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**AFRICAN REGIONAL INTELLECTUAL PROPERTY  
ORGANIZATION (ARIPO)**

**ADMINISTRATIVE COUNCIL**

**FORTY-FIRST SESSION**

*Lilongwe, Malawi, November 20 to 22, 2017*

**COMPENDIUM I  
SUPPORTING DOCUMENTS FOR THE TECHNICAL  
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**A. TECHNICAL COMMITTEE ON COPYRIGHT &  
RELATED RIGHTS**

## **REPORT OF THE TECHNICAL COMMITTEE ON COPYRIGHT AND RELATED RIGHTS** *Document ARIPO/TCCR/IV/7*

### **INTRODUCTION**

1. The Fourth Session of the Technical Committee on Copyright and Related Rights (hereinafter referred to as the “Committee”) was held at the ARIPO Headquarters, Harare, Zimbabwe, from August 17 to 18, 2017.

### **ATTENDANCE**

2. The following members attended the Fourth Session of the Committee: Botswana, The Gambia, Kenya, The United Republic of Tanzania, and Zimbabwe. The list of participants is contained in this Report as Annex I.

### **OFFICIAL OPENING**

3. The Director General of ARIPO, Mr Fernando dos Santos, welcomed the delegates to the Fourth Session of the Technical Committee on Copyright and Related Rights. The opening remarks of the Director General of ARIPO are attached to this Report as Annex II.

### **ADOPTION OF THE AGENDA**

4. The agenda was unanimously adopted.

### **WORKING DOCUMENTS**

5. The Secretariat made presentations on the following documents:
  - i. Report on Copyright and Related Rights Activities in 2017 and proposed activities for 2018 (document ARIPO/TCCR/IV/2).
  - ii. Report on Feasibility Study and development of policy framework for the establishment of a Regional Voluntary Copyright Registration and Notification System (document ARIPO/TCCR/IV/3).
  - iii. Development of ARIPO Model Law on Copyright and Related Rights (document ARIPO/TCCR/IV/4).
  - iv. Proposed Draft Africa Agenda on Copyright and Related Rights (document ARIPO/TCCR/IV/5).
  - v. Progress report on the Regional ICT Projects for IP Business Processes: Regional Copyright Database (document ARIPO/TCCR/IV/6).



## **REPORT ON COPYRIGHT AND RELATED RIGHTS ACTIVITIES IN 2017 AND PROPOSED ACTIVITIES FOR 2018 (ARIPO/TCCR/IV/2)**

6. The Secretariat presented documents *ARIPO/TCCR/IV/2* on the Report on Copyright and Related Rights activities undertaken in 2017 and proposed activities for 2018. The activities undertaken in 2017 are in line with the Value and Growth Transformation Strategic Plan 2016 – 2020. Strategies that were addressed are: Copyright and Related Rights Advocacy; Strengthening the Administration of Copyright Offices, Collective Management Organizations' and Enforcement Agencies; Partnership with other copyrights institutions; Participation in international conferences, meetings, workshops and seminars; and Department staff development.
7. The Committee discussed the report and recommended the following:
  - i. For the 2018 high level meeting the Permanent Secretaries should be prioritized. Thereafter, Cabinet Ministers and Chief Executive Officers of Copyright Offices.
  - ii. To facilitate strengthening of CMOs in The Gambia, Liberia and Rwanda and support establishment of CMOs in Lesotho and Swaziland.
  - iii. To organize study visits to Ghana for seven CMOs to be identified.
  - iv. Member States that have implemented provisions on "Blank Tape Levy" to share experiences with the Secretariat for guidelines to be developed and shared with the other states.
  - v. To incorporate the principles of Transparency, Accountability and Good governance (TAG) in CMO trainings.
  - vi. It was proposed that the Copyright department attend the WIPO Advisory Committee on Enforcement (ACE) meeting.
8. The Committee commended the Secretariat for the work carried out so far.
9. The Committee took note of the report and recommended it to be submitted to the Administrative Council for noting and endorsement of the recommendations in paragraph seven.

## **REPORT ON FEASIBILITY STUDY AND DEVELOPMENT OF POLICY FRAMEWORK FOR THE ESTABLISHMENT OF A REGIONAL VOLUNTARY COPYRIGHT REGISTRATION AND NOTIFICATION SYSTEM (ARIPO/TCCR/IV/3).**

10. The Secretariat presented document *ARIPO/TCCR/IV/3 and its annexes* on the Feasibility report and policy framework for the establishment of a Regional Voluntary Copyright Registration and Notification System.

11. The Secretariat emphasized the need for development of a legislative framework to facilitate effective and efficient implementation of the regional voluntary copyright registration and notification system.
12. The Committee reviewed the document and its annexes (feasibility report and the policy framework) and made the following recommendations to the Administrative Council:
  - i. Adopt the report of the feasibility study and policy framework
  - ii. Adopt the following roadmap:
    - a) Engagement of a consultant to consider the best possible legal framework to implement the voluntary registration for ARIPO taking into account other aspects of Copyright and Related Rights.
    - b) Review of the draft legal framework by the Member States
    - c) Consideration by the Committee in the Fifth Session
    - d) Submission of the recommended legal framework for review by the Administrative Council.

**DEVELOPMENT OF ARIPO MODEL LAW ON COPYRIGHT AND RELATED RIGHTS (ARIPO/TCCR/IV/4).**

13. The Secretariat presented document *ARIPO/TCCR/IV/4*.
14. The Secretariat informed the Committee that there is need to have important provisions on copyright that should be reflected in the Model Law. The Secretariat also informed the Committee that WIPO is developing guidelines on the benefits and challenges of ratification by October 2017 and this can be taken on board while developing the Model Law.
15. The Committee reviewed and drafted Terms of reference for the engagement of a consultant to be finalized by the Secretariat.
16. The Committee recommends that the Administrative Council adopts the following roadmap:
  - i. To advertise the Expression of Interest for consultancy (December 2017).
  - ii. Development of ARIPO Model law on copyright and related rights (February-April 2018).

- iii. Review of the ARIPO Model Law on copyright and related rights by the Member States (May-June 2018).
- iv. Review of the ARIPO Model Law and comments by the Technical Committee on Copyright and Related Rights (August 2018).
- v. Adoption of the ARIPO Model Law by the Administrative Council (November-December 2018).
- vi. Publication and Dissemination of the Model Law to Member States (2018).
- vii. Advocacy of the Model Law in the Member States (2018).

**PROPOSED DRAFT AFRICA AGENDA ON COPYRIGHT AND RELATED RIGHTS (ARIPO/TCCR/IV/5).**

- 17. The Secretariat presented document *ARIPO/TCCR/IV/5 and its annex* on the proposed draft Africa Agenda on Copyright and Related Rights.
- 18. The Secretariat informed the Committee that the Agenda was as a result of the Symposium that was attended by more than 70 delegates from ARIPO Member States. The Symposium was graced by Ms. Sylvie Forbin the Deputy Director General of WIPO, Copyright and Creative Industry Sector.
- 19. The Committee reviewed and discussed the document with its annex. The Committee developed a monitoring and evaluation matrix for Member States (Copyright Offices and Collective Management Organizations) to report twice a year on the status of implementation, challenges and recommendations. The ARIPO Secretariat shall develop questionnaires for a more detailed report from time to time. This report will be compiled by ARIPO and presented at the Technical Committees.
- 20. The developed matrix is to be attached as an annex to the Agenda. The Committee emphasized that the Agenda should inform the Intellectual Property Policy, the Creative Sector Policy and Strategy in Member States.
- 21. The Committee recommended the following to the Administrative Council:
  - i. To adopt the Agenda on Copyright and Related Rights as a basis for development of the creative sector in ARIPO region.
  - ii. Member States be encouraged to customize the Agenda, use it for planning and implementation.

- iii. Monitoring and Evaluation matrix on the status of implementation of the six pillars in the Agenda be completed twice a year and submitted to ARIPO.

#### **PROGRESS REPORT ON THE REGIONAL ICT PROJECTS FOR IP BUSINESS PROCESSES: REGIONAL COPYRIGHT DATABASE (ARIPO/TCCR/IV/6).**

22. The Secretariat presented document *ARIPO/TCCR/IV/6 and its annex* on the Regional ICT projects for IP Business Processes: Regional Copyright Database.
23. The Secretariat informed the Committee that the regional copyright database is very important as it will synchronize the Member States' systems with the ARIPO system to make ARIPO Africa's leading intellectual property hub.
24. The Committee supports the whole project.
25. The Committee discussed the report and proposed the following changes:
  - i. To add under paragraph 5, "GDA or any other system that Member States opt for as long as it can be compatible with the ARIPO copyright database."
  - ii. Customize WIPO Connect to work for Member States and have it as the foundation system.
26. The Committee recommended the approval of the project on regional copyright database by the Administrative Council.

#### **ANY OTHER BUSINESS**

27. The Chairman invited the Committee members to table other matters they wish to have the Committee consider. The following issues were raised:
  - i. The attendance of more Member States at the Standing Committee on Copyright and Related Rights (SCCR) be encouraged.
  - ii. ARIPO to circulate information on SCCR documents prior to the commencement of the meeting.

#### **DATE AND VENUE OF THE FIFTH SESSION**

28. The Fifth Session of the Technical Committee on Copyright and Related Rights will be held at the ARIPO Headquarters, Harare, Zimbabwe. The date will be communicated to the Committee by the Secretariat in due course.

#### **ADOPTION OF THE REPORT**

29. The Report was unanimously adopted.

### **CLOSING REMARKS**

30. The Chairman thanked the Director General's representative and the Secretariat for organizing a very successful Session stating that the Committee's expectations have been exceeded. He further thanked the Committee members for their enormous contributions to the deliberation of various matters that were brought before the Committee.

31. The Director General's representative applauded the Committee for their good work and assured the Committee that the recommendations will be submitted to the Administrative Council for decision making. The Director General's representative bid farewell to the Committee members and declared the Fourth Session of the Technical Committee on Copyright and Related Rights closed.

**Date .....**

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**TCCR Chairman**

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**Secretary (Head of Copyright &  
Related Rights)**

**[End of Report]**

**Annexes follows**

## Annex I

### List of Participants

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## **OFFICERS**

Mr Edward Kiplangat SIGEI  
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Chairperson  
Secretary (Head Copyright & Related  
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## **ARIPO SECRETARIAT**

Ms Maureen Fondo

Miss Tariro Anifasi

Secretary (Head Copyright & Related Rights)

Intern Copyright & Related Rights



## Annex II

### STATEMENT OF THE DIRECTOR GENERAL OF ARIPO AT THE OPENING OF THE 2017 TECHNICAL COMMITTEES' SESSIONS<sup>1</sup>

**Distinguished members of the Technical Committee on Industrial Property;  
Distinguished members of the Technical Committee on Copyright and Related Rights;  
Distinguished members of the Technical Committee on Plant Variety Protection;  
Other Delegates of ARIPO member States;  
Representatives of the Civil Society Organisations here present;  
ARIPO members of Staff;  
Ladies and Gentlemen;**

Good morning!

On behalf of the African Regional Intellectual Property Organization (ARIPO) and on my own behalf, it is my singular honour to welcome you all, our delegates, to Harare for this meeting bringing together the Seventh Session of the Technical Committee on Industrial Property, the Fourth Session of the Technical Committee on Copyright and Related Rights, and the Second Session of the Technical Committee on Plant Variety Protection.

I wish to express my sincere gratitude to you all for having travelled from different parts of Africa to come and attend these sessions despite the important responsibilities you hold in your different offices. I also know that some of you have travelled for more than two days to come to Harare. It is a clear example of the invaluable support we continue to receive from Member States.

#### **Distinguished Delegates,**

The Administrative Council of ARIPO at its 40<sup>th</sup> Session held in Harare from 5 to 7 December 2016 appointed new members to its different Committees. It is in that regard that Kenya and Zambia were elected as new members to serve on the Technical Committee on Industrial Property for the period 2017 - 2018. Allow me to extend a special welcome to the Delegates of Kenya and Zambia! We have a lot of expectations from your expertise and experience in Industrial Property.

In the next two days, all the three Technical Committees will be examining activities and initiatives that have been undertaken or are planned by the Secretariat in order to ensure that those activities and initiatives are indeed in line with the mandates of the Organization, and that we are working towards the growth of the Organization and in the best interest of Member States.

The Technical Committee on Industrial Property will be looking at the improvement of the operations in Industrial Property field and will among other things consider a number of amendments to the Harare and the Banjul Protocols to render them more user-friendly. The Secretariat had a chance to discuss the proposed amendments during the Sixth Session of the Working Group on the ARIPO Protocols that met here at the Organization's Headquarters from 12 to 13 June 2017. In total, 28 participants, comprising delegates of ARIPO Member

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<sup>1</sup> The Director gave one opening statement for all the three Technical Committees. This Annex will not be repeated in the reports of the other Committees contained in this Compendium.

States and IP agents and attorneys, attended the Sixth session of the Working Group. Delegates of ARIPO Member States came from Kenya, Malawi, Mozambique, Namibia, São Tomé e Príncipe, Uganda, Zambia and Zimbabwe. IP Agents also came from different Countries in order to contribute to the improvement of ARIPO Protocols: Namibia, South Africa and Zimbabwe.

The Technical Committee on Copyright and Related Rights on its part will be looking among other items the Report on Feasibility Study and development of policy framework for the establishment of a Regional Voluntary Copyright Registration and Notification system which, I believe, will promote the development and coordination between ARIPO, the Copyright Offices, the Collective Management Organizations, the right holders and other stakeholders. The other item on the agenda of the Committee that I would like to mention particularly is the consideration of the draft Africa Agenda on Copyright and Related Rights which was a result of the Symposium on Copyright and Related Rights that was held from 5 to 7 June 2017 here at ARIPO Headquarters. These items of the agenda and the rest will surely shape the copyright and related rights systems in Africa.

Last but not the least, the Technical Committee on Plant Variety Protection, which is meeting for the second time from its creation, will discuss among other things the draft Regulations for the implementation of the Arusha Protocol on Plant Variety Protection as well as other documents which are expected to support the operationalization of the Arusha Protocol.

In the case of this Technical Committee, although Member States serving on the Committee are five as is the case with other Administrative Council Committees, we decided to invite the Member States and Civil Society representatives who provided relevant contributions for the improvement of the Draft Regulations. In that regard, Malawi, Namibia, Uganda and the African Centre for Biodiversity were invited to take part in the discussions of the Committee. We welcome these delegates and we thank you for your contributions and for making time to come and personally give your inputs into this Committee.

#### **Distinguished Delegates,**

Irrespective of the Committee you are serving on, your role during the two day session is crucial for the work of the Organization. In fact, in the overall Secretariat's sake to ensure the meetings of the ARIPO Governing Bodies are conducted smoothly and efficiently, it is paramount that the bigger part of the work of the Administrative Council be done by Technical Committees. It is expected that all discussions on technical matters be done by this forum and you will give clear guidance to the Administrative Council on decisions to be taken. To that end, I wish to draw your attention to the new reporting structure which will clearly single out the proposals tabled by the Secretariat, the considerations and concerns raised by the Committee and finally the recommendations made for consideration by the Administrative Council.

The Secretariat has also endeavoured to prepare documents spelling out what is expected from the Technical Committees. In the same vein, the reports of the Technical Committees should be clear and concise on what is requested to the Administrative Council.

#### **Distinguished delegates, ladies and gentlemen,**

I am proud to announce that this is the first time we are receiving the meetings of the Technical Committees in our new building which was inaugurated, as some of you may know, in December last year. It is my sincere hope that you will enjoy the comfort of the new

meeting rooms, the canteen and the general view of the building. Please take some time to tour the building and witness one of the results of the unwavering support of the ARIPO member States.

Finally, **Distinguished delegates**, as the sessions of the three Technical Committees will be held concurrently, it is impossible for me to attend them simultaneously. Therefore, for the Technical Committee on Industrial Property, I will be represented by Mr Kiige, Director of Industrial Property while Mr. Emmanuel Sackey, Intellectual Property Development Executive, will represent me in the Technical Committee on Plant Variety Protection. Finally for the Technical Committee on Copyright and Related Rights, I will be represented by Ms. Maureen Fondo, the Head of Copyright Department.

Also, be assured that I will always be at your disposal should you need to consult me on any issue, and I will randomly be appearing in your respective meeting rooms to follow proceedings.

With these remarks, it is now my pleasure to declare the Seventh Session of the Technical Committee on Industrial Property, the Fourth Session of the Technical Committee on Copyright and Related Rights, and the Second Session of the Technical Committee on Plant Variety Protection officially opened. I wish you fruitful discussions.

**THANK YOU FOR YOUR KIND ATTENTION!**

## **REPORT ON COPYRIGHT AND RELATED RIGHTS ACTIVITIES IN 2017 AND PROPOSED ACTIVITIES FOR 2018** (*Document ARIPO/TCCR/IV/2*)

### **INTRODUCTION**

1. This document seeks to report on copyright and related rights activities that have been undertaken in 2017. The activities undertaken in 2017 are in line with the Value and Growth Transformation Strategic Plan 2016 – 2020. Strategies that were addressed are:
  - i. Copyright and Related Rights Advocacy,
  - ii. Strengthening the Administration of Copyright Offices, Collective Management Organizations' and Enforcement Agencies
  - iii. Partnership with other copyrights institutions
  - iv. Participate in international conferences, meetings, workshops and seminars
  - v. Department staff development

### **ACTIVITIES CARRIED OUT FROM JANUARY TO AUGUST 2017**

2. The activities carried out are as follows:

#### **Feasibility Study and Policy Framework**

3. The Secretariat engaged a consultant to undertake the feasibility study and development of the policy framework. The final report and policy was submitted to the Member States for comments that have been consolidated. The report of the feasibility study on voluntary copyright registration or notification system in ARIPO Member States, policy framework together with the comments received will be presented in document ARIPO/TCCR/IV/3 with its annexes.

#### **Development of ARIPO Model Law on Copyright and Related Rights**

4. The Secretariat as directed by the TCCR 3 Session to develop a model law on copyright and related rights. ARIPO did a research on the different copyright laws and the Southern and Eastern Africa Copyright Network (SEACONET) sample law on copyright. ARIPO has developed a roadmap for the development of the model law on copyright and will be presented in a separate document.

#### **Symposium on Copyright and Related Rights**

5. The Secretariat in collaboration with the World Intellectual Property Organization (WIPO) held a Symposium on Copyright and Related Rights at the new state of the art Conference Hall of ARIPO in Harare, Zimbabwe from June 5 to 7, 2017. The purpose of the Symposium was to facilitate the understanding and appreciation of the economic contribution of copyright and related rights to the national economy and its impact on policy formulation. The symposium also sought to promote efficiencies of

administration and management by the copyright offices and collective management organizations.

6. Participants from seventeen (17) ARIPO Member States were in attendance, namely: Botswana, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Sudan, Swaziland, Uganda, United Republic of Tanzania, Zambia and Zimbabwe. Angola and Ethiopia, which have observer status (and potential ARIPO Member States) participated in the opening session.
7. International Organizations and Parties that attended the Symposium were: the African Regional Intellectual Property Organization (ARIPO), the World Intellectual Property Organization (WIPO), the *Organisation Africaine de la Propriété Intellectuelle* (OAPI), the International Federation of Reproduction Rights Organizations (IFRRO), the Norwegian Copyright Development Association (NORCODE), the Public Lending Right International, the International Federation of the Phonographic Industry (IFPI), as well as GRH Consultancy.
8. Administrative Council Members who attended include: Mr. Anthony Bwembya, the Chairman of the Administrative Council of ARIPO and Registrar General and Chief Executive Officer Patents and Companies Registration Agency (PACRA) Zambia, Mr. Tilienge Andima, Chief Executive Officer, Business and Intellectual Property Authority (BIPA) Namibia, Mr. Chapusa Phiri, Registrar General, Department of the Registrar General Malawi, Mr. Conductor Masena, Registrar General, Companies and Intellectual Property Authority (CIPA) Botswana and Ms Jane Okot P'Bitek Langoya, Deputy Registrar General, Uganda Registration Services Bureau (UBRS) Uganda.
9. At the end of the symposium, the delegates developed a draft Comprehensive Agenda for Copyright and Related Rights in Africa (Harare Strategic Action Plan) with the view to reaching a level playing field in the global Copyright ecosystem while balancing the interest of all stakeholders. This was circulated to all delegates and the Secretariat received positive response. This agenda will guide future activities for the Secretariat, Member States and Cooperating Partners. The draft Africa Agenda on Copyright and Related Rights will be presented as a separate document.
10. In the course of the Symposium, an exhibition was held where Member States showcased works, products and what they are doing in their countries on copyright and related rights. The exhibition was successful; it was open to the delegates and the public.

### **Copyright Competitions**

11. Copyright competitions were undertaken in Malawi, Zanzibar and in Tanzania mainland during the Roving Seminar sessions and the winners were awarded prizes. Participants appreciated such an activity as it motivated and encouraged more learning on issues of copyright and related rights. The awareness the participants

received will enable them to further disseminate correct information on copyright in their jurisdictions. This will ultimately lead to increased awareness on copyright and related rights.

**12. Skills development to documentation & licensing officers**

ARIPO and Mr. Samuel Sangwa, the Regional Director for Africa CISAC, visited the Copyright Society of Malawi (COSOMA) on 24 March 2017. The focus of the visit was to meet with the Licensing and Documentation departments at COSOMA and discuss the opportunities and challenges faced. It was highlighted that some of the challenges faced the departments included: ICT infrastructure, using the debt collectors to assist the licensing officers and prosecuting broadcasters by a private law firm and lack of financial resources. Other findings was that the licensing department manually licenses the users, the level of compliance is very low, need more human resource as the licensing market is large and there is always need to follow-up with the users in order for them to pay. Currently, COSOMA is licensing on public performance, broadcasting, mechanical reproduction, reprography and online licensing.

**ARIPO –CISAC CMO Strategic Plan**

13. On 20 to 23 June 2017, ARIPO hosted CMO Strategic Plan in collaboration with the International Confederation of Societies of Authors and Composers (CISAC). The following societies were represented: Copyright Society of Malawi (COSOMA), Copyright Society of Nigeria (COSON), Dramatic Artistic Literary Rights Organisation (DALRO), Ghana Music Rights Organisation (GHAMRO), Mauritius Society of Authors (MASA), Musical Copyright Society Nigeria (MCSN), Namibia Society of Composers and Authors of Music (NASCAM), Rwanda Society of Authors (RSAU), Seychelles Authors and Composers Society (SACS), Uganda Performing Rights Society (UPRS), Zambia Music Copyright Protection Society (ZAMCOPS) and Zimbabwe Music Rights Association (ZIMURA).

14. The participants agreed that:

- (i) there is a need to build a result-oriented strategic plan for CMO development in Africa for the next four years;
- (ii) generation of knowledge in terms of capitalizing information to address specific issues and shared experiences;
- (iii) team building through networking CMOs and their CEOs vision, identifying common cross-cutting challenges,

15. Participants also developed and pre-validated the following:

- (i) Training on Cisnet, WIPO Connect, Cosis
- (ii) Training on Income & Expenditure & financial management for accountants & officers in CMOs
- (iii) Training on marketing & negotiation skills for CMOs.
- (iv) Study tour on blank tape levy by CMOs.

**Establishment of an operational CMO in Lesotho**

16. ARIPO undertook the initiative of assisting Lesotho to establish a CMO. The Secretariat with the assistance of the Copyright Society of Malawi (COSOMA) will visit Lesotho on 9 to 10 August 2017 to hold the first meeting with the Registrar General Office and the representatives from the different offices that will constitute the Board of the CMO.

## **COOPERATING PARTNER MEETINGS**

### **WIPO**

17. The Secretariat participated in the 34<sup>th</sup> Session of the Standing Committee on Copyright and Related Rights (SCCR) held at the WIPO headquarters in Geneva, Switzerland from 1 to 5 May 2017. Items discussed included: Election of the Chair and the two Vice Chairs, Adoption of the agenda of the thirty-fourth session, Accreditation of new non-governmental organizations, Adoption of the report of the thirty-third session of the Standing Committee on Copyright and Related Rights, Protection of broadcasting organizations, Limitations and exceptions for libraries and archives, Limitations and exceptions for educational and research institutions and for persons with other disabilities, Other matters included Proposal for Analysis of Copyright Related to the Digital Environment and Proposal from Senegal and Congo to include the Resale Right (droit de suite) in the Agenda of Future work by the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization.
18. International Conference on artist resale rights was held on 28 April 2017 at WIPO prior to the SCCR. Dr. Francis Gurry said that the conference will help to see how to address gaps that exist in resale rights. H.E. Ndiaye Minister of Culture and Communication, Dakar, Senegal stated that the resale rights bring a balance between artists and those who trade on their works. He further said that Senegal intends to give life to the Dakar Declaration and looked forward to May 2018 to hold Congress on Recognition on rights of artists and Resale Rights in Dakar. Topics discussed are:
  - (i) The International Development of the Art Market
  - (ii) Importance of Resale Right for Artists
  - (iii) Presentation of study on resale right for SCCR
  - (iv) Implementation of Resale Right
  - (v) Management of Resale Right

Resale rights enable the artist to participate in commercial aspects of his work, keep a link with his art work and encourage artists to recover modest percentage

### **IFRRO**

19. The International Federation of Reproduction Rights Organisations (IFRRO) invited ARIPO to the African Development Committee (ADC) annual meeting held in

Johannesburg South Africa from 25 to 26 July 2017. The meeting recommended the following:

- (i) The reproduction rights organization (RRO) were encouraged to report on substantial progress in the next ADC meeting.
- (ii) Upcoming RROs were encouraged to learn from the experiences of the well established RROs such as Dramatic Artistic Literary Rights Organisation (DALRO) in South Africa.
- (iii) RROs should continue to work with Universities to enhance intellectual property awareness so that they can appreciate and respect intellectual property rights.

### **CISAC**

- 20. The International Confederation of Societies of Authors and Composers (CISAC) invited ARIPO to the African Committee Meeting held in Kigali, Radisson Blu Hotel from 25 to 28 July 2017. The meeting gave an opportunity for African Societies to discuss development of collective management in Africa and around the world in terms of advances and difficulties as well as its potential and prospects. The meeting validated the chronogram of activities that were agreed in the strategic plan meeting held in Harare from 20 to 23 June 2017.

