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ACTA & Access to Learning Materials In Morocco: An Examination of How ACTA Impacts the Creation of a Moroccan Orphan Works Regime

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ACTA & ACCESS TO LEARNING MATERIALS IN MOROCCO: AN EXAMINATION OF HOW ACTA IMPACTS THE CREATION OF A MOROCCAN ORPHAN WORKS REGIME

*Caroline B. Ncube*¹

ABSTRACT

This paper briefly examines the current regime of copyright law in Morocco and seeks to examine the status of orphan works in Morocco, in lieu its membership as the sole African country in the recently signed Anti-Counterfeiting Trade Agreement (ACTA). The paper concludes that Morocco can, and ought to, enact exceptions and limitations that facilitate meaningful access to orphan works in both analogue and digital formats.

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I. INTRODUCTION

Morocco is the only African country that was party to the negotiation of the Anti-Counterfeiting Trade Agreement (ACTA).² The other negotiating parties were Australia, Canada, the European Union (EU) and its Member States, represented by the European Commission and the EU Presidency (Belgium), Japan, Korea, Mexico, New Zealand, Singapore, Switzerland and the United States of America.³ Morocco's inclusion in the negotiations was probably due to its close economic ties with the United States based on the Free Trade Agreement (FTA) it concluded with the United States.⁴ The final text of ACTA was released in December 2010⁵ and was signed on October 1, 2011 by Australia, Canada, Japan, Korea, Morocco, New Zealand, Singapore, and the United States.⁶ Once ACTA comes into force,

² See Press Release IP/10/1504, European Commission, 'Joint statement on the Anti-Counterfeiting Trade Agreement (ACTA) from all the negotiating partners of the agreement' (Nov. 15, 2010) [hereinafter European Commission Press Release IP/10/1504], available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1504&format=HTML&aged=0&language=EN&guiLanguage=en>.

³ *Id.*

⁴ Free Trade Agreement between the United States of America and the Kingdom of Morocco, U.S.-Morocco, June 15, 2004 [hereinafter U.S.-Morocco FTA], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta>.

⁵ See Final Draft of the Anti-Counterfeiting Trade Agreement (Dec. 3, 2010) [hereinafter ACTA Final Draft], available at http://www.ustr.gov/webfm_send/2417.

⁶ Anti-Counterfeiting Trade Agreement, Oct. 1, 2011 [hereinafter ACTA] available at http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf; see also *Joint Press Statement of the the Anti-Counterfeiting Trade Agreement Negotiating Parties* (Oct. 1, 2011), available at <http://www.ustr.gov/about-us/press-office/press-releases/2011/october/joint-press-statement-anti-counterfeiting-trade-ag>.

most if not all of the signatory states will have to effect amendments to their domestic laws in compliance with their obligations under ACTA. Although the United States government argues that no changes of U.S. domestic law will be required,⁷ this is disputed by several scholars as is the classification of ACTA as a sole executive agreement.⁸

This paper seeks to assess whether Morocco's domestic copyright law must be amended to comply with ACTA and how this will impact access to learning materials with particular reference to orphan works. As ACTA has already been finalized and signed, and is soon to be implemented, the main goal of this paper is to explore ways in which Morocco can devise a legislative regime for orphan works within the constraints of ACTA.

II. THE STATUS QUO: ACCESS TO LEARNING MATERIALS IN MOROCCO

The minimum standards in Morocco's Copyright Law⁹ are based on Morocco's obligations under international treaties it has ratified or acceded to and the Morocco-U.S. FTA. Morocco has acceded to the Universal Copyright Convention¹⁰ and has ratified the Berne Convention,¹¹ the TRIPS

⁷ *USTR Fact Sheet 'ACTA: Meeting U.S. Objectives'*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Oct. 1, 2011), available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/september/acta-meeting-us-objectives>.

