

# Chapter 7

## Senegal\*

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### 7.1 Background

#### 7.1.1 Political and economic context

Senegal, independent from France since 1960, has a pluralist presidential political structure, with a directly elected president and an elected parliament. The parliament consists of a National Assembly and a Senate.

Senegal has the fourth-strongest economy in the West African region, after Nigeria, Côte d'Ivoire and Ghana. It is, however, classified as one of the world's least-developed countries (LDCs). Compared with other countries on the African continent, Senegal is poor in natural resources. But given its geographical location and its political stability, Senegal is among the most industrialised African countries and many multinational corporations, most of them French but also some American, are doing business in the country.

The agricultural sector employs about 70 per cent of the Senegalese population. However, the contribution of this primary sector to the gross domestic product (GDP) is decreasing. Little rainfall and a crisis in the peanut sector—the most profitable crop in the country—have reduced the contribution of agriculture to less than 20 per cent of GDP. Fishing, which remains one of the key sectors for Senegalese household economies, has suffered from declining fish stocks resulting from overfishing. Most wealth produced in Senegal is concentrated in the capital Dakar and its suburbs.

Financial transfers to Senegal from the Senegalese diaspora are substantial. It is estimated that the influx from Senegalese emigrants is at least equal to the amount received in international cooperation aid monies (ie US\$37 per capita per year).<sup>1</sup>

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\* This chapter, including its quotations from legislative texts, is translated from the French-language version prepared by its authors.

1 G-F. Dumont and S. Kanté 'Le Sénégal: une géopolitique exceptionnelle' (October 2009) 25 *Géostratégiques*. Available at [http://www.strategicsinternational.com/25\\_08.pdf](http://www.strategicsinternational.com/25_08.pdf) [Accessed 1 November 2009].

### 7.1.2 Social, educational and ICT context

The population of Senegal was estimated at 11.9 million people in 2008, for an average density of around 61 inhabitants per km<sup>2</sup>. The annual population growth rate is 2.34 per cent and the age structure is as follows: 40.8 per cent aged 0 to 14; 56.1 per cent aged 15 to 64; and 3.1 per cent aged 65 and older. Around 42 per cent of the population lives in urban areas.<sup>2</sup> More than 30 per cent of the population resides in the region of Dakar. The other highly populated area is the centre of the country (the peanut-growing area), which contains more than 35 per cent of the population. The east of the country is sparsely populated.

Senegal has around 20 different ethnic communities, with the most populous being the Wolofs (43 per cent), the Pulaars (24 per cent) and the Serers (15 per cent). Foreigners represent about 2 per cent of the population and mostly reside in Dakar, where they work in commerce, industry and international organisations. In terms of religious affiliation, the population of Senegal is 96 per cent Muslim, 3 per cent Christian and 1 per cent holding indigenous beliefs. The official language is French, but Wolof is spoken by 80 per cent of the population.

The literacy rate of Senegalese young people (aged 15-24) was 59 per cent for males and 44 per cent for females in 2007. The net schooling rate at the primary level in the period 2000-2007 was 71 per cent for boys and 70 per cent for girls. At the secondary level, the net schooling rate in the period 2000-2007 was 20 per cent for boys and 18 per cent for girls.<sup>3</sup>

Central to Senegal's drive to enhance its education system are its Vision à l'Horizon 2015 (Future Vision 2015) programme and its Programme Décennal de l'Éducation et de la Formation (PDEF, the Ten-Year Education and Training Plan).<sup>4</sup> Key education objectives include:

- making sure that all school children complete their elementary cycle and that access is improved at other levels;
- creating favourable conditions for quality education at all education levels;
- eradicating illiteracy and promoting national languages;
- expanding the responsibility of communities in the educational system, eg school management, monitoring of quality and mobilisation of resources;
- promoting and orienting vocational training towards the workplace;
- eliminating the discrepancies between economic groups (rich/poor), between males and females, between regions and within them and between the rural

2 Central Intelligence Agency (CIA) 'Senegal: People', in *The world factbook*. Available at <http://www.cia.gov/library/publications/the-world-factbook/geos/sg.html> [Accessed 1 November 2009].

3 UNICEF *Senegal: statistics—education* (2009). Available at [http://www.unicef.org/infobycountry/senegal\\_statistics.html#56](http://www.unicef.org/infobycountry/senegal_statistics.html#56) [Accessed 25 July 2009].

4 More information is available at Portail de l'Éducation au Sénégal. Available at <http://www.education.gouv.sn> [Accessed 1 November 2009].

and urban areas at all levels of teaching and taking into account the needs of handicapped children;

- promoting education for girls; and
- opening up regional cooperation on education within the Economic Community of West African States (ECOWAS).

In terms of culture, the state has launched its Programme National de Développement Culturel (PNDC, National Programme for Cultural Development), with objectives that include:

- harnessing the economic potential of culture by providing cultural industries and companies with competent human resources;
- supporting training for professions in the cultural sector, via the École nationale des arts (ENA) and other initiatives; and
- supporting stakeholders for events and cultural days, with an emphasis on cultural heritage, traditional knowledge and folklore.

Senegal dedicates 40 per cent of its budget to education and as has just been outlined, the country has set a number of objectives regarding culture and education,<sup>5</sup> especially girl-child education and the effort to continue girls' school careers in general. The government's emphasis on culture and education makes the ACA2K study of access to knowledge in Senegal and access to learning materials in particular, an important one.

In terms of deployment of information and communication technologies (ICTs), Senegal's focus over the last decade has been on increasing the digitisation, reach and affordability of its telecommunications network, primarily through Sonatel, the main telecommunications provider. More recently, one of the government's priorities has been supporting production of digital content of a cultural and educational nature. For this ambition to be realised, Senegal will need to find an appropriate balance between the necessary copyright protection for ICT-based content and the access requirements for knowledge content carried via ICTs.

### **7.1.3 The copyright environment in Senegal**

It was through France's adoption of its 11 March 1957 Copyright Law that the French colonies in Africa, including Senegal, came into contact with legislation protecting the rights of authors. Due to the special extension procedure<sup>6</sup> of French

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5 'Our country dedicates 40 per cent of its budget to education, and has reached a gross rate of schooling of 81.8 per cent, which provides positive perspectives for total schooling by 2015,' said the Minister of Culture and Historical Heritage, Mame Birame Diouf, before the UNESCO General Assembly in its 34th session in Paris.

6 This legal mechanism made internal laws from France applicable to the colonies.

national laws, Senegal was able to adopt its first copyright regulation based on the 1957 French Law. It is important to note, however, that even before the extension of the French Copyright Law, Senegal was already playing an important role in the defence and popularisation of copyright in the West African region. Senegal was already hosting the Bureau africain du droit d'auteur (BADA, the African Copyright Bureau)<sup>7</sup> during the Second World War. And through France, the Berne Convention as revised in Rome in 1928 had been applicable to Senegal since 1930, only two years after its adoption in 1928.