### **MEMORANDUM OF UNDERSTANDING (MoU)**

- 21. The Secretariat signed two Memoranda of Understanding (MoUs). On 14 February 2017, ARIPO signed MoU with International Confederation of Societies of Authors and Composers (CISAC) and on 4 May 2017, ARIPO signed an MoU with the International Federation on Phonographic Industries (IFPI). The MoU paves the way for joint projects on strengthening copyright, technical exchange, education and training of organisations collecting revenues for creators

### **Publications**

- 22. The Secretariat has finalized the following titles to be published and distributed to Member States:
  - (i) Guidelines to Contract: Music Genre
  - (ii) Comparative study on copyright laws & adherence to international instruments on copyright & related rights Volume 2
  - (iii) Success Stories from Member States
  - (iv) Creativity lives book 1, 2, 3 & 4
  - (v) CMO phase 2 survey study
  - (vi) CO survey study

### **ACTIVITIES TO BE UNDERTAKEN FROM SEPTEMBER TO DECEMBER 2017**

- 23. ARIPO is to undertake the following activities:



- (i) To participate and exhibit during the WIPO Advisory Committee on Enforcement (ACE) meeting that will take place from 4 to 6 September 2017 at Geneva, WIPO. Mr. Satumba Documentation and Communications Associate will represent ARIPO.
- (ii) ARIPO has been invited by Electronic Information for Libraries (EIFL) to participate in the regional seminar to be held on 12-13 September 2017, co-organized by EIFL and the Lesotho Library Consortium (LELICO), in cooperation with the Registrar General's Office. The seminar is entitled 'Ending the book famine in Africa: libraries and the promise of the Marrakesh Treaty' and will include a representative from CIPA in Botswana, Kenya (to be confirmed), as well as librarians. It is co-funded by the UNESCO Information for all Programme.
- (iii) ARIPO has been invited to participate in the meeting that is organized by CISAC together with the Algerian Office of Copyright and Related Rights (ONDA), to be held in Algiers, Algeria on 14 to 15 September 2017 under the theme "African Screenwriters, Directors and Music Creators here and abroad Encounter". This meeting will bring together audio-visual and music creators from all across Africa as well as the Presidents of CISAC Creators' Council and CEOs of Africa to discuss creators' protection and CISAC's public policy campaign for stronger rights for them.
- (iv) ARIPO will participate in the Cultural Festival in the Gambia from 25 to 29 October 2017.
- (v) The International Federation of Reproduction Rights Organisations (IFRRO) has invited ARIPO to the IFRRO World Congress to be held in Tokyo from 6 to 9 November 2017.
- (vi) ARIPO will participate in the 35<sup>th</sup> Session of the Standing Committee on Copyright and Related Rights (SCCR) that will be held at WIPO from 13 to 17 November 2017.
- (vii) The Norwegian Copyright Development Association (NORCODE), in cooperation with the African Regional Intellectual Property Organization (ARIPO) and World Intellectual Property Organization (WIPO Academy), with the assistance from International Federation of Reproduction Rights Organizations (IFRRO), The International Confederation of Societies of Authors and Composers (CISAC), International Federation of the Phonographic Industry (IFPI) and The Societies' Council for the Collective Management of Performers' Rights (SCAPR) will organize a Regional Training Program on

Collective Management of Copyright and Related Rights in Dar-es-Salaam, Tanzania from November 20 to 30, 2017.

- (viii) ARIPO and WIPO will organize a Conference on Copyright to close the residential phase of the 10<sup>th</sup> Cohort of the Masters in Intellectual Property (MIP) programme at the ARIPO headquarters on 6 to 7 December 2017.

## **ACTIVITIES TO BE UNDERTAKEN IN 2018**

24. The following activities have been planned for 2018. They will be incorporated in the programme of activities and budget to be presented to the Finance Committee:

### **a. Copyright & Related Rights Advocacy**

- i. Policy and Legislation development: High level Policy makers workshop for example parliamentarians, permanent secretaries, Ministers and Chief Executive Officers from Copyright Offices in the Member States
- ii. Copyright and related rights symposium and exhibition in Harare for both the copyright offices and collective management organizations in Member States.
- iii. Mapping of and participate in one cultural festival in the Member State.
- iv. Workshop for Judiciary and enforcement agencies to strengthen understanding and enforcement of copyright and related rights Harare.
- v. Assist one Member State to customize WIPO toolkit on IP Crime Prosecution.
- vi. Follow-up on the introduction of IP teaching in police academy in Member States
- vii. Facilitate establishment of CMOs in Member States and follow-up on Lesotho.
- viii. Study visit programs in the Member States: Sudan, Sao Tome and Sierra Leone visit Ghana CMOs and CO
- ix. Peer to Peer Education on Intellectual Property Rights in 1 Member States.

### **b. Promoting Recognition of the ICT on Creativity**

- i. ICT infrastructures for ARIPO to support the voluntary copyright registration system-DB and application server.
- ii. Identification of the ICT system to be used for the ARIPO voluntary copyright registration system.

### **c. Promoting Voluntary Registration and Notification System**

- i. Engage a consultant to develop legal framework on voluntary copyright registration on the basis of the Policy Framework (Policy objective, guiding principles, substantive provisions.
- ii. Review of the legal framework by Member States.
- iii. Legal framework presented to the governing bodies.
- iv. Formulation of guidelines, technical assistance at national level and ARIPO
- v. Identify suitable voluntary registration system, create awareness at ARIPO & Member States

**d. Research and Publication**

- i. Conduct study on the reproduction rights societies (RRO) in the Member States and publish.

**e. Trainings**

- i. Training economist, statisticians and researchers on undertaking intellectual property data collection and creative industry studies.
- ii. Training on Cisnet, WIPOConnect, Cosis to 25 CMOs in Harare.
- iii. Training on Income & Expenditure & financial management for accountants & officers in 25 CMOs Harare.
- iv. Training on marketing & negotiation skills for 25 CMOs Harare.
- v. Training on Administration & Management of 18 Copyright Offices- Role of CO Harare.
- vi. Study tour to Ghana by 7 CMOs on blank tape levy.
- vii. Training for the Department Staff

**f. Increase financial & human resources for the development of the Copyright Department of ARIPO**

- i. Employ Copyright Officer
- ii. Engage an Intern at ARIPO

**g. Meetings:**

Participate in strategic partners meetings such as: SCCR, IFRRO, IFPI, CISAC and NORCODE

**[End of Document]**

**REPORT ON FEASIBILITY STUDY AND DEVELOPMENT OF POLICY  
FRAMEWORK FOR THE ESTABLISHMENT OF A REGIONAL VOLUNTARY  
COPYRIGHT REGISTRATION AND NOTIFICATION SYSTEM** (*Document  
ARIPO/TCCR/IV/3*)

**I INTRODUCTION**

1. The Fortieth Administrative Council held at Harare, Zimbabwe from 5 to 7 December 2016, approved the following roadmap for the establishment of a regional voluntary copyright and related rights registration system:
  - (i) Situational Analysis of the voluntary registration and notification system in the member states. (January- April 2017).
  - (ii) Development of Policy Framework (May- June 2017).
  - (iii) Review of the Policy Framework by the Member States and the Adoption by the Administrative Council (July-December 2017).
2. Two Consultants, namely Dr Marisella Ouma, PhD, Intellectual Property Consultant and former Executive Secretary of Kenya Copyright Board and Naana Halm, Intellectual Property Consultant and Researcher from South Africa were engaged to undertake the feasibility study and development of the policy framework.
3. The detailed reports of the feasibility study and the policy framework have been attached to this document as Annexes I and II.

**REPORT ON FEASIBILITY STUDY AND DEVELOPMENT OF POLICY FRAMEWORK FOR THE ESTABLISHMENT OF A REGIONAL VOLUNTARY COPYRIGHT REGISTRATION AND NOTIFICATION SYSTEM** (*Annex I to Document ARIPO/TCCR/IV/3*)

**EXECUTIVE SUMMARY**

Copyright and related rights, unlike other intellectual property rights are automatically protected once an idea has been reduced to material form. Protection is territorial but extends to other countries by virtue of the fact that they are members of international treaties to which the country of origin is a member of. This includes the Berne Convention and the WTO Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement.

The proposal for establishment of a voluntary copyright registration or notification system at ARIPO is based on the 40<sup>th</sup> Administrative Council decision as part of the implementation of the extended ARIPO mandate to include copyright and related rights. It is important to note that unlike other intellectual property rights, copyright does not require formalities such as registration or notification to enjoy protection.

A voluntary copyright registration system is one of the four systems of copyright registration and documentation. It is mainly for purposes of identifying the owner of the copyright and related rights and may be used for purposes of enforcement or asserting ownership of copyright. A voluntary copyright notification system serves the same purpose except that it does not require the actual deposit or examination of applications. Copyright offices such as those in Kenya, Ghana, Uganda, Sudan and the Gambia, among others provide voluntary copyright registration or notification systems. There are various challenges in setting up the system as the national systems are not uniform and some countries do not have the voluntary registration systems at all. In some countries like Malawi and the United Republic of Tanzania, although the Copyright Society of Malawi (COSOMA) and the Copyright Society of Tanzania (COSOTA) act as both the collective management organisation and the copyright office, their registration systems are purely for collective management purposes and are not voluntary registrations systems.

A feasibility study was carried out in six ARIPO Member States namely Ghana, The Gambia, Kenya, Malawi, Namibia, and Zambia. From the six countries, it is evident that there is need to have a proper legal and institutional framework at the national level that in turn supports the proposed ARIPO system. The ARIPO system will be more of a central point, a secondary registration system that is connected to existing systems at national level. This will require capacity building and establishment of national systems where they do not exist.

The feasibility study helped in the drafting of a policy document and a road map for the implementation of the ARIPO voluntary copyright registration or notification system.

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## **LIST OF ACRONYMS AND ABBREVIATIONS**

ARIPO	African Regional Intellectual Property Organization
BIPA	Business and Intellectual Property Authority
GDA	Global Documentation System
CISAC	International Confederation of Societies of Authors and Composers
CMO	Collective Management Organisation
COSOMA	Copyright Society of Malawi
GCO	Ghana Copyright Office
GHAMRO	Ghana Music Rights Organisation
ICT	Information Communications Technology
KECOBO	Kenya Copyright Board
NASCAM	Namibian Society for Composers and Authors of Music
NCAC	National Centre for Arts and Culture
PACRA	Patent and Companies Registration Agency
TRIPS	Trade Related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
WIPOCOS	WIPO Software for Collective Management
WPPT	WIPO Performances and Phonograms Treaty
ZAMCOPS	Zambian Copyright Society

## 1.0 INTRODUCTION

1. Copyright is the exclusive right granted to authors/owners of works for the original expression of an idea in any tangible format. It is a branch of intellectual property law that deals with intellectual creations and covers books, music, film, photographs, computer software, and artistic designs among others. Protection of copyright is automatic and does not require registration for rights to be granted. The prohibition of formalities for the recognition of copyright is historical.

2. Copyright and related rights, unlike other intellectual property rights are automatically protected once an idea has been reduced to material form. Protection is territorial but extends to other countries by virtue of the fact that they are members of international treaties to which country of origin is a member of. This includes the Berne Convention and the WTO Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement.

3. The establishment of a voluntary copyright registration or system at ARIPO is based on the 40<sup>th</sup> Administrative Council decision as part of the implementation of the extended ARIPO mandate to include copyright and related rights. It is important to note that unlike other intellectual property rights, copyright does not require formalities such as registration to enjoy protection.<sup>2</sup> Copyright confers automatically once an idea has been reduced to a tangible format. However, several countries, including some ARIPO Member States have come up with voluntary registration or notification systems, which are used for purposes of creation of databases, to help in enforcement of rights and may also be used as *prima facie* evidence for copyright infringement cases. The voluntary copyright registration and notification system is likely to increase job creation among rights holders, increase revenue through licensing and raise the profile of copyright and related rights within ARIPO Member States.

4. Countries such as Botswana, Ghana, the Gambia, Kenya, Malawi, Namibia, Rwanda, Sierra Leone, United Republic of Tanzania, Sudan, Uganda and Zambia, among others, have established registration systems based on existing legal provisions as well as practice. Some of these are voluntary registration systems while others are through collective management organisations. There is need to understudy the policy, legal and institutional framework, the resources, success as well as the challenges faced and how to mitigate them.

5. The outcome of the study, will lead to the development of a policy for ARIPO

## 1.2 BACKGROUND

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<sup>2</sup> This is provided for in Article 5(2) of the Berne Convention and Article 9 of the TRIPs Agreement.



6. During the 8<sup>th</sup> Session of the Council of Ministers held in Malawi, the Council extend the mandate of the Organization to include Copyright and Related Rights to enable ARIPO to coordinate copyright and related rights at regional level. ARIPO has since taken steps to implement the mandate through policy development, capacity building and advocacy.

7. Africa has a lot of creativity and culture that needs to be nurtured, promoted and protected for the benefit of the right holders and users. It is within this context that ARIPO needs to elevate the status of copyright and related rights in its Member States and Africa at large by helping them to realize the benefits of implementing IP rights. One such approach that has been proposed and approved by the fortieth Administrative Council is the roadmap to the establishment of a voluntary copyright registration & notification system within the African Regional Intellectual Property Organization. To ensure the successful implementation of the road map, a feasibility study to be undertaken in ARIPO member states and development of policy framework was recommended.

8. A voluntary copyright registration system offers right owners a simple and effective means of notification as to authorship and/or ownership of rights. National registration systems often hold valuable information on creativity, both from a legal and economic standpoint. The notification system provides important records with regard to copyright works and may be used in various transactions, which involve transfer of rights including the negotiations for royalties payable. In addition, registration can also help to delimit the public domain, and consequently facilitate access to creative content for which no authorization from the right owner is needed.<sup>3</sup> The information contained in national registries also serves the public interest by providing a source of national statistics on creativity and culture. Registration of works provides an assurance to the business community and opens doors for rights holders. Finally, national registries may constitute a repository of cultural and historical heritage, as they represent collections of national creativity, including works and other creative contributions.

9. It is important to note that due to historical reasons and the nature of copyright, the voluntary registration and notification system for copyright and related rights is a recent phenomenon. One of the main reasons is the fact that copyright, unlike other intellectual property rights does not require registration for the grant of rights. Article 5(2) of the Berne Convention clearly states that the enjoyment of copyright shall not be subject to any formalities.<sup>4</sup>

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<sup>3</sup> This covers licensing, assignments as well as testamentary disposition.

<sup>4</sup> Article 5(2) of the Berne Convention provides “The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”

10. Among the ARIPO Member States, the following countries have the system in place: Botswana, Ghana, the Gambia, Kenya, Namibia, Rwanda, Sierra Leone, Sudan, Uganda, and Zambia.

### **1.3 SCOPE AND OBJECTIVES OF THE STUDY**

11. As per the terms of reference, the feasibility study will be based on studies in six countries, namely: Ghana, the Gambia, Malawi, Namibia, Kenya and Zambia and will also detail the feasibility and potential sustainability of the Voluntary Copyright Registration & Notification System.

a. The study examines

- The nature, number and type of beneficiaries and other stakeholders that the Voluntary Copyright Registration & Notification System of ARIPO will potentially affect;
- All Member States, organisations and agencies impacted on by or involved in the Voluntary Copyright Registration & Notification System of ARIPO;
- All major problems experienced by the supposed beneficiaries and by any other parties likely to be involved, the causal inter-relationships of these problems, and the inter-sectoral links;
- Other interventions or priorities by any Member State, national organization or donor which may be affected by the Voluntary Copyright Registration & Notification System of ARIPO;
- Appropriate technology, technical matters and technical assistance;
- Institutional and management capacity and arrangements, public and private; and
- Economic and financial aspects.

b. Development of policy from the feasibility study

12. The feasibility study, undertaken in ARIPO Member States is meant to facilitate the successful implementation of the road map and the development of policy at ARIPO. It is important to note that this takes cognisance of the importance of copyright and related rights in economic and social development within the ARIPO Member States.

13. The study aims to establish the technical, economic and financial, institutional and managerial, environmental and socio-cultural, and operational aspects of the Voluntary Copyright Registration & Notification System at the African Regional Intellectual Property Organization.

## **1.4 METHODOLOGY**

14. The main objective of the feasibility study is to develop the policy framework and provide empirical data to assist decision makers in ARIPO with sufficient information to justify the roadmap for the establishment of a Voluntary Copyright Registration & Notification System. This involved a multi-pronged approach that included legal doctrinal review of existing copyright laws and policies as well as comparative analysis. It examined the historical background of the existing notification systems.

15. The consultants examined the administrative framework, based on documents provided by the copyright offices that provide the voluntary registration or notification systems and collective management organisations. The consultants used documentation available either online or other documents accessed from the relevant offices. To augment the information obtained from the documentation, including empirical data, it was necessary to get information from the offices through online semi structured interviews either online or through phone calls. This is due to the fact that some information was not documented or readily available online such as challenges that are faced by the registration systems, and proposals to mitigate them.

16. The consultants used key informant interviews to engage the government institutions responsible for copyright and related rights (policy making and implementation), administrative and enforcement agencies where applicable, and some of the rights holders including authors and copyright organisations and other relevant government agencies. From the key informant interviews and desk research, the consultants identified lessons learnt, including best practices, challenges and problems, what works and what should be, or not be replicated.

17. The study looked at the issues of sustainability, institutional and administrative support, efficiency and effectiveness of voluntary registration of copyright and related rights and the resource requirements such as human resources, information, technology and communication, financial implications as well as the economic benefits.

## **2.0 FINDINGS**

18. Registration of copyright and related rights, unlike industrial property is voluntary and does not confer rights. As stated above, copyright confers automatically once an idea has been reduced into a tangible form. The main purpose of the registration or notification system is to help in creation of a database, improve business opportunities for right holders and enforcement of copyright and related rights. The registration certificate may be used as *prima facie* evidence of copyright and related rights.

19. The prohibition of formalities for copyright protection is the result of a historical process. Prior to the Berne Convention, most countries had their own registration systems with their own formalities. The Berne Convention introduced the principle that authors only required to conform to formalities within their countries. In 1908, this was revised to introduce the formality free provision that is currently contained in Article 5(2) of the Paris Act of 1971.<sup>5</sup>

20. In ARIPO member states, the voluntary copyright registration and notification is a recent phenomenon as it was adopted post Berne for various reasons which include:

- (a) The registration and notification facilitates the exercise of copyright and related rights by providing owners with a simple way to establish ownership of rights.
- (b) Rights holders and third parties can access the registers and certified copies that can be used to provide important information including ownership and transfer of rights.<sup>6</sup>
- (c) Registration and notification can also help delimit the public domain expanding access to works. It may also be used to provide information on the creative works within a certain jurisdiction, providing data and statistics that may be used for economic, cultural and social development.<sup>7</sup>
- (d) The digital technologies and more so the internet also provide more opportunities for creation, dissemination and access to works and the registries can help in providing information as to ownership and facilitate access and use.

21. The registration and notification systems vary from country to country with some simply requiring a declaration as to ownership while others require a deposit of the works and have more elaborate verification systems.

22. The voluntary registration and notification system may be provided for in the law or may be purely administrative as will be discussed below. It is important to look at the international framework as well as the national regimes and how they deal with voluntary registration or notification of copyright and related rights.

## **2.1 LEGAL FRAMEWORK**

23. Copyright is a bundle of exclusive rights granted to the creator/owner of the rights to the exclusion of all others for a specific period of time subject to specific limitations and exceptions. Copyright laws in the ARIPO Member States provide for protection of copyright and related rights in their national laws, which draw from existing treaties and agreements to which they are signatories.

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<sup>5</sup>[http://www.wipo.int/copyright/en/activities/copyright\\_registration/](http://www.wipo.int/copyright/en/activities/copyright_registration/)

<sup>6</sup> Copyright Registration and Documentation Systems WIPO available at [http://www.wipo.int/copyright/en/activities/copyright\\_registration/](http://www.wipo.int/copyright/en/activities/copyright_registration/)

<sup>7</sup>*Ibid*

### **2.1.1 International Framework**

24. The international treaties and agreements such as the Berne Convention and the TRIPS Agreement set out the minimum standards of protection for copyright. The WIPO Copyright Treaty (WCT), WIPO Performances and Phonograms Treaty (WPPT) and the Beijing Treaty set out to address the issues brought about in the digital environment.

25. There are three important principles at international level set out by the Berne Convention and which are captured in other international instruments, which are important in this study, namely; national treatment, automatic protection and independence of protection.

26. Under the principle of national treatment, protection conferred by national law will be applicable to rights holders who are citizens or residents of other countries that are members of the Berne Convention. It also applies to persons who are not citizens but created the work in a Berne Member country.

27. The second principle is that of automatic protection. Under Article 5(2), there shall be no formalities for the enjoyment of copyright and related rights. Therefore, once an original work has been reduced to material form, the works shall automatically enjoy the protection. The provision does not preclude voluntary registration at national level as long as it is not a requirement for the conferment of copyright and related rights.

28. The third important principle is that of independence of protection whereby the enjoyment and exercise of copyright in a country, which is a member of the Berne Convention is independent of the existence of copyright protection in the country where the work originated from, as long as it is also part of the Union. These principles are important in relation to the voluntary registration systems both at national and regional levels. The author/right holder is not obliged to refer to the national law of the country that he or she originally claims protection. They however shall enjoy the same level of protection.<sup>8</sup>

29. These are important when considering a regional voluntary registration system for copyright and related rights.

### **2.1.2 Regional Framework**

30. There is currently no specific legal instrument at the regional level for the ARIPO Member States in relation to copyright and related rights. Article III of the Lusaka Agreement requires ARIPO to develop and promote copyright and related rights in the Member States and Africa as a whole, but there is no legal or policy framework to support the same. The institutional framework needs to be strengthened by having legal and policy framework and through the enhancement of resources to the copyright department within ARIPO.

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<sup>8</sup>Article 5(2) of the Berne Convention

### 2.1.3 National Legislation

31. ARIPO Member States have taken different approaches to voluntary registration/notification of copyright and related rights. In the countries under study and other ARIPO Member States, there are no express provisions for voluntary registration but this may be implied from other provisions that require the copyright offices to maintain databases of copyright works.

32. Section 39 of the Copyright Act of Ghana<sup>9</sup> provides that the Copyright Administrator shall open and maintain registers of authors, works and productions. Section 5 of the Copyright Act of Kenya<sup>10</sup> provides that the Kenya Copyright Board, shall among other things, maintain an effective data bank on authors and their works. The implementing regulations have detailed provisions on the register of works to be maintained by the copyright office.<sup>11</sup> The Copyright Office in the Gambia, under section 49 of the Copyright Act is mandated to accept works for registration into the government database as required by the Act and the regulations.<sup>12</sup> However, the country does not, have a registration or notification system as the regulations are yet to be implemented. In Malawi, the law provides that the Society shall maintain a register of authors, performers, producers of sound recordings, broadcasters and publishers.<sup>13</sup> The Zambian Copyright Act makes provisions for the Register of Copyright which shall be maintained by the Registrar of Copyright.<sup>14</sup> The register covers all copyright and related rights except broadcasts of cable programs.

33. The laws are however clear that copyright registration shall not be a requirement for copyright protection, making the system voluntary. The rights holders are under no obligation to register their works with the copyright offices or the collective management organisations. The Copyright Act in Zambia expressly states that the existence and enforceability of copyright is independent of copyright registration.<sup>15</sup> This is also captured in the law in Ghana.<sup>16</sup> In Kenya, this is provided for in the regulations.<sup>17</sup> One of the proposals to amend the Copyright Act of Kenya is to include an express provision stating that there shall be a voluntary notification system for copyright and related rights but it shall not be a prerequisite to copyright protection.<sup>18</sup> In Namibia, the registration system is administrative as the Copyright Act makes no mention of a registration system and there are no regulations or rules that govern the registration system.<sup>19</sup>

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<sup>9</sup>Copyright Act, 2005, Act 690

<sup>10</sup>Copyright Act Chapter 130 of the Laws on Kenya

<sup>11</sup> Regulation 8 of the Copyright Regulations 2004, Kenya and Regulation 2 of the Copyright Regulations Ghana

<sup>12</sup> Section 49 Gambia Copyright Act and the Works Registration Regulations 2010

<sup>13</sup> Section 5(1) (b) of the Copyright Act of Malawi 2016

<sup>14</sup> Section 39 of the Zambia Copyright and Performance Rights Act 1994 (as Amended in 2010)

<sup>15</sup> Section 39(4) of the Zambia Copyright and Performance Rights Act (as Amended in 2010)

<sup>16</sup> Section 39(4) of the Copyright Act of Ghana

<sup>17</sup> Regulation 8(3) of the Copyright Regulations 2004

<sup>18</sup> Copyright (Amendment) Bill 2016

<sup>19</sup>Section 61, of 1994 Copyright Act. provides that the Minister of Information and Broadcasting may make Regulations in relation to any matter required or permitted under the Act.

## **2.2 ADMINISTRATIVE/INSTITUTIONAL FRAMEWORK**

34. The system of copyright administration and management also varies from country to country. The copyright offices are either independent offices or part of an existing structure such as the Office of the Registrar General or the Intellectual Property Office.

### **2.2.1 Copyright Offices as Part of Government Ministries/Agencies**

35. In Zambia, until early 2017, the office of the Registrar of Copyright was under the Ministry of Information but was moved to the Patents and Companies Registration Agency (PACRA).<sup>20</sup> Since April 1, 2017, the Copyright Office in Namibia falls under the Business and Intellectual Property Authority (BIPA).<sup>21</sup> BIPA is responsible for protection of authors, development of and enforcement of copyright and related rights. The Copyright Office in the Gambia falls within the ambit of the National Centre for Arts and Culture (NCAC).<sup>22</sup> The copyright office in the Gambia is responsible for registration of copyright and related rights, enforcement and training as is the case with the other offices in Kenya, Ghana, Namibia and Zambia, However, as stated in paragraph 2.1.3 above, there is no registration system in place in the Gambia

### **2.2.2 Independent Copyright Offices**

36. In Ghana, the Copyright Office is established under the law and its mandate is to ensure the effective administration of copyright and related rights in Ghana and to encourage and promote creativity for economic development.<sup>23</sup> The Kenya Copyright Board is established as an independent state corporation to deal with administration and enforcement of copyright and related rights in Kenya.<sup>24</sup>

### **2.2.3 Copyright Office/ Collective Management Organisation**

37. The Copyright Society of Malawi (COSOMA) is established to deal with collective management as well as other copyright matters.<sup>25</sup> The law mandates COSOMA to maintain registers of works, productions and associations of authors, performers, translators, producers

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<sup>20</sup> Section 54(1) of the Copyright and Performances Act of 1994 (As Amended in 2010) of Zambia creates the office of the Registrar of Copyright.

<sup>21</sup> This was under the Business and Intellectual Property Act No. 198 of 2016. BIPA is responsible for administration and protection of business and intellectual property.

<sup>22</sup> The NCAC is a semi-autonomous institution established by the NCAC Act of 2004, to preserve, promote and develop Gambian arts and culture. The Ministry of Tourism and Culture is responsible for copyright matters

<sup>23</sup> The Copyright Office was statutorily established by the Copyright Law, P.N.D.C Law 110 of 1985 and was saved under the current Copyright Act, 2005, Act 690. In exercise of the powers conferred on the Minister responsible for Justice by sections 27, 49 and 74 of the Copyright Act, Regulations were drafted on the 25<sup>th</sup> of January, 2010.

<sup>24</sup> Section 3 of the Copyright Act Cap 130 of the Laws of Kenya

<sup>25</sup> Section 4 of the Copyright Act of Malawi 2016

of sound recordings, broadcasters and publishers.<sup>26</sup> COSOMA also has to ensure that there is constant improvement and continued effectiveness on copyright and related rights and implementation of the Act.<sup>27</sup> It is also mandated to devise programmes on promotions, training of copyright and related rights and co-ordinate with national or international organisations, which deal with copyright and related rights.<sup>28</sup> This puts it in a unique position as a copyright office as well as a collective management organisation.