⁸ See Sean Flynn, *ACTA'S Constitutional Problem: The Treaty is not a Treaty*, 26 AM. U. INT'L L. REV. 903 (2011); Sean Flynn, *USTR's Precedents do not justify ACTA as sole executive agreement* INFOJUSTICE.ORG (Oct. 3, 2011 1:40 PM) <http://infojustice.org/archives/5731>; James Love, *KEI comment on US signing of ACTA* KNOWLEDGE ECOLOGY INT'L (Oct. 3, 2011, 12:30 PM) <http://keionline.org/node/1291>; Mike Palmedo, *ACTA Signed by Eight Nations – USTR States that ACTA is Consistent with US Law and Doesn't Need Congressional Approval* INFOJUSTICE.ORG (Oct. 3, 2011, 1:10 PM), available at <http://infojustice.org/archives/5727>.

⁹ Law No. 2-00 on Copyright and Related Rights (promulgated by Dahir No. 1-00-20 of 15 February 2000) as last amended by Law No. 34-05 (promulgated by Dahir No. 1-05-192 of 14 February 2006) [hereinafter Copyright Law].

¹⁰ Universal Copyright Convention (Paris Act/Text, 1971) 25 U.S.T. 1341, 943 U.N.T.S.; see *Universal Copyright Convention as revised on 24 July 1971, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI. Paris, 24 July 1971*, UNESCO, available at <http://portal.unesco.org/la/convention.asp?KO=15241&language=E> (listing Morocco to have acceded to the UCC on Oct. 28, 1975).

¹¹ Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as last revised at Paris on July 24, 1971, 1161 U.N.T.S. 30 [hereinafter Berne Convention] (Morocco ratified the Berne Convention, with the exception of articles 1 -21 and the Protocol Regarding Developing Countries, on 6 May 1971); see *Berne Notification No.28*, WIPO (May 6, 1971), available at

Agreement,¹² the WIPO Copyright Treaty¹³ and the WIPO Performances and Phonograms Treaty.¹⁴ As noted above, in the near future Moroccan copyright law will have to be amended to bring it into compliance with ACTA. The impact of such amendments will be the subject of part III of this paper.

A. General Overview of Copyright Law

Morocco's Copyright Law affords protection to 'literary and artistic works' which include written works, computer programs, lectures, addresses and other oral works, musical and dramatic works.¹⁵ Expressions of folklore and ancient manuscripts are also afforded copyright protection.¹⁶ However, copyright protection is not extended to official texts of a legislative, administrative or judicial nature or the official translation of these texts, current events, ideas, processes, systems, operating methods, concepts, principles, discoveries or simple data.¹⁷ The Copyright Law protects a copyright-holder's inalienable, infinite¹⁸ moral rights (of paternity, to remain anonymous or use a pseudonym and integrity)¹⁹ and economic rights. These economic rights include the right to reprint or reproduce, translate, adapt or transform, hire, perform, import, broadcast or publicly communicate the protected work.²⁰ These economic rights may be

http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_28.html. (Morocco ratified the Paris revisions of the Berne Convention on February 17, 1987 and the treaty came into force on May 17, 1987 for Morocco); *see also Berne Notification No. 117*, WIPO (Feb. 17, 1987), *available at*

http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_117.html.

¹² Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 1869 U.N.T.S. 299 [hereinafter TRIPS].

¹³ WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997); 36 I.L.M. 65 (1997) (Morocco ratified the WCT on April 20, 2011 and the treaty will come into force on July 20, 2011 for Morocco); *see WCT Notification No. 77*, WIPO (April 20, 2011), *available at* http://www.wipo.int/treaties/en/notifications/wct/treaty_wct_77.html.

¹⁴ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997); 36 I.L.M. 76 (1997) (Morocco ratified the WCT on April 20, 2011 and the treaty will come into force on July 20, 2011 for Morocco); *see WPPT Notification No. 80*, WIPO (April 20, 2011), *available at*

http://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_80.html.

¹⁵ Copyright Law, *supra* note 8, art. 3.

¹⁶ *Id.* at arts. 6, 7.

¹⁷ *Id.* at art. 8.

¹⁸ *Id.* at art. 25.