However, the socioeconomic and political context that followed the Second World War, which included the rejection of French structures during the independence struggle, led to some degree of marginalisation of the subject of copyright in Senegal. BADA did not survive the end of the colonial era. After they gained their independence, the French-speaking African countries chose national-only systems of protection for literary and artistic property. As far as industrial property was concerned, the same states adopted a standard and centralised regional registration system, via a regional industrial property organisation called OAMPI. In 1977, via the 1977 Bangui Agreement, OAMPI became the Organisation africaine de la propriété intellectuelle (OAPI), which develops regional standards in Francophone Africa for all intellectual property matters, including copyright. OAPI member states, of which Senegal is one, are expected to harmonise their national copyright laws to the standards set out in OAPI agreements.

Upon its independence in 1960, Senegal pursued adherence to the Berne Convention, eventually becoming a fully-fledged Berne Member State. But it was only 13 years after its independence and 12 years after its first copyright-related bill was tabled in 1961,<sup>8</sup> that Senegal passed its first national Copyright Law, in 1973. This 1973 Law was amended in 1986 and then repealed with the enactment of the current Copyright Law of 2008.

As well as laws that are entirely dedicated to copyright, Senegal has other laws whose application has the potential to impact on the exercise of copyright and the level of access to knowledge. Among others, there is Law 2008-08 (passed by the Senate on 15 January 2008) on electronic transactions and Law 2008-10 (also passed by the Senate on 15 January 2008) relating to the information society.

As well as these laws related to ICTs, the Law of 2 February 1996 deals with social communication organs, journalists and technicians; Law 2006-04 of 4 January

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7 The Bureau africain du droit d'auteur (BADA, the African Copyright Bureau) was created during the Second World War and its main objective was to defend creators and authors from the mother country France as well as those of people from the four Senegalese 'communes' of Dakar, Gorée, Rufisque and Saint-Louis.

8 The 1961 Bill was derived from the 1886 Berne Convention and from the French Law 57/298 of 11 March 1957.

2006 outlines the functions of the Conseil national de régulation de l'audiovisuel (CNRA, National Audiovisual Regulatory Council) and Law 2002-18 of 15 April 2002 regulates production, use and promotion of cinematographic and audiovisual works. Among the CNRA's roles is a mandate to ensure pluralism in the audiovisual sector. Issues of media/audiovisual sector diversity are related to knowledge access, as knowledge access is enhanced if there is a plurality of information sources.

Senegalese law in relation to archives also has the potential to impact on the acquisition of knowledge. Law 2006-19 relating to administrative (public) archives and documents and Decree 2006-596 relating to the organisation and operation of the Directorate of Archives both contain clauses that regulate access to documents.<sup>9</sup> In its Article 7, the Decree stipulates that 'the role of the National Archives Service is to collect, take stock of, classify, keep and communicate all documents derived from the activities of official and non official public institutions from social, political and religious communities, work organisations, private companies and individuals who are or were residing in the territory'. Through its responsibilities, the Department must implement the principles formulated in Articles 16 and 25 of the 2006 Decree, which stipulate that 'the access to public documents is free'. These Articles are, however, limited by Article 29 of the same Decree, which prevents public access for anything from 30 to 100 years to archival documents that could undermine national security or personal privacy.

Also relevant to access to knowledge and learning materials are provisions related to the right to freedom of expression, the right to information and the right to education. Senegal is aware of the importance of such rights, has ratified the Universal Declaration of Human Rights (UDHR) and has enshrined such rights in its Constitution. The 1963 Constitution,<sup>10</sup> in its Article 8, protected freedom of expression and the right to education. This principle was reiterated in the new 2001 Constitution, which, in Article 8, states:

The Republic of Senegal guarantees all citizens their individual fundamental freedoms, economic and social rights as well as group rights. These freedoms and rights are: civil and political liberties, freedom of opinion, freedom of expression, press freedom, freedom of association, freedom to hold meetings, freedom of movement, freedom to protest, cultural freedoms, religious freedoms, philosophical freedoms, union freedoms, freedom of enterprise, the right to education, the right to literacy, the right to property, the right to work, the right to health, the right to a healthy environment, and the right

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9 Before this law, the archives were managed by décret n° 81-430 du 15 avril 1981 (modified by décret n° 83-341 du 1 avril 1983).

10 Senegal's first Constitution was adopted by referendum on 3 February 1963. This Constitution included in its Preamble clauses of the 1948 UDHR and the 1981 African Charter on Human and Peoples' Rights.

to a variety of information. These freedoms and rights shall be exercised under the conditions provided by law.<sup>11</sup>

Many of these freedoms outlined in Article 8 of the 2001 Constitution are relevant to the issues central to the ACA2K research: access to knowledge and access to learning materials.

The 2001 Constitution, in its Preamble, also affirms:

... adherence to the Declaration of the Rights of Man and of the Citizen of 1789 as well as to the international instruments adopted by the United Nations and the Organisation of African Unity, in particular the Universal Declaration of Human Rights of 10 December 1948, the Convention on the Elimination of all Forms of Discrimination Against Women of 18 December 1979, the Convention on the Rights of the Child of 20 November 1989 and the African Charter on Human and Peoples' Rights of 27 June 1981;

Article 19 of the Universal Declaration of Human Rights states that 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' Similarly, the principle of freedom of expression is included in Article 13 of the African Charter on Human and Peoples' Rights.<sup>12</sup>

In terms of international instruments directly relevant to copyright law in Senegal, the key ones are the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, as modified and completed on 24 July 1971 and 28 September 1979 as well as by the Rome Convention of 26 October 1961, managed by the World Intellectual Property Organisation (WIPO); the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), adopted in 1994; and the OAPI revised Bangui Agreement of 1999, which came into force in 2002.<sup>13</sup> The Berne Convention and the TRIPs Agreement, coupled with the revised Bangui Agreement, provide the international context for Senegal's national copyright environment. Senegal is a signatory to the Berne Convention, to TRIPs and to the revised Bangui Agreement and has also signed and ratified the so-called 'WIPO Internet Treaties' of 1996: the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT).

11 Constitution de la République du Sénégal, loi n° 2001-03 du 22 janvier 2001.

12 The African Charter on Human and Peoples' Rights was signed in Banjul, Gambia in 1981, within the framework of the Organisation of African Unity (OAU). It protects both collective and individual rights.

13 The 16 OAPI Member States are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Mauritania, Niger, Senegal and Togo.

Among other things, as shall be discussed in more detail below, the passing of Senegal's 2008 Copyright Law was motivated by the country's desire to meet the requirements of TRIPs, the WPPT and the WCT. Adding to this push was the 1999 Bangui Agreement, which was aimed at getting OAPI countries to adhere to TRIPs (and even to adopt 'TRIPs-plus' provisions in some areas) and to harmonise their national copyright legal frameworks. The 1999 Bangui Agreement technically has the force of law in all OAPI countries that have ratified it and member states are encouraged to harmonise their national laws with it.

For some, the 2008 Copyright Law is a positive development, with its extension of copyright term from 50 years to 70 years; its inclusion of neighbouring rights for performers and producers and its rules against circumvention of technological protection measures (TPMs), because it is aimed at better protecting the rights of creators. But for others, the law is seen as regressive and dangerous for Senegal's economy, which requires access to knowledge for innovation, education and development.

## **7.2 Doctrinal analysis**

### ***7.2.1 Evolution of copyright law in Senegal***

There have been three key pieces of copyright legislation in Senegal since independence in 1960:

- The 1973 Law (Law 73-52);
- The 1986 Amendment Law (Law 86-05), amending the 1973 Law; and
- The 2008 Law (Law 2008-09), which repealed and replaced the 1973 Law as amended in 1986.

