policy to expand the range of cultural and educational works available to consumers, and thereby to empower them as creators and innovators. CI believes that there is a strong potential for this area of consumer policy to find expression in the Guidelines in the future, but it is also true that the issues concerned are still under active discussion, and that relevant laws at the national level are still being debated and tested.

That said, as observed when the Guidelines last came up for amendment, “The United Nations Guidelines were not intended to be a static document. They need to be revisited in the light of

changes in social, political and economic systems.”¹ We can therefore expect to be reviewing the Guidelines again in due course, and it may be timely to reconsider these emerging areas then. As such, we present below our experts’ analysis on provisions that would empower consumers as creators, as food for those future discussions.

¹ Commission on Sustainable Development (1998), ‘Consumer Protection and Sustainable Consumption: New Guidelines for the Global Consumer’, available online at <http://www.un.org/documents/ecosoc/cn17/1998/background/ecn171998-consumer.htm>.

Broadening access to works through the public domain, from government and through libraries

The first step towards the empowerment of consumers as creators is in providing them with access to the building blocks of knowledge and culture, through the public domain (works that are free of copyright restrictions), through the provision of access to publicly-funded works by government, and through public and institutional libraries and archives. On this topic, CI developed a set of draft proposals, firstly addressing the public domain in a provision that draws from the Public Domain Manifesto.²

² See <http://www.publicdomainmanifesto.org/>.

Governments should work to actively maintain a rich and accessible public domain. No expansion of the scope or extension of the duration of copyright protection should be made without wide public consultation and a comprehensive, objective and transparent assessment of public benefits and detriments. Rights holders should be permitted to voluntarily relinquish copyright in their own works. It should not be possible to re-appropriate exclusive rights over public domain works by technological, contractual or other legal means, or by making technical reproductions of such works.

Vipul, India: Under Section 21 of the *Indian Copyright Act, 1957* authors of a work may release/relinquish their work into the public domain by giving an appropriate notice as prescribed to the Registrar of Copyrights or by way of public notice. It may be noted that the option to relinquish the work by ‘public notice’ was only inserted by the *Copyright (Amendment) Act, 2012* which has now made relinquishing one’s copyright a much simpler process.

The duration of all copyrights are generally above the minimum required by India’s international obligations, thus decreasing the public domain which is crucial for all scientific and cultural progress. Under the current system of legislation, the duration of copy-

right protection is considered after due process of public/stakeholder involvement as well as consensus in both houses of Parliament. Although it must be noted that the terms of Copyrights on most works were last increased in 1992 by the *Copyright (Amendment) Act, 1992* (Act 13 of 1992) no public consultation was done nor even any study sanctioned by the government to justify the increases made in the Act 13 of 1992.

Schönwetter and Chetty, South Africa: In broad terms, the *Copyright Act* currently prescribes the minimum duration and scope for copyright protection as required by applicable international treaties and agreements. No concrete plans for generally reforming South Africa's outdated copyright legislation are currently under way. However, if such a reform process were to be initiated, South African lawmakers would be bound by the Constitution and would have to act in accordance with, and within the limits of, the Constitution. The preparation of a Bill involves a number of steps, such as the investigation and evaluation of the legislative proposals and consultation with interested parties.

While no general amendment process regarding the *Copyright Act* is currently under way, certain aspects of IP were recently or are currently being discussed which could be seen as an expansion or strengthening of IP protection. Legislators recently introduced the *Intellectual Property Rights from Publicly Financed Research and Development Act*, which requires recipients of public funding to protect and commercialise their works by means of IP. However, copyrighted works are largely excluded from the scope of the Act. Moreover, the legislator is planning to introduce the piece of legislation targeting traditional knowledge and providing IP protection measures for such creative output. This Bill is controversially discussed in South Africa at present.

Copyright holders may voluntarily relinquish copyright in their works; but it is unclear as to whether this extends to their moral rights.

Re-appropriation of public domain works in the broader sense is possible under South African law, eg if a public domain literary work is being designed and published in a certain manner. Copyright only subsists in the new creative elements, eg the design or typesetting, and not in the public domain content itself. The protection of public domain works by means of TPMs is also possible.

Under the *Promotion of Access to Information Act (PAIA)*, and in accordance with the *Constitution*, the right of access to information may only be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Act intended to foster a culture of transparency and accountability. Section 2 of PAIA further provides that when interpreting PAIA, every court must prefer any reasonable interpretation of the provision that is consistent with those objects.