¹⁹ *Id.* at art. 9.

²⁰ *Id.* at art. 10.

exercised by the descendants of the creator/author of the work or a legal entity to which the rights have been transferred.²¹ Where these rights have not been so transferred to a creator's dependents or to a legal entity, they may be exercised by the Moroccan Copyright Office.²² The statutory duration of copyright protection for these economic rights is the life of the author plus 70 years.²³

Chapter IV of the Copyright Law provides for a number of exceptions and limitations. Of prime importance to this paper is article 15, which provides exceptions and limitations for educational use. Reproduction for educational purposes is permitted provided the source is attributed in two instances. Firstly, reproduction for illustration in publications, broadcasts or sound or visual recordings is permitted.²⁴ Secondly, it is allowed "for educational purposes or for examinations in educational institutions whose activities are not designed directly or indirectly to generate commercial profit, and to the extent justified by the aim to be achieved, individual articles lawfully published in a journal or periodical, short extracts of a lawfully published work or a lawfully published short work."²⁵

Limitation and exceptions other than those in article 15 include:

1. Reproduction for private purposes.²⁶ This exception does not extend to:
 - a) the reproduction of architectural works in the form of buildings or similar constructions,²⁷
 - b) reprographic reproduction of a whole book or musical scores,²⁸
 - c) the reproduction of databases in digital form,²⁹
 - d) computer programs beyond the exceptions provided for by article 21³⁰ and
 - e) "any other reproduction of a work which appears to hamper the normal use of the work or would unjustifiably prejudice

²¹ *Id.* at art. 11(1).

²² *Id.* at art. 11(2).

²³ *Id.* at art. 25.

²⁴ *Id.* at art. 15(a).

²⁵ *Id.* at art. 15(b).

²⁶ *Id.* at art. 12.

²⁷ *Id.* at art. 12(a).

²⁸ *Id.* at art. 12(b).

²⁹ *Id.* at art. 12(c).

³⁰ *Id.* at art. 12(d).

the author's legitimate interests."³¹

2. Temporary reproduction during the course of lawful digital transmission or storage.³²
3. Citation provided the source and the scope of the citation is reasonably justified.³³
4. Reproduction by non-profit libraries and archives in response to requests from individuals and for the replacement or preservation of lost or damaged works respectively.³⁴
5. Reproduction of culturally significant works by government authorities.³⁵
6. Reproduction for judicial and administrative purposes.³⁶
7. Importation of a single copy of a work by natural persons for personal use.³⁷

Some of these exceptions may be harnessed to improve access to learning materials and to enhance learning. For example, the availability of works in libraries and archives and government departments is beneficial to educational users. In addition, those with the financial resources may import single copies of educational materials.

B. Access to Learning Materials

The African Copyright and Access to Knowledge (ACA2K) Project examined the impact of Morocco's current copyright environment, comprising of laws, policies and practices, on access to learning materials.³⁸ This project found that in its totality, the copyright environment is not currently maximizing access to learning materials but can be improved to maximize such potentials.³⁹ In particular, access is hampered by narrow exceptions and limitations that do not cater for distance learning, learning on digital or internet platforms, or for the conversion of works to formats

³¹ *Id.* at art. 12(e).

³² *Id.* at art. 13.

³³ *Id.* at art. 14.

³⁴ *Id.* at art. 16.

³⁵ *Id.* at art. 17.

³⁶ *Id.* at art. 18.

³⁷ *Id.* at art. 24.

³⁸ Said Agrib, Noufissa El Moujaddidi & Abdelmalek El Ouazzani '*Morocco*' in *ACCESS TO KNOWLEDGE IN AFRICA AND THE ROLE OF COPYRIGHT* 126 -161 (C. Armstrong et al., eds., 2010).