#### *The 1973 Law*

That the young Senegalese state was late in adopting a national copyright law (in 1973, 13 years after independence) is surprising, given the earlier interest in this field. Indeed, after the African Seminar in Brazzaville in August 1963, Senegal, Côte d'Ivoire, Cameroon, Congo, Congo-Brazzaville and Togo were inspired by the recommendations produced by the seminar to implement a 'model bill' on copyright. But this model bill never materialised. Senegal then waited until 4 December 1973 to finally adopt Law 73-52 on copyright.

This Law set the general conditions of copyright protection and its use. One particular feature of the Law was its creation of a fee-based public domain, a provision dedicated to safeguarding and developing the nation's cultural heritage and resources and putting an end to the pillaging of national folklore. Article 9 of the 1973 Law — an Article replicated but with some modification by Article 157 of

the 2008 Law — enables the country to generate profit through the use of national folklore, thanks to a remuneration mechanism.

### *The 1986 Amendment Law*

The 1986 Amendment Law, Law 86-05 of 24 January, replaced clauses 22, 46-47 and 50 of the 1973 Law. The objective of the amendment was to provide for stronger protection and enforcement of rights. The most important aspect of that reform was the modification of Article 46 to include an offence of counterfeiting (as defined in Article 397 of the Penal Code of Senegal). This inclusion considerably broadened the scope of enforcement of copyright.

The 1986 Amendment Law also introduced (in Article 47) the possibility of referring a matter to an examining magistrate who has experience in cases involving counterfeiting or a presiding judge, wherever there exists ‘a threat of imminent infringement’ of copyright, in order to obtain a legal order to implement emergency actions such as the seizure or the suspension of any manufacturing or execution — even before the act of counterfeiting has been performed. Such measures could also be solicited in cases of the modification, performance or reproduction of folklore. These ‘preventive’ measures allowed for the application of a system similar to that of ‘référéés’ (ie quick adjudications) in order to prevent a possible infringement.

In parallel with these measures, other measures were put in place to facilitate evidence management in cases of counterfeiting, in order to broaden the possibilities of evidence production. Indeed, evidence of counterfeiting could now be established by way of certificates of offence from customs agents or economic control agents, according to the new Article 50. In the past, material evidence of copyright infringement could result only from certificates of offence produced by police agents or officers and members accredited with the Bureau sénégalais du droit d’auteur (BSDA, the Senegalese Copyright Office).

### *The 2008 Law*

The 2008 Law replaced the 1973 Law as amended in 1986. It retained many of the provisions from the 1973 Law but also added some significant new provisions on, for instance, ‘neighbouring rights’ for performers and producers, an increased term of protection and provisions related to technological protection measures (TPMs). Thus, the Law complies with the latest developments in the IP sector in general and the field of artistic and literary property in particular. Senegal could no longer continue to ignore new copyright issues raised by the development of ICTs and its international commitments under the Berne Convention (especially towards the 1961 Rome Convention on Berne) as well as the modifications introduced by the

1994 TRIPs Agreement (as reinforced by the 1999 Bangui Agreement) and the 1996 WIPO Internet Treaties.

That is why the 2008 Law introduced protection for technological protection measures (TPMs), the devices rights-holders use to control access to copyright-protected content available on digital platforms. However, the 2008 Law went beyond required minimum standards with the introduction of a term of economic rights protection of 70 years for most works, an increase from the previous 50-year term and an example of what is known as a ‘Berne-plus’, ‘TRIPs-plus’ provision (a provision that goes beyond the standard 50 years required by the Berne Convention and the TRIPs Agreement). This extended term is one way in which Senegal has harmonised its Copyright Law with the OAPI 1999 Bangui Agreement, which mandates a 70-year term of protection, up from the 50-year term in the previous Bangui Agreement of 1977.<sup>14</sup>

The 2008 Law also makes provision for the gradual dissolution of the Bureau sénégalais du droit d’auteur (BSDA, the Senegalese Copyright Office) and the introduction of multiple collective societies to collect royalties on behalf of authors and rights-holders of different types of works (royalty collection has until now been the monopoly of the BSDA).

### **7.2.2 The content of the 2008 Law**

While the 2008 Law constitutes a significant evolution for copyright in Senegal and for the rights of performing artists in particular, it has kept the same provisions as the 1973 Law regarding the conditions for copyright protection: A work needs to be in material form and needs to be original in order to enjoy copyright protection. This condition is negatively expressed by the exclusion of ‘ideas’ from copyright protection.

According to Article 6 of the 2008 Law, the following types of intellectual creations, be they artistic or literary, may be protected:

1. Language-based works, whether they are literary, scientific or technical, including computer software and whether written or oral;
2. Drama and other works intended for performance on stage;
3. Choreographic works, circus acts and pantomimes;
4. Musical works with or without lyrics;
5. Works consisting of animated image sequences, with or without sound, also known as audiovisual works;

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14 For analysis of the role of OAPI in mandating ‘TRIPs-Plus’ provisions for its Member States, see C. Deere *The implementation game: the TRIPs Agreement and the global politics of intellectual property reform in developing countries* (2009) Oxford University Press, Oxford.

6. Visual art works, including drawings, paintings, sculpture, architecture, engraving, lithographs, photographs and applied art works such as fashion creations, weaving, ceramics, woodwork, ironwork or jewellery;
7. Geographical maps, plans, sketches and plastic works relating to geography, topography, architecture and sciences;

As regards the criterion of originality, Senegal's Law is one of the rare examples of legislation from the French-speaking world that has defined it. According to Article 7(2) of the 2008 Law, 'originality is understood to be the mark of the author's personality'. This definition is more precise than that contained in the 1973 Law, according to which 'an original work is a work that, in all its features and its form, or in its form only, makes it possible to individualise its author'.

The 2008 Law also seeks to modify collective management, by providing for many bodies to conduct collective management and seemingly providing for the dissolution of the BSDA. New clauses in the 2008 Law create measures for corporate collective management structures, protection and information. However, even though the Law was adopted in early 2008, at the time of the writing of this report in late 2009, some aspects of the Law (such as replacement of the BSDA by multiple collection agencies) have not yet been operationalised due to the lack of application clauses, which typically need to be introduced through a Decree.

### *Moral rights*

Senegal has a civil law system which attaches substantial importance to moral rights. In the French and Senegalese perspectives, moral rights occupy a central place in copyright — and more often than not, are the top priority. This emphasis is confirmed in Article 3 of the 2008 Law, which lists moral attributes before economic attributes in describing the components of copyright.

Moral rights are attached to the author's person and they exist in perpetuity. They cannot be transferred and they cannot be renounced. Article 27 of the 2008 Law indicates that:

1. Moral rights, which are the expression of the bond that exists between the work and its author, are attached to the latter's person.
2. However, moral rights are transmissible after the death of the author in accordance with the rules prescribed in Chapter VII of the first part of this Law.
3. Moral rights are inalienable and remain even after property rights have been ceded. Moral rights cannot be relinquished in advance.
4. Moral rights are perpetual.

Performing artists' moral rights are also perpetual (Article 90).