Governments should limit or exclude copyright protection for works that they have produced or funded, should endeavour to provide universal online access to such works including all official public documents, and should support the preservation, digitisation and online dissemination of other public domain works. Governments should be further guided by the UNESCO Charter on the Preservation of Digital Heritage of 15 October 2003, and the UNESCO Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace of 21 November 2003.

Vipul, India: In India the Protection and Utilisation of Public Funded Intellectual Property Bill (PUPFIP Bill) introduced in the Rajya Sabha (Upper House of Parliament) in 2008 sought to transfer intellectual property generated through public funded projects to private individuals. However, this Bill is currently pending with the legislature and is not being actively pursued by the Parliament.

Further the Approach Paper to the 12th Five Year Plan, in its section on Technology and Innovation lays down the intent of the state to adopt an Open Innovation Model and states that “by using an “open source” and collaborative approach, organisations could expect to develop affordable products for the world which otherwise would not be a cost-effective option for many organisations. Many clusters and collaborative initiatives to foster innovation have begun to operate in the country. These include SIEN — the Science and Entrepreneurship initiative hosted in IIT Powai; an automotive cluster in Pune; an initiative at the CMTI with involvement of ISRO to develop technologies for flexible manufacturing, and many others.

Government needs to take appropriate steps to promote the growth of such collaborative initiatives, both in the physical and virtual domains. The National Innovation Council (NInC) is in the process of facilitating the setting up of industry and university-based clusters to spur innovations.”³ Similar thoughts and intentions have been reflected by the Office of the Adviser to the Prime Minister, Public Information Infrastructure & Innovations in its Strategy Paper on Inclusive Innovation brought out in March 2012.⁴ Certain Universities and Research Institutions (including CSIR) have actually opted for an open access mandate and recommendation thus freeing up scientific access.

With respect to Preservation of Digital Heritage in India initiatives such as; The National Mission for Manuscripts (IGNCA),

³ <http://12thplan.gov.in/12fypdocs/13.pdf>

⁴ <http://iii.gov.in/images/stories/innovation/InnovationStrategy.pdf>

Microfilming and Digitisation of Libraries, National Mission on Libraries (Being proposed) and National Mission on Antiquities are being put in place.⁵ Digital preservation deals with issues concerning “refreshing”, “migration” and “emulation” of contents from one form to another or one medium to another. This copying process has raised many legal issues. Both Copyright Act, 1957 and Indian Information Technology Act, 2000 are silent on these emerging issues. It needs to have afresh look and strategy to deal with issues concerning digital preservation.

Although there is no direct reference to the UNESCO Charter on the Conservation of Digital Heritage or the UNESCO Recommendation regarding Use of Multilingualism and Universal Access to Cyberspace in any legislations or policy papers, however, there is scope for the government of India to be guided by these two instruments in future policy and initiatives.

Schönwetter and Chetty, South Africa: According to the South African *Copyright Act*, copyright in works which are made by or under the direction or control of the state vests in the State (s 5). However, no copyright subsists in official texts of a legislative, administrative, or legal nature, or in official translations of such texts, or in speeches of a political nature.

The *Intellectual Property Rights from Publicly Financed Research and Development Act* of 2008 strives to ensure that IP emanating from publicly financed research and development is identified, protected, utilised and commercialised. However, copyrighted works such as a thesis, dissertation, article, handbook or any other publication which, in the ordinary course of business, is associated with conventional academic work are excluded from the scope of the Act.

No evidence was found for the South African Government being guided in the past by either the UNESCO Charter on the Preservation of Digital Heritage of 15 October 2003 or the UNESCO Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace of 21 November 2003.

⁵ <http://ndpp.in/presentation/IndoUSWorkshop2009/RameshCGaur.pdf>

Governments have a responsibility to fund public libraries and archives, and to facilitate their operation through appropriate limitations in copyright law to allow archival and preservation, lending, and copying for education and research. Libraries should be permitted to circumvent technological protection mechanisms on digital works for the above purposes.