³⁹ *Id.* at 154 – 156.

suitable for the sensory-disabled.⁴⁰ In 2006 Morocco lengthened the term of copyright protection, beyond the 50 years required by the Berne Convention, to 70 years⁴¹ in compliance with its obligations under article 5 of its FTA with the United States.⁴² The result of this extension of copyright term delays the entry of protected works into the public domain, from where these works would be accessible at no cost. Further, there are no statutory provisions that enable parallel importation⁴³ or access to orphan works. The ACA2K Project recommended that Morocco should seek to remedy these deficiencies through legislative reform-based policies that adequately protect and promote the public interest.⁴⁴ Moroccan legislative reforms ought to aim to properly balance right-holder interests with users' rights to education and the state's goal of promoting sustainable economic development. The ACA2K Project suggested that such a balance may be achieved by the amendment of the Copyright Act to provide (inter alia) for the following:⁴⁵

1. The expansion of educational use exceptions and limitations to cater for distance learning and e-learning for example by provision for compulsory and statutory licenses,
2. The creation of exceptions and limitations that cater for sensory disabled users and
3. The inclusion of a provision for parallel importation.

In addition, provisions that enable access to orphan works ought to be enacted.⁴⁶ It is important to note that due to its obligations under the Morocco-U.S. FTA, Morocco is not able to revert to a 50 year term for copyright infringement, hence its exclusion from the above list of recommendations.

In any consideration of access to learning materials, anti-circumvention provisions are significant as they have the potential to thwart user access to

⁴⁰ *Id.* at 35 at 155-156.

⁴¹ Copyright Law, *supra* note 8, art. 25.

⁴² Agrib, Moujaddidi & Ouzanni, *supra* note 37, at 136.

⁴³ *Id.* at 156.

⁴⁴ *Id.*

⁴⁵ Said Agrib, Noufissa El Moujaddidi & Abdelmalek El Ouazzani *Morocco*

Executive Policy Brief, 3. available at

http://www.aca2k.org/attachments/154_ACA2K%20MOROCCO%20EPB%20WEB.pdf.

⁴⁶ Chris Armstrong et al 'Summary and Conclusions' in ACCESS TO KNOWLEDGE IN AFRICA AND THE ROLE OF COPYRIGHT 345 (C. Armstrong et al., eds., 2010).

works under existing exceptions and limitations.⁴⁷ The ACA2K Project also noted that whilst Morocco had strengthened its anti-circumvention provisions pursuant to its signature of the Morocco-U.S. FTA, article 65 of the Copyright Law contained educational use exceptions, which shield universities, libraries, archives and other public institutions from liability for infringement.⁴⁸ In this way, Morocco has successfully incorporated educational use exceptions into its anti-circumvention regime.⁴⁹

The following section considers the impact of ACTA on the position outlined above with respect to orphan works and anti-circumvention provisions.

III. THE IMPACT OF ACTA ON ACCESS TO ORPHAN WORKS IN MOROCCO

Orphan works are “works technically still in copyright, but for which it is virtually impossible to locate the appropriate rights holders to ask for permission”⁵⁰ to use them for purposes which are not covered by exceptions and limitations.⁵¹ Although works are orphaned for a number of reasons, some of the main reasons include are inadequate disclosure of identification information about the copyright-holder and the failure by potential users to locate the identified copyright-holder.⁵² Orphan works are indisputably an important resource for educational institutions with limited resources as they obviate the need to pay copyright license fees to copyright-holders. However, the possibility of a copyright holder who may sue for infringement in the future is a deterrent to the use of orphan works.⁵³

Various jurisdictions have crafted solutions to eliminate or lessen the threat posed by the emergence of right-holders for previously orphaned works. For example, in the United States legislative amendments were

⁴⁷ Tobias Schonwetter & Caroline Ncube, *New Hope for Africa? Copyright and Access to Knowledge in the Digital Age*, 13 INFO 64-74, 71 (2011).

⁴⁸ Agrib, Moujaddidi & Ouzanni, *supra* note 37, at 138.

⁴⁹ Schonwetter & Ncube, *supra* note 46 at 71.

⁵⁰ Pamela Samuelson, *Legally Speaking: The Dead Souls of the Google books Settlement*, 52(7) COMMUNICATION OF THE SCM 28-30, 28 (2009).