Moral rights are of four types:

- disclosure: Only the author is entitled to distribute his/her work to the public (Article 28);
- retraction: The author may ask the assignee to withdraw his/her work even after it has been published. In this case, the author will have to compensate the assignee in advance for the prejudice s/he will have suffered. Similarly, when the author decides to publish his/her work another time, s/he has to grant his/her previous assignee priority rights with the same conditions that were previously determined (Article 29);
- attribution: The author has the right to demand that his/her name be indicated, to the extent and in a manner consistent with good practice on all copies of the work and every time it is made accessible to the public (Article 30); and
- integrity: The work shall not be modified without the written consent of the author (Article 31).

### *Economic rights*

The economic rights conferred upon the author of a work according to the 2008 Law fall into two categories: exploitation rights and a resale right. The resale right is recognised only for the authors of graphic and plastic works and original manuscripts.

### *The right of exploitation*

Article 33 of the 2008 Law grants the author an exclusive right of exploitation, which includes the right to communicate the work to the public, the right of reproduction, the right of distribution and a rental right.

The right of communication to the public gives the author the exclusive right to authorise the communication of his/her work through any process, especially broadcasting, distribution by cable or satellite and making his/her work available on demand so that everyone may access the work from any place and at a time chosen by them individually and, in the case of graphic and plastic works, by exhibiting the object itself (Article 34).

The right of reproduction enables the author to authorise his/her work to be put in a material format that can help communicate it to the public (Article 35(1)). Also, the legislator has enacted a special rule for reproduction and considers that the right of reproduction is transmitted, via the publication of the work, to a collective management company accredited by the Ministry of Culture, which is the only organ authorised to sign a convention with users (Article 35(3)).

In addition, the legislator added that the right of communication and the right of reproduction will be applied for any type of communication or reproduction, total

or partial, of the work, wherever these rights are applied to the work itself or to any work derived from it (ie, translations or adaptations).

Regarding the right of distribution, the author is entitled to authorise the distribution, by sale or any other means, of the physical copies of his/her work (Article 36(1)).

Finally, the author has the exclusive right to authorise the rental of copies of his/her work. Rental means the availability for use of a work, for a limited time and for a direct or indirect commercial or economic advantage (Article 37(1)). In this rental right provision, the Senegalese legislator has gone beyond the international norms in place. Article 11 of the TRIPs Agreement limits the rights-holder's right to control rental to certain types of work, ie computer software and movies, while the Senegalese Law extends this rental control right to all types of works.

### The resale right

Unlike exploitation rights, the resale right is not a monopoly; rather, it is the right to demand a part of the profit in the case of certain transactions. The resale right is described in Article 14<sup>ter</sup> of the Berne Convention, but it is nevertheless applied only in a small number of countries. According to Senegal's 2008 Law, 'the authors of graphic, plastic works and original manuscripts have, notwithstanding any transfer of the original, an inalienable right of sharing in the profits of any sale of the work or of this manuscript at public auctions or through a vendor, after the first property transfer' (Article 47). It should, however, be noted that architectural works and applied art works are excluded from the provision for sharing of resale profits (Article 49).

### *Transfer of rights*

Finally, it should also be noted that when the author dies, moral and economic rights can be transferred to his or her heirs and successors (Article 57). When the author dies without a will or heirs, then economic rights belong to the state and are to be managed by an accredited collective management company. Resulting profits will be dedicated to cultural and social objectives (Article 58).

### *Term of protection*

In the Senegalese law, the author's economic rights last for 70 years following the author's death. This is new in the 2008 Law, with the previous 1973 Law calling for 50-year terms in most situations. The extended term of protection delays entry into the public domain of copyright-protected works.

Regarding collaborative works, economic rights last for a duration of 70 years after the death of the last surviving co-author (Article 52). In the case of anonymous works or works written under a pseudonym, the duration of exclusive rights is 70 years from the publication of the works. For posthumous works, the protection duration is 70 years from the date the work has been disclosed. These periods expire at the end of the calendar year (Article 55).

Regarding performers, the duration of their economic rights is described in Article 90 of the 2008 Law, which indicates that the term of protection is 50 years from the first performance.

### *Limitations and exceptions*

The following sub-sections outline the limitations and exceptions to copyright in the 2008 Law.

#### **Personal and private use**

Article 40 of the 2008 Law includes provisions relating to reproduction for strictly personal and private uses, similar to the provisions in Article 10 of the 1973 Law. Article 40(1) says that ‘the author can not prevent reproduction intended for a strictly personal and private use’. However, this exception is not absolute, as Article 40(2) qualifies:

The exception described in the first paragraph does not apply to:

- a) The reproduction of architectural works taking the form of buildings and other similar constructions;
- b) The reproduction by reprographic means of limited edition visual art, music sheets and exercise manuals;
- c) The reproduction of an electronic database;
- d) The reproduction of a computer program.

The legitimate user of computer software is allowed to make a backup copy in order to replace the original copy (Article 41). This exception is important, but does little to promote broad access to knowledge, since the copied work can only be accessible to the legitimate owner of the software.

The 2008 Law also introduced a remuneration system for private copying of works and performances recorded on phonograms and videograms (Article 103). Remuneration for private copies made is thus theoretically due to authors, performers and phonogram and videogram producers. The amount, the remuneration conditions and the distribution of such remuneration are all described in Articles 105 to 109.

Senegalese law does not directly include reference to the so-called ‘three-step test’ introduced in the Berne Convention and incorporated into the TRIPs Agreement

and WIPO Copyright Treaty.<sup>15</sup> The three-step test sets out conditions for what is an allowable portion/amount of reproduction of a particular work. Despite the absence of express reference to the three-step test, ordinary principles of statutory interpretation might nevertheless lead Article 40 to be interpreted in line with international norms.

### Teaching

According to Article 42, 'subject to mentioning his/her name and the source, the author cannot forbid the reproduction or the communication of the works if done without aim to profit and in order to illustrate a point in an educational setting'. This means that a work may be reproduced or used publicly in an educational context without the author's consent, on the condition that such exploitation is not-for-profit and for illustration purposes. It should be noted that online learning (e-learning) and distance learning are not specifically mentioned in the Senegalese Copyright Law. Although the Law does not regulate distance education or e-learning, the exception concerning education described in Article 42 could presumably be applied to these modes of teaching.

The 2008 Law does not include rules that allow granting of compulsory and/or statutory licences for reproduction for educational purposes.

### Analysis and quotation

The Senegalese Copyright Law allows, in Article 44, any individual to use a protected work in order to analyse it or to quote a short portion of it as part of another work, on condition that the name of the author and the title of the work are mentioned and that the use is 'appropriate'.

### Use for information purposes

For information purposes, reproduction and communication are allowed when dealing with political, social and economic articles as well as speeches made in political, judicial, administrative or religious assemblies and public, political and official meetings (eg official ceremonies) (Article 45(1)). Reproduction and communication are also allowed for works that can be seen or heard during a current public event, to the extent that said reproduction and communication are justified by the objective (Article 45(2)).

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15 The three-step test, in Article 9(2) of the Berne Convention, allows Member States to allow the reproduction of works 'in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author'. The three-step test was extended to all property rights by Article 13 of the WTO TRIPs Agreement and by Article 10 of the WIPO Copyright Treaty.