Vipul, India: In India, most though not all public libraries are

funded by the government and most States have their own Public Libraries legislations. The recommendations of the National Knowledge Commission on the Libraries and Information Sector in 2006 also stressed that peer reviewed research papers resulting from publicly funded research should also be made available through open access channels, subject to copyright regulations. It further recommended that all academic institutions must set up institutional repositories of electronic thesis and dissertations and such repositories should be made open access. In 2012 India formed a new National Mission on Libraries to advise the government on all library and information sector matters of national importance and to set up long term plans for the development of the library sector.

Sections 52(1)(n), (o) and (zb) of the Copyright Act allow for exceptions to infringement of copyrighted works for the purposes of libraries. Section 52(1)(o) being the main provision which allows for the making of up to three copies of a book (including a pamphlet, sheet of music, map, chart or plan) for the use of a non-commercial public library, only if such book is not available for sale in India. The 2012 Amendment of the Copyright Act has substituted the word “hire” wherever it occurs (other than in Section 51) with the word “commercial rental”.

Although this has seemingly been done to bring India in conformance with the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WPPT) it definitely clarifies the legality of lending by non-profit public libraries. Further Section 52(1)(n) allows for the storing of a work in any medium by electronic means by a non-commercial public library, for preservation if the library already possesses a non-digital copy of the work. This exception coupled with the protection provided for circumvention under Section 65A(2)(a) of the Act allows for circumvention of technological measures for making copies for the purposes specified in Section 52.

Note:

- Section 65A(2)(a) is the anti circumvention provision added by the Copyright (Amendment) Act, 2012 and makes circumvention illegal only if the purpose for which such circumvention is made is prohibited by the Copyright Act. This means that circumvention *per se* is not illegal, and is allowed if done to make copies for the purposes provided in the exceptions section of the Copyright Act.
- It is not clear what a ‘public library’ means since each state enactment has a different definition of ‘public library’.

Schönwetter and Chetty, South Africa: A 2007 study revealed that the total number of public libraries as well as the annual library expenditure in South Africa compares unfavourably with developed countries. According to the study, South Africa only has about 30

libraries per million people (whereas Sweden, for instance, has 216), and while South Africa only spends about

US\$ 3 per capita on libraries, the UK spends about US\$ 36. Exclusive legislative competence for libraries other than national libraries vests in the Provinces.

The South African *Copyright Act* currently contains relatively narrow general copyright limitations for general educational purposes, eg in ss 12(1)(a) and 12(4), as well as a set of provisions in the Copyright Regulations that expressly allow for limited permission-free reproductions of copyrighted materials by library and archives. These provisions are generally perceived as too narrow and outdated in that they do not address realities in the digital age, including distance learning and digitising of learning materials. Libraries are not permitted to circumvent TPMs on digital works for such purposes.

User-generated content: the empowerment of Internet users

In the digital age, consumers are no longer simply a passive audience for mass market content. With the rise of blogging, wikis, citizen-journalism, amateur video and podcast production, music production, social media sharing of photography and fan art, and so on, the public has become a creative community in its own right.

Usually non-commercial, often critical, and at turns cutting-edge or hilariously banal, user-generated content has challenged previous conceptions of the relationship between consumer and creator. It comes as no surprise that whilst this dramatic democratisation of media production has giving rise to new business opportunities, at the same time some established businesses have found themselves on shaky ground.

It should also come as no surprise that the law has failed to keep pace with these changes; for example, the outdated notion of “authorship” that is embedded in the copyright paradigm bears little relation to the way in which creative works are now developed through techniques such as mash-up, remix and collaborative editing.

In this context CI developed two proposals to address the needs of the creator-consumer, beginning with a statement about open collaborative projects that draws from sources such as the WIPO Development Agenda⁶ and the Definition of Free Cultural Works.⁷

⁶ See recommendation 36 at <http://www.wipo.int/ip-development/en/agenda/recommendations.html>.

⁷ See <http://www.freedomdefined.org/>.

Governments, in partnership with the private sector and other relevant organisations, should encourage the development and use of more inclusive models for the production and distribution of knowledge and culture, including the use of free and open licenses that allow works to be freely studied, applied, copied and/or modified, by anyone, for any purpose. Open collaborative projects that utilise such licenses should be supported as incubators of creativity and innovation.