38. The main difference between copyright offices and collective management organisations is that the former are established for the overall management of copyright and related rights within the country. The collective management organisations on the other hand are created solely for purposes of collection and distribution of royalties, identification of rights holders and are members' organisations. The registration at the CMOs is required for membership purposes and distribution of royalties while in the case of copyright offices; it is mainly for purpose of identification of the rights holder and creation of a database.

## **2.3 REGISTRATION OF COPYRIGHT AND RELATED RIGHTS**

39. There are different types of copyright registration and documentation systems and these include:<sup>29</sup>

- (a) National voluntary registration systems;
- (b) Registration and documentation systems under collective management organisations;
- (c) Private registration systems;
- (d) Information systems.

40. It is important to note that the national copyright offices carry out the voluntary registration or notification. Although in some countries, such as Malawi, and the United Republic of Tanzania, the CMOs, namely COSOMA and COSOTA, carryout the functions of national copyright office, registration is mainly for collective management of the rights.

### **2.3.1 National Voluntary Registration or Notification Systems**

41. The offices described in the preceding paragraphs are among other things charged with the registration of copyright and related rights. In Ghana, Kenya and the Gambia, the main purpose of the register is to:<sup>30</sup>

- a) Maintain a record of works: It provides an opportunity to create and maintain a database that may be used for verification of works at the national level as well cross border verification of works.

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<sup>26</sup> Section 5(1)(b) of the Copyright Act of Malawi

<sup>27</sup> Section 5(1) (h) of the Copyright Act of Malawi 2016

<sup>28</sup> Section 5(1) (i) of the Copyright Act of Malawi 2016

<sup>29</sup> For further reading see

[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_tk\\_mct\\_11/wipo\\_tk\\_mct\\_11\\_ref\\_t\\_8\\_1.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_tk_mct_11/wipo_tk_mct_11_ref_t_8_1.pdf)

<sup>30</sup> Section 49(2) of the Gambian Copyright Act and Section 39 of the Copyright Act of Ghana, Regulation 8(2) of the Copyright Legislation 2004 Kenya



- b) Publicise the rights of the owners, and
- c) Give evidence of the ownership and authentication of intellectual property. The certificate of registration or notification presumes that the person whose name appears on the certificate is the owner of the works.

42. In Kenya and Zambia, in addition to the above, the registration is used for purposes of enforcement of copyright and related rights through the implementation of the authentication device. The register is used to confirm ownership before the authentication device is issued. The enforcement officers can also use the register to verify the presumed ownership of the work. The registration has some procedural advantages as the burden of proof is shifted to the defendant in a claim in infringement. In such cases, the defendant is bound to rely on lack of knowledge of existence of copyright but the certificate of registration implies the legal presumption that anyone should have knowledge of the existence of copyright and can only adduce evidence as to invalidity or faulty registration.<sup>31</sup>

43. In Namibia, the system is more of a notification system and is mainly for record keeping. The system is seen to promote creativity by encouraging creative authors to produce original works. The main objective of the notification system is to provide both social and economic benefits to the citizens of Namibia and a foundation for further creativity based on existing works.

44. It is important to note that the certificate of registration or notification certificate may be challenged by a third party and it may be revoked by the copyright office.

45. Another benefit of the voluntary registration or notification system is that the rights holders can use the certificates as proof of ownership especially where they have to negotiate with users and other third parties in the chain of commerce. The certificates are also useful in disputes over ownership of copyright.<sup>32</sup> These become essential tools for negotiations especially in the software and audio-visual industry. The certificates can also be used to address issues of double registration and also help in the identification of the owner of the work.

46. The laws, where applicable, provide for the registration requirements.<sup>33</sup> All works eligible for copyright protection can be registered under the voluntary system. These include works of art, literary works such as books, computer software, audio-visual works such as films,

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<sup>31</sup> For further reading see Ricolfi M. *et al* Survey of Private Copyright Documentation Systems and Practices available at (Last accessed on April 22, 2017) [http://www.wipo.int/export/sites/www/meetings/en/2011/wipo\\_cr\\_doc\\_ge\\_11/pdf/survey\\_private\\_crdocsystems.pdf](http://www.wipo.int/export/sites/www/meetings/en/2011/wipo_cr_doc_ge_11/pdf/survey_private_crdocsystems.pdf)

<sup>32</sup> It is important to note that the certificates only provide prima facie evidence and are not proof of ownership.

<sup>33</sup> In the Gambia, the Works Registration Regulation 2010 provides for a registration form, prescribed fee and also a registration/certificate of copyright ownership.

documentaries and television programs, music including sound recordings, musical works, photographs and performances. For the works to be registered, one is required to:<sup>34</sup>

- i. Complete an application form (either online or in hardcopy) The application form includes the particulars of the works such as the owner's name and address, particulars as to nationality, category of works, date of copyright protection, details of agent where applicable, particulars of original owner where the work has been transferred, licence or assignment type of copyright claimed and a statutory declaration.
- ii. Attach two copies of the works (depending on the category of works one copy may suffice). This may be in digital or non-digital format.
- iii. Registration fee; the fees are paid directly to the copyright office when depositing the application form with relevant attachments and/or deposits. In Kenya, payment is made to the bank account and a slip of the deposit submitted with the application or payment may be made through mobile money transfer. In Ghana and Namibia, the fees are payable at the Copyright Office. The same will be applicable in the Gambia, once the regulations are implemented.

47. The registration process includes verification of the work and if the Copyright Office is satisfied that the conditions have been fulfilled, a certificate of registration or certificate of notification is issued to the applicant. In Zambia, there are only two people who examine the application, and where necessary, they consult external experts to verify the work. In Kenya and Ghana, the legal department is charged with the responsibility of verification of the works. The certificate may be revoked under very specific circumstances such as double registration, or where the application was done fraudulently.

48. Registration of copyright works in Kenya takes a maximum of five working days while in Ghana and Zambia it takes up to one month. In Namibia, it takes ten days and it's important to note that certificates are not issued for sound recordings and musical works. However, applicants' forms are authenticated after vetting is done.

49. Registration is open to copyright owners who are residents of, or have created the work in the country where registration one is seeking registration or are members of the Berne Convention. . In Ghana, Kenya and Namibia, foreign rights holders may register their works provided they fulfil the requirements. In Ghana, most of the works registered are of Ghanaian origin. Only about 3% of registered works (music) in a given year are by foreigners, usually Nigerians, Ivoirians and occasionally Cameroonians. Categories of works registered in Ghana are literary works, artistic works (including logos), audio-visual works, computer software, sound recordings and musical works but the majority are musical works. In Namibia, there is a wider variety of the types of works that have been registered, including, literary, musical, artistic, photographs, cinematographic/ audio-visual, architectural designs, sculptures,

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<sup>34</sup> See <http://www.copyright.go.ke/8-program/2-copyright-registration.html> for registration in Kenya, [http://www.mibs.gov.zm/?q=copyright\\_registration](http://www.mibs.gov.zm/?q=copyright_registration) for registration in Zambia.

woodwork, handicrafts, indigenous, poetry, stories, drawings, metal work, plays, television programs/ shows, folk songs and instrumental folk music, paintings, franchises, business models and electronics.

**TABLE1: WORKS REGISTERED AS OF MAY 2017**

Category of works	Ghana	The Gambia	Kenya	Namibia	Zambia
Literary (books, software,	4419	0	3937	795	-
Artistic (paintings, visual arts, photographs)	319	0	415	6	-
Sound recordings (music, spoken word)	-	0	1150		-
Audiovisual works (films, fixed performances, documentaries, TV programs)	679	0	3221	81	-
Musical works	8389	0	1106		-
Other Works	N/A	0	N/A	318	-
<b>Total Works</b>	<b>13 806</b>	<b>0</b>	<b>9829</b>	<b>1200</b>	<b>3 542</b>

50. It was not possible to get the registration per category in Zambia as the records are manual and the office was only able to provide the total works registered for the period. This underscores the importance of having an automated system of registration and notification as well as electronic records. It was possible to get the breakdown of works from Kenya as the records are automated and the system was able to generate them instantly.

**TABLE 2: REGISTRATION BY CATEGORY PER ANNUM IN KENYA**

Year	Literary Works	Artistic Works	Musical Works	Audiovisual Works	Sound Recordings	Total Works Per year
2002	0	0	0	0	0	<b>0</b>
2003	1	0	0	0	0	<b>1</b>
2004	0	0	0	0	1	<b>1</b>
2005	0	0	1	2	1	<b>4</b>
2006	2	0	0	2	0	<b>4</b>

2007	47	1	5	0	0	<b>53</b>
2008	115	12	39	44	1	<b>211</b>
2009	203	13	35	51	3	<b>305</b>
2010	312	44	499	1310	4	<b>2169</b>
2011	491	35	349	333	0	<b>1208</b>
2012	297	47	164	179	22	<b>709</b>
2013	467	57	14	258	255	<b>1051</b>
2014	576	61	0	269	227	<b>1133</b>
2015	584	54	0	476	370	<b>1484</b>
2016	592	71	0	190	188	<b>1041</b>
2017 (up to May)	250	20	0	107	78	<b>455</b>
<b>Total per Category</b>	<b>3937</b>	<b>415</b>	<b>1106</b>	<b>3221</b>	<b>1150</b>	<b>9829</b>

From the above table, is important to note that the number of works registered is quite low and Kenya get an average of USD 7 020 per annum from registration.

**TABLE 3: REGISTRATION BY CATEGORY PER ANNUM IN GHANA**

<b>Year</b>	<b>Musical Works</b>	<b>Literary Works</b>	<b>Audiovisual Works</b>	<b>Artistic Works</b>	<b>Computer Software</b>	<b>Total Works</b>
<b>2001</b>	448	175	23	11	0	<b>657</b>
<b>2002</b>	705	165	7	4	0	<b>881</b>
<b>2003</b>	621	171	3	12	1	<b>808</b>
<b>2004</b>	656	190	16	1	2	<b>865</b>
<b>2005</b>	709	220	55	35	1	<b>1020</b>
<b>2006</b>	633	177	21	22	2	<b>855</b>
<b>2007</b>	575	174	27	16	4	<b>796</b>

<b>2008</b>	499	218	52	12	2	<b>783</b>
<b>2009</b>	500	239	59	19	11	<b>828</b>
<b>2010</b>	586	303	20	22	3	<b>934</b>
<b>2011</b>	541	387	133	22	4	<b>1087</b>
<b>2012</b>	609	459	71	29	4	<b>1172</b>
<b>2013</b>	413	498	47	48	9	<b>1015</b>
<b>2014</b>	477	366	59	39	14	<b>955</b>
<b>2015</b>	417	610	86	27	12	<b>955</b>
<b>TOTAL per Category</b>	<b>8389</b>	<b>4352</b>	<b>679</b>	<b>319</b>	<b>69</b>	<b>13806</b>

51. Payment of registration and notification fees varies from country to country. In Kenya and Ghana a non-refundable application fee is required and may be paid upon submission of the application or paid before, as is the case in Kenya. In Kenya, it costs KES 1,000 (USD10), while in Namibia it costs NAD 100.<sup>35</sup> Registration in Zambia is free. In the Gambia, once the Copyright Regulations come into force, the application fee will be D600.<sup>36</sup>

52. The cost of registration in Ghana is the same for both local and foreign works but varies which each category of works. The total cost per category includes the purchase of the various application forms for GH¢10.<sup>37</sup> The costs for each category of works are as follows:

**TABLE 4: REGISTRATION FEES PER CATEGORY IN GHANA**

Category	Literary works	Artistic works	Logos	Audio-visual works	Computer Software	Sound recordings / musical works
Fees	GH¢50	GH¢70	GH¢110	GH¢70	GH¢160	GH¢40

**TABLE 5: TABLE REGISTRATION OR NOTIFICATION**

Registration and Notification requirements	Ghana	The Gambia*	Kenya	Namibia	Zambia
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<sup>35</sup> USD1= NAD13

<sup>36</sup> USD 1 = D46

<sup>37</sup> USD1 = GH¢4

\* The Registration System has yet to be put in place. No registration has been done as of May 2017.

Application form	Yes	Yes	Yes	Yes	Yes
Application fees	As per table 4 above	D600	KES 1,000	NAD 100	Free
Deposit of works	2 copies	2 copies	2 copies	2 copies	2 copies
Registration time	One Month	N/A	Five days	Ten days	30 working days
Verification of works	Yes	No	Yes	No	Yes
Statutory Declaration	Yes	N/A	Yes	N/A	Yes
Registration of Foreign works	Yes	No	Yes	Yes	No
Identity Documents	No	No	No	Yes	No

53. The registration process requires trained staff to manage it from the beginning to the issuance of the certificate. The Zambia Copyright Office currently has only two members of staff. It stopped the registration of music and this is currently done by the collective management organisation, *Zambian Music Copyright Society (ZAMCOPS)*<sup>38</sup>. The office plans to have linkages with ZAMCOPS. In Ghana there are eight staff members in total. Kenya currently has 40 members of staff at KECOBO with about 14 members of staff dealing directly with registration. Namibia currently has 2 but is in the process of recruiting more staff. The Gambia also has 2 staff members in its Copyright Office.

### **2.3.2 Registration under Collective Management Organisations**

54. Malawi provides a unique scenario, as it is a collective management organisation and a copyright office. As stated in paragraph 2.2.3 above, it deals with both collective management of copyright and related rights and to a certain extent also deal with other copyright issues such as protection of rights holders, maintenance of a register, ensure constant review and improvement of copyright legislation, training and awareness creation on copyright and related rights, take part in bilateral and multilateral negotiations on matters of copyright, enforcement of copyright and related rights and advise the Minister on matters set out under the Act. A similar system exists in the United Republic of Tanzania.

55. In Malawi, the registration at COSOMA is open to local rights holders and foreign rights holders will only be registered if they provide declarations from the collective management organisation of the country of origin. Registration of works in Malawi is strictly for purposes of collective management for different categories of works. The register is used to identify the owner of the works.

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<sup>38</sup> When ZAMCOPS was established in 1996, the Copyright Office stopped registration of musical works.

56. COSOMA is a member of BIEM an international organisation representing mechanical rights societies, International Federation of Reproduction Rights Organizations (IFRRO) and International Confederation of Societies of Authors and Composers (CISAC) and has reciprocal agreements with other collective management organisations in other countries. It does not charge an application fee for membership but once admitted as a member, one has to pay an ID fee of MK 3 500 (US 5 \$).

**TABLE 6: REGISTRATION AT COSOMA**

Registration requirements	Malawi
Application form	Yes
Application fees	Free
ID processing fee	Yes. K3, 500=\$5
Deposit of works	Yes
Registration time	Two weeks
Verification of works	Yes
Statutory Declaration	No
Registration of Foreign works	Only if cleared in country of origin

57. In Malawi, the WIPOCOS system for collective management has been deployed and is currently in use. Since its inception, it has registered 67 515 works as of May 2017 and registers an average of 1891 copyright works per

annum.

**TABLE 7: WORKS REGISTERED AT COSOMA**

Musical works	Literary Works	Audio Visual Works	Photographs	Total
64 139	3005	370	70	<b>67 515</b>

58. However, in the case of purely collective management organisations like in the case of Kenya, Ghana, Namibia and Zambia, the collective management organisations are separate entities for different categories of works and each has their own registration system. They are established either by statutory provisions for instance, Ghana and the Gambia or they may be privately established entities as is the case in Kenya. In Namibia, the CMO is established administratively. The purpose of registration for the collective management organisations as stated above is mainly for purposes of collection and distribution of royalties. The objective of registration under CMOs is to manage the rights of their members.

59. This study shall however focus on the voluntary registration and notification system under the national copyright offices.

### **2.3.3 Voluntary Registration and Notification Systems**

60. As stated above, the voluntary copyright registration and notification systems vary from country to country. They differ in terms of subject matter, accessibility and search tools as well as the format. These systems are either automated or manual. In Zambia, and the Gambia, the registration process is manual. Namibia is still trying to get an automated system in place. In Kenya and Ghana, the process has been automated to a certain extent with the modification of the WIPO Global Documentation System (GDA).

61. The voluntary copyright registration or notification system requires funding and this may be raised from the application fees, as is the case with the Gambia and Kenya. In Ghana, the registration system is funded through government subvention and income generated from the registration fees. The Copyright Office may also be funded through the exchequer or get other external funding.

### **2.3.3.1 The Global Documentation System (GDA) system**

62. The World Intellectual Property Organisation in line with its technical assistance to its Member States helped in the implementation of the GDA copyright registration system. The GDA assists copyright offices in Member States to improve efficiency of copyright registration processes through IT automation of the administration and management of registration data.<sup>39</sup> The GDA included application software, database and hardware, which was first developed in and used in Latin America. The GDA has the following features:<sup>40</sup>

- Server client configuration
- Browser accessible on the client side
- Documentation (copyright registration for different types of work)
- Local database depository (creation of national copyright database repositories for authors, publishers, works etc)
- Search for discovery of title, an author/creator or combination of all these (against the local database)
- File attachment of works (in digital format and subject to local conditions)
- Statistical report generation
- Registration certificate generation
- Record of payment
- User and system administration
- User access control with system functions protected at role level

63. Due to the flexible nature of the system, each country was able to tailor it to suit the copyright office. The system was successfully implemented in Kenya with a payment module included where the applicants can pay the money using mobile money transfer. The GDA was also deployed in Zambia and Ghana.<sup>41</sup> However, it is important to note that WIPO withdrew the technical support for the GDA in 2015 and the countries were given the source

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<sup>39</sup><http://www.wipo.int/copyright/en/initiatives/gda.html>

<sup>40</sup><http://www.wipo.int/copyright/en/initiatives/gda.html>

<sup>41</sup> The GDA was deployed in at least 9 countries in Africa before it was phased out in 2015



codes and requested to continue on their own. As this requires extra resources, Zambia was not able to continue with the system. Kenya continued modifying the system and now has an effective registration system and comprehensive database covering all categories of rights.<sup>42</sup> Ghana also experienced major technical problems and disruptions after the withdrawal by WIPO of the technical support. However, after extensive work on the system, it is functioning but not optimal. The Gambia has no registration system in place.

### **2.3.5 Nature and Type of Beneficiaries**

64. The main beneficiaries of the voluntary copyright registration and notification system in the countries under study include the rights holders, users, collective management organisations, government agencies, business and other corporate entities. As stated earlier, the system may be used to create a database, which can be used as a reference point for creative works within a country, or for purposes of enforcement. The certificate may also be used as proof of ownership in cases where there is a dispute or for purposes of negotiation with third parties. An example is drawn from the Zambian Copyright Office where a dispute arose in relation to software that had been registered by a student who subsequently got into a contract with a bank. The student was able to prove that the work was his, based on the notification with the Copyright Office.

65. Legal counsel can also use the certificate of registration or notification to settle copyright disputes. In one case at the Kenya Copyright Board (KECOBO), there were two similar works where there was a dispute as to ownership as each had a certificate of notification from KECOBO. On close examination of the works in the database, KECOBO was able to establish that they were actually different works as one was registered, as an artistic work while the other was an audio-visual work.<sup>43</sup> The copyright offices can also use the registration or notification system for purposes of enforcement such as the administration of the authentication device as is the case in Ghana, Zambia, Malawi and Kenya. The office is able to identify the legitimate rights for purposes of enforcement of rights.

66. Users such as broadcasting organisations and corporate entities can also refer to the register or database to verify claims of ownership before they get into contracts with the authors or other rights holders. For instance, where a rights holder wants to licence or assign his or her rights, the potential licensee or assignee can verify the same with the copyright office. The Copyright Offices and the government as well as other public agencies also benefit from the system as it creates a database that may be accessed and used for preservation of works as well as archiving. This may be used for purposes of research and other creative activities. The registration system is also important for verification of cross border works. For instance, the Copyright Office may get a request from a corresponding office in another country to verify ownership of works. The registration or notification system is then used as a point of reference. Other organisations that may benefit from the

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<sup>42</sup>[www.copyright.go.ke](http://www.copyright.go.ke)

<sup>43</sup>This example demonstrates the importance of registering the different types of copyrightable works, since these will help in allaying confusion.

registration and/or notification system are the collective management organisations as well as the industry organisations.

### 2.3.6 Challenges

67. There are various challenges to the copyright registration or notification system, which affect the rights holders, users and copyright offices.

- i. Funding is limited as some offices as in the case of Zambia where no fee is charged for registration or notification. The registration system will require additional funding where there is no registration and notification fee or the fee is nominal.
- ii. Lack of clear legal/regulatory framework. In some cases the voluntary copyright registration and notification system is purely administrative.
- iii. As it is a voluntary system, there is no guarantee that the rights holders will register their works unless they see the benefits of the same or are given incentives.<sup>44</sup>
- iv. The registration or notification system is not uniform in the different countries. For instance, in some countries like Kenya, Ghana, and Zambia as well as Malawi, verification of the works is required, but in the Gambia, although this is a requirement, there is no system for verification.
- v. Limited or lack of human resources to administer the system. In some countries, the copyright office only has two members of staff while others have to work in other departments within the parent ministry.
- vi. Lack or limited automation. In Ghana, Kenya, Malawi and Zambia, although the systems are partly automated, they still require the rights holder to physically deposit the works in the copyright office when making the application. In Ghana, the situation is made worse by lack of the required technical skills to run the system.
- vii. Challenges of double registration due to the nature of the verification system. If the system is not automated, it might be difficult to verify the works especially if there is a resource limitation.
- viii. Technical issues with the systems. The withdrawal of the GDA system by WIPO has left several copyright offices that were under the programme in a difficult situation, as they either have to get alternative support or implement a new system. In most cases they were still in the process of making modifications to the system to suit the local situation. Security and confidentiality of the works deposited in the copyright office upon application. There is an issue with physical space as well as security of digital works. Since the applicants are required to deposit their works, most offices do not have adequate space to store the works.
- ix. Lack or limited technical expertise in setting up and maintaining the copyright registration systems at national level
- x. No linkage between the national offices as each has a separate system of voluntary registration or notification systems.

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<sup>44</sup>The Ghanaian administrator was concerned that the copyright office was not reaching as many people as they wanted and this had an impact on the number of registered works.

- xi. Territoriality. In some countries, the registration system is limited to local works; works either produced locally or by citizens or residents of the country. Where registration of foreign works is available, there is a requirement to have the works verified in the country of origin, which can be quite difficult. This is made worse if the other country does not have a copyright office or the office is limited in its functionality and has no registration system.
- xii. There are countries that do not have national copyright offices, for instance Liberia and Sierra Leone, and others have sections within the Department of the Registrar General such as Lesotho and Swaziland, which will present a challenge in setting up the ARIPO system.

### **3.0 A VOLUNTARY COPYRIGHT REGISTRATION AND NOTIFICATION SYSTEM FOR ARIPO**

68. From the foregoing, it is important to establish whether to have:

- (a) A regional voluntary copyright registration or notification system at ARIPO (primary registration) or;
- (b) A regional registry of works from the Member States (secondary registration)

69. A voluntary registration system and notification system as exists in various countries under study is a primary registration system, which requires the necessary legal and institutional framework. It would allow for registration of works at ARIPO by the rights holders from the ARIPO Member States. This however requires a policy and legal framework at ARIPO to support it. It is not viable as it would require direct registration by rights holders from the Member States as there is no legal framework and the system is voluntary.

70. The register on the other hand would create a secondary system at ARIPO where works that have been registered in ARIPO Member States can be documented at ARIPO from the copyright offices, either directly or through linking the different registration systems.

### **3.1 ASSESSMENT OF THE TECHNICAL, ECONOMIC AND FINANCIAL, INSTITUTIONAL AND MANAGERIAL, ENVIRONMENTAL AND SOCIO-CULTURAL FEASIBILITY**

71. Having looked at the registration and notification systems in the ARIPO Member States, it is important to examine whether or not the setting up of the voluntary copyright registration or notification system is feasible in ARIPO.

#### **3.1.1 Financial Feasibility**

##### **(a) Regional Voluntary Copyright Registration and Notification System**

72. Based on the study in the six Member States, it is clear that voluntary registration and notification of copyright does not generate income for the copyright offices to cover costs other than registration. The application/registration fees from the study countries range from USD 0 to USD 40.<sup>451</sup> As per the table in the previous section, Zambia does not charge any fees for registration, the lowest fee in Ghana is USD 10 and the highest one can pay in the case of computer software is USD 40. In Kenya, the registration fee is USD 10, Namibia USD 7.60 while in the Gambia it is USD 13. Taking into account that Kenya has registered 9829 works, at the rate of USD per work, it works out to a total of USD 98 290 for a period of 15 years thus raising only USD 6 552.60 per annum. In Namibia, a total of 1200 works had been registered as of May 2017. The total amount from registration fees is USD 9120. Zambia does not impose any registration fees.

73. The rights holders already find the fees quite high and since it is a voluntary system and they know that copyright confers automatically and does not require registration, not many register their works. Some of the creative authors find it expensive and request for waivers on the fees. In some instances, especially where the rights holders have many works that they need to have registered at a go, they find the cost prohibitive. For example, one university sought to register over 4000 works with the Kenya Copyright Board but that would have cost them USD 40 000. KECOBO allowed them to register the works in catalogues of 100 works each to reduce on costs and allow them to register.

74. The registration fee collected is barely enough to cover the administrative costs and the offices have to rely on funding from the exchequer. For ARIPO, there would be need to allocate resources from its budget or seek external funding to have the primary registration system. It will also be difficult to convince rights holders in Member States like Zambia to pay for registration as at the moment it is offered free of charge.

75. Setting up and maintenance of the voluntary copyright registration system is costly and will require support from within ARIPO and from development partners. As demonstrated in the countries under study, when the GDA collapsed, the offices had to look for alternative means to fund and run the systems. If the system is expected to generate income for ARIPO, then it is not viable, as it will require substantial investment by ARIPO. It is notable that ARIPO only recently included copyright in its mandate and the copyright department within ARIPO is expected to generate income or source for funding from development partners.

#### **(b) Secondary Registration of Copyright and Related Rights**

76. Taking into account the nature of copyright and related rights and the systems that exist within the Member States, it would be feasible to have a secondary copyright registration system, which will provide a central database of works registered within the Member States. The system would link the various registries in the copyright offices. As a secondary registration system, the financial implications for ARIPO would be minimal as the ICT

department at ARIPO can create a system or modify the existing systems to accommodate it. The national copyright offices can pay a fee to ARIPO to have the works included in the ARIPO registry. However, it is important to note that the copyright offices do not generate much income and may require further support from their respective governments.

### **3.1.2. Economic Feasibility**

#### **(a) Regional Voluntary Copyright Registration System**

77. There are no direct economic benefits to ARIPO due to the fact that the regional voluntary copyright registration and notification would be quite costly to implement as stated in paragraph 3.1.1 (a) above. Secondly, as stated earlier, copyright registration, unlike other intellectual property rights does not confer any proprietary rights to the rights holder, as copyright protection is automatic. Since registration is free in some ARIPO Member States, it is unlikely that there will be any fees required to have the works included in the ARIPO registration system.