### Use of official texts

According to Article 9 of the 2008 Law (a provision not in the 1973 Law), copyright protection does not extend to official texts of a legislative, administrative or judicial nature or to their official translations, ie these works automatically fall into the public domain.

### Parallel importing

Parallel importing is authorised in Senegal, but only partially. It is allowed within the regional Union économique et monétaire ouest africaine (UEMOA, West African Economic and Monetary Union) bloc of countries. Under economic rights and more specifically the exclusive right of distribution granted to the author, the legislation clearly indicates that the right of distribution is exhausted by the first sale or any other property transfer of the copies of the work by the author, or with his/her consent, within the UEMOA<sup>16</sup> (Article 36(2)). Thus, a work protected and legally acquired on the market in one of the member states of UEMOA may be imported into another member state without the permission of the copyright-owner in the second country.

Parallel importing is a practice whereby a good that is being sold more cheaply in another country than in the importing country is imported and offered at a price lower than the current price in the importing country.

### Disabled people

The 2008 Law does not contain any provisions specific to disabled people such as the visually impaired. Senegal's educational policy does purport to take into account the needs of disabled people in its PDEF programme (as outlined earlier), but copyright law makes no special accommodation for this group.

### Libraries and archives

Here the Senegalese 2008 Copyright Law clearly favours the rights of the author, as the Law contains no exceptions for reproduction of a work by library or archive services accessible to the public. However, pursuant to laws relating not to copyright but to libraries and archives in Senegal, provision is made for libraries and archive services to copy works that are at an advanced stage of degradation so that these may be preserved.

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16 UEMOA was established in 1994 by seven countries: Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal and Togo. In 1997, Guinea-Bissau became the eighth member.

This lack of provision in the Copyright Law for permission-free reproduction by libraries and archives and the lack of provision for digitisation of resources by libraries and archives, impact negatively on access to knowledge.

### *Technological protection measures (TPMs) and electronic information*

Prohibitions against circumvention of technological protection measures (TPMs) appeared for the first time in the 2008 Law, in Articles 125 and 145. The rights-holder now has the right to implement, as part of his or her rights, technical measures to prevent or limit acts not authorised or acts which are forbidden by the Law regarding works, performances, videograms, phonograms or programmes. In the 2008 Law, prohibited acts of circumvention of such TPMs are outlined in Article 125 and penalties for such prohibited acts are described in Article 145.

Meanwhile, Article 126 broadens rights-holder protection in the digital environment even further, prohibiting unauthorised reproduction of any kind of copyright-protected information in electronic format. Article 126 states that:

1. The information in electronic format concerning the rights relating to a work, a performance, a phonogram, a videogram or a programme is protected in the cases provided for in this article when one of the information items, numbers or codes is included in the reproduction, or appears to bear a relation to the communication of the work, performance, phonogram, videogram or programme.
2. Information in electronic format is defined as any piece of information supplied by a copyright owner that can help identify a work, performance, phonogram, videogram or programme or copyright owner, any information on the conditions of use of a performance, phonogram, videogram or programme as well as any number or code that represents all or a part of these pieces of information.
3. It is illegal to perform any of the following acts without the authorisation of the copyright owner or the owner of a related right, while knowing or having valid reasons to think that such an act would entail, allow, facilitate or hide an infringement of copyright or a related right:
  - a) Suppressing or modifying any piece of information in electronic format;
  - b) Distributing, importing for distribution purposes, communicating to the public in any form whatsoever a work, performance, phonogram, videogram or programme of which a piece of information in electronic format has been suppressed or modified.
4. When the author of one of the acts described in paragraph 3 knows that such acts entails, allows, facilitates or hides the infringement of copyright or a related right, s/he may incur the criminal penalties described in Article 145.

Interestingly, Article 126 is, in places, identical to the 2006 amendment to the French Copyright Law.

Regarding the penalties imposed in cases of infringement, Article 145 states that:

1. The neutralisation of technical protection measures described in Article 125 is punishable by imprisonment of one to three months and a fine of five hundred thousand francs CFA.
2. Infringement relating to copyright law by one of the acts described in Article 126.3 knowingly committed is punishable by the same penalties.

Notably, the provisions prohibit circumvention for both infringing and potentially non-infringing activities. These blanket provisions have the potential to prevent citizens from exercising their legitimate legal rights pursuant to exceptions such as those for teaching or for personal use.

### *Use of public domain materials, including folklore*

The 2008 Law retains the provision from the 1973 Law that use of folklore in the public domain requires payment of royalties, but the 2008 Law broadens the provision so that royalties are now payable for use of all public domain works, not just folklore. Article 9 of the 1973 Law stipulated that use of ‘folklore with a view to exploitation for profit-making purposes’ required a royalty payment, while the current 2008 Law more broadly states that ‘exploitation’ of folklore and works in the public domain requires payment of a royalty. This wording potentially extends the new provision to cover any kind of exploitation, not just exploitation for profit-making purposes and to cover all works in the public domain, not just works of folklore.

Use of a public domain work requires notification to a collective management society and payment of a royalty to the society, as per the terms of Articles 157 and 158. The royalties for use of public domain works are to be set by the Ministry of Culture, but cannot exceed 50 per cent of the rate of royalty usually paid to authors or rights-holders. The Ministry is then required by the 2008 Law to redirect a portion of the royalties collected on public domain works to social and cultural initiatives.

In Article 159, the 2008 Law specifies that in cases of illegal exploitation of folklore or other works in the public domain, the judicial branch of the state, on request from the Minister of Culture, may follow the counterfeit artifacts seizure procedure described earlier in the Law. According to Article 160, illegal use of folklore or other works in the public domain is punishable by a fine of CFA500 000 (US\$1 000).

### **7.2.3 Case law**

This research was not able to identify any case law related to copyright and access to learning materials in Senegal. Case law on copyright in general is scarce in Senegal, due it seems to a lack of specialised human resources (eg the Université de Cheikh Anta Diop does not provide any dedicated course on intellectual property) and a

lack of a legal culture in relation to copyright. Therefore, in cases of disputes, the parties involved apparently prefer to choose traditional solutions for settlement.

#### **7.2.4 Summary analysis of the doctrinal research**

The main thrust of the 2008 Copyright Law is that it further strengthens the protection of authors and extends strong protection to performers and producers, with no focus on improving the rights of users. The extension of copyright term from 50 years to 70 years and the strict protection of TPMs and other electronic information are examples of how non-commercial user access, for educational or personal use, is potentially undermined by the 2008 Law.

Also, the requirement of payment of royalties for use of public domain works, while perhaps justified in cases of commercial use of folklore as a way to protect against unfair exploitation of national heritage, does not seem to be justifiable in the case of ordinary public domain works for which the term of protection has expired.

And the legislator has, in the 2008 Law, gone beyond TRIPs Agreement requirements in defining the scope of rights-holder control over rental of works.

Meanwhile, the exceptions in the Law are insufficient. In particular, there are no specific provisions for reproduction by libraries and archives, no provisions for people with disabilities, no provisions for translation or adaptation for educational purposes, no provisions for distance education and e-learning, no provisions for granting compulsory and/or statutory licences to reproduce works for educational purposes and only limited provision for parallel importing (within the eight-country UEMOA bloc).