Vipul, India: As mentioned above, the Approach Paper to the 12th Five Year Plan, in its section on Technology and Innovation lays down the intent of the state to adopt an Open Innovation Model and states that “by using an “open source” and collaborative approach, organisations could expect to develop affordable products for the world which otherwise would not be a cost-effective option for many organisations... Government needs to take appropriate steps to promote the growth of [such] collaborative initiatives, both in the physical and virtual domains. The National Innovation Council (NInC) is in the process of facilitating the setting up of industry and university based clusters to spur innovations.”⁸ Similar thoughts and intentions have been reflected by the Office of the Adviser to the Prime Minister, Public Information Infrastructure & Innovations in its Strategy Paper on Inclusive Innovation brought out in March 2012.⁹ Certain Universities and Research Institutions (including CSIR) have actually opted for an open access mandate and recommendation thus freeing up scientific access.

Contrary to such policies, under the current Copyright regime, the Copyright Board in India is authorised to issue a ‘compulsory license’ to publish works that are within copyright, under certain conditions:

- an ‘orphaned work’ which is of public interest, but whose author or heir is unknown, untraceable or dead;
- a work of national/public interest deliberately withheld from public by the author or her heirs;
- for publishing a translation of an existing work.

However, it is pertinent to note that the compulsory licensing has rarely been invoked.

Schönwetter and Chetty, South Africa: Legislation such as the CPA and PAIA have included definitions that promote more inclusive models for interpretation of the production and distribution of

⁸ <http://12thplan.gov.in/12fypdocs/13.pdf>

⁹ <http://iii.gov.in/images/stories/innovation/InnovationStrategy.pdf>

knowledge either in the form of goods (in the case of the CPA) or records (in the case of PAIA). The *Consumer Protection Act*, Section 1, defines “good” to include anything marketed for human consumption, tangible objects, literature, music, photographs, films, games, information, software and other intangible products or a licence to use such intangible products, regardless of form or medium.

The definition of licence in the CPA promotes broader dissemination of knowledge through a broad definition of the term “licence”. The Consumer Protection Act, Section 1, defines “licence” to mean the authority, regardless of its specific title or form, issued to a person and in terms of which that person is either (a) authorised in terms of a public regulation to conduct business; or (b) authorised by another person to (i) access any facility of use any goods or (ii) supply any goods or services.

Under PAIA, the rights of access to information contemplated pertain to “records” defined as (in relation to public or private bodies), any recorded information, regardless of form or medium in the possession or under the control of that public or private body, respectively, and whether or not it was created by that body.

In addition to the aforementioned legislation, there are a number of Government-supported initiatives in South Africa supporting the development and use of more inclusive models for the production and distribution of knowledge and culture.

Most importantly, the South African Government adopted, in 2007, a Policy on Free and Open Source Software (FOSS) use for South Africa.¹⁰ The policy stipulates the following:

¹⁰ See <http://www.info.gov.za/view/DownloadFileAction?id=94490>

1. The South African Government will implement FOSS unless proprietary software is demonstrated to be significantly superior. Whenever the advantages of FOSS and proprietary software are comparable FOSS will be implemented when choosing a software solution for a new project. Whenever FOSS is not implemented, then reasons must be provided in order to justify the implementation of proprietary software.
2. The South African Government will migrate current proprietary software to FOSS whenever comparable software exists.
3. All new software developed for or by the South African Government will be based on open standards, adherent to FOSS principles, and licensed using a FOSS license where possible.
4. The South African Government will ensure all Government content and content developed using Government resources is made Open Content, unless analysis on specific content shows that proprietary licensing or confidentiality is substantially beneficial.
5. The South African Government will encourage the use of Open Content and Open Standards within South Africa.

In adopting this policy, the South African Government has acknowledged, along with many industry leaders, that FOSS is often a viable choice, both on the desktop and in the back end.

Other recent projects and initiatives supporting the development and use of more inclusive models for the production and distribution of knowledge and culture include:

- The Department of Higher Education and Training's Green Paper of 2012 on use of open educational resources. The Green Paper states that the Department of Higher Education and Training will consider the adoption of an appropriate open licensing framework and determine ways to support the development of high-quality learning resources to be made available as open content for use with appropriate adaptation.¹¹

¹¹ <http://mg.co.za/article/2012-03-02-open-up-and-say-access-for-everyone/>

¹² <http://www.sivulile.org/>

- The Sivulile Open Access Project (supported by the Department of Basic Education).¹²

¹³ <http://capetowndeclaration.org>

¹⁴ <http://www.worldwidescience.org/>

- The support for open access publishing by several South African universities through signing declarations such as the Cape Town Declaration¹³ and publishing Open Access Journals.