78. There is no incentive for the rights holder to register the works directly with ARIPO. It is already quite difficult to get the rights holders to do so at national level. And as stated earlier unlike industrial property where the applicant can designate ARIPO Member States in order to enjoy protection in those countries, copyright confers automatically and does not require designation. It is automatically protected in other member states as long as they are members of the relevant copyright treaties to which the country of origin of the copyright work is party to.

79. Since registration is free in some ARIPO Member States, it is unlikely that there will be any fees required to have the works included in the ARIPO registration system unless the Member States propose and approve the fees to cover costs of running the system.

#### **(b) Secondary Registration**

80. There are no direct economic benefits to ARIPO as it is a secondary system that will rely on the national voluntary registration systems.

81. ARIPO Member States are likely to have indirect benefits that accrue from the system such as enhanced enforcement of copyright and related rights especially across the borders. This is likely to have a positive impact on the growth and development of the copyright industries. The centralised system will also help the rights holders and users to access information as to ownership and subsistence of copyright and related rights.

### **3.1.3 Technical Feasibility**

#### **(a) Regional Voluntary Copyright Registration System**

82. The copyright department at ARIPO is relatively new and currently has only one permanent member of staff. The regional voluntary copyright registration or notification system requires specialised software to function effectively. At the national level within the Member States, there have been challenges in terms of technical support and deployment of systems. ARIPO would have to purchase the appropriate software or develop it. The system would have to be accessible online for the rights holders and this could be a challenge for many rights holders. Although access to the Internet and other ICT facilities has increased, it is still not available to all within the Member States. Creative artists may not have proper access or it may be limited. The other issue is the storage of works and security. There is need to have a system that can receive and store copies of the original works and limiting access to avoid misappropriation by third parties.

### **(b) Secondary Registration System**

83. ARIPO can leverage on existing ICT expertise to develop it and increase human resource in the department for efficiency and sustainability of the system.

84. For the Member States, there is limited expertise as was demonstrated when WIPO withdrew its support to the GDA and how each handled the situation. The levels of expertise are different and there is need to come up with a uniform system or to make the existing systems compatible so that they can be used to populate the secondary register at ARIPO. It is notable that some countries may require technical and financial assistance to either set up, revive or maintain their systems or to ensure that they are compatible with those of other Member States.

85. As a secondary system, ARIPO will not require technical capacity to store and secure copyright works, as it would basically be a database linked to the existing national registries.

86. In line with the ARIPO mandate under the Lusaka agreement, ARIPO may facilitate Member States by providing technical assistance to ensure that they voluntary copyright registration systems are set up at national level. The registration albeit secondary, will require a well thought out and functional ICT system. It will be difficult to incorporate it into the existing registration system as the parameters vary and information input is different from that of other intellectual property rights at ARIPO.

## **3.1.4 Institutional and Managerial Feasibility**

### **(a) Regional Voluntary Copyright Registration System**

87. The deployment of the system requires a proper institutional framework to ensure proper and effective implementation and maintenance. As stated earlier, ARIPO currently has one

member of staff dealing with copyright and related rights with support from the main division within which copyright falls.

88. From the countries under study like Kenya, the registration process, even when automated requires staff to validate each step. For instance, before the application is received, the staff members check to see if it is eligible for copyright and for complicated cases, refer to the legal counsel to deal. In the case of a regional voluntary registration system even if automated, ARIPO will require more staff to work on the system from receiving online applications to vetting and final issuance of the certificate. A manual system will not be appropriate due to issues such as submission and storage of physical copies, payment of application fees and security of the works. Most copyright digital files may be huge and require a lot of storage space, which will require additional resources for the ICT department.

#### **(b) Secondary Registration System**

89. The registration albeit secondary, will require a well thought out and functional ICT system. It will be difficult to incorporate it into the existing registration system as the parameters vary and information input is different from that of other intellectual property rights at ARIPO.

90. The registration and notification will already have been done at the national level and all that will be required is to enter the information received from the national level into the system. ARIPO will have to enhance the capacity in the copyright department to work with the ICT department at ARIPO. The reporting mechanisms have to be clear to allow the smooth interaction between the ICT department and copyright.

91. Although the system will be populated by national offices or provide a link for the different copyright office, it will require at least two more members of staff at the copyright office to facilitate and provide the national offices in terms of technical and legal assistance.

#### **3.1.5 Social Cultural Feasibility**

92. Copyright and related rights confer automatically once eligible ideas are reduced to material form. The ARIPO secondary registration system will promote creative industries and provide opportunities for rights holders, users and other stakeholders within the copyright industry to details as to works from other ARIPO Member States. The different Member States will also have the opportunity to set up voluntary registration systems depending on the commitment of the Member States at national level and enjoy the benefits that accrue to it.

93. It will be beneficial for ARIPO, as the regional office, to keep records of the works being registered, which will mean that there will be a clearer and reliable source of the types of

works being registered for present and future analyses. It will also enhance enforcement and creation of respect for copyright and related rights within ARIPO Member States.

### **3.1.6 Legal**

#### **(a) Regional voluntary copyright registration system**

94. There is no legal framework for the establishment of a regional voluntary copyright registration system at ARIPO. The system would require some harmonisation of copyright laws within the Member States in relation to registration but this is best left to national legislation as they have different ways to deal with the matter. Registration, once again, is not mandatory and rights holders can still enjoy their rights without it.

95. In the instance where there is direct registration at ARIPO, as the primary registration system, it will be critical for there to be some form of harmonisation of the member state copyright laws, which will make it easier for ARIPO to carry out its copyright mandate. This will have to be done through the formalisation of a legal framework setting out member state responsibilities to be met for ARIPO to take on its role in this area.

#### **(b) Secondary Registration system**

96. As stated earlier, on matters of Copyright, ARIPO's mandate is to promote copyright and related rights within its Member States. In the Member States under study, most have provisions for registration, which include provisions for creation and maintenance of registers or databases. This is either in the substantive law or subsidiary legislation. They clearly provide that there shall be no formalities in the enjoyment of copyright and related rights.

97. The creation of a secondary registration system at ARIPO requires a policy, as there is no specific legal provision that provides for the registration of copyright works. The policy will provide ARIPO and the Member States a clear framework for creation and maintenance of a secondary copyright registration system at ARIPO.

### **3.1.7 Political Feasibility**

#### **(a) Regional voluntary copyright registration system**

98. ARIPO Member States agreed to have a feasibility study on the establishment and implementation of the voluntary copyright registration.

#### **(b) Secondary Registration System**



99. As a secondary registry, it is important to have the voluntary copyright registration system set up in all the ARIPO Member States, as there will be no direct registration by individuals with ARIPO. There is need to have a policy on the registration/notification and what is required of Member States. The political will of the Member States is essential.

## **3.2 PLAN/PROJECT ACTIVITIES**

### **3.2.1 Project**

100. Establishment of the Secondary Registration System at ARIPO

### **3.2.2 Objective**

101. The main objective of the project is to establish a Secondary copyright registration system at ARIPO. Other objectives of the project are to:

- a) Formulate a policy on voluntary registration of copyright and related rights within ARIPO Member States
- b) Facilitate the creation of voluntary copyright registration systems in ARIPO Member States where they do not exist;
- c) Create a database of copyright and related rights at ARIPO;
- d) Provide technical assistance and build technical capacity to member states on voluntary copyright registration system at national level
- e) Build capacity at ARIPO and create awareness among ARIPO Member States on the ARIPO secondary copyright registration system.
- f) Build a robust and flexible technology enterprise that is dedicated to the current and future needs of a modern and reliable copyright system by recruiting a diverse pool of legal, technology and business experts and a dedicated career staff and advisory committee;
- g) Facilitate the modernisation including digitisation/ automation of voluntary copyright registrations systems within ARIPO Member States

### **3.2.3 Indicators for project objectives and results**

102. A holistic examination of the copyright offices in the countries under study gave an insight as to the diverse needs of the different rights holders and the services offered from application to issuance of the certificate. The project takes into account the different levels of technological advancement in ARIPO Member States and proposes a system that will be compatible with those existing or to be set up in the Member States

### **Project**

Objective	Activity	Output	Party Responsible	Funding	Time Frame
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Policy Formulation	Drafting of Policy	Draft Policy	ARIPO Consultant	ARIPO	May 2017
	Validation of Policy	Policy Document	ARIPO Member States	ARIPO	November 2017
Formulation of Guidelines on voluntary registration and notification at National Level	Develop Guidelines for Member States on voluntary registration	Document on Guidelines for ARIPO Member States	ARIPO	ARIPO Collaborating Partners	March 2018
	Provide legislative advice	Uniform Voluntary Copyright Registration or notification system in ARIPO Member States	ARIPO Secretariat Consultants ARIPO Member States	ARIPO Development Partners ARIPO Member States	December 2018
Establish or enhance National Voluntary Copyright Registration Systems	Adoption of a common system for registration	Uniform Registration system	ARIPO Member States	ARIPO Development Partners	December 2018
	Enhance Capacity at ARIPO	Trained and adequate Staff	ARIPO Secretariat Consultants	ARIPO Development Partners	March 2018
	Provide technical assistance at national level and at ARIPO	Competent National Copyright Offices	ARIPO Consultants	ARIPO Development Partners Member States	December 2018
Enhance Capacity at ARIPO and National Level	Identify suitable voluntary registration system	Database on copyright and related rights	ARIPO Secretariat Consultant ARIPO Member States	ARIPO Member States Development Partners	February 2018

Create a Database of Copyright and Related Rights in ARIPO	Create awareness at ARIPO	Database on copyright and related rights	ARIPO Secretariat Consultant ARIPO Member States	ARIPO Member States Development Partners	February 2018 to December 2018
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### 3.2.4 Design specifications

#### (a) Regional Voluntary Copyright Registration System

103. Not feasible

#### (b) Secondary Copyright Registration System

104. The design will accommodate online registration of works by the national copyright offices based on the information from the voluntary copyright registration and notification systems. The copyright office will pay a fee to have the works included in the ARIPO register. The work information will be the same as what is contained in the national registry but will not include actual deposit of the works. However, the main details such as:

- i. the owner (including whether or not there has been an assignment or licence of the works),
- ii. title of the work,
- iii. category of the work,
- iv. date of registration or notification,
- v. Contacts of the rights holder/owner
- vi. Next of kin
- vii. Country

105. ARIPO shall maintain the register and allow third parties to access at a fee to be determined. The fee should be payable online or through other means such as bank transfer or other online payment options available in ARIPO Member States. The register will also be accessible to third parties outside the ARIPO Member States.

106. The issue of the fees payable by the copyright offices to upload the information or register with the ARIPO database will be determined based on consultations with the copyright offices within the Member States. Access fees can be informed by fees paid to carry out searches for industrial property at ARIPO.

107. The cost of developing and implementing the system will take into account the following;

- (a) Human Resources: Two additional members of staff for the copyright department within ARIPO

- (b) ICT: Development of the system or incorporation of copyright registration within the existing ARIPO systems and infrastructure
- (c) Capacity Building: Training at ARIPO and the Copyright Offices at national level on registration at ARIPO and voluntary copyright registration and notification at national level.
- (d) Development and approval of the policy: engagement with Member States. This will also cover the legal framework at national level

### **3.2.5 Resources, the institutional structure for implementation stipulating the responsibilities of various bodies, project timing/phases:**

#### **(a) Regional voluntary copyright registration system**

108. It is notable that at national level, not all countries charge registration fees such as Zambia as the system is voluntary and there is need to have incentives to get rights holders to register their works. For countries where there is a registration fee, the amount is nominal and barely covers the costs. The Copyright Offices are mainly funded through the exchequer. Substantial resources will be required in setting up and maintaining the system. It will be quite difficult to get the creative authors and owners to pay for a system that is not mandatory.

109. A regional voluntary copyright registration system would require substantial investment in resources. For instance, at the national level, the process of registration is as below:

1. Registration: Before an application is submitted, the registration staff have to ascertain whether or not the works fall within the scope of copyright protected works or otherwise. Where this is not obvious, the works are sent to the legal office to ascertain the same. (This is the same whether the system is manual or automated)
2. For the application to be accepted, the registration staff will examine it to ensure that all the requirements have been met.
3. Payment and verification of payment of receipt.
4. Verification of the works: The staff examine whether or not the works have been previously registered, if they are original, ascertain eligibility for protection
5. Issuance of certificate and storage of works

110. From the foregoing it is clear that ARIPO would have to invest in human resources, create a suitable institutional framework and ensure that sufficient budget allocations are made for the system. This however from the feasibility study would not be desirable and the Member States under study emphasised the need to have a secondary registration system, which would simply be a voluntary registration from the national offices.

#### **(b) Secondary Copyright Registration System**

111. As this is a **secondary registration system**, additional capacity will be required at the copyright department at ARIPO to cover the additional responsibilities that come with the registration system. This would include staff to run the system and ensure linkages with the national offices of the ARIPO Member States. ARIPO is in the process of expanding the capacity of the Copyright and Related Rights Department by employing copyright officers.

### **3.2.6 Estimated costs and a logical framework planning matrix;**

112. Registration of copyright and related rights is part and parcel of the work done by the copyright office and it was difficult to separate the staff dealing with registration from the other duties. Thus it was not possible to get a figure at to how much it would cost to engage staff to deal with registration. However, the costs may be determined in line with the consideration set out in section 3.2.5 above.

### **3.2.7 Appropriate technology, technical matters and technical assistance;**

113. The WIPO GDA system is a flexible system, which allowed copyright offices within the ARIPO Member States to modify it suit their national needs with regard to secondary copyright registration or notification. ARIPO shall engage the services of technology experts to help it to design and build the registration system/database.

114. The ARIPO system will be constantly updated to cater for technological changes. ARIPO will facilitate provision of technical assistance to its member states to ensure that all the registration systems are in sync with the ARIPO database. The ARIPO registration system will be fully automated for uniformity and to take advantage of technological innovations in the digital environment. This will be more cost effective than having a manual system or both a manual and a digitised system.

115. The digitised system will involve huge financial resources for ARIPO and the Member States, as this would involve not just the procurement of both the hardware and customised software to work within and between the registration offices and ARIPO.

116. The level of technological literacy and systems within each Member State needs to be taken into consideration, as it would prove futile for financial costs to be allocated to setting up systems yet if users are not knowledgeable on the ICT tools employed.

## **3.3. EVALUATION OF PROJECT**

117. The project will be evaluated based on the following:

### **3.3.1 Relevance**

118. It is important to note that the current registration systems are based on existing national laws and/or practices. From the countries under study, voluntary copyright registration or notification system as stated in paragraph 2.3.1 above is important for creation and maintenance of a database of works, publication of the rights of owners, use as prima facie evidence of ownership and help in enforcement of rights at national level and to some extent

beyond the borders where there are corresponding copyright registration systems. Can this be replicated at the regional level? The proposed ARIPO system will provide a central system, which can be accessed by the copyright offices at the national level as well as rights holders, users and other beneficiaries. Unlike the registration of Trademarks under the Banjul Protocol, which confers the rights to the applicant, the copyright system is merely a notification system, as copyright exists independent of registration or notification.

119. The purpose of the ARIPO secondary copyright registration or notification system would be to:

- (a) Create a database on copyright and related rights within ARIPO that can be accessed by the Member States, beneficiaries and other countries. This will be a fully automated digital registry or database
- (b) Help in enforcement of copyright and related rights especially in the case of cross border infractions
- (c) Assist in rights clearance at regional level as it will be a secondary database drawing information from the national offices within the member states
- (d) Encourage voluntary copyright registration or notification at national level

### **3.3.2 Impact**

120. The proposed secondary copyright registration or notification system is likely to create an increased interest in copyright and related rights within ARIPO, among Member States and other countries. There is need to have the necessary legal and administrative framework at both national level and at ARIPO to implement the system. This should also cover the requisite ICT systems.

### **3.3.3 Effectiveness**

121. The effectiveness of the system will depend on support and participation by the Member States. This will require the establishment and coordination of voluntary copyright registration or notification systems at national level and linking them through ARIPO.

### **3.3.4 Efficiency**

122. The efficiency of the system will depend on various issues, such as mobilising technology system experts, installation of the system(s), training of administrators and maintenance of the system.

### **3.3.5 Sustainability**

123. This system is voluntary. There is need to provide incentives to encourage rights holders to have their works registered. ARIPO would have to allocate resources for the establishment and maintenance of the system. The system being dependant on the national systems will require the Member States to have their own voluntary copyright registration or notification systems.

### **3.4 SUMMARY OF FINDINGS**

124. The feasibility study in the six countries, Ghana, The Gambia, Kenya, Malawi, Namibia and Zambia brought out the following points;

- i. The voluntary copyright registration system is different from registration done by collective management organisations.
- ii. A regional voluntary copyright registration system at ARIPO is not financially viable or economically feasible but a secondary registration system is feasible at regional level.
- iii. The voluntary copyright registration or notification system at national level will provide the relevant data for the secondary copyright registration system at ARIPO.
- iv. The voluntary copyright registration or notification systems at national level can be set up administratively and registration may be free or at a specified cost.
- v. The voluntary copyright registration system requires technical expertise from registration to issuance of certificate which should be automated and where possible available as an online process.
- vi. The voluntary copyright registration system needs software that can be customised and adapted for efficiency of the registration system.
- vii. The voluntary copyright registration system needs human resource who have know how to undertake the assignment.
- viii. The voluntary copyright registration system needs sufficient investment.

### **4.0 RECOMMENDATIONS**

- 1) It is important to have a policy for development and implementation of the registration of copyright and related rights at ARIPO
- 2) The ARIPO system should be a secondary registration system drawing from the national systems. It should connect all national copyright systems either automatically or through applications by the national copyright offices.
- 3) ARIPO should work with member states to facilitate the creation of voluntary copyright registration and notification systems, at national level within Member States, which will include legislative reforms as well as institutional set up.
- 4) There is need to mobilise resources including human, technical and financial for the system as it requires a substantial investment, (capacity building, enhanced staff at the ARIPO Office, ICT equipment and other resources)
- 5) There is need to increase the staff at the Copyright Department in ARIPO to at least three. This will help in the creation and maintenance of the database as well as facilitate training of staff from Member States on voluntary copyright registration and notification.
- 6) ARIPO should draw from existing practices within Member States to design a secondary registration system for copyright and related rights. The experiences and challenges faced by the member state offices provide a perfect starting point for ARIPO.
- 7) The Registration system has to be fully automated and online to allow for linkages with national copyright offices.

- 8) Taking into account the fact that voluntary copyright registration systems differ from registration under collective management organisations, it is important to have a distinct system of voluntary copyright registration or notification and another for the collective management organisations at national level.
- 9) Although the CMOs already have a network at international level it would be desirable to have a system within ARIPO which they can access and facilitate more efficient distribution of royalties. The secondary copyright registration system will be through the national copyright offices.

## **ANNEX**

### **I. WORK PLAN**

As stated in paragraph 4 above, the study shall be carried out in four phases over a period of two months. The key deliverables are:

- Inception Report
- Feasibility Study Report
- Policy document

#### **i) Inception Report**

The Consultants will prepare the draft inception report within two days of signing the contract and submit it to ARIPO by March 17, 2017. ARIPO is expected to review and send comments (if any) to the consultant by March 22, 2017, which will be taken into consideration for the final report. The final inception report will be submitted to ARIPO by March 27, 2017.

#### **ii. Feasibility study**

The feasibility study will involve both desk research and key informant interviews. The consultants will develop the semi-structured questionnaires for the Key informant interviews, which are crucial in the study. This will be done by March 30 2017. This will lead to the data collection through desk research and key informant interviews to be completed by April 7 2017. Once the information has been collected, the consultants will analyse and prepare the first draft report and submit it to ARIPO for review and comments by April 30, 2017. ARIPO is expected to complete the review by May 5 2017, to enable the consultants to incorporate them into the report by May 19 2017.

#### **iii. Policy Document**

The consultants will prepare the policy document on the secondary copyright registration system for ARIPO. This will be based on the findings of the feasibility study and the first draft will be sent to ARIPO for comments, which will in turn be considered by the consultants in drafting the final report. The preparation of the report will be completed by May 19 2017 when it shall be submitted by the consultants to ARIPO. ARIPO will complete the review and return the document to the consultants by May 24 2017.



Taking into account all the comments from ARIPO the consultants will prepare the final report, which will incorporate the feasibility study and policy document and submit to ARIPO by May 30, 2017.

### Work plan

Activities		March				April				May			
		1	2	3	4	1	2	3	4	1	2	3	4
<b>A</b>	<b>Inception Report</b>												
1	Preparation of Inception Report and work plan												
2	Submission to ARIPO												
3	Review by ARIPO												
4	Incorporation of comments (if any)												
5	Submission of Inception report												
<b>B</b>	<b>Feasibility Study</b>												
1	Development of Data Collection Tools												
2	Desk review of documents/ Key Informant interviews												
3	Analysis and compilation of report												
4	Submission of First Report to ARIPO												
5	Review By ARIPO												
6	Submission of 2nd Report												
<b>C</b>	<b>Policy Framework</b>												
1	Preparation of draft Policy												
2	Submission to ARIPO												
3	Review of draft Policy by ARIPO												
4	Submission of Final Report												

The project is expected to take two months and may be adjusted as per the signed contract.

## II REFERENCES

### International Conventions

The Berne Convention on the Protection of Literary and Artistic Works

### Laws

1. Copyright Act, 2005, Act 690 Ghana
2. Copyright Act Chapter 130 of the Laws on Kenya
3. The Gambia Copyright Act, 2004
4. Zambia Copyright and Performance Rights Act 1994 (as Amended in 2010)
5. Copyright Act of Sudan 2013
6. Copyright (Amendment) Bill 2016 Kenya
7. Copyright Act of Malawi 2016
8. Copyright Act Namibia, 1994

### Regulations

1. Copyright Regulations Kenya 2004,
2. Copyright Regulations Ghana, 2010
3. Works Registration Regulations 2010(The Gambia)

### Documents

1. Ricolfi M. *et al* Survey of Private Copyright Documentation Systems and Practices available at (Last accessed on April 22, 2017)  
[http://www.wipo.int/export/sites/www/meetings/en/2011/wipo\\_cr\\_doc\\_ge\\_11/pdf/survey\\_private\\_crdocsystems.pdf](http://www.wipo.int/export/sites/www/meetings/en/2011/wipo_cr_doc_ge_11/pdf/survey_private_crdocsystems.pdf)
2. [http://www.wipo.int/copyright/en/activities/copyright\\_registration/](http://www.wipo.int/copyright/en/activities/copyright_registration/)
3. <http://www.wipo.int/copyright/en/initiatives/gda.html>
4. <http://www.wipo.int/copyright/en/initiatives/gda.html>
5. <http://www.copyright.go.ke>

### III TEAM ORGANISATION AND RESPONSIBILITIES

No.	Name of Consultant	Designation	Responsibilities
1.	Marisella Ouma	Lead Consultant	<ul style="list-style-type: none"><li>• Team leadership and coordination</li><li>• Preparation of the reports</li></ul>
2.	Naana Halm	Consultant	<ul style="list-style-type: none"><li>• Preparation of the reports</li></ul>

**DRAFT ARIPO POLICY ON VOLUNTARY COPYRIGHT REGISTRATION AND NOTIFICATION SYSTEM AT ARIPO AND ARIPO MEMBER STATES** (*Annex II to Document ARIPO/TCCR/IV/3*)

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## 1.0 Introduction

1. The Administrative Council, during the fortieth session approved the roadmap for the implementation of the ARIPO voluntary registration and notification system. This included:

- (a) The situational analysis of the voluntary registration and notification system in the Member States and observer States
- (b) Development of the Policy Framework
- (c) Review of the Policy Framework by Member States and Adoption by the Administrative Council

2. This draft policy document is based on the feasibility study (which is part of the situational analysis) that was carried out in six ARIPO Member States namely Ghana, The Gambia, Kenya, Malawi, Namibia and Zambia.<sup>46</sup> The national copyright offices within the Member States are charged with implementation of the voluntary copyright registration and notification system.

## 1.1 Definitions

**ARIPO Administrative Council:** The governing body as established under Article VII of the Lusaka Agreement.

**Guidelines:** Principles outlining the implementation of the policy

**Policy:** A formal statement or directive that guides decision making. It is a course or principle of action that is adopted by an organisation.<sup>47</sup>

**Procedures:** Steps to be taken to achieve a certain outcome

## 2.0 Situational Analysis

3. Voluntary copyright registration and notification of copyright varies within ARIPO Member States. Several countries such as Botswana, Ghana, the Gambia, Kenya, Namibia, Liberia, Rwanda, Sierra Leone, Sudan, Uganda and Zambia, have voluntary copyright registration and notification systems in place. Each country has its own regulatory and institutional framework including procedures, practice and guidelines. The national copyright offices implement the registration

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<sup>46</sup> See Document Proposed Roadmap to the Establishment of a Regional Voluntary Copyright Registration and Notification System ARIPO/AC/XL/18(b)

<sup>47</sup> Oxford English Dictionary

systems. It is important to note that Sudan,<sup>48</sup> Ghana,<sup>49</sup> The Gambia<sup>50</sup> Liberia,<sup>51</sup> and Zambia<sup>52</sup> have specific provisions for registration of copyright and related rights. Kenya has a provision for maintenance of a copyright database and the registration is provided for in the regulations.<sup>53</sup> Countries such as Namibia have registration provided for administratively.

4. The voluntary registration and notification system is used for creation of databases on authors' works, notification as to ownership of copyright and related rights, and identification of owners of rights. To this end, they may be used as *prima facie* evidence of ownership in case of legal disputes. Voluntary copyright registration and notification is also used in enforcement of rights. Some ARIPO member States such as The Gambia has yet to put in place the voluntary registration and notification system.

5. Other countries such as Malawi and the United Republic of Tanzania have collective management organisations that also carry out the functions of national copyright offices. However, the copyright registration systems are purely for collective management of their members' rights and to a certain extent enforcement of copyright and related rights.

6. The registration and notification system will promote development and coordination between ARIPO and national copyright offices. It will provide data from the national copyright offices, which may be used by the creative industries and other stakeholders within the ARIPO Member States and this is likely to increase Foreign Direct Investment. The voluntary registration and notification system has been used within ARIPO Member States such as Kenya, Ghana and Zambia for enforcement of rights especially in relation to the implementation of the anti-piracy security device. The system will also provide data on copyright and related rights, which in turn will increase the profile of copyright and copyright based industries.

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<sup>48</sup> Section 38 of the Copyright and Neighbouring Rights (Protection) and Literal and Artistic Works Act 2013 of Sudan

<sup>49</sup> Section 39 of the Copyright Act 2005 of Ghana (Act 690)

<sup>50</sup> Section 49 of the Copyright Act 2014 of the Gambia

<sup>51</sup> The registration under Section 2.33 and 2.34 of the Copyright Law of the Republic of Liberia is actually a depository system where the authors section 2.33 and 2.34

<sup>52</sup> Section 39 of the Copyright and Performance Act of 1994 (as amended in 2010) of Zambia

<sup>53</sup> Section 5(1) of the Copyright Act Cap 130 (as amended in 2014) of Kenya and Regulation 8 of the Copyright Regulations 2004

7. ARIPO does not have a registration system for copyright and related rights at regional level as this is done at national level. Although the Lusaka Agreement provides that ARIPO shall develop and promote copyright and related rights in the Member States, there is no policy or legal framework to support the same.<sup>54</sup> There is need for ARIPO to have a clear policy on the voluntary copyright registration and notification system to realise the objectives set out in the Lusaka Agreement.