### **7.3 Qualitative analysis**

In order to supplement doctrinal research with an understanding of practices and perceptions in relation to copyright — and thus to develop a holistic understanding of the copyright environment in Senegal — we conducted qualitative impact assessment interviews with relevant stakeholders, following the categories and interview guidelines outlined in the *ACA2K methodology guide*. As the guide indicates, the interviews were designed to help us understand more clearly what the potential and actual consequences of copyright law are in Senegal.

#### **7.3.1 Impact assessment interviews**

Research interviews were non-directional. A respondent was invited to answer general questions as exhaustively as possible on his/her own terms and within his/her own frame of reference.

Interviews revealed a general lack of knowledge regarding Senegal's copyright law and regulations. This lack of knowledge often translates into illegal behaviour

and practices. In some cases there is tolerance of illegal practices (such as large-scale photocopying on a commercial basis) or, as in the case of organisations such as libraries, there is a tendency to ignore potentially infringing photocopying behaviour. Library authorities interviewed said that while they favour the application of the Copyright Law, they are cognisant of the information needs of users, the high price of hard-copy materials and the difficulties faced in accessing electronic materials.

### **7.3.2 Interviewees**

We compiled an interview guide for each category of interviewee, with questions designed to probe their understanding of copyright and understanding of the potential impact of copyright on access to knowledge. We interviewed individuals from the following categories:

- **government:** a manager at the Bureau sénégalais du droit d'auteur (BSDA, the Senegalese Copyright Office, under the Ministry of Culture), an employee in the Criminal Affairs section of the Ministry of Justice and representatives in the Office of the Prime Minister, of the National Archives Service and the National Library; and
- **educational community:** the director of the École des bibliothécaires, archivistes et documentalistes (EBAD, the School of Library, Archives and Information Sciences), the director of the Centre de formation judiciaire (CFJ, the Judicial Training College), two university librarians (at the Université de Cheikh Anta Diop in Dakar and at the Université de Bambey in Bambey) and a group of three students (one male and two females).

Interviewing these people enabled us to frame our findings around the views of stakeholders at the heart of the relationship between access to knowledge and copyright.

### **7.3.3 Interview findings**

#### *Government*

It was found that the Ministry of Culture — through the Bureau sénégalais du droit d'auteur (BSDA) — played a central role in championing the 2008 reform of the Law as well as in its actual drafting. It was the campaign of the BSDA, in association with artists (particularly musicians), that culminated in the most recent copyright reform in Senegal, which was achieved through the passing of the 2008 Copyright Law outlined above. The interview with the BSDA representative revealed, however, that some elements of the 2008 Law, for instance the introduction of multiple collective societies to replace the BSDA, have not yet been implemented due to

delayed introduction of the Decree required to operationalise certain aspects of the 2008 Law. There is growing pressure from artists for enactment of this Decree, with the artists for the most part represented by the Association des musiciens du Sénégal (AMS, Musicians Association of Senegal). The Decree must come from the Office of the President.

From interviews with the archives and library officials in the Office of the Prime Minister, we learned that some of the push for the reforms in the 2008 Law came from political authorities seeking to comply with international commitments (the WIPO Internet Treaties of 1996, the WPPT and WCT, which Senegal has ratified). The authorities also wanted to adapt legislation to the development of information and communication technology (ICT) and to satisfy the demands from artists for better protection. ICTs and the Internet Treaties were catered for through tough TPM anti-circumvention provisions in the 2008 Law and artists were catered for through protection of neighbouring rights for performers and producers.

At the Ministry of Justice, our interviewee said he believed that the non-compliance issues arising in relation to the Copyright Law are essentially due to ignorance or even, to some extent, rejection of the concept of artistic and literary property. The interviewee also pointed to obstacles in the way of copyright enforcement. He told us that, until recently, handing down penalties for infringing copyright was far more complex and difficult for a judge than handing down a sentence for damage to the property of other people. This difficulty was essentially due to the general lack of knowledge on many judges' part regarding intellectual property rights and literary and artistic property in particular. (For that reason, the Ministry is engaged in capacity-building of judges in terms of intellectual property.) This difficulty was also a result of the general ignorance of the public regarding copyright. This ignorance was and still is a contributor to the lack of acceptance of penalties resulting from copyright infringement, hence the people's surprise — and sometimes even the injustice felt — when they are condemned by a judge. In fact, some of the offenders are not even aware they have infringed any law, which is not the case for a thief who, by physically stealing another person's property, is quite aware that he or she has broken the law. The same thief is also aware of the fact that she or he has committed an act that is morally and culturally reprehensible.

The Justice Ministry official said that a large number of copyright cases are settled amicably and out of court through traditional dispute-resolution mechanisms. These cases are mostly mediated by families or close relatives of the parties in disputes.

The government people we interviewed showed a desire to sensitise the public in the field of copyright. The BSDA has undertaken an awareness campaign for the 2008 Law, through seminars, workshops, road shows, radio shows and a general

involvement at national, continental and international level in debates about copyright.

Regarding the issue of access to knowledge, the Justice Ministry official acknowledged the close relationship that exists between access to knowledge and copyright, but he highlighted the complexity of the issue for a developing country such as Senegal — a country for which access to knowledge and cultural production are both major challenges in the current globalised context. The interviewee therefore advocated for better remuneration of authors through copyright in order to stimulate the creation of learning materials and thus to make the copyright environment more favorable to access to knowledge.

At the BSDA and in the Office of the Prime Minister, the people we interviewed acknowledged the problems relating to access to learning materials, but they focused on the protection of works and their authors. The BSDA interviewee pointed to the fact that any citizen, via Article 40 of the 2008 Law, can reproduce any work for private and personal use.

The National Archives Service interviewee in the Prime Minister's Office said that people usually consult resources on site and therefore a photocopy service was implemented. He said this service strictly complies with the legal obligations concerning copyright and forbids the photocopying of a complete document. This forbidding of copying an entire work constitutes an interpretation of the 2008 Copyright Law, because the Law is actually silent on photocopying by libraries and archives and the extent of photocopying allowed for personal use is not made clear in the Article 40 exception for personal use. The interviewee said that managers at the National Archives believe that copyright must be enforced, as copyright constitutes, according to them, a motivating factor for literary and artistic production.

When asked about possible gender dynamics at play, there were wide discrepancies among the government interviewees in their perspectives on copyright and gender. Some showed indifference to the relationship that may exist between copyright and gender, while others pointed to the increasingly active contribution by women in creation. In the case of writing, for instance, one quickly notices that there are more and more women in the field of literature, in spite of the fact that women came rather late to this field. In other sectors such as music and drama, the majority of creators are women.

We also tackled the question of ICTs, especially the Internet and its role in the quest for knowledge. Regarding the Internet, the Justice Ministry interviewee said he believes that it is the best tool, but also the most dangerous tool, for a person seeking to acquire knowledge. The Internet, he said, makes a wide number of learning materials of variable quality and reliability available to users while exposing them to various types of risks.

For the BSDA interviewee, the key concern in relation to ICTs was the protection of the rights of creators whose works are available via ICTs.

### *Educational community*

École des bibliothécaires, archivistes et documentalistes (EBAD, the School of Library, Archives and Information Sciences)

EBAD is an undergraduate and postgraduate school for training of librarians and archivists within the Université de Cheikh Anta Diop (UCAD) in Dakar. The mission of its students is directly linked to access to knowledge. Our focus on EBAD was justified by the fact that it has now started to offer distance education.