- The CSIR's support of the World Wide Science Open Access Initiative,¹⁴ a project designed to accelerate scientific discovery and progress by accelerating the sharing of scientific knowledge.

- The Academy of Science of South Africa initiative to create an open access platform for accredited local journals.

It is worth noting in this context that South Africa seems to be leading the pack in Africa in embracing open government principles, a benchmark on which governments should increasingly be evaluated in terms of their commitment to be accountable to their citizens. In fact, South Africa is the only African country that is part of what is set to become a powerful and popular global movement to place openness at the centre of governance and development.

Recognising that much creative expression in the digital age is produced by consumers drawing on elements from their surrounding culture, governments should recognise consumers' right to quote or otherwise make reasonable use of a copyright work in the creation of a new work, and to distribute that new work non-commercially, provided that:

- (a) The source is not an obviously infringing copy;
- (b) The use does not conflict with the normal exploitation of the existing work and does not unreasonably prejudice the legitimate interests of the author; and
- (c) The source is acknowledged where it is reasonable in the circumstances to do so.

Schönwetter and Chetty, South Africa: The South African *Copyright Act*, in s 12(4), does contain a provision allowing the permission-free quotation from copyrighted works. However, if a use goes beyond mere quoting, the legality of such use depends on whether it is covered by any of the detailed copyright exceptions and limitations contained in the Act, eg by the fair dealing provision contained in s 12(1). In most instances, the current Act does not distinguish between commercial and non-commercial uses. It would fall on legislators to consider the legitimacy of authorising limited uses of the work permission-free where the conditions above (and other conditions) are met to accommodate digital creative expression. Public consultation will attest to whether South African society would be accommodating of such models. Clarity on issues of what constitutes "non-commercial distribution" or the "legitimate interests of the author" would be necessary.

Vipul, India: With respect to criticism and commentary, both find place under the exception rule under Section 52(1)(a)(ii). The Copyright Act in its current version does not explicitly include "parody" in the exception provision, though case law reflects that the concept of "fair use" is applied widely by the Courts to include parody. The above exception, however, does not apply to computer programmes.

In *Civic Chandran v. Ammini Amma* 1996 (16) PTC 670 the artistic work challenged was not a parody as such, but a *counter drama*, as expressively termed by the Kerala High Court:

The original work in question was *Ningal Enne Communistakki* – a

well-known drama written by Thoppil Bhasi, a famous Malayalam playwright. The play dealt with some of the burning social and political problems of those days, specially espoused by the Communist Party of India before its split, and had considerably aided the undivided Communist Party of India to come to power in Kerala in the 1957 assembly elections. On the other hand, the *counter drama* written by the appellant, Civic Chandran, was intended to convey the message that though the party had succeeded in coming to political power, it had forgotten the depressed classes who were instrumental in its success, and who had made substantial sacrifices for the party. The *counter drama* used substantial portions of the original, with some alterations required for its purpose. The characters and dialogues in the original were also reproduced in some instances.¹⁵

¹⁵ <http://www.nalsar.ac.in/IJ IPL/Files/Archives/Volume%201/4.pdf>

The Court held that the reproduction was not a misappropriation for the purpose of producing a play similar to the original. Rather, the purpose was to criticise the idea propagated by the original drama, and to expose to the public that it had failed to achieve its real object. Furthermore, it was noted that there was no likelihood of competition between the two works in question. It was held that since the copying was for the purpose of criticism, it amounted to fair dealing and did not constitute infringement of the copyright.

Sophy Lambert-Racine, Union des consommateurs, Canada:

The new Canadian Copyright Law, which will soon take effect, includes some new rights in its “fair dealing” provisions. One of those concerns user-generated content (UGC) – something that has been called “the YouTube exception”. In short, Internet users will be allowed to use content protected by copyrights to create a new work or other subject matter in which copyright subsists. This new right can be exercised only under certain conditions, including the non-commerciality of use or dissemination, as mentioned in the above proposed paragraph of the UN Guidelines for Consumer Protection.

This new right was well received by consumers, considering that copyright holders often are opposed to that kind of creation. A few people who took part in public consultations for C-11 (as well former, identical C-32 bill) insisted on the fact that this right promotes creativity and freedom of expression, as well as creation of new innovative content, the latter being one of the implicit goals of Copyright laws. In short, this right reflects a new reality linked with the rise of the Internet and confirms the legality of a practice that has become common among Internet users.