### **3.0 Policy Statement**

8. ARIPO is governed by various protocols dealing with governance as well as matters related to intellectual property. However, there is no specific protocol that covers the issue of copyright and related rights and in particular registration. There is need to come up with a policy, procedure(s), guidelines and standards on voluntary copyright registration or notification system for ARIPO. The main Policy statements include:

- (a) Create a policy, legal and regulatory framework for voluntary copyright registration and notification system in ARIPO and within ARIPO Member States
- (b) Help in the development and implementation of the voluntary registration and notification system in ARIPO
- (c) Provide guidelines as to creation of voluntary copyright registration systems within the ARIPO Member States and enhancing capacity where the systems exist.

9. The purpose of this policy is to set out procedures for establishment and implementation of voluntary copyright registration and notification within ARIPO and ARIPO Member States.

### **4.0 Policy Objective(s)**

10. The main objective of the policy is to provide a roadmap for the establishment and implementation of the registration and notification of copyright and related rights within ARIPO and ARIPO Member States.

### **5.0 Scope**

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<sup>54</sup> Article III (i) of the Lusaka Agreement

11. The policy applies to all ARIPO Member States, rights holders, as well as the ARIPO Secretariat. The policy is formulated within the ARIPO policy framework.<sup>55</sup>

## **6.0 Principles/Strategic Pillars**

12. ARIPO is governed by various protocols dealing with governance as well as matters related to intellectual property. However, there is no specific protocol that covers the issue of copyright and related rights, and in particular, registration. There is need to come up with a policy and relevant legislative framework, procedure(s), guidelines and standards on voluntary copyright registration or notification system for ARIPO. These are discussed below:

### **6.1 Enabling legislation**

13. As one of the objectives, Article III (i) of the Lusaka agreement seeks

‘To promote, in its members, the development of copyright and related rights to ensure that copyright and related rights contribute to the economic, social and cultural development of members and of the region as a whole’

14. There is no specific legal regime within ARIPO that provides for the voluntary copyright registration and notification system. It is notable that ARIPO does not have a specific protocol on copyright and related rights, which ideally would include issues such as voluntary copyright registration and notification of copyright and related rights. However, it is important to note that as much as it may be desirable to have a legal provision for voluntary registration within the Member States and at the regional level, it is not mandatory. This may create a problem as some countries like Namibia may provide for registration and notification administratively while others like Zambia and Ghana have specific provisions for registration and notification. Other countries do not have the legal provisions or systems in place.

15. The policy on voluntary registration and notification at ARIPO will address these issues and provide the necessary guidelines to facilitate voluntary copyright registration and notification within ARIPO Member States and at ARIPO. Registration at ARIPO shall be a secondary registration system that relies on the national voluntary copyright registration and notification systems.

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<sup>55</sup>This is based on the assumption that ARIPO has a policy framework



## **6.2 Governance**

16. The governance structures at ARIPO are clearly set out in the Lusaka Agreement. The Technical Committee on Copyright and Related Rights will present the proposed policy document to the ARIPO Administrative Council once it has been circulated to all Member States and comments received and incorporated where applicable.

## **6.3 Institutional Mechanism**

17. Registration and notification of copyright and related rights requires a well-structured institutional mechanism. At the national level, ARIPO will work with the Member States to facilitate the national offices to set up systems where they do not exist or enhance the existing institutional framework in countries which already have the registration and notification process in place. The National offices will require to have trained staff to handle the process of registration and notification from the application to the issuance of the certificate of registration or notification.

18. Taking into account the impact of digital technologies on the copyright industries, it is important to have an institutional set up that accommodates online registration and notification of copyright. This includes provisions for access to online application forms, payment of fees where applicable, vetting, deposit of digital works and issuance of digital certificates.

19. At the regional level, the ARIPO Secretariat should provide facilities to access information from the national offices and create a system where data on registration can be deposited and accessed by third parties from within and outside ARIPO. Access to copyright information is important for the development and growth of the copyright industries as third parties can get the information and permission to use it.

20. For the system to work at ARIPO, it is imperative that the national offices are set up and are functional.

## **6.4 Networking and Partnership**

21. Development and implementation of the copyright registration and notification system at ARIPO requires resources such as trained staff, money, ICT infrastructure among others. At the national

level where the systems exist, there are various partnerships and collaborative efforts with other institutions. It is imperative for the Member States to network and learn the best practices from each other as well as train and make good use of resources.

22. ARIPO could also work with the national offices and other partners such as the World Intellectual Property Organization, the Copyright Office in the United States under the Library of Congress, the US Patent and Trademarks Office,<sup>56</sup> and the Copyright Office South Korea to name a few. These offices have set up registration systems at national level and have various resources that could be tapped into in setting up the system at ARIPO and within the ARIPO Member States. There are other organizations where ARIPO can form partnerships from within the industry to utilize existing systems or set up a new system.

## **6.5 Financiers**

23. Copyright, unlike industrial property does not generate income through registration and renewal of registration. There are some countries that charge a registration fee but this is nominal and not enough to sustain the registration system and create a surplus for use by the copyright offices at national level or ARIPO. In other Member States, no registration fees are charged taking into account the nature of copyright and the fact that registration is voluntary. The national government funds registration system within Member States.

24. In cases where the Intellectual Property Office is an autonomous body and is allowed to retain the funds generated for its use, then the money may be used for copyright registration and notification.

25. For ARIPO, the main source of funding would be from the ARIPO budget. Additional funds may be obtained from collaborative partners especially in the area of capacity building and development and implementation of the registration and notification system.

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<sup>56</sup> USPTO deals with the policy issues on all intellectual property matters including copyright and related rights

## **6.6 Resources**

26. Resources required include:

- i. Staff trained in matters of copyright and related rights, Registry staff, ICT
- ii. ICT equipment
- iii. Funding
- iv. Office Space

27. There is need to enhance the staff capacity at the copyright department within ARIPO to facilitate training, development and implementation of the registration and notification system at the national level and at ARIPO.

## **7.0 Implementation**

28. Implementation of the copyright registration system will be done at two levels: at the national level by the copyright offices (voluntary registration and notification) and at ARIPO (Secondary registration)

### **7.1 Role of ARIPO**

29. ARIPO Secretariat will be in charge of the overall development and implementation of the policy on copyright registration and notification system. The policy will form a basis for the development of a legislative framework. ARIPO will take the necessary steps for the approval of the policy by the governing bodies and communicate the policy to the Member States and the ARIPO Staff. The policy framework shall be implemented through the laid out channels at ARIPO.

### **7.2 Role of Member States**

31. The Member States are responsible for development and implementation of the voluntary copyright registration and notification system at national level. Once the policy is approved, they should also work with ARIPO and other collaborative partners to set up a network that will allow the secondary registration at ARIPO and sharing of information among the Member States.

32. Although the registration and notification of copyright and related rights is voluntary, the Member States are encouraged to formulate laws or regulations or guidelines to facilitate the

voluntary registration and notification. These provisions could be harmonized to provide uniformity if the systems are to be synchronized and used to populate the registry at ARIPO.

### **7.3 Role of National Copyright Offices**

33. National Copyright Offices are either independent offices, part of the office of the Registrar General or are found within the Intellectual Property Offices. This determines the capacity and resources allocated to them. Taking into account that most do not have the optimal capacity and other resources, there is need to train and allocate more resources to them. The offices provide for the voluntary copyright registration and notification system. They have a duty to create awareness on the system and benefits to the users and other stakeholders. They are also the originators of the relevant law, policy and or guidelines for the system, which is then escalated to the other offices within the Member States who are in charge of drafting and passing of laws.

### **7.4 Role of Copyright Owners**

34. Copyright owners are the main beneficiaries of the registration and notification system. They should understand the benefits and opportunities and be encouraged to use the voluntarily registration and notification of copyright and related rights.

## **8.0 Benefits and Opportunities**

35. Voluntary Registration and notification of copyright and related rights has various benefits and opportunities to the rights holders, users and the governments as well.

### **8.1 Benefits**

- i. It would provide data of different categories of works in each Member State having a regional registry and depository system.
- ii. The government is able to have data on the copyright works registered within a country and the data can be used for planning including allocation of funds to the copyright industries and the copyright offices as well.

- iii. Statistical evidence on ownership of the works and rights in the Member States will be available thus having information on the contribution of creative industries in the respective countries.
- iv. The creative authors can use the information to monitor the use of their works by third parties and enhance enforcement of copyright and related rights at both national and regional level
- v. The national offices can share information on copyright and related rights

## **8.2 Opportunities**

- i. The voluntary registration and notification system would promote Foreign Direct Investment (FDI) in the Member States as potential business users will access the relevant information needed from the right holders. This will enhance creativity and growth of the copyright industry.
- ii. It would help Member States in tracking infringement of works by individuals both online and in relation to physical copies
- iii. The system aids in the creation of inputs into the ARIPO copyright database, bringing a focus on copyright as an important IP, linking of the region's copyright to users including potential licensees

## **9.0 Monitoring and Evaluation**

36. ARIPO shall establish a monitoring and evaluation system that can be used to determine the extent to which the policy has been implemented both at ARIPO and within the Member States.

## **10.0 Review/Revision**

37. Review and revision of the policy shall be done within the ARIPO policy framework.

## **DEVELOPMENT OF ARIPO MODEL LAW ON COPYRIGHT AND RELATED RIGHTS**

*(Document ARIPO/TCCR/IV/4)*

### **INTRODUCTION**

1. The Third Session of the Technical Committee on Copyright and Related Rights (TCCR) directed the copyright and related rights department to develop a model law on copyright and related rights. Research on the different copyright laws in the Member States was done as evidenced in the comparative study on copyright laws and adherence to international instruments on copyright & related rights Volume 1 & 2 and the Southern and Eastern Africa Copyright Network (SEACONET) sample law on copyright.
2. ARIPO comparative studies on copyright laws and adherence to international instruments on copyright and related rights volume 1 and 2 will form the basis for the model law.
3. ARIPO is proposing the following roadmap for the development of the ARIPO model law on copyright and related rights.
  - (i) Development of ARIPO model law on copyright and related rights (January- April 2018).
  - (ii) Review of the ARIPO model law on copyright and related rights by the Member States (May- June 2018).
  - (iii) Review of the ARIPO model law and comments by the Technical Committee on Copyright and Related Rights (August 2018)
  - (iv) Adoption of the ARIPO model law by the Administrative Council (November- December 2018).

**[End of document]**

# **PROPOSED DRAFT AFRICA AGENDA ON COPYRIGHT AND RELATED RIGHTS**

*(Document ARIPO/TCCR/IV/5)*

## **INTRODUCTION**

1. The Secretariat in cooperation with World Intellectual Property Organization (WIPO) held a Symposium on copyright and related rights at the ARIPO headquarters from 5 to 7 June 2017. At the end of the symposium, the delegates developed a draft Comprehensive Agenda for Copyright and Related Rights in Africa (Harare Strategic Action Plan) with the view to reaching a level playing field in the global Copyright ecosystem while balancing the interest of all stakeholders. This was circulated to all delegates and the Secretariat received positive response.
2. Based on the comprehensive agenda for copyright and related rights the Secretariat has come up with a proposed Agenda on copyrights and related rights for the ARIPO Member States to be implemented in the next three years. The proposed Agenda is attached to this document as an Annex.

## **ANNEX<sup>57</sup>**

### **DRAFT AFRICA AGENDA ON COPYRIGHT AND RELATED RIGHTS**

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<sup>57</sup> Inserted in the main working document for its consideration and approval

**PROGRESS REPORT ON THE REGIONAL ICT PROJECTS FOR IP BUSINESS  
PROCESSES: REGIONAL COPYRIGHT DATABASE** *(Document ARIPO/TCCR/IV/6)*

## **INTRODUCTION**

1. The Regional Copyright Database seeks to achieve several benefits including: ARIPO will be a hub for copyright and related rights in Africa, it will facilitate data exchange and digitization of copyright records, serve as a common platform for information sharing and common position of copyright matters, and promote linkages with right holders, copyright offices, collective management organizations, ARIPO, public and business community for economic benefits that can facilitate licensing activities leading to royalty collection.

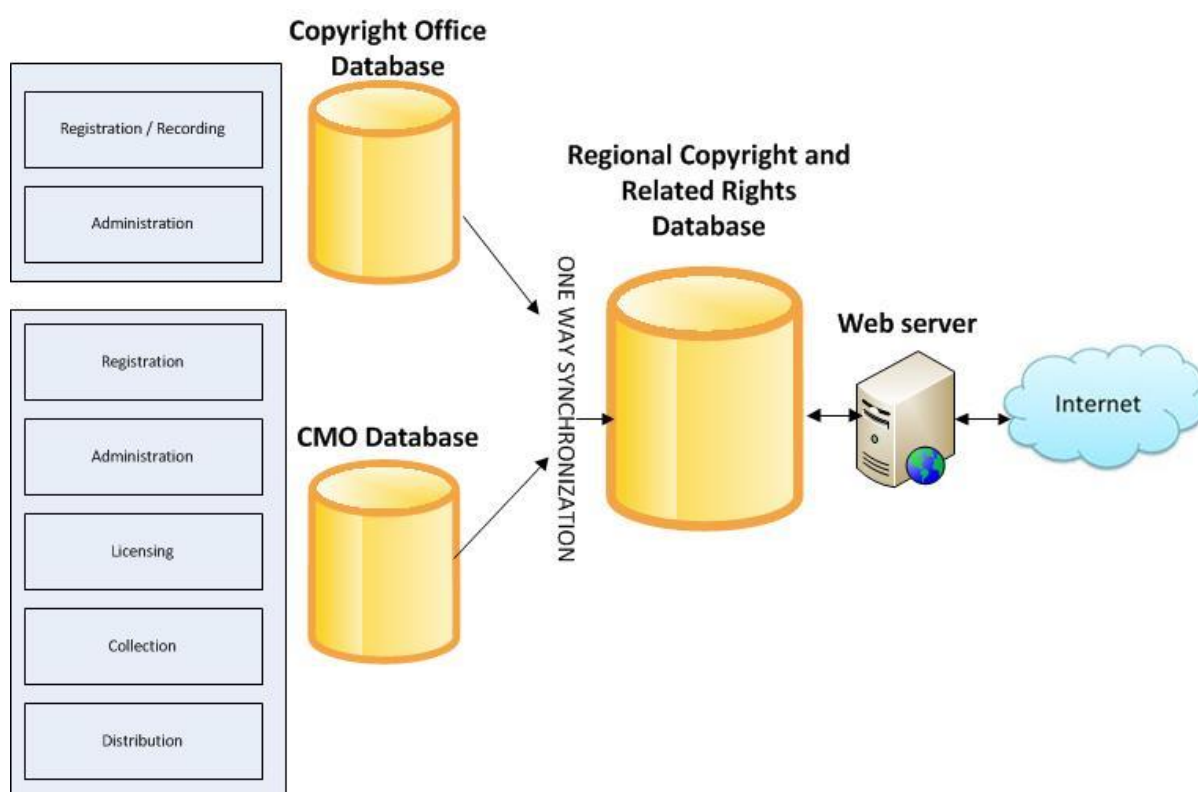
## **PROPOSED WAY FORWARD**

2. The proposed architecture will consist of two different types of databases, which are the local and regional databases. The local database will be hosted by the copyright offices and CMOs. Its data will be fully managed and maintained by the copyright office or CMO. The regional database will be hosted by ARIPO and will provide centralized access to the registered copyright and related rights information in the ARIPO region. Detailed information would only be available on the national systems. The local databases will be synchronized with the regional database.
3. The regional database will provide users with the copyright information from the various member states and offices in a single place with an online search tool allowing any internet users to search for information from the participating offices.
4. The ARIPO Secretariat has started working on the development of a policy framework for the establishment of a Regional Voluntary Copyright Registration and Notification System. Having analyzed a number of systems for registration and notification, WIPO Connect has been identified as the system that ARIPO can use. WIPO Connect is a web based system and has modules for local registration management, music publishing agreement management, user, licensing and tariff management, matching, usage report management, data aggregation and de-duplication and data dissemination to sister CMOs and third parties.
5. The implementation of WIPO Connect is in the pilot phase in Malawi. The Secretariat will engage WIPO about the possibility of using it for the voluntary registration system in the next 6 months and report back to the Technical Committee its findings.
6. The Secretariat proposes to then use the registration and notification system at ARIPO to build on the regional database.



7. The regional database will be configured in such a way that it synchronizes with the systems in the national offices and the systems being used by the CMOs, starting with those using the WIPO Connect. National offices and CMOs would be free to choose systems of their choice, but the Secretariat will negotiate with cooperating partners and advise on the systems they will be offering. Integration with the regional copyright database will be subject to permission being granted by the individual national offices and CMOs.
8. The Regional Copyright Database will be implemented with the support of the ARIPO cooperating partners through a project proposal that has already been tabled and implemented by 2020 including time for data collection. The project will seek to provide member states with the infrastructure to facilitate the implementation of linkages between the national and regional systems. The project proposal has also been uploaded on the WIPO match making database.
9. The architecture of the proposed copyright database is attached as an *Annex*.

#### **ANNEX – Architecture of the proposed Regional Copyright Database**



**[End of Document]**

## **B. TECHNICAL COMMITTEE ON INDUSTRIAL PROPERTY**

## **REPORT OF THE SEVENTH SESSION OF THE TECHNICAL COMMITTEE ON INDUSTRIAL PROPERTY** (*Document ARIPO/TCIP/VI/5*)

### **INTRODUCTION**

1. The Seventh Session of the ARIPO Technical Committee on Industrial Property (hereinafter referred to as the “Committee”) was held at the ARIPO Headquarters, Harare, Zimbabwe, from August 17 to 18, 2017.

### **ATTENDANCE**

2. In attendance were delegates from the following Members of the Technical Committee: Kenya, Swaziland, Uganda, Zambia and Zimbabwe as well as representatives of the ARIPO Secretariat.
3. The list of participants is attached to this Report as *Annex I*.

### **OFFICIAL OPENING**

4. The Director General of ARIPO, Mr Fernando dos Santos, welcomed the delegates to the Seventh Session of the Technical Committee on Industrial Property, the Fourth Session of the Committee on Copyright and Related Rights and the Second Session of the Committee on Plant Variety Protection. The opening remarks of the Director General of ARIPO are attached to this Report as *Annex II*.

### **APPOINTMENT OF THE CHAIRPERSON AND VICE CHAIRPERSON**

5. Zambia was unanimously elected as Chair and Kenya as Vice Chair.

### **ADOPTION OF THE AGENDA**

6. The Draft Agenda of the Seventh Session of the Committee was unanimously adopted without amendment.

### **WORKING DOCUMENTS**

7. The Secretariat tabled the following documents for substantive discussion during the Seventh Session of the Committee:
  - (i) Report on IP Operations
  - (ii) Proposals to amend the Harare Protocol on Patents and Industrial Designs (*document ARIPO/TCIP/VII/2*)
  - (iii) Proposals to amend the Banjul Protocol on Marks, (*document ARIPO/TCIP/VII/3*)
  - (iv) Report on the Regional ICT Projects for IP Business Processing (*document ARIPO/TCIP/VII/4*)

## **REPORT ON IP OPERATIONS**

8. The Report on IP Operations covered the Harare, the Banjul and the Swakopmund Protocols.
9. The Report contained statistics under the Harare, the Banjul and the Swakopmund Protocols. The analysed statistics showed comparative trends in application filings, registrations and grants.
10. In addition to the statistics, the Secretariat reported on the implementation of the approved amendments to the Harare Protocol that came into effect on January 2017 and indicated that users of the system have embraced and expressed satisfaction with the introduced amendments.
11. Members of the Committee commented on the Secretariat's report and raised concerns with regard to the low level of filings originating from member States in respect of patent, utility model, industrial designs and mark applications. Furthermore, members wanted to know why the Swakopmund Protocol has not witnessed any meaningful uptake in its use. One of the Delegates enquired on the current status of the mandate on Geographical Indications.
12. In its response, the Secretariat explained that the low level of filings from Member States may be due, to among other things, limited awareness about IP in general and added that this is being addressed through awareness campaigns in the form of Roving Seminars. With regard to Geographical Indications (GI), the Secretariat indicated that ARIPO is in the process of requesting all Member States to provide information on potential GIs that they have and that a feasibility study on the suitability of a Regional Legal Framework for the registration of GI would be undertaken. The Secretariat further added that the Comparative Study on Industrial Property Laws of ARIPO Member States being undertaken will also include the status of the national GI laws in the Member States.
13. In respect of the Swakopmund Protocol, the Secretariat responded that the low uptake in its use could be attributed to the fact that Contracting States have not put in place the required institutional arrangements for its operationalization. The Secretariat urges each Contracting State to establish a National Competent Authority as required by the Protocol.
14. The Committee recommended the following:
  - (i) The Secretariat to study filing trends from Member States and compare these statistics with global trends with a view to innovatively suggesting how local entities within the Region could be encouraged to utilize the Organization's services under the three Protocols.
  - (ii) The ARIPO Office and national IP Offices of the Member States continue with IP awareness drives to stimulate the uptake of IP.
  - (iii) The Secretariat to use the report of the Comparative Study on Industrial Property Laws of ARIPO Member States to pursue harmonization of the laws of the Member States.

- (iv) The Secretariat to encourage Swakopmund Contracting States to establish national competent authorities.

### **PROPOSAL TO AMEND THE HARARE PROTOCOL ON PATENTS AND INDUSTRIAL DESIGNS**

15. The Secretariat presented proposals to amend the Harare Protocol on Patents and Industrial Designs, contained in *document ARIPO/TCIP/VII/2*.
16. The Kenyan delegation made several proposals including the introduction of individual fees under the Harare Protocol; which was extensively discussed by the Committee.
17. After due deliberations, the Technical Committee recommended:
- (i) The submission to the Forty-First Session of the Administrative Council for consideration and approval of the proposed amendments to the Harare Protocol and its Implementing Regulations as contained in document *ARIPO/TCIP/VII/2*.
  - (ii) That a study be commissioned to establish the impact of individual fee systems within a Regional Patent Administration system; with input being invited from all Member States before the Committee considers the proposal on individual fees.

### **PROPOSAL TO AMEND THE BANJUL PROTOCOL ON MARKS**

18. The Secretariat presented proposals to amend the Banjul Protocol on Marks, contained in *document ARIPO/TCIP/VII/3*.
19. After due deliberations, the Committee recommended the submission to the Forty-First Session of the Administrative Council for consideration and approval of the proposed amendments to the Banjul Protocol and its Implementing Regulations as contained in document *ARIPO/TCIP/VII/3*.

### **REPORT ON THE REGIONAL ICT PROJECTS FOR IP BUSINESS PROCESSING**

20. The Secretariat presented a Report on the Regional ICT Projects for IP Business Processing contained in *document ARIPO/TCIP/VII/4*.
21. After due deliberations the Committee took note of the report and recommended its submission to the Forty-First Session of the Administrative Council for its consideration and noting.

### **ANY OTHER BUSINESS**

22. There being no other business, the Committee concluded its Seventh Session at 15:30 pm on 18<sup>th</sup> August 2017.

### **DATE AND VENUE OF THE EIGHTH SESSION**

23. The Eighth Session of the Technical Committee on Industrial Property will be held at the ARIPO Headquarters, Harare, Zimbabwe. The Secretariat will communicate the date to members of the Committee in due course.

### **ADOPTION OF THE REPORT**

24. The Committee unanimously adopted the amended Report of the Seventh Session.

### **CLOSING REMARKS**

25. The Chair commended the Secretariat for setting the ground for the highly constructive and productive discussions and deliberations leading to meaningful proposals for the amendments to both the Harare and the Banjul Protocols and extended gratitude to all participating delegates for their valued inputs in making the Seventh Session of the Committee the success it has turned out to be.

**[End of Report]**

**[Annexes Follow]**

## **ANNEX I**

### **LIST OF PARTICIPANTS FOR THE 7<sup>TH</sup> SESSION OF THE TECHNICAL COMMITTEE ON INDUSTRIAL PROPERTY, HARARE, ZIMBABWE, 17 TO 18 AUGUST 2017**

#### **MEMBER STATE DELEGATES:**

<b>Kenya</b>	Mr David Njuguna Chief Patent Examiner Kenya Industrial Property Institute (KIPI) Weights & Measures South C P.O. Box 51648-0200 <b>NAIROBI</b> Kenya Tel: +254 20 600221/0 Mobile: +254 726 126 996 Email: <a href="mailto:dnjuguna@kipi.go.ke">dnjuguna@kipi.go.ke</a>
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<b>Zambia</b>	Mr Jethro Ndhlovu TM Examiner Patents and Companies Registration Agency (PACRA)

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**ARIPO SECRETARIAT**

Mr Christopher J. Kiige, Director, Intellectual Property

Mr John Kabare, IP Operations Executive

Ms Flora Mpanju, Head, Substantive Search and Examination

Mr Charles Pundo, Head, Formality Examination

Mr Ahmed Ibrahim, Senior Examiner

Mr John Omiti, Examiner (*Secretary*)

Ms Perpetua Sireu, Senior Registry Associate

Ms Pedzisai Rewayi, Senior Formality Examiner

Ms Meroline Shiri, Senior Data Capture

Ms Clarid Hozheri, Finance Associate



## **REPORT ON THE REGIONAL ICT PROJECTS FOR IP BUSINESS PROCESSING**

*(Document ARIPO/TCIP/VII/4)*

### **INTRODUCTION**

1. ARIPO has embarked on a number of ICT projects taking advantage of the ICT tools available to provide efficiency in IP business processing, support the availability of IP information, encourage IP scientific research and IP rights protection and enforcement. This is in support of two of ARIPO's objectives which are to establish such common services or organs as may be necessary or desirable for the co-ordination, harmonization and development of the industrial property activities affecting its members; and to assist its members, as appropriate, in the acquisition and development of technology relating to industrial property matters.
2. ARIPO is using various ICT tools to:
  - i. enhance the efficiency of business processing and other administrative work at the ARIPO Office and those of its Member States,
  - ii. facilitate the accessibility and use of Intellectual Property information in the region and in Africa at large
  - iii. strengthen ICT institutional capacity in the ARIPO region and beyond

### **IMPLEMENTATION OF THE ARIPO-WIPO-KOICA ICT PROJECT FOR THE UPGRADE OF THE ARIPO ICT INFRASTRUCTURE AND THOSE OF ITS MEMBER STATES**

3. In August 2013 ARIPO embarked on the Upgrade and Modernization of the ICT Infrastructure of the ZIPO, ARIPO and its Member States project. The goal of this project was to upgrade and modernize ICT infrastructure of patent offices in ARIPO and 19 Member states.
4. The project focused on upgrading ARIPO's IP administration system, development of a member states' module for online electronic data communication with the upgraded IP administration system of the ARIPO Office and those of its Member States and the development and provision of online services to users and the public at large.
5. The new IP administration system, POLite+, was launched in 2015 and is now fully functional. The system is web-based and provides functions for IP work including online filing, online file inspection, online payment, access to online journals and form and fee information download.
6. Some of the benefits to date include reduction of paper records in IP file processing, elimination of duplicate records and processes across the ARIPO region, substantial

productivity and efficiency gains amongst ARIPO stakeholders, significant savings on time and money.

