

Information and Communication and the Rights of the World's Consumers in the 21st Century: Updating the UN Guidelines for Consumer Protection

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4 Information and Communication and the Rights of the World's Consumers in the 21st Century: Updating the UN Guidelines for Consumer Protection

Robin Brown and Jeremy Malcolm

ABSTRACT This paper provides background to the proposed amendments to update the United Nations Guidelines for Consumer Protection for the digital age. A soft-law instrument, the Guidelines provide an influential standard for the dissemination of good practices in consumer protection, as a mechanism to foster and promote social and economic development. They outline eight areas for developing policies for consumer protection, which are reflected by the eight consumer rights declared by the global consumer movement: rights to satisfaction of basic needs, safety, choice, information, consumer education, redress, representation and a health environment.

The paper outlines the current global regime of public policy development and regulation relating to access to knowledge. Indicating that many of the issues of concern in terms of access to knowledge are essentially consumer issues it argues that amendments to the Guidelines would form the basis for progress. The paper then details the proposed amendments explaining the basis for each one.

Introduction

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. There is now good policy and sound legislation based on the Guidelines in most countries. In his 1993 report on progress in implementation of the Guidelines the UN Secretary-General notes that both developing and developed country governments “reported that the guidelines had had a significant impact on their work” on consumer policy.

It remains the case though that in many countries much is yet to be done to achieve effective administration of regulation to make markets work efficiently and equitably to promote social and economic development.

The Guidelines outline measures to assist governments in dealing with eight issues: economic interests, standards, essential goods and services, redress, education and information, health and sustainable consumption. Complementing the Guidelines are eight rights of people everywhere as consumers of goods and services: to satisfaction of basic needs, to safety, to choice, to information, to consumer education, to redress, to representation and to a healthy environment.

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 Consumers International. 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]”.¹ This is exactly what Consumers International (CI) now proposes: updating the Guidelines for the digital age.

The Wider Context

There has long been world wide advocacy 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 of 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 CI, 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. This paper provides some background on the relevant instruments and agencies and on the Guidelines. The following paper *The UN Guidelines for Consumer Protection: Making them work in developing countries* gives additional back-

¹ ECOSOC report E/1997/61, available at <http://www.un.org/documents/ecosoc/docs/1997/e1997-61.htm>, paras 59 and 3.

ground on the Guidelines and what is needed to make them more effective.

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 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 able 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 recognise 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 recognise 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; and

- Rights to obtain, available anywhere globally, at a fair price information processing and communication products and use them without unfair/unreasonable constraints by neither states nor producers.

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:

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.

The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

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, but 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.
- Set minimum standards for essential copyright limitations and exceptions for consumers.
- Stop suppliers from using technology to cripple digital products or unreasonably limit the ways in which consumers can use them.
- Promote a permissive approach to copyright to facilitate non-commercial creativity by consumers.
- Require that the dissemination of consumer safety information, and 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.
- Ensure that consumers retain access to their own data in formats that they can use, and that such data is protected against misuse.

The proposed amendments have been drawn from best practices from around the world. For example, the provision that requires consumers to be notified of technical protection mechanisms and interoperability limitations is drawn from new provisions in European consumer law.² Other provisions are based closely on current legislative developments in Canada and Brazil. The amendments also make reference to relevant UNESCO documents and recommendations. CI and its partners are in the process of conducting research for a detailed background paper which will illustrate the case for the amendments, with case studies from India, Brazil and South Africa.

A2K in the UN system and the Process for Having the Amendments Passed

The draft amendments were developed by CI and its members over a process of several months, then released for broader public comment for a further three months. However, they are still only a starting point for intergovernmental discussion. CI now seeks to actively engage governments and international organisations in discussions within all appropriate fora towards settling amendments to the Guidelines and eventually having them agreed at the General Assembly.

UNCTAD is the agency with carriage of the Guidelines, but the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the World Intellectual Property Organisation (WIPO) and the Commission on Science and Technology for Development (CSTD) are the agencies with particular responsibilities for access to knowledge and information issues.

² Helberger Natali, *Parliament adopts new directive to improve digital consumer rights* (2011), available at <http://klawercopyrightblog.com/2011/07/01/parliament-adopts-new-directive-to-improve-digital-consumer-rights/>.