The extraordinary availability for the public of existing works as well as that of tools that permit to easily create new content has given a boost to the creation of new content based on or using existing material. The numerous possibilities of the World Wide Web, as far as communication and dissemination of content is concerned, certainly help explain why so many users are encouraged to create that kind of content, even though they cannot get profit from it from a commercial standpoint. Not only can users easily create new content, but they can also share and broadcast their personal

creation with an ease that has never been greater.

Probably the most frequent type of UGC is known as “mash up”, which usually consists in mixing up different audio and video clips taken from popular movies or songs, and protected by copyrights, to create entirely new and entertaining contents – words or soundtrack from one source mixed with music or images from another. These mixings are usually broadcast on websites such as YouTube, but are also commonly spread through social networks. Sometimes, content generated by users can take many other shapes. For instance, writers may also be familiar with the concept of “fan fiction”, which consists of non-commercial literary works created by Internet users and featuring characters from famous novels or movies. In short, possibilities are endless, limited only by imagination and will to create.

Nevertheless, many rights holders did not approve of this new right as described in bill C-11. Some, for instance, a participant representing video game industry, expressed the fear that this new right might allow users to create free “copycat” games, which would be made available freely online. Some other rights holders had similar concerns: they considered that this right to use protected content may affect the normal exploitation of existing work, and that it would be very difficult to demonstrate that a specific UGC was having a substantial adverse effect on the exploitation or potential exploitation of the content protected by copyrights.

Another important issue mentioned during consultations was the definition itself of said non-commercial user-generated content: the use of copyrighted content for a new user-generated creation will be permitted only if the creation, the use and the dissemination are done solely for non-commercial purposes. A few participants mentioned that even if the user didn’t create or disseminate new content for lucrative purposes, websites such as YouTube or Google are still commercial ventures and get benefits from the dissemination of such content, considering they use their web pages to sell advertising. It seems that it was taken for granted that the rules concerning user generated content were meant only for the creators of UGC and not the broadcasters, as there was no modification to the bill after attention was drawn to that point. How will the “commercial purpose” be interpreted? Future will tell.

Despite some concerns expressed by copyright holders, this new right is certainly an interesting possibility for the protection of consumers online. Letting users create and disseminate new content based on copyright protected material, as it is now done in Canada through the Copyright Law, would promote Internet’s freedom, but it would also confirm the fact that right holders no longer have monopoly over ideas and creativity. In other words, creative contents, from now on, should no longer be considered solely as products of entertainment, but should be viewed and used legally by everyone as a direct source of inspiration and creativity.

References:

- Barry Sookman. *Some observation on Bill C-11: The Copyright Modernization Act* (2011), available from <http://www.barrysookman.com/2011/10/03/some-observations-on-bill-c-11-the-copyright-modernization-act/comment-page-1/>
- House of Commons. Legislative Committee on Bill C-11 (2011), available from <http://www.parl.gc.ca/committeebusiness/RelatedDocuments.aspx?Cmte=CC11&Mode=1&Parl=41&Ses=1&Language=E>
- Meeyoung Cha, Haewoon Kwak, Pablo Rodriguez, Yong-Yeol Ahn and Sue Moon. *I Tube, You Tube, Everybody Tubes: Analyzing the World's Largest User Generated Content Video System* (2007), available from <http://www.land.ufrj.br/classes/coppe-redes-2012/trabalho/youtubeimc07.pdf>
- Organisation for Economic Co-operation and Development. *Participative Web: User-Created Content* (2006), available from <http://www.oecd.org/dataoecd/57/14/38393115.pdf>
- Union des consommateurs. *Brief on C-11* (2011), available from <http://www.parl.gc.ca/Content/H0C/Committee/411/CC11/WebDoc/WD5459877/411C11CopyrightBriefsitemize>

Acknowledgements

Jeremy Malcolm

Consumers International

THE PRODUCTION OF THIS BOOK WAS MADE POSSIBLE by a grant from the International Development Research Centre (IDRC). Background work was also supported by the Open Society Foundations (OSF).