7. Agents and applicants using the online platform have found it to be very convenient and the number of new applications filed online has been increasing. The statistics for online filings for 2016 and 2017 (up to 30 June 2017) are shown below.

	<b>2016</b>		
	<b>Online</b>	<b>Other Methods</b>	<b>Online %</b>
<b>Patents</b>	219	481	31.29
<b>Industrial Designs</b>	19	64	22.89
<b>Utility Models</b>	7	21	25.00
<b>Trademarks</b>	123	174	41.41
<b>TOTAL</b>	<b>368</b>	<b>740</b>	<b>33.21</b>

	<b>2017</b>		
	<b>Online</b>	<b>Other Methods</b>	<b>Online %</b>
<b>Patents</b>	217	139	60.96
<b>Industrial Designs</b>	25	17	59.52
<b>Utility Models</b>	0	6	-
<b>Trademarks</b>	69	72	48.94
<b>TOTAL</b>	<b>311</b>	<b>234</b>	<b>57.06</b>

8. The statistics show that about 57% of all new applications for 2017 have been filed online. The Secretariat is working on promoting the eservices in order to increase the percentage of online filings.
9. The ARIPO journals are now available for download free of charge on the online platform. The system also has a facility for uploading Member States journals, but to date only 2 Member States who are Kenya and Mozambique have availed their journals for upload on the online platform.
10. In an effort to simplify the exchange of notifications with member states, ARIPO is using File Transmission Protocol (FTP) mainly for larger files and those Member States not using the MS module. To date the FTP is being used to exchange notifications with Lesotho, Malawi, Namibia, Rwanda, Tanzania and The Gambia.
11. Some of the challenges that are being faced are that most of the member states have not made their journals available for upload on the online services platform, there are still some agents who have not signed up for online filing, internet accessibility and some banks still issuing cards which are not 3D secure hampering online payments.

## **ARIPO POLITE+ MEMBER STATES MODULE**

12. The Member States (M/S) module allows for online data exchange between POLite+ of ARIPO and IPAS of its Member States. Through the module, ARIPO and its member states will be able to exchange all types of notifications, forms and documents online which are presently delivered by courier.
13. The module will allow for paperless exchange of information as ARIPO's applications will be input and uploaded onto the member states' IPAS automatically, bringing about some cost and time savings.
14. The module was successfully implemented at ZIPO as a pilot office as part of the project to Upgrade and Modernize the ICT Infrastructure of the ARIPO office and those of its Member States.
15. The source code of the module has now been handed over to WIPO who will facilitate its implementation together with ARIPO, KOICA, KIPO and the Member States. With support from WIPO, the module has now been implemented in Mozambique and will soon be implemented in all the other member states. The objective is to implement the module in at least 5 more member states before the end of 2017. Implementation of the module is demand driven and some of the issues considered to determine the suitability of a Member State to host the module are the legal framework, institutional framework, human resources capacity and ICT infrastructure.

## **ARIPO/WIPO DIGITIZATION PROJECT**

16. The project involves digitization of ARIPO's IP physical files lodged before 2<sup>nd</sup> March 2015 due to the fact that the digitization of the front files commenced with the deployment of POLite+. The objectives of the digitization project include:
  - i. The automation of all business processes at the ARIPO Office and those of its Member States;
  - ii. Provision of greater flexibility in the flow of documents with the consequent reduction in processing times;
  - iii. Improvement in the quality of search results;
  - iv. Provision of secure access to documents.
17. The ARIPO/WIPO digitization project commenced in July 2016 following successful training and infrastructure setup. This project has been sponsored by WIPO through the

Funds-In-Trust of the Government of Japan. To date about 6,000 patent files out of a total of about 8,600 patent files have been digitized. Trademark, utility models, designs and search request files will also be digitized. The project had to be temporarily suspended in January 2017 due to some logistical challenges which are being addressed. It is expected to resume in September 2017 and be completed by the end of 2017.

### **WIPO/ARIPO REGIONAL IP DATABASE PROJECT**

18. The project proposal for the creation of a regional database for granted/registered IP titles of the ARIPO Office and those of its Member States was presented and approved at the 38<sup>th</sup> Session of the Administrative Council of ARIPO, held in Victoria Falls, Zimbabwe, in 2014.
19. The objective of the project is for ARIPO to create a centralized database for its published IP titles and those of its Member States. With the current setup, it is impossible to centrally view all published IP titles in the ARIPO region.
20. The ARIPO Regional IP database has now been setup with assistance from WIPO and can be accessed on <http://regionalip.aripo.org>. The ARIPO Secretariat with assistance from WIPO has started the process of collecting the relevant published IP titles from Member States to populate the ARIPO Regional IP database. To date more than 350,000 Trademarks from ARIPO, Botswana, Ghana, Kenya, Malawi, Namibia, Rwanda, Uganda, Zambia and Zimbabwe have been uploaded on the portal. The database will also have Patents and Designs registered in the Member States.
21. WIPO is providing the necessary software for automated online publication, and the necessary technical support in the Member States and the Secretariat has provided the hosting environment.
22. The regional IP Database is designed to serve multiple purposes, including on-line provision of published IP data, encouragement of regional trade, IP scientific research, IP rights protection and enforcement in the ARIPO region, and sustainable development of IP.
23. As a prerequisite to be part of the regional IP database, the member states should have an automation system, preferably IPAS, to facilitate extraction of data in electronic format.

### **THE ARIPO TRADITIONAL KNOWLEDGE (TK), EXPRESSIONS OF FOLKLORE (EoF) AND GENETIC RESOURCES (GR) RELATED INFORMATION DATABASE**

24. The Council of Ministers of ARIPO at its Eighth Session held in Mangochi, Malawi on August 29 and 30, 2002 requested the Secretariat of ARIPO to carry out a study on the feasibility of establishing, in cooperation with member States, an inventory and database on traditional knowledge taking into account the experiences of countries that have already

developed similar inventories and databases. The Swakopmund Protocol entered into force on May 11, 2015.

25. Africa is rich in resources relating to traditional knowledge and expressions of folklore which is most of the times exploited by third parties without the benefits of the owners of the knowledge. The ARIPO Protocol on Traditional Knowledge and Expressions of Folklore is expected to limit the exploitation of these resources without the benefit of the owners. It will also empower the knowledge holders to exploit the knowledge for their community development.
26. In order to effectively implement the Protocol, ARIPO has contacted WIPO and requested assistance for the establishment of databases that will contain registered traditional knowledge, associated genetic resources, expression of folklore as well as existing and publicly available information in the form of scientific publications, pharmacopeia, cultural heritage inventories, museum and archival collections, etc.
27. A consultant was appointed by WIPO to carry out a feasibility study on a 6 months contract. The inception and draft feasibility study reports have already been submitted to ARIPO and WIPO. The report recommends the creation of the registry based on the Swakopmund Protocol and the creation of TK, EoF and GR and associated TK database that will be sustainable either through internal generation of funds or collaborative partnerships. ARIPO will be discussing with WIPO on the possibilities of funding the development of the register and database.

## **EUIPO TOOLS FOR IP MANAGEMENT**

28. The ARIPO Secretariat is considering using some of the online tools that have been developed and offered by the EUIPO. The tools are TMClass, DesignClass, Quality, User Satisfaction Survey and Forecasting.
29. TMClass is a search tool that enables users to find the appropriate term and the corresponding class or classes for goods and services of a trademark application. It brings together the classification lists of participating offices worldwide and provides the interface to access the classification databases of each of the participating offices. The database contains terms that have been pre-validated by the EU trademark offices and those that have been accepted by other participating offices.
30. DesignClass is a tool that helps users find product indications in the Harmonized Database to classify design applications. The Harmonized database follows the same structure of classes and subclasses as the Locarno Classification and contains product indications that are accepted by the participating IP Offices and using other product indications that are currently

not listed in Locarno. The tool will among other benefits improve the visibility of ARIPO and make it easier to classify design applications.

31. Quality is an online tool that reflects the commitment of a participating office to promote quality by providing transparent, easily accessible information on services and the performance of services offered. The participating office selects the quality standards that apply to it and map the processes related to those quality standards, periodically providing statistical data for the selected quality standards.
32. The User Satisfaction Survey tool is used by the participating offices to easily create electronic surveys based on predefined templates to assess the satisfaction of the users with the different services provided by the office.
33. The Forecasting tool uses advanced statistical and computer science techniques to predict the number of future filings. It provides a better understanding of the underlying factors that influence IP applications.

**C. TECHNICAL COMMITTEE ON PLANT VARIETY  
PROTECTION**

## **REPORT OF THE SECOND SESSION OF THE TECHNICAL COMMITTEE ON PLANT VARIETY PROTECTION** (*Document ARIPO/TCPVP/II/5*)

### **INTRODUCTION**

1. The Second Session of the Technical Committee on Plant Variety Protection, hereinafter referred to as “the Committee”, was held at the ARIPO Headquarters in Harare, Zimbabwe from August 17 to 18, 2017.

### **ATTENDANCE**

2. Four (4) Member States of the Committee were represented at the Session, namely: Ghana, Kenya, Zambia and Zimbabwe (*ex-officio* member of the Committee). The United Republic of Tanzania was not represented.
3. In view of the comments for the improvement of the Draft Regulations for implementing the Arusha Protocol received from member States and the Civil Society Organizations, two ARIPO Member States that are not members of the Committee attended the session: Malawi and Uganda. A representative of the Civil Society Organizations, from the Alliance for Food Sovereignty in Africa (AFSA) also attended the Session of the Technical Committee.
4. The list of participants is attached to this Report as Annex I.

### **OFFICIAL OPENING**

5. The Director General of ARIPO jointly welcomed and opened sessions of the Technical Committee on Industrial Property, the Technical Committee on Copyright and Related Rights and the Technical Committee on Protection of Plant Varieties. The statement of the Director General is attached to this Report as Annex II.

### **ADOPTION OF THE AGENDA**

6. The Secretariat introduced *document ARIPO/TCPVP/II/1* which contained the draft agenda.
7. The agenda was unanimously adopted.

### **WORKING DOCUMENTS**

8. The Secretariat presented the following documents to the Committee for consideration:
  - (a) Consideration of the Draft Regulations for Implementing the Arusha Protocol for the Protection of New Varieties of Plants (*document ARIPO/TCPVP/II/2*);
  - (b) Consideration of revised List of Agricultural Crops with historical practice of farm-saved seeds in the Member States (*document ARIPO/TCPVP/II/3*);



- (c) Consideration of proposed Competent Institutions, Quality Audits and arrangements for DUS Testing (*document ARIPO/TCPVP/II/4*).

## **CONSIDERATION OF THE DRAFT REGULATIONS FOR IMPLEMENTING THE ARUSHA PROTOCOL FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**

9. The Secretariat presented document ARIPO/TCPVP/II/2 which contained the directives of the Fortieth Session of the Administrative Council on the need of further review of the draft Regulations for Implementing the Arusha Protocol on the Protection of New Varieties of Plants.
10. The Secretariat indicated to the Committee that the Administrative Council resolved that, due to concerns raised by Member States and Civil Society Organizations on the draft Regulations, the draft Regulations should be referred back to the Technical Committee so that the comments of the Member States and Civil Society Organizations can be taken into account in finalizing the draft Regulations. The Council had also resolved that Member States that wish to submit comments on the draft Regulations should do so before the 29<sup>th</sup> of January, 2017.
11. In order to cater for the concerns raised in the comments received from two member States, Malawi and Uganda, and the Civil Society Organizations (Annexes II to , the Committee amended the draft Regulations as follows:
- (a) Rule 7 (*Technical Questionnaire and Test Guidelines*) was amended in its paragraph (1) in a view to prevent misappropriation of local genetic resources:  
“1. *The Director General of ARIPO shall develop and publish a Technical Questionnaire and Test Guidelines for each species for conducting technical examination. The Technical Questionnaire shall require Applicants to provide among others information on the source of genetic material used.*
- (b) Rule 12 (*Grant and Rejection of a Breeder’s Right*) was amended in its paragraph (1) to cater for the operationalization of Article 4(1) of the Arusha Protocol:  
“(1) *Grant of Certificate for Breeder’s Right*  
(a) *Transmission of applications to the designated States*  
(i) *Prior to grant of certificate of Breeder’s Right and upon compliance with the requirements for grant, the ARIPO Office shall transmit without delay the application to all designated States;*  
(ii) *The designated State shall within six (6) months notify the ARIPO Office in Form... whether or not the breeder’s right shall have effect in its territory;*  
(iii) *Where a designated State notifies the ARIPO Office that the breeder’s right shall not have effect in its territory, the notification shall specify grounds for the decision;*  
(iv) *After expiration of the six (6) months, the ARIPO Office shall grant the breeder’s right, which shall have effect in those designated States that had not made communication referred to in sub-section (ii) above.*

- (c) In order to address the concerns raised with regard to the rights of small scale farmers and the need to define the “acts done privately and for non-commercial purposes”, Rule 15 (*Exceptions to Breeder’s Right*) was completed in its paragraph 2 as follows:

*“(2) In the case of the provision under Article 22 (2) of the Protocol, the Administrative Council shall specify from time to time a list of agricultural crops and vegetables with historical practice of saving, **using, sowing, re-sowing or exchanging** seeds that shall not include fruits, ornamentals, other vegetables or forest trees after consultation with the Contracting States. The list shall be periodically published by the ARIPO Office.*

12. The Committee agreed that the revised draft Regulations for Implementing the Arusha Protocol on the Protection of New Varieties of Plants be submitted to the Administrative Council for consideration and adoption.

## **CONSIDERATION OF REVISED LIST OF AGRICULTURAL CROPS WITH HISTORICAL PRACTICE OF FARM-MADE SEEDS IN THE MEMBER STATES**

13. The Secretariat presented the document ARIPO/TCPVP/II/3 on consideration of revised list of agricultural crops with historical practice of farm-made seeds in the Member States.
14. The Secretariat informed the Committee that some Member States have not yet provided their Lists of Agricultural Crops with historical practice of farm-made seeds. It was also noted by the Committee that some countries which had provided the Lists did not include all the necessary information, including an indication on National Agricultural Centres that have capacities to undertake the examinations of new varieties.
15. The Committee requested the Secretariat to send letters to Member States that have not yet submitted their country information as per tables below, and also request for their input regarding the proposed criteria for the entrustment of competent Institutions by the Administrative Council. The Committee further requested the Secretariat to write to Member States to submit the list of their Agricultural Institutions with capacity to undertake Distinctness Uniformity and Stability (DUS) tests and state the crops in which they have the technical capacity and reference materials to conduct the DUS examination.
16. The Committee developed the indicative Tables that shall be sent to Member States for them to fill in the required information:

### **List of Crops with historical practice of farm-made seeds**

**(i) Table- List of Agricultural Crops**

Country	Agricultural crops (farm-made seeds)		Acreage/tonnage that defines a small holder farmer in their territory (ha)
	Common Name	Scientific Name	

**(ii) Table- List of Vegetable Crops**

Country	Vegetable crops (farm-saved seeds)		Acreage/tonnage that defines a small holder farmer in their territory (ha)
	Common Name	Scientific Name	

**(iii) Table: Agricultural Institutions with capacity to undertake DUS**

Institution	Crop Species

17. The Committee recommended that the updated list of Agricultural crops with historical practice of farm-saved seeds be submitted to the Administrative Council for consideration.

**CONSIDERATION OF PROPOSED COMPETENT INSTITUTIONS, QUALITY AUDITS AND ARRANGEMENTS FOR DUS TESTING**

18. The Secretariat presented document ARIPO/TCPVP/II/4 on Competent Institutions, Quality Audit and arrangements for DUS testing. The Secretariat indicated that the proposed scheme was drawn following consultations and a study visit to the European Community Plant Variety Office (CPVO).
19. The Committee reviewed the proposed scheme and determined the minimum requirements for entrusting competent institutions by the Administrative Council as follows:
- (i) Experience in specific crop(s) with reference collections
  - (ii) Capacity to undertake independent DUS Tests or Trials with integrity and confidentiality
  - (iii) Available skilled personnel
  - (iv) Readiness to enter into an agreement and corporate with ARIPO
  - (v) Adequate facilities and equipment including irrigation facilities
  - (vi) Available Test Protocols and Procedures
  - (vii) Storage facilities for plant materials
  - (viii) Quality management system with effective documentation and reporting structures
20. The Committee also took note of the proposed independent audit team and reviewed the basis upon the Director General should designate Examination Offices to undertake the DUS tests. It was agreed that the following should form the basis:
- (i) Where the variety was bred
  - (ii) Suitable agro-ecological conditions
  - (iii) Competence of the Examination Office

(iv) Preference of the breeder.

21. The Committee recommended to the Secretariat to re-draft the document indicating the processes that the Administrative Council should follow in the entrustment of the Competent Institutions.
22. The Committee further recommended to the Secretariat revise the document and attach Table (iii) for consideration by the Administrative Council.

#### **ANY OTHER BUSINESS**

23. The Committee expressed concern that there is little participation by Ministries of Agriculture (MoA) and Plant Variety Protection (PVP) Offices in meetings of the relevant Organs of ARIPO with respect to PVP matters. The Committee therefore recommended to the Secretariat to urge Member States to ensure the active participation of the relevant MoA and PVP offices.
24. The Committee recommended to the Secretariat to develop capacity building plan for in-house human resources as well as in the Member States in the area of PVP in readiness for the implementation of the Arusha Protocol.

#### **ADOPTION OF THE REPORT**

25. On proposal by the delegation of Zambia, seconded by the delegation of Ghana, the report was adopted as amended.

#### **CLOSING OF THE SESSION**

26. The Chairman of the Committee thanked the members of the Committee for their commitment and rich contributions during the second session of the Committee. He also thanked the ARIPO Secretariat for the work done in organizing the meeting and availing the required documents.
27. The Director General of ARIPO officially closed the second Session of the Technical Committee on Plant Variety Protection. He thanked the members of the Committee for their commitment and the fruitful deliberations that will guide the Organization for the implementation of the Arusha Protocol.

**[End of document]**

**Annexes follow**

## **ANNEX I**

### **LIST OF PARTICIPANTS**

#### **A. MEMBERS OF THE TECHNICAL COMMITTEE ON PLANT VARIETY PROTECTION**

##### **GHANA**

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#### **E. OFFICERS OF THE TECHNICAL COMMITTEE ON PLANT VARIETY PROTECTION**

Mr Simon Mucheru **MAINA** (Kenya) – Chairperson

Mr Bruce Chulu **SIMBUNJI** (Zambia) – Vice-Chairperson

Mr. Pierre Runiga (ARIPO Secretariat) – Secretary

**CONSIDERATION OF THE DRAFT REGULATIONS FOR IMPLEMENTING THE ARUSHA PROTOCOL FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**  
(Document ARIPO/TCPVP/II/2)

1. On July 6, 2015, the ARIPO Diplomatic Conference that was held in Arusha, United Republic of Tanzania, adopted the Arusha Protocol for the Protection of New Varieties of Plants. At the Ninth Extra-ordinary Session of the Administrative Council that was held earlier at the venue of the Diplomatic Conference from July 2 to 3, 2015, the Council requested ARIPO Secretariat to develop a roadmap for the development of Draft Implementing Regulations for the Arusha Protocol as provided by the Protocol under Article 39.
2. The Administrative Council adopted the roadmap at its Thirty-ninth Session that took place in Lusaka, Zambia from November 16 to 18, 2015.
3. The Secretariat developed the Regulations for implementing the Arusha Protocol and convened a meeting of Experts to review and finalise the draft. The Experts met from June 14 to 17, 2016 at the Rainbow Towers Hotel in Harare, Zimbabwe.
4. Following the review by the Expert Meeting, the draft was again sent to Member States for further scrutiny and comments. The comments received together with the draft regulations were reviewed by the First Session of the Technical Committee on Plant Variety Protection and recommendations were made for the draft regulations to be considered and approved by the Administrative Council. The Draft Regulations submitted for consideration by the Fortieth Session of the Administrative Council is attached to this document as Annex I.
5. During the Fortieth Session of the Administrative Council that took place in Harare from December 5 to 7, 2016, the Council considered the document and expressed the view that due to concerns raised by Member States and Civil Society Organizations, the document should be referred back to the Technical Committee so that the comments of the Member States and Civil Society Organizations can be taken into account in finalizing the draft Regulations.
6. The Council further recommended that Member States that wish to submit comments on the draft Regulations should do so before the 29<sup>th</sup> of January, 2017.
7. Four sets of comments were received from Malawi, Uganda, Namibia and Civil Society Organizations (CSOs) and have been attached to this document as annexes II to V.
8. From June 28 to 30, 2017 the Civil Society Organizations in Africa organized a regional meeting in Harare under the theme “Towards Seed and Food Sovereignty”. It was attended by over 40 Civil Society Organizations in Africa and ARIPO was invited to give an update of the Arusha Protocol and related draft Regulations. The meeting afforded an opportunity for ARIPO and CSOs



to discuss the draft Regulations and the open letter that has been sent to ARIPO regarding the need to review the Regulations to take into account the contents of the open letter. At the end of the meeting, the CSOs called for active participation in the Sessions of the Administrative Council so that their issues are heard and addressed. It was agreed that a request should be made by the CSOs to ARIPO so that a Memorandum of Understanding (MOU) can be signed which will enable them to participate in the Administrative Council Sessions.

9. It is recalled that prior to the adoption of the Arusha Protocol, a regional workshop was held in Lilongwe, Malawi from July 22 to 25, 2013 to sensitize Member States on the Protocol and respond to concerns raised by Civil Society Organizations. Seventeen ARIPO Member States were represented at the Workshop, namely: Botswana, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sierra Leone, Somalia, Swaziland, Uganda, United Republic of Tanzania, Zambia and Zimbabwe. Four cooperating partners were represented at the expert review meeting namely: UPOV, CPVO, USPTO, OAPI. Experts from seed trade associations of Kenya and Malawi, Civil Society Organizations and international experts i.e. African Agricultural Technology Foundation (AATF), African Centre for Biosafety (ACB) and Community Technology Development Organization (C.T.D.O) contributed to the Workshop.
10. The concerns raised by Civil Societies have not changed significantly since then and during the workshop, experts from the IP Offices and Ministries of Agriculture of ARIPO Member States provided responses to the concerns raised by the Civil Societies which is attached to this document as Annex VI.
11. The Second Session of the Technical Committee on Plant Variety Protection is therefore requested to review the draft Regulations taken into account the comments received.

*In Reply Please quote Ref No.*

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**Ref. RG/LL/IP/ARIPO62**

**1st February, 2017**

The Director General  
African Regional Intellectual Property Organization  
11 Natal Road  
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Harare  
**ZIMBABWE**

**Att: Mr Fernando Dos Santos**

Dear Director General,

**MALAWI'S CONCERNS REGARDING THE ARUSHA PROTOCOL  
REGULATIONS**

I am writing in regard to the concerns Malawi and a few other countries raised during the Administrative Council Meeting of ARIPO that took place in Harare, Zimbabwe in December, 2016 regarding the Arusha Protocol Regulations which were being debated. You may recall that the Delegation of Malawi was requested to forward their concerns to the Aripo Secretariat by 31st January, 2017. Please find attached them.

Thank you for your usual cooperation.

**Chapusa D Phiri  
REGISTRAR GENERAL OF MALAWI**

### **1. Draft Regulations fail to safeguard the rights of farmers in Article 22(1) (a).**

The Regulations fail to provide a clear definition for the exception “private and non-commercial purposes” as envisaged in Article 22(1) (a) of the Protocol to safeguard rights of small-scale farmers to freely use, save and exchange seeds and propagating materials of protected varieties. The exception of “private and noncommercial purposes” should be defined to give small-scale farmers full freedom to operate in relation to protected varieties on their land.

The Draft Regulations also differentiate between small-scale commercial farmers and large scale commercial farmers and treat both categories of farmers as if they were the same. This is wholly inequitable as the Regulations require small scale commercial farmers along with large scale farmers to pay remuneration to the right holder when saving seed for purposes of propagation on their own holding, for protected varieties which are included in the list contemplated by Article 22(2) of the Protocol.

### **2. Safeguard against biopiracy.**

The Draft Regulations should address serious concerns regarding biopiracy. The Regulations should include issues of ‘disclosure of origin’ to safeguard against biopiracy. This will be consistent with the SADC PVP Protocol, since some Member States of ARIPO also belong to SADC and have agreed to this provision in the SADC PVP Protocol.

**The following is therefore a recommendation to add to Rule 2(1) (b) the following elements:**

(b) The application will contain:

[.....]

- **evidence, that the genetic material or parental material used for breeding, evolving or developing the variety has been lawfully acquired and that, where appropriate, the applicant has complied with prior informed consent and benefit-sharing requirements.**

### **3. Access to the Application Information.**

The Draft Regulations also do not recognize the right of ARIPO Members to have access to the applications as well as to the technical examination reports. Access to this information is important in safeguarding the right of a member state to object to the grant of PBRs.

**The following text is therefore recommended to add as Rule 9bis: Rights of Contracting States**

**(1) The ARIPO Office shall promptly make available to Contracting States the application received and all documentation related to the application including examination results concerning novelty, distinctness, uniformity and stability as well as variety denomination.**

**(2) Where a Contracting State decides to undertake its independent technical examination for purposes of accepting or rejecting an application for registration, the ARIPO Office and the right holder shall within 21 days of request by a Contracting State make available to the Contracting State in adequate quantities and quality, the material needed for technical examination together with the requested fees.**

The above inclusion will safeguard the right of contracting states to undertake DUS examination in its own fields, if it is dissatisfied with the Examination report.

#### **4. Lack of Definition for Exception “acts done privately and for non-commercial purposes” in Rule 15**

Sub-rule 15(1) of the Protocol states that breeders’ rights shall not extend to Article 22(1) of the Protocol, which refers to “acts done privately and for non-commercial purposes”. However, the lack of definition creates significant uncertainty as to which acts are exceptions to breeders’ rights. A definition will go a long way in facilitating the realization of Farmers Rights as envisaged in the ITPGRFA.

#### **5. Exempting small-scale commercial farmers from payment of remuneration for saving seed of protected variety on own holding**

Rule 15(2) is established in connection with Article 22(2) of the Protocol, which allows farmers to save seed for propagating purposes *on their own holdings* with regard to crops specified by the Administrative Council; however it appears subject to payment of remuneration. Article 22(3) of the Protocol speaks of different level of remuneration to be paid by small-scale commercial farmers and large-scale commercial farmers. But this differentiation is not reflected in the Draft Regulations. In fact Rule 15(4) suggests that both will pay the same level of remuneration. The Draft Regulations do not define small-scale commercial farmers or large-scale commercial farmers.

**It is therefore recommended to add to Rule 15(1) the following text; The exception of “acts done privately and for non-commercial purposes” in Article 22(1) (a) of the Protocol shall be understood as allowing small-scale farmers to save, use, exchange and sell to local markets and other small-**

scale farmers, farm saved seed or propagating material of the protected variety.