EBAD produces traditional learning materials, including curricula, classes and the products of teaching staff and students (doctrinal articles, books, conference/seminar/workshop minutes, dissertations, theses, training reports). These resources are generally in paper format but are increasingly available in electronic form. These resources are mainly the property of the institution.

According to the EBAD interviewee, in 2000 UCAD signed an agreement with French Cooperation Services, through the French Embassy in Senegal, which saw the implementation of an Adult Training Course in Computerised Network Information (French acronym FORCIIR). Thanks to this project, EBAD received nearly CFA300 million in subsidies (US\$640 000). With these subsidies, the school was able to diversify its curricula to be able to face increasingly pressing demands from the sector's professionals. EBAD implemented distance education courses which were replicas of its on-campus courses.

In terms of the impact of copyright, EBAD went through a very unsatisfactory experience with an online learning management system—an experience that eventually motivated its directors to use copyright-free learning platforms. At the beginning of the distance education programme, EBAD spent 2 000 Euros in order to put its cataloguing course online via the FADIS learning management system. This investment, however, bore almost no return. Outside the interface installed on the school's website and the class for which this platform was ordered, it was impossible to use the system for any other class or course. The result is that today, the institution's policy is to work with copyright-free platforms or free software. With the help of the Agence universitaire de la francophonie, EBAD will now stop working with FADIS and is adopting MOODLE, a free software package dedicated to distance education. Therefore, in this institution, the strategy currently aims at avoiding the use of any tool that has copyright attached to it and favouring the use of free software. This choice is justified by economic reasons, but also by practicality in terms of use, adaptability and, possibly, improvement of such tools, all features that are offered with the use of free software.

### Centre de formation judiciaire (CFJ, the Judicial Training College)

The CFJ is an institution which provides first-level training for students who wish to become magistrates or clerks of the court. The CFJ also implements continuous training for practising magistrates and clerks of the court, as well as for other professions working in the field of justice: customs officers, police, military police and law enforcement officers.

The CFJ plays an essential role in the legislative progress of Senegal, because it frequently organises meetings on themes relating to the future of the country. Each time weaknesses or gaps are identified by judges, the CFJ suggests reforms of laws or calls for new legislation where necessary.

As far as the academic activities of the institution are concerned, the electronic format is increasingly popular (CD-ROM, USB flash drive). The CFJ uses learning materials that are mainly basic law books, legal codes, administrative documents and cases that are currently awaiting judgment and spends on average more than 70 per cent of its operating budget<sup>17</sup> on the acquisition of books.

The CFJ interviewee expressed the desire for easier access to digital legal resources that are currently not accessible for economic reasons. The interviewee believes that the difficulties linked to access to specialised documents are related to copyright and digital protection of copyright-protected online resources. The interviewee said it is necessary to find a balanced solution for the online environment that will take into account the interests of both copyright-holders and of users.

The interviewee also indicated that the level of knowledge of copyright in Senegal among CFJ learners is very low. Although one of the lecturers does teach a course on disputes relating to intellectual property, the issue is of no concern to the rest of the staff.

### University libraries

The university libraries we contacted for our research are at UCAD in Dakar and at the Université de Bambey, both public universities. Their mission is to make documents available for the whole academic community — for lecturers, researchers, students and, to a lesser extent, the administrative staff as well as a few external users.

The UCAD Library (French acronym BUCAD) was created in 1965. The library has enjoyed the status of Central Documentation Service at the University of Dakar since 1992 and is the hub of 14 faculty libraries. The Director of the central library is also the head of the Documentation Council and a member of the University Board.

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17 The CFJ is a public school that is entirely funded by the state.

The Université de Bambey also has its own academic library. It was opened at the same time as the university in March 2007, with only 292 books received from the French Embassy in Senegal. This collection grew to 1 800 books by the end of 2007, thanks to the funds allocated by the university budget.

As is the case for most university libraries in Senegal, these two libraries share the same practices in terms of acquisition, processing and dissemination of resources.

The university libraries manage learning materials produced by the academic community (researchers and students) and also produce a few document resources, including tools and research data in various formats. These resources are the property of the universities and consequently of the libraries, that keep them for their dissemination.

The libraries have many constraints in terms of compliance with copyright. The students, however, indicate that, in practice, the enforcement of copyright is not that strong at the libraries.

It is our finding that these libraries continue to be confronted with a financial situation which does not allow them to have the document resources (either on paper or digital) necessary for the proper accomplishment of their mission.

In parallel with the increase in the price of materials, the budget allocated has systematically been insufficient since the devaluation of the CFA currency in 1994. This situation adds more stress to the issue, because the size of the academic population has increased exponentially from year to year. UCAD currently has about 70 000 students. University libraries thus have a reduced purchasing power and face, at the same time, an increase in the cost of production while having to service a substantially increased number of users. The main consequence of this problem is that in all cases, the library collections become obsolete, to the detriment of the individuals who seek access to knowledge.

### Students and lecturers

We elected to restrict our study of users of learning materials to the university setting and we therefore interviewed lecturers and students in both the institutions we had targeted, UCAD and the Université de Bambey.

We found that lecturers display the same behaviour in both universities as do the students. Through their teaching and research activities, lecturers are the members of the academic community who produce the most learning materials. As creators, they naturally enjoy copyright on their works (articles, books, lectures) even though some productions are owned by several entities (for example, owned in conjunction with laboratories or research institutions).

Lecturers are not only copyright-owners; they also are often the first users of materials, due to their research activities. Lecturers said they generally comply with copyright—compliance which is aided by the fact that reproduction for

non-commercial teaching purposes is allowed, without authorisation of the copyright-holder, in terms of the exception outlined in Article 42 of the 2008 Copyright Law. Regrets were, however, expressed by the lecturers regarding the difficulties of accessing specialty resources. In fact, many of them indicated that they purchase their working materials abroad, as there are not satisfactory amounts of current and diversified materials available in the country, either in hard copy or electronic form (especially online scientific journals). While the latter may be accessible through the Internet, they remain largely out of reach due to very high prices of access.

The students also represent a substantial user base for learning materials in universities and in our interviews we found that students to some extent seek the resources they need in libraries and other document and/or research centres.

When seeking materials outside libraries and resource centres, students rarely purchase books and when they do these purchases are generally made at second-hand book dealers. It was found that students mostly rely on large-scale photocopying, sometimes of entire books. (The law is not clear, in the Article 40 private use exception, as to whether photocopying of an entire work is allowed, but where a person buys a photocopied book from a copy shop, then the person doing the copying is clearly violating the law, as there is no exception for reproduction for commercial purposes.) The students' reliance on photocopying was explained by the interviewees as being a product of the insecure financial situation of many students and the high price of learning materials.

Another student practice uncovered in the interviews — one which is clearly a violation of authors' moral right to ensure the integrity of their works — is the practice of 'page-tearing', whereby pages are permanently removed from books. This practice exists at UCAD, to the extent that the UCAD library has signs warning against the practice. The students interviewed denounced this behaviour, which is to them an example of the selfishness of their fellow students. Some interviewees, however, while they reject such acts, find that this practice can be explained by the state of poverty of some students who do not receive a state allowance<sup>18</sup> and whose parents are unable to assist them financially. These students may find themselves forced to tear pages from the books they need.