The principal contributors to this volume are Robin Brown from the Foundation For Effective Markets & Governance, and our research partners from India, Brazil and South Africa, for whom biographies are given below. Shorter case studies were also contributed by Lee Suhhyue from Consumers Korea, and Sophy Lambert-Racine from Union des consommateurs, Canada. Allan Asher's facilitation of our work on the amendment of the Guidelines is also acknowledged with appreciation. The book was edited and linking material was written by Jeremy Malcolm, who accepts responsibility for any errors that may remain in the text.

Robin Brown was head of the Consumers' Federation of Australia for around ten years. He has served as a member of statutory and non-statutory regulatory bodies in telecommunications, insurance, banking, drugs, chemicals, food standards and direct marketing. For a period he worked for the Australian Agency for International Development. In 1999 he initiated the Foundation for Effective Markets and Governance (FEMAG – <http://www.femag.org.au>) a non-profit organisation affiliated with the Regulatory Institutions Network at the Australian National University. FEMAG, of which Robin is Executive Director, consults and advises government, business and civil society organisations on consumer and competition policy and regulation, on government accountability and on civil society participation in public policy formation.

Pria Chetty was at the time of her contribution an Associate Director within the PwC Southern African practice, leading advisory services relating to technology law. Pria has ten years' experience particularly in ICT legal and regulatory matters. Prior to joining PwC, Pria founded a leading technology law firm, which serviced

several of South Africa's largest organisations on ICT contracts, policies, regulatory compliance and legal risk management.

Vipul Kharbanda is an editor of various legal books and journals and also works as a consultant with the Centre for Internet and Society, Bangalore. His interests lie in environmental law, access to knowledge, privacy laws, labour and the corporate commercial space. He is an alumnus of the National Law School of India University, Bangalore and has worked as an associate with one of the leading law firms of India working on some of the biggest project finance deals in the country. He also does freelance litigation in the Hon'ble High Court of Judicature at Allahabad.

Charley Lewis works as a senior lecturer, researcher and consultant at the LINK Centre, Faculty of Humanities, University of the Witwatersrand. He has lectured and presented widely and undertaken research on a number of ICT policy, regulation and development issues, including universal access and service, consumer protection, ICT sector liberalisation, the Internet, call centres and e-learning. He holds the degree of Master of Commerce in the Management of Information Systems from the University of the Witwatersrand and is currently a PhD Candidate. He was recently appointed by the Minister of Communications to serve on South Africa's national ICT Policy Review Panel.

Tobias Schönwetter was at the time of his contribution a Senior Manager within PricewaterhouseCoopers' South African practice performing legal advisory services specifically relating to innovation, technology and intellectual property (copyright and trademarks). Tobias has studied and practised law in Germany, the US and South Africa and he has led the copyright division at UCT's Intellectual Property Law and Policy Research Unit for several years. He has led a number of intellectual property-related projects and research collaborations such as the African Copyright and Access to Knowledge (ACA2K) project and the Open AIR (African Innovation Research and Training) project.

Guilherme Varella was at the time of his contribution a lawyer at Idec (Brazilian Institute for Consumer Defense) in telecommunications, Internet and access to knowledge and Master's student in public policies of culture in the Law School of Universidade de São Paulo (University of São Paulo – USP).

Mariana Valente, for whom no biography was available at printing time, co-authored Idec's contributions to this book.



UPDATING THE UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION FOR THE DIGITAL AGE

The United Nations Guidelines for Consumer Protection are an influential declaration of best practices in consumer protection law and policy. But as they were last amended in 1999, they are now overdue for an update — not least in areas where advances in technology have affected consumers, such as access to knowledge, Internet and telecommunications services, e-commerce, and digital products and services.

Consumers International (CI), as the global campaigning voice for consumers, is well placed to make recommendations about what amendments should be made to address these new and emerging areas of consumer rights. This publication — which is a companion volume to a broader set of amendments developed by CI — explains our reasoning behind those proposed amendments that particularly affect consumers in the digital age.

A focus of this volume — and of the Guidelines themselves — is on how effective consumer laws and policies can benefit consumers in developing and emerging economies. As such, in-depth analysis is provided of how the proposed amendments relate to consumers in India, Brazil and South Africa, either by reflecting existing best practices in those countries, or by shining light on problem areas that the proposed amendments could help address.

For more information about Consumers International

Visit www.consumersinternational.org

Email consint@consint.org



www.facebook.com/consumersinternational



[@Consumers_Int](https://twitter.com/Consumers_Int)



www.youtube.com/user/ConsumersIntl



A2Knetwork.org/guidelines