And add to Rule 15(2) the following text;

With regard to the list of crops specified by the Administrative Council for purposes of Article 22(2) of the Protocol, small-scale commercial farmers shall not be required to pay any remuneration to the holder. For this purpose, small-scale commercial farmers shall be defined by each Members State local laws.

**Please note the below source of the information.**

Prepared by the African Centre for Biodiversity (ACB),  
Third World Network (TWN), endorsed by the Alliance for  
Food Sovereignty in Africa (AFSA)  
16 November 2016

**ALLIANCE FOR FOOD SOVEREIGNTY IN AFRICA**

These concerns are available in the submission by African Centre for Biodiversity at [http://acbio.org.za/wp-content/uploads/2016/07/ACB-comments-revised-ARIPORegs\\_270716.pdf](http://acbio.org.za/wp-content/uploads/2016/07/ACB-comments-revised-ARIPORegs_270716.pdf)

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RG/21

6/2/2017

Director General  
Africa Regional Intellectual Property Organisation  
11 Natal Road, Belgravia  
Harare, Zimbabwe

**COMMENTS ON THE REVISED DRAFT REGULATIONS FOR THE  
IMPLEMENTATION OF THE ARUSHA PROTOCOL**

Pursuant to the Administrative Council's decision to review the draft regulations for the implementation of the Arusha Protocol, please find enclosed Uganda's comments on the draft regulations.

Yours faithfully,

  
BEMANYA TWEBAZE  
REGISTRAR GENERAL

Encl: Comments on the draft regulations implementing the Arusha Protocol

*your registration needs served*



### **Issue 1: Prevention of biopiracy**

The regulations do not adequately provide for prevention of misappropriation of local genetic resources as they do not require applicants to disclose the origin of the variety/ breeding material under rule 2(1)(b).

It is therefore proposed that Rule 2(1)(b) be amended:

- to allow for applicants to be requested to provide evidence that the genetic material used for breeding conforms to informed consent and benefit sharing agreements.
- to require Applicants to provide supporting documents relating to the compliance of any law regulating activities involving genetically modified organisms in cases where the development of the plant variety involves genetic modification.

The following text is proposed:

#### **(b) The application will contain:**

[.....]

- evidence, that the genetic material or parental material used for breeding, evolving or developing the variety has been lawfully acquired and that, where appropriate, the applicant has complied with prior informed consent and benefit-sharing requirements.
- the pedigree information and associated passport data, as available to the applicant, on the lines from which the variety has been derived, along with all such information available to the applicant relating to the contribution of any farmer, community, institution or organization upon which the applicant relied to derive the new variety.
- be supported by documents relating to the compliance of any law regulating activities involving genetically modified organisms in cases where the development of the plant variety involves genetic modification.

### **Issue 2: Operationalisation of Article 4(1) of the Protocol**

The regulations do not provide for a mechanism for contracting parties exercise their sovereign right to object to the grant of plant breeder's rights from being applicable in their respective territories.

To this end, it is proposed that

- The regulations should require the ARIPO office to promptly make available to ARIPO member states the application received and all documentation related to the application including examination reports.
- The regulations should require ARIPO to promptly notify the Contracting States in writing of its decision to grant breeders rights.
- And on receiving the notification, contracting states should make a written communication within a specified period, to the ARIPO office, clearly stating that the breeder's rights shall not have any effect in their territory.

**The following text is proposed**

**(Rule 9bis) Rights of Contracting States**

- (1) The ARIPO Office shall promptly make available to Contracting States the application received and all documentation related to the application including examination results concerning novelty, distinctness, uniformity and stability as well as variety denomination.**
- (2) Where the ARIPO Office has decided to grant breeder's right, it shall promptly notify the Contracting States in writing.**
- (3) On receiving this written notification a Contracting State may:**
  - (a) within 12 to 18 months make a written communication to the ARIPO Office, that if breeder's right is granted by the ARIPO Office, the breeder's right shall not have any effect in its territory;**

### **Issue 3: Small Scale Farmers**

We are concerned that the regulations do not adequately safeguard the rights of small scale farmers, who are the back bone of agriculture in the ARIPO region, to freely use, save, exchange and sell seeds and propagating material materials of protected varieties even in local markets.



It's important to protect the rights of the small scale farmers and protect them from payment of remuneration for saving seed of a protected variety on own holding.

It is proposed that the regulations should include text that explicitly defines who a small scale farmer is.

Recommendation:

**The exception of "acts done privately and for non-commercial purposes" in Article 22(1)(a) of the Protocol shall be understood as allowing small-scale farmers to save, use, exchange and sell to local markets and other small-scale farmers, farm saved seed or propagating material of the protected variety.**

Text for defining small-scale farmers:

**A small-scale farmer is someone whose total earnings from sales of farm-saved seed do not exceed the average household income.** This approach is taken by the draft Ethiopian PBR Bill.

To add to Rule 15(2)

**With regard to the list of crops specified by the Administrative Council for purposes of Article 22(2) of the Protocol, small-scale commercial farmers shall not be required to pay any remuneration to the holder.**

#### **Issue 4: Acts done privately and for non commercial purposes**

Whereas sub rule 15(1) of the Protocol extends exception to Breeders' rights to "acts done privately and for non commercial purposes", there is no definition of these acts. This creates uncertainty.

Most farmers in the ARIPO region are small-scale farmers who access seed by reusing farm saved seed, and through exchange and purchase from the local markets. As such it is important to safeguard the practices of freely being able to use, save, exchange and sell in local market.

Uganda is a member of the International Treaty of Plant Genetic Resources for Food and Agriculture (ITPGRFA) which means it is under an obligation to

facilitate the realization of Farmers' Rights'.

The ITPGRFA clearly states that the right to "save, use, exchange and sell farm-saved seed and other propagating material" is "fundamental to the realization of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels".

Smallholder farmers should be allowed to freely exchange with other farmers and sell to their local markets their farm saved seed and propagating material. This may be achieved by defining the exception of acts done privately and for non-commercial purposes. The Draft Regulations fail to include such a definition. This is a serious omission in the Draft Regulations.

This is not a matter that should be left up to each government as every government may adopt different interpretations, resulting in a significant legal uncertainty as to what is allowed and not allowed with regard to the protected variety.

In reviewing the draft regulations, we critically analyzed both comments prepared by the African Centre for Biodiversity (ACD), Third World Network (TWN), and endorsed by the Alliance for Food Sovereignty in Africa (AFSA) on the draft regulations bearing in mind the concerns raised by the United Nations Special Rapporteur on the Right to Food.



**BUSINESS AND INTELLECTUAL  
PROPERTY AUTHORITY**  
*Protecting Entrepreneurship and Innovation*

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Mr. Fernandes Dos Santos

Director General

African Regional Intellectual Property Organization

11 Natal Road, Belgravia

Harare

**ZIMBABWE**

May 9, 2017

Dear Sir,

**LIST OF ISSUES REGARDING THE DRAFT REGULATIONS FOR THE IMPLEMENTATION  
OF THE ARUSHA PROTOCOL**

Your letter dated 21 December 2016 bears reference.

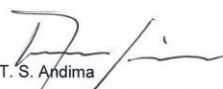
The Business and Intellectual Property Authority presents its compliments to the African Regional Intellectual Property Organization and further expresses gratitude for the continued support of the Organization towards the development of intellectual property in the region.

Namibia would like to thank ARIPO for the invitation to submit the issues related to the draft Regulations under the Arusha Protocol. The concerns raised on the implementation of the Protocol are valid to Namibia whose agricultural sector is literally under-developed and largely traditional. It is thus our view that the concerns demands due consideration.

Therefore, my Office is in the process of consulting the relevant institutions on the subject matter. I will be pleased to send you the country's position after the said consultations.

Counting on your usual cooperation.

Yours sincerely,

  
T. S. Andima  
**CHIEF EXECUTIVE OFFICER**



Non Profit Association incorporated under Section 21 - Reg. 21/2011/0482

Riundja A. (Othy) Kaakunga, (Chairperson), Martha Uumati (Deputy Chairperson), Fritz C. Jacobs,  
Lovisa Indongo-Namandje, Seno Namwandi, Ignatius K. Thudinyane, Chaze Nalisa, Tileinge S. Andima (CEO)

# **Comments on the revised draft regulations (draft 3) for implementing the Arusha Protocol for the Protection of New Varieties of Plants**

Prepared by the African Centre for Biodiversity (ACB),  
Third World Network (TWN), endorsed by the Alliance for  
Food Sovereignty in Africa (AFSA)

16 November 2016

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TWN  
Third World Network





## I. INTRODUCTION

African civil society's resistance to the Arusha Protocol for the Protection of New Varieties of Plants ("The Arusha Protocol") is well established, as is its track record of constructive engagement with the Secretariat of the African Regional Intellectual Property Organisation (ARIPO) as well as the Member States of ARIPO.

The concerns of African civil society and farmer organizations are well documented and have been communicated to the ARIPO Secretariat, as well as Member States of ARIPO, both in writing and orally over the past few years.<sup>1</sup> Foremost amongst these concerns include that: the Arusha Protocol is based on the International Union for the Protection of New Varieties of Plants (UPOV) 1991, a most inappropriate model for the establishment of Plant Variety Protection (PVP) regimes in developing countries particularly in ARIPO Member States; the Protocol advances a centralised harmonised regime which is unnecessary for the region and which contains several provisions that undermine the sovereign rights of Member States; undermine the realization of Farmers' Rights; facilitates and/or fails to curb biopiracy; undermine implementation of international treaties such as the Convention on Biological Diversity (CBD), the Nagoya Protocol on Access and Benefit Sharing, and the International Treaty on Plant Genetic Resources for Food and Agricultural (ITPGRFA) as well as various international instruments on human rights.

African civil society and farmer organizations have also on numerous occasions highlighted concerns about the un-transparent and flawed process by which the Protocol was developed and the deliberate locking out of African civil society and farmer representatives from deliberations when the Arusha Protocol was adopted on the 6th July 2015.<sup>2</sup>

**The comments contained in this submission, are in respect of a further draft of the Regulations that will be submitted to the Administrative Council for consideration and adoption. There are a number of serious concerns in relation to the Draft Regulations that have been raised in the past and that continue to remain valid with regard to the revised Draft Regulations that will be presented to the Administrative Council. These concerns are available in the submission by African Centre for Biodiversity at [http://acbio.org.za/wp-content/uploads/2016/07/ACB-comments-revised-ARIPO-Regs\\_270716.pdf](http://acbio.org.za/wp-content/uploads/2016/07/ACB-comments-revised-ARIPO-Regs_270716.pdf)**

**Without prejudice to those concerns, this paper focuses on some of the most problematic aspects that needs to be rectified by ARIPO Member States** as these perpetuate impingement of national sovereignty; fail to safeguard Farmers' Rights and farmer seed systems; and to prevent biopiracy. These comments have been produced without prejudice to our very strong opposition to the Arusha PVP Protocol and our consistent position that it represents an inappropriate regional legal framework for the ARIPO region, wherein 13 out of the 19 member states are least developed countries (LDCs) and under no legal obligation to implement plant variety protection (PVP) regimes.

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<sup>1</sup> See <http://acbio.org.za/wp-content/uploads/2015/02/CSOconcernsonARIPO-PVPframework1.pdf> & <http://acbio.org.za/wp-content/uploads/2015/02/AFSA-letter-ARIPO-March2014-.pdf>

<sup>2</sup> See <http://afsafrika.org/open-letter-to-members-of-the-international-union-for-the-protection-of-new-varieties-of-plants-upov-2/>

## II. GENERAL COMMENTS

### ***1. Draft Regulations perpetuate impingement of National Sovereignty, continue to flout Protocol:***

We are astonished that the Draft Regulations continue to ignore the operationalization of Article 4(1) of the Arusha Protocol. The Draft Regulations fail to provide a mechanism for Contracting Parties to object to the grant of plant breeders' rights (PBRs) from being applicable in their respective territories as envisaged by Article 4(1) of the Protocol. Member States themselves fought hard for this right to be included in the Protocol and have continuously insisted on the importance to be able to object to the grant of any PBR application being operational in their respective countries. Hence, we call on ARIPO Contracting Parties to remedy this fundamental defect. We have proposed some text to operationalize Article 4(1) of the Protocol, see below section III.2

### ***2. Draft Regulations fail to safeguard the rights of farmers.***

We are similarly taken aback that the Regulations fail to provide a clear definition for the exception "private and non-commercial purposes" as contemplated in Article 22(1)(a) of the Protocol in order to safeguard the rights of small-scale farmers to freely use, save, exchange and sell seeds and propagating materials of protected varieties even in local markets. This is despite overwhelming evidence that point to the importance of safeguarding the interest of small-scale farmers who are the backbone of agriculture in the ARIPO region. Such farmers should freely and without any impediment, be able to continue to access all seed including protected varieties through, exchange between themselves and purchase from local markets in Africa.<sup>3</sup> In short, the exception of "private and non-commercial purposes" should be defined to give small-scale farmers full freedom to operate in relation to protected varieties. These farmers operate on a rather small scale, often farming on land of less than 3 hectares and thus are unlikely to pose any significant threat to the interests of the right holder. See below the discussion and proposals in Section III.3.1.

The Draft Regulations also fail to differentiate between small-scale commercial farmers and large-scale commercial farmers and treat both categories of farmers as if they were the same. This is wholly inequitable as the Regulations require small scale commercial farmers along with large scale farmers to pay remuneration to the right holder when saving seed for purposes of propagation on their own holding, for protected varieties which are included in the list contemplated by Article 22(2) of the Protocol. Even in the EU, small-scale commercial farmers who are much better off economically than their counterparts in the ARIPO Region are exempt from payment of such remuneration. See below the discussion and proposals in Section III.3.2

See also comments in Section III.4 and III.5, which highlight deficiencies in the Draft Regulations' provisions on the subject of remuneration and provision of information to farmers.

### ***4. The Draft Regulations enable biopiracy.***

The Draft Regulations continue to ignore our serious concerns that provisions be made to prevent someone from tweaking local varieties and thereafter claiming PBRs over such varieties, all without

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<sup>3</sup> McGuire and Sperling, 2016, "Seed systems smallholder farmers use" available at <http://link.springer.com/article/10.1007/s12571-015-0528-8>

having to obtain the prior informed consent from the farmers and subject to fair and equitable benefit sharing. There is no mention of ‘disclosure of origin’, which ironically has been championed by African countries in various international forums over the years. In fact, the Draft Regulations enable biopiracy by failing to introduce appropriate safeguards and allowing breeders to hide behind confidentiality rules. At the very least, the Regulations should be consistent with that of the SADC PVP Protocol (which has introduced text to prevent the exploitation of African farmers), since numerous Member States of ARIPO also belong to SADC and have agreed to this provision in the SADC PVP Protocol. See proposals in Section III.1

### III. SPECIFIC COMMENTS & ALTERNATIVE PROPOSALS

#### *III.1 Comment on Rule 2: Applications for a Breeder’s Right*

**Recommendation:** To add to Rule 2(1)(b) the following elements:

(b) The application will contain:

[.....]

- evidence, that the genetic material or parental material used for breeding, evolving or developing the variety has been lawfully acquired and that, where appropriate, the applicant has complied with prior informed consent and benefit-sharing requirements.
- the pedigree information and associated passport data, as available to the applicant, on the lines from which the variety has been derived, along with all such information available to the applicant relating to the contribution of any farmer, community, institution or organization upon which the applicant relied to derive the new variety.
- be supported by documents relating to the compliance of any law regulating activities involving genetically modified organisms in cases where the development of the plant variety involves genetic modification.

Serious concerns have been raised of the failure of the Arusha Protocol and the Draft Regulations to require the applicant to disclose the origin of the variety/breeding material in order to prevent misappropriation of local genetic resources.

CSOs and farmer representatives participating in the finalization of the draft SADC PVP Protocol in March 2014 raised similar concerns. A disclosure of origin provision will assist in the identification of situations whereby local farmer varieties are utilized in the development of new varieties, and will facilitate implementation of benefit sharing. An example of misappropriation is the “Turkey Purple Carrot” whereby Monsanto’s subsidiary Seminis purchased farmers’ seed at a farmers’ market in southern Turkey of a certain variety of purple carrot and after a simple process of selection obtained plant variety protection in both the United States and the European Union in respect of the variety, all without payment of fair and equitable benefits.

During the SADC PVP discussions, SADC Secretariat made clear that “we cannot exploit farmers,” resulting in SADC Member States agreeing to include, as part of the requirements for applying for



PBRs, a declaration by the applicant to the effect that the “genetic material or parental material acquired for breeding, evolving or developing the variety was lawfully acquired.”<sup>4</sup>

In order to prevent biopiracy and be consistent with the SADC Protocol as well as to promote achievement of the objectives of the CBD, the Nagoya Protocol and the ITPGRFA, (all of which require fair and equitable benefit sharing in situations of utilization of genetic resources), Rule 2 (1)(b) of the ARIPO regulations needs to be amended.

The first bullet proposed for inclusion in Rule 2(1)(b) is similar to that contained in the SADC Protocol. The second bullet point is proposed to require the applicant to disclose the source of the genetic material and for the applicant to declare if any community has contributed to the development of the new variety. This declaration will facilitate fair and equitable benefit sharing to the relevant communities.

Many ARIPO Members are also Contracting Parties of the CBD and the ITPGRFA and have a commitment to operationalize fair and equitable benefit sharing. Given that PVP applications are an important checkpoint for the implementation of access and benefit sharing legislation, the proposed two bullets are essential.

The third bullet point is proposed as an applicant should first comply with biosafety laws before a grant of breeders’ rights is obtained over a GMO variety. Some may argue that this provision is not necessary as Monsanto and other developers of GMOs would still need to comply with national biosafety and marketing laws to commercialize a GM variety. However, the grant of breeders’ rights provides a strong incentive for the commercialization of GMOs in countries where the introduction of the technology is not only contentious but vigorously contested, thus breeders’ rights over GMO varieties should only be accorded in countries that have approved the particular GM variety for commercial growing.

Finally the inclusion of the abovementioned paragraphs ensures mutual supportiveness and coherence of laws at the national level.

### **III.2 Rights of Contracting States: Operationalizing Article 4 of the Arusha Protocol.**

A major point of controversy and the subject matter of heated negotiation especially during the final round of negotiations was the right of countries to object to the grant of PBRs.

Article 4 of the Arusha Protocol states “A breeder’s right granted under this Protocol shall, on the basis of one application, be protected in the designated Contracting States *provided the designated Contracting State has not refused the grant.*”

**However there is nothing in the Draft Regulation to operationalize the right of a Contracting State to object to the grant.** This is a serious omission on the part of the ARIPO Secretariat. This omission needs to be highlighted and rectified.

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<sup>4</sup> <http://acbio.org.za/wp-content/uploads/2015/02/AFSA-Briefing.pdf>

ARIPO Member states should have a right to object to the grant as well as to conduct their own DUS examination. This is to safeguard and enforce its sovereign rights. It also needs to be acknowledged that there are differences in climatic, soil and other agronomic conditions in the countries that constitute ARIPO member states. For instance, a variety which might be uniform and stable when tested in a country outside of the ARIPO region but may not be stable and uniform when tested in Botswana. Similarly a variety, which shows uniformity and stability in Kenya, may not show stability and uniformity in Sierra Leone or Liberia. The Draft Regulations fail to take into account the differences in climate and soil that exists between countries and the impracticality of a centralised, fast track one grant system for many diverse countries. Thus it is important for Contracting States to retain the right to conduct its own DUS examination.

The Draft Regulations also does not recognize the right of ARIPO Members to have access to the applications as well as to the technical examination reports. Timely access to the applications as well as to the examination reports is imperative to safeguard the right of a member state to object to the grant of PBRs. Accordingly it is important to introduce text in the Draft Regulations that clearly outlines the rights of Contracting States in relation to examination and grant of PBR applications.

***Recommendation: To Add Proposed Text (Rule 9bis)***

**Rights of Contracting States**

- (1) The ARIPO Office shall promptly make available to Contracting States the application received and all documentation related to the application including examination results concerning novelty, distinctness, uniformity and stability as well as variety denomination.
- (2) Where the ARIPO Office has decided to grant breeder's right, it shall promptly notify the Contracting States in writing.
- (3) On receiving this written notification a Contracting State may:
  - (a) within 12 months make a written communication to the ARIPO Office, that if breeder's right is granted by the ARIPO Office, the breeder's right shall not have any effect in its territory;

or

- (b) within 12 months make a written communication to the ARIPO Office that it is not satisfied with the Examination Report(s) and the decision of the ARIPO Office and has undertaken or intends to undertake its own technical examination of novelty, distinctness, uniformity and stability. In this case, the Contracting State may inform the ARIPO Office within 36 months of receiving the notification mentioned in (2), that if the ARIPO Office grants breeders' right, it shall not have any effect in its territory.
- (4) Where a Contracting State decides to undertake its independent technical examination as mentioned in paragraph 3(b), the ARIPO Office and the right holder shall within 14 days of request by a Contracting State make available to the Contracting State in adequate

**quantities and quality, the material needed for technical examination together with the requested fees.**

The proposed text has three main objectives:

- (i) it makes clear that the application form, and results of examination of novelty, distinctness, uniformity and stability will be sent to the Contracting State;
- (ii) the text operationalizes the right to object by giving a Contracting State a duration of 12 months, following receipt of notification that the ARIPO Secretariat will grant PBR to object to the grant (see sub-para 3(a));
- (iii) the text safeguards the right of Contracting states to undertake DUS examination in its own fields, if it is dissatisfied with the Examination report. This is important due to differences in climate and soil among ARIPO Members.

The proposal in sub-para 3(a) follows the approach taken in ARIPO's Harare Protocol on Industrial Property, wherein Contracting Parties have 6 months to object to the grant of patents by the ARIPO Secretariat. The subject of PBR requires more time, and field assessment, thus the extended time limits of 12 months and 24 months.

**At the very least sub-paras (1), (2) and 3(a) should be included in the Draft Regulations.**

### **III.3 Comment on Rule 15: Exceptions to Breeder's Right**

#### **III.3.1 Lack of Definition for Exception "acts done privately and for non-commercial purposes"**

Sub-rule 15(1) of the Protocol states that breeders' rights shall not extend to Article 22(1) of the Protocol, which refers to "acts done privately and for non-commercial purposes". However, the lack of definition creates significant uncertainty as to which acts are exceptions to breeders' rights.

Existing literature and evidence are conclusive of the need for policy to accommodate the needs of small-scale farmers.<sup>5</sup> Moreover an objective of the Arusha Protocol is to facilitate access by farmers to new varieties and to enable local adaptation of the variety. Most farmers in the ARIPO region are small-scale farmers. And there is extensive evidence that these farmers access seed by reusing farm saved seed, and through exchange and purchase from the local markets. One study across six countries and 40 crops concluded that smallholder farmers get seeds mainly from local markets (51%); their own stock (31%); from neighbours (8.6%); from government / NGOs / UN (7.3%) and from agro-dealers (2.4%).<sup>6</sup>

As such it is important to safeguard the practices of freely being able to use, save, exchange and sell in local market. This will enable widespread uptake and dissemination of new varieties among farmers. Smallholder farmers generally own less than 2 hectares and thus allowing the freedom to use, save, exchange and sell farm-saved seeds/propagating material is not going to threaten the rights of foreign companies, most of which are likely to be interested in foreign markets. Moreover most ARIPO

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<sup>5</sup> See for example the 2015 FAO Voluntary Guide for National Seed Formulation.

<sup>6</sup> McGuire and Sperling, 2016, "Seed systems smallholder farmers use" available at <http://link.springer.com/article/10.1007/s12571-015-0528-8>

members are members of the ITPGRFA, which means they are under an obligation to facilitate the realization of Farmers' Rights'. The ITPGRFA clearly states that the right to "save, use, exchange and sell farm-saved seed and other propagating material" is "fundamental to the realization of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels".

Smallholder farmers should be allowed to freely exchange with other farmers and sell to their local markets their farm saved seed and propagating material. This may be achieved by defining the exception of acts done privately and for non-commercial purposes. The Draft Regulations fail to include such a definition. This is a serious omission in the Draft Regulations.

This is not a matter that should be left up to each government as every government may adopt different interpretations, resulting in a significant legal uncertainty as to what is allowed and not allowed with regard to the protected variety.

**Failure to accommodate the interest of smallholder farmers would also confirm that the Arusha Protocol is biased in favour of commercial interests and set against the wellbeing and interests of African smallholder farmers that are the backbone of agricultural systems in Africa.**

### ***III.3.2 Need to Exempt small-scale commercial farmers from payment of remuneration for saving seed of protected variety on own holding***

Rule 15(2) is established in connection with Article 22(2) of the Protocol, which allows farmers to save seed for propagating purposes *on their own holdings* with regard to crops specified by the Administrative Council, however it appears subject to payment of remuneration.

Article 22(3) of the Protocol speaks of different level of remuneration to be paid by small-scale commercial farmers and large-scale commercial farmers. But this differentiation is not reflected in the Draft Regulations. In fact Rule 15(4) suggests that both will pay the same level of remuneration. The Draft Regulations does not define small-scale commercial farmers or large-scale commercial farmers. A list to be submitted to the Administrative Council highlights agricultural and vegetable crops for which a farmer may save and propagate seed of protected varieties on the farmer's own holding. The list includes the acreage that defines a smallholder farmer. The details vary country by country. For instance Ghana lists crops such as maize, rice, cassava, cowpea, yams as crops for which seed saving may be allowed while smallholder farmers are defined as having a holding of between 0.25 to 0.80 hectares in relation to the crops listed. But there is nothing in the Draft Regulations that exempt these farmers from payment of remuneration, suggesting that these farmers may have to pay remuneration for saving seed for propagating purposes on their holdings.

In Europe, small farmers (most of whom are small scale commercial farmers) are exempted from payment of remuneration for saving and propagating on their own holding, protected varieties identified in a list. The EU regulations define small farmers as those that do not grow plants on an area bigger than which would be needed to produce 92 tons of cereals or 185 tons of potatoes. The area to produce 92 tons of cereals in Europe is about 15hectares (based on an average yield of 6 tons/ha)<sup>7</sup>.

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<sup>7</sup> <http://data.worldbank.org/indicator/AG.YLD.CREL.KG?end=2014&start=2014&view=map>

15hectares is also near to the average farm size in Europe (16.1ha in 2013).<sup>8</sup> 6 Member states of the EU have an average farm size under 10hectares. In any case, the main principle is that small-scale commercial farmers are excluded from paying any remuneration for saving seeds for propagating purposes on the farmers' own holding for crops identified in a list.

In Switzerland, a farmer has an average holding of 22 hectares and ALL farmers (small or large) are exempted from having to pay remuneration for saving and propagating seed of a protected variety on the farmers own holding. However a similar exemption is absent in Rule 15 meaning that African small-scale commercial farmers with a lower economic status than European small commercial farmers will have to pay remuneration. To rectify the inequity in Rule 15, the following recommendations are made.