A fascinating but problematic consequence of the habitual vandalism of library resources is the blatantly contradictory messaging promoted to students in libraries such as UCAD's. Signs posted above UCAD library photocopiers urge students to photocopy books rather than tear out pages, while simultaneously warning students that photocopying books may constitute illegal copyright infringement. Students

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18 There is a state allowance system for university students, but the sums provided are low in comparison with the high cost of living in Dakar. This allowance amounts to CFA36 000 per month (US\$77) for a full bursary, CFA24 000 (US\$51) per month for a two-thirds bursary and CFA18 000 (US\$38) per month for a half-bursary.

presented with such a paradox could be forgiven for their confusion; a clear and sustainable solution is needed for this problem.

#### 7.4 Conclusions and recommendations

In conclusion, the copyright environment in Senegal is generally oriented towards creators and protection of their rights. Artists, particularly musicians, were central to the push to improve protection of their rights through copyright, a push that led to the 2008 Copyright Law extending the term of protection from 50 to 70 years, introducing neighbouring rights for performers and producers and creating strict protection of technological protection measures (TPMs) and other electronic information. Senegal has a cultural sector that is currently booming and thus the power of the artists lobby is understandable, as is the state's desire to ensure that creation is encouraged and that the rights of creators are protected.

However, the state's objective of protecting creators and the copyrights of creators is being pursued in a fashion that is not balanced by an appreciation of the need to ensure reasonable levels of free user access to works, particularly learning materials. The protection of creators needs to be balanced by the protection of users. The 2008 Copyright Law goes too far in the direction of protectionism in the following respects:

- the 'Berne-plus', 'TRIPs-plus' 70-year term of protection in the 2008 Law is excessive, given that the term required by Berne and TRIPs is only 50 years. The longer the term of protection, the longer the period of time it takes for works to enter the public domain;
- the requirement in the Law of payment of royalties for potentially any exploitation of any public domain work (not just for use of folklore and potentially not just for profit-making use of the work) is unnecessary and is not required by international conventions;
- the scope of rental rights in the Law goes beyond TRIPs requirements, as it is not limited to certain types of work such as computer software and movies but covers all types of works;
- the Law lacks provisions for reproduction of works by libraries and archives;
- the Law lacks provisions for translation or adaptation for educational purposes;
- the Law lacks provisions for compulsory/statutory licences for educational purposes;
- except within the UEMOA bloc of countries, the Law does not provide for parallel importation of works where works are being sold at higher prices in Senegal than in another country;

- the Law provides blanket protection for technological protection measures (TPMs), with no exceptions for acts such as TPM circumvention for personal private use, for teaching or for format conversion for use by the visually impaired;
- the Law contains no specific provisions for visually impaired people; and
- the Law contains no specific provisions for distance education or e-learning.

Meanwhile, in terms of practice, we found widespread lack of awareness of copyright law and even where the law is understood or partially understood, there is widespread lack of adherence. For instance, university students routinely purchase photocopies of entire books which, because the reproductions are made for commercial purposes, are in violation of the Copyright Law. In other cases, university students have been found to engage in illegal 'page-tearing' from library books. The strongest explanations provided for student reliance on illegal commercial photocopies or page-tearing were poverty and the high prices of materials.

Other practices, such as student photocopying on a non-commercial basis of large portions of works, or entire works, for personal private use, are not clearly illegal, but could be illegal if the exception for photocopying for private/personal use (Article 40) is at some point interpreted in a narrow way by the judiciary. In the meantime, in the absence of judicial interpretation of Article 40, the rights of users to photocopy on a non-commercial basis for personal/private use remain unclear.

In terms of enforcement and the judiciary, it was found that a lack of expertise and a lack of a sense of the validity of intellectual property as opposed to more tangible kinds of property, has led to a lack of copyright-related cases, with most copyright cases being settled amicably out of court. Thus, much needs to be done to build awareness of copyright on the part of users and members of the judiciary.

Much also needs to be done to support the local publishing sector, because access to knowledge largely depends on books and in Senegal most learning materials above primary level come from overseas and are too expensive for many users.

The Internet could, in the years to come, become an important means of knowledge access, particularly for the higher education sector. But very few Senegalese have a high-speed Internet connection at home, mainly due to cost. UCAD in Dakar, through its EBAD unit, is making progress in offering distance education via ICTs, an important initiative given that UCAD, with 70 000 students, is the largest university in Francophone Africa and faces a shortage of lecture rooms. But successful implementation of ICT-based distance education/e-learning

requires specific copyright exceptions and, as mentioned above, such exceptions are not present in the 2008 Law.

We thus conclude that both of the ACA2K hypotheses have been confirmed by our research findings. The Senegalese copyright environment is not at present maximising (legally permitted) learning materials access; and the environment can be changed in order to improve and maximise (legally permitted) access.

The 2008 Law's exceptions to copyright protection, currently set out in Articles 40 to 46, could be augmented in order to include:

- provisions specific to disabled people, particularly the visually impaired;
- specific provisions for distance learning and e-learning; and
- exceptions for non-commercial public/academic libraries and non-commercial documentation/archive centres, including an exception for non-commercial digitisation of copyright-protected works for archival purposes and library use.

Also, Article 125, which makes it an infringement to circumvent technological protection measures (TPMs), could be amended so that it does not undermine exceptions and limitations. The amendments to this Article should include:

- provisions to exclude from the anti-circumvention rules the use of works within the confines of the existing exceptions for personal and private use and for teaching;
- a proviso to exclude from anti-circumvention rules the use (eg via format adaptation) of copyright-protected works in the digital environment by visually impaired people; and
- exclusion from the anti-circumvention rules of certain acts by libraries and archives (in accordance with the recommendation above to include library/archive exceptions in amendments to the Law).

The Law could also be amended to allow unlimited parallel importation of learning materials, not just parallel importation from UEMOA countries. And there could be provision for compulsory and/or statutory licensing for educational purposes.

Also, the 2008 Law's extension of the copyright term from 50 years to 70 years and its application of a royalties system to all works in the public domain (and not just folklore), could be reconsidered.

In addition, the Université de Cheikh Anta Diop and the Université de Bambey could each adopt an intellectual property management policy that reflects the flexibilities provided for in the 2008 Law.

We further recommend that Senegal develop a 'positive discrimination' IP policy that addresses not just protection of the interests of rights-holders but also the needs of users. We recommend that professionals from the educational and research

sectors, as well as rights-holders, be part of the process of developing this policy and of re-examining the 2008 Law.

Indeed, all stakeholders need to take steps to increase awareness of copyright limitations and exceptions among the general population and in academic and research circles.

The AMS is a powerful organisation whose main mission is the defence of musicians' interests. The protection of copyright represents its major lobbying action to date. The AMS could be made aware of the different flexibilities for educational and research purposes, so that it could be encouraged to lobby the government for some reforms to facilitate better access to knowledge for a certain categories of the population, such as learners and disabled persons.

The Ministry of Justice and the Ministry of Culture (through the BSDA) are the key policymakers and they could be called upon to work with their Cabinet colleagues to provide an IP policy and related policies, that push for maximum access to teaching and learning materials in the country.

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