⁵¹ Stef van Gompel, *Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe*, IViR, at 3, available at http://www.ivir.nl/publicaties/vangompel/IIC_2007_6_orphan_works.pdf.

⁵² NAOMI KORN, IN FROM THE COLD: AN ASSESSMENT OF THE SCOPE OF ‘ORPHAN WORKS’ AND ITS IMPACT ON THE DELIVERY OF SERVICES TO THE PUBLIC 6 (2009), available at <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>.

⁵³ Jane S. Ginsburg, *Recent Developments in US Copyright Law: Part I - "Orphan" Works* 4, Colum. Pub. L. & Legal Theory Working Paper No. 08152 (2008), available at http://lsr.nellco.org/columbia_pllt/08152.

suggested (although they did not ultimately become law) that would have conditionally limited remedies for infringement of copyright in orphan works.⁵⁴ Had the legislation been enacted, the conditions for the limitation of remedies would have included a diligent or reasonable search by the user to identify and/or locate the copyright-holder and good faith attempts to negotiate reasonable compensation of upon the receipt of communication from the copyright-holder.⁵⁵ The limitations on remedies in this proposed legislation included the following:

1. Exemption from liability to pay monetary damages, costs and attorney's fees. The only award that could have been made was one of 'reasonable compensation' based on the amount which would have been agreed upon between a 'willing buyer and willing seller' had permission been sought for the use of the work.⁵⁶
2. Exemption from liability to pay reasonable compensation for non-profit educational institutions, museums, libraries, archives or public broadcasting entities and their employees who acted within the scope of their employment provided that:
 - '(i) the infringement was performed without any purpose of direct or indirect commercial advantage,
 - '(ii) the infringement was primarily educational, religious, or charitable in nature, and
 - '(iii) after receiving notice of the claim for infringement, and after conducting an expeditious good faith investigation of the claim, the infringer promptly ceased the infringement, except that if the legal or beneficial owner of the exclusive right under the infringed copyright proves, and the court finds, that the infringer has earned proceeds directly attributable to the infringement, the portion of such proceeds so attributable may be awarded to such owner'⁵⁷
3. Injunctive relief would not be available against derivative works

⁵⁴ S.2913 Shawn Bentley Orphan Works Act of 2008, 110th Congress (2008). *See Report on Orphan Works*, USPTO (Jan. 2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf> (providing background information); *see also* Ginsburg, *supra* note 52; Corree Thompson, *Orphan Works, U.S. Copyright Law, and International Treaties: Reconciling Differences to create a Brighter Future for Orphans Everywhere*, 23(3) *Ariz. J. Int'l & Comp. L.* 787- 852 (2006).

⁵⁵ Shawn Bentley Orphan Works Act of 2008, *supra* note 53, §§ 514 (b)(1)(A)(i), 514(b)(1)(B).

⁵⁶ *Id.* at § 514 (c)(1)(A).

⁵⁷ *Id.* at § 514(c)(1)(B).

based on the orphan work.⁵⁸

The essence of these limitations is an educational use exception that would have enhanced access to learning materials.

Other jurisdictions are considering similar approaches. For instance, the recently issued European Union Proposal for a Directive on Permitted Uses of Orphan Works, predicates access to orphan works on a prior diligent search by a user for the copyright-holder.⁵⁹ Likewise, the Hargreaves Report on IP and Growth in the United Kingdom released in May 2011 called for the enactment of legislative provisions that limit remedies for infringement of orphan works provided the alleged infringer conducted a diligent search to identify and locate the copyright-holder.⁶⁰

The second possible solution to the problem of using orphan works is that provided for in section 77 of the Canadian Copyright Law, namely the issuing of non-exclusive licenses for the use of orphan works.⁶¹ This section provides:

Owners Who Cannot be Located

Circumstances in which licence may be issued by Board

77. (1) Where, on application to the Board by a person who wishes to obtain a licence to use

- (a) a published work,
- (b) a fixation of a performer's performance,
- (c) a published sound recording, or
- (d) a fixation of a communication signal in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a licence to do an act mentioned in section 3, 15, 18 or 21, as the case may be.