**Recommendation: To add to Rule 15(1)**

**The exception of "acts done privately and for non-commercial purposes" in Article 22(1)(a) of the Protocol shall be understood as allowing small-scale farmers to save, use, exchange and sell to local markets and other small-scale farmers, farm saved seed or propagating material of the protected variety.**

Options for defining small-scale farmers:

**Option A: A small-scale farmer is someone that earns less than US\$10,000 per year from farming.** This is the definition of resource-poor farmers in the licensing agreement of Syngenta on Golden Rice.<sup>9</sup>

**Option B: A small-scale farmer is someone whose total earnings from sales of farm-saved seed do not exceed the average household income.** This approach is taken by the draft Ethiopian PBR Bill.<sup>10</sup>

**Option C: A small-scale farmer is a farmer whose farming operations do not exceed 2 hectares of cultivated land.**<sup>11</sup>

**Recommendation: To add to Rule 15(2)**

**With regard to the list of crops specified by the Administrative Council for purposes of Article 22(2) of the Protocol, small-scale commercial farmers shall not be required to pay any remuneration to the holder.**

**For this purpose, small-scale commercial farmers may be defined as those that plant the varieties specified in the list, irrespective of the area on which they grow other plants, do not grow such varieties on an area bigger than the area needed to produce 92 tons of cereals per harvest. In the case of potatoes, irrespective of the area on which they grow plants other than potatoes, do not**

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<sup>8</sup> [http://ec.europa.eu/eurostat/statistics-explained/index.php/Farm\\_structure\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Farm_structure_statistics)

<sup>9</sup> [http://www.goldenrice.org/Content1-Who/who4\\_IP.php](http://www.goldenrice.org/Content1-Who/who4_IP.php)

<sup>10</sup> B. De Jonge, Plant Variety Protection in Sub-Saharan Africa: Balancing Commercial and Smallholder Farmers Interests (2014), Journal of Politics and Law, 7(3), 100-111.

<sup>11</sup> 2015 Food and Agriculture Organization of the United Nations. SARAH K. LOWDER, JAKOB SKOET and TERRI RANEY;

[http://ac.els-cdn.com/S0305750X15002703/1-s2.0-S0305750X15002703-main.pdf?\\_tid=fdae556c-a72f-11e6-9741-00000aachb362&acdnat=1478773704\\_805c38e47a02722c4b5cd39430b679e5](http://ac.els-cdn.com/S0305750X15002703/1-s2.0-S0305750X15002703-main.pdf?_tid=fdae556c-a72f-11e6-9741-00000aachb362&acdnat=1478773704_805c38e47a02722c4b5cd39430b679e5). This paper was prepared as background research for The State of Food and Agriculture 2014, available at <http://www.fao.org/publications/sofa/en>



**grow potatoes on an area bigger than the area, which would be needed to produce 185 Metric tons of potatoes per harvest.**

The proposed definition is similar to that found at the European level. It is also clear that other farmers (i.e. large scale commercial farmers) shall be required to pay remuneration, the basis of which needs further discussion (see below).

#### **III.4 Comment on rule 15(3): Remuneration**

Rule 15(4)(a) should be amended to delete reference to small scale commercial farmers as explained above such farmers should be exempt from payment of remuneration.

Further it is unclear what is meant by “*shall be reasonably lower* than the amount charged for the licensed production of propagating material of the lowest category qualified for official certification, of the same variety in the same area” in sub-para (b) and “the level of remuneration *shall be reasonably lower* than the amount which is normally included, for the above purpose, in the price at which propagating material of the lowest category qualified for official certification, of that variety is sold in that area, provided that it is not higher than the aforesaid amount charged in the area in which that propagating material has been produced” in sub-para (c).

This vague text does not provide any certainty with regard to payment of remuneration. This lack of certainty is against the interests of African farmers. ARIPO Member states should query the ARIPO Secretariat as to the basis for the abovementioned text on remuneration, what it actual means in terms of monetary payments that will need to be made and assess whether it is reasonable and affordable for African farmers taking into account their circumstances.

#### **III.5 Comment on rule 15(5): Information to be provided by farmers to the breeders:**

The present text of Rule 15(5) is open-ended, as it requires all farmers to provide information to the breeder irrespective of whether they have utilized the protected variety. This makes farmers vulnerable to harassment and intimidation.

It is critical to note that even in the EU, the provision of information by farmers to breeders is extremely controversial to the extent that the European Court of Justice has placed limits on the right holders’ right to information. For example, in Germany, seed companies wrote letters to all “farmers” (including dead farmers and people who were not farmers) demanding a full inventory each year of what seed they are growing, to determine the royalty on farm-saved seed that the companies should collect. This matter was taken up to the European Court of Justice, which ruled that the seed companies cannot indiscriminately wrestle such information out of the farmers without prior evidence of use. *Schulin v Saatgut* (C-305/00, 2003) established that a breeder could not request information from a farmer regarding use of farm saved seeds without prior evidence of such use. *Schulin v Jäger* (C-182/01, 2004) confirmed the 2003 ruling.

**Recommendation: To amend Rule 15(5) as follows:**

(5) Information to be provided by farmers to breeders

For the purpose of implementing Article 22 (3) of the Protocol in these Regulations, **unless a breeder has evidence of use by farmer of a specific protected variety, a breeder shall not be entitled to**

request information from a farmer. In requesting information from the farmer, the breeder should specify the specific protected variety for which it requires information and the evidence it has with regard to use by the farmer. The on the information to be provided by the farmer to the breeder, the following should be included shall be limited to:

- (a) The details of the farmer and address including the location of farmer's own holding;
- (b) The details of use of the protected variety;
- (c) ~~Quantity of seed saved~~
- d) ~~The detail of the processor if the saved seed has been processed.~~

Point (c) has been deleted as the breeder is not entitled to know generally how much seed the farmer saves. The breeder is only entitled to information with regard to use of the protected variety. The breeder is not entitled to any information with regard to processing of seed. This information is not contemplated in Article 22(3) of the Protocol and is ultra vires the scope and ambit of these Regulations. Thus sub-rule (c) and (d) should be deleted.



AFRICAN REGIONAL INTELLECTUAL PROPERTY ORGANIZATION (ARIPO)

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REGIONAL WORKSHOP ON THE ARIPO LEGAL FRAMEWORK FOR THE PROTECTION OF NEW  
VARIETIES OF PLANTS

**July 22 to 25, 2013**

**Ufulu Gardens**

**Lilongwe, Malawi**

The following responses to the comments made by civil society organizations on the ARIPO Legal Framework for the Protection of New Varieties of Plants have been provided by the experts from the IP Offices and Ministries of Agriculture of ARIPO Member States, at the Regional Workshop held from July 22 to 25, 2013, in Malawi.

Article	Comments	Responses
Preamble	It does not recognize the role of women in their contribution to seed saving, selection and breeding	The preamble covers all farmers (including women) In the draft Legal Framework, gender-neutral terms will be used.
Art. 2	The article should take into account a greater recognition of farmers' rights as contained in Part V of the OAU Model Law	The OAU Model Law provides a framework whose objective is to address different policy issues such as conservation, sustainable use of biological resources, community intellectual property rights, farmers' rights including their traditional knowledge and landraces.  Recognition of some aspects of farmers' rights is provided for in the Swakopmund Protocol: "Protection of traditional knowledge and access and benefit sharing framework". Farmers' rights need to be addressed in separate legislation, although such legislation should be compatible and mutually supportive.
Art. 3	The provisions contained in the draft legal framework are based on UPOV 1991 and in some areas goes beyond UPOV 1991. As such the draft legal framework adopts standards found in UPOV 1991 that	The approach used in the development of the Legal Framework has been based on the decision of the Administrative Council in November 2012 and the recommendation to take into account existing Plant Breeders' Acts



	strengthen breeders rights to the prejudice of farmers' rights. This includes coverage of all plant genera and species, extensive duration of protection i.e. of 20-25 years; extensive scope of breeders rights, limited exemptions to breeder rights and severely limited farmers' rights etc	from Member States. The legislation of those Member States covers all plant genera and species. Offering protection for all plant genera and species will maximize the benefits provided by the plant variety system from the beginning. Restricting the list of genera and species will reduce the benefits.
Art. 4	ARIPO Member States should retain significant flexibility in the domestic implementation of the PVP System.	ARIPO Member States are convinced that provision for plant breeders' rights in the region will allow farmers access to a wide range of improved varieties to contribute to the attainment of the regional goal of economic development and food security. Member States can continue to operate at a national level (Art. 39 of the Draft Legal Framework).
Art 6-10	The provisions are restrictive and will lead to misappropriation of farmers' rights Replacing traditional varieties with uniform commercial varieties will lead to erosion of crop diversity	Plant Variety Protection (PVP) encourages the development of new varieties of plants. PVP does not govern unprotected varieties. The CBD and ITPGRFA address the conservation of biological diversity. Separate measures should be put in place in order to ensure conservation of biodiversity (such as establishment of gene banks). Studies have shown that there has been no loss of diversity in a range of crops in different countries. Relevant examples were presented at the Workshop by the participants.
Art. 6.2 Art. 25	Relationship between Treaties (Convention of Biological Diversity (CBD)/ International Treaty (ITPGRFA)...) )	The Treaties pursue different objectives, have different scopes of application and require different administrative structure to monitor their implementation. Therefore, those matters should be addressed in separate legislation, although such legislation should be compatible and mutually supportive.
Art. 7.2; 7.3	The Legal Framework should not extend protection to existing varieties	The aim of the transitional novelty provision is to enable the protection of varieties which have been created shortly before protection becomes available for the first time, but which do not fall within the period for novelty in Article 7.2 of the Legal Framework. This provision will be beneficial for all type of breeders, including, for example, public research institutes who have recently released varieties prior to the entry to force of the Legal Framework.
Art. 12	There should be a requirement to specifically indicate whether the variety is genetically modified (GM), mutant, terminator or any other variety produced by modern biotechnology. This serves as a check point that triggers other regulatory safety nets. There is also no provision for disclosure of complete passport (the parental line of the variety, best method of developing the variety) and information about the origin of	The regulation of GMOs should be addressed by separate legislation. The African countries have developed robust Biosafety Regulations which are strictly enforced. It is therefore not appropriate to indicate how the varieties have been developed in the Legal Framework.

	the genetic material that the variety was based on (disclosure of origin)	
Art. 15	Applicant must be required to reveal all information with regard to the variety in the development of the variety that is to be protected e.g. breeding methods used	Information on the breeding history, genetic origin and the origin of the plant material used in the breeding of the variety would be required to be provided where this facilitates the examination of the variety. Confidential information will only be published with the consent of the breeder.
Art. 16	The pre-grant opposition period should be specified. A 9-month time frame for pre-grant opposition is proposed to allow member states to make determination taking into account their national laws. Provision should be made to waive payment of fees when objection is made by certain communities such as farmers and civil societies. Objection should be made through national offices as well as the ARIPO Office. Grounds of opposition should include where granting of PBR is not in the public interest of ARIPO Member States or where the variety may have an adverse effect on the environment.	The opposition process is non-discriminatory and must ensure that there is national treatment. A right can be canceled or shall be nullified at any time if applicable. The payment of fee is necessary to cover the cost of the procedure and to ensure a genuine basis for the opposition.  Regulations concerning the environment should be addressed by separate legislation
Art. 21	UPOV 1991 vastly extends the rights of the breeders and severely restricts the scope of other breeders to innovate around the protected varieties.	The 1991 Act of the UPOV Convention has been examined by ARIPO Member States and considered to be appropriate. With regard to the use of a protected variety for breeding "other" varieties, the authorization of the breeder of the protected variety is not required in either the 1978 Act ("Authorization by the breeder shall not be required ... for the utilization of the variety as an initial source of variation for the purpose of creating other varieties ... ") or the 1991 Act ("The breeder's right shall not extend to ... acts done for the purpose of breeding other varieties"). In addition, acts done with the "other" varieties (e.g. marketing), do not require the authorization of the breeder of the protected variety except for the circumstances specified in the 1978 Act and the 1991 Act. Article 5(3) of the 1978 Act specifies that the "authorization shall be required ... when the repeated use of the variety is necessary for the commercial production of another variety". The 1991 Act specifies that the authorization of the breeder is required, where the provisions of Article 14(5) (essentially derived and certain other varieties) apply, in respect of the acts for material covered under Article 14(1) to (4). This clarifies that the authorization of the breeder for the use of protected varieties for breeding purposes is required under neither the 1978 Act nor the 1991 Act.
Art. 22	Compulsory exceptions narrowly interpreted limited farmer exception only for agricultural crops specified by the Administrative Council	ARIPO will ensure, in the development of the regulations that the situation of small holder farmers will be taken into consideration in

	<p>on condition royalty is paid by the farmer to the breeder.</p> <p>Fruits, ornamentals, vegetables and forest trees are explicitly excluded from the scope of the exception.</p> <p>The resulting effect is that should member states wish to provide exceptions in the interests of farmers, they will have to limit the exception to the parameters set out in the draft legal framework.</p> <p>ARIPO Administrative Council (and not member states) will be responsible</p> <p>Restrictions on customary practices of saving, sharing and trading seed undermines farmers rights and threatens food security</p>	<p>relation to farm saved-seed, in consultation with the Member States.</p>
Art. 24	<p>Exceptions should include the following grounds:</p> <ul style="list-style-type: none"> <li>-where the exercise of the breeder's right involves issues pertaining to food security, nutrition and health</li> <li>-Where there is an anti-competitive practices by the rights holder</li> <li>-Where the proportion of plant variety offered for sale is being imported</li> <li>-Where requirements of the farming community for propagating material of a particular variety are not met</li> <li>-For socio-economic reasons and the development of indigenous and traditional technologies (refer to Article 33 of the OAU Model Law)</li> </ul>	<p>The experts agreed that the general provision of public interest in the text provides sufficient coverage of restrictions in the exercise of the breeder's right.</p>
Art. 28 & 29	<p>Flexibility should be made in the provision to enable Member States to decide on nullity and cancellation where applicable. The provision should also enable individual Member States to allow for post-grant opposition</p>	<p>The experts agreed that the authority responsible for granting the right must also be the authority responsible for nullity and cancellation.</p>
Art. 35 & 36	<p>It is important that Member States retain maximum flexibility at the national level with regard to enforcement of PBR (See Article 44(2) of the TRIPs Agreement).</p>	<p>The Legal Framework sets minimum measures for the enforcement of PBR and provides flexibility for Contracting States to ensure that accessible and appropriate enforcement measures are available.</p>
Art. 38	<p>The grant of regional breeder's rights will have significant implications for the national interests of the contracting parties. It may prevent Member States from taking any individual action with regard to PVP if it is a matter of national interest.</p>	<p>Art. 39 provides that the Legal Framework shall be without prejudice to the right of the Contracting States to grant national plant breeders' rights for plant varieties, subject to the provisions of Article 40.</p>

General Comments	Arguments/ replies
<p>The Framework fails to recognize farmer's rights as an integral part of the innovation process</p> <p>The Legal Instrument does not incorporate elements pertaining to plant breeders and farmer's rights agreed to in the OAU Model and Article 9.1 of the ITPGRFA</p>	<p>Recognition of some aspects of farmers' rights is provided in the Swakopmund Protocol.</p> <p>Farmers' rights should be addressed in separate legislation, although such legislation should be compatible and mutually supportive.</p> <p>Farmers that develop news varieties will be entitled to obtain protection under the legal framework.</p>
<p>The Legal Framework provides one-size -fit-all PVP system that does not take into account the specificities of national agricultural systems</p>	<p>The legal framework has been developed in line with the UPOV Convention because the UPOV system has proven to be effective in a range of different countries with different agricultural systems including developing and developed countries.</p> <p>The positive impact of PVP has been documented in developed and developing countries in various regions of the world, including Argentina, Brazil, Canada, China, Japan, Kenya, Poland, Republic of Korea and South Africa.</p> <p>Many examples are available on the increased number of breeders after the introduction of PVP. For example, after the introduction of PVP in Kenya, the number of breeding entities doubled within seven years and continued to rise thereafter, with increases in the number of breeding entities in a range of agriculture, vegetable and ornamental crops. Information from the Republic of Korea and Canada has also provided data on the increased investment in breeding.</p> <p>Under the UPOV Convention, there are no restrictions on who can be considered to be a breeder: a breeder might be an individual, a farmer, a researcher, a public institute, a private company etc. For example, information is available on the use of plant variety protection by farmer breeders of rice, potato and gentians in the Republic of Korea, the Netherlands and Japan, respectively.</p> <p>Information from China (e.g. maize, wheat) and the Republic of Korea (rice), amongst others, has indicated an increase in the number of applications by breeders in both the public and private sector after the introduction of PVP. In Brazil and South Africa, information has been presented on the way in which PVP can be used to enhance public-private partnerships, with the Agricultural Research Council in South Africa using PVP in order to ensure the participation of smallholder producers in the</p>

	<p>commercialization value-chain.</p> <p>Membership of UPOV is an important global signal for breeders to have the confidence to release their varieties in the region. The case of the development of the cut-flower industry in Kenya indicates how the value of the export market was increased by 8-fold after Kenya became a UPOV member and had access to the best varieties from foreign breeders. In the case of Argentina, access to foreign-bred soybean, lucerne and strawberry varieties provided an example of the importance of new varieties for meeting export needs. Furthermore, under the UPOV Convention, foreign-bred varieties, once available in a country, can be freely used for breeding under the breeders' exemption. Several examples exist of domestic breeders using foreign-bred varieties in their breeding programs and data from Republic of Korea has shown how the number of applications from residents now greatly exceeds the number of applications by non-residents.</p>
<p>The Legal Instrument is based on the UPOV 91 and is likely to result in progressive marginalization of farmer managed seed systems and the disappearance of local varieties</p> <p>The plant variety protection system promotes standardization and homogeneity rather than agro-biodiversity</p> <p>About 75% of plant genetic diversity has been lost as farmers world-wide have abandoned the local varieties for genetically uniform varieties that provide higher yields under certain conditions</p> <p>Concerns have been raised with regards to the protection of conservation of agricultural biodiversity for livelihood security and food sovereignty, farmers rights and self-determination, citizens involvement in decision-making process, the industrialization and privatization of Africa's food systems and commodification of nature and knowledge</p>	<p>PVP encourages the development of new varieties of plants. PVP does not govern unprotected varieties. The CBD and ITPGRFA address the conservation of biological diversity.</p>
<p>The adoption of the Instrument will make farmers to become increasingly dependent on expensive input, creating the risk of indebtedness in the face of unstable incomes</p> <p>The Draft Legal Framework does not meet the needs of ARIPO Member States since more than 80% of seed supply is produced by informal/farmer managed seed systems.</p>	<p>The ARIPO Legal Framework will encourage the development of new varieties of plants by giving farmers more choice than before. The provisions for plant breeders' rights in the region will allow farmers access to a wide range of improved varieties to contribute to the attainment of the regional goal of economic development and food security. With regard to landraces, subsistence farmers</p>

	<p>will be able to continue what they were used to do.</p> <p>Governments have put in place parallel regulations to ensure that the interests of subsistence farmers are safeguarded.</p> <p>Subsistence farming will be covered by the exception for private and non-commercial purposes.</p>
<p>The Instrument will create an imbalance between the private and public sectors in agricultural research, with R&amp;D being oriented towards meeting the needs of farmers in rich countries while needs of poor farmers in developing countries are comparatively neglected</p>	<p>There are no restrictions on who can be considered to be a breeder under the UPOV system: a breeder might be an individual, a farmer, a researcher, a public institute, a private company etc.</p> <p>Information from a range of countries has demonstrated that many types of breeders use plant variety protection. For example, the UPOV system is very actively used by public institutes to deliver improved varieties to farmers, including in the form of public-private partnerships. The experts meeting noted that the public-private partnership in the WEMA Project relied on the existence of plant variety protection.</p>
<p>Access to credit is packaged with commercial varieties which disadvantages the small holder farmer</p>	<p>Access to credit is not a matter related to Plant Variety Protection.</p>

**CONSIDERATION OF REVISED LIST OF AGRICULTURAL CROPS WITH HISTORICAL PRACTICE OF FARM-MAINTAINED SEEDS IN THE MEMBER STATES** (*Document ARIPO/TCPVP/II/3*)

**INTRODUCTION**

1. During the Regional Workshop on the ARIPO Draft Legal Framework for the Protection of New Varieties of Plants that was held in Lilongwe, Malawi from July 22 to 25, 2013, the Experts from Ministries of Agriculture and IP Offices requested the ARIPO Office to send a circular to all the Member States to seek information regarding agricultural and indigenous vegetable crops for which there is an historical common practice of using the product of the harvest for replanting in their territory (farm-maintained seed), the acreage that defines a small holder farmer in their territory; and the National agricultural research centres that have capacities to undertake examination of new varieties of plants. The request was made in order to facilitate the implementation of Article 22 of the Protocol which requires the Administrative Council of ARIPO to come up with a list of Agricultural Crops for the purposes of implementing the farm-maintained seed provisions.
2. Following the request, letters were sent to all the Member States to provide the information and responses were received from Botswana, Gambia, Ghana, Kenya, Sierra Leone, Zimbabwe and Rwanda. The summary of the inputs was submitted to the Fourteenth Session of the Council of Ministers.
3. At the Expert Meeting held from June 14 to 17, 2016 at the Rainbow Towers Hotel in Harare, Zimbabwe to finalise the draft Regulations for the implementation of the Arusha Protocol, the delegates reviewed the list of Agricultural crops and further requested the Secretariat to send letters to all the Member States of ARIPO particularly those that did not submit information to do so as well as those that submitted information to provide update where necessary. Letters were subsequently sent to all the member states and responses were received from Ghana, Namibia and Botswana.

**LIST OF AGRICULTURAL AND VEGETABLE (INDIGENOUS AND NATURALISED) CROPS**

4. During the First Session of the Technical Committee on Plant Variety Protection, the Secretariat presented a draft list of Agricultural crops with historical practice of farm-maintained seeds as well as competent institutions that have the capacity to undertake examination of new varieties for specific crops. The document was developed from the responses received from Botswana, The Gambia, Ghana, Kenya, Mozambique, Namibia, Rwanda, Sierra Leone, Swaziland, Zambia and Zimbabwe.
5. The Technical Committee reviewed the list of the Agricultural and Indigenous Vegetable

Crops, took note of the National Agricultural Centres that have capacities to undertake the examinations of new varieties and requested Secretariat to submit the document to the Administrative Council for consideration.

6. During the Fortieth Session of the Administrative Council, the Council expressed the view that the Technical Committee on Plant Variety Protection should review all the necessary documents related to the Arusha Protocol taking into account the comments from Member States and Civil Society Organizations.
7. It is within this context that this document has been re-submitted to the Second Session of the Technical Committee on Plant Variety Protection for further review.



**CONSIDERATION OF PROPOSED COMPETENT INSTITUTIONS, QUALITY AUDITS AND ARRANGEMENTS FOR DUS TESTING** *Document ARIPO/TCPVP/II/4*

1. At the Expert Meeting held from June 14 to 17, 2016 at the Rainbow Towers Hotel in Harare, Zimbabwe to finalise the draft Regulations for the implementation of the Arusha Protocol. It was also highlighted that officials of ARIPO will undertake study visit to the Community Plant Variety Office (CPVO) of the European Union to familiarise with the successfully implemented Quality Audit Scheme for auditing Examination Offices in the European Union. This would enable ARIPO to develop appropriate quality audit scheme for the implementation of the Arusha Protocol.
2. In order to ensure conformity to standard requirements and quality examination by National Agricultural Centres (Competent Institutions), it would be necessary for ARIPO to establish Quality Audit Scheme to facilitate standardisation and quality DUS Test results that are reliable, comparable and repeatable in the examination offices that will be entrusted with the responsibility of undertaking DUS test on behalf of ARIPO.
3. It is against this backdrop that officials from ARIPO undertook a study visit to the Community Plant Variety Office (CPVO) of the European Union in Angers, France from 2 to 4 November, 2016 to assess the CPVO Quality Audit Scheme and Technical requirements. The draft quality scheme that has been developed for ARIPO as a basis for the entrustment of examination offices in the ARIPO Member States as well as arrangements for examination of candidate varieties is attached to these documents as an Annex.
4. The draft scheme in annex was reviewed by the Technical Committee on Plant Variety Protection at its First Session and submitted to the Fortieth Session of the Administrative Council. Following the decision by the Administrative Council for the Technical Committee to give further consideration of the document related to the Arusha Protocol, this document has been submitted to the Second Session of the Technical Committee for further review.

## **PROPOSED ARIPO QUALITY AUDIT SCHEME**

1. Quality Audit Schemes are essential for the entrustment of competent institutions with the capacity to undertake DUS Testing due to the fact that the examination of plant varieties is undertaken in the field with different ecologies and climate. The Scheme will ensure that the examination officers conduct their tests in a standard way to produce quality DUS Test results that are reliable, comparable and repeatable as well as demonstrate a certain level of competence to accord strong protection for the breeders' rights. In order to achieve this, three key essential elements are required. These are entrustment criteria, independent Audit team and establishment of an independent review body.

### **A. ENTRUSTMENT REQUIREMENTS**

2. The entrustment requirements provide clear criteria for the entrustment or appointment of competent institutions in the ARIPO Member States to conduct DUS Testing on behalf of the Organization. The following are non-exhaustive proposed criteria for consideration:
  - (i) Well established policy and legal framework
  - (ii) Experience in specific crop(s) with reference collections
  - (iii) Capacity to undertake independent DUS Tests or Trials with integrity and confidentiality
  - (iv) Available skilled personnel
  - (v) Ability to sub-contract work
  - (vi) Readiness to enter into an agreement and corporate with ARIPO
  - (vii) Adequate facilities and equipment
  - (viii) Available Test Protocols and Procedures
  - (ix) Storage facilities for plant materials
  - (x) Quality management system with effective documentation and reporting structures

### **B. ESTABLISHMENT OF AN INDEPENDENT AUDIT TEAM**

3. In order for assessment of the competent institutions in ARIPO Member States to be undertaken based on the above mentioned criteria, an independent audit team should be established for assessment and review of competent institutions. It is therefore proposed that the audit team should be composed of the following:
  - i. One technical staff from ARIPO Member States with relevant expertise in conducting field trials
  - ii. One technical staff from ARIPO
  - iii. Head of Internal Auditor

4. The technical staff should have hands-on experience in technical work. The team should be trained on basic auditing techniques and should carry out their work under confidentiality agreement.
5. It is also proposed that the team should be given terms of reference that includes assessment of proposed institutions to conduct DUS testing as well as periodic (once in three years) review of the appointed competent institutions for compliance with entrustment criteria and tests guidelines.

#### **C. AUDIT ADVISORY BOARD**

6. It is proposed that the Audit Committee of the Administrative Council should serve as the Audit Advisory Board who will from time to time review the work of the audit team.

#### **D. ARRANGEMENT FOR EXAMINATION OF CANDIDATE VARIETIES (DUS TESTING)**

7. To enable the Director General of ARIPO to designate examination offices to undertake tests on candidate varieties submitted as applications to the ARIPO Office, the following shall be considered in identifying which examination office should carry out the technical examination of the candidate varieties:
  - i. Geographical origin of the variety
  - ii. Origin of the applicant
  - iii. Experience of an examination office including reference collection
  - iv. Available descriptive information and storage facilities.
  - v. Wish of the breeder

**[End of Document]**