United Nations Educational, Scientific and Cultural Organisation (UNESCO)

UNESCO is the main body charged with the task of making knowledge accessible to humanity at large. It was established soon after the UN officially came into existence on 24 October 1945 and even before the adoption of the Universal Declaration of Human Rights. The Constitution of UNESCO came into force on 4 November 1946 after ratification by twenty countries: Australia, Brazil, Canada, China, Czechoslovakia, Denmark, Dominican Republic, Egypt, France, Greece, India, Lebanon, Mexico, New Zealand, Norway, Saudi Arabia, South Africa, Turkey, United Kingdom and United States.

UNESCO's constitution states:

Article I

Purposes and functions

2. To realise this purpose the Organisation will: Maintain, increase and diffuse knowledge:

By encouraging cooperation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information;

By initiating methods of international cooperation calculated to give the people of all countries access to the printed and published materials produced by any of them.

World Intellectual Property Organisation (WIPO)

In 1970 the Convention Establishing the World Intellectual Property Organisation came into force. WIPO succeeded the **United International Bureaux for the Protection of Intellectual Property (BIRPI)** and inherited its role under Article 3 of this Convention to "promote the protection of intellectual property throughout the world." When WIPO became a specialised agency of the UN in 1974 the agreement indicated a somewhat wider remit to that of facilitating technology transfer for development. Article 1 of the agreement says that WIPO is responsible

for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development, subject to the competence and responsibilities of the United Nations and its organs, particularly the United Nations Conference on Trade and Development, the United Nations Development Programme and the United Nations Industrial Development Organisation, as well as of the United Nations Educational, Scientific and Cultural Organisation and of other agencies within the United Nations system.

In 2004, Brazil and Argentina pushed WIPO to focus more on its technology (knowledge) transfer role and proposed a development agenda which has subsequently been accepted.

A response to this was the preparation of a draft Treaty on Access to Knowledge by an informal international committee. The draft was released in 2005 following an extensive process involving academics, government officials, NGOs, businesses and individuals and meetings in Geneva and London. This draft broadly comprehends

the goals of the Access to Knowledge movement, particularly the facilitation of transfer of knowledge to developing nations and liberation of innovation systems globally. Notwithstanding WIPO's clear mandate, little progress has been achieved under its auspices and seems unlikely to be achieved in the near future given the interests involved. A focussing on certain more limited areas has resulted in a welcome draft treaty for the blind. The "soft law" UN Guidelines have the potential to progressively make advances in relation to the consumers rights areas and a number of these are strongly relevant to the development agenda.

United Nations Conference on Trade and Development (UNCTAD)

Established in 1964, UNCTAD is the main UN agency responsible for the operation of markets globally, particularly as they relate to development. (Other agencies with responsibilities which overlap to some extent include the World Trade Organisation (WTO) the United Nations Industrial Development Organisation (UNIDO)).

UNCTAD is the agency with responsibility for the Guidelines. The theme of its next conference (UNCTAD XIII Qatar April 2012) is "Development Centred globalisation". Amongst other things the access to knowledge issue of transfer of technology is on the agenda. Getting consideration of amendments to the Guidelines to include access to knowledge provisions would not be practical until UNCTAD XIV in 2016. However, CI will be proposing an addition to the negotiating text for UNCTAD to note that amendments to the Guidelines are appropriate to help ensure that information and communication technologies can be used optimally in the interests of consumers, especially those in developing countries.

Another proposed addition would draw attention to the effect of some bilateral preferential trade agreements between developed and developing countries. In a number of cases these have meant that the scarce public resources of the developing country have had to be diverted towards the enforcement of the developed country's intellectual property rights. A more general effect of such agreements has been an increase in the trade imbalance in knowledge goods and services between developing and advanced countries, and a reduction in public access to cultural, educational and scientific works.

CI will also take the opportunity to point out the merit in reviewing the Guidelines generally to account for the effects of technological change.

UNCTAD is also the auspice for the Commission on Science & Technology for Development (CSTD), a commission of the Economic and Social Council (ECOSOC), which has a clear mandate for technology transfer issues. CI will be participating in its processes as appropriate.

World Summit on the Information Society (WSIS)

The WSIS was held pursuant to Resolution 56/183 (21 December 2001) of the UN General Assembly. It had two sessions in Geneva in 2003 and in Tunis in 2005. It resulted in a *Declaration of Principles – Building the Information Society: a global challenge in the new Millennium*, *The Geneva Plan of Action* and *The Tunis Agenda for the Information Society*. In broad terms the WSIS reaffirmed articles of the *Universal Declaration of Human Rights*

relevant to access to knowledge and information and laid out a comprehensive agenda for member states and the relevant international agencies. The amendments to the *UN Guidelines for Consumer Protection* CI proposes are entirely consistent with the outcomes of the WSIS.

The Proposed Amendments

This section sets out the proposed amendments to the Guidelines. The amendments are laid out here following the existing structure of the Guidelines, which has not been amended other than by the addition of a new sub-section labelled *Access to knowledge*:

- I. Objectives
- II. General principles
- III. Guidelines
 - A. Physical safety
 - B. Promotion and protection of consumers' economic interests
 - C. Standards for the safety and quality of consumer goods and services
 - D. Distribution facilities for essential consumer goods and services
 - E. Measures enabling consumers to obtain redress
 - F. Education and information programmes
 - G. Promotion of sustainable consumption
 - H. Access to knowledge
 - I. Measures relating to specific areas
- IV. International cooperation

Except in the case of the *Access to knowledge* sub-section, which being entirely new is not emphasised, the amendments are emphasised here using boldface text.

To save space, provisions of the Guidelines that have not been amended are not reproduced here. However the full text of the Guidelines with the proposed amendments highlighted is available for download on CI's website at <http://A2Knetwork.org/guidelines>.

I. Objectives

*1. 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, **the rights 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:*

This amendment to the preamble paragraph of the Objectives echoes the relevant provisions of the *Universal Declaration of Human Rights* and the *Covenant on Economic, Social and Cultural Rights* that underlie the subsequent amendments. These words are also found in the Draft A2K Treaty.

(i) To promote and enhance access to knowledge for consumers; that is, more equitable public access to the products and tools of human culture and learning.

This would add a ninth objective to the guidelines. It incorporates a short definition of the phrase “access to knowledge” that was developed by CI as part of its global programme on A2K, and first published in its book “Access to Knowledge: A Guide for Everyone” in 2010.

II. General principles

(h) Access to knowledge, as a precondition of consumers’ full participation in cultural, civic and educational affairs.

This would add an eighth statement of *the legitimate needs which the guidelines are intended to meet*. It mirrors statement of principle (b) *The promotion and protection of the economic interests of consumers* and is implied by the proposed amendments in the objectives.

5A. Policies for promoting access to knowledge should seek to strike a fair balance between the object of rewarding creativity and investment in the provision of knowledge resources, with the cultural, civic and educational rights of consumers and their needs for economic and social development.

This proposed amendment adds an eighth statement of principle to the seven current statements. The principle of balance between creator and consumer rights is a well accepted principle in intellectual property regulation and is enunciated in most instruments. Adam Smith famously stated “Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer.” It follows that the balance required is that which best serves consumers, but what is in contention is setting and resetting a balance that results in equity as between consumers of differing levels of wealth and in different parts of the world and between present and future consumers.

8A. All laws, regulations and non-statutory instruments such as codes and standards which are related to the protection and advancement of the interests of consumers or the public at large should be freely, accessibly and publicly available.

This proposed amendment adds a ninth statement of principle to the seven current statements. 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.

III. Guidelines

10. In applying any procedures or regulations for consumer protection, due regard should be given to ensuring that they do not become barriers to international trade and that they are consistent with international trade obligations, as well with international principles that protect human rights and social, cultural and economic rights of all people.

This proposed amendment follows from the proposed amendments to the objectives and principles. It redresses an imbalance in the provision as it now exists, which implicitly

elevates trade obligations above other fundamental underlying principles, such as human rights.

A. Physical safety

12. *Appropriate policies should ensure that goods produced by manufacturers are safe for either intended or normally foreseeable use. Those responsible for bringing goods to the market, in particular suppliers, exporters, importers, retailers and the like (hereinafter referred to as “distributors”), should ensure that while in their care these goods are not rendered unsafe through improper handling or storage and that while in their care they do not become hazardous through improper handling or storage. Consumers should be instructed in the proper use of goods and should be informed of the risks involved in intended or normally foreseeable use. Vital safety information should be conveyed to consumers, **including** by internationally understandable symbols wherever possible, **at time of purchase, and thereafter made readily available to consumers.***

This amendment broadens the existing provision, principally to address the situation where safety information that was conveyed to the consumer at the time of purchase is no longer readily available, perhaps because the item was purchased second-hand or because the original safety instructions were lost. This amendment reflects the existing widespread best practice whereby suppliers will make safety information available online on an ongoing basis, so that even consumers of second-hand goods can operate them safely.

B. Promotion and protection of consumers’ economic interests

21. *Consumers should be protected from such contractual abuses as one-sided standard contracts, 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, and unconscionable conditions of credit by sellers.***

Whilst the focus of the present amendments is on those required to bring the Guidelines into the digital age, we are justified in adding the new bold text to this paragraph because the practices referred to are much more prevalent in contracts for online services and software than in other contexts. For example, whereas a consumer who purchases a compact disk in a music store does not have to agree to any conditions of use other than those printed on the label, the consumer seeking to purchase the same music from the Apple iTunes store must first agree to a full 56 pages of small text! Other suppliers reserve the right to modify their terms and conditions of use without the consumer’s consent, or else procure that consent under duress: see the commentary to article 23A below. This amendment would deprecate these practices.

21A. Governments should restrict suppliers of digital 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 and safe.

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. An example which was recognised by the United States Copyright Office in 2010 was the right for consumer to “jailbreak” mobile phone handsets, bypassing restrictions that prevent them from installing applications other than those approved by the vendor.

This point is well argued in the *Consumer Digital Rights Declaration* promulgated by the Bureau Européen des Unions de Consommateurs/the European Bureau of Consumers Unions (BEUC), which asserts that:

“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.”

And that

“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.”

This amendment reflects these principles.

23. 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, the effect of any applicable technical protection measures and information on interoperability with hardware and software.

This amendment is based on Article 5 of the EU Consumer Rights Directive (Directive 2011/83/EU) that requires consumers of digital content to be provided with information about its functionality, including any applicable technical protection measures, and interoperability information.

23A. Suppliers of consumer electronic devices, or of proprietary software for such devices, may not issue a software or firmware update that would disable the consumer’s access to functionality that the device or software possessed at the time of purchase, unless:

- (a) the update is essential to protect the safety of the consumer or the consumer’s data;*
- (b) the consumer is fully and clearly informed of the effects of the update; and*
- (c) the consumer is given the opportunity to accept or reject the update, unconditionally upon the acceptance of any other update that improves or corrects functionality of the device or software.*

An example of supplier conduct infringing these principles is when in 2010 Sony remotely updated previously-purchased Playstation 3 consoles to remove their ability to run other operating systems, which had been a key feature with which the consoles were advertised. 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 hotspots. George Tian’s paper in this volume explains how such practices are an abuse of intellectual property rights, which infringe consumer law in countries such as Australia and Brazil.

C. Standards for the safety and quality of consumer goods and services

No amendments

D. Distribution facilities for essential consumer goods and services

No amendments

E. Measures enabling consumers to obtain redress

No amendments

F. Education and information programmes

40A. 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.

The importance of broadband Internet access as a vehicle for the empowerment of consumers has been recognised by the global consumer movement with the adoption of the Consumers International campaign, *Holding Broadband Service Providers to Account*, reported elsewhere in this volume.

This proposed amendment draws from the UNESCO Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace. It also complements the mission of the Broadband Commission for Digital Development, a joint initiative by the International Telecommunication Union (ITU) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO), which was established in May 2010 to promote the adoption of broadband-friendly practices and policies as a way of advancing the Millennium Development Goals (MDGs).

G. Promotion of sustainable consumption

No amendments

H. Access to knowledge

The following proposed amendments would make up a new section H of the Guidelines.

55A. Access to knowledge for consumers should be promoted and protected by governments as part of their duty to uphold their citizens' rights to seek, receive and impart information and ideas through any media and regardless of frontiers; to receive an education directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; and freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

This proposed amendment reflects Articles 19, 26 and 27 of the *Universal Declaration of Human Rights* and fleshes out the amendments made to the objectives and general principles of the Guidelines.

55B. 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.

This summarises the main points of the *Public Domain Manifesto*, as well as drawing from the *Adelphi Charter*. It is also consistent with Professor Séverine Dusollier's 2011 *Scoping Study on Copyright and Related Rights and the Public Domain*, which was commissioned in furtherance of recommendations 16 and 20 of the *WIPO Development Agenda*. All of these sources are listed in the bibliography to this paper.

55C. 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.

The main bases for the principle that works of the government should be made freely available are twofold: firstly this supports the democratic principle of open government, by allowing a country's citizens to effectively exercise public oversight of their representatives, and secondly it recognises that citizens have already paid for the production of these works through taxes, and should therefore not be limited in their access to or use of these works by copyright law. It reflects the practice of countries such as the United States that exclude copyright in such works, and others that have adopted policies to release their works under liberal copyright licenses.³

55D. 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.

The UNESCO documents referenced in article 55C are also important references for this amendment, which is more specific in its focus on public libraries and archives. The provision permitting libraries to circumvent technological protection mechanisms on works is compatible with Article 14 of the *Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives*, prepared by IFLA, EIFL, ICA and Innovarte, that was presented to WIPO at a November 2011 standing committee session.

55E. 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.

This amendment acknowledges the revolutionary benefits that open collaborative projects utilising open licences have brought to consumers, and recommends that all stakeholders support such initiatives. Amongst the best-known examples are the free encyclopaedia Wikipedia, open access journals and textbooks, and free computer software such as Linux-based operating systems, the Firefox web browser and the OpenOffice office suite. Sources for the wording of this provision include the *Definition of Free Cultural Works* and recommendation 36 of the *WIPO Development Agenda*.

55F. Governments must protect the rights of consumers of knowledge goods over the underlying copyright works in those goods. The rights that should be recognised by law and protected from derogation by contract include:

One of the core amendments put forward is this provision, which suggests a set of basic copyright limitations and exceptions that ought to be made available to consumers in order to balance their legitimate interests in access to knowledge against the exclusive rights of authors protected by copyright law. The formulations of these points (a) to (h) are new, but similar rights are covered in the sources referenced below.

(a) To make use of such works for private research and study purposes, including distance education;

This or something like it is one of the most common copyright flexibilities in national law. It is to be distinguished from a right for teachers to copy works for purposes of classroom education, which is not a right directly exercised by consumers and hence not included here.

³ See http://wiki.creativecommons.org/Government_use_of_Creative_Commons.

(b) To make use of such works in criticism, commentary or parody;

In response to recommendations in the 2011 Hargreaves Report, the United Kingdom is currently proposing the introduction of a copyright limitation to cover parody. One of the justifications given is that many of today's consumers express themselves through new media and online social networks by parodying elements from popular culture, and that it is appropriate to facilitate such expression through a copyright limitation. Parody is already permitted by the copyright laws of other countries such as Australia, France, the Netherlands and the United States.

(c) To make copies for backup purposes;

A copyright limitation for backup protects consumers against the loss of original copies of copyright works. Such a provision is often explicitly included for specific cases such as computer software, as in the copyright laws of the United Kingdom, Japan and Kenya, and music, as in Australia. Elsewhere, the more general case is covered by a personal use exception, as in India, South Korea and continental Europe.

(d) To time, space and format shift the works so that they can be accessed at a convenient time and place;

Time shifting is the practice of recording broadcasts so that they can be enjoyed at a more convenient time. Space shifting is when a user copies a work to use it in more than one place, for example at home and in the car. Format shifting is converting a work into a format that enables it to be used with a certain device or software, eg. copying music from CD to a personal music player. None of these practices result in significant lost revenue to the copyright owner, hence an emerging global best practice is to explicitly allow them, without right of remuneration, as limitations to copyright. Australia and New Zealand are amongst the countries with provisions covering all of these practices, and the United Kingdom, which currently only has a time-shifting provision, now proposes to broaden this to cover other acts of personal copying.

(e) To use works in digital form, or works that the consumer has shifted into digital form, on any compatible device, and to make any temporary copies that may be required to enjoy such use;

This amendment flows naturally from the previous one, but goes further in explicitly recognising that the enjoyment of digital works often involves the automatic creation of temporary copies as an adjunct to the act of playback. Such copies, having no independent economic value, are properly allowed under a limitation to copyright. This is in fact the only compulsory copyright limitation under the EU Copyright Directive.

(f) To copy, lend or perform the works for personal use, family use or similar uses within a limited circle;

Copying within a private or domestic sphere, such as a family, household or social circle is permitted by the copyright laws of countries such as France, Spain, and South Korea. Much as a household will traditionally watch television or listen to music together, and freely share books and magazines with each other, so too the modern household reasonably expects to be able to share digital works without thereby committing an act of copyright infringement.

(g) To adapt works, or to make use of adaptations made non-commercially by others, to overcome a disability suffered by the consumer or by a member of the consumer's family or household that would otherwise interfere with their enjoyment of the works; and

This provision seeks to ensure that copyright law remains consistent with the *Convention on the Rights of Persons with Disabilities*, which reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms.

(h) To resell knowledge goods together with all of the rights with which they were first sold, provided that they destroy any personal copies they may have made.

This provision would ensure technological neutrality, by specifying that consumers have the same resale rights over digital goods as they possess over physical goods. It is targeted at the practice of selling digital works with rights that enure only to the benefit of the original purchaser, by which the supplier aims to eliminate competition from the legitimate second-hand market.

55G. 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.*

This text is based loosely on section 29.21 of the Canadian Bill C-11 (formerly C32, which will become the Copyright Modernisation Act), and section 46(VIII) of the Brazilian Draft Law on Copyright and Neighbouring Rights. It is a narrowly-crafted exception, compliant with the Berne and TRIPS three-step test, to ensure that the millions of consumers who express themselves online through the production and sharing of new creative works based on existing works from popular culture, are not thereby committing copyright infringement.

55H. To the extent necessary to enable a consumer to exercise the rights over a work described in paragraphs 55E or 55F above, the consumer must be afforded the right to circumvent technological protection measures applied to that work, or to modify a device to enable it to be used for accessing the work, provided in the latter case that the consumer owns that device or has permission from its owner to do so. Governments should apply similar penalties against those who hinder or prevent consumers from exercising the rights described in paragraphs 55F or 55G above as are applied to the infringement of copyright in the work.

The two related provisions in this paragraph are respectively based on section 22 of the EIFL-IP Model Copyright Law and section 107 of the Draft Law on Copyright and Neighbouring Rights of Brazil. Their intent is to prevent technological protection mechanisms from being used to nullify the effect of copyright limitations and exceptions for consumers. For example, although the law may allow consumers to use an extract from a DVD in an educational project, this right is useless unless the consumer can overcome copy protection technology applied to the DVD. Recognising this, the right for consumers to bypass DVD copy protection for such purposes was granted by the US Copyright Office in 2010.

55I. Acts of copyright infringement committed by consumers for non-commercial purposes, or possession of copyright-infringing goods in non-commercial quantities, should not be punishable by criminal sanctions, nor by the suspension or termination of the consumer's access to essential communication networks such as the Internet,

Whilst copyright enforcement is important, there is a need for proportionality. The TRIPS agreement sets out the appropriate balance, by only requiring criminal penalties to be made available for commercial-scale infringements. That consumers should not be made into criminals over infringement of copyright law is a precept of the BEUC Consumer Digital Rights Declaration. That their Internet connections should not be terminated a penalty for infringement was highlighted by the UN Rapporteur on Freedom of Expression, in his 2011 report to the UN Human Rights Council.

55J. *Governments and industry should support, use and contribute to the development of open and interoperable standards for works supplied to or hosted for consumers in digital formats. Suppliers who provide a service to host such works online (other than a content streaming service) should also provide the means for consumers to extract those works from online storage by that supplier, using open formats and protocols.*

The purpose of this provision is to ensure that the documents, photographs, and creative works that consumers either create themselves and host online, or purchase for consumption, are supplied and stored in formats that they can use, without tying them to a single proprietary vendor. This is particularly important for online ("cloud") services in which consumers store their content, so that if the service provider terminates its service, they will be able to extract their content and move it elsewhere. Some of the language of this provision is derived from the Paris Accord, which is referenced in the bibliography.

55K. *Government policy should promote the creation, dissemination and preservation of content in diverse languages and formats, including local content suited to domestic or regional needs. Governments should be further guided by the UNESCO Universal Declaration on Cultural Diversity of 2 November 2001, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 20 October 2005, and the UNESCO Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace of 21 November 2003.*

Apart from the UNESCO instruments referenced here, this text is also based closely on paragraph 53 of the *Geneva Declaration of Principles at the World Summit on the Information Society (WSIS)*.

55L. *The Internet has become a basic means of communication for individuals and their most important means of access to knowledge and general information, as well as a platform for consumers' access to participate in public, democratic debate. Considering this, governments and business should afford consumers the right to access neutral networks. That means that consumers 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.*

This provision is taken almost directly from the *TACD Charter of Consumer Rights in the Digital World*. It complements the earlier amendment 40A, and specifies that not only should the Internet be accessible to consumers, but its open and neutral character should also be preserved.

55M. *Consumers who access information and knowledge in digital form should not thereby sacrifice their personal privacy. Governments and businesses should ensure effective consumer control of personal data, through collection of personal data (including internet usage information and IP addresses) only when strictly necessary and in an open and transparent way, and wherever practicable and lawful, through free, informed and positive consent (opt-in).*

55N. *Business and governments should apply data minimisation practices and use effective and updated technology to protect confidential personal data against unauthorized use. Those affected by any personal data breach must be promptly notified of the details of the breach and of the available means of redress. The content of consumers' communications online must not be intercepted by governments or third parties without a valid court order.*

These two provisions have been included to protect consumer privacy. Both are intended to address consumers' loss of control over their personal information online, but the first focuses on the preventative measure of limiting the information that is collected about consumers to begin with, and the second concerns safeguards and remedies against the loss or misuse of that information. The main sources for these provisions are the *OECD Civil Society Background Paper* and the *TACD Charter of Consumer Rights in the Digital World*.

I (currently H) Measures relating to specific areas

61. Pharmaceuticals. *Governments should develop or maintain adequate standards, provisions and appropriate regulatory systems for ensuring the quality and appropriate use of pharmaceuticals through integrated national drug policies which could address, inter alia, procurement, distribution, production, licensing arrangements, registration systems and the availability of reliable information on pharmaceuticals. In so doing, Governments should take special account of the work and recommendations of the World Health Organisation on pharmaceuticals. For relevant products, the use of that Organisation's Certification Scheme on the Quality of Pharmaceutical Products Moving in International Commerce and other international information systems on pharmaceuticals should be encouraged. Measures should also be taken, as appropriate, to promote the use of international non-proprietary names (INNs) for drugs, drawing on the work done by the World Health Organisation. Governments should also provide an enabling environment for generic competition in the market for pharmaceutical products, in order to improve consumers' access to affordable healthcare.*

Although this amendment addresses a somewhat different issue than the balance of the amendments, it is included because it likewise concerns the balancing of intellectual property rights with consumer rights. The right to health, like the right of access to knowledge, is threatened by excessive pricing of branded products, especially those protected by pharmaceutical patents. However, after such patents expire, legal generic drugs can help to dramatically improve affordability.

IV. International cooperation

65A. Governments should work to eliminate unnecessary barriers to the export of legally produced knowledge goods, including those that have been adapted for the use of consumers who are blind, visually impaired or reading disabled.

WIPO is currently discussing a proposed international instrument on limitations and exceptions for persons with print disabilities, which would overcome an anomaly whereby it is a copyright infringement for a legally-produced work adapted for blind readers to be exported from one country to another, even if the work would also have been legal to produce in the importing country. This provision addresses that problem, but also more broadly encourages international trade in legally produced knowledge goods, to improve affordability for consumers.

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