Conditions of licence

⁵⁸ *Id.* at § 514(c)(2).

⁵⁹ EUR. PARL. DOC. (COM(2011) 289 final (May 24, 2011), available at http://ec.europa.eu/internal_market/copyright/docs/orphan-works/proposal_en.pdf.

⁶⁰ IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY & GROWTH 8, 33 (2011).

⁶¹ Jeremy de Beer & Mario Bouchard, *Canada's "Orphan Works" Regime: Unlocatable Copyright Owners and the Copyright Board*, at 7 (Dec. 1, 2009), available at <http://www.cb-cda.gc.ca/about-apropos/2010-11-19-newstudy.pdf>.

(2) A licence issued under subsection (1) is non-exclusive and is subject to such terms and conditions as the Board may establish.

Payment to owner

(3) The owner of a copyright may, not later than five years after the expiration of a licence issued pursuant to subsection (1) in respect of the copyright, collect the royalties fixed in the licence or, in default of their payment, commence an action to recover them in a court of competent jurisdiction.

Regulations

(4) The Copyright Board may make regulations governing the issuance of licences under subsection (1).

Whilst this approach was not seriously considered in the United States due to its associated administrative delays and costs, a recent comprehensive study found that it is in fact ‘one of the most advanced’ solutions to the dilemma posed by orphan works.⁶²

A third option is to devise a scheme whereby collecting societies issue and administer extended collective licenses.⁶³ The key question considered by this paper is whether ACTA’s provisions preclude these solutions.

ACTA does not incorporate any of the options listed above to enable access to orphan works. On the contrary, Knowledge Ecology International (KEI) notes that it includes the following punitive remedies for infringement that will deter users from using orphan works:⁶⁴

1. Article 9(1) provides that courts must be empowered to order damages based on ‘any legitimate measure of value the right holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price, or the suggested retail price’.
2. Article 9(2) provides that courts must be empowered to order the payment of profits made by the infringer to the copyright-holder
3. Article 9(3) provides that each member state must ‘establish or maintain a system that provides for one or more of the following:
 - a. pre-established damages; or
 - b. presumptions for determining the amount of damages

⁶² *Id.* at 7.

⁶³ *Id.* at 7.

⁶⁴ James Love, *Access to Orphan Works and ACTA Provisions on Damages*, KNOWLEDGE ECONOMY INT’L (Oct. 20, 2010, 4:26 PM), available at

- sufficient to compensate the right holder for the harm caused by the infringement; or
- c. at least for copyright, additional damages.
4. Article 9(4) provides that each member state must ensure that there is statutory provision for the award of court costs or fees and appropriate attorney's fees or any other related expenses provided for in that member state's national legislation.
 5. Article 10(1) provides that domestic legislation must empower courts, at the copyright-holder's request, to order the destruction of infringing goods, except in exceptional circumstances, without any compensation.

In addition, ACTA article 10(2) provides for the destruction, without compensation, or disposal outside the channels of commerce, of materials and implements that were used by the infringer in the creation of the infringing goods. Finally, ACTA article 10(3) provides that member states may provide that such destruction or disposal of infringing goods and related manufacturing implements be carried out at the expense of the infringer.

ACTA affords very limited flexibility to member states in article 9(1) which mandates the consideration of any legitimate measure of value of damages suffered by right-holders and article 10(1) which provides for 'exceptional cases' where destruction of infringing goods would not be warranted. It has been noted that these flexibilities are so vague as to be meaningless.⁶⁵ In all respects, these provisions are the direct opposite of the solution proposed by the Shawn Bentley Act in the U.S.. More significantly, ACTA does not expressly provide that member-states may enact exceptions and limitations, except with regard to enforcement in the digital environment.

Therefore, it is not clear if Morocco and other ACTA member-states would be able to enact exceptions and limitations relating to orphan works in their domestic laws. It can be argued that since this is not expressly prohibited, ACTA does not preclude the adoption of such exceptions and limitations in Morocco and other ACTA member-states. Such an interpretation would be based on a plain reading of the text, as required by article 31(1) of the Vienna Convention on the Law of Treaties. On this basis, Morocco could, and ought to, create exceptions that emulate the Shawn Bentley Act or any of the other options discussed above. Indeed, this

<http://www.keionline.org/node/980>.

⁶⁵ *Id.*

would be in the interests of enhancing access to learning materials. Morocco has already demonstrated its will and capacity, to carve out exceptions and limitations even from within restrictive international agreements. As will be shown below, Morocco currently has an educational use exception to its anti-circumvention provisions which were introduced after its conclusion of the Morocco-US FTA.

IV. ANTI-CIRCUMVENTION PROVISIONS AND ACCESS TO ORPHAN WORKS

As noted above, anti-circumvention provisions may negate existing exceptions and limitations. Since I have discussed Morocco's anti-circumvention provisions in another publication,⁶⁶ the discussion of this issue in this paper will be kept brief. Suffice to say, that as despite having what the ACA2K Project found to be one of strongest anti-circumvention regime in the world, Morocco has successfully created educational use exceptions.⁶⁷ In this regard, article 65.1 of Morocco's Copyright Law provides:

the following non-profit entities: libraries, archive services, educational institutions or public broadcasting organizations shall not be subject to the provisions of Article 64 for the violations mentioned in Article 65, paragraphs (a), (d), (e), (f), (g) or (h). Non-profit entities covered in the previous paragraph may not be ordered to pay damages under Article 62 for the violations mentioned in Article 65, paragraphs (a), (d), (e), (g), (h) or (i) *if they provide proof that they were not aware or had no reason to think that their acts constituted a prohibited activity.* (emphasis added)

The italicized phrase above renders this exception inapplicable to orphan works because it is predicated on evidence that the alleged infringer believed that the use of material was non-infringing. This is the direct opposite of the *status quo* with respect to the use of orphan works where the user is aware that the use of the work is infringing but has no means of securing the necessary permission because the copyright-holder cannot be located. Therefore under the current legislative provisions, an educational institution that circumvents the technological protection measures securing an orphan work to facilitate use beyond that permitted by existing exceptions and limitations will be liable for infringement and may be

⁶⁶ Schonwetter & Ncube, *supra* note 46.

⁶⁷ Agrib, Moujaddidi & Ouzanni, *supra* note 37, at 138.

ordered to pay damages to the copyright-holder. Therefore, it appears that a further exception to enable the circumvention of technological measures to gain access to, and use of orphan works (beyond that covered by existing exceptions and limitations) is necessary. This may be achieved by limiting the remedies available to the relevant copyright-holder if the user provides evidence of a diligent search to locate the copyright-holder prior to the use of the orphan work.

The key question to be answered here is: do ACTA's anti-circumvention provisions, contained in article 27(5) – (8), preclude the creation of an orphan works exception? As noted by Margot Kaminski ACTA significantly ramps up the WIPO Copyright Treaty's anti-circumvention provisions.⁶⁸ However, article 27(8) provides that member-states may create or maintain exceptions and limitations. Therefore, Morocco, and other member-states of ACTA, may create exceptions and limitations that enable access to orphan works.

V. CONCLUSION

The above discussion shows that Morocco can, and ought to, enact exceptions and limitations that facilitate meaningful access to orphan works both in the analogue and digital worlds. Meaningful digital access will require nuanced anti-circumvention exceptions and limitations that enable the circumvention of technological measures to secure access to digitized orphan works. Failure to create such exceptions and limitations will further compromise a copyright environment that does not currently maximize access to learning materials.

⁶⁸ Margot E. Kaminski, *An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement (ACTA)*, PIJIP Research Paper no. 17 (2011) at 2 [hereinafter Kaminski 2011], available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1019&context